The Evolution of FAPE

The *Endrew F* Decision and What it Means for Minnesota School Districts

Presented by
Peter Martin
Knutson, Flynn & Deans, P.A.
The Legislative Beginnings of Special Education


- A state could receive funding under Title VI by submitting a plan that met eleven general conditions, the first of which was that grant money could only be spent to initiate, expand, or improve programs to meet the special educational and related needs of handicapped children. The Commissioner could disapprove a state’s plan subject to judicial review.

- The Elementary and Secondary Education Amendments of 1970 repealed Title VI and created the Education of the Handicapped Act. The new Act built upon the administrative structure created by Title VI, adding grant opportunities for institutions of higher education to recruit and train special education personnel, and research projects related to educating children with disabilities.


• In *PARC*, Pennsylvania law permitted a child to be excluded from public school if a school psychologist certified that the child was uneducable. A group of excluded students sued, alleging that the state’s practice denied them the education promised by the state constitution without a hearing in violation of the due process clause. They also alleged that the state’s conclusion that they could not be educated lacked a rational basis, violating the equal protection clause, and the substantive aspects of the due process clause.
Pre-IDEA Litigation – Access and Appropriateness

• The plaintiff students in PARC were within the age range to whom the state constitution promised an education, and thus were similarly-situated to typically developing students. The question was whether their exclusion was rationally related to a legitimate state interest. PARC, 343 F. Supp. at 297 (“We are satisfied that the evidence raises serious doubts (and hence a colorable claim) as to the existence of a rational basis for such exclusions.”)

• Before the court ruled on the merits, however, the parties agreed to a consent decree granting the plaintiff students access to a public education.

• Access, however, raised the issue of appropriateness almost immediately. The plaintiff students were similarly-situated to typically developing peers by age, but not similarly situated in terms of educational needs.
The issue of appropriateness was left to educators, a course of action taken in both PARC and Mills.

The PARC decree required schools to grant a child with disabilities “access to a free public program of education and training appropriate to his capacities.” 343 F. Supp. at 287.

The decree in Mills required schools to provide “a publicly supported education suited to [the students’] needs.” 348 F. Supp. at 971. Neither decree guaranteed a level of benefit or outcome.

PARC and Mills led to litigation elsewhere. In response to this increase in litigation, Congress began taking action.
The First Federal Special Education Law

• The EHA was extended for an additional three years with two new conditions. States had to provide “full educational opportunity” to all children with disabilities as well as provide procedural safeguards, specifically, prior written notice of an agency’s decision to change a child’s educational status, and the opportunity for a hearing to challenge the decision.

• The following year, Congress adopted the “Education of All Handicapped Children Act of 1975.” Congress found that the education needs of children with disabilities were not being fully met, and many were not receiving “appropriate educational services which would enable them to have full educational opportunity.”

• Therefore, it was “in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.”
The First Federal Special Education Law

- In order to receive funding, states had to submit a plan meeting conditions that remained largely unchanged from the prior year’s EHA. If a school district did not comply with the plan, the state was required to withhold further payments from the district.

- The EAHCA set eligibility criteria, including assuring the state had a goal of ensuring “full educational opportunity to all handicapped children,” and that a “right to a free appropriate public education,” would be available to all handicapped children.

- The fact that the legislation referred to “full educational opportunity” separately from a free appropriate public education and created separate timelines for implementation suggests that “full educational opportunity” was aimed at the problem of exclusion, or access, while a free appropriate public education addressed the issue of appropriateness.
The First Federal Special Education Law

- The EAHCA defined a free appropriate public education as:

- special education and related services which (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, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program.

- Special education was defined as specially designed instruction to meet the unique needs of the child. An individualized education program had to include a written statement of the child’s present levels of educational performance, annual goals, short term objectives, the educational services that would be provided to the child, the extent to which the child would be educated with nondisabled peers, and objective criteria for determining whether instructional objectives were being achieved.

Amy Rowley, the student at issue in *Rowley*, suffered from a partial hearing impairment. She had good residual hearing in the frequencies of sound where vowels, which are difficult to lip-read, register. Amy’s parents were deaf. They raised her using an array of interventions. By the time Amy entered kindergarten, she was adept at lip reading. She had an IQ of 122.
Board of Education v. Rowley

• Assisted by a hearing aid, Amy interacted productively with her classmates and teachers, and her academic performance was above average.

• A sign language interpreter was placed in the classroom for a two week trial and reported that Amy did not need his services.

• Amy’s first grade IEP called for sessions with a tutor for the deaf for one class a day, three hours a week of speech language services, the use of the hearing aid and preferential seating. Her parents sued, complaining that Amy should have a sign language interpreter.
Board of Education v. Rowley

- When Amy’s case reached the Supreme Court, the School District argued that Amy’s IEP was appropriate because it was consistent with the state’s plan. In addition, the IEP was individualized, based on observations, evaluations, and experience. And it was working. Amy was getting good grades. She was going to be self-sufficient.

- Her parents argued that the Act’s definition of a free appropriate public education was “not a functional definition.” They argued that the term could only be understood by reference to the Congressional goal of equal protection.

- The United States argued for “substantially equal access to the educational process.” The Solicitor General urged the Court to rely on the Section 504 regulations to give meaning to Congress’s use of the term free appropriate public education.
Justice Rehnquist wrote the majority opinion joined by Chief Justice Burger, Justices Powell, O’Connor, and Stevens.

Justice Rehnquist acknowledged that the definition of free appropriate public education tended “toward the cryptic,” but:
“According to the definitions contained in the Act, a “free appropriate public education” consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child “to benefit” from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a “free appropriate public education” as defined by the Act.”
"By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep., at 11. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."
Key Quotes:

“Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education . . . We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”
But how do we know when is a child receiving a FAPE?

“The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem.”

“We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.”

“[W]e hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”
The *Rowley* Test

*Rowley* established a two-part test to determine whether a child has received a free appropriate public education:

- First, has the State (or LEA) complied with the procedures set forth in the Act?

- Second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?

- If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.
Amendments to the IDEA in 1997 and 2004

Although everyone seemed to agree that IDEA did not include a substantive standard, Congress responded with utter silence. However, when Congress undertook to amend the IDEA in 1997, some argued that the 1997 amendments undermined Rowley. The argument was based upon the Congressional findings:

“Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities. However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.”

Congress found that the education of children with disabilities can be made more effective by having high expectations and ensuring access to general education curriculum in the regular classroom.
Amendments to the IDEA in 1997 and 2004

Perhaps more importantly, in 2004, Congress linked the IDEA with the education of all students by amending the Elementary and Secondary Education Act (ESEA) to require that the ESEA statute be coordinated with the IDEA. This amendment is known as the “The No Child Left Behind Act.”

The ESEA required states to adopt a statewide accountability system. The accountability system was based on “academic content standards” that specify what students should know and be able to do. States also had to adopt “academic achievement standards” aligned with the state’s content standards. Academic achievement standards define how students will demonstrate knowledge of the content standards.

*In short, Congress directed the states to establish the level of benefit that students should receive -- including students with disabilities.*
Amendments to the IDEA in 1997 and 2004

• Not surprisingly, litigants have argued that NCLBA and the 2004 amendments changed the meaning of Rowley, but “[c]ourts that have considered the issue have uniformly rejected that argument.” M.M. v. Lafayette Sch. Dist., 2012 WESTLAW 398773, at *20 (N.D. Cal. Feb. 7, 2012) (“Plaintiffs provide no legal authority for their contention that the IDEA IEP requirements incorporate NCLB standards”).

Post-Rowley: Different Substantive Standards or Use of Different Adjectives to Describe the Standard?

- The Rowley standard – “reasonably calculated to enable the child to receive educational benefits” – has been followed by every circuit in the federal system.

- However, disputes began to arise when courts used different adjectives to describe Rowley’s requirement that a child’s IEP must be “reasonably calculated to enable the child to receive educational benefits.”
How Has the Eighth Circuit Applied Rowley?

A review of opinions suggests that the Eighth Circuit has generally adhered to the “some educational benefit” standard. See e.g., K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 809 (8th Cir. 2011).

Where the Eighth Circuit has departed from the “some benefit” standard, it has tended toward a “meaningful standard.” Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1012 (8th Cir. 2006) (“we are satisfied that he was provided with meaningful educational benefit.”).
What Standard of Educational Benefit Satisfies *Rowley*?
Endrew F. (“Drew”), is a child with a diagnosis of autism and attention deficit/hyperactivity disorder. From preschool through the fourth grade, Drew received special education and related services from the Douglas County School District.

While Drew made progress in preschool and kindergarten years, his behavioral problems began increasing in second grade. In response, the District instituted a behavior intervention plan (“BIP”). Drew’s third-grade IEP significantly increased the minutes he spent either in a significant-support-needs classroom or paraprofessional aide, and added the services of a mental-health professional and speech-language therapist.

While Drew made progress towards some of his goals and objectives, his behaviors began to interfere with his educational opportunities. Drew’s fourth-grade IEP included a new BIP designed to address these behaviors.
The IEP Team met in April 2010 to design an IEP for the fifth-grade year. The Team made some adjustments to the IEP – increasing the hours in the significant-support needs classroom or with his aide – and agreed to meet again on May 2010 to discuss a new BIP and the inclusion of an autism specialist on the Team.

However, Drew’s parents notified the District prior to that meeting that they were enrolling Drew at Firefly Autism House, a private school specializing in educating children with autism.
The parents filed a due process complaint in February 2012 with the Colorado Department of Education, seeking reimbursement for the cost of sending Drew to Firefly. They alleged that Drew had “stopped making progress in his first grade year,” and that his fifth-grade IEP “was not substantively different than the IEPs that had failed to provide [him] and appropriate education in the past.”

A state administrative law judge (“ALJ”) denied the parents’ claim for relief, concluding that the fifth-grade IEP discharged the school district’s obligation to provide a FAPE because it was “reasonably calculated for [Drew] to receive educational benefit.” The parents challenged the ALJ’s decision in federal court; however, the District Court upheld the ALJ’s determination.
On appeal, the Tenth Circuit affirmed. The court noted that it had “long subscribed to the Rowley Court’s ‘some educational benefit’ language,” and analyzed whether the IEP was reasonably calculated to offer a “merely more than de minimis” educational benefit.

The Tenth Circuit ultimately concluded that “the IEP rejected by [Drew’s] parents” was “substantively adequate,” as manifested by his “progress towards his academic and functional goals on his IEPs during the time he was enrolled in the District.”
Endrew F. v. Douglas County Sch. Dist. RE-1

- Drew’s parents filed a petition for a writ of certiorari on December 22, 2015, and the U.S. Supreme Court granted review on September 29, 2016. Oral argument was held on January 11, 2017. The issue before the U.S. Supreme Court was:

- What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act?
Endrew F. - The Decision

Key Quotes:

• 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.”

• “Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard 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.”
Endrew F. - The Decision

Key Quotes:

• "Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."
Does *Endrew F.* Fundamentally Change *Rowley*?

**Key Quotes:**

- “[T]he question is whether Amy [Rowley]’s program ... offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates”). But the majority rejected any such standard in clear terms. ... (“The requirement that States provide ‘equal’ educational opportunities would ... seem to present an entirely unworkable standard requiring impossible measurements and comparisons”). Mindful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since Rowley was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.”
Does *Endrew F.* Fundamentally Change *Rowley*?

- Both *Rowley* and *Endrew F.* highlight academic progress as an important factor at which an “IEP must *aim*.”

- However, both decisions also use moderating terms such as “reasonable,” and “appropriate” which clearly signal that the target at which the IEP is to take aim is one that is reasonable, as opposed to ideal.

- As stated in *Rowley*, to require a school district to furnish “every special service necessary to *maximize* each handicapped child’s potential is, we think, further than Congress intended to go.”
Does *Endrew F.* Fundamentally Change *Rowley*?

### What Have the Courts Said (So Far)?


The *Endrew F.* standard, which provides that an IEP must be reasonably calculated to enable “progress appropriate in light of the child's circumstances,” id., clarifies the older *Rowley* standard that an IEP must be “reasonably calculated to enable the child to receive educational benefits,” 458 U.S. at 206-07. The Supreme Court explained that, for a student “who is not fully integrated in the regular classroom and not able to achieve on grade level,” an “IEP need not aim for grade-level advancement” but should be “appropriately ambitious in light of [the student's] circumstances” such that the student has “the chance to meet challenging objectives.”
What Have the Courts Said (So Far)?


“Plaintiffs contend that the Hearing Officers' decision does not pass muster under the heightened standard adopted by the Supreme Court in Endrew F. 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.”
What Does *Endrew F.* Mean for Minnesota?

- Although *Endrew F.* is an important case with which school district administrators must become familiar, it does not appear that the decision will cause significant changes in the practical, day-to-day development and implementation of IEPs.

- First, the Supreme Court only reviewed the Tenth Circuit’s “merely more than de minimis” FAPE standard, and did not address or reject other circuits’ previous articulations of the *Rowley* standard. In the Eighth Circuit, the FAPE standard may not change at all. (We shall see!).

- Second, school staff members develop programming and provide services that are appropriate to meet the unique needs of students with disabilities, and do not use a “merely more than de minimis progress,” standard.
What Does *Endrew F.* Mean for Minnesota?

- It might be wise to start by asking: is the student more like Amy Rowley, or Endrew F.?

- In either case, design an IEP that is “appropriately ambitious.” “The goals may differ, but every child should have the chance to meet challenging objectives.”

- However, if the student is more like Endrew F., any recommendation to continue goals and objectives from year-to-year should be carefully reviewed and thoroughly explained within the four corners of the IEP. Importantly, the Court held *school officials must “be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”* It is anticipated this language will be cited to shift the burden to school officials to defend IEP goals and objectives as “appropriately ambitious” and sufficiently challenging.
What Does *Endrew F.* Mean for Minnesota?

- The IDEA still does not guarantee an educational outcome. Chief Justice Roberts said that no law could ever make that guarantee for ANY CHILD.

- The two-part *Rowley* test STILL APPLIES!

- First, has the State complied with the procedures set forth in the Act?

- Second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?
More Litigation About the Meaning of Endrew F?

- Although *Endrew F.* clearly does not implicate fundamental changes, it is likely that there will be new litigation arguing for a heightened FAPE standard.

- The Supreme Court’s statements that the FAPE standard is *markedly more demanding than the “merely more than de minimis” test*, that IEPs must be *appropriately ambitious* and offer the chance to meet *“challenging objectives”* will undoubtedly be used in support of such arguments.
QUESTIONS?

PETER MARTIN
Knutson, Flynn & Deans, P.A.
651-225-0625
pmartin@kfdmn.com