

Developing Educationally Appropriate and Legally Sound Behavioral IEPs: Federal Guidance and Litigation

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MSLBD Conference of Behavior Issues for School Leaders
October 13, 2017



The primary vehicle for providing a FAPE is through an appropriately developed IEP that is based on the individual needs of the child. In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider – and, when necessary to provide FAPE, include in the IEP – the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

U.S. Department of Education, August 1, 2016



Outline

- Defining FAPE and the Endrew standard
- Court cases on behavior and FAPE
- U.S. Department of Education advice
- Educationally appropriate & legally sound behavioral IEPs



Free Appropriate Public Education

- 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)



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*?



The Tenth Circuit's Educational Benefit Standard

Andrew F. v. Douglas County School District R1, 798 F.3d 1329, (10th Cir. 2014)



The Tenth Circuit's Educational Benefit Standard

“The educational benefit mandated by the IDEA must merely be more than *de minimis*”



Appeal to the U.S. Supreme Court

- On December 22, 2015 the parents appealed 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?

Certiorari Granted on September 29, 2016



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 Rowley/Endrew Test

1. In the development of an IEP, has the school agency complied with the procedures set forth in the IDEA?
2. Is the IEP developed through the IDEA’s procedures reasonably calculated to enable the child to make progress that is appropriate in light of his or her circumstances?



The Five More Important Phrases in the Endrew Standard

- “Fact-intensive exercise”
- “In light of a child’s circumstances”
- “Potential for growth”
- “Ambitious and Challenging objectives”
- “Progress appropriate”



Fact-Intensive Exercise

- The IEP is “the centerpiece of the law’s education delivery system” (Endrew, p. 2)
- Endrew continues Rowley’s focus on the process of IEP development
- The IEP “must be drafted in compliance with a detailed set of procedures” (Endrew, p. 2)



In Light of a Child’s Circumstances

- The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.
- A student’s program must be based on a comprehensive evaluation

Endrew, P. 15 & 16



Potential for Growth

A student’s IEP is “constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.”

Endrew, P. 12



Challenging Goals

- “The goals may differ, but every child should have the chance to meet challenging objectives.”
- IEP teams should precisely document that they carefully deliberated with a student’s parents about the content of the IEP and the meaning of ensure progress, appropriately ambitious and challenging goals, and the student’s circumstances

Endrew, P. 14



“Enable the child to make progress appropriate in light of the child’s circumstances”

Endrew, P. 16



“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.”

Endrew, P. 11



Benefit v. Progress

“We find little significance in the (Rowley) Court’s language concerning the requirement that States provide instruction calculated to provide some educational benefit.”

Endrew, P. 10



Progress

- The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue.

- A reviewing court may fairly expect those 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.

Endrew, P. 16



The Importance of Reacting to Data

When progress report and other data do not reflect that an annual goal will be met, reconvene the IEP team to determine why, make needed instructional changes, and continue to collect data



“A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act”

Endrew, P. 11



What Does Endrew Mean for Students with Behavior Problems?

“An IEP must aim to enable the child to make progress; the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. And the degree of progress contemplated by the IEP must be appropriate in light of the child’s circumstances”

Endrew, P. 11



Paris School District v. A.H. (2017)

- The case involved a school districts appeal of a due process hearing officer’s decision that the school district had failed to confer FAPE because the district had developed an inadequate behavior plan.

- Facts of the case.



District Court Ruling

- The hearing officer's ruling that the behavior management plans for 2 years were inadequate was upheld because:
 - The management plan was not developed in a timely manner.
 - The district supposed plan was not attached to the student's IEP or referenced in the IEP and consisted of two pages without dates or signatures.
 - The behavior plan lacked substance because it did not address specific behaviors noted by the parents, school, and evaluation
 - The behavior plan did not specifically address how teachers were to manage the student's behaviors



District Court Ruling

- “The Court agrees with the Hearing Officer's conclusion that the behavior plans were inadequate, especially in light of the higher standard of Endrew F. that must now be applied” (Paris, p. 8).
- While the IDEA does not explicitly mandate a behavior plan, Endrew's standard may require that given a child's circumstances he/she's IEP may require one. “A.H.'s circumstances required that any IEP address behavior issues. The Court agrees with the Hearing Officer's conclusion that the behavior support plans in place were inadequate” (Paris, footnote 10).



Behavior in the IEP

IDEA requires that a student's IEP team “consider the use of **positive behavioral interventions and supports** for any student whose **behavior impedes** his or her learning or the learning of others” (IDEA, 20 U.S.C. § 1414(d)(3)(b)(i))



The U.S. Department of Education

- Office of Special Education Programs (OSEP) Dear Colleague Letter of August 1, 2016
- “Research shows that **school-wide, small group, and individual behavioral supports that use proactive and preventative approaches**, address the underlying cause of behavior, and reinforce positive behaviors are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.”



The Office of Special Education Programs (OSEP)

“children are more likely to achieve when they are directly taught predictable and contextually relevant **school and classroom routines and expectations, acknowledged clearly and consistently** for displaying positive academic and social behavior, **consistently prompted** and **corrected** when behavior does not meet expectations, and treated by others with respect.”



The Office of Special Education Programs (OSEP)

“IEPs should contain behavioral supports supported by evidence—IDEA specifically requires that both special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. As a matter of best practice, we strongly **encourage schools** to consider how the implementation of behavioral supports within the IEP **could be facilitated through a school-wide, multi-tiered behavioral framework.**”



Dear Colleague Letter of 8/1/16

“behavioral supports are most effectively organized within a **multi-tiered behavioral framework** that provides instruction and **clear behavioral expectations for all children, targeted intervention** for small groups not experiencing success, and **individualized supports and services** for those needing the most intensive support” (p.8).



Implications of the IDEA, the Endrew Decision, and Policy Guidance

1. **Implement school-wide PBIS systems in accordance with research and evidence-based practices (e.g., follow the OSEP approved PBS Implementation Blueprints (www.pbis.org/blueprint)**
 - **Ensure that a school’s PBIS system does not inadvertently violate the child find or evaluation requirements of the IDEA**



Implications of the IDEA, the Endrew Decision, and Policy Guidance

2. **Ensure that administrators and IEP team members understand their procedural obligations in developing IEP**
 - **Procedural violations, in and by themselves, can be a violation to FAPE**



Procedural Errors in IEP Development

- **Procedural requirements are important and must be followed, however, failure to do so will not always result in a finding against a school district.**
 - **Harmless error doctrine**
- **Procedural violations will only result in a ruling that FAPE was denied if:**
 - **The violations impeded a student’s right to FAPE**
 - **Caused a deprivation of educational benefits**
 - **Significantly impeded parents’ rights to participate**



Two Part Procedural Error Test

1. **Did the school district violate one or more of the procedural requirements of the IDEA?**
 - **Procedural standard-May or may not be a FAPE violation**
2. **Did this procedural violation impede the student’s right to a FAPE or did it significantly impede the parents’ opportunity to participate in the decision making process?**



Common Procedural Errors


- **Failing to provide prior written notice**
- **Failing to ensure parents meaningful involvement**
- **Predetermining services & placement**
- **Improper IEP membership**
- **Determining placement prior to programming (“shoehorning”)**
- **Failing to address transition needs & services**



Implications of the IDEA, the Endrew Decision, and Policy Guidance

3. Conduct comprehensive individualized assessments that address all of a student’s needs irrespective of disability.


- Ensure that all data is current and relevant to a student’s academic and functional needs
- Base a student’s present levels of academic & functional performance (PLAAFP) statement on this information



Implications of the IDEA, the Endrew Decision, and Policy Guidance

4. Ensure that annual IEP goals are challenging, ambitious, and measurable.


- Goals must be based on the needs as based on the assessment and PLAAFP statements



Implications of the IDEA, the Endrew Decision, and Policy Guidance

5. Continuously monitor and measure a child’s progress on annual goals and maintain specific data to demonstrate that progress has been made.


- Collect meaningful and relevant progress monitoring data



Implications of the IDEA, the Endrew Decision, and Policy Guidance

6. When progress reports and other data do not reflect that an annual goal will be met, reconvene the IEP team to determine why, make needed instructional changes, and continue to collect data


- Data are numbers, not words




Implications of the IDEA, the Endrew Decision, and Policy Guidance

7. Implement a student’s IEP as developed and written by his or her IEP team

- Implementation requirements represent a school districts faithfulness in implementing a student’s IEP
- The services promised in a student’s “IEP is a contract. It is signed by the child’s parents and the school’s representatives, and thus embodies a binding commitment” (*M.C. v. Antelope Valley School District*, 2017)


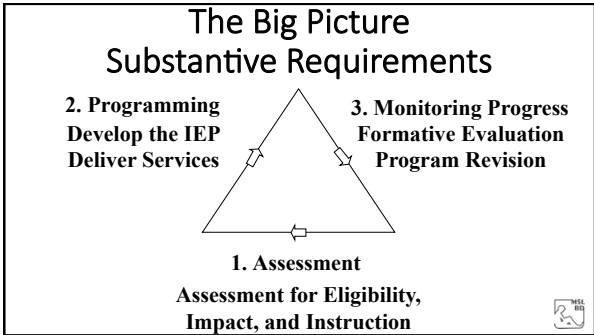



Developing Behavioral IEPs that meet the Endrew Standard






“An IEP must aim to enable the child to make progress; the essential function of an IEP is to set out a plan for pursuing academic and functional advancement”

(Andrew F. v. Douglas County School District, 2017)


- ### The Four IEP Questions
- 1) What are the student’s unique educational needs that must be considered in developing the individualized program?
 - 2) What goals & objectives will enable the student to achieve meaningful educational benefit?
 - 3) What services will we provide to the student to address each of his or her educational needs?
 - 4) How will we monitor the student’s progress to determine if the instructional program is effective
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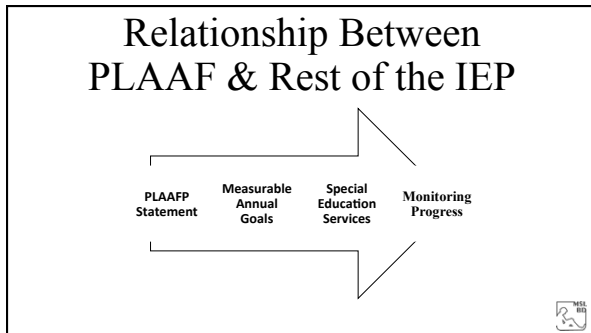
- ### 1. Assessment
- Who should receive special education services
 - Eligibility & classification decisions
 - What instructional services will be provided
 - Assessment leads directly to instructional programming based on impact
 - How effective are special education services
 - Monitoring progress
- 
- 

- ### Present Levels of Academic Achievement and Functional Performance (PLAAFP)
- Based on the full and individualized assessment
 - IEP team determines student’s unique educational needs
 - Explains effects of student’s disability on learning and involvement in the general education curriculum
 - Becomes the baseline to determine student progress
- 

Appendix C IDEA Regulations (1997)

“There should be a direct relationship between the present levels of performance and the other components of the IEP. Thus, if the statement describes a problem with a child’s reading level and points to a deficiency in reading skills, the problem should be addressed under both (a) goals and (b) specific special education and related services provided to the child.” (Question 36)





PLAAF

Accurate PLAAF statements
provide the starting point or baseline for a
student's IEP

Identifies Student Need	Impact Statement	Serves as Baseline	Connected to a Goal, Service, or Both

- ## 2. Programming
- Special education & Related services
 - Supplementary services
 - Program modifications
 - Based on "peer-reviewed research"
 - Designed to confer "educational progress"
- Programming

Peer-Reviewed Research

IEPs must include "a statement of special education services and supplementary aids and services based on peer reviewed research to the extent practicable.

(Individuals with Disabilities Education Improvement Act of 2004)

To the Extent practicable?

The phrase "to the extent practicable," as used in this context, generally means that services and supports should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research. 71 Fed. Reg. 46,665 (2006).

Select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. **This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE...**there is **nothing** in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would **automatically result in a denial of FAPE**. The final decision about the special education and related services must be made by the child's IEP Team based on the child's individual needs. (U.S. Dept. of Ed. *Fed. Register*, Vol. 71, No 156, pp. 46663-4666)

2. Programming

- Annual Goals
 - Ambitious
 - Measurable
 - Measured
- Academic & Functional
- Minimize barriers to accessing the general curriculum

Programming



Services

Services statements represent what the school district will do in response to a student's needs

Addresses all areas of need	Based on peer-reviewed research	Descriptive	Amount, frequency, duration, location



Caution: Unambitious Goals



“The stated progress on Shannon’s goals in reading and math skills for an entire school year ensured the IEPs inadequacy from its inception. Even if Shannon had met her goals should would continue to fall further behind her peers. The goals were wholly inadequate. Florence County School District failed to provide Shannon Carter with a free appropriate public education.”

—Carter v. Florence County Four 17 EHLR 452(D. SC. 1991)



Caution: Overly General Goals



“The student’s annual goals and objectives in each IEP simply do not contain objective criteria which permit measurement of Student’s progress. . . . A goal of ‘increasing’ reading comprehension skills or ‘improving decoding skills’ is not a measurable goal Even if [present levels of performance] were clearly stated, an open-ended statement that the student will ‘improve’ does not meet the requirement . . . for a ‘measurable’ goal” (p.563).

— Rio Rancho Pub. Schools 40 IDELR 140 (SEA N.M. 2003)



3. Monitoring Progress

- Measure a student’s progress toward his/her goal (formative evaluation)
- Report a student’s progress to his/her parents (reporting schedule) including data
- Revise the special education program if a student is not making progress
- Continue to monitor progress

3. Monitoring Progress



Monitoring and Reporting Progress

- Kathleen Mehfound (2016; 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.”



Caution: Teacher Observation



“Although subjective teacher observation provides valuable information, **teacher observation is not an adequate method of monitoring student progress.**”

“Without supporting data, teacher observation is opinion which cannot be verified.”

-- *Board of Education of the Rhinebeck Central School District (39 IDELR 148, 2003)*



Caution: Misuse of Percentages



- Annual goals that contain percentage of accuracy is not helpful where the IEP fails to define a starting point, an ending point, or the curriculum in which student will achieve 80 to 85% accuracy (*Rio Rancho Public Schools, 2003, p. 563*)

- **Percentages, by themselves, are meaningless!**



Data Collection for Monitoring Progress

The method by which LEAs can increase student achievement and ensure its IEPs is Educationally Meaningful & Legally Sound

Can be graphed (Numbers not words)	Measured frequently & systematically	User friendly & time efficient	Used for instructional decision-making



Implementing the IEP

- After a student’s IEP is written and an appropriate placement is determined, the LEA must provide the student with the special education and related services in the IEP (including all supplementary services and program modifications)
- Depending of a student’s program, special education and general education teachers, related service providers, counselor, school nurses, school psychologists, and others are responsible for implementing a student’s IEP



Thank you!!!!

