

The Supreme Court's Recent Decision in *Endrew F.*: A Game Changer for Substantive FAPE?

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These slides provides updated highlights based on the the following article, which provides more complete explanation and citations:

Zirkel, P. A. (2017). The Supreme Court's decision in *Endrew F. v. Douglas County School District RE-1*: A meaningful raising of the bar? *West's Education Law Reporter*, 341, 545-554.

The updates include the lower court decisions that interpreted and applied *Endrew F.* in the first few months after the Supreme Court's March 22 issuance of this decision.

Pre-*Endrew F.*: A Quick Overview

The Focus in the IDEA

FAPE

The “central pillar” of the IDEA is to provide each eligible student, via an individualized education program (IEP), with a free appropriate public education (FAPE).

The courts have developed four dimensions of FAPE: (1) procedural, (2) substantive, (3) failure to implement the IEP, and (4) capacity to implement the IEP.

The Supreme Court’s *Endrew F.* decision addressed the substantive dimension.

The Focus in Rowley

Rowley

In *Board of Education v. Rowley* (1982), the Supreme Court established the first two dimensions of FAPE:

- (1) Does the IEP comply with the procedures set forth in the IDEA?
- (2) Is the IEP reasonably calculated to enable the child to receive educational benefits?

The procedural side was not at issue in this case, thus focusing on the second, substantive standard.

The Focus in Rowley (cont.)

Rowley (cont.)

However, the Court disclaimed a general standard, limiting the scope to the factual contours of the case:

- a child with a disability (here, deafness) who was integrated in a regular classroom and performing above average in relation to her peers
- two non-absolute indicators were (1) achieving passing marks and (2) advancing from grade to grade

Period Between Rowley and Endrew F.

The Rowley Aftermath

The lower courts during the next two decades added two twists to the *Rowley* formulation:

- [For procedural FAPE, the courts added a second step, focusing on whether the violation(s) resulted in loss to the student. In IDEA 2004, Congress codified this two-step test, adopting the alternative at the second step of loss re parent participation.]
- For substantive FAPE, the circuits divided into two camps: “some” (i.e., more than *de minimis*) and “meaningful” educational benefit.

Endrew F. (2017)

The Level Directly Below the Supremes

The Tenth Circuit Court of Appeals’ Decision

In 2016, the Tenth Circuit Court ruled in favor of the district for the two dimensions of FAPE as applied to a child with autism in a segregated setting (where the requested relief was tuition reimbursement):

- [On the procedural side, the court ruled that gaps in progress reporting and lack of FBA/BIP constituted, at the second step, harmless procedural error.]
- On the substantive side, the court applied the some benefit standard to uphold the sufficiency of the IEP.

The Supreme Court's Decision

Holding

The Court, on an 8-to-0 vote, held that the IEP must “reasonably calculated to enable [the] child to make progress appropriate in light of the child’s circumstances.”

- “reasonably” – confirming that optimal is not the standard
- “calculated” – confirming that the judgment is prospective and does not guarantee “any particular outcome”
- “progress” – “functional and academic advancement” as the essential function of the IEP

The Supreme Court's Decision (cont.)

Dicta

“the child’s circumstances”:

- integrated settings – retaining *Rowley*’s frame of reference of passing grades and annual promotion – not inflexible and automatic
- other settings – “appropriately ambitious” analogy
 - “the goals may differ but ... the chance to meet challenging objectives”
 - “careful consideration of the child’s present levels of achievement, disability, and potential for growth”
 - declining bright-line rule and specific elaboration

The Supreme Court's Decision (cont.)

Dicta (cont.)

Overall level:

- markedly more demanding than “some benefit”
- sidestepping “meaningful benefit” altogether
- rejecting “substantially equal to the opportunities afforded children without disabilities”

The Supreme Court's Decision (cont.)

Dicta (cont.)

Judicial deference:

- repeating *Rowley* dicta for deference to school authorities
- but calling for school authorities to provide “a cogent and responsive explanation” for meeting the new, refined substantive standard

Ultimate outcome:

- remand for application of this substantive standard to this particular child (and inferably, if not met, to the child's unilateral placement)

Immediate Aftermath
of *Endrew F.*

The Immediate Aftermath

Range of Stakeholder Views

One side:

- dramatic elevation – e.g., “a game changer”

Other side:

- lower than “meaningful benefit”

Tempered view:

- lack of rigor of the specified indicators in light of grade inflation and social promotion
- circular qualifier of “appropriate” even for “ambitious”
- benefit already assessed in terms of progress

The Immediate Aftermath (cont.)

Range of Case Law Outcomes

During the first 4 months after its 3/22/17 issuance, the lower courts applied *Andrew F.* in the substantive FAPE rulings of 18 cases in which the hearing officer had ruled in the district's favor.

- in 2 (11%) of the 18 cases, the lower court remanded the ruling for re-doing under the new standard
 - 1 of the 2 cases previously used "meaningful" and translated the new standard commensurate opportunity in relation to the general curriculum
 - the other 1 characterized as unclear whether the new standard is different from "some" benefit

The Immediate Aftermath (cont.)

Range of Case Law Outcomes (cont.)

- in the other 16 (89%) of the 18 cases, the lower court upheld the ruling, i.e., reached the same result, for substantive FAPE under the new standard
 - approximately half of the 16 rulings previously used "some" benefit or an unclear standard
 - only a few of the 16 rulings the court recognized the distinction between integrated and segregated settings
 - the only other notable dicta was the use of the "cogent" qualifier for deference in 1 of the 16 rulings

The Immediate Aftermath (cont.)

Tentative Take-Aways

As a prophylactic, professional matter of best practice, use rigorous standards that emphasize parental participation and student progress.

As an objective legal matter, beware of (a) extreme characterizations of *Andrew F.* that rely on selective dicta, such as unqualified use of "ambitious," and (b) overgeneralizations that blur the flexible, individualized nature of the standard.

The Immediate Aftermath (cont.)

Tentative Take-Aways (cont.)

- Also for objective analysis, consider carefully:
 - the only-illustrative circumstances (e.g., “potential for growth”)
 - the LRE distinction re the non-absolute progress indicators (e.g., passing grades)
 - the application of the new, refined substantive standard to the second step (i.e., the appropriateness of the unilateral placement) in tuition reimbursement cases

References

Case Law:

- *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).
- *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329 (10th Cir. 2015), *vacated and remanded*, 137 S. Ct. 988 (2017).

Secondary Sources:

- Wenkart, R. D. (2009). The *Rowley* standard: A circuit by circuit view of how *Rowley* has been interpreted. *West's Education Law Reporter*, 247, 1–30.
- Zirkel, P. A. (2017). The Supreme Court's decision in *Andrew F. v. Douglas County School District RE-1*: A meaningful raising of the bar? *West's Education Law Reporter*, 341, 545–554.
