A New FAPE? Fact or Fiction?

The Interpretation of *Endrew F.* by Courts Across the U.S.

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Facts Behind *Endrew F.*

- Parents of a 5th grade student with autism who had escalating behavioral problems complained that the district included almost identical goals in his IEPs for 2nd, 3rd, and 4th grade years
- The child was not participating in a general education setting and was not performing at grade level (unlike student in Rowley)

Endrew F. by Joseph F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017)

Facts Behind *Endrew F.*

- In the 10th Circuit, the standard for FAPE had been "merely more than *de minimus*" progress
- Endrew's parents argued that FAPE amounts to "opportunities to achieve academic success, attain self-sufficiency, and contribute to society" equal to those available to non-disabled students

AASA Amici Curiae

- Argued that Congress accepted the *Rowley* standard
  - Repeatedly declined to amend the FAPE definition
  - 2004 standards enacted by Congress to guide administrative hearings codified case law applying *Rowley* and reinforced the "some benefit" standard.
  - School teams are in the best position to make recommendations for a student
    - Know student's individual needs
    - Know what has worked for their students in the past

AASA Amici Curiae

- *Rowley* does not create "a race to the bottom"
- Abandoning "some benefit" standard will be unworkable and counter-productive.
  - Unworkable to have generalist hearing officers and judges who are untrained in educational methodologies second-guess the judgments of educational experts working daily with the student the IEP is designed to support

AASA Amici Curiae

- Heightened substantive standard will increase inequality in special education between "the have-nots and the have-enough-to-litigate."
- Result will be lopsided allocation of limited special education resources

AASA Amici Curiae

- *Rowley* standard allows generalist judges to steer clear of making difficult choices between equally viable educational alternatives, while providing a substantive check that ensures educational benefit.

AASA Amici Curiae

- "*Rowley's* non-intrusive standard allows multidisciplinary teams to craft the best options for the child at hand, without risk of being second-guessed by hearing officer or judge who lacks the expertise to assess the comparative worth of different educational approaches."

AASA Amici Curiae

- "The notion that school districts commonly reject methods and approaches that could be helpful to a child under the guise that they are already 'doing enough' only presumes, without foundation, the worst about educators, it completely ignores the accountability measures emphasized in and enforced by the IDEA, and interwoven statutes like the Elementary and Secondary Education Act (ESEA)."

AASA Amici Curiae

- "This non-intrusive inquiry makes sense because, like the legislative process, the development of an IEP can be messy and complex, often involving nuanced educational choices and compromise in services of attaining sometimes conflicting objectives that are exceedingly difficult for a court to appraise post hoc."

Endrew F. Ruling

- The U.S. Supreme Court ruled in *Endrew F.* that a school must offer an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's unique circumstances"
- Court agrees with longstanding proposition that IDEA does not require an optimal, ideal, or potentially-maximizing education, but "barely more than *de minimis*" is too low compared to grade-to-grade advancement required for mainstreamed SPED students
- Court also rejected parents' proposed standard of "educational opportunities equal to those afforded to nondisabled individuals"

Endrew F. Ruling

- 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"
- 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.

Endrew F. Ruling

- Court in *Endrew F.* did not overturn its *Rowley* decision;
  - Merely explained that the standard announced in *Rowley* was based on the facts of a student who was educated in a regular education setting and was progressing smoothly in the general education curriculum.

Endrew F. Ruling

- In *Rowley*, student's progress clearly demonstrated student was receiving adequate benefit
- New standard in *Endrew F.* is meant to be a more generally applicable standard, with the understanding that each case is necessarily fact specific, as students with disabilities each have unique needs and circumstances
- There can be no bright-line rule governing the appropriateness of all FAPE cases

Endrew F. Ruling

- Court reiterated IDEA does not "guarantee any particular level of education," and that it "cannot and does not promise any particular educational outcome."
- Moreover, in the new *Endrew F.* FAPE standard, the Court retained the "reasonably calculated" qualification.

Endrew F. Ruling

- Court explained that the qualification "reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials" based on the specific facts related to a student and informed by school officials' expertise and input from the parents or guardians. *Id*. at 11.
- Court further observed that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id*.

Endrew F. Ruling

- Finally, the Court reiterated from Rowley its admonishment to courts that the "absence of a bright-line rule [for analyzing whether an IEP provides FAPE] should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id*. at 16.

Endrew F. Ruling

- The Court explained that such "deference is based on the application of expertise and the exercise of judgment by school authorities. The [IDEA] vests these officials with responsibility for decisions of critical importance to the life of a disabled child," and noted that both parents and school officials should opine through the IEP development process "on the degree of progress a child's IEP should pursue." *Id*.

Circuit Courts' FAPE Standards Before *Endrew F.*

- 1st Circuit – "Meaningful" benefit (see, e.g., *D.B. v. Esposito*, 58 IDELR 181 (1st Cir. 2012))
- 2nd Circuit – "Meaningful" benefit (*M.W. v. New York City Dept. of Educ.*, 61 IDELR 151 (2nd Cir. 2013))
- 3rd Circuit – "Meaningful" benefit (*Coleman v. Pottsdown Sch. Dist.*, 64 IDELR 33 (3rd Cir. 2014))
- 4th Circuit – "Meaningful" benefit (*O.S. v. Fairfax County Sch. Bd.*, 66 IDELR 151 (4th Cir. 2015))
- 5th Circuit – "Meaningful" benefit (*Cypress-Fairbanks Independent Sch. Dist.*, 26 IDELR 303 (5th Cir. 1997))
- 6th Circuit – "Meaningful" benefit (*T.W. v. Northport Pub. Sch.*, 59 IDELR 64 (6th Cir. 2012))

Circuit Courts' FAPE Standards Before *Endrew F.*

- 7th Circuit – "Benefit" with "progress," citing 5th Circuit test (*M.B. v. Hamilton Southeastern Schs.*, 58 IDELR 92 (7th Cir. 2011))
- 8th Circuit – "Benefit," but "progress is an important factor" (*M.M. v. District 0001 Lancaster County Sch.*, 60 IDELR 92 (8th Cir. 2012))
- 9th Circuit – "Benefit," although cases have also used the term "meaningful" (*K.S. v. Fremont Unified Sch. Dist.*, 56 IDELR 190 (9th Cir. 2011); *S.W. v. Governing Bd. of East Whittier City Sch. Dist.*, 60 IDELR 124 (9th Cir. 2013))
- 10th Circuit – "Barely more than *de minimis*" (now overturned by Supreme Court)

Circuit Courts' FAPE Standards Before *Endrew F.*

- 11th Circuit – "Adequate educational benefit based on surrounding and supporting facts" and "child's individual needs"(*Phyllene W. v. Huntsville City Bd. of Educ.*, 66 IDELR 179 (11th Cir. 2015))
- D.C. Circuit – Plain "educational benefit" per *Rowley* (*Reid v. District of Columbia*, 43 IDELR 32 (D.C.Cir. 2005); *Kerkam v. Superintendent, D.C. Pub. Schs.*, 17 IDELR 808 (D.C.Cir. 1991)

Federal Court Opinions Since *Endrew F.* : 2nd Circuit

- *J.P. on Behalf of J.P v. City of New York Dep't of Educ.*, 71 IDELR 77(2nd Cir. 2017)
  - Opinion came out Dec. 19, 2017
  - Citing *Endrew F.* , the court reasoned,
    - The question is "whether the IEP is reasonable, not whether the court regards it as ideal"
    - The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials.

Federal Court Opinions Since *Endrew F.* : 2nd Circuit

- *D.B v. Ithaca City Sch. Dist.*, 70 IDELR 1(2nd Cir. 2017).
  - Cites *Rowley* asserting IDEA does not require a school district to furnish "every special service necessary to maximize each handicapped child's potential."
- *R.B. v New York City Dept. of Educ.*, 69 IDELR 263 (2nd Cir. 2017)
  - IEP "need not bring the child to grade-level achievement, but must aspire to provide more than *de minimis* educational progress"
- No change to analysis of procedural compliance
- Circuit appears to view *Endrew F.* as an elaboration of *Rowley*

Federal Court Opinions Since *Endrew F.* : 4th Circuit

- *N.P. by S.P. v. Maxwell*, 71 IDELR 53 (4th Cir. 2017)
  - Vacated and Remanded with Instructions
    - ALJ quoted the "more than *de minimis*" standard in her opinion
  - 4th Circuit felt ALJ should have the opportunity to decide whether outcome of case is different under *Endrew F.* standard

Federal Court Opinions Since *Endrew F.* : 5th Circuit

- *C.G. v. Waller Ind. Sch. Dist.*, 117 LRP 24920 (5th Cir. 2017)
  - District Court decided case before *Endrew F.*
  - In its analysis, 5th Circuit noted the district court explicitly stated that "[t]he educational benefit ... 'cannot be a mere modicum or de minimis; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.' "
  - In its analysis the district court focused on the four factors from *Michael F.* (*Michael F. v. Cypress-Fairbanks Ind. Sch. Dist.*, 26 IDELR 303 (5th Cir. 1997))
  - Although the district court did not articulate the standard set forth in *Endrew F.* verbatim, the 5th Circuit found its analysis left no doubt that the court was convinced that the IEP was "appropriately ambitious in light of [her] circumstances."
  - Thus, Court found lower court's analysis "fully consistent" with *Endrew F.*

Federal Court Opinions Since *Endrew F.* : 5th Circuit

- *Dallas Ind. Sch. Dist. v. Woody*, 117 LRP 30441 (5th Cir. 2017)
  - The 5th Circuit noted that IEP timelines "allow school districts to evaluate the student so an IEP may be proposed that 'is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth.'" (quoting *Endrew F.*)
  - The Court did not distinguish *Endrew F.* from previous law, but rather viewed it as an elaboration on the *Rowley* FAPE standard.

Federal Court Opinions Since *Endrew F.* : 8th Circuit

- *I.Z. M v. Rosemont-Apple Valley-Eagan Pub. Schs.*, 70IDELR 86 (8th Cir. 2017)
  - 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
  - Court found this consistent with reading the regulation as requiring "all reasonable steps" not perfect results
  - Court upheld both the ALJ decision and District Court opinion holding school provided a FAPE

Federal Court Opinions Since *Endrew F.* : 9th Circuit

- *M.C. v. Antelope Valley Union High Sch. Dist.*, 69 IDELR 203 (9th Cir. 2017)
  - "In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the student's disabilities so that the child 'can make progress in the general education curriculum, commensurate with his non-disabled peers, taking into account the child's potential."
  - The 9th Circuit found that *Endrew F.* clarified *Rowley* and provided a "more precise standard for evaluating whether a school district has complied substantively with the IDEA."

Federal Court Opinions Since *Endrew F.* : 9th Circuit

- *M.C. v. Antelope Valley Union High Sch. Dist.*, 69 IDELR 203 (9th Cir. 2017)
  - But are the Court's "other words" a fair restatement of *Endrew F.* ? Is not the 9th Circuit's interpretation closer to the higher "equal opportunity" standard specifically rejected by the Supreme Court?

(This decision means uncertainty for schools in the 9th Circuit states, as the Court's interpretation of *Endrew F.* is likely to be challenged)

California District Court Decisions Prior to *Antelope Valley*

- *K.M. v. Tehachapi Unified Sch. Dist.*, 69 IDELR 241 (E.D.Cal. 2017) and *N.G. v. Tehachapi Unified Sch. Dist.*, 69 IDELR 279 (E.D.Cal. 2017)
  - In both cases, the Judge held that the *Endrew F.* standard only "clarifies" *Rowley.*
  - No change to the procedural analysis that precedes the substantive FAPE question.

Other Post-*Endrew F.* District Court Opinions

- *C.D. v. Natick Pub. Sch. Dist.*, 117 LRP 29263 (D.Mass. 2017)
  - Prior to *Endrew F.*, the 1st Circuit articulated the appropriateness requirement in the following way:
    - "[T]he obligation to devise a custom-tailored IEP does not imply that a disabled child is entitled to the maximum educational benefit possible…At the same time, the IDEA calls for more than a trivial educational benefit, in line with the intent of Congress to establish a 'federal basic floor of meaningful, beneficial educational opportunity.'"
  - Court agreed with hearing officer that the standard in *Endrew F.* is not "materially different" from standard in previous 1st Circuit cases.

Other Post-*Endrew F.* District Court Opinions

- *E.D. v. Colonial Sch. Dist.*, 69 IDELR 245 (E.D.Pa. 2017)
  - Court found 3rd Circuit was already applying appropriate standard.
  - "While it is true that *Endrew F.* was decided after the Hearing Officer issued her decision, the standards employed by the Hearing Officer do not differ substantively from the standards adopted by the Supreme Court in *Endrew F.* The Hearing Officer analyzed the administrative record with reference to Third Circuit cases that had already rejected the *de minimis* standard in lieu of a more stringent standard."

Other Post-*Endrew F.* District Court Opinions

- *I.L. through Taylor v. Knox County Board of Education*, 70 IDELR 71 (E.D.Tenn. 2017)
  - Interesting introduction, "This case involves three federal laws [IDEA, ADA, and First Amendment retaliation] and one state law. They are complex and chocked full of jargon, so a survey of these laws will help."
  - Court cited Justice Alito remarking in *Endrew F.* that the IDEA is "frustrating" because it involves a "blizzard of words."
  - A reasonableness standard for single-student claims gives school districts "breathing room to serve their disabled students without constant fear of liability."
  - No difference in procedural analysis

Other Post-*Endrew F.* District Court Opinions

- *Smith v. Cheyenne Mountain School District 12*, 117LRP 20901 (D. Colo. 2017)
  - Same district court as *Endrew F.*
  - Notes that *Endrew F.* pointed out, the statute's "detailed set of procedures" for drafting an IEP "emphasize collaboration among parents and educators."
  - Court states, "*Endrew F.* also discusses *Rowley* as binding precedent, and in *Rowley*, the Court emphasizes that the IDEA left in place the States' traditional responsibility for minors' education: 'the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children.'"

Endrew F. Itself was Remanded

- *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 694 F. App'x 654, 655 (10th Cir. 2017)
  - "But the Supreme Court reversed our judgment, holding that in order '[t]o 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 Court clarified that 'this standard is markedly more demanding' than the 'merely more than *de minimis* test applied by the Tenth Circuit.'"
  - Remanded to the District Court for "further proceedings consistent with the Supreme Court's decision."

U.S. Department of Education's Questions and Answers on *Endrew F.*

- Breaks down *Endrew F.* opinion
- List of 20 questions and answers explaining the impact of *Endrew F.*

U.S. Department of Education's Questions and Answers on *Endrew F.*

- Question and Answer 7
  - How did *Endrew F.* clarify the standard for determining FAPE and educational benefit?
    - Clarified *Rowley*
      - "the goals may differ but every child should have the chance to meet challenging objectives."
      - "merely more than *de minimis*" not good enough

U.S. Department of Education's Questions and Answers on *Endrew F.*

- Question and Answer 9
  - Does the standard in *Endrew F.* only apply to situations similar to the facts presented in *Endrew F.*?
    - OSDE says no
    - Clarifies the scope of FAPE in IDEA and "applies regardless of the child's disability, the age of the child, or the child's current placement."

U.S. Department of Education's Questions and Answers on *Endrew F.*

- Question and Answer 10
  - What does "reasonably calculated" mean?
    - Recognizes developing appropriate IEP requires prospective judgment by IEP team
    - Means that "school personnel will make decisions that are informed by their own expertise, the progress of the child, the child's potential for growth, and the views of the child's parents."

U.S. Department of Education's Questions and Answers on *Endrew F.*

- Question and Answer 11
  - What does "progress appropriate in the light of the child's circumstances" mean?
    - Court didn't specifically define
      - Emphasized individualized decision-making required in the IEP process
      - Emphasized need for every child to have the opportunity to meet challenging objectives

U.S. Department of Education's Questions and Answers on *Endrew F.*

- Question and Answer 18
  - Is there anything IEP Teams should do differently as a result of the *Endrew F.* decision?
    - According to USDE, "Although the Court did not determine any one test for determining what appropriate progress would look like for every child, IEP Teams must implement policies, procedures, and practices relating to:
      - Identifying present levels of academic achievement and functional performance;
      - The setting of measurable annual goals, including academic and functional goals; and
      - How a child's progress toward meeting annual goals will be measured and reported, so that the *Endrew F.* standard is met for each individual child with a disability."

What We Can Learn from *Endrew F.*

- *Endrew F.* emphasizes that schools must have cogent and responsive explanations for their educational decision-making
  - Focus on developing quality Prior Written Notices (PWNs) and documenting logical reasoning of IEP team decisions
  - Document any circumstances that may work to limit a student's progress
- School staff must use evaluations, student data, and information and input from colleagues and parents/guardians—combined with their experience and professional judgment—to develop educational programs that the team reasonably believes will allow students to make progress based on their abilities and needs.

What We Can Learn from *Endrew F.*

- Review your policies and procedures, and revise them, if needed.
- Use your computerized programs to INDIVIDUALIZE AND UPDATE your IEPs and PWNs.
- Provide staff with the time and training necessary to develop individualized, up to date and meaningful IEPs.
- Identify your difficult cases and plan early.
- Identify parentally placed students and arrange evaluation update.
- Strive toward consensus – don't table meetings. Make a plan and schedule another meeting. In the meantime, finalize an IEP with recommendations for follow up on issues that may be resolved.
- Get those IEPs out well before the first day of school and be sure everyone involved in implementation has access to them and reviewed them!

What We Can Learn from *Endrew F.*

- The IEP must be designed to assist the student in making progress. Begin with an accurate baseline.
- Present levels data needs to be current and accurate when writing an IEP so that it is clear where the student is starting.
- Present levels data should align with goals in the previous IEP so that it is clear to the team which goals have been met and which goals have lacked success.

What We Can Learn from *Endrew F.*

- Goals must be written in a way that allows clear measurability.
  - Some recommend the "SMART" goal process to ensure well-written goals.
  - SMART goals are goals that are:
    - Specific,
    - Measurable,
    - Assignable,
    - Realistic, and
    - Time-based.
- The IEP team should ensure that goals are written in a way that clearly delineates the expected outcome and the timeframe in which the outcome is expected to be reached.

What We Can Learn from *Endrew F.*

- Train staff to really analyze performance on goals to determine if the IEP team needs to meet during the year to address lack of expected progress.
- If a student is not progressing during the school year, the IEP team must meet to review goals and adjust accommodations, modifications, and supports to improve progress.
- The IEP is not a once-per-year obligation and should be reviewed and adjusted when the supports in the IEP are not helping the student make progress towards goals.
- The IEP team must analyze the lack of progress if the IEP does not contain the supports necessary for the student to succeed.