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The U.S. Supreme Court and special education

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Students with disabilities receiving special education services represent 13% of all students in public schools, according to the most recent survey (2014-2015) by the National Center for Education Statistics. In Ohio, nearly 15% of students in public schools are students with disabilities. To effectively serve this significant population, districts must stay abreast of changing legal requirements.

In 2017, the U.S. Supreme Court issued two important decisions affecting special education. One concerned the level of educational benefit required for a student to receive a free appropriate public education (FAPE). The other considered whether a student must pursue all available administrative remedies under the Individuals with Disabilities Education Act (IDEA) before filing a discrimination claim against a public school under other legal provisions. Both decisions are already affecting public schools.

Endrew F. v. Douglas Cty. School Dist.
In March 2017, the U.S. Supreme Court took up a question it left unanswered when it decided *Bd. of Edn. of Hendrick Hudson Central School Dist. v. Rowley* (458 U.S. 176 (1982)), interpreting the law that became IDEA. The earlier law required each state, in order to qualify for federal education funds, to demonstrate that it ensured FAPE to all students with disabilities. A student's individualized education program (IEP) must be "reasonably calculated to enable the child to receive educational benefits." Since that time, schools and parents have debated what level of educational benefit was necessary.

That question has now been answered in Chief Justice **John Roberts'** opinion in *Endrew F. v. Douglas Cty. School Dist.* To provide FAPE, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

The child in this case, **Endrew**, was diagnosed with autism at age 2. Endrew attended school in Colorado's Douglas County School District from preschool through fourth grade under an IEP that was updated each year. As he was entering fifth grade, Endrew's parents felt that the IEP presented by the district was essentially the same as his past IEPs, and that Endrew was not making educational progress.

Endrew's parents removed him from the school district, enrolled him at a private school for children with autism and asked the district to reimburse them for Endrew's tuition at the school. They argued that Endrew was denied FAPE at the district because his IEP did not meet the *Rowley* standard.

The Colorado administrative law judge (ALJ) sided with the district, and the U.S. district court affirmed the ALJ's decision. In its opinion, the district court said that modifications to Endrew's previous IEPs showed "a pattern of, at least, minimal progress."

The district court decision was affirmed by the 10th U.S. Circuit Court of Appeals, relying on language in *Rowley* stating that instruction and services to children with disabilities must be calculated to confer "some educational benefit." The court stated that a child's IEP is adequate provided that it intends to confer educational benefit that is "merely … more than *de minimis*." De minimis means negligible or so insignificant that it is unworthy of attention.

In its decision, the U.S. Supreme Court expressly rejected the 10th Circuit's standard. The court stated that an educational program providing merely more than de minimis progress from year to year can hardly be said to be "an education at all." The court noted that children receiving instruction that aims so low would be "sitting idly … awaiting the time when they were old enough to 'drop out.'"

The Supreme Court didn't expressly say what "appropriate" progress meant, but rather that an IEP's adequacy depends on the circumstances of the child for whom it was created. However, it cautioned that the absence of an explicit standard was not an invitation for courts to substitute their own notions of educational policy for those of school authorities.

The opinion stated that IDEA "vests (school authorities) with responsibility for decisions of critical importance to the life of a disabled child." Because the IEP process affords both parents and schools the opportunity to express their opinions on the degree of progress an IEP should pursue, the court concluded that school authorities are given "a complete opportunity to bring their expertise and judgment to bear on areas of disagreement."

Fry v. Napoleon Community Schools
The other U.S. Supreme Court case, decided in February 2017, is *Fry v.*

Napoleon Community Schools. It involved E.F., a student with cerebral palsy who attended school in Michigan. When E.F. was a kindergartner, her parents asked her school to allow her service dog, Wonder, to accompany her to school. The school allowed Wonder to attend on a temporary basis but did not allow him to perform all of his functions as a service dog.

Ultimately, the district decided to bar Wonder from the school. The Frys home-schooled E.F. until they found another district that welcomed Wonder.

The Frys sued the local and regional school districts E.F. had previously attended. Their complaint alleged that the districts discriminated against E.F., in violation of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, by denying E.F. equal access to the school and its programs and refusing to reasonably accommodate her use of a service animal.

The school districts filed a motion to dismiss the Frys' suit on the basis that IDEA required the family to pursue available administrative solutions ("exhaust their administrative remedies") before filing a lawsuit under other laws. The district court agreed with the school districts' argument and granted their motion. The 6th U.S. Circuit Court of Appeals affirmed, holding that exhaustion of remedies is required if the injuries alleged in a lawsuit "relate to the specific substantive protections of the IDEA."

In an opinion written by Justice **Elena Kagan**, a unanimous U.S. Supreme Court returned the case to the appeals court for additional review. The Supreme Court held that a plaintiff need not exhaust IDEA's remedies provided the essence of the plaintiff's suit is "something other than denial of the IDEA's core guarantee of a FAPE." In other words, exhaustion is required only when the plaintiff seeks remedies under IDEA.

The court suggested two questions to determine whether a complaint against a school concerns the denial of FAPE or disability-based discrimination:

- Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school — say, a public theater or library?
- Could an adult at the school — say, an employee or visitor — have pressed essentially the same grievance?

If the answer to these questions is yes, the complaint is likely not about the denial of FAPE. When the answer is no, the complaint probably does concern denial of FAPE.

When the Supreme Court applied the questions to the Frys' complaint, it concluded that the answer to both is yes, suggesting that the Frys' complaint is not truly about the denial of FAPE. However, if the plaintiffs had pursued administrative remedies under IDEA before bringing their current suit, that would suggest the substance of the complaint is the denial of FAPE, even if that term isn't in the complaint.

The court returned the case to the court of appeals to determine whether the crux of the Frys' complaint was denial of FAPE. The court specifically charged the appeals court to determine:

- whether the Frys invoked IDEA's dispute resolution process before filing their discrimination lawsuit;
- if so, whether pursuing that process revealed that their complaint was about the denial of FAPE.

Conclusion

Both of these cases have already been interpreted multiple times by federal courts. As the cases are applied to more fact patterns, educators are getting a better sense of how significantly they will affect day-to-day classroom activity.

OSBA's Division of Legal Services will continue to monitor these case law developments and share information with member districts through the School Law Summary e-newsletter, fact sheets, workshops and the division's blog, The Legal Ledger. Board members and administrators who have not already subscribed to the blog can do so by visiting **http://links.ohioschoolboards.org/12673**. ▪

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