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REVISITING SERVICES, SUPPORTS, AND THE IEP TEAM DECISION-MAKING PROCESS FOR STUDENTS WITH CHALLENGING BEHAVIORS IN LIGHT OF *ENDREW F.*

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***Endrew F. v. Douglas County School District*, 798 F.3d 1329 (10th Cir. 2015), 580 U.S. ___, 137 S. Ct. 988 (2017)**



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The Issue Before the Supreme Ct Challenged the 2nd “Substantive” Prong of the *Rowley* Standard

What is the level of educational benefit a school district must confer on children with disabilities to provide them with a Free Appropriate Public Education as guaranteed by the IDEA?

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What did the Court decide?

The IEP of a student “who is not fully integrated in the regular classroom and not able to achieve on grade level” must be:

- (1) Procedurally compliant (the 1st “procedural” prong of the *Rowley* standard); and
- (2) Reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances

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- Further, “[the child’s] educational program must be appropriately ambitious in light of his circumstances”
- “The goals may differ, but every child should have the chance to meet challenging objectives”

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This new standard “is markedly more demanding” than the “merely more than *de minimis*” test used by the 10th Circuit in its 2015 *Endrew F* decision

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- Yet, the question is whether an IEP is reasonable, not whether a court regards it as “ideal”
- Any court that reviews a dispute about the adequacy of an IEP “may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances”

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- Because the Court didn’t elaborate on what “appropriate” progress will look like from case to case, “[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created”
- So hearing officers and courts will decide how *Endrew F* applies to particular situations

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How Is *Endrew F* likely to impact situations in which behavior is a significant issue?

- **Districts may now be more vulnerable** to claims that they denied FAPE to students with disabilities who:
 - Exhibit challenging behaviors at school that persistently interfere with progress or
 - Have been placed on a shortened school day or on homebased instruction as a result of behavior

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So what should Districts be doing?

- To demonstrate that an IEP is **substantively appropriate** in compliance with the 2nd prong of the standard, it should include:
 - Appropriate, current (re) evaluation data;
 - Thorough and accurate Present Levels of Educational Performance/Objective Statements – baseline data;
 - Measurable goals (and short-term objectives or benchmarks, as needed);
 - Appropriate measures of student progress; &
 - Meaningful & timely progress reports

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- Further, just because your team followed the appropriate procedure to implement a disciplinary removal, the Student can still be denied FAPE
- For disciplinary removals that constitute a change of placement, see the one-page **FAPE Considerations** handout

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- For short-term removals, see U.S. Department of Education, Office of Special Education & Rehabilitative Services (OSERS), *Dear Colleague Letter re Behavioral Supports* (August 1, 2016), found at <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps-08-01-2016.pdf>
- **Casts doubt** on widely-held belief that “Schools have free use of up to 10 school days of short-term removals per school year without IDEA implications. The days can be used in any combination, quickly or slowly, although caution would warrant using the 10 ‘free’ days judiciously over the school year, and avoiding multiple suspension days if at all possible.”

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- Revisit the **Behavioral Supports Dear Colleague Letter** with staff to identify non-disciplinary/non-removal options for addressing challenging behaviors
- Consider site-wide PBIS
- When you've exhausted your in-District capacity, consider use of a behavior consultant who will use research-based strategies
- Consider the possibility of building new initiatives with your SDE and universities

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What if you've done it all and progress is questionable or non-existent? Do reasonable good faith efforts still matter?

- Before the Supreme Court's *Andrew F* decision, administrative officers and courts frequently took districts' reasonable good faith efforts into account in deciding denial of FAPE cases

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- *Andrew F* confirmed that, substantively, IEPs must be "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances," not guaranteed to do so
- It further explained that the IEP must be reasonable, not ideal

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- So, never throw up your hands and keep them there!
- If progress is questionable or non-existent, seek answers through the IEP team process
- Even if the team makes no changes to the IEP, the discussion and documentation are valuable
- All teachers and providers should consistently document their efforts and outreach

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What do the post-*Andrew F* cases tell us about denial of FAPE when challenging behavior is the big issue?

- *C.M. v. Warren Independent School District, 69 IDELR 282* (E.D. TX 2017) (unpublished)
 - 9-year-old with emotional disturbance who exhibited noncompliance, elopement and physical aggression
 - Not receiving instruction in the general education classroom and not performing on grade level
 - Court considered whether Student's IEP was reasonably calculated to enable him to make progress in light of his individual circumstances
 - Court credited teacher testimony that Student made measurable progress in behavior after team developed and implemented a BIP and that he made some progress in core subjects
 - Court found for District because this progress was appropriate in that severity of Student's behavior issues required placement in self-contained classroom with one-on-one instruction

School Responsibility for Behavioral Supports under the IDEA

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New Guidance

- U.S. Department of Education, Office of Special Education & Rehabilitative Services (OSERS), *Dear Colleague Letter re Behavioral Supports* (August 1, 2016), found at <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>

- Casts doubt** on widely-held belief that “Schools have free use of up to 10 school days of short-term removals per school year without IDEA implications. The days can be used in any combination, quickly or slowly, although caution would warrant using the 10 ‘free’ days judiciously over the school year, and avoiding multiple suspension days if at all possible.”

Prior Guidance Documents

- U.S. Department of Education, Questions and Answers on Discipline Procedures (revised June 2009), found at <https://www2.ed.gov/policy/speced/guid/idea/discipline-q-a.pdf>
- U.S. Department of Education, *Dear Colleague Letter on the education of students with disabilities in correctional facilities and IDEA requirements* (December 5, 2014), found at <https://www2.ed.gov/policy/gen/guid/correctional-education/idea-letter.pdf>

Definitions

- “**Behavioral supports**” refers generally to behavioral interventions and supports and other strategies to address behavior
- “**Exclusionary disciplinary measures**” includes the range of actions school personnel implement – in response to misbehavior or violation of a code of student conduct – where the child is removed and excluded from the classroom, school grounds, or school activities formally (suspension) or informally (asking parent to keep child home)

Purpose

- OSERS states that recent data on short-term disciplinary removals from current educational placement strongly suggest that many students with disabilities may not be receiving appropriate behavior interventions in IEPs

Technical Assistance Documents

- With the DCL, OSERS enclosed 2 technical assistance documents to help districts develop & implement appropriate IEPs for students with challenging behaviors
 - *Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers*, found at <https://www.pbis.org/common/cms/files/pbisresources/Supporting%20and%20Responding%20to%20Behavior.pdf>
 - *Positive Behavioral Interventions and Supports: Implementation Blueprint and Self-Assessment*, found at <https://www.pbis.org/blueprint/implementation-blueprint>

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The Bottom Line

- OSERS takes position that **failure to consider & provide behavioral supports through IEP process will likely result in a child not receiving meaningful education benefit, FAPE, or education in the LRE**
- Just because districts have the authority to impose short-term disciplinary removals doesn't mean they should
 - Imposing such removals may support an inference that FAPE has been denied

(8)

- Also, OSERS repeatedly encourages the use of PBIS (or another school-wide, multi-tiered behavioral framework)

(9)

IEP Procedural Requirements

- The IEP team must consider use of PBIS & other evidence-based strategies to address behavior of a child when behavior impedes his/her learning or learning of others
- Misbehavior (especially a pattern of misconduct) may indicate that IEP should include appropriate behavioral supports
- When there are incidents of misconduct, team must consider whether & what parts of the IEP must be reviewed/revised to ensure FAPE

(10)

- Parents may request an IEP meeting to discuss behavior concerns
 - District should grant reasonable requests or issue Written Notice if meeting request is refused

(11)

- When child has repeated incidents of misconduct, the IEP team should meet to consider whether child needs new or revised behavioral supports

(12)

- If team can't meet before student's return to school after a suspension, parent & district could instead agree to develop a written document to amend the IEP
 - Must follow relevant IDEA regulations

(13)

Developing the IEP

- When child exhibits challenging behaviors (and when s/he is subject to short-term disciplinary removal), the IEP team may need to consider appropriate behavioral supports to ensure FAPE
- In the IEP process, the team should consider
 - **Special ed & related services**
 - **Supplementary aids & services &**
 - **Programs modifications/supports for personnel**

(14)

- **Special ed & related services might include**
 - Instruction about & reinforcement of school behavior expectations
 - Violence prevention programs
 - Anger management groups
 - Counseling to address mental health needs
 - Life skills or social skills training

(15)

- **Supplementary aids & services might include**
 - Sessions with behavior coach
 - Social skills training
 - Counseling

(16)

- OSERS advised that the IEP team should not place a student outside the regular educational environment (school or classroom) due to behavior when the district could provide the child **effective behavioral support with supplementary aids & services**

(17)

- **Program modifications or supports for personnel might include**
 - Training
 - Coaching
 - Other tools that address a particular child's unique needs

(18)

Denial of FAPE or LRE

- District failure to comply with these requirements may result in child not receiving meaningful educational benefit, causing denial of FAPE &/or education in the LRE

(19)

- OSERS advises that **FAPE may be denied when**
 - IEP team didn't consider inclusion of positive behavioral interventions & supports in response to behavior that impeded learning of student or others
 - District personnel ignored parent request for IEP meeting to address behavior issues
 - IEP team failed to discuss parent concerns during meeting

(20)

- IEP doesn't include behavioral supports although team found them necessary
- Behavioral supports in IEP are inappropriate
 - Their frequency, scope or duration is insufficient to prevent behaviors that impede learning of student or others
- Consistent use of supports hasn't resulted in positive changes in behavior, which continues to or further impedes learning

(21)

- Failure to implement appropriately or at all the behavioral supports in student's IEP
 - **Focus on adequacy of teacher training in classroom management and de-escalation techniques**

(22)

- OSERS advises that a student's IEP may not be **reasonably calculated to provide meaningful educational benefit when s/he**
 - Displays pattern of behavior that impedes learning of self or others & receives no behavioral supports
 - Has had a series of disciplinary removals from current placement of 10 days or less (no change in educational placement) for different incidents, but IEP team doesn't consider need for behavioral supports
 - Has less than expected level of progress toward IEP goals re disciplinary removals or lacks behavioral supports, & IEP team hasn't reviewed/ revised IEP

(23)

What Does the DCL Mean in Light of Current IDEA Regulations?

- Section 300.530 of IDEA regulations states:
 - "School personnel may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for up to 10 consecutive school days in a school year, to the extent those alternatives are applied to children without disabilities, and for additional removals of up to 10 school days in the same school year for separate incidents of misconduct, provided that the additional removals do not constitute a change of placement."

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<ul style="list-style-type: none">• Nevertheless, OSERS advises that using short-term disciplinary removals may indicate that the IEP team needs to review & revise the IEP to address behavior needs• District's failure to do so may deprive student of meaningful educational benefit, which could deny FAPE	
	(25)

<ul style="list-style-type: none">• So, districts need to<ul style="list-style-type: none">• Focus on the behavioral supports a student needs to address misconduct/behavior that impedes learning of self or others• Address needed behavioral supports through the IEP team process before a manifestation determination mandates team discussion/ action• Recognize that "behavioral supports" a particular student needs may include services/ strategies the district hasn't previously considered or provided	
	(26)

<ul style="list-style-type: none">• Train staff to consistently provide appropriate behavioral supports• Understand the scope & limitations of the "10-day rule"	
	(27)

FAPE Considerations for Students on Out-of-School Suspension that Constitutes a Disciplinary Change of Placement:

1. **The Student is still entitled to FAPE.**
2. The IEP team must determine how the Student will continue to receive educational services that allow him/her, during the suspension or other removal from school:
 - a. to continue to participate in the general education curriculum; and
 - b. to progress toward meeting the goals in the IEP; andamend the current IEP or develop a subsequent IEP that specifies what and where special education and related services will be provided.
3. In addition, the IEP team, if appropriate, will conduct an FBA and develop a BIP.
4. Since the Student is entitled to FAPE during the out-of-school suspension, the IEP that will be implemented during the suspension term must be – under *Endrew F.* – reasonably calculated to enable the Student to make progress appropriate in light of his/her circumstances.
5. **So, relevant FAPE-related questions for the Director are:**
 - a. **Does the IEP to be implemented during the suspension term allow the Student to participate in the general education curriculum? How?**
 - b. **Does it allow the Student to progress toward meeting the goals in the IEP? How?**
 - c. **Does it allow the Student to work on the behavior that resulted in the suspension, as appropriate? How?**
 - d. **Is the IEP reasonably calculated to enable the Student to make progress appropriate in light of his/her circumstances? How?**

If the answer to any of these questions is no and/or if the team members can't reasonably explain how, **the team needs to continue to work on the IEP.**

If the answers to these questions is, initially, yes and the explanation is reasonable, but the Student doesn't make progress toward meeting the IEP goals or make progress appropriate in light of his/her circumstances, **then the IEP team should meet promptly to review the situation and amend the IEP, as appropriate.**