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FAPE

MO-CASE
Sunday Law Seminar
September 23, 2018
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- Why is it important to understand what FAPE means?
- How does the meaning of FAPE impact day to day decisions for kids and day to day services?

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Development of an IEP- every decision made by the IEP team in the process of developing the IEP stems from an understanding of what it means to provide the student FAPE. For example:

- Goals
- Services
- Placement

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Notices of Action – Every written notice of action refused given to a parent must focus on the standard of FAPE:

- Why is parent requesting what they are requesting?
- Why did team decide to say “no”?

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What are the most frequent contexts for disputes over whether the school district met the legal standard of FAPE?

- Discipline
- Private Placement

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What is the legal standard for FAPE?

- Prior to 2017: The “Rowley” standard
- From March 22, 2017: The “Andrew F.” standard

Are they different?

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Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176 (1982):

Assuming the procedural requirements are met:

Is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

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“the requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with **some educational benefit.**”

Citing *Rowley* case:

“A school district meets its IDEA obligations if the student’s IEP is “reasonably calculated to enable the child to receive educational benefits.”

Zumwalt School District v Clynes, 119 F.3d 607, 612 (8th Cir.1997); *Neosho R-V School District v Clark*, 315 F. 3d 1022, 1027 (8th Cir. 2003); *M.M. ex rel L.R. v Special School District No. 1*, 512 F. 3d 455 (8th Cir. 2008).

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

- a school must offer an IEP that is reasonably calculated to enable a child to make progress “appropriate in light of the child’s circumstances.”
- When a child is “fully integrated” into a regular classroom, providing FAPE that meet the unique needs of a child with a disability typically means providing a level of instruction **reasonably calculated to permit advancement through the general curriculum.**

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Andrew F. Cont'd

- If progressing smoothly through the general curriculum is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement but must be **“appropriately ambitious in light of his circumstances.”** (emphasis added)

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- Andrew F. was a fifth-grade male child with autism, who had been making progress, then plateaued.
- Parents complained that his IEPs had the same basic goals year after year. This, they argued, was an indication that Andrew was not making meaningful progress.
- Andrew's parents also expressed concern over the District's ability to adequately address his behaviors and fears – behaviors and fears that were interfering with his learning.

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- Parents removed Endrew from district and placed him in a private school that provided ABA therapy.
- The claim was that he started making much better progress at the private school.
- Parents filed a due process complaint and sought reimbursement for the \$78,000/year tuition at the private school.
- The court ruled in favor of school district.

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Parents appealed decision in federal court.

The court found that Endrew had made at least minimal growth while with the District.

The U.S. Court of Appeals for the 10th Circuit held:

the progress required under the test used by the 10th Circuit was that an IEP should be reasonably calculated to provide “**merely more than de minimis benefit.**”

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The Supreme Court reversed the Tenth Circuit.

The Court really did not like the phrasing
“merely more than de minimis.”

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How did it all end for Endrew F.?

- U.S. Supreme Court sent the case back down to consider using the standard of FAPE clarified by the Court.
- The federal district court – using the standard of FAPE clarified by the Supremes – ruled in favor of the parents for reimbursement of private school tuition.
- Held the IEP was not reasonably calculated to enable the student to make progress in light of his unique circumstances.

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What was the primary reason that the judge ended up ruling in favor of the parents when the case was considered under the clarified FAPE standard?

Behaviors, Behaviors, Behaviors.

The judge found that the student's behaviors were not properly addressed and therefore negatively impacted his ability to make progress on his goals.

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Final outcome?

Rather than appeal the decision against it, the school district settled the case with the parents.

Confidentiality was part of the agreement. But rumor has it that the district paid \$1.3 million to settle the matter.

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“reasonably calculated to enable a child to receive educational benefits”

verses

“reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”

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So why have the feds felt the need to muck things up???? Or did they really muck it up?

U.S. Department of Education's Office of Special Education Programs (OSEP) issuance of a Q & A document on December 7, 2017.

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OSEP:

“Each child’s IEP must include....an accurate statement of the child’s present levels of academic achievement and functional performance and measurable annual goals including academic and functional goals. This information must include how the child’s disability affects the child’s involvement and progress in the general education curriculum.”

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What is the standard used by IEP teams across Missouri when developing goals?

Ensuring each goal meets the SMART standard.

Specific, measurable, attainable, relevant, time bound.

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Did OSEP indicate it viewed the *Andrew F.* decision as changing or expanding the *Rowley* FAPE standard?

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OSEP:

“The Supreme Court decisively rejected the ‘merely more than *de minimis*’ standard used by the Tenth and other Circuits....”

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OSEP: To develop an IEP reasonably calculated to enable the child to make progress –

“The IEP team should consider the child’s previous rate of academic growth, whether the child is on track to achieve or exceed grade-level proficiency, and behaviors interfering with the child’s progress, and additional information and input provided by the child’s parents.”

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OSEP did emphasize the need for the IEP team to develop “challenging” goals/objectives.

Is this consistent with development of quality SMART goals?

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OSEP cautions that a lack of progress on goals should be considered by the IEP teams – even though there is no guarantee goals will be achieved, a lack of progress might mean the goals need to be revisited/revised along with services.

Is this something new?

NO.

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Bottom-line:

Jurisdictions that used *a de minimis* standard were faced with having to change to the *Endrew F.* standard – the clarified *Rowley* standard.

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How has our jurisdiction been impacted by the Endrew F. decision?

8th Circuit Court of Appeals:

- I.Z.M. v Rosemout-Apple Valley-Eagan Pub. Sch., 863 F.3d 966 (8th Cir. 2017)
- Parrish v. Bentonville School District, 896 F.3d 889 (8th Cir. 2018)

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I.Z.M. case:

- Student who is Visually Impaired.
- IEP provided for use of Braille for all classroom assignments and instruction and other services.
- Parents alleged failure to implement.
- Due Process hearing decision that District provided FAPE.
- Appealed to federal court and UPHELD.
- Appealed to 8th Circuit Court of Appeals and UPHELD.
- 8th Circuit cited *Rowley* and that FAPE standard and addressed consistency with *Andrew F.* standard.

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Parrish case:

- Action filed on behalf of four different children with Autism, four different families, alleging violation of FAPE.
- There were other legal issues involved including exhaustion of administrative remedies under IDEA.
- The decision cited from *Rowley* as well as *I.Z.M.* in discussing and deciding the FAPE claims. No reference to *Andrew F.* was made or cited to.

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Cases from other jurisdictions:

E.G. v Great Valley School District, (E.D. Pa. 2017) –

Court held FAPE provided, cited to Endrew F., even though student’s reading progress as a 5th grader (reading at 2nd grade level) was “maddeningly slow” the IEP was tailored to the student’s severe learning disability and student continued to progress although very slowly.

Disclaimer

PLEASE NOTE: The information provided in this training is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

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