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MCLE FEBRUARY 7, 2017

The Scope of the IDEA Statute

How far must local school districts go in providing a "free and appropriate" public education?

BY GREGORY J. ROLEN

Say what you will about the Roberts Court, but you cannot say it does not confront difficult issues that impact the everyday lives of most Americans. One of those issues presently before the Court is public education, specifically, the mandate expressed in the Individuals With Disabilities Education Act—the IDEA, 20 U.S.C. §§1401, *et seq.*—that all students receive a "free and appropriate public education." See 20 U.S.C. §§ 1400(d)(1)(A); 1401(9). The key to the statute, as case law has confirmed, is the mandate that local school districts fashion an "individualized education plan" (an IEP in education law parlance) for each disabled student. See, e.g., *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985); 20 US.C. §§ 1401(14), 1414(d).

The IDEA has been the books for more than three decades. Although the Warren Court declared a generation ago that education is "perhaps the most important function of state and local governments," *Brown v. Board of Education,* 347 U.S. 483, 493 (1954), the Supreme Court has not spoken much about the parameters of the requirement that local schools districts provide a FAPE to disabled students.

All of that may change in a case recently argued before the short-handed Roberts Court. The case is *Endrew F. v. Douglas County School District*, 798 F.3d 1329 (10th Cir. 2015), cert granted 137 S.Ct. 29 (2016). It raises the difficult issue of just what constitutes a FAPE for a disabled student.

MORE THAN DE MINIMIS?

The student, Endrew F., is autistic. He qualified for special education services with the Douglas County School District through 4th grade. However, he did not return for fifth-grade because his parents did not agree with the proposed IEP, primarily because the "goals" mirrored the goals from prior years. Endrew was enrolled in private school where his parents believe he made, "academic, social and behavioral progress." They sought reimbursement from the school district, arguing simply that the proposed IEP was inadequate.

> "The IDEA's labyrinthine protocol leads to a highly specialized practice, replete with administrative and litigation pitfalls"

The Colorado Department of Education, a federal trial court, and the 10th Circuit Court of Appeal all ruled against Endrew and his parents, finding that he had made "some academic progress" while in public school and the district need only provide him with an educational benefit that was, "merely more than *de minimis*." See 798 F.3d at 1339.

That conclusion may have hewed to 10th Circuit precedent, but it conflicted with the view of other circuits, which have determined that the IDEA requires more, specifically that an IEP provide "meaningful educational benefit. *See, e.g., Deal v. Hamilton Cty. Bd. of Educ.,* 392 F.3d 840, 862 (6th Cir. 2004); *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.,* 328 F.3d 804, 808–09 (5th Cir. 2003); and *Polk v. Cent. Susquehanna Intermediate Unit 16,* 853 F.2d 171, 182 (3d Cir. 1988).

This circuit split set the stage for the Supreme Court to grant certiorari and eventually declare the scope of the FAPE mandate in the IDEA context. The issue is whether the IDEA requires public schools maximize the potential of children with disabilities or simply provide them and their families with something more than a *de minimis* educational opportunity.

IDEA EXPLAINED

To understand the magnitude of the Court's task, one must first comprehend the complexities of the IDEA.

The IDEA is a comprehensive statutory scheme conferring on disabled students a substantive right to public education. See *Honig v. Doe* 484 U.S. 305, 310 (1988). The IDEA ensures that, "all students with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. §1400 (d) (1) (A).

A student's FAPE must be, "tailored to the unique needs of the handicapped child by means of an individualized educational program, also known as the IEP." *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley,* 458 U.S. 176 (1982.) *Rowley,* decided 35 years ago, was the first and last opportunity the Supreme Court had to weigh in on the definition of a FAPE. In

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that case, the Court ruled that a deaf child, who was an accomplished lip reader, did not have a right to an interpreter. The Court held that an IEP must be "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 204. In other words, it has to provide what seems like a reasonable amount of support, but not the best available. The Court held that a FAPE provides a "basic floor of opportunity" that levels the playing field. *Id.* at 215. After that ruling, many federal courts used the analogy that students have the right to a "serviceable Chevrolet" not a "Cadillac" when it comes to services. See, e.g., *Troy Sch. .Dist. v. Boutsikaris*, 250 F.Supp.2d 720, 735 (E.D. Mich. 2003); *Doe v. Bd. of Educ. Of Tullahoma City Schs*., 9 F.3d 455, 459-460 (6th Cir. 1993).

Although General Motors wins either way under this analytical framework, the case law has left special-education practitioners struggling to define the substantive level of service required.

IDEA PROCEDURE

School districts can also violate the IDEA by running afoul of its many procedural requirements. Those requirements are complex, compounded, and are individually and collectively the subject of significant litigation. What distinguishes the procedural requirements IDEA from other civil rights statutes, is that they intended to facilitate parent participation rather than bar it. Here is a short sampling of the IDEA's procedural particularities:

Child find (34 CFR §300.111)
The state must have policies and procedures to ensure that all children with disabilities are identified located and evaluated.

Prior Written Notice (34 CFR §300.503)
A district must give parent prior written notice to a parent of a proposed or refused to take any action regarding a special education student. The content must describe the action contemplated, reasons, and procedures implemented in clear and understandable language.

Native Language (34 CFR §300.29)
Not only the IEP, but all communications must be conducted in a language normally used by the parents at home or in the learning environment.

Parental Consent (34 CFR §300.9)
A school district must obtain express written consent to evaluate for services (34 CFR §300.300), reevaluate, provide services, change services or terminate services.

Independent Educational Evaluation ("IEE") (34 CFR §300.502)
Parents have the right to one independent educational evaluation if they disagree with the school's evaluation. The evaluation must be conducted by a qualified examiner at public expense.

Opportunity To Participate in Meetings (34 CFR §300.503 (b) (3))
Parents must be afforded the opportunity to participate in meetings with respect to (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE.

Student Records (34 §300.611-34 §300.624)
Parents have access to all records pertaining to their student in the right to keep those records confidential. (Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g) ("FERPA").

Mediation (34 CFR §300.506)
The school district must develop procedures to make mediation available to resolve disagreements under the IDEA.

Due Process (34 CFR §300.507; 511, 512)
A parent or a school district may file he due process complaint related to a proposal or refusal to initiated or change the identification, evaluation, or placement of a student or concerning the provision of FAPE. The parties have a right to an impartial hearing before a hearing officer.

"Stay Put" (34 CFR §300.518)
Once a due process complaint has been sent to the other party, during the resolution process time period and while waiting decision of any impartial due process hearing officer the child must remain in his or her current educational placement.

Judicial Review (34 CFR §300.516)
Any party that does not agree with the decision in the due process hearing has a right to bring a civil action in United States District Court.

Attorneys' Fees (34 CFR §300. 517)
In any IDEA proceeding the court has the discretion to award reasonable attorney's fees to the prevailing party.

Needless to say, this labyrinthine protocol leads to a highly specialized practice, replete with administrative and litigation pitfalls.

SUPREME COURT CONUNDRUM

While special-education lawyers practice in these trees, the Supreme Court is the steward of the forest. As is often the case, the Court's challenge, as Justice Sotomayor summarized during oral argument in the *Endrew F.* case, is trying to come up with the right words which will be "less confusing to everyone." The school district's counsel argued that the IDEA standard of "some benefit" or "more than merely *de minimis"* standard derived from *Rowley* has worked for many years. However, the fact that Congress twice amended the IDEA—first in 1997, and again in 2004—with the intent to place greater emphasis on student performance, appears to belie that assertion. Drawing on the IDEA's legislative history, Endrew's counsel argued that pursuant to the statutory language command of "reasonably calculated to provide" requires local districts provide an educational benefit "substantially equal" to that of other (non-disabled) students.

Justice Breyer expressed concerns about judges who, "don't know much about education." He was concerned that creating a new standard would be interpreted differently by "judges and lawyers and people" all over the country.

Also, as Chief Justice Roberts pointed out, what if the student's disabilities make it impossible to follow a general education curriculum?

Where does the Court go from there?

THE FEDS WEIGH IN

The United States Department of Education filed a brief on Endrew's behalf that offered an alternatee standard: requiring a program that is "aimed at significant educational progress in light of the child's circumstance."

This could well be is the most likely judicial compromise on statutory interpretation. The federal government standard somewhat clarifies the "some benefit" standard while recognizing congressional intent to improve education for disabled students. It addresses Justice Breyer's concern about the creation of an unworkable standard, as it allows for the adoption of one offered by the Department of Education. Finally, the proposed federal standard addresses Chief Justice Roberts' concern by articulating a standard that allows for flexibility geared around a particular student's circumstances.

ELUSIVE GUIDANCE

Regardless of the Supreme Court's ultimate decision on the scope of the IDEA, it appears likely that parents, educators, lawyers, and experts will continue the semantic debate over what is the best approach for educating disabled students. One reality, however difficult it may be in the real world of public education, is that an all-inclusive, ever-elusive, bright-line test will remain out of reach.

MCLE – The IDEA Statute
TEST & ANSWER KEY

1. **Question:** The phrase, "free and appropriate education" is a creature of case law,
   Answer: False.
   Explanation: This term comes directly from the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400(d)(1)(A), 1401(9).
2. **Question:** Each student who qualifies for special education services must have an IEP.
   Answer: True.
   Explanation: Each special education student must have been individualized education plan ("IEP") to meet their specialized needs. 20 US.C. §§ 1401(14), 1414(d).
3. **Question:** Federal Circuit courts agree on the level of benefits that must be provided to special education students.
   Answer: False.
   Explanation: Some circuit courts require schools to provide only "some academic progress" while other circuits require, "meaningful educational benefit." *Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988)*
4. **Question:** The IDEA only pertains to classroom services.
   Answer: False.
   Explanation: The IDEA gives special education students the right to, "related services." (20 U.S.C. §1400 (d) (1) (A). Related services include physical therapy, transportation, speech-language, psychological and, interpreting services.
5. **Question:** The seminal Supreme Court cases in special education require public schools to provide special education students the best possible education.
   Answer: False.
   Explanation: The Court has held that an IEP must only be, "reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 204 (1982.)*
6. **Question:** School districts can violate the IDEA by making procedural errors unrelated to the educational program.
   Answer: True.
   Explanation: Part B of the IDEA sets forth requirements for school districts providing special education and related services. Failure to adhere to these requirements can be an IDEA violation.
7. **Question:** Parents must always request special education services in order to receive them.
   Answer: False
   Explanation: School districts are required to identify, locate and evaluate all children with disabilities, regardless of a parent request or severity of their conditions. (34 CFR §300. 111)
8. **Question**: School districts can provide special education services then inform parents of their child's placement.
   Answer: False.
   Explanation: Parents must receive prior written notice of any action proposed before the action is taken. (34 CFR §300.503)
9. **Question**: Parents who are not proficient English speakers must hire an interpreter to fully understand the program proposed in their child's Individualized Education Plan (IEP).
   Answer: False.
   Explanation: Public schools are required to communicate orally and in writing in the language preferred by the parent. (34 CFR §300.29).
10. **Question**: If parents disagree with a school district's evaluation for special education eligibility, they can make the district pay for another evaluation.
    Answer: True.
    Explanation: Parents have the right to one independent educational evaluation ("IEE") at public expense. (34 CFR §300.502).
11. **Question**: District staff should meet before the IEP and prepare a signed, completed and final IEP for parent approval.
    Answer: False
    Explanation: Staff may meet to formulate goals and discuss evaluation findings. However, completing an IEP and preparing a placement may be considered "predetermination" and inhibit the parent's right to participate. (34 CFR §300.503 (b) (3).
12. **Question**: District staff should review and consider its own evaluative data for District use only.
    Answer: False
    Explanation: Failure to share all relevant evaluative data can be considered a procedural violation and amount to denial of FAPE. Although the Department of Education does not establish a timeline for providing evaluation reports, they should be provided in a manner to allow parents to meaningfully participate in IEP meetings. (34 CFR §300.503 (b) (3); 71 Fed. Reg. 46645).
13. **Question**: Parents have the right to all school district records pertaining to their child.
    Answer: True
    Explanation: Parents have the right to timely receive all student records pertaining to their child under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g.
14. **Question:** If the parties cannot agree about a student's eligibility and/or level of service provided, they must proceed directly to a contested hearing.
    Answer: False.
    Explanation: Each public agency must ensure that procedures are established and implemented to allow parties to dispute involving any matter under 34 CFR Part 300, to resolve disputes through a mediation process.(20 U.S.C. §1415(e)(1); 34 CFR §300.506(a).
15. **Question:** Only a parent can file a due process complaint under the IDEA.
    Answer: False.
    Explanation: Either the parent or the school district can file a due process complaint. (34 CFR §300.507)
16. **Question**: Due process hearings pertain specifically to the content of the educational program offered in the IEP document.
    Answer: False.
    Explanation: Parents or a school district may file a due process complaint related to any matter under the IDEA including identification, evaluation, or related services.
17. **Question:** Once a due process complaint is filed, the student must remain in their placement during the pendency of the litigation.
    Answer: True
    Explanation: This is the so-called "Stay Put" rule. Unless the parties agree otherwise, during IDEA proceedings, the student must remain in his or her placement agreed upon during the last IEP to ensure special education students are not excluded from services. (34 CFR §300.518; see also, *Honig v. Doe 484 U.S. 305, 310 (1988)*).
18. **Question**: The decision of the hearing officer at a due process hearing is final and binding.
    Answer: False.
    Explanation:Either the school district or the parent has the right to bring civil action in United States District Court if they disagree with the hearing officer's findings.
19. **Question**: Much like traditional civil rights statutes, special education plaintiffs can recover reasonable attorney's fees necessary to enforce their statutory rights.
    Answer: True.
    Explanation: The prevailing party is entitled to reasonable attorney's fees under the IDEA. (34 CFR §300.517).
20. **Question**: The IDEA has been subjected to multiple legislative revisions.
    Answer: True.
    Explanation: The IDEA has been amended both in 1997 and 2004.