

Andrew F. and the Future of Special Education

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SCOTUS on the Case

- ▶ *Endrew F. v. Douglas County School District RE-1.*
- ▶ This one's about what FAPE means.
- ▶ SCOTUS defined FAPE in 1982 in *Rowley v. Board of Education*. But the Court noted that its analysis in that case was limited to kids like Amy Rowley—mainstreamed students achieving on grade level.

What Did Rowley Say?

- ▶ Rowley told us that the school is not required to offer the best possible educational program, or to enable the student to “maximize” his or her potential.
- ▶ But the school had to offer an IEP that was reasonably calculated to confer “some educational benefit” on the student.
- ▶ How much is “some”?

“Some Benefit” For Kids Like Amy

- ▶ SCOTUS left it at “some” in Rowley because it was obvious that she was receiving considerable benefit from her IEP. The record showed that she was one of the better students in general education class and was moving from grade to grade with her peers.
- ▶ The court left to another day what “some benefit” would mean for lower functioning students.

Andrew and Amy

- ▶ Andrew is not mainstreamed, is not on grade level, and by all accounts never will be. So the question is: for a student like that, how do you measure “FAPE”?

The Arguments

- ▶ Parents: Congress has raised the standards every time they re-authorized IDEA. The bar has been raised since 1982 and the Court should recognize this.
- ▶ School: The definition of FAPE is in the law. Congress knows how the Court interpreted it in 1982, and Congress has not changed it since then. Leave it to Congress to make a change—not the Court.

How Mushy Can You Get?

- ▶ The case is about whether FAPE means a student is entitled to “some” benefit; “meaningful” benefit; “significant” benefit; “more than de minimis” benefit or, in Judge Gorsuch’s phrase “merely more than de minimis” benefit.
- ▶ It’s hard to imagine more subjective and mushy standards.
- ▶ And the Court concluded.....

SCOTUS Sets the Standard

- ▶ “...a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
- ▶ Court rejected the school’s “merely more than de minimis” standard.
- ▶ Also rejected the standard sought by the parent. SEE NEXT SLIDE.

What Andrew's Parents Sought....

- ▶ “...opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.”
- ▶ SCOTUS: we rejected this 35 years ago in Rowley. It’s “an entirely unworkable standard requiring impossible measurements and comparisons.”

Other Key Tidbits from *Endrew*....

- ▶ Developing an IEP is a “fact-intensive exercise...informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians.”
- ▶ “An IEP is not a form document. It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.”

For Kids Like Amy...

- ▶ For students served in the mainstream and taught at grade level “the system itself monitors the educational progress of the child.”
- ▶ This happens through “Regular examinations....grades...and yearly advancement to higher grade levels.”

For Kids Like Andrew...

- ▶ If “progressing smoothly through the regular curriculum” is “not a reasonable prospect for a child, his IEP need not aim for grade level advancement.
- ▶ “But his IEP must be **APPROPRIATELY AMBITIOUS** in light of his circumstances....The goals may differ, but every child should have the chance to meet **CHALLENGING OBJECTIVES.**”

Deference to School Officials

- ▶ SCOTUS reminds us that courts should defer to the “sound educational policy” decisions of school officials. But....
- ▶ “...deference is based on the application of expertise and the exercise of judgment by school authorities.”
- ▶ “A reviewing court may fairly expect those authorities to be able to offer a **COGENT AND RESPONSIVE** explanation for their decisions...”

Is This a New Standard for FAPE?

- ▶ For the 10th Circuit, this is a new standard. They have been operating on “merely more than de minimis” which is now rejected.
- ▶ Not so in all circuits. For example, the 5th Circuit standard is set by *Cypress Fairbanks ISD v. Michael F.* and its four part test: 1) IEP is individualized based on performance and assessment; 2) LRE; 3) Collaboration and coordination among key stakeholders; 4) Positive academic and non-academic benefits.
- ▶ *Michael F.* standard is consistent with *Andrew F.* standard.

The Importance of Evaluation Data

- ▶ *Z.B. v. D.C.*, 888 F.3d 515 (D.C. Cir. 2018).
- ▶ In light of *Andrew*, the court sent the case back to district court to determine if the district had information adequate to the task. The court emphasized the PROACTIVE responsibility of the district.
- ▶ See Next Slide for key quotes:

Don't Just Respond. Be Proactive.

- ▶ The lower court lauded the district for its responsiveness. But the Circuit Court noted that “merely reacting when parents complain is not enough. A school has an affirmative obligation to ‘conduct a FIE’ of an eligible student ‘before’ it begins providing services. If it considers only whatever information parents pass along, a school may miss what reasonable evaluation would uncover and, as a result, offer an inadequate education.” *Z.B. v. D.C. (D.C. Cir. 2018)*.

No Guarantees in life or in Endrew....

- ▶ *I.Z.M. v. Rosemount-Apple Valley-Eagan*, 863 F.3d 966 (8th Cir. 2017).
- ▶ Parents argued that a state statute guaranteed blind students would be able to communicate as well as sighted peers. Court disagreed: held that the statute required services sufficient to make this possible...but no guarantee. Court held this is consistent with *Endrew*: “IDEA cannot and does not promise ‘any particular [educational] outcome.’ No law could do that—for any child.”

Assessing Progress

- ▶ *Mr. P. v. West Hartford Board of Education*, 885 F.3d 735 (2nd Cir. 2018).
- ▶ Court held that *Endrew* did not change the FAPE standard in the 2nd Circuit. And that the district satisfied the standard for a student in an alternative high school. Student made good grades (3.0), passed statewide tests in all subjects. Court noted that the curriculum in the alternative school was aligned with general curriculum. Teacher testified student achieved at grade level—was more like Amy than Endrew.

Not Everyone is on Grade Level

- ▶ 3rd Circuit held that *Endrew* did not alter its FAPE standard. IDEA does not demand grade level achievement for all students. An OSERS guidance letter from 2015 that suggested otherwise was merely aspirational, and was not legally binding or even persuasive.
- ▶ *K.D. v. Downtown Area School District*, 72 IDELR 161 (3rd Cir. 2018)

How to Proceed

- ▶ It might be wise to start by asking: is this student more like Amy Rowley, or Endrew F.? Keep in mind that each student is unique, each IEP is individualized, so this is just a starter question.
- ▶ In either case, design an IEP that is “appropriately ambitious.”
- ▶ “The goals may differ, but every child should have the chance to meet challenging objectives.”

Let's Simplify

- ▶ Developing an IEP is a goal setting process. We start with where the student is; establish goals; and then services designed to achieve those goals. We also establish criteria for measuring success.
- ▶ It's no different from a goal to lose weight or save money. Same principles.

Step by Step...

- ▶ First make sure you have sufficient evaluation data to make your decisions. When you have consensus on that...
- ▶ Then develop present levels. When you have consensus on that....
- ▶ Then establish annual, measurable goals. Establish your “measuring stick” for determining if the goals have been met.
- ▶ And then stop and ask the *Andrew F.* question....
- ▶ See Next Slide!!

The *Andrew F.* Question

- ▶ The leader of the meeting should eyeball each member of the team and ask: “do you think these goals are **APPROPRIATELY AMBITIOUS** for this student? Are we aiming at **CHALLENGING OBJECTIVES?**”
- ▶ When you have consensus on that....
- ▶ Establish the services that the student will need in order to have a good shot at achieving those goals.

IEP First. Then Placement.

- ▶ Your description of services needed should include both instructional services and related services, specifying the frequency, duration and location for the delivery of those services.
- ▶ When you have consensus on that, you are ready to ask: “And what would be the least restrictive environment in which we can provide all these services?”

And Then?

- ▶ Developing the IEP is only part of the job. Making sure it is implemented is the other part. Stay on top of this.
- ▶ If IEP services are not being implemented, the principal needs to take corrective action.
- ▶ Monitor for progress. Be honest. If the student is not on track to achieve the “appropriately ambitious” goals, get in touch with the parent. Do something about it.

Keep Your Perspective

- ▶ IDEA establishes “appropriately ambitious” goals for our society. Serving every child, regardless of the nature or severity of the disability, and with less than adequate funding, is very difficult.
- ▶ When you make your best efforts toward this goal you are not just complying with legal requirements. You are serving the community and fulfilling its moral obligations.
- ▶ So go forth and do good.

And Now....Let's Look at Some Cases

- ▶ ADA/504: Remember that these laws apply to extracurriculars.
- ▶ Many cases alleging physical abuse, seeking damages.
- ▶ Don't say: "There are NO modifications allowed in an A.P. class." Say instead: modifications are permitted if they are 1) needed to accommodate the disability; and 2) do not reduce the rigor of the course.
- ▶ 11th Circuit case emphasizes the importance of IEP implementation.

Behavior

- ▶ There is no legal template for a BIP. You have considerable discretion, but pay attention to the evaluation data.
- ▶ Your alternative learning environments need to be **LEARNING** environments.
- ▶ “Do the other kids in class have any rights?” Ever get that question?

Child Find

- ▶ Don't lose the student's records!
- ▶ The “label” is not as important as the services.
- ▶ Child find is triggered by residence—not enrollment.

Discipline

- ▶ There are kids who are entitled to IDEA protections even though they have not been identified as needing IDEA services.
- ▶ Parent request for evaluation puts the student in that category, if done **PRIOR TO** the misconduct.
- ▶ But parent refusal to allow an evaluation causes student to lose that protection.

Eligibility

- ▶ The eyes of teachers are not “untrained.”
- ▶ Remember: there is DEAF. And then there is HEARING IMPAIRED.

Evaluations

- ▶ The Chicago case is yet another example of how not to prepare an expert witness. Also: some judges really do “defer” to educators.

FAPE

- ▶ Time on task matters.
- ▶ Did Endrew F. mean that all IEPs should be at grade level? No.
- ▶ Court trashes OSERS guidance from 2015 about all students achieving at grade level and “closing the gap.”

IEPs

- ▶ A progress report should indicate if the student is on track to reach the goal.
- ▶ Note the “cogent and responsive” phrase from Andrew F.
- ▶ The goals should be “appropriately ambitious.” They can be “inappropriately ambitious” if too high.

IEP Team Meetings

- ▶ Courts seem to be noticing that the parents who are most likely to claim a denial of “meaningful participation” are the parents who have participated in the most meaningful way.
- ▶ Courts are always assessing the reasonableness of the parties.
- ▶ The less sophisticated parents might have a stronger case...but they don't know how to bring it.

LRE

- ▶ It's always about the fundamentals in these disputes.
- ▶ You must have a continuum.
- ▶ You should always aim for a less restrictive setting.
- ▶ Move the student out of that setting only when the disability demands it.

Liability

- ▶ Notice that many cases seeking damages involve physical injuries to the more severely disabled students.
- ▶ Keep a close eye on the self contained units, where students may be low in cognitive ability and unable to advocate for themselves.

Personnel Issues: a Baseball Analogy

- ▶ You get to first base on a retaliation claim by showing that you engaged in “protected activity.”
- ▶ You advance to second base with evidence of an “adverse action.”
- ▶ You round third and score only if you can prove that the adverse action was caused by the protected activity.

Related Services

- ▶ If the student assaults the PT you need to do something about that, but cutting off PT is not the thing to do.
- ▶ Old lesson: we are not Walgreen's. We do not fill medical prescriptions.

The Paris, Arkansas Case

- ▶ Never a good reason to rush a parent into an IEP Team meeting.
- ▶ Sentences that begin with “I’ll get in trouble for saying this” should probably end right there.

Our Broken System

- ▶ Our laws are well intended and have produced many positive results.
- ▶ But there are unintended negative consequences, mostly due to hijacking of the educational system by the legal system.



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The information in this handout was prepared by Walsh Gallegos Treviño Russo & Kyle P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

