

***WHAT'S NEW IN SPECIAL
EDUCATION LAW
& WHAT ARE THE COURTS
SAYING?***

TIPS TO GUIDE DECISION-MAKING



UL LAFAYETTE 8TH ANNUAL LOUISIANA K-12 SCHOOL
LAW CONFERENCE

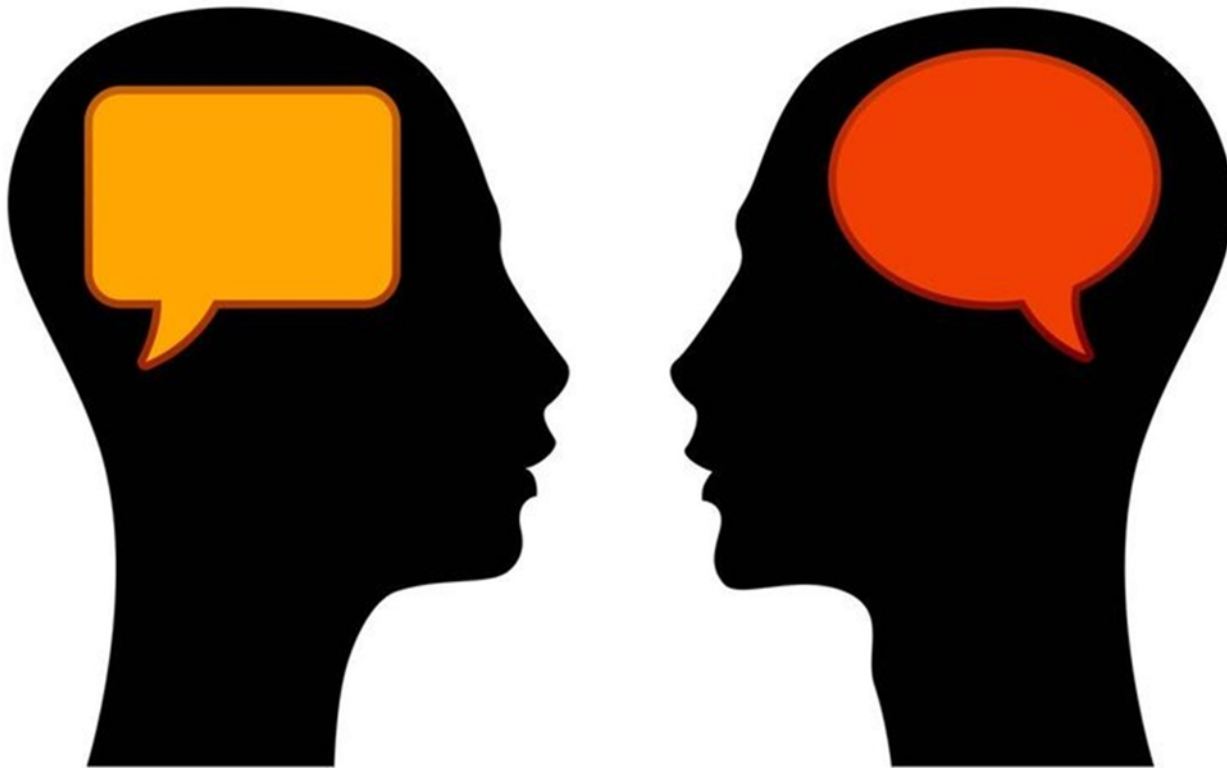
MAY 22, 2023

EDUCATIONAL DILEMMA

IDEA requires states, through local school boards, to provide a free appropriate public education to ALL children with disabilities (20 U.S.C. 1400-1482 (2012)).

However, it does not establish substantive criteria by which the adequacy of services can be measured other than specially designed instruction in conformity with the students individualized education program.

COMMUNICATION & LANGUAGE



WHAT'S INVOLVED & RESULTS

- **Time**
- **Energy**
- **People**



STEPS

Resolution Session

Mediation

Due Process

Federal Court



DUE PROCESS HEARINGS

Requested by either party

BOP is on party requesting hearing!

Decision within 45 days

Mediation is option

Due Process Hearing Requests

- Due process hearings are designed to decide issues affecting the placement of individual children
- The only parties entitled to file due process requests are parents/guardians, school districts or students 18 years of age or older
- Results in a legally binding decision on both parties, unless the decision is changed or overturned on appeal

THINGS TO PONDER

Behavioral Management Plan

Personnel

Scheduling

Open mind



EXTRA-CURRICULAR

IDEA requires school boards to provide related, or supportive, services to students with disabilities when children need such assistance to benefit from their special education programs (20 U.S.C. 1401 (26))

It could be developmental, support or corrective services; thus, services such as art, music or dance therapy could be related.



INCLUDING EXTRACURRICULAR IN IEP

Recreation & therapeutic recreation are related services (20 U.S.C. 1402(22))

Recreation – includes assessment of leisure function, recreation programs in schools and community agencies and leisure education, along with therapeutic recreation. (34 C.F.R. 300.34© (11))

Does this include athletics, special interest groups or clubs?

MICHIGAN SAYS

Court ordered a summer enrichment program because Student with autism needed a program including outdoor activities such that the court was convinced the requested program fell within the parameters of special education and related services. Physical education fit the definition of special education and recreation was a related service.

NEW YORK SAYS

No duty to provide an after-school program when participation was unnecessary for the student to receive FAPE

IOWA COURT IN SNEITZER V. IOWA DEP' T OF ED.

Student with Asperger syndrome, obsessive compulsive disorder, mood disorder, adjustment disorder and Tourette syndrome and academically gifted.

Student auditioned for school show choir but was not selected.

School allowed her to participate in lower level choir, but mother wanted upper level

Ct said not necessary and was getting educational benefit without show choir.

IMPACT OF ENDREW F

Rowley “Some benefit” vs. Endrew F. “Meaningful benefit”

How has this impacted court cases?

Key appears to be “individual circumstances.

See cases later in presentation for some discussion of Endrew F. impact.

IEP

Individualized Education Plan – Rowley (Must provide some educational benefit, what does that mean?) New standard – Andrew F. v. Douglas County School District RE-1

“Appropriately ambitious in light of his circumstances” Every child should have the chance to meet challenging objectives.

More than merely de minimis!

Rights transfer when child reaches 18 unless interdicted

PROCEDURAL SAFEGUARDS

If too many procedural safeguards are violated, it may constitute substantive violation.

Time

Personnel

Notifications



ELIZABETH B. V. EL PASO CNTY. SCH.
DIST., 841 F. APP' X 40 (10TH CIR.
2020)

Unilateral placement cost in private school

FBA & intervention plan was at issue – Not required to have one, but does require school to consider the use of positive behavioral interventions and supports when behavior impedes the child's learning or that of others (see other cases that focus on the lack of an assessment and plan)

No requirement for one-to-one applied behavioral analysis (ABA) from an ABA-certified instructor because the terms of the IEP were consistent with ABA principles. It said student would receive consistent reinforcement, first/then strategies, visual prompts, and errorless teaching strategies consistent with ABA-guided instruction.

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**S.S. V. BD. OF EDUC. OF
HARFORD CNTY., 498 F. SUPP. 3D
76 (D. MD. 2020)**

Student with an autism spectrum disorder.

No denial of FAPE because IEP conferred benefit to student as he reached 2 of 7 goals and 20 of 26 objectives

However, failure to timely conduct a FBA did contribute to denial of FAPE for next year, so IEP did not address student's behavioral issues until January of next year.

Failure to prevent student from escaping classroom was not disability discrimination under ADA as it was not bad faith or gross misjudgment as student was found in parking lot and staff had been dealing with another student at the time.

ALBUQUERQUE PUB. SCHS. BD. OF EDUC. V.
ARMSTRONG, 1:21-CV-00396 WJ-JHR
(D.N.M. DEC. 13, 2021)

Methodology for Students with Dyslexia

Parents perceived a lack of progress in reading

HO ordered 1 hour of compensatory education in 1:1 dyslexia-specific reading instruction and ordered IEP team to include writing goals and inclusion support in math

SPIRE could be effective, but district had unreliable and inconsistent measures that = lack of meaningful progress

SPIRE teachers had no specialized training regarding dyslexia; thus, no capacity to provide the needed instruction

Limited impact of Covid discussed (attendance etc.)

R. B. V. DOWNINGTON AREA SCH.
DIST., 509 F. SUPP. 3D 339 (E.D.
PA. 2020)

Other health impaired, ADHD, and speech. Increasing behavioral issues parents moved to private

Initial IEP did not have baseline data for goals and was found to be procedural deficient even though not legally required.

Questions if procedural issue found (1) Was the student's right to a FAPE impeded? (2) Was the parent's opportunity to participate in decision-making significantly impeded? (3) Was there a deprivation of educational benefit?

Next year was impacted by failure to timely address behavioral issues

Utilization of varied instructional program instead of one parents wanted is not violation of FAPE (used 7 different reading curriculums, phonetics game, evidence of improvement).

WEBSTER V. CHESTERFIELD CNTY. SCH. BD. 534 F. SUPP. 3D 537 (E.D. VA. 2021)

Paraprofessional filed sexual harassment claim because eight year old student grabbed her private parts

Classroom teacher said child's behavior was not unusual for student with Down syndrome though they recorded events and worked to minimize potential incidents

In March, student grabbed her repeatedly and Title IX investigation began for hostile work environment

Conduct was unwelcome, but not based on Para's sex, conduct not severe enough to alter working conditions, and district not at fault. Court noted difficulties with work of special education

Staffing special education is difficult and folks need to be moved around. Principal maintained open dialogue with Para

SWOGGER V. ERIE SCH. DIST., 517 **F. SUPP. 414 (W.D. PA. 2021)**

17 year old had meltdown and began swearing and was confronted by 2 police and 2 district employees near principal's office after earlier incident. Ordered to leave school. Allowed to call mom (who missed call) and then gently pushed out the front door and locked behind him.

Principal called mom as well, but mom did not get message for hours. No arrangements for him to get home despite IEP and behavior plan that said he was to be transported to and from school. Lived 2.8 miles away and did not know how to walk home or take public transport. He did get home finally

Student afraid to attend school, did not follow BMP, had some online courses, suffered emotional and mental damage

Does Title II and Section 504 allow noneconomic damages? Some circuits say YES, but 3rd Circuit has not ruled. 5th Circuit says NO. Court sided with 11th circuit and said YES

PARRISH V. BENTONVILLE **SCHOOL DISTRICT, (8TH CIR.** **2018)**

4 different children each diagnosed with autism (all with behavior issues involving serious aggression).

Judges are not trained educators so review limited**

Reasonable steps to train teachers; B) Did not use physical force or seclusion that denied FAPE; C) Held programming conferences and informal meetings to propose, implement and modify and communicate behavior and academic progress; D) Collection of BIP data complied with IDEA; E) Strategies not perfect, but complied with IDEA; F) Parents allowed meaningful participation opportunity

M.L. V. SMITH, NO. 15-1977 **(4TH CIR. 2017)**

Student with Down syndrome was member of Orthodox Jewish faith and attending a private religious school associated with that faith.

Age 9 parents wanted public school and the public school assessment said he could learn in public school with constant repetition and consistency.

Parents rejected because it did not provide functional instruction to prepare for life in Orthodox Jewish community

Court ruled for district holding religious and cultural instruction does not fall within school's duty.



MINNETONKA PUBLIC SCHOOLS **VS. M.L.K. (8TH CIRCUIT** **UNPUBLISHED)**

Intriguing case on issue of assessing all areas of suspected disability.

Initial evaluation after K – autism. Used IEP for K, 1, 2, and 3.

Specialized instruction in reading, writing and math.

Slow progress led to increased 1:1 support and added small group instruction in the Wilson Reading System.

Due process filed with request for IEE. Came back with addition of dyslexia & ADHD & district revised IEP to add secondary classification of speech/language impairment.

H.O. found denial of FAPE for whole 4 years

Dist. Ct. agreed based on failure to identify dyslexia & ADHD.

What about 8th Circuit?

8TH CIRCUIT DECISION

Failure to add diagnosis of dyslexia & ADHD - no violation (fulfilled by including struggles with reading & attention)

Even if misclassified Child was not denied FAPE because IEP met the Endrew F. standard

Although the court acknowledged the IEP goals were largely the same for the 2 years, the overall trend showed that the School District set achievable, measurable goals that, when combined with consistently increasing special education services, were reasonable calculated to allow the child to make appropriate progress.

COURT DECISION SUMMARY: A CAUTIONARY TAIL

Decision illustrates the difficulty in applying the “all areas” evaluation requirement of IDEA.

Majority focuses on substance of the IEP under Endrew F. rather than labels.

But see H.O. and Dist. Ct. decisions that indicate more than 1 interpretation depending upon the particular circumstances of the case, including the judge and the jurisdiction.

HEATHER H. VS. NORTHWEST INDEPENDENT SCHOOL DISTRICT (5TH CIR. UNPUBLISHED)

K child – parents requested evaluation and provided private psychological evaluation showing Autism Spectrum Disorder, Generalized Anxiety Disorder & separation anxiety

District focused on autism and multi-disciplinary team found child did not qualify for IDEA Services.

Parents requested IEE and district denied and filed for DP

Parents got an IEE that concluded child was eligible under IDEA classification of emotional disturbance (ED).

H.O. ruled school district's evaluation was appropriate and declined to order reimbursement for IEE.

District court ruled for school district as well

5TH CIRCUIT RULING

District did evaluate in “all areas of suspected disability” because it did not have reason to suspect ED as K teacher credibly testified that in the school setting the child did not manifest the anxiety diagnoses and was within typical range + evaluation included the BASC-3 which assessed his behavior and emotional functioning.

Parents claimed district should have assessed autism via the ADOS-II instead of the CARS-2 and the SRS-2 But 5th circuit said in the absence of IDEA statutory or regulatory criteria beyond general standards for technical soundness and lack of specific evidence of violations of these standards, the school district’s selection of evaluation tools is entitled to judicial deference.

CONCLUSIONS

Applicable regulations require the school district to show its evaluation was appropriate “or” that the IEE did not meet these same criteria.

Illustrates the general pro-district trend of court decisions specific to district evaluations/reevaluations and IEEs under the IDEA. Nevertheless, school districts should continue to keep in mind the distinction between minimum legal requirements and proactive professional best practices

G.D. V. SWAMPSCOTT PUB.
SCHS. 27 F.4TH 1, 400 EDUC. L.
REP. 32 (1ST CIR. 2022)

Child from private school (K-1) requested evaluation

Child found eligible due to learning disability and parents requested placement in a substantially separate school for language-based disabilities, but district placed in a partial inclusive placement at a district elementary school

Later due to slow progress district proposed a substantially separate language-based classroom in the district

In spring the child was reassessed and found to be improving in several areas and making progress toward goals of her IEP. Parents not happy and stated intention for unilateral placement at private school.

H.O. and District Court ruled for school district.

1ST CIRCUIT OPINION

Whether IEP was reasonably calculated to enable a child to make progress appropriate to her circumstances did not depend on how the child performed on statewide standardized tests designed to measure progress without regard to a child's circumstances.

H.O.'s reliance on informal assessments that showed the child had made slow gains under her IEP was not erroneous given that this finding was based on her individualized circumstances.

H.W. V. COMAL INDEPENDENT SCHOOL DISTRICT (5TH CIRCUIT UNPUBLISHED)

FAPE & LRE for 3rd grader based on Down Syndrome and various other learning and health impairments

Based on inadequate progress in K, IEP modified for more inclusion support with resource for math & reading and a revised BIP.

In light of continuing difficulties increased separate special services but relenting to parents for further inclusion & ESY

Later parents agreed to more resource-room instruction

Next year school proposed majority in self-contained due to failing grades & behavioral difficulties & parents sought IEE

District started IEE but parents filed DP – IEE recommended continued inclusion but H.O. said blended placement = FAPE

5TH CIRCUIT RULING UTILIZING MULTI-FACTOR ANALYSIS UNDER DANIEL R.R.

**Did Dist. take steps to accommodate in general education –
Yes due to repeated revisions with successive increases in
inclusion support = not mere token gestures**

**Did child receive meaningful academic & non-academic
benefits in general education – NO. Court rejected IEP-centric
test in favor of holistic approach to meaningful. “Even
though she ultimately mastered many goals she was still
regressing and failing behind in other areas**

**Overlapping 3rd factor is whether child’s balance of benefits
was in favor of general education – NO. Ct. recognized
potential benefits of language models in general education,
but her academic and behavioral benefits were much more
notable than her increasing stagnation in the inclusive
placement.**

5TH CIRCUIT RULING CONTINUED

4. Did the child have a disruptive effect on her nondisabled peers – YES. Court found she engaged in various disruptive behaviors, including hitting, biting, and kicking staff and peers; screaming and moaning; and swiping materials off desks.

This case illustrates the application of the multi-factor test that prevails in most jurisdictions and that yields varying judicial outcomes.

CROFTS V. ISSAQUAH SCHOOL **DIST. NO. 411 (9TH CIRCUIT)**

Evaluation of successive IEPs for student with dyslexia

Parents got IEE in summer before 2nd grade stating “the classic profile of the special learning disability of dyslexia”

District found eligibility

40 minutes of reading and writing in special- education instructional room + accommodations in general room

Student progressed toward but did not meet goals. IEP team revised goals and increased special-education instructional time to 60 minutes. District rejected requests for Orton Gillingham reading program, specific classification of dyslexia and an IEE at public expense.

H.O. and Federal Court ruled for School District.

9TH CIRCUIT RULING

Parents claimed all areas of suspected disability were not assessed. Court said District did not procedurally violate IDEA finding language-related services under SLD rather than using term dyslexia. Court might have meant parents did not show harm. It did include original dyslexia assessment and parents did not identify any additional testing need nor showed students difficulties were different from SLD.

Court found District met substantive standard under Endrew F. without providing for specific approach. Court cited traditional deference to District methodology in provisions and implementation of IEP, while noting the exception for preponderant proof that a particular approach was necessary for the requisite progress.

9TH CIRCUIT RULING CONTINUED

Court reasoned that Endrew F. standard does not require meeting “all” IEP goals or grade-level expectations.

Bottom line is to continue individualized evaluation and FAPE determinations with due consideration for, but not overreliance on, particular diagnoses, such as dyslexia, methodological brands, such as Orton-Gillingham; or stilted interpretations of Endrew F.

CONFIDENTIALITY

Supreme Court of Alabama (504 case)

Updated report for 12th grader with medical condition requiring special accommodations

Report placed in sealed envelopes and student worker was to deliver to each teacher but read report before doing so and told others

Plaintiff alleged ridicule, harassment and bullying resulted. Claimed negligent hiring, training and supervision

CONCLUSIONS

There are Special Education Issues -- not problems

Communication upfront is best

Items to consider:

A. Behavior plan

B. Personnel

Schedule

Individual Circumstances of the Child

What is best for the child under the circumstances

CONTACT INFORMATION

Nathan M. Roberts, J.D., Ph.D.

Professor, College of Education

**University of Louisiana at
Lafayette**

(337) 482-5744

nathan.roberts@louisiana.edu