

Legal Developments in the Education of
Students with EBD: What You Need to Know
and Why

Midwest Symposium in Behavior
Disorders

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Presenters

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Session Sequence

- FAPE: Endrew and Implications
- Aversives: An Update
- FAPE and Mental Health
- Looking Ahead: Some Thoughts
- Questions/Discussion

FAPE: Endrew and Implications

Mitchell Yell

**The Essence of Special
Education: To provide a
special education that
confers a free
appropriate public
education (FAPE)**

What is a 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)

**FAPE issues
account for 85% to
90% of all special
education litigation**

Gerl, 2014

Board of Education v. Rowley



458 U.S. 176 (1982)

The Rowley Two-Part Test

- Has the state complied with the procedures set forth in IDEA?
- Is the IEP reasonably calculated to enable the student to receive educational benefits?

“We therefore conclude that the “basic floor of opportunity” consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”

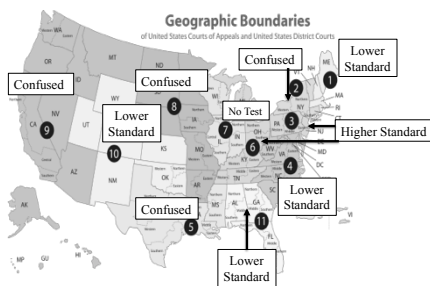
Split in the Circuits

- Lower standard: Some benefit, more than trivial or *deminimus*
- Higher standard: Meaningful benefit
- Confused standard: More than some benefit, not ruling out meaningful

Split in the Circuit Courts

Lower Standard Slightly more than Nothing	Confused Standard More than trivial, maybe meaningful	Higher Standard Meaningful Benefit
1 st Circuit	2 nd Circuit	3 rd Circuit
4 th Circuit	5 th Circuit	6 th Circuit
10 th Circuit	8 th Circuit	
11 th Circuit	9 th Circuit	

FAPE Tests



Andrew F. v. Douglas County School District, 2015

Facts of the Case

- Andrew F. (Drew) was diagnosed with autism and attention deficit hyperactivity disorder at age 2
- He received special education services in the Douglas County Schools through 4th grade
- Drew's parents rejected an IEP proposed by a school district
- Drew's parents enrolled him at the private school, the Firefly Autism House
- They requested that Douglas County Schools reimburse them for tuition and related expenses

The Hearing & District Court Case

- Drew's parents contended that the school had denied him a FAPE.
- The administrative law judge (ALJ) denied the request, finding that the school district had provided Drew with a FAPE
- The parents filed suit in the the U.S. District Court for the District of Colorado. The judge affirmed the ALJ's decision
- The parents filed an appeal with the U.S. Circuit Court of Appeals the the 10th Circuit

Appeal to the 10th Circuit

- Drew's parents contended that they were entitled to tuition reimbursement because the ALJ and district court failed to recognize the District' procedural and substantive violations of the IDEA
- The court noted that the two conditions under which tuition reimbursement is available under the IDEA
- Of the two the court only addressed in the District had violated FAPE by failing to provide Drew with a FAPE

The Parents Challenges

- **Procedural deficiencies**
 - The District failed to provide adequate reporting on Drew's progress
 - The District failed to properly assess Drew's behavior and did not include an adequate plan to address behavior problems (no FBA)
- **Substantive deficiencies**
 - Drew made no measurable progress on his goals
 - District failed to address Drew's escalating behavioral problems

The 10th Circuit's Decision

- **Procedural deficiencies**
 - Even though the district admitted to not reporting Drew's progress, and the court "did not endorse the District's reporting," the parents still participated in a meaningful way in crafting his IEP
 - Because the district "considered" Drew's behavior and possible interventions, it met the requirements of the IDEA
 - An FBA is only required when there is a disciplinary change of placement

10th Circuit's Decision

- **Substantive deficiencies**
 - Although Drew's progress was not measured, the ALJ decided that he had made progress in the past so he had made some educational progress during his time in the district, and some educational progress was sufficient
 - Many of Drew's goals remained the same from year to year but sometimes they were changed
 - The district has made sufficient effort to craft a behavioral plan so it did not deny FAPE

Appeal to the U.S. Supreme Court

- On 12/22/2015 the parents filed a petition with the U.S. Supreme Court
- Granted certiorari by the U.S. Supreme Court on 9/29/2016
- Question presented: What is the level of educational benefit that school district's must confer on children with disabilities to provide them with a FAPE?

Will this be the most
important court decision
since *Rowley v. Board of
Education (1982)*?

Stay Tuned!
We'll find out in late
June or early July!

Aversives: An Update

Antonis Katsiyannis

IDEA Provisions

IEP Team shall in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" [Section 1414 (d)(3)(B) (i)].

Federal Guidance

The disproportionate use of exclusionary practices remains a persistent concern; failure to provide such behavioral supports, in light of repeated use of disciplinary actions, may potentially amount to denial of FAPE (U.S. Department of Education, 2016)

Minority Over representation-discriminatory discipline is in violation of Titles IV and VI regarding race and Section 504/ Title II of ADA regarding disability (U.S Department of Education, Office of Civil Rights, 2014)

Potential for discrimination and the violation of individual rights also include the use of aversive interventions (e.g., seclusion and restraints, corporal punishment, and neglect and abuse).

Case Law Review

Special Ed Connection Data Base

The topical index was searched using the terms, "abuse and neglect", "aversives", and "corporal punishment".

The search was limited to special education and disability judicial decisions from 1997 to 2016.

The search yielded 356 total cases. After duplicate cases were removed 313 cases remained.

Following review for inclusion criteria, totaled 173

Case Law Highlights

Case involved circuit courts ($n = 15$), district courts ($n = 74$), state supreme courts ($n = 9$), state educational agencies ($n = 48$), and the Office for Civil Rights ($n = 27$).

The majority of cases were in regards to students with Autism ($n = 54$), followed by undisclosed disabilities ($n = 45$) and students with emotional and behavioral disorders ($n = 26$).

Cases were brought primarily against public schools (84%), and at the elementary school level (38%), although a third of cases did not report the school level.

The most commonly applied aversives were abuse (30%) and physical restraint (29%), followed by seclusion (20%).

Abuse and Corporal Punishment

In Hatfield v. O'Neill (2013), the 11th circuit held that the teacher's striking of the student in the head during a feeding exercise was an excessive use of force. This action took place despite the teacher's awareness that that a grade schooler with multiple, profound disabilities had undergone brain surgery years earlier.

In determining whether the teacher's alleged conduct was obviously excessive, the court considered (a) the need for corporal punishment, (b) the relationship between that need and the amount of punishment administered, (c) the extent of the injury inflicted.

Gottlieb v. Laurel Highlands School District (2001)

The court established a four pronged test to determine whether excessive force was used and consequently constitutional violations occurred.

The four-pronged test includes

- (a) was there a pedagogical justification for the use of force,
- (b) was the amount of force necessary to meet the legitimate objective in the given situation,
- (c) was the force applied in a good faith effort to maintain or restore discipline; or maliciously and sadistically for the purpose of causing harm, and
- (d) was there serious injury to the student?

Restraints

In *Phipps v. Clark County School District* (2016), the U.S. District Court, Nevada, districts can be liable under Section 1983 for an employee's violation of a student's constitutional rights if the employee acted in accordance with a district policy, custom, or practice

The teacher in this case dragged the student from under a table by his wrist, pinned him to the floor using her knees and elbows, and shoved another student into him. Police arrested the aide on the date of the restraint incidents after witnessing her conduct on live-feed surveillance.

Seclusion

In Hillsdale (MI) Intermediate School District (2014), the parent of a second grader with an emotional disability alleged that the district used a "behavior management room" as well as 3' x 4' boxes called "booths" to seclude the child when exhibiting certain behaviors. In addition, as evident by bruises and marks, the child was subject to excessive and inappropriate restraints.

Although "appropriate classroom discipline is permissible, inappropriate physical restraint for conduct related to the student's disability may amount to disability harassment when physical restraint or seclusion creates a hostile environment and deprives the students from educational opportunities.

Key Considerations

School officials may be held liable for subordinate actions (e.g., teachers), particularly when idle in light of reported incidents.

Excessive and inappropriate use of aversives may amount to disability discrimination and violations under Section 504 and Title II

Use of aversives may be permissible but conditions apply particularly with regard to sound pedagogical justification, intent, and presence of injury.

Adherence to policies (state or district) is critical and consequently it is necessary that all personnel are properly trained and promptly document incidents involving the use of aversives. Failure to follow these policies and neglect to implement IEP provisions may violate FAPE requirements and result in liability for employees and districts.

FAPE and Mental Health

Carl R. Smith

FAPE/Mental Health

- Can benefit (any kind) take place without addressing MH issues for students experiencing a mental disorder?
- Can mental health needs be consistently separated for other elements of educational performance?
- What is expectation of full and comprehensive evaluation in relation to mental/behavioral health issues?

FAPE/Mental Health

- FAPE/Out-of-District Placements/Mental Health Needs
- How do we address evidence-based practices in meeting FAPE/Mental Health?
- What are expectations of progress with students with mental health needs?
- What is role of related services in FAPE and mental health?

May not have time . . .

. . . to address all!

Children's Mental Health (Center for Disease Control, 2013)

- Estimates that 13-20 percent of children living in the U.S. experience a mental disorder in a given year.
- Millions of American children live with depression, anxiety, ADHD, autism spectrum disorders, Tourette syndrome or a host of other disorders.
- In schools, early identification is critical, yet . . .

But Remember . . .

- Disability designation requires:
 - Does the student have a condition considered as a disability
 - Disability impacts educational performance
 - Student requires special education

Mental Health and Education

Intertwined or Not: Varying
Conclusions

Recent Decision

(Fort Bend School District v. Douglas A., Fifth Circuit, 2015)

- Involved a high schooler with reactive attachment disorder placed in mental health treatment facility by parents.
- Placement considered not appropriate by three judge panel.
- Factors considered:
 - Did the parents place student for educational reasons?
 - Did the facility evaluate the student's progress primarily by educational achievement?

However . . .

Mental health has been affirmed as
related to educational performance

Mr. & Mrs. I. v. Maine School Admin. District 55
(U.S. District Court-Maine, 2006)

- 12 year old student with Asperger Disorder
- Issue of IDEA eligibility
- Issues in defining educational performance

Eligibility Issue
(Mr. & Mrs I)

- “The mere fact of a diagnosis of Asperger’s Syndrome and Adjustment Disorder with Depressed Mood does not automatically qualify a child for special education . . .the disability must adversely affect the child’s educational performance.”

Educational Performance

- District asserted educational performance as not affected by virtue of:
 - Strong academic skills
 - Meeting standards for learning
 - Strong written and oral skills
 - Obeying rules
 - Not a discipline problem

Educational Performance
(Mr. & Mrs. I)

- Issue of behaviors such as social isolation, self mutilation behaviors, behavioral rigidity
- “. . . The purpose of education is not merely the acquisition of academic knowledge but also the cultivation of skills and behaviors needed to succeed generally in life.”
- Decision was affirmed by First Circuit in 2007

Evaluation

Students who are suspected of having disabilities should be referred for special education evaluation

Upon receiving written consent from a student’s parents, a multidisciplinary team of knowledgeable people, including the student’s parents must conduct a full and individualized evaluation to determine if (a) student has an idea eligible disability and (b) because of that disability the student needs special education

In most categories, the student’s disability must also *adversely affect* his or her academic performance

When conducting an evaluation, the team must assess all suspected areas of need irrespective of a student’s possible disability

Oakland Unified v. N.S.
(U.S. District, N.CA., 2015)

- District contended that record of substance abuse negated need for mental health evaluation.
- Student born in Africa, adopted at age 8.
- Diagnosed, externally, with depression, ADHD, PTSD and reactive detachment disorder
- Issue “on the table” was tuition reimbursement in addition to evaluation issues

Oakland Unified v. N.S. (U.S. District, N.C.A., 2015)

- Court Concluded:
 - District contention that behaviors such as drug use, absences and tardies, unusually awkward behavior were to be attributed to entry into high school and peer pressure was not supported.
 - Supported notion of co-occurring substance abuse and mental health concerns.
 - Ruled in favor of parents

Free Appropriate Public Education (FAPE)

A common strategy to deliver mental health services is through the provision of related services

Related services are any services needed to enable to student to benefit from his or her special education. Except for medical services, or cochlear implants there are no restrictions on related services that may be included in an IEP.

The IEP team, in addition to determining the type of related service, must also determine the amount or frequency of service provision.

Students' IEP teams offer mental health related services via counseling, psychological services, or social work services

Related Services

- Psychological services
- Early identification and assessment of children with disabilities
- Counseling services
- Medical services for diagnostic and evaluation purposes
- Social work services
- Parent counseling and training

Question to Ponder

“Parent is expected to seek services or is this a related service?”

Recommendations for Special Educators

Include mental health programming as a related service if needed to confer FAPE

Related services are any services that is provided to assist a student to benefit from his or her special education services

The type of related service is up to a student's IEP team

Typically mental health related services include counseling, psychological services, the services of a school social worker, or therapy by an outside counselor or therapist

Looking Ahead: Some Thoughts

Mitchell Yell

What Does the Future Hold for Special Education?

- Reauthorization of the IDEA
- CEC IDEA Working Group
- Impact of the Trump administration, the congress, & Betsy DeVos

Questions/Discussion

... and thanks for being here

Cases Cited

- Fort Bend Independent School District v. Douglas A. (65 IDELR 1, U.S. Court of Appeals, Fifth Circuit, 2015)
- Mr. & Mrs. I. v. Maine School Administrative District (45 IDELR 55, U.S. District Court Maine, 2006)
- Oakland Unified School District v. N.S (66 IDELR 221, U.S. District Court, Northern District of California, 2015)