

"This Just In!"
A Legal Update

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SPECIAL ED LITIGATION IN 2020

The number of cases have been down since COVID
Federal and state courts have been backlogged
Administrative hearings rarely done "live" at this point
"Zoom" hearings have presented some logistical challenges
Virtual mediations have been efficient and successful

THE "ROWLEY" STANDARD

In 1982, the Court ruled that IDEA requires districts to provide students with special needs with "some educational benefit".

For students in general ed, this meant schools had to provide the student with a program that was "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade".

At that time, the Court did not articulate a similar test for students not participating in the general curriculum.

CLARIFIED LEGAL STANDARD FOR FAPE IN ENDREW F.

“[t]o meet its substantive obligation under the IDEA, a school must offer an IEP *reasonably calculated* to enable a child to make *progress appropriate* in light of the *child’s circumstances*.”

LEGAL STANDARD (CON’T)

“If grade-level advancement is not a reasonable prospect for the child, his IEP need not aim for it, but his educational program must be *appropriately ambitious in light of his circumstances*, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.”

The Court explicitly held that a school *does not* have to provide a child with a disability “opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities”.

OBSERVATIONS ABOUT THE COURT'S RULING

- The Court did not overturn its *Rowley* decision; rather, it explained that the standard announced in *Rowley* was based on facts related to a student that was fully integrated.
- If a student is “fully integrated” in the regular classroom, FAPE usually means the IEP is reasonably calculated to permit advancement through the general curriculum.
- The Court indicated that “every child should have the chance to meet challenging objectives”.

OBSERVATIONS ABOUT THE COURT'S RULING (CON'T)

- The standard articulated in *Endrew F.* was meant to be a more generally applicable standard, with the understanding that each student and case is factually specific and unique.
- The Court conceded that there can be “no bright-line rule” governing the appropriateness of IEPs.
- The Court reiterated that the IDEA does not “guarantee any particular level of education” nor does it “promise any particular educational outcome”.

OBSERVATIONS ABOUT THE COURT'S RULING (CON'T)

- Notably, the Court explained that the IEP requires “prospective judgment by school officials” based on the specific facts related to a student and informed by school officials’ expertise, with input from the parents.
- The Court stated that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as *ideal*”.
- *Endrew F.* reiterated that courts should not substitute “their own notions of sound educational policy for those of the school authorities for which they review”.

PRACTICAL CONSIDERATIONS AFTER ENDREW F.

- The decision has not had a significant impact on the every-day development and implementation of IEPs.
- IEPs that utilize evaluations, data, information and input from professionals and parents will continue to meet the threshold requirement for educational benefit.
- The decision provides that school officials should “be able to offer a *cogent and responsive explanation for their decisions* that shows the IEP is reasonably calculated to enable the child to make progress in light of his circumstances”.

U.S. SUPREME COURT DENIED CERTIORARI IN
TWO SPED CASES IN 2020

- “Rule of 4” required before the S.C takes a discretionary case
- In 2020, the Court denied cert in two Fifth Circuit cases:
 - McMillen v. New Caney ISD
 - Bruno v. Northeast ISD

TEXAS HEARING OFFICER DECISION

Student v. Georgetown ISD

(November 18, 2020)

In this instance, the primary issue was whether the school denied the student FAPE as a result of campus closures due to the COVID-19 pandemic.

The HO determined that the district failed to make every effort to implement the student’s IEP during the relevant time period, resulting in the denial of FAPE.

THINGS TO CONSIDER

Georgetown ISD case

- The parents did not challenge the *sufficiency* of the IEP, only its *implementation*.
- After the COVID outbreak, the district enabled a program to conduct teletherapy speech sessions. Also, the Governor waived teletherapy regulatory requirements.
- Initially, the district delivered the teletherapy sessions, but then abruptly stopped, resulting in a denial of FAPE.
- The district also used a computer-based program for delivering dyslexia instruction to the student as opposed to direct instruction virtually.
- The HO found this to be a material failure to implement services.
- The school further modified the IEP outside of the committee process and without parental participation.

TEXAS HEARING OFFICER DECISION

Student v. Elgin ISD

(May 4, 2020)

- The hearing officer determined that the district's failure to meet procedural requirements significantly interfered with the parent's ability to participate and collaborate in the development of the IEP.
- The HO ordered the use of an IEP program facilitator and he ordered the district to pay for several IEEs, including the area of autism.
- The HO dismissed causes of action outside of the IDEA.

THINGS TO CONSIDER

Elgin ISD case

- Although the district provided opportunities for the parent to review evaluations and ask questions outside of the ARD meeting, the HO stated that those discussions did not replace the IEP meeting and the discussion with all members of the committee.
- He further held that the district substantially impeded the parent's opportunity to participate by 1) failing to allow sufficient time for questions and input during the ARD; 2) failing to cover all required topics; 3) prematurely declaring the meeting as "completed" before the parent could agree or disagree; and 4) failing to recess an ARD meeting as requested by the parent.
- The HO indicated that even though the parents were frustrating and difficult to work with, the district must still allow participation and input from the parents.

FEDERAL DISTRICT COURT

P.M. v. Wylie ISD

(October 10, 2020)

P.M. was an elementary student with autism and speech impairments. The parents *alleged* that his sped teacher pulled him off of a play structure by his feet, dragged him for approximately ten yards, then picked him up off the ground and threw him back down, causing a concussion. The parents further *alleged* that several aides stood by and did nothing. The concussion was reported to the principal.

The parents sued in federal court under Section 1983 and Section 504 rather than IDEA. The district sought dismissal since a district is generally not liable for the actions of individual policies unless the action was done pursuant to a policy or practice.

The court granted the parents an opportunity to amend their pleadings.

THINGS TO CONSIDER Wylie ISD case

- Texas law on restraints applies to special education students.
- “Restraint” means the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of a student’s body.
- Restraint can be used when the child’s behavior poses a threat of imminent and serious physical harm to the child or others, or property destruction.
- Make sure peace officers are trained in special education restraints

THINGS TO CONSIDER Wylie ISD case (con’t)

The use of restraint must:

- be limited to such force as is reasonable to address the emergency
- be discontinued when an emergency no longer exists.

Limited physical contact with the child to promote safety, prevent a potentially harmful action, teach a skill, or to provide comfort does not constitute a restraint.

Likewise, seat belts and other safety equipment used to secure children during transportation are not considered restraints.

THINGS TO CONSIDER
Wylie ISD case (con't)

- *Good faith effort* to notify parents verbally on day restraint used
- *Written notification* placed in mail or otherwise provided within one school day of the use of restraint
- Written notice must state *date and length of restraint*
- Notice must provide a description of the activity the child was engaged in *immediately before the restraint*, and the behavior that *prompted the restraint*
- The notice must also describe the *efforts made to de-escalate the situation and alternatives to restraint* that were attempted

TEXAS HEARING OFFICER DECISION
Student v. Floresville ISD
(October 26, 2020)

- The parents of a student who qualified for services under autism and speech sought an order from the HO finding that the district denied FAPE from at least September of 2017 to the date of the decision in 2020.
- The district asked for dismissal of the case based on the Texas one year statute of limitations for bring a due process request.
- The HO determined that the parents knew or should have know about their claims in June of 2017, thus the due process request was dismissed because the hearing was not filed until January of 2020.
- None of the exceptions to the statute of limitations applied.

THINGS TO CONSIDER Floresville ISD case

- The school district bears the burden to prove that the statute of limitations applies.
- If it does so, the burden shifts to the parent to demonstrate one of the two exceptions to the statute of limitations.
- The one-year timeline does not apply if the parent was prevented from filing the due process complaint due to:
 - 1. specific misrepresentations by the school that it had resolved the problem forming the basis of the due process complaints; or
 - 2. the school's withholding of information from the parent that must be provided (e.g., notice of procedural safeguards, PWN).

THINGS TO CONSIDER Floresville ISD case (con't)

- For misrepresentation, the district must subjectively determine that the student was not receiving FAPE and intentionally and knowingly misrepresent this fact to parents. Disagreement over the appropriateness of the IEP does not rise to this level.
- With respect to withholding information, if the school delivers a copy of the IDEA procedural safeguards, the exception will not apply, regardless of whether the parents later examine the safeguards and acquire actual knowledge.
- Failure to provide prior written notice alone does not automatically toll the statute of limitations. A parent must show that the failure to provide PWN prevented the parent from filing for due process in a timely manner.

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