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Here and Now

Andrew F. and the Shifting Standard of FAPE



What's On the Agenda . . .

- History and Background
- The Andrew F. Decision
- Subsequent Application of Andrew F. in FAPE Disputes
- Has Andrew F. Significantly Changed the IDEA's FAPE Standard?
- Practice Pointers: Post-Andrew F. Compliance Tips

Things To Do	
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I. History and Background



Rowley FAPE Standard

- Amy Rowley, student with hearing impairment, was educated primarily in general ed setting, with some supports
- Achieved at or above grade level, but was not able to fully understand her instructors
- District offered FM system; Parents wanted sign language interpreter



Rowley FAPE Standard

- Case ultimately reached U.S. Supreme Court
- 1983 ruling stated that IDEA statute set no actual standard of FAPE
- Decision used phrase “some educational benefit” as standard for whether school district has complied substantively with IDEA
- Rejected “maximization of potential” standard



Rowley FAPE Standard

- Rowley decision expressly declined to state more specific test for determining adequacy of educational benefits
- Circuit Courts adopted various interpretations of “some educational benefit”
- Ninth Circuit decisions interpreting Rowley were not always consistent with each other



9th Circuit: Pre-Andrew F.

N.B. v. Hellgate Elem. School (2008)

- “A school must provide a student with a **‘meaningful benefit’** in order to satisfy the substantive requirements of the IDEA”
- IDEA 1997 enhanced schools’ obligations beyond Rowley by requiring them to do more than simply ‘open the door’ to children with disabilities



9th Circuit: Pre-Andrew F.

J.L. v. Mercer Island School Dist. (2009)

- Rowley's basic floor of opportunity standard is still in effect
- School districts must, to “make such access meaningful,” confer at least “**some educational benefit**” on disabled students



9th Circuit: Pre-Andrew F.

Anchorage School Dist. v. M.P. (2012)

- Reaffirmed Mercer Island decision
- “Educational benefit” is satisfied when a district provides “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction”



II. The Andrew F. Decision



Andrew F. – Facts

- Student diagnosed with autism at age 2; diagnosed with ADHD at age 3
- Student's autism affected his cognitive functioning, language and reading skills, and his social and adaptive abilities
- Attended District schools from preschool through fourth grade



Andrew F. – Facts

- Behavior problems escalated during third and fourth grades
- District scheduled meeting to address behavior issues, but Parents withdrew Student, claiming he was not progressing
- Placed Student in private school specializing in educating children with autism
- Sought tuition reimbursement



Andrew F. – History

ALJ and District Court (2014)

- No denial of FAPE
- District made sufficient efforts to develop BIP before Parents withdrew Student
- Although IEPs contained essentially same goals and objectives, team's modifications to short-term objectives showed Student was making slow but steady progress



Andrew F. – History

10th Circuit (2015)

- Affirmed District Court's ruling
- Educational benefit mandated by IDEA must merely be "more than *de minimis*"
- Declined to adopt higher "meaningful benefit" FAPE standard
- Sufficient indications of Student's progress



Andrew F. – History

- September 2016: U.S. Supreme Court agreed to review 10th Circuit's decision
- Sole question addressed: What is level of educational benefit districts must offer for a student to receive FAPE under the IDEA?
- March 2017: Decision released (unanimous)



Andrew F. – Supreme Court

- In order to meet their substantive obligation to provide FAPE under IDEA, districts must offer IEPs that are “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”
- Each child’s educational program must be “appropriately ambitious”



Andrew F. – Supreme Court

- Court explicitly rejected the “merely more than *de minimis*” test for educational progress applied by 10th Circuit
- Andrew F. does not overturn Rowley
- Instead, it expands scope of Rowley’s “some educational benefit” standard



Andrew F. – Supreme Court

- “Rowley sheds light on what appropriate progress will look like in many cases: For a child fully integrated in the regular classroom, an IEP typically should be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade’”



Andrew F. – Supreme Court

- But “it cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than *de minimis* progress for children who are not”



Andrew F. – Supreme Court

- Court agreed with approach established in Rowley that “any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal”



Andrew F. – Supreme Court

- Court declined to establish any “bright-line” standards for IEPs
- “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created”
- Courts should not “substitute their own notions of sound educational policy for those of the school authorities which they review”



Andrew F. – Supreme Court

- Court rejected argument by Parents that IDEA requires districts to provide students with educational opportunities that are substantially equal to the opportunities afforded children without disabilities



Andrew F. – Retroactive Effect

- Each of the deciding triers of fact in Andrew F. relied upon what they considered to be the FAPE standard
- U.S. Supreme Court essentially said, no, that was never the standard and returned case back to the 10th Circuit
- How does that impact cases today?



III. Subsequent Application of Andrew F. in FAPE Disputes



Ninth Circuit's Interpretation

M.C. v. Antelope Valley Union High School Dist. (9th Cir.)

- School must implement an IEP that is “reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can make progress in the general education curriculum taking into account the progress of his nondisabled peers and the child’s potential”

(M.C. v. Antelope Valley Union High School Dist. (9th Cir. 2017) 852 F.3d 840, 117 LRP 21748)



IEP Goals Address Needs

K.M. v. Tehachapi Unified School Dist. (E.D. Cal.)

- Court upheld ALJ's pre-Andrew F. ruling in District's favor
- IEP goals addressed needs of Student with autism and enabled progress in light of Student's circumstances
- Goals directly measured Student's ability to remain on task

(K.M. v. Tehachapi Unified School Dist. (E.D. Cal. 2017) 69 IDELR 241)



Behavior Strategies Offered FAPE

N.G. v. Tehachapi Unified School Dist. (E.D. Cal.)

- Despite District's failure to conduct FBA when requested by Parent, IEP behavior provisions were "appropriately ambitious"
- District implemented strategies (adult aide, positive reinforcement, etc.) that addressed aggressive behavior and elopement issues

(N.G. v. Tehachapi Unified School Dist. (E.D. Cal. 2017) 69 IDELR 279)



NPS Allows Student to Progress

San Mateo-Foster City School Dist. (OAH)

- ALJ applied Endrew F. standard to find District's offer of continuing NPS therapeutic day treatment program would enable Student with ED to make continued progress
- Student demonstrated considerable improvement and peer interactions during time at NPS

(Student v. San Mateo-Foster City School Dist. (OAH 2017) Case No. 2016090418, 117 LRP 16950)



Reduction in Services Denies FAPE

Irvine Unified School Dist. (OAH)

- First-grade Student with autism received intensive 1:1 aide support (30 hours/week) at previous District
- District's interim IEP offered aide support for only one hour per day
- IEP offer denied FAPE under both Rowley and Endrew F.

(Student v. Irvine Unified School Dist. and Irvine Unified School Dist. v. Student (OAH 2017) Case Nos. 2017030696 and 2017031348, 117 LRP 32125)



Circumstances Require SDC

Garvey School Dist. (OAH)

- District appropriately determined Student with orthopedic impairment and ID required spending 91 percent of day in SDC
- Restrictive placement necessary for progress
- “Clarification of the Rowley standard by . . . Andrew F. does not affect the outcome”

(Garvey School Dist. v. Student (OAH 2017) Case No. 2016110339, 117 LRP 11715)



No Progress in General Classroom

Elk Grove Unified School Dist. (OAH)

- ALJ upheld District's proposed self-contained classroom to address behavior challenges presented by Student with autism
- IEP was "appropriately ambitious" for Student who "could not . . . progress smoothly through the regular curriculum"
- Student was being left behind in general class

(Elk Grove Unified School Dist. v. Student (OAH 2017) Case No. 2016110439, 117 LRP 17196)



No Need for Bilingual Aide

Glendale Unified School Dist. (OAH)

- Parents claimed Student in dual language immersion program needed bilingual behavior aide to perform at same level as peers
- Parents misapplied Andrew F. FAPE standard
- District's aide improved Student's behavior, allowing for "meaningful educational benefit"

(Student v. Glendale Unified School Dist. (OAH 2017) Case No. 2017031019, 117 LRP 32140)



Decisions from Other Jurisdictions

- C.G. v. Waller Indep. School Dist. (5th Cir.)

Fifth Circuit found preschooler's IEP "appropriately ambitious" in accordance with Andrew F.

- E.D. v. Colonial School Dist. (E.D. Pa.)

Court refused to disturb pre-Andrew F. ruling, finding that Hearing Officer took into account "unique circumstances" in upholding IEP



Decisions from Other Jurisdictions

- A.G. v. Arlington Cent. School Dist. (S.D.N.Y.)

Court upheld resource room placement/services for 12-year-old with dyslexia, finding progress was “not trivial” and satisfied Andrew F.

- T.M. v. Quakertown School Dist. (E.D. Pa.)

District complied with Andrew F. by regularly tracking Student’s progress on goals to demonstrate “meaningful educational benefit”



Decisions from Other Jurisdictions

- Paris School Dist. v. A.H. (W.D. Ark.)

Behavior plans that focused solely on “noncompliance” were inadequate “especially in light of the higher standard of Endrew F.”

- C.D. v. Natick Pub. School Dist. (D. Mass.)

Court returned case to Hearing Officer, requiring determination if “educational benefit” standard applied by HO was consistent with Endrew F.



IV. Has Andrew F. Significantly Changed the IDEA's FAPE Standard?



The More Things Change . . .

- Andrew F. standard appears to be more restatement than departure from existing FAPE viewpoints (except for 10th Circuit)
- So far, courts and OAH continue to focus their FAPE analyses on reasonableness of IEP in light of student's needs



Differing Opinions

- Point: Andrew F. offers no new analytical framework for courts since it was derived from IDEA FAPE language, which hasn't changed since statute's inception
- Counterpoint: Andrew F. provides parents with better argument that IEPs need to be more ambitious overall and cannot reiterate or only slightly modify previous year's goals



What's Next?

- Andrew F. likely will result in closer scrutiny of districts' IEPs and an increase in litigation based on the perception (true or not) that the FAPE standard has been heightened
- Awaiting how courts and OAH will apply Ninth Circuit's Antelope Valley language



V. Practice Pointers: Post-Andrew F. Compliance Tips





Practice Pointer #1: Terminology

- Be prepared to field questions about the provision of FAPE following Endrew F.
- Remember that Endrew F. requires districts to “offer a cogent and responsive explanation” of their determination that the IEP enables the student to make progress





Practice Pointer #2: Assessments

- Andrew F. underscores the importance of thorough assessments—and reassessments—to ensure an understanding of the student’s “circumstances” when developing or revising his or her IEP





Practice Pointer #3: Record-Keeping

- Take steps to improve record-keeping and reporting on progress
- Reconvene IEP team as necessary to review progress “in light of circumstances”
- Document all efforts to provide FAPE, especially with students who are not making a great deal of progress





Practice Pointer #4: Benchmarks

- Andrew F. requires that a student's IEP must be "appropriately ambitious"
- IEP teams should make sure to document benchmarks of what this phrase might mean for students with varying abilities
- "Ambitiousness" can be measured over time by summarizing mastered goals





Practice Pointer #5: Goals

- A lesson from Andrew F. is not to repeat student's goal from previous IEPs without addressing "why" and adjusting criteria to make goal more realistic
- If a student does not master a goal, indicate why – and if no reason can be pinpointed, the team should ask whether goal was appropriate in the first place





Practice Pointer #6: Grades

- Particularly for students who do not receive full-time instruction in general education classroom, IEP teams should not rely solely on grades or advancement from grade-to-grade as evidence of a FAPE





Practice Pointer #7: Procedure

- While Endrew F. emphasized substantive standard of FAPE, IEP teams should be aware that procedural violations—in and of themselves—can deny FAPE
- Continue emphasizing parent participation in IEP process, avoid predetermination and adhere to IEP team composition requirements





Practice Pointer #8: General Education Staff

- Following Andrew F., full-inclusion programs might feel pressure to have all their students meet grade-level standards
- General education teachers and administrators should become familiar with expectations placed on education programs for students with disabilities



Take Aways . . .



- Although the Andrew F. standard is a brand new judicial articulation, it is one that most districts and their IEP teams have been following dating back to Rowley—considering the child’s needs and abilities on a case-by-case basis and developing an IEP that is product of that analysis



Take Aways . . .



- It is important to recognize that new “educational benefit” language of Andrew F. does not mean that what IEP teams were doing prior to March 22, 2017 (the date of the Andrew F. decision) is now illegal today



Take Aways . . .



- IEP teams should continue to collaborate to determine each student's needs, connect needs to measurable goals, design individualized services in an appropriate placement—all to enable the student to make progress in light of his or her circumstances



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