

Update on Legal Developments in Special Education: What Teachers Need to Know and Why they Need to Know it

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What We Will Do This Morning

- What's happening in DC
- Endrew F. v. Douglas School District (2017) and behavior
- Free Resources
- Violence in schools, disciplinary procedures, bigotry, & mental health
- Back to the basics: Expectations for a Continuum of Programs and Services

What's Happening in DC



Senate Committee on Health, Education, Labor, & Pensions (HELP)

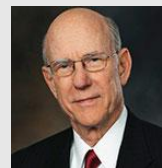
Chairman: Lamar Alexander, TN



Ranking Minority: Patty Murray, WA



Senator: Pat Roberts, KS

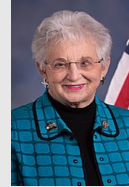


House Committee on Education & Labor

Chairman: Bobby Scott, VA



Ranking Minority: Virginia Foxx, NC



Committee Member: Steve Watkins, KS



IDEA Reauthorization



IDEA Full Funding Act

- Introduced in Senate (S.866) by Senator Chris Van Hollen (D-MD) & Senator Pat Roberts (R-KS)
- Introduced in House (H.R. 1878) by Representative Jared Huffman (D-AZ)
 - Not been reintroduced in the House in this session
- Puts the IDEA on a glide path to full funding (40%) by 2029

The Path to a Law: You Can Make a Difference!!



Council for Exceptional Children



Policy Advocacy



**The Primary Requirement of the IDEA
and the crucial obligation to special
education is to provide a special
education that confers a free
appropriate public education (FAPE)**

Free Appropriate Public Education (FAPE)

- Special education & related services that are:
 - Provided at public expense
 - Meet the standards of the SEA
 - Includes preschool, elementary, or secondary education
 - Are provided in conformity with the individualized education program (IEP)

IDEA, 20 U.S.C. § 1401 (A)(18)

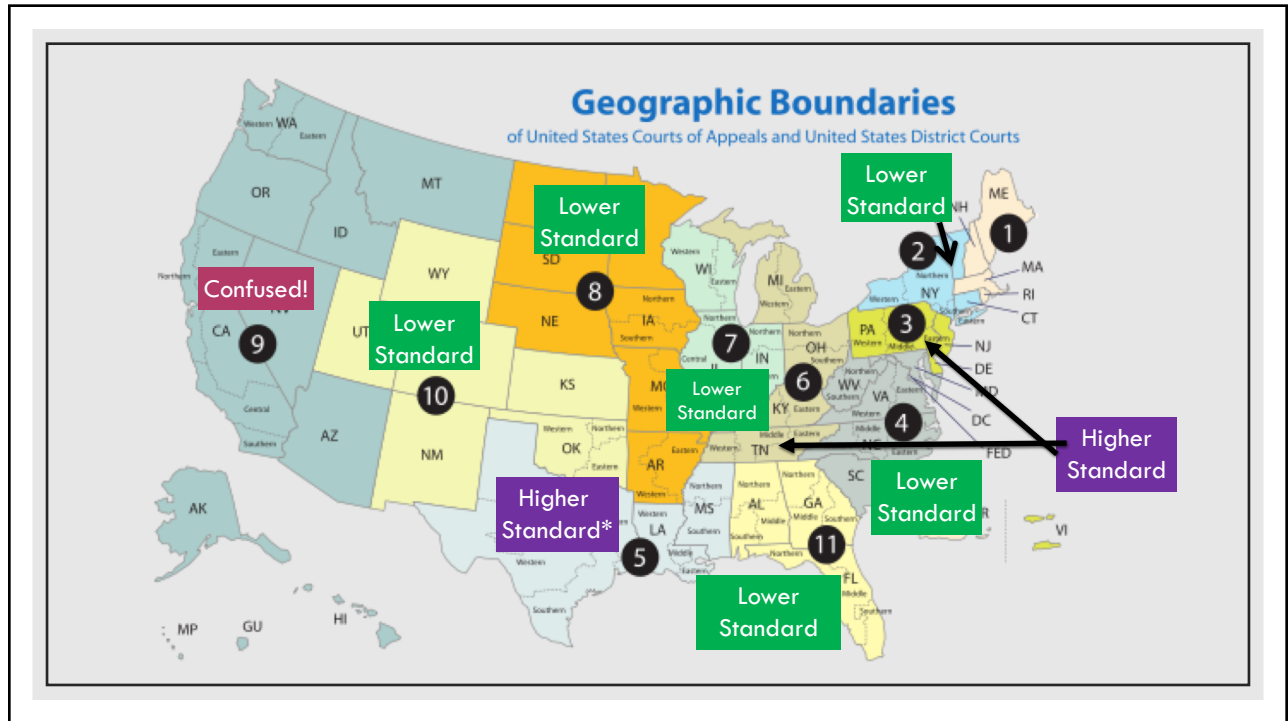
Board of Education v. Rowley, 1982



◦ 458 U.S. 176 (1982)

The *Rowley* Two-Part Test

1. Has the state complied with the *procedures* set forth in the law?
2. Is the resulting IEP reasonably calculated to enable the student to receive *educational benefit*?



Andrew F. v. Douglas County School District R1 (10th Cir. 2014)



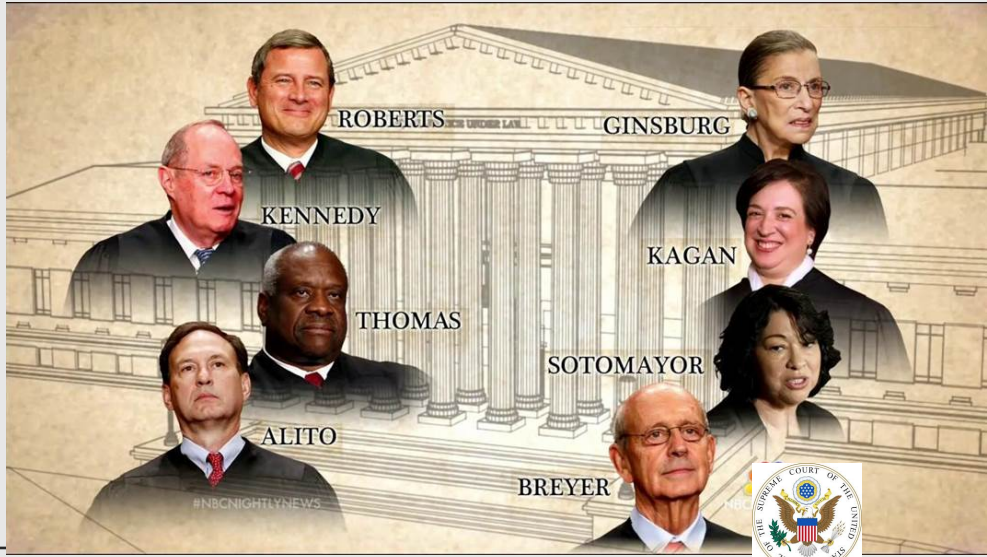
The Tenth Circuit's Educational Benefit Standard

“The educational benefit mandated by the IDEA must merely be more than de minimis” (*Endrew*, 2015, p.17)

Appeal to the U.S. Supreme Court

- **Question Presented:** What is the level of educational benefit school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act?

Oral Arguments: January 11, 2017



Supreme Court
Ruling: March
22, 2017

The High Court rejected the “merely more than *de minimis*” standard, vacating the decision and remanding the case back to the 10th Circuit to apply the new standard.

“To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.’

“The IEP must aim to enable the child to **make progress**. After all, the **essential function of an IEP is** to set out a plan for pursuing **academic and functional advancement.**”
- *Andrew F.*, 2017, p. 11-

The *Rowley/Andrew* Two-Part Test

1. Has the state complied with the ***procedures*** set forth in the law?
2. Is the resulting IEP reasonably calculated to enable the student to make **progress appropriate** in light of his or her circumstances?

The Final Chapter of *Endrew F.*

- U.S. Circuit Court of Appeals for the 10th Circuit - 2017
- U.S. District Court for the District of Colorado - 2018
 - Endrew’s “IEP was **not appropriately ambitious** because it did not give (Endrew) the chance to meet challenging objectives” (*Endrew*, 2018, p. 20).
- After 7 years of litigation, the Douglas County School District paid \$1.3 million from the District’s general fund to settle the case (Denver Post, 2/12/18).

The *Endrew* District Court on Behavioral Programming in IEPs

“The District’s inability to **properly address Petitioner’s behaviors** that, in turn, **negatively impacted his ability to make progress on his educational and functional goals**, also cuts against the reasonableness of the April 2010 IEP” (*Endrew v. Douglas County School District*, 2018, p. 17).

The U.S. Department of Education Dear Colleague Letter

- “Positive behavior support in IEPs”
- “The Failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit and FAPE. (OSEP DCL, p. 3)”

FAPE Requirements

Procedural Requirements

- These safeguards are designed to protect the rights of parents and their child with a disability by requiring the school district take actions to involve parents in the special education process
- Procedures requirements represent the “how” and “when” of the IDEA
- Has the school district complied with the procedures set forth in the law? (*Board of Education v. Rowley*, 1982)

Substantive Requirements

- Weatherly (2019), referred to the substantive requirements as the content standard of IDEA because the substantive requirements address the importance of the content of student’s IEP being sufficient to enable that student to make progress
- Substantive requirements represent the “what” of the IDEA
- Is a student’s IEP “reasonably calculated to enable the child to make **progress** appropriate in light of his circumstances.” (*Andrew F. v. Douglas County School District* (2017)).

Kathleen Mehfound (Attorney with Reed & Smith and Consultant to LRP): “ *When I have a school district with a FAPE case the first thing I do is go to the teacher and say: ‘Give me information on your student’s progress.’ If the teacher doesn’t have data, I advise the school district to settle.*” (Tri-State Special Education Law Conference, 2015)

Implementation Requirements

- The implementation requirements of IDEA refer to a school district's obligation to implement the IEP as developed by school-based personnel in collaboration with their parents.
- Implementation requirements represent a school district's faithfulness in implementing a student's IEP
- An IEP, like a **contract**...embodies a binding commitment and provide notice to both parties as to what will be provided to the student” (*M.C. v. Antelope Valley School District*, 2017, p. 1197)

Resources

IRIS IEP Modules
<https://iris.peabody.vanderbilt.edu/>

IEPs: Developing High-Quality Individualized Education Programs

- Overview of high-quality IEPs
- Explanation of the *Endrew F.* Supreme Court case and implications for IEP development
- IEP process guidelines & common errors
- Detailed development steps for IEP content, substantive guidelines, and common errors

What is an IEP?

Page 2: Endrew F. & IEP Standards

As we mentioned on the previous page, the IEP process is described in regulation (law) but clarified through litigation (lawsuits). That is, legislation tells educators what they must do, whereas litigation rulings help them to more specifically understand how and to what extent they must do it.

In 2017, a case before the U.S. Supreme Court, *Endrew F. v. Douglas County School District* (hereafter referred to as *Endrew*), sought to bring clarity to the IEP process by answering the following question: What is the level of educational benefit school districts must confer on children with disabilities to provide them with a free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act (IDEA)?

In the sections below, we will overview this landmark case and ruling and then begin to describe what it all means to the way that educators create IEPs for students with disabilities.

Background: The focus of this case was Endrew (an 8th grader) and attention deficit hyperactivity disorder (ADHD) who had attended public school in the Douglas County, CO for three years. During those years, his academic and functional progress was limited. Endrew's parents rejected the district's proposed 5th grade IEP and sought a more challenging IEP.

IEP Toolbox

This toolbox describes additional resources related to the information presented on this page. These resources are provided for informational purposes only for those who wish to learn more about the topic. It is not necessary for those working through this module to read or refer to all of these additional resources to understand the content.

IDEA Memo: Questions and Answers (Q&A) on U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District No. 1

This Q&A, developed by the U.S. Department of Education's Office of Special Education Programs (OSEP), gives parents and other stakeholders information on the issues addressed in *Endrew F.* and the impact of the Court's decision on the implementation of IDEA.

SCOTUSblog on Endrew F. v. Douglas County School District

This official blog of the Supreme Court contains the majority opinion in the *Endrew* case, an analysis of the case, proceedings and orders from the Supreme Court, the briefs written by the attorneys for *Endrew* and for the Douglas County School District, and numerous amicus or friend of the court briefs.

Oral Arguments, Endrew F. v. Douglas County School District

This site provides audio files of the oral arguments in the *Endrew* case as well as the opinion announced by Chief Justice John Roberts.

How Administrators Can Support the Development of High Quality IEPs



New Module
IEPs:
For School
Administrators

View the Module
Here




**National Center on Intensive
Intervention**

www.intensiveintervention.org

Progress Center

promotingprogress.org

 U.S. Department of Education

Student Loans Grants Laws

OSEP Policy Documents

Including OSEP Letters, Memos, Dear Colleague Letters, and FAQs

OSEP policy documents provide information, guidance and clarification regarding implementation of the Individuals with Disabilities Education Act (IDEA) through two types of issuances:

- Policy Support Documents
- Policy Letters

Policy Support Documents

OSEP issues broader written guidance in the form of memos, Dear Colleague Letters, or frequently asked questions (FAQ) documents, as determined appropriate, based on:

- Information gathered through OSEP's oversight of implementation of the IDEA by state educational agencies and Part C lead agencies.
- Stakeholder-identified needs for clarification of the IDEA's provisions.
- Needs identified due to new statutory or regulatory provisions or court cases.

OSEP POLICY DOCUMENTS

Special Education Law Blog

spedlawblog.com

Twitter

spedlawblog

Violence in Schools

- In 2015–2016, about 1.1 million incidents of serious offenses occurred in public schools.
- Incidents of physical attack or fight without a weapon (787,200; 75%) and incidents involving physical attack without a weapon (197,900; 19%) accounted for 94% of all serious offenses.
- 22,600 incidents of robbery without a weapon, 11,700 physical attack or fight with a weapon, 10,400 threats of physical attack with a weapon, 9,300 sexual assault (other than rape), 5,900 possession of a firearm or explosive device, 3,400 threats of physical attack with a firearm or explosive device, and 2,800 physical attack or fight with a firearm or explosive device were reported.
- 230 schools (0.2%) reported at least one incident of shooting and over 100 schools (0.1%) reported a homicide involving a student, faculty member, or staff member (U.S. Department of Education, Office of Civil Rights (OCR; 2019, p.2).

Disciplinary Procedures

- In 2015–2016, 2.7 million (about 6%) of K-12 students received one or more out-of-school suspensions; 24,500 students (about 0.2%) were physically restrained, mechanically restrained, or secluded; and over 290,600 were referred to law enforcement agencies or arrested (OCR, 2019).
- As of July 1, 2019, 30 states have laws providing meaningful protections against restraint and seclusion for all children; 39 for children with disabilities; 21 states protect all children from non-emergency seclusion; 28 protect children with disabilities (Butler, 2019; see also, Freeman & Sugai, 2019).
- Students referred to law enforcement or arrested were disproportionately black (31%) almost double their representation in school enrollment and students with disabilities (28%) though representing about 12% of students (OCR, 2019).
- Nationwide, about 46% of traditional public schools had a School Resource Officer present at school at least once a week, compared with only 19 percent of charter schools. Larger schools also more likely to have SROs; schools with 1,000 or more students (79%) than schools with 300 students (34%) (OCR, 2019).

Disciplinary Procedures

- About 5.6% of students were subjected to corporal punishment in 2013–14; more than 600 students per day. The rates were as high as 9.3 percent (Mississippi), 7.5 percent (Arkansas) and 5.9 percent (Alabama) (Southern Poverty Law Center, 2019)
- Though the use of corporal punishment has declined considerably in recent years, only 31 states (plus D.C. and Puerto Rico) have abolished it; corporal punishment is still permitted in 19 states, and it remains prevalent in Alabama, Arkansas and Mississippi (Farrell, 2016; see also (*Ingraham v. Wright*, 1977)).

Bigotry

- 7175 hate crimes last year compared with 6121 in 2016; a 17.2% increase-
- 59.6% of incidents against race
- 20.6% against religion,
- 15.8% against sexual orientation
- was the reason behind 15.8% of crimes
- (U.S. Department of Justice, Federal Bureau of Investigation, 2019).
- The recent surge in hate crimes especially affected Black and Jewish Americans. Of the reported attacks in 2017, 2013 were aimed at African Americans, while 938 were against Jewish Americans (Levin & Reitzel, 2018).

Bigotry

- In 2015–2016, approximately 135,600 individual allegations of harassment or bullying on the basis of sex, race, sexual orientation, disability, or religion were reported in the public school context (U.S Department of Education, Office of Civil Rights [OCR], 2018).

Mental Health

- **ADHD, behavior problems, anxiety, and depression are the most commonly diagnosed mental disorders in children**
 - 9.4% of children aged 2-17 years (approximately 6.1 million) have received an ADHD diagnosis.
 - 7.4% of children aged 3-17 years (approximately 4.5 million) have a diagnosed behavior problem.
 - 7.1% of children aged 3-17 years (approximately 4.4 million) have diagnosed anxiety.
 - 3.2% of children aged 3-17 years (approximately 1.9 million) have diagnosed depression.
 - (Center for Disease Control and Prevention, 2019)

Back to Basics: Expectations for a Continuum of Programs and Services

Carl R. Smith
Professor Emeritus
Iowa State University

Defining Continuum (34 CFR § 300.115)

- Instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions
- Make provision for supplementary services . . . In conjunction with regular class instruction

OSEP Memorandum (1994)

- IDEA does not require students with disabilities be placed in regular classes
- Such a placement may not be appropriate for all students
- A continuum of alternative placements is needed to meet unique student needs

Pachel v. Schol Bd (Eight Circuit, 2006)

- Question of whether LRE was provided for a sixth-grade student with physical disabilities who was served in segregated classroom for 30% of her time.
- Parents asserted that this was not LRE
- Circuit upheld decision of District Court that appropriate standard had been applied in concluding that LRE was met.
- Also upheld need for student to use special education bathroom.

Avaras v. Clarkstown (U.S. District, NY, 2017)

- Focused on the needs of a fifth-grade who needed assistance in reading and writing.
- Testimony of general ed teacher indicated that the only option provided was a special education classroom with 15 students.
- Parents objected to this option.
- Court determined that other, less restrictive, options were not considered and thus ruled in favor of the parents.

M.S v. Los Angeles Schools (Ninth Circuit, 2019)

- A different scenario was presented.
- Case involved a 16-year-old girl with emotional disturbance who had been court ordered into a licensed children's institution.
- ALJ had decided that student had been denied FAPE by not considering continuum of alternative placements to meet educational needs.
- District Court had affirmed ALJ and Ninth Circuit did likewise.

Despite these decisions . . .

- I question whether the Districts in our states provide for such a continuum of options.
- Furthermore, I question whether our states are exercising due diligence in applying their responsibilities under the “Single Line of Responsibility” provisions of IDEA.
- This being said, I have not found any examples of local districts or SEAs being taken to task on either matter!

Jackson v. Pine Bluff District (Dist. Ct. Arkansas, 2017)

“The IDEA and its regulations expressly direct the state agency to ‘monitor’ the local educational agencies’ implementation of the IDEA, and authorize the state agency to use ‘appropriate enforcement mechanisms’ against any local agency that is failing to comply with the statutory requirements . . . “

In Conclusion . . . “So What?”

- Likelihood that parents are not presented options but rather “Take it or leave it”. (Iowa parents)
- Is an unintended consequence of this omission the increased use of restraint, seclusion and room clears?
- Are we failing to provide what could be a critical component of mental health services?



An Update on Continuum Issues



Current Proposed Iowa Legislation

Senate File 2360

Creates and Funds “Therapeutic Classrooms”

- Classrooms (one to five students)
- Classrooms (six to ten students)
- Classrooms (11 to 15 students)



Darn . . .

It looks like a revision of continuum concept!

Definition of These Classrooms

“ . . . a classroom designed for the purpose of providing support for any student whose emotional, social, or behavioral needs interfere with the student’s ability to be successful in the current educational environment, with without supports, until the student is able to successfully return to student’s current educational environment . . . ”



It also . . .

Prohibits “room clears” from being in a student’s IEP



**And so it goes . . .
(Kurt V.)**

References

- *Avaras v. Clarkstown Central School District* (U.S. District Court, Southern District of New York, July 17, 2017) 70 IDELR 129.
- *Board of Education of the Hendrick Hudson Central SD v. Rowley*, 458 U.S. 175 (1982).
- *Endrew F. v Douglas County School District*, 137 S. Ct. 988 (2017). (Available at scotusblog.com)
- *M.S. v. Los Angeles Unified School District* (U.S. Court of Appeals, Ninth Circuit, January 24, 2019) 73 IDELR 195.
- *Jackson v. Pine Bluff School District* (U.S. District Court, Eastern District of Arkansas, May 12, 2017) 117 LRP 21533.
- *Pachl v. School Board of Anoka-Hennepin Independent School District* (U.S Court of Appeals, Eighth Circuit, July 14, 2006) 46 IDELR 1.