Updates on Special Education Cases and Trends

Presented by

Jose L. Martín, Attorney

Richards Lindsay & Martín, L.L.P.—Austin, Texas

2018 State's Superintendent's Conference, Wisconsin

Endrew F. v. Douglas County Sch. Dist. RE-1, 137 S.Ct. 988 (2017)

- Recent Supreme Court opinion involving a FAPE dispute on a child with severe autism
- Lower courts had determined that the student had made at least minimal progress
- 10th Circuit standard for FAPE was one of "barely more than de minimis"
- Parents appealed successfully (writ granted) to Supreme Court

Endrew F. v. Douglas County Sch. Dist. RE-1, 137 S.Ct. 988 (2017)

- Court first reviewed 1982 opinion in *Rowley*—FAPE = IEP reasonably calculated to confer educational benefit
- Court noted *Rowley* involved a sp ed student served in regular classes/curriculum
- For such a student FAPE generally means advancing from grade to grade

- But, Court stated that Rowley was not as helpful in cases of students served in sped classes on modified curricula

- Court also noted that Rowley was correct in holding that “the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end”

  An acknowledgement that expected progress depends on the severity of disability, and other factors…

- Court thus decided to clarify the Rowley educational benefit standard of FAPE

  Clarified FAPE Standard—Schools must offer IEPs **"reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"**

- “The question is whether the IEP is reasonable, not whether the court regards it as ideal”

- The statement in Rowley that IDEA “’did not guarantee any particular level of education’ simply reflects the unobjectionable proposition that the IDEA cannot and does not promise any particular educational outcome”

- But, the IEP must be geared toward **progress**—"After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" ("program must be *appropriately ambitious*")
- Appropriate progress **"in light of child's circumstances"** reflects the individualized nature of special education

  Circumstances?—Type of disability, severity, environmental issues, behavior, parent participation/cooperation, etc…

- **Holding**—10th Circuit standard of "barely more than de minimis" is too low compared to grade-to-grade advancement required for mainstreamed sp ed students, violates IDEA

- But, Court also rejects parents' proposed standard of "educational opportunities equal to those afforded to non-disabled individuals"

  Standard rejected in *Rowley* in 1982

  Congress has not changed law since

- **Impact of *Endrew***

  Depends on the various FAPE formulations of Circuit Courts (other than the 10th Circuit, which is reversed)

  Overall Conclusion—Review of courts' existing FAPE formulations shows most had already instinctively rejected a "barely more than de minimis" standard

  Thus, the real-life impact of *Endrew* may be limited

- **FAPE in Other Circuit Courts?**

  1st—"Meaningful" benefit

  2nd—"Meaningful" benefit

  3rd—"Meaningful" benefit

  4th—"Meaningful" benefit

  5th—"Meaningful" benefit

  6th—"Meaningful" benefit

  7th—Educational benefit with "progress," more than trivial

  8th—"Benefit," but "progress is an important factor"

- **Other Circuit Courts?**

  9th—"Benefit," but has used the term "meaningful" in dicta

  10th—"Barely more than de minimis" (now reversed)

  11th—"Adequate educational benefit based on surrounding and supporting facts" and "child's individual needs"

  D.C.—Plain "educational benefit" per *Rowley*

- ***Endrew's* Impact on Federal Courts**

  Most post-*Endrew* courts have found that their Circuit's existing FAPE analyses are consistent with *Endrew* language

  The **"meaningful benefit"** circuits tend to focus on progress, as emphasized in *Endrew* opinion

  And, based on *Rowley*, they also acknowledge and consider the child's circumstances, as *Endrew* reemphasized

- ***Endrew's* Impact on Federal Courts**

  Also, most circuits already applied a higher "meaningful benefit" standard than the "barely more than de minimis" formulation the Supreme Court rejected in *Endrew*

  E.g., 3rd Circuit's "meaningful benefit" formulation (*Polk v. Central Susquehanna In. Unit No. 16*, 441 IDELR 130 (3rd Cir. 1988)), which influenced 5th Circuit's own "meaningful benefit" analysis (*Michael F. v. Cypress-Fairbanks Ind. Sch. Dist*., 26 IDELR 303 (5th Cir. 1997)), which influenced 7th Circuit's analysis

- **Seventh Circuit FAPE Formulation**

  ***M.B. v. Hamilton Southeastern Schs.*, 58 IDELR 92 (7th Cir. 2011)**

  "We reiterate that an IEP is reasonably calculated to confer educational benefit when it is likely to produce progress, not regression or trivial educational advancement"

  Court cites 5th Circuit's "meaningful educational benefit" formulation (*Michael F. v. Cypress-Fairbanks Ind. Sch. Dist*.)

Practical "Takeaways" from *Endrew*

- **IEPs for students with severe disabilities must be ambitious**

  Present levels of performance should be advancing commensurately with potential for progress

  IEP Goals and objectives should likewise show progression in skills, even if modest due to severity or types of disability

- **Evaluations may want to include statements on students' "potential for growth"**

  For students with lower potential for growth evaluations, team may want to document realistic expectations for progress, as supported by data (cognitive assessment data, behavior data, developmental delay, interaction of multiple disabilities, past progress data, etc…)

- **Evaluations may want to include statements on student circumstances that might limit progress**

  E.g., problem behaviors, excessive absences, motivational issues, multiple or complex disabilities, severe disability, frequent moves and disruptions to education, homeschooling periods, and lack of instruction in early ages, among others

- **“Ambitious” goals may mean some students might not meet the goals**

  This might not mean a denial of FAPE (an IEP cannot guarantee mastery)

  But, it does mean IEP teams must examine why the goals were not met and take action accordingly

- **Procedurally, schools should focus on well-articulated prior written notices (PWNs) and documentation of the team's reasoning**

  Endrew emphasizes that schools must have cogent and responsive explanations for their educational decision-making

  Thus, schools should focus on developing quality PWNs and documenting logical reasoning and data bases for IEP team decisions

- **IEP teams should take action when fully mainstreamed students are not passing**

  As *Endrew* emphasizes that FAPE for fully mainstreamed students means advancement from grade to grade, IEP teams should meet promptly to address failure in regular classes

  Monitor implementation of accommodations, behavior plans

- **Updating of FAPE Standard may have more impact in close cases**

  Cases where IEP services are suspect and evidence of progress is weak may go to parents more often

  Scrutiny will increase on IEP teams' responses when students are not making the expected progress

FAPE Issues in College Programs

- **Dual-Enrollment Early College Programs**

  Increasingly an option in urban districts

  §504 question—Are these programs like an extracurricular activity or college, to which the reduced "reasonable accommodation" §504 standard applies, or are they a part of FAPE, not subject to a reasonableness limitation on §504 services?

FAPE Issues in College Programs

- **Dual-Enrollment Early College Programs**

  Is the college responsible for accommodations, or the district?

  Do §504 plans or IEPs have to be implemented?

- **Dual-Enrollment Early College Programs**

  ***Johnston County (NC) Schs*. (OCR 2016)**

  High school student with disabilities participated in early college program

  College professors did not implement her §504 plan accommodations

Johnston County (NC) Schs. (OCR 2016)

When she stopped turning in work, the District's 504 Coordinator told her to go to her professors and the college's disability services office for help

Principal told parent that it was the student's responsibility to seek help from the college

OCR found the District violated §504

Johnston County (NC) Schs. (OCR 2016)

First, OCR found that the school failed to convene the §504 committee when the student started failing the class

Second, it was the District's responsibility to ensure that the §504 plan accommodations were implemented

Although the program generated college credit, it also provided high school course credits, and thus was part of FAPE

Johnston County (NC) Schs. (OCR 2016)

"The college courses are therefore included within the District program, and the District has an obligation to ensure that students with disabilities receive FAPE within their college courses."

OCR also found that that the school's policy of referring students directly to the college's disability services office violated §504

***Johnston County (NC) Schs*. (OCR 2016)**

Commentary—The issue of accommodations for students with disabilities is best discussed when a district first enters into an arrangement with a local college for a dual credit program

College must understand that the program will be subjected to the §504 FAPE standard, not the reduced "reasonable accommodation" standard to which they are used

Johnston County (NC) Schs. (OCR 2016)

The reasoning of OCR's findings would seem to apply equally under IDEA, as they enjoy residual §504 rights (as seen in cases where IDEA students file §504 and ADA actions)

Hard to argue early college classes are not akin to the regular curriculum offerings of the LEAs, much like AP classes

So, special education instructional support in early college classes?...

***Johnston County (NC) Schs*. (OCR 2016)**

Questions for MOU Process—Will professors implement 504 Plan or IEP accommodations? Will district staff? Will professors *allow* full implementation of §504 plans and IEPs?

What if a program is already in place, but not in compliance with OCR guidance?

Bullying/Harassment

- ***Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Teen with Asperger's reported more than 30 instances of peer harassment (crude remarks, threats, put gum in his hair, egged house, put bag of feces at his door)

  Parents sued under §504 and ADA, claiming discrimination by "deliberate indifference"

Bullying/Harassment

- ***Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Court noted that school investigated each report of harassment and took various actions (counseling students, peer mediation, calls home, suspensions, referrals to police)

  Student also engaged in inappropriate comments and behaviors

- ***Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  §504/ADA liability for harassment requires deliberate indifference ("clearly unreasonable" response by school, but no duty to remedy peer harassment)

  Court finds that student's disagreement with the severity of some of the measures does not mean they were "clearly unreasonable" (although it states school "cannot be particularly proud of its response")

- ***Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Question—Other circuits focus on the nexus between the student's disability and the harassment, since the claim is one of discrimination on the basis of disability.

  Does the harassment here appear linked to disability? None of the statements seemed to be disability-based, just plain harassment. Why was that not analyzed first?

- ***Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Lessons:

  Failure to respond to even plain harassment can lead to denials of FAPE and potential IDEA liability

  Failure to respond to *disability*-based harassment can subject school to money damages claims

- ***Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Practical Guidance:

  Part of schools' harassment investigations should be to determine (and document) whether harassment is disability-based

  Practically and ethically, disability-based harassment requires a more assertive response

  Harassment reports should lead to IEP team meeting to address potential impact on FAPE

- ***Bowe v. Eau Claire Area Sch. Dist.*, 71 IDELR 168 (W.D.Wis. 2018)**

  Practical Guidance:

  IEP team response? Counseling, behavioral interventions, assignment of student liaison who has rapport with student, enhanced supervision in unstructured settings, assist campus with its administrative response

Service Dogs and Exhaustion

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  Main issue in case is whether parent could proceed to federal court with service dog claim instead of going to IDEA hearing process first

  Technical case, but some good points on service dogs and effective communication aids under the ADA vis-à-vis IDEA

- ***E.F. v. Napoleon Cmty. Schs.*, 62 IDELR 201 (E.D.Mich. 2014)(Lower Court Opinion)**

  8-year-old IDEA-eligible girl born with spastic quadriplegic cerebral palsy, requires physical assistance in daily activities

  Pediatrician wrote prescription for a service animal

  "Wonder" is a Goldendoodle, trained to retrieve items, help her balance when using a walker, open/close doors, turn on/off lights, transfer to and from toilet, etc.

- ***E.F. v. Napoleon Cmty. Schs.*, 62 IDELR 201 (E.D.Mich. 2014)(Lower Court)**

  Wonder "enables [E.F.] to develop independence and confidence and helps her bridge social barriers." (**Note**—Sounds kind of like something an IEP would do…)

  Parents allege Wonder is specially trained and certified (**Note**—DOJ regs do not require certification, informal training OK)

  School decides Wonder cannot come to school, since IEP meets all FAPE needs

- ***E.F. v. Napoleon Cmty. Schs.*, 62 IDELR 201 (E.D.Mich. 2014)(Lower Court)**

  School allows Wonder to come to school for a 30-day trial period, at end of which school reasserts that dog is not needed for FAPE and cannot return

  Parents sue, alleging violations of § 504 and ADA—They seek a declaratory judgment, monetary damages, and attorney's fees.

  School argues that parents have failed to exhaust required administrative remedies under IDEA

- ***E.F. v. Napoleon Cmty. Schs.*, 62 IDELR 201 (E.D.Mich. 2014)(Lower Court)**

  Court notes parents not alleging denial of FAPE or violation of IDEA

  But, Court "fails to see how Wonder's presence would not — at least partially — implicate issues relating to E.F.'s IEP," such as requiring various modifications to the IEP to facilitate the dog

  Thus, Court dismisses case for failure to exhaust IDEA remedies, the 6th Circuit affirms the dismissal, and parents appeal to the Supreme Court

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  At Supreme Court, focus was on rights of IDEA students under §504/ADA and whether those rights can be pursued in court without first going through IDEA administrative due process

  "Under E.F.'s existing IEP, a human aide provided E.F. with one-on-one support throughout the day; that two-legged assistance, the school officials thought, rendered Wonder superfluous."

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  Court—Just because a student wants relief from a school does not mean they must exhaust remedies under IDEA

  "The IDEA's administrative procedures test whether a school has met [the FAPE] obligation—and so center on the Act's FAPE requirement…. For that reason, §1415(l)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education."

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  Court—Look to "gravamen" (true underlying basis) rather than the language of complaint

  IDEA "requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way."

  So, how does one ascertain the "gravamen" of a complaint?...

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  "One clue…can come from asking a pair of hypothetical questions.

  > First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school— say, a public theater or library?
  >
  > And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?"

  If answers are yes, the gravemen is **not** FAPE

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  The Court applies the test to two examples:

  A wheelchair-bound child sues his school for discrimination under ADA (again, without alleging denial of a FAPE) because the building lacks access ramps. RESULT?

  A student with a learning disability sues his school under ADA for failing to provide remedial tutoring in mathematics. RESULT?

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

The Court applies the test to two examples:

A wheelchair-bound child sues his school for discrimination under ADA (again, without alleging denial of a FAPE) because the building lacks access ramps.

Result—Not a FAPE complaint, not subject to exhaustion, could have been raised by a non-student or against another public facility

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  The Court applies the test to two examples:

  A student with a learning disability sues his school under ADA for failing to provide remedial tutoring in mathematics

  Result—FAPE-based complaint, requires exhaustion of IDEA remedies, could not have been raised by a non-student or against another type of public facility

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  Thus, the Court reverses the lower court decisions and remands the case back to them for a decision based on its new analysis

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  Question—Is every IDEA due process hearing request really based on an allegation of denial of FAPE? What about challenges to a manifestation determination in a discipline placement dispute? To failure to identify?

  Question—Do not the IDEA regulations require the IEP to include modifications needed for participation in nonacademic activities, even if not needed for FAPE? (*See* 34 C.F.R. §300.320(a)(4)(ii))

- ***E.F. v. Napoleon Cmty. Schs.*, 69 IDELR 116 (2017)(Supreme Court Opinion)**

  Question—With respect to the §504 claim, does not the provision of an appropriate IEP equal compliance with §504 requirements? If so, why would a §504 claim be viable in this case?

  Question—What if the ADA/§504 relief requested conflicts with the IEP's efforts to provide a FAPE under IDEA? Would that not implicate the FAPE requirement? Which law and purpose would prevail?

Practical "Takeaways" from *E.F.*

- **More plaintiffs seeking money damages under the disabilities laws will try to go straight to federal court**

  This ramification of *E.F./Fry* will lead to more intensive litigation on the technical question of exhaustion of administrative remedies

  Attorneys will try various ways to "draft around" what may really be an IDEA claim

Practical "Takeaways" from *E.F.*

- **For the IDEA-eligible student, requests for effective communication aids or use of a service animal should go to through the IEP team first**

  For students with communication needs, since the duty to consider effective communication is ongoing, IEP team should discuss effective communication in annual IEP meetings

  Team should document if the requested item is needed for FAPE or for ADA/§504 access

- **For the IDEA-eligible student, requests for effective communication aids or use of a service animal should go to through the IEP team first**

  If required for FAPE, add to the IEP and provide at school expense

  If not needed for FAPE, but required under ADA/§504, and no conflict with FAPE, ensure school provides the requested item

  (Items can be listed in IEP with statement that aid is not required for FAPE)

- **For the IDEA-eligible student, requests for effective communication aids or use of a service animal should go to through the IEP team first**

  If the provision of a requested ADA/§504 item **would** conflict with FAPE, consult school attorney, as issue is dicey:

  - Prior written notice informing parents of FAPE conflict areas?
  - Refusal on basis of “fundamental alteration”?
  - Other options?

- **For the IDEA-eligible student, requests for effective communication aids or use of a service animal should go to through the IEP team first**

  If the provision of a requested ADA/§504 item would conflict with FAPE, IEP team should carefully document in detail how the item would undermine implementation of the IEP goals and provision of a FAPE

- **Ensure your district understands that even if the IEP contains everything required for FAPE, ADA and §504 might require more**

  E.g., school may have to provide an intensive communication program (such as CART) to an IDEA student, even if he is performing well in his classes and on his IEP goals, due to ADA effective communication requirements

  This is based on a DOE/DOJ interpretation, in turn based on 9th Circuit opinion—Is this Obama-era interpretation being reviewed by current administration?...

- **Service Animals**

  Don’t have to be certified or formally trained, but must perform tasks for student needed due to disability, not merely comfort student by their presence

  Emotional support or comfort animals are not “service animals” and ADA does not require school to allow them

  But, IEP team should consider whether a comfort animal is needed for FAPE

- **Service Animals**

  If a service animal cannot be handled by the student, school staff may have to assist (but see *Riley v. School Adm. Unit #2*3, 67 IDELR 8 (D. N.H. 2016)—DOE guidance appears to go beyond what courts view as schools' obligations)

  Service animal can be excluded if aggressive, disruptive, or not subject to control (*A.P. v. Pennsbury Sch. Dist*., 68 IDELR 132 (E.D. Pa. 2016)(dog that bit another student can be excluded))

- **Service Animals**

Resources:

See 28 C.F.R. Part 35 (DOJ service animal regulations)

Frequently Asked Questions about Service Animals and the ADA, 115 LRP 30805 (DOJ July 2015)(or DOJ website)

Private School Choice/Vouchers

- Key priority of Secretary Betsy DeVos
- She supports State choice laws and use of IDEA funds for students with disabilities to access private schools
- ***Thorny Issue***—Ms. DeVos seems sensitive over the fact that IDEA students using a voucher for private school will lose FAPE entitlement, IDEA procedural safeguards, and non-discriminatory enrollment rights

Private School Choice/Vouchers

- ***Example***: DOE refused to issue guidance for notice to parents on the loss of IDEA rights consequent to a private school choice
- Wouldn't "choice" imply full knowledge of options
- Would it be possible for IDEA students to retain IDEA rights in private schools?...
- Would it be possible to prevent private schools from rejecting high-needs sp ed students?

Private School Choice/Vouchers

- **The issue of geography and school choice**

  Majority of private schools are in urban and suburban areas (particularly schools for students with disabilities)

  What about students in rural areas?

Private School Choice/Vouchers

- **The issue of severity of disability and school choice**

  Many private schools will be unable to meet the needs of students with severe and profound disabilities

  Or, those students will go to private schools for students with disabilities, creating segregated placement situations

Private School Choice/Vouchers

- **The issue of family resources and choice**

  Vouchers will, in most cases, cover only some of the private school costs (which can include tuition, fees, and equipment)

  Are choice programs inevitably limited by geography, family resources, and severity of disability?...

Parental Participation

- ***Pangerl v. Peoria USD*, 69 IDELR 133 (D.Az. 2017)**

  Parents brought two advocates to an annual meeting held right before an IEP was to expire

  One advocate indicated she could only stay for two hours, and parent and advocates left after two hours, although IEP transition plan was not completed

Parental Participation

- ***Pangerl v. Peoria USD*, 69 IDELR 133 (D.Az. 2017)**

  Staff indicated they would continue with the IEP, and they offered follow-up meetings to address parent concerns

  School convened two follow-up meetings

  Parents sued, asserting violation of their right to participate in IEP process

- ***Pangerl v. Peoria USD,* 69 IDELR 133 (D.Az. 2017)**

  Court held that the school staff acted reasonably in protecting the parents' right to participate by offering, and convening, follow-up meetings

  The handling of the situation, moreover, ensured the completion of an annual IEP as required under IDEA

- ***Pangerl v. Peoria USD,* 69 IDELR 133 (D.Az. 2017)**

  Analysis complicated by *Doug C. v. Hawaii DOE*, 61 IDELR 91 (9th Cir. 2013)(schools can proceed with meeting without the parent only if parents affirmatively state they do not want to meet)

  Here, however, there was meeting and opportunity to participate

- ***Pangerl v. Peoria USD*, 69 IDELR 133 (D.Az. 2017)**

  Questions: Can a parent effectively stymie the IEP process by purposely leaving meetings early?

  If the IEP team had not completed the IEP, and the parent filed a due process hearing request the day after the meeting, there would be no offer of FAPE on the table (which has hurt schools legally in numerous cases)

- ***Pangerl v. Peoria USD,* 69 IDELR 133 (D.Az. 2017)**

  Probable best practice for schools—complete the IEP to establish actual, not speculative, offer of FAPE

  Then, send the IEP to parent with a cover letter offering another IEP meeting to address any potential concerns, as well as prior written notice

IEE Requests Upon Dismissal

- **Question**—If IEP team, after reevaluation, determines a student should be dismissed from IDEA, and parents ask for an IEE, does the student stay in sp ed pending the IEE?

  Answer—Not unless the parent requests a due process hearing, which would trigger stay-put (see **Letter to Anonymous**, 118 LRP 28134 (OSEP 2018)

IEE Requests Upon Dismissal

- Thus, although parent requests IEE, the IEP team can proceed with dismissal

  When IEE is completed, however, IEP team would have to reconvene to review and consider the IEE (notice that an IEP meeting would thus occur on an ineligible student)