

School Law Update 2017

Special Education Update

Greg Perry

Perry, Guthery, Haase & Gessford,
P.C., L.L.O.

gperry@perrylawfirm.com

402-476-9200

Topics

1. FAPE standard – Andrew F.
2. Mainstreaming/LRE – Bennington
3. Exhaustion & service animals - Fry
4. Procedural issues – Bennington & Doug C.
 - a. Parental Involvement vs. Annual IEP
 - b. Behavior Intervention Plan (BIP)
 - c. Suspensions (S-T and bus)
 - d. Functional Behavior Assessment (FBA)
 - e. Predetermination of IEP
 - f. Prior Written Notice

FAPE

... a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

20 USC § 1414(f)(3)(E). NDE Rule 55.008.02.

FAPE

The term "free appropriate public education" means special education and related services that--

- (A) ... at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education ...; and
- (D) are provided in conformity with the individualized education program required under section 614(d)

Rowley (S. Ct. 1982) FAPE Test

- “[I]s the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?”
- “The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed.” *Bennington* (Neb. HO 2005)

Rowley (S. Ct. 1982)

"[T]he 'evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade.' In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated ... to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter."

Rowley FAPE Test

Does not mean the maximum or best:

“The Act requires that the Tullahoma schools provide the educational equivalent of a **serviceable Chevrolet** to every handicapped student. [The parent], however, demands ... a Cadillac We suspect that the Chevrolet offered to the [the parent] is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the **board is not required to provide a Cadillac**, and that the proposed IEP is reasonably calculated to provide educational benefits to [the parent], and therefore is in compliance with the requirements of IDEA.”

Doe v. Bd. of Educ. of Tullahoma City Schools, (6th Cir. 1993)

Lincoln Public Schools (Neb. HO Jan. 2000)

Andrew F. (S. Ct. 2017)
Raising the Bar

Andrew F. (S. Ct. 2017) FAPE Test

1. Rejected a “more than *de minimis* test”
2. Instead, “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 goals may differ, but every child should have the chance to meet challenging objectives.”
3. Student is to be provided with “an educational program reasonably calculated to enable [him] to make progress appropriate in light of [his] circumstances.”

Rowley FAPE Test

Mainstreaming:

“The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible.”

Footnote: Despite this preference for "mainstreaming" handicapped children -- educating them with nonhandicapped children -- Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that "the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The Act thus provides for the education of some handicapped children in separate classes or institutional settings.

Bennington PS (NDE HO 2017)

Tried:

1.Regular classroom

2.Reduced day

3.Reduced day in therapy room with 3rd party ABA providers

“Removing a child from the mainstream setting is permissible when ‘the handicapped child would not benefit from mainstreaming,’ when ‘any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting,’ and when ‘the handicapped child is a disruptive force in the non-segregated setting.’”

Bennington PS (NDE HO 2017)

Approved Level III day school placement:

“Even after moving [the student] to an isolated learning environment, he continued to exhibit behaviors that were harmful to himself and others. The evidence establishes that the IEP team correctly assessed [the student’s] disruptive and threatening behavior at BPS, and concluded that his disruptive and dangerous behaviors made it quite nearly impossible to provide him with a FAPE at BPS. I find that [the student] cannot be provided with a FAPE at BPS. I further find that an educational placement of [the student] at [the Level III day school] is the appropriate placement for him to receive a FAPE and that it is the least restrictive environment in which he can be educated until such time as his behaviors are moderated.”

Exhaustion



Service and Assistance Animals

Exhaustion & Service Animals



- “Service animals” must be allowed to accompany individuals with disabilities wherever the public is normally allowed.
- A “service animal” is a dog individually trained to do work or perform tasks for people with disabilities.
- Examples:
 - Guiding the blind
 - Alerting the deaf
 - Pulling wheelchair
 - Alerting or protecting in seizures
 - Calming PTSD

Exhaustion & Service Animals



- **Not comfort or emotional support**
- **Must be trained to do a task or work**
- **Must be housebroken**
- **Must be under control—harnessed or leashed unless interferes with work or handler cannot use leash**

Exhaustion & Service Animals



- **Permitted inquiries:**
 - Is this a service dog required because of disability, and
 - What work is dog trained to do
- **Cannot deny access because of allergies or fear of dogs**
- **Miniature horses can also qualify as service animals**

Exhaustion & Service Animals



- Assistance animals—or emotional support or therapy animals—are different than service animals.
- Not working animals. Provide emotional support.
- Use of assistance animals can be a reasonable accommodation when prescribed by a doctor.
- But assistance animals are accommodated under the Fair Housing Act. Relates to residential housing.
- Should not be an issue in school setting . . .

Exhaustion & Service Animals



- Except if the assistance animal is necessary under a special education student's IEP or 504 plan.

Exhaustion & Service Animals



- *Fry v. Napoleon Cmty. Sch.* (S. Ct. 2017)
 - Ehlena, Kindergartner with cerebral palsy, limited mobility and motor skills
 - Got a service dog, Wonder
 - Wonder helped with retrieving dropped items, balance while using walker, opening and closing doors, turning lights on and off, taking off coat, transferring to and from toilet
 - School refused to allow Wonder at school. Human aide all Ehlena needed for FAPE

Exhaustion & Service Animals



- *Fry*
- Office of Civil Rights agreed with parents
 - Providing FAPE through human aide isn't enough
 - Must comply with ADA and § 504—no discrimination based on disability
 - “OCR analogized the school’s conduct to ‘requir[ing] a student who uses a wheelchair to be carried’ by an aide or ‘requir[ing] a blind student to be led [around by a] teacher’ instead of permitting him to use a guide dog or cane.”

Ehlena, parents, and Wonder

Exhaustion & Service Animals



- *Fry*
 - Case focused on procedure—administrative procedure v. lawsuit
 - Exhaustion Rule: Cannot sue for ADA or 504 violation, must instead file a Rule 55 Petition with NDE
 - Court's hypothetical questions
 - ✦ Could the Frys have brought essentially the same claim if the 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?

Exhaustion & Service Animals



- *Fry*
 - Could the student have made an ADA claim if a library refused to allow Wonder?
 - Could a teacher have made an ADA claim if Wonder was refused access?
 - Service animals should always be allowed
 - Even if Wonder was an assistance animal, he arguably should have been allowed as part of the IEP

Rowley FAPE Test

“**First**, has the State complied with the procedures set forth in the Act?”

Procedural Issues

Rule 51/IDEA remedy only if the violation

- (I) impeded the child's right to a FAPE;
- (II) significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE; or
- (III) caused a deprivation of educational benefits.

92 NAC 55-008.03

a. Parental Involvement vs. Annual IEP

Doug C. v. Hawaii (9th Cir. 2013)

- Annual IEP due **Nov. 13**
- IEP meeting set for Nov. 9
- Dad called morning of Nov. 9 – I'm sick
- School said – let's try Nov. 10 or 11
- Dad said - can't, may still be sick
- Dad said - let's try Nov. 16 or 17
- School said – let's proceed with today's meeting, you participate via telephone
- Dad said – I want to be physically present & may not feel well enough

Parental Involvement vs. Annual IEP

Doug C. (9th Cir. 2013)

Catch-22:

- **Violate** parent involvement rule
- **Violate** annual IEP meeting rule

Parental Involvement vs. Annual IEP

Doug C. (9th Cir. 2013)

School proceeded with the Nov. 9 meeting

- **IEP team changed placement** from Level III school to regular school

IEP met again on Dec. 7

- Reaffirmed regular school placement
- Dad attended but did not participate
- Dad had filed for due process on Dec. 6

Parental Involvement vs. Annual IEP

Doug C. (9th Cir. 2013)

Court:

- School made the **wrong** choice
- When have a situation where you will violate one procedural rule or another –
violate the one least likely to result in a denial of a FAPE
- When there are scheduling conflicts, attendance of the parents takes priority over other members' attendance

Parental Involvement vs. Annual IEP

Doug C. (9th Cir. 2013)

School:

- We **cured** the defect by holding another IEP meeting
- Court: No you didn't because "after the fact parental involvement is not enough"

b. Behavior Intervention Plan (BIP)

Bennington (NDE HO 2017)

- Rule 51.007.07B3 In the case of a child whose behavior impedes his or her learning or that of others, the IEP team shall consider the use of positive behavioral interventions, and supports and other strategies to address that behavior.
- “[The student’s] IEP included plans for his behaviors.”
 - If behavior impedes learning section
 - Present level section
 - Annual goals section
 - Statement of special education and related services section
 - Accommodations section

b. Behavior Intervention Plan (BIP)

Bennington (NDE HO 2017)

- Principal developed a BIP
- 3rd Party provider then developed a BIP
- Expert: 2 BIPs confusing to a student
- HO: the multiple behavior plans did not impeded the student's right to a FAPE or cause a deprivation of educational benefits

c. Suspensions

Bennington (NDE HO 2017)

- Suspended for 5 days – two times (10 total)
- Suspended from bus 14 days – two times (28 total)
 - Missed no school because of
 - School offered mileage reimbursement
- Called Mom to come pick him up early several times
 - Parents did not give why evidence (e.g. sent home early because of his conduct, or was he not feeling well, etc.?)

10 Free Days

d. Functional Behavior Assessment (FBA)

Bennington (NDE HO 2017)

- School psychologist observed student 4 (shortened) days, then completed the FBA
- Expert: FBA process takes 2-3 weeks
- HO:
 - FBA involved more than observations, as psych also reviewed behavior data compiled by others
 - Any inadequacy did not impede student's right to a FAPE or cause a deprivation of educational benefit
 - FBA not required because not removed more than 10 days and the IEP included positive behavior interventions

d. Predetermination of IEP

Bennington (NDE HO 2017)

- A predetermination of an IEP meeting decision is a procedural violation because it deprives parents of a meaningful opportunity to participate in the formulation process
- Parents claimed a predetermination occurred because school lined up transportation to the Level III school before the IEP meeting
- HO:
 - It is permissible to form opinions or compile reports prior to the IEP meeting
 - The school appropriately planned for the possibility that the team would decide to place the student at the Level III school

e. Prior Written Notice (PWN)

Bennington (NDE HO 2017)

- PWN must be given a reasonable time before action to initiate or refusal to change “the identification, evaluation, or educational placement ... or the provision of a FAPE”
- Level III placement approved at IEP meeting on March 29
- Placement was to begin on March 31.
- PWN (School District Decision) given on March 30
- HO: 1 day notice reasonable, and if not, harmless, since:
 - Parents’ attorney attended IEP meeting
 - Student not receiving a FAPE in current placement for nearly a semester
 - Parents’ attorney able to file Rule 55 Petition before March 31 (thus invoking stay put)

School Law Update 2017

Special Education Update

Greg Perry

Perry, Guthery, Haase & Gessford,
P.C., L.L.O.

gperry@perrylawfirm.com

402-476-9200