Special Education Law 101

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Session Agenda

Why are we here?

- Goal: Provide a basic understand of the laws and preview issues frequently presented in special education due process hearings.
- Audience: ALJs and HOs who are new to special education hearings.
- We will cover: An overview of the Individuals with Disabilities Education Act (IDEA) and its federal regulations.
- We won't cover: The weird things that happen in your state. But we will explain why the weird things in your state matter a lot!

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"Welcome to—and apologies for—the acronymic world of federal [special education] legislation."

Justice Kagan - *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017)

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… but first some historical context.

Why do we have special education laws?

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Before 1971 - A History of Exclusion

Pre 1971: Children with visible disabilities were turned away at the schoolhouse gate and children with invisible disabilities failed.

1971: *PARC v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971): A law permitting schools to exclude children with disabilities was found unconstitutional. First case of its kind. Others followed. Congress took note.

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1975 - First Federal Special Education Law

Congress studies the problem, concludes that the problem is real and widespread, and passes the Education for All Handicapped Children Act (EHA) in 1975.

- Prohibits exclusion.
- Includes procedural requirements.
- Establishes, but does not define, the right to a FAPE.

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1982 - SCOTUS Weighs In (But Not Really)

Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).

SCOTUS held that schools satisfy the FAPE obligation when "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits."

But no obligation to "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children."

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1982 to 2017 - A Circuit Split Grows for 35 Years

Some circuits interpret *Rowley* to mean that IEPs providing a "merely more than trivial" benefit comply.

Others interpret *Rowley* to mean that IEPs must provide a "meaningful educational benefit."

SCOTUS hears IDEA cases, but will not touch the FAPE standard.

Meanwhile, in Congress...

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1990 to 2008 - The Law Develops

1990 - Congress changes the EHA to the IDEA

2004 - Significant IDEA Amendments

2006 - Significant Amendments to the Federal IDEA Implementing Regulations

2008 - Less Significant Regulatory Amendments

Bottom Line: Every child with a disability is entitled to a FAPE.

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2017 - SCOTUS Weighs In (For Real This Time)

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

SCOTUS addresses the FAPE standard in substance.

We will talk more about *Endrew* later!

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Enough history!
How does the IDEA work?

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Procedure and Substance

The mechanics of the IDEA are procedural.

- We will talk about that first because it is easy.
- You need to know this, but your case probably won't be about this.

The substance of the IDEA is case-specific.

- This is hard, but there are guiding principles.
- Your case will likely be about this.

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Pause! Who is eligible?

Bottom Line: Every child with a disability is entitled to a FAPE.

A child with a disability is a child with any of the 13 disabilities recognized by the IDEA "who, by reason thereof, needs special education and related services." 20 U.S.C § 1401(1)(3).

A child with a disability is also entitled to protections under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability. 29 U.S.C. § 794. A person has a disabilty if he or she "has a physical or mental impairment which substantially limits one or more major life activities," or has a record of such impairment or is regarded as having such impairment. 34 C.F.R. § 104.3(j)(1). "Major life activities" include learning. 34 C.F.R. § 104.3(j)(2)(ii).

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IDEA Disability Categories

- Autism
- Deaf-Blindness
- Deafness
- Emotional Disturbance
- Hearing Impairment
- Intellectual Disability
- Multiple Disabilities
- Orthopedic Impairment
- Other Health Impairment
- Specific Learning Disability
- Speech or Language Impairment
- Traumatic Brain Injury
- Visual Impairment Including Blindness

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Special Education…

The term "special education" means **specially designed instruction**, at no cost to 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.

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

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… and related services

- Transportation
- Speech-language pathology
- Audiology
- Interpreting services
- Psychological services
- Physical and occupational therapy
- Recreation, including therapeutic recreation
- Social Work Services
- School Nurse Services
- Counseling services
- Orientation and mobility services,
- Medical services for diagnostic and evaluation purposes only

as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

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IDEA Procedural Requirements

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The IDEA's Procedural Requirements

The most basic procedural requirements are:

- Child Find
- Evaluation
- IEP Development / Least Restrictive Environment
- IEP Implementation / Data Collection
- Disciplinary Protections
- Reevaluation

There are more,
but this is special education 101!

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Child Find

"[A]ll children residing in the state who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located and evaluated."

- 20 U.S.C. 1412(a)(3).

Know your state regulations and case law!

- E.g, in PA, this is a continuing obligation and the timeline to propose an evaluation is "reasonable."

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Evaluation

Two purposes of a special education evaluation: (20 U.S.C. §1414(a)(1)(C)(i)):

- Determine whether or not a child is a child with a disability as defined
- Determine the educational needs of the child

Must meet requirements of IDEA (20 U.S.C. §§ 1414(a) - (c); 34 C.F.R. §§ 300.301 - 300.311):

- Assess all areas related to the suspected disability
- Be comprehensive and consider variety of information

Requires consent of parents

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IEP Development

An IEP must

- Respond appropriately to the identified educational needs (20 U.S.C. § 1414(d))
- Be individualized: reasonable and appropriate in light of a child's unique circumstances (***Endrew***)
- Consider the child's strengths of the child; concerns of the parents, evaluation results, the child's academic, developmental, and functional needs, and "special factors:"
    - Need for behavioral support
    - Language needs for child with limited English proficiency
    - Visual, communication, and assistive technology needs

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Least Restrictive Environment

"To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

20 U.S.C. § 1412(a)(5)(A).

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Brian's Soap Box

There is no conflict between the FAPE and LRE obligations!

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IEP Implementation

LEA is required to implement the IEP "as soon as possible" after development (34 C.F.R. § 300.323(c))

IEP teams must monitor the student's performance and revise IEP as needed on an ongoing basis

Failure to implement = Denial of FAPE???

- Many jurisdictions require "material" or "significant" failure
- Considerations include whether progress was reasonable, duration of failure

Many hearings involve claims of failure to implement.

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Disciplinary Protections

Apply to students who are eligible and "thought to be eligible"
Apply to change of placement for disciplinary reasons requires Manifestation Review

- Removal < 10 days
- Removal > 10 days (10 consecutive or 15 cumulative)
- Pattern of removal

Placement of a student during removal and appeal
Special circumstances: Drugs, Weapons, Serious Bodily Injury
Notice of change in placement decisions provided to parents
Expedited hearing and decision timelines

20 U.S.C. § 1415(k)

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Reevaluation

Reevaluations required every three years unless team agrees otherwise - but check your state's law!

Also required if IEP team agrees, or a parent or teacher requests, or change in eligibility is proposed.

Same process as initial evaluations.

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IDEA Substantive Requirements

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Substantive FAPE

Endrew is the closest we have to a national, substantive standard.

SCOTUS rejected a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. 988, 1001 (2017).

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Substantive FAPE

Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id* at 1000.

Academically, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id*.

Education, however, **encompasses much more than academics.** Grade-to-grade progression, therefore, is not an absolute indication of progress even for an academically strong child, depending on the child's circumstances.

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Substantive FAPE

What about actual progress?

- Actual progress does not tell you if an IEP was reasonably calculated to provide a FAPE when it was offered in most cases.
- The school's response to actual progress is good evidence of FAPE violations (or lack thereof) after the IEP is implemented.
  - Did the school draft more ambitious goals in response to good progress?
  - Did the school try to figure out what wasn't working in response to poor progress?

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Substantive FAPE

Substantive FAPE is a student specific inquiry.

Any hard and fast test for substantive FAPE is inherently flawed.

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A very quick word about remedies (just two slides, we promise!)

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Remedies

In matters alleging procedural violations, the HO or ALJ may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(ii)

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Remedies

There are **enormous** differences between state laws and jurisprudence on remedies for substantive FAPE violations. You must know what you do and do not have authority to award.

Compensatory education, tuition reimbursement, and public-funded independent educational evaluations are the most common demands, but…

There are **enormous** differences between state laws on how to calculate remedies upon finding a substantive FAPE violation.

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Questions?
Thank you!

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