IAASE WINTER CONFERENCE

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"The Year in Review: Interesting Cases Impacting State Law in the Field of Special Education"

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SO WHAT EXACTLY IS FAPE?

Endrew F. v. Douglas County School District. This case is pending before the United States Supreme Court and will impact special education cases for years to come. This case will change the legal standard under which courts will examine all future cases when a parent questions whether their school district has offered their child a Free Appropriate Public Education (FAPE) pursuant to the *Individuals with Disabilities Education Act* (IDEA). The Supreme Court heard oral arguments on January 11, 2017 and a decision is expected sometime in June. In this case, the school district has argued that Congress intended to defer to the states and local school districts to make decisions on programming for individual students and that the FAPE standard set forth previously by the Supreme Court in the case of *Board of Education v. Rowley*, whereby a district needed to show that they are meeting a student's educational needs above "more than merely de minimus" standard, provides the flexibility needed to apply that law. If the FAPE standard is supposed to be more than that, any change in that standard should be made by Congress, they argued.

In this particular case, Endrew is a 5th grade student with autism and behavioral issues who showed some, but little, progress on his IEP goals while in his public school program. His parents removed him from that program and unilaterally placed him in a private school program, where they allege he was making "significant" progress. The parents are seeking reimbursement for their costs associated with providing their son with that private program from their public school district. Other issues were raised as well, such as their claim that the district did a poor job of recording Endrew's progress on his goals, thus impeding their ability to participate in his education in a meaningful way. They also argued that a lack of an FBA/BIP over a two year time period denied their son of a FAPE. They argued that year after year his IEP's were similar and did not address his behavioral issues in a meaningful way, arguing that because of this he did not obtain an educational benefit from the public school program.

Both the district court and 10th Circuit Court of Appeals held in favor of the public school's program, ruling that their program provided FAPE under the *Rowley* standard. In *Rowley*, the Court held that "Insofar as a State is required to provide a handicapped child with a free appropriate public education, we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." This language has since been referred to as the "some benefit" or "more than merely de minimus benefit" standard. The 10th Circuit found that the parents communicated with their school on a daily basis and also received draft IEP's seeking their input on a yearly basis, rejecting their assertion that they were not given the opportunity to participate in their son's education in a meaningful way. They also ruled that IDEA does not "mandate" that public schools provide BIP's, except for disciplinary reasons, and that the school responded to the parents behavioral concerns by involving outside consultants to advise the school regarding Endrew's behavior.

During oral argument, an attorney from the Solicitor General's Office suggested changing the FAPE standard articulated in *Rowley* and now require a showing that the program recommended for the student be reasonably calculated to achieve "significant" educational progress toward grade-level standards in light of the child's circumstances. If the Supreme Court rules that the

new standard for determining whether a student obtains a FAPE is a showing that they made "significant" progress, schools are in for a very busy annual review season!!!

FAPE IN ILLINOIS: HOW LONG MUST YOU FAIL IN THE LEAST RESTRICTIVE ENVIRONMENT BEFORE YOU CAN BE APPROPRIATELY PLACED?

Jason O. v. Manhattan Sch. Dist. No. 114 (appeal pending). This case decided multiple issues, one of which was the issue of what constitutes an appropriate placement, taking into consideration not only whether the placement offered was capable of providing the student with a FAPE, but also whether that proposed placement was provided in the least restrictive environment for that student. The case ended up in due process when the district determined that Jason needed a change of placement from a program in the general education setting with every conceivable supportive service to a change of placement to a self contained program designed to provide a more structured setting for children who require constant social-emotional supports. The proposed program was not part of any mainstream classroom and was housed in an entirely different building. The parents rejected that proposed placement and filed for due process.

Once the case went to a hearing, its' focus had expanded to include other issues, such as allegations of procedural violations, questions about the adequacy of assessments that were administered, whether the district pre-determined placement and later, while in due process, whether the district violated the protections of the "stay-put" regulations. There was also some reimbursement issues connected to the use of private evaluations that the parents provided to the district during the course of Jason's education. The main issue, however, was placement.

The court applied the FAPE standard articulated by the 7th Circuit, that an IEP must be "reasonably calculated" to confer educational benefit when it is likely to produce progress, not regression or trivial educational benefit. That degree of progress will vary, depending upon the student's abilities. It remains to be seen just how far this FAPE standard will be increased by the Supreme Court with their upcoming ruling in the *Endrew* case. In Jason's case, the court sided with the due process hearing officer. They both felt that Jacob's academic and behavioral goals were not being met in a general education setting, even with the provision of additional adjustments, supports, and related services.

Taking into consideration least restrictive environment concerns, Jacob could not receive the immediate and frequent interventions needed to address his anger and insensitivity issues unless and until he was removed from his current general education setting and placed in the district's self contained program. Citing 7th Circuit decisions on the least restrictive environment requirement of the law, the court found that "[T]o determine whether keeping a child in a regular school is appropriate, the Seventh Circuit has directed this Court to ask whether the education in the conventional school was satisfactory and, if not, whether reasonable measures would have made it so." The evidence presented at the hearing clearly showed that there were no further adjustments available that could have been applied to the general education program that would have been adequate in lieu of placing Jacob in their self contained program.

As we see in many other placement cases, there was evidence of multiple times in the past when the district felt that Jason's needs were not being appropriately addressed and he needed to be placed in a more restrictive setting. However, his parents would not go along with any such placement change, so they acquiesced and let him remain in his current general education setting while providing additional supports. His escalating behaviors finally forced them to draw that line in the sand and take the position that his LRE was a self contained setting. It resulted in a 6 day hearing, which I am sure was no picnic. However, in the end, the district prevailed on all counts, except for one adjustment made to the amount of reimbursement they were ordered to pay for two private evaluations that had been covered mostly by the parents' insurance carrier.

SAFETY PLANS: A HELPFUL INTERIM MEASURE

Berkeley (IL) School District. Sometimes, circumstances do not allow districts to hold IEP meetings to review and revise IEP's and make recommendations for a change in placement with the immediacy needed for the situation. In such situations, schools should consider the use of a safety plan. In this particular case, the district placed restrictions on an 8th grade student who posed a "direct threat" to herself and others. A psychiatric evaluation from the student's recent hospitalization indicated that she had "homicidal ideation". Her mother also informed the school that her daughter had also been collecting knives around the house. Considering the probability of injury and the nature, duration and severity of the risk involved, the school put together a safety plan that subjected the student to one-to-one monitoring and daily searches. The parent filed a complaint against the school with the Office of Civil Rights, alleging harassment.

OCR determined that the school's actions were not inappropriate in light of the child's recent psychiatric evaluation. They found that a district may place restrictions on a student who poses a direct threat to herself and others, so long as they conduct an individualized assessment or rely upon a report provided by an outside professional with facts and findings to support the need for implementing such a plan. That assessment must include a determination that the nature, duration, and severity of the risk and the probability of injury as well as whether reasonable modifications can be made to policies, practices, and procedures to mitigate any risk.

APPLICATION OF RtI PRACTICES TO PRE-SCHOOL CHILDREN

Memorandum to State Directors of Special Education. OSEP has instructed state special education directors, state preschool coordinators, and Head Start directors not to reject any referrals for an initial case study evaluation of a preschool student on the basis that their preschool program has failed to implement the RtI process with the child first. Typically, when school districts receive a request for an initial case study evaluation, they can either honor that request and begin the assessment process or deny the request, with the understanding that the law requires them to inform the person making the referral, in writing, of the basis for their denial. Failure to implement RtI activities with a student having educational difficulties is not a valid basis for a denial or postponement of a request for a case study when the student is in a preschool program which does not employ RtI at that level of instruction. If school personnel have reason to suspect that a child has a disability and needs special education and related services, they

should seek parental consent to evaluate and initiate the evaluation process on the basis of whatever data they have available to them, even in the absence of any RtI data, including information which would otherwise be considered for referrals of students in later grade levels.

OSEP stated that it is "critical" for educational agencies to timely identify preschoolers with disabilities who may be in need of special education. They warned not to "gum up the works" by requiring a preschool program to first provide RtI data on a child. An LEA may not extend the applicable time line or reject the referral solely on the basis that the preschool program must first monitor the child's developmental progress using RtI. OSEP added that a parent who believes that a district has declined to evaluate until the preschool program implements RtI may seek redress through either due process or state complaint procedures.

PARTY POOPER- MAKING ACCOMMODATIONS FOR EXTRA-CURRICULAR ACTIVITIES

Oswego (IL) Community Unit School District #308. A parent filed a complaint with the Office of Civil Rights after an end of school year roller skating party threatened to keep her son from participating. Her son has cerebral palsy, epilepsy, and autism. The parents of all of the 5th graders made plans to hold a roller skating party to celebrate the end of the school year. In previous years, the end of the year party had been a barbeque. Due to changes made in their district policies, they were no longer able to have barbeques, so a group of parents planned to hold a skating party for the kids instead. The District did not participate in the planning of the skating party.

The parents put together a flier about the party, which the school principal reviewed before it was sent home to other parents. The classroom teachers assisted with collecting money from the students to pass along to the parents who were organizing the activities. On the basis of those activities, OCR determined that this party was considered as a school-sponsored event. The student with epilepsy, cerebral palsy and autism could not participate in the skating activities due to his physical disabilities. He also had an adverse reaction to the use of strobe lights during some of the activities. Due to these reactions by her son, the mother filed her complaint, alleging that the school district was discriminating against her son on the basis of his disabilities, since he could not participate in any of the planned activities.

The district then got more involved. They arranged for the roller rink to turn off their strobe lights. They also assisted in coming up with some alternative activities that he could participate in during the skating activities, such as board games and card games. The parent was not satisfied with the alternatives proposed. She felt that the district should just cancel the activity in its entirety. OCR determined that under Section 504 regulations, federally funded districts must provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford disabled students an equal opportunity for participation in such services and activities. OCR ruled that the parent failed to provide any justification why the proposed alternatives were not suitable for her child and, therefore, denied her request that the entire activity be cancelled.

LEGAL STANDING: DO DIVORCED PARENTS HAVE AN EQUAL RIGHT TO REQUEST A DUE PROCESS HEARING?

Smith v. Crete-Monee CUSD 201-U and ISBE. After completing a case study evaluation of a middle school student, the district's IEP team found the student ineligible for special education. His biological mother disagreed with that determination, strongly believing that he qualified for an IEP. The student resides with his father and has been living with dad in the district since 2009. His father did not object to the Team's determination.

The mother filed a complaint for due process and sought a hearing before an ISBE impartial hearing officer for a review of the district's decision not to create an IEP for her son (he had a 504 plan). The Hearing Officer dismissed her complaint, ruling that she did not have the right to raise any such complaint because she was not the custodial parent. She then filed a subsequent complaint, before a different hearing officer, seeking relief for the district's failure to keep her informed of all school developments related to her son's education. That hearing officer allowed her to proceed with that complaint and a 4 day long hearing took place. That hearing resulted in a ruling by hearing officer number 2 stating that there was no evidence to support mother's allegations and that the district provided her with opportunities to participate in decisions concerning her son. The mother appealed both the first hearing order saying she had no standing to file for due process and the second finding that she was provided with the opportunity to participate in decisions involving her son's education. The district and ISBE filed motions to dismiss both actions.

The cases were decided on the basis of Illinois law. Under State law, the mother did not have the right to bring her claims on her son's behalf. The court ruled that under Illinois law, only the custodial parent has the right to make educational decisions, unless there is a court order that says otherwise (which there wasn't in this case). In this case, his biological mother had visitation rights and rights under the Illinois School Student Records Act to obtain access to her child's student records. However, the child resided with his father. Under their dissolution of marriage order, there was language clearly stating that the child was to remain in the care of his father. Under Illinois law, the father clearly had educational decision-making authority because he had custody of the child. "Although [mother] retained her parental right to obtain access to educational records, she lacked educational decision-making authority and therefore lacked standing to bring a due process complaint under the IDEA administrative process, according to [the hearing officer]." Under Illinois law, it is the custodial parent who has the right to make educational decisions, if no court order allocates decision-making authority differently. The noncustodial parent lacks standing under the IDEA to demand a hearing on the appropriateness of a school district's IEP evaluation or the provision of a FAPE.

RESOLUTION SESSIONS- BE CAREFUL WHAT YOU SAY!

Letter to Cohen. After a party files a request for a due process hearing, the law requires them to participate in one of two procedures to attempt to resolve their differences and avoid an adversarial hearing process that can impose a financial and emotional strain on both parties. The parties have the option of participating in a Resolution Session or in State-sponsored Mediation.

Their other option, if both sides agree, is to opt out of participating in either process and proceed directly to a hearing, do not pass go, do not collect $200. There are differences between the Resolution Session process and the State-Mediation process. We now know of another important distinction that could have a big impact on the hearing process, if matters go that far.

In a recent letter, OSEP is now advocating their belief that what is said in Resolution does not necessarily stay in Resolution. In other words, there is no confidentiality provision governing what the parties discuss if they participate in negotiations with each other in a Resolution Session. OSEP believes that unless the parent and district have agreed to keep their resolution meeting discussions confidential, either party may be able to introduce information that was discussed at that meeting in a subsequent due process hearing or court case.

Keep in mind that there is already a provision in the law that states that attorneys are not allowed to attend Resolution Sessions. Congress intended this negotiation to be between the parties only. The problem with that situation is that in the heat of the moment, some people tend to say things that are better off left unsaid. One party or the other could make an admission against their interests, not thinking that what they said may come back to haunt them later in the event they are unable to resolve all of their differences. "Absent an enforceable confidentiality agreement, either party may introduce information discussed during the resolution meeting at a due process hearing or civil proceeding when presenting evidence and confronting or cross-examining witnesses", OSEP wrote. Since school employees may not be very experienced in drafting good, iron-clad confidentiality agreements, you can see how this interpretation of the law by OSEP can lead to the introduction of some very damaging comments or information pertinent to the issues at hand in a subsequent hearing. In the future, school staff who meet with parents during resolution sessions need to be reminded, even as they are entering the room, to be very careful about what they say in that room.

HALT! WHO GOES THERE? ARE YOU AN ATTORNEY OR JUST MY FRIEND?

Letter to Andel. OSEP sent out this little letter offering their friendly advice to districts that they not cancel IEP meetings when a parent shows up with their attorney at a meeting and they did not give you prior notice of their intent to do so. They cite applicable federal regulations that clearly state that a parent has a right to bring an attorney with them to an IEP meeting if they so choose and point out that there is nothing in the law that says they have to give you any prior notice before doing so and they don't need the school's permission before bringing an attorney with them. If only things were so clear cut! I'm going to tell you about my personal nightmare and ask if you think this issue is as easy and clear-cut as OSEP (and ISBE) think it is.

Assume you are involved in a case with parents who you would characterize as being less than cooperative. These are the type of parents who communicate with your staff on a daily basis by phone, e-mail, or insulting entries in daily communication logs. When you attempt to schedule IEP meetings to address their concerns, they cancel at the last minute or keep changing meeting dates or just ignore your attempts to schedule the meetings, yet complain that you are refusing to meet with them and hear their concerns. They personally threaten and insult your staff to the

point where you have teachers and therapists in tears, or afraid to open e-mails, or principals who have to send letters putting restrictions upon the parents' access to school property.

Over a period of time of approximately 18 months, these same parents file over 9 complaints with ISBE, 4 complaints with OCR, 3 due process requests, and 3 false allegations with DCFS against the teacher and principal alleging physical and sexual abuse. They file an ARDC complaint against the district's attorney. Thinking that perhaps there may be personal issues between the parents and the district's legal counsel, the district changes attorneys. The new attorney representing the district then gets 2 ARDC complaints of his own. Your principal starts receiving subpoenas asking for records as part of an investigation by the State Education Preparation and Licensure Board over a complaint filed by a parent. The complaints and actions go on and on.

During a Pre-Hearing Conference between the Due Process Hearing Officer, the parents, the parents' attorney, and the district's attorney, the parents tell the hearing officer that their entire complaint is due to the fault of the district's attorney and it can be resolved in one short meeting if they could just meet alone with the district's Special Education Director and not have the district's attorney present in the room. The Hearing Officer asks the district's attorney if he would allow such a meeting to occur. He agrees, but only if the parents agree not to bring their attorney with them (since, after all, the matter is a pending due process matter). The parents agree to these terms. The meeting is scheduled, candles are lit, and staff are cautiously optimistic.

On the day of the meeting, the parents arrive with their attorney! The Special Education Director calls her attorney to inform him of the situation. The legal advice provided by the attorney to his client is to ask the parents to leave their attorney in the lobby and proceed with the meeting. If the parents refuse those terms, cancel the meeting and reschedule for a date when attorneys for both sides can attend. After some time passes, another call is received from the Special Education Director. She informs her attorney that the parents have refused to proceed in the manner suggested. The parents are now alleging that the individual with them is not there as their attorney but he is there as their "family friend" (everyone knows that "attorney" and "family friend" are not synonymous!). The advice given is to cancel the meeting. The parents leave and immediately file another complaint against the district with ISBE.

How many of you would have canceled that meeting?