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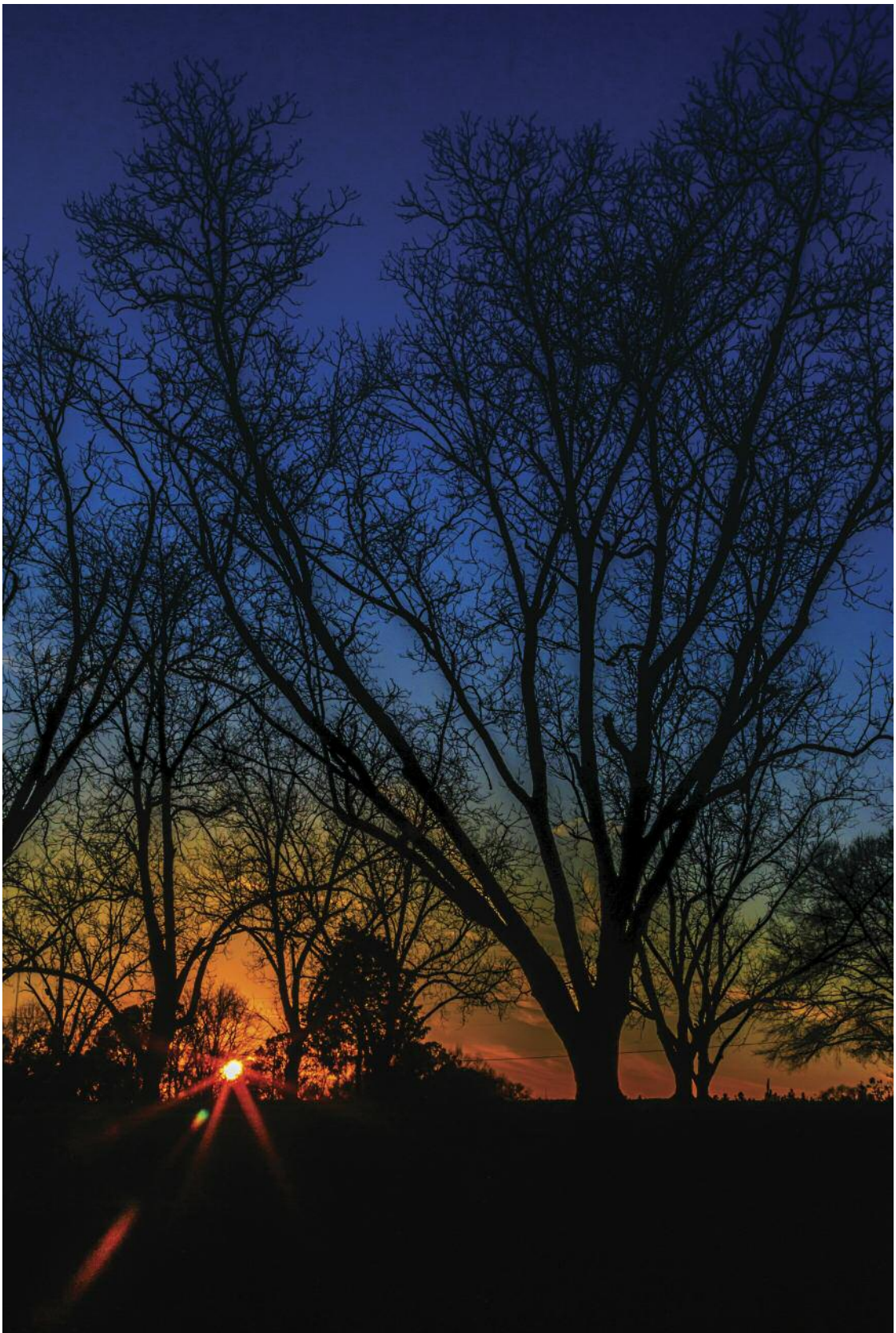

# The United States Supreme Court's Watershed Ruling in *Endrew F. v. Douglas County School District* and the Effect on Your Client's Special Education Programming

***By Shane T. Sears and James D. Sears***

## The IDEA

In passing the Education of Handicapped Children Act of 1975 (now known as the *Individuals with Disabilities Education Act* or IDEA) in 1975, the United States Congress found that:

> [d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.[1]

The primary purposes of the Individuals with Disabilities Education Act were to ensure that

children with disabilities received appropriate educational services, in their least restrictive educational environment, and in a public-school program that has adequate financial support.[2]

# Abrogation of State Sovereign Immunity

The 11th Amendment to the United States Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The United States Supreme Court in *Kimel v. Florida Bd. of Regents*[3] interpreted the 11th Amendment to the United States Constitution to prohibit lawsuits against a state by its own citizens.

In furthering the purpose of the IDEA, Congress appropriated funds to support special education programming and related activities.[4] As a stipulation to the receipt of these funds the receiving states and local education agencies had to conform to the requirements of, *inter alia*, the abrogation clause of the IDEA. This clause states, "[a] State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter."[5] In effect, if a state accepts the federal government's money, the respective state is waiving its right to sovereign immunity and, therefore, consents to be sued for a violation of the IDEA.

# State of Alabama

The IDEA provides federal assistance to states that provide a Free Appropriate Public Education (FAPE) to children who have disabilities by offering each eligible student special education and related services an individualized education plan ("IEP").[6] By accepting federal funding under the IDEA, each state is required to maintain procedures in accordance with the IDEA.[7] Alabama codified its procedures for compliance with the IDEA in the *Alabama Administrative Code* at section 290-8-9-.00.

State of Alabama local education agencies ("LEAs" or public school systems) are required to locate, evaluate and identify children, from birth to 21 years of age, who are in need of special education services (a process under the IDEA known as "Child Find").[8] Child Find also applies to children with disabilities who are home-schooled, attend private schools, including children attending religious schools, migrant children, homeless children and children who are wards of the state.[9] The duty of finding these children who need services is imposed upon the LEA and not upon the parents to come forward with their concerns.[10]

When one thinks of children with "special needs," many of those "special needs" or "disabilities" are addressed under the IDEA. In conforming to federal law, Alabama recognizes 13 disability classifications: autism, deaf/blindness, developmental delay, emotional disturbance, hearing impairment, intellectual disability, multiple disability, orthopedically impaired, other health impairment, specific learning disability, speech language impairment, traumatic brain injury and visual impairment.[11] However, other disabilities that are not specifically identified are included within the listed eligibility categories, most often under the classification of "other health impairment." The following disabilities are also addressed under other health impairment: attention deficit/hyperactivity disorder, epilepsy, asthma, Tourette syndrome, diabetes, sickle cell anemia and tuberculosis.

After a child has been identified as eligible as a student with a disability, the LEA must provide the child with a disability a free, appropriate public education ("FAPE").

# FAPE

The IDEA represented "an ambitious federal effort to promote the education of handicapped children and was passed in response to Congress' perception that a majority of handicapped children in the United States were either totally excluded from schools or were sitting idly in regular classrooms awaiting the time when they were old enough to 'drop-out.'"[12] The IDEA was enacted by Congress in 1975 to ensure that children with disabilities receive a FAPE.[13] FAPE has been defined in the law to be an educational program, including special education and related services, that has been provided to the child with a disability (a) at public expense, (b) under public supervision and direction and, (c) without charge.[14]

# Individual Education Program (IEP)

The most critical element of the child's educational program is the IEP. If the child is eligible for special education services, an IEP must be developed by the school district.[15] An IEP is a written individualized education program that specifies the needs of the child including present levels of educational performance, annual measurable educational goals, behavioral goals, special education services and related services like physical therapy, occupational therapy and speech, so that he or she can advance both socially and academically in the school environment.[16]

The statement of annual measurable goals includes academic and functional goals that are designed to meet the child's needs and to make progress in the general education curriculum.[17] Further, the annual goals must meet each of the child's "other educational needs" arising from the child's disability.[18] An IEP provides the IEP team a roadmap of educational action to be taken on behalf of the child with a disability and, further, provides a means of objective accountability. Progress reports provided to the child's parents during the school year demonstrate whether the child is making progress toward the annual goals created by the IEP team.

The IDEA encourages the child's parents to be active participants of the IEP team.[19] The IDEA further requires that the IEP team includes (a) one general education teacher, (b) one special education teacher, (c) an individual who is capable of interpreting test results and (d) one representative of the local education agency who is qualified and knowledgeable about the availability of resources of the LEA.[20]

# Violations of FAPE

Regrettably, not all children with disabilities receive an educational program that complies with the IDEA. The LEA may be considered to be in violation of the IDEA if it fails to (a) locate an eligible child with a disability, (b) evaluate the child, (c) identify the child as being eligible for special education and related service and/or (d) provide the eligible child a free, appropriate public education. If the child's parents believe that a violation has occurred they may seek a remedy through one of three different strategies available under the IDEA: file a complaint with the Alabama State Department of Education, enter into mediation with the LEA or file a request for an impartial due process hearing.[21]

# Due Process Hearing

The parents of a child with a disability initiate a request for a due process hearing by filing their request with the superintendent of the Alabama State Department of Education.[22] He will, in turn, appoint an administrative law judge/hearing officer (ALJ) to conduct the due process hearing.[23] Should the parties to the due process hearing not resolve the issues related to the request for due process hearing, the ALJ will conduct a hearing, where the ALJ will receive evidence and hear testimony related to the issues of the request.[24] At the completion of the hearing, the ALJ will render a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education."[25]

If either party disagrees with the outcome of the due process hearing, that party may appeal the decision by filing a lawsuit in state court or in the United States District Court.[26] A party to a due process hearing may appeal an unfavorable decision to the 11th Circuit Court of Appeals, and to the United States Supreme Court.

One such case, *Endrew F. v. Douglas County School District*,[27] was recently decided by the United States Supreme Court. The *Endrew F.* decision, a unanimous decision authored by Chief Justice Roberts, focused on the notion of what constitutes an "appropriate" IEP under the IDEA. The predecessor to *Endrew F.* was *Hendrick Hudson Board of Education v. Rowley*.[28] The *Rowley* case also focused on what constitutes an "appropriate" IEP under the IDEA.

# The *Rowley* Decision

Aside from issues of identification, most all other litigation revolves around the appropriateness of the child's IEP. The IDEA does not define the term "appropriate education."[29] "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children."[30] The IDEA does define that a

FAPE consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services that are necessary to permit the child "to benefit" from the instruction.[31] *Hendrick Hudson Board of Education v. Rowley*[32] was a landmark 1982 United States Supreme Court case that laid the groundwork for establishing standards for measuring the success of special education programs, especially the appropriateness of IEPs.

The facts of *Rowley* involved a child who was hearing impaired with minimal residual hearing.[33] The basic issue of the case revolved around whether or not the child with a hearing impairment should have an interpreter available to her in all of her academic classes.[34] The facts of the *Rowley* case further revealed that the child was fully integrated into her general education classes and was making more than satisfactory progress.[35] The parents sought to have the type of educational opportunity for their daughter that would allow her to reach her maximum potential.[36] A divided Court disagreed with the parents and opined that the Act "… did not intend to achieve strict equality of opportunity or services for handicapped and non-handicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education."[37]

The benefits attainable by children at one end of the spectrum will differ dramatically from those attainable at the other end.[38] *Rowley* required a two-part test: First, has the state complied with the procedure set forth in the Act? Second, is the IEP calculated to enable the child to receive educational benefits? [39]

Notwithstanding, the *Rowley* court did not define the term "educational benefits." However, it concluded that the evidence firmly established the child was receiving an "adequate education" because she was performing better than the average child in her class and was advancing from grade to grade.[40]

## Courts' Interpretation of "Educational Benefits"

The 11th Circuit Court of Appeals pre-*Endrew F*. had interpreted *Rowley's* "educational benefits" language to provide a "basic floor of opportunity."[41] "The IDEA does not require the educational services offered maximize the child's potential." [42]

Rather, the services offered only have to confer "some benefit."[43] "If the educational benefits are adequate based on surrounding and supporting facts, the IDEA requirements have been satisfied."[44] "Adequacy is determined on a case-by-case basis in light of the child's individualized needs."[45] The Tenth Circuit and other Courts had interpreted the standard as one providing "merely more than *de minimis* level of services."[46]

Nevertheless, Alabama district courts have continued to analyze the child's unique needs to determine whether a FAPE was being provided.[47] In *Bowens*, the court concluded that an independent clinic's recommendations (which were accepted by the school district) placed an obligation on the LEA to provide a FAPE consistent with those recommendations.[48] The clinic recommended full-time placement while the LEA only offered placement two to three times per week.[49] The court concluded that the LEA's recommendation fell significantly short of satisfying the child's "unique needs."[50]

In *DeKalb v. Manifold*, involving almost identical facts to *Rowley*, the administrative law judge concluded that the LEA did not adequately consider the testimony and reports of two outside experts who offered opinions that the child needed speech-to-text technology for her educational needs.[51] Moreover, the LEA's choice of technology, an FM system, was not reliable enough and there was not sufficient evidence presented to show it was used across the entire spectrum of the child's classes.[52] "The court finds it especially persuasive that both outside

experts brought to observe A.M. at school were in agreement that A.M. and D.M.'s belief that an IEP without CART or another speech-to-text method was not providing her sufficient access to lectures, discussions, and classroom materials. The Board has not pointed to any other facts to contradict those experts and show that the IEPs it provided were sufficient for A.M.'s needs."[53]

In *Lolita v. Jefferson County Board of Education*, the administrative law judge concluded that the LEA had provided an IEP with an adequate statement of the child's present level of academic achievement and functional performance, articulated measurable goals, and were reasonably calculated to provide educational benefit in the least restrictive environment.[54] The child made meager, but not *de minimis* progress, and the meagerness of the progress may have been attributed more to his cognitive level, his lack of effort, his failure to complete homework assignments, his refusal to re-take tests he had failed and his tendency to skip classes than to an inadequate IEP or the absence of appropriate special education services.[55]

The *Lolita* court concluded that a portion of his meager progress was attributable to the inappropriate IEPs to the extent that they were not tailored to meet his unique needs. [56] Moreover, the child did not receive personalized transition services, but instead received vocational and career based training along with the rest of his class. [57] Therefore, he did not receive adequate transition services.[58] The court reversed part of the administrative law judge's decision and affirmed part.[59]

## *Endrew F.'s* Interpretation of "Educational Benefits"

The United States Supreme Court's ruling in *Endrew F.* did not expressly overrule its decision in *Rowley*. In fact, the Court specifically distinguished the facts in the *Endrew* ruling from the facts in *Rowley*. Highlighting the difference in facts, the Court opined that the *Rowley* Court, "…carefully charted a middle path."[60] It had confined its analysis only to the facts before it and no further.[61] Therefore, the Court had "declined to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[62]

In *Endrew F.*, the parents had become dissatisfied with the progress of their autistic child.[63] He had some strengths, but also many behaviors which impeded his ability to access learning in the classroom environment.[64] The child's parents contended that his IEP largely carried over the same basic goals from one year to the next, indicating he was failing to make meaningful progress.[65] Consequently, they removed him from public school and placed him in a private program where he began making significant behavior and academic progress which had evaded him in public school.[66]

Subsequently, the school district presented the parents with another IEP which was similar to prior IEPs before he departed to the private program even though the success in that program indicated a different approach was more successful.[67] A due process complaint was filed against the school district asserting that the final IEP was not calculated to enable Endrew to receive educational benefits.[68] The administrative law judge disagreed and denied relief. [69] The parents sought review in the United States District Court.[70]

The United States District Court affirmed, noting that although Endrew's performance under past IEPs "did not reveal immense educational growth," the annual modifications to his IEP revealed that he was making at least minimal progress as *Rowley* demanded.[71] The Tenth Circuit affirmed, citing the *Rowley* standard that *Endrew* had been provided "some educational benefit."[72]

The *Endrew F.* Court concluded that a much different fact pattern existed in *Rowley* because the child in *Rowley* was performing better than her peers in her class.[73] The Court was not concerned with "precisely articulating a governing standard for closer cases."[74] Here, the Court noted the incongruent thinking that the IDEA aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.[75] "When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all."[76]

Consequently, the 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 goals may differ, but every child should have a chance to meet challenging objectives." [77] Under this new standard, school representatives

should be able to offer a "cogent and responsive explanation" for their decisions which shows that the IEP is reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances.[78]

# The Effect on Your Client's IEP

The *Endrew F.* Court's ruling appears subtle but its effect is dramatic. Although a child with special needs is not entitled to the "Cadillac of IEPs," the prior standard was allowing the school district to provide only the "Ford Pinto." The recent United States Supreme Court ruling in *Endrew* has now raised the bar to require an IEP resembling more of a "Chevrolet Impala."[79]

For the legal practitioner, the analysis should now include: first, whether his or her client's IEP is individualized for his or her unique needs and, second, is it "appropriately ambitious" or only providing *de minimis* progress? The *Endrew* standard is markedly more demanding; thus, a more stringent analysis must be applied. If your client's IEP only allows him or her to make *de minimis* progress, then filing a due process complaint (or the lesser utilized mediation process) may be your best way to obtain an appropriate IEP for your client to provide a FAPE which is mandated by the IDEA.

## Endnotes

1. 20 U.S.C. § 1400(c)(1).
2. 20 U.S.C. § 1400(c)(2-3).
3. 528 U.S. 62 (2000).
4. 20 U.S.C. § 1411, generally.
5. 20 U.S.C. § 1403(a).
6. 20 U.S.C. § 1415(a).
7. 20 U.S.C. § 1415(a)&(b).
8. 20 U.S.C. §1412(a)(3)(A).
9. *Id*.
10. *Jamie S v. Milwaukee Public Schools*, 519 F.Supp.2d 870,880 (E.D. Wis. 2007).
11. *Alabama Admin Code* §290-8-9.03(1)-(13).
12. *Hendrick Hudson Board of Education v. Rowley,* 458 U.S. 176, 179 (1982).
13. 20 U.S.C. § 1412(a)(1)(A).
14. 20 U.S.C. § 1401(9)(A).
15. 20 U.S.C. § 1412(a)(4).
16. 20 U.S.C. § 1414(d).
17. 20 U.S.C. § 1414(d)(d)(1)(A)(i)(II)(aa).
18. 20 U.S.C. § 1414(d)(d)(1)(A)(i)(II)(bb).
19. 20 U.S.C. § 1414(d)(1)(B).
20. 20 U.S.C. § 1414(d)(1)(B)(ii)-(iv).
21. *See generally,* 20 U.S.C. § 1415.
22. Alabama Administrative Code § 290-8-9.08(9)(a)1.
23. 20 U.S.C. § 1415 (f)(3)(A); *See also*, Ala. Admin. Code § 290-8-9.08(9)(c)4.
24. Ala. Admin. Code § 290-8-9.08(9)(c)12.(i)(XVII).
25. 20 U.S.C. § 1415(f)(3)(E).
26. 20 U.S.C. § 1415(i)(2)(A).
27. 580 U.S. _____ (2017).
28. *Rowley*, 458 U.S. 179.
29. *Id.* at 187.
30. *Id*. at 189.
31. *Id*. at 188-189.
32. *Id.* at 179.
33. *Id*. at 184.
34. *Id*.
35. *Id*. at 185.
36. *Id*. at 186.
37. *Id.* at 177.
38. *Id*. at 202.
39. *Id*. at 206-207.
40. *Id*. at 209-210.
41. *Phyllene W. v. Huntsville City School Board*, 630 Fed.Appx.917, 920 (11th Cir. 2015).
42. *Id*. at 919.
43. *Id*. at 920.
44. *Id*.
45. *Id*.
46. *Endrew F. v. Douglas County School District*, 580 U.S. _____ , 8 (2017).
47. *Blount County Board of Education v. Bowens*, 929 F.Supp.2d 1199, 1207 (N.D. Ala. 2013).
48. *Id.* at 1208.
49. *Id*.
50. *Id*.
51. *DeKalb County Board of Education v. Manifold*, 4:13-CV-901-VEH, 6 (Ala. N.D. June 16, 2015).
52. *Id.*
53. *Id*. at 7.
54. *Lolita v. Jefferson County Board of Education*, 977 F.Supp.2d 1091, 1107 (N.D. Ala. 2013).
55. *Id*. at 1107.
56. *Id*. at 1119.
57. *Id.* at 1122.
58. *Id*.
59. *Id*. at 1129.
60. *Endrew F. v. Douglas County School District*, 580 U.S. at 5.
61. *Id*. at 6.
62. *Id*.
63. *Id*. at 6.
64. *Id*.
65. *Id*. at 7.
66. *Id*.
67. *Id*.
68. *Id*. at 7-8.
69. *Id*. at 8.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*. at 10.
74. *Id*. at 10.
75. *Id*. at 14.
76. *Id*.
77. *Id*.
78. *Id.*
79. The analogy being drawn is that the *Endrew* standard is still not for the child to be given the "luxury car" (Cadillac) of IEPs and not the worst (Pinto) either, but somewhere in between, i.e., the Impala.


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