AN UPDATE ON
RECENT SUPREME COURT
DECISIONS INVOLVING
SPECIAL EDUCATION LAW

Jim Gerl
Scotti & Gerl
jimgerl@yahoo.com  email
blog: http://specialeducationlawblog.blogspot.com/

© 2017 James Gerl

Written Materials to Accompany
A Presentation at the
Annual Conference of the
National Association of Hearing Officials
September 10 - 13, 2017
Washington, DC
Supreme Court Update


1. Background
The Requirement of FAPE (free and appropriate public education)

The basic requirement of the IDEA is that states and school districts must have in effect policies and procedures that ensure that children with a disability receive a free and appropriate public education, hereafter sometimes referred to as “FAPE.” IDEA, § 612(a)(1).

The IDEA defines “child with a disability” as a child:
(i) with mental retardation, hearing impairments..., speech or language impairments..., visual impairments..., serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
(ii) who by reason thereof, needs special education and related services.
IDEA, § 602(3)

The IDEA defines “FAPE” as:
special education and related services that:
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school or secondary school education in the state involved; and
(D) are provided in conformity with the individualized education program required (...hereunder.).
IDEA, § 602(9). See also 34 C.F.R. §§ 300.101 to 300.113.
The IDEA defines “special education” as:
Specially designed instruction, at no cost to the parents,
to meet the unique needs of a child with a disability, including
(A) instruction conducted in the classroom, in the
home, in hospitals and institutions, and in other
settings; and
(B) instruction in physical education.
IDEA, § 602(29).

In 1982, the Supreme Court of the United States
issued the seminal decision interpreting the provisions of
the IDEA in the case of Board of Education of Hendrick
Hudson Bd. of Ed. v. Rowley 455 U.S. 175, 102 S.Ct. 3034,
553 IDELR 656 (1982). The facts of the case were that
the student had a hearing impairment. The parents
requested that the schools provide a sign language
interpreter for all of the student’s academic classes.
Although the child was performing better than the
average child in her class and easily advancing from
grade to grade, she was not performing consistent with
her academic potential. Rowley, supra, 102 S.Ct at 3039-
3040.

Holding that FAPE required a potential
maximizing standard, the District Court ruled in favor of
the student. The U. S. Court of Appeals for the Second
Circuit affirmed. See, Rowley, 102 S.Ct at 3040.

The Supreme Court reversed. Rowley, supra, 102
S.Ct at 3052. After a review of the legislative history of
the Act and the cases leading to Congressional passage of
the Act, the Supreme Court held that the Congress did
not intend to impose a potential-maximizing standard,
but rather, intended to open the door of education to
disabled students by requiring a basic floor of opportunity. Rowley, supra, 102 S.Ct at 3043-3051.

The Supreme Court noted that the individualized Educational Program, hereafter sometimes referred to as the “IEP,” is the cornerstone of the Act’s requirement of FAPE. Rowley, supra, 102 S.Ct at 3038, 3049. The Court also notes with approval the many procedural safeguards imposed upon the schools by the Act. Rowley, supra, 102 S.Ct at 3050-3051. The Court also cautioned the lower courts that they are not to substitute their “…own notions of sound educational policy for those of the school authorities which they review.” Rowley, supra, 102 S.Ct at 3051.

The Supreme Court held that instead of requiring a potential maximizing standard, FAPE is satisfied where the education is sufficient to confer some educational benefit to the student with a disability. Rowley, supra, 102 S.Ct at 3048. Accordingly, the Court concludes that the IDEA requires “…access to specialized instruction and related services which are individually designed to provide educational benefit to the …” child with a disability. Rowley, supra, 102 S.Ct at 3048.

The Supreme Court instructed lower courts that the inquiry in cases alleging denial of FAPE should be twofold: First, have the schools “…complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefit.” Rowley, supra, 102 S.Ct. at 3051.

Prior to the Endrew F decision, all courts cited the Rowley standard as the law governing FAPE. But some circuits read the requirement as “some benefit,” while other
circuits read the requirement as “meaningful benefit.” Some saw this as an important difference.

2. The Facts
The student, Endrew F. was diagnosed with autism at age two. Endrew attended school in respondent Douglas County School District from preschool through fourth grade. Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Endrew’s fourth grade year, however, his parents had become dissatisfied with his progress. Although Endrew displayed a number of strengths—his teachers described him as a humorous child with a “sweet disposition” who “show[ed] concern for friends”—he still “exhibited multiple behaviors that inhibited his ability to access learning in the classroom.” Endrew would scream in class, climb over furniture and other students, and occasionally run away from school. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Endrew’s parents saw it, his academic and functional progress had essentially stalled: Endrew’s IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims. His parents believed that only a thorough overhaul of the school district’s approach to Endrew’s behavioral problems could reverse the trend. But in April 2010, the school district presented Endrew’s parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism. Endrew did much better at Firefly.

In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the Douglas County School District. The district presented a new IEP. In February 2012, Endrew’s
parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew’s tuition at Firefly. An ALJ denied relief. Endrew’s parents sought review in Federal District Court. The District Court affirmed. The parents appealed again and The Tenth Circuit affirmed, holding that that a child’s IEP is adequate as long as it is calculated to confer an “educational benefit [that is] merely . . . more than de minimis.”

3. The Supreme Court Decision
The United States Supreme Court issued a big decision in March, 2017. The high court clarified what FAPE means and how courts should apply the FAPE requirement. The decision in *Endrew F by Joseph F v. Douglas County Sch Dist RE-1* vacates and remands a previous decision by the Tenth Circuit.

A few preliminary observations: First this was a *unanimous* decision, the second special ed unanimous decision by the Supremes this year. So we have a new slogan of this area of law: special ed law...bringing people together!

Second, although this opinion clarifies how courts should apply the FAPE standard, the court's decision does *not overrule* the seminal *Rowley* decision. Instead, it clarifies *Rowley* and explains how courts have not been correctly interpreting the decision.

Now for some general analysis: the new gold standard for FAPE is: to meet its obligations under IDEA, a SD must offer an IEP *reasonably calculated to enable a child to make progress in light of the child's circumstances*. The court described this standard is a *fact-intensive* exercise. The question is what is reasonable not what is ideal.

4. Analysis
The Supreme Court said that the Rowley decision sheds light on what appropriate progress will look like in many cases - where a child is fully integrated in regular education classes, that is the IEP must be reasonably calculated to make progress and to make passing marks and advance from grade to grade. The court noted that the facts of Rowley fit this analysis. In footnote # 2, the court reiterated the language in Rowley that it was specifically declining to hold that every child advancing from grade to grade is automatically receiving FAPE. The Court also noted that the fact that the new standard is not a bright line is not in any way a suggestion that a court should substitute its own notion of sound educational policy for that of professional educators.

But where a child is not fully integrated in regular education classes, the IEP need not aim for grade level advancement. Instead, the IEP must be appropriately ambitious in light of the child's circumstances. The goals may differ, but every child should have the chance to meet challenging objectives.

The clarification, according to the Court, is a standard not a formula - but in any event it is "...markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot."

The Supreme Court decision also flatly rejected the parent's argument that FAPE requires an opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities. The court here noted that Congress has reauthorized IDEA number of times without overruling the Rowley decision which had rejected a
similar potential-maximizing FAPE standard, so it would not adopt the parent's proposed FAPE standard.

The court stated..."We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."

Some additional thoughts. First, the Court did not reach the some benefit vs. meaningful benefit debate which seemed to be the real question in the petition for certiorari. Instead, the court rephrased the FAPE standard without reversing the Rowley decision. So the new standard is that an IEP must be reasonable given the unique circumstances of the individual child with a disability. The high court stated that although the standard does not require an ideal education or potential maximization, it clearly requires more than a trivial or de minimis educational benefit.

One of my blog readers suggested that parents may now fight harder for full inclusion because of the court's statement that generally students in the general education classroom receive FAPE where they make grade level progress and advance from grade to grade.

5. Who Won?

I got an email from a reporter just after the decision asking a fascinating question: did parents or school districts win in the Endrew F decision by the US Supreme Court?

The reporter noted that it seems that parent groups are hailing the decision as a victory for them while at the same time school district groups are saying that they are already providing educational benefit at the level required by this decision.
So who won...well the answer is not very clear

For the parties to the actual case, the matter was remanded to the Tenth Circuit. This means that there will be further court proceedings before we know who prevailed in this case.

For purposes of special education law, however, the answer is a little foggy. School districts clearly won to the extent that the Supremes did not overturn Rowley. In fact the decision does not even mention the battle between some benefit vs. meaningful benefit that the earlier pleadings and argument seemed to involve. So Rowley is still good law.

On the other hand, parents clearly won to the extent that the high court required more benefit than the more than trivial or de minimis standard used by the Tenth Circuit Court of Appeals. To provide FAPE, a school district has to do better than that. The unanimous Supreme Court held that the standard is "markedly more demanding" than the standard used below.

However, school districts clearly won to the extent that the court rejected the potential maximizing standard that was previously rejected by Rowley. The Court refused to require an IEP that lead to self-sufficiency, academic success, and the ability to contribute to society. The Court rejected the argument that opportunity equal to that received by non-disabled students is necessary. In this regard, the Court mentioned that the Congress had amended IDEA a number of times since 1982 and yet never overruled Rowley so that it was good law still. Potential maximization arguments that had been rejected in Rowley continue to be rejected. So an IEP must be reasonable not ideal.

Nonetheless, parents clearly won to the extent that the court made FAPE turn on the individual circumstances of the child. The Court stated, "The goals may differ, but every child should have the chance to meet challenging
objectives..." Rather than develop a bright line rule, the Court adopted an individualized fact specific approach.

OK so everybody won. Or at least you can see why they all believe that they won.

The real answer to the question will turn on how hearing officers and courts apply the new standard to actual fact patterns. The new standard requires that an IEP must be reasonable given the unique circumstances of the child with a disability. In other words, the IEP must be reasonably calculated to enable a child to make progress in light of his own individual circumstances. Students fully integrated in general education classrooms will be expected to make passing grades and advance from grade to grade. Other special education students may not need to make grade level success to receive FAPE as the standard for them is somewhat lower.

Hearing officers and courts will follow the Supreme Court's instruction and apply the revised standard on a case by case basis. They will engage in a fact-specific analysis involving the unique circumstances of the child with a disability. To some extent, what is "reasonable" is in the eye of the beholder.

You can read the decision here.
https://www.supremecourt.gov/opinions/16pdf/15-497_p8k0.pdf

The facts are as follows: The student in this case has a severe form of cerebral palsy that significantly limits her motor skills and mobility. Her parents obtained a service dog, a goldendoodle named Wonder who aids the student by retrieving dropped items, helping her balance on her walker, opening and closing doors, turning on and off lights, etc. The elementary school attended by the student refused to allow her to bring the service dog, claiming that her needs were met by the human aide provided by her IEP. (I love service dogs!)

The parents removed the student from school and began homeschooling her. After an OCR complaint, the elementary school offered to allow the dog to attend with the student, but the parents felt that the principal would resent the student and make her return difficult, so the student was enrolled in a different public school in a different district. (NB because the case was originally decided on a motion to dismiss all facts plead in the parents complaint were accepted as true.)

The parents then filed suit in federal court alleging violations of the Americans with Disabilities Act and §504 of the Rehabilitation Act. The district court granted the school district's motion to dismiss holding that exhaustion of administrative remedies require the parents to first have a due process hearing before an IDEA hearing officer. The Sixth Circuit Court of Appeals agreed with the District Court. The Supremes granted certiorari, and the issue before the Supreme Court was when

Interesting aside: the Fry case, the NSBA, NASDSE, AASA and others filed an amicus brief, and the brief cites me and one of my outlines concerning the duty and power of a hearing officer to make a complete record. Check out footnote 18 on page 24 for the reference to my outline and the complete record discussion. You can read the amicus brief here.
The Supreme Court's holding has two parts. First it ruled that exhaustion of IDEA hearing procedures is only required where parents seek relief for a denial of a free and appropriate public education. Second it held that courts must look to the gravamen of a complaint to determine whether it seeks such relief.

The reasoning of the court is flawed. The basis for the ruling is the court's conclusion that the only relief that a hearing officer can give is relief for a denial of FAPE. Apparently the parties stipulated to this fact, but unfortunately it is wrong. The court's standard is fine for the 85%+ of IDEA cases that involve a denial of FAPE, but how about the other cases? There are four specific areas that can give rise to a due process complaint for an IDEA violation. Denial of FAPE is one of the four areas; the others are evaluation, identification (including child find and eligibility) and placement (including allegations of least restrictive placement violations, disciplinary changes of placement, etc). IDEA §615(b)(6)(A); 34 CFR § 300.507(a)(1). What about those cases? Does this opinion authorize parents who are alleging an LRE violation or a child find violation or an independent educational evaluation at public expense the right to go directly to court without first exhausting administrative remedies because the gravamen of their complaint is not a denial of FAPE? Will parent lawyers test this new ruling by avoiding FAPE but challenging the other three categories of IDEA violations? I cannot believe that this is the result the high court is anticipating.

The court's confusion, as well as the parties, seems to stem from the changes made to IDEA in 2004 concerning procedural violations. Specifically, the Act was amended to include a provision that procedural violations only constitute a denial of FAPE where there was something more, like an adverse effect on the student's education or a substantial impeding of the parent's participation rights. IDEA § 615(f)(3)(E). The section also includes a requirement that the decision of a hearing officer be based upon substantive grounds. The Office of Special Education Programs, specifically because of these considerations, wrote the federal regulations to clarify that only a hearing officer's decision concerning whether FAPE was provided must be on substantive
grounds. 34 C.F.R. §300.513(a). In an attempt to allay fears that the provision might limit hearing officers to ruling only on FAPE issues, OSEP in its analysis of comments to the proposed federal regulations specifically stated that despite this new provision in IDEA "...hearing officers continue to have the discretion to dismiss complaints and make rulings on matters in addition to those concerning the provision of FAPE, such as the other matters mentioned in §300.507(a)(1)." 71 Fed. Register No. 156 at page 46707 (OSEP August 14, 2016). The other matters in the quoted regulation are placement, identification and evaluation.

From there the high court provides guidance to lower courts in interpreting this test. The Supreme Court ruled that the lower courts must look at the substance or gravamen of the complaint to prevent parties from avoiding the exhaustion requirement by artful pleading.

The court then suggests some specific questions for lower courts to consider. This is where the concurring justices (Alito and Thomas) get off: they find the suggested questions which begin on page 15 of the opinion to be not so good. The six justice opinion offers three questions. First could a plaintiff have brought essentially the same claim for a public facility that is not a school—a theater or library for example? Second could an adult at the school— an employee or visitor for example— have brought essentially the same grievance? If the answer to these questions is yes, exhaustion would not be required because the gravamen of the complaint would not be a FAPE case. Another line of inquiry for lower courts suggested by the high court involves the parent’s prior history with IDEA proceedings. A plaintiff that began seeking relief in a due process hearing may possibly be after relief for a denial of FAPE.

One issue that the Supreme Court specifically did not reach was whether exhaustion of IDEA remedies is required where the plaintiff complains of a denial of FAPE, but seeks a remedy that an IDEA hearing officer cannot give such as money damages. Because the parents argued that their complaint was not about a denial of FAPE, the Court specifically ducked the issue as unnecessary to the resolution of this case. See footnotes 4 and 8,
and the surrounding text. So this decision does not provide guidance in that situation.

You can read the opinion and the concurring opinion here. My analysis is in this blog post.

NOTE: This document, and any discussion thereof, is intended for educational purposes only. Nothing stated or implied in this document, or in any discussion thereof, should be construed to constitute legal advice or analysis of any particular factual situation.