

Parents' & Children's Rights in Special Education: 2018 Update

**The Arc Montgomery County
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Ellen A. Callegary, Esq.

THE LAW OFFICES OF
ELLEN A. CALLEGARY, P.A.



(410) 576-7606

callegarylalaw.com

Endrew F. v. Douglas Co. School Dist. RE-1

U.S. Supreme Court, 137 S.Ct. 988
Decided March 22, 2017

Endrew F. v. Douglas Co. School Dist. RE-1

The U.S. Supreme Court determined that, when providing special educational services to students with disabilities, school systems cannot simply ensure that a student makes minimal or trivial progress from year to year, but instead must ensure that students make meaningful progress, given the student's circumstances.

Endrew F. v. Douglas Co. School Dist. RE-1

FACTS

Endrew F. – or “Drew” – was a student diagnosed with an Autism Spectrum Disorder at age two. He attended school in his local school system, Douglas County (Colo.) School District, from preschool through fourth grade.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

The school system developed Individualized Education Programs (IEPs) for Drew each year. During Drew's fourth grade year, his parents were concerned that he was not making appropriate progress.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

Parent concerns included:

- Drew exhibited multiple behaviors that affected his academic progress and his ability to access instruction, including screaming in class, climbing over furniture, climbing over other students, and running away from school.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

Parent concerns included:

- Drew exhibited severe fears of flies, spills, and public restrooms.
- Drew's IEPs repeatedly carried over the same goals and objectives from one year to the next.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

In April of Drew's fourth grade year, the school system presented a proposed IEP to be implemented during fifth grade. Drew's parents concluded that the proposed IEP was substantially identical to his fourth grade IEP, which had been ineffective in addressing his behaviors or his academic needs.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

As a result, Drew's parents unilaterally placed him in a nonpublic school specializing in educating children with Autism Spectrum Disorders.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

The nonpublic school implemented a Behavioral Intervention Plan that proved effective in addressing Drew's most frequent interfering behaviors. Drew made significant behavioral and academic progress.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

The nonpublic school was also able to provide Applied Behavior Analysis and speech-language services that Drew had not received in his public placement.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

In November of Drew's fifth grade year, his parents attended a meeting with the school system to consider another proposed IEP, but concluded that IEP was substantially the same as what they had rejected seven months earlier.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

In particular, they were concerned that the school system's proposal did not incorporate effective elements of the nonpublic school's behavior intervention plan.

Andrew F. v. Douglas Co. School Dist. RE-1

FACTS

His parents rejected the school system's second proposed IEP and requested that the school system reimburse them for his placement at the nonpublic school.

Andrew F. v. Douglas Co. School Dist. RE-1

LEGAL PROCEEDINGS

ADMINISTRATIVE HEARING

In 2012, Drew's parents filed a due process hearing request. During a hearing, they presented evidence and argued that the evidence indicated that Drew had made "little to no progress" during his enrollment in the school system.

Andrew F. v. Douglas Co. School Dist. RE-1

LEGAL PROCEEDINGS

ADMINISTRATIVE HEARING

The administrative law judge disagreed, and found that the school system had provided "some" educational benefit, which was all it was obligated to provide.

Andrew F. v. Douglas Co. School Dist. RE-1

LEGAL PROCEEDINGS

DISTRICT COURT

Drew's parents appealed to the U.S. District Court. The district court judge upheld the administrative law judge's decision, and concluded that modifications to Drew's past IEPs were "sufficient to show a pattern of, at least, minimal progress."

Andrew F. v. Douglas Co. School Dist. RE-1

LEGAL PROCEEDINGS

COURT OF APPEALS

Drew's parents appealed to the U.S. Court of Appeals for the Tenth Circuit. The appellate court also upheld the administrative law judge's decision and the district court's decision.

Andrew F. v. Douglas Co. School Dist. RE-1

LEGAL PROCEEDINGS

COURT OF APPEALS

The appellate decision concluded that any child's IEP was appropriate as long as it conferred an "educational benefit that is merely more than *de minimis*."

Endrew F. v. Douglas Co. School Dist. RE-1



Drew's parents appealed to the U.S. Supreme Court.

Endrew F. v. Douglas Co. School Dist. RE-1

The Supreme Court's Decision:

In a unanimous decision, the Supreme Court ruled 8-0 to overturn the Tenth Circuit's decision.

(The decision was announced 2 weeks before Neil Gorsuch's nomination to the Court was confirmed)

Endrew F. v. Douglas Co. School Dist. RE-1

In the decision written by Chief Justice John Roberts, the Court took the opportunity to reexamine the holding in *Board of Ed. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the first case in which the Supreme Court examined the requirements of the Individuals with Disabilities Education Act (IDEA).



Endrew F. v. Douglas Co. School Dist. RE-1

In *Rowley*, a majority of the Court determined that the IDEA did not require that school systems provide students with disabilities an equal educational opportunity relative to students without disabilities.

Endrew F. v. Douglas Co. School Dist. RE-1

Instead, the Court in *Rowley* decided that school systems only needed to provide special education services “sufficient to confer **some** educational benefit upon the handicapped child.” (Emphasis added).

Endrew F. v. Douglas Co. School Dist. RE-1

However, the Court in *Rowley* declined to specify what kind of progress would rise to the level of **some** educational benefit: “The determination of when handicapped children are receiving sufficient educational benefits ... presents a more difficult problem.”

Andrew F. v. Douglas Co. School Dist. RE-1

As a result, the Court only considered the circumstances in the *Rowley* case, which involved a child who was able to participate in her general education classroom with accommodations for her deafness.

Andrew F. v. Douglas Co. School Dist. RE-1

The Court did require an IEP to be “reasonably calculated to enable the child to receive educational benefits,” and for students in general education classrooms, that generally entailed achieving “passing marks” and advancing from grade to grade.

Andrew F. v. Douglas Co. School Dist. RE-1

Justice Roberts, in considering the standard applied by the Colorado school district, referred at length to the *Rowley* Court’s discussion of Congress’ goals in passing the IDEA: “The essential function of an IEP is to set out a plan for pursuing academic and functional advancement.”

Endrew F. v. Douglas Co. School Dist. RE-1

"This reflects the broad purpose of the IDEA, an 'ambitious' piece of legislation enacted '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.'"

Endrew F. v. Douglas Co. School Dist. RE-1

In addition, Justice Roberts noted, "A focus on the particular child is at the core of the IDEA. The instruction offered must be '*specially* designed' to meet a child's '*unique* needs' through an '*individualized* education program."

Endrew F. v. Douglas Co. School Dist. RE-1

In arguments before the Court in the current case, the Colorado school system argued that any educational benefit was sufficient to confer some educational benefit.

The decision by Chief Justice John Roberts rejected that reasoning.

Andrew F. v. Douglas Co. School Dist. RE-1

"It would not have been 'difficult' for us to say when educational benefits are sufficient if we had just said that any educational benefit was enough." Instead, Justice Roberts concluded, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Andrew F. v. Douglas Co. School Dist. RE-1

For a student who fully participated in the general education classroom, one indication of educational benefit would be measured by the student's ability to achieve passing grades and advance from grade to grade.

Andrew F. v. Douglas Co. School Dist. RE-1

However, the Court cautioned that "[t]his guidance should not be interpreted as an inflexible rule." Citing *Rowley*, the Court pointed out that not "every handicapped child who is advancing from grade to grade ... is automatically receiving a [FAPE]."

Endrew F. v. Douglas Co. School Dist. RE-1

But for a student who is not “fully integrated in the regular classroom and not able to achieve on grade level,” Justice Roberts wrote that “his educational program must be appropriately ambitious”

Endrew F. v. Douglas Co. School Dist. RE-1

“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.”

Endrew F. v. Douglas Co. School Dist. RE-1

As a result, the Court rejected the conclusion by the Tenth Circuit and the Colorado district court that any minimal or trivial progress meant that the school system had met its obligations.

Andrew F. v. Douglas Co. School Dist. RE-1

The Court remanded the case back for consideration by those lower courts.

Andrew F. v. Douglas Co. School Dist. RE-1

On remand, the district court in Colorado applied the Supreme Court's standard to determine if Drew had received educational benefit. The judge determined that Drew had not, "based on the continued pattern of unambitious goals and objectives of his prior IEPs" with "very slight" changes from year to year.

Andrew F. v. Douglas Co. School Dist. RE-1

As a result, the judge found that Drew's fifth grade IEP – which had been the basis of the due process hearing, and judicial appeals – was "clearly just a continuation of the District's educational plan that had previously only resulted in minimal academic and functional progress."

Andrew F. v. Douglas Co. School Dist. RE-1

The judge ordered the school system to reimburse Drew's parents for the years of tuition for his enrollment in the nonpublic school. He also ordered the school to pay parents' attorney's fees.

Andrew F. v. Douglas Co. School Dist. RE-1

Note for the Future: The Court still declined to impose a clear formula to determine whether a student was receiving "sufficient" educational benefit.

Andrew F. v. Douglas Co. School Dist. RE-1

Note for the Future: As a result, the question of what constitutes "appropriate progress" or "sufficient educational benefit" will likely still be the subject of disputes between parents and school systems in IEP Team Meetings and in administrative and judicial proceedings.

Parental Consent

Parental Consent

On April 10, 2017, the Maryland General Assembly passed Senate Bill 710, amending the requirements for obtaining parental consent set forth in §8-405(f), Education Article, Maryland Code. The law took effect on July 1, 2017.

Parental Consent

Under the IDEA, schools must obtain parental consent in order to initiate:

- An initial evaluation;
- Services under a student's initial IEP; and
- A Re-Evaluation.

Parental Consent

Under the new state law, schools must now also obtain parental consent in order to:

- Transfer a child from the diploma track to the certificate track;
- Identify the child as participating in alternative assessments (e.g., Alt-MSA)
- Include restraint or seclusion as approved behavior interventions in the IEP.

Parental Consent

If a school system wants to implement one of these proposals, it can ask for parental consent at the meeting at which it's proposed.

Parental Consent

If parents do not consent at the meeting, the school must send parents written notice within 5 days of an IEP Team meeting that:

- The parents have the right to consent, or to refuse consent; and
- If the parent does not provide written consent or written refusal within 15 days, the school will implement the proposed action.

Parental Consent

If parents provide written refusal to consent to these proposals, the school system may file for a mediation session or a due process hearing to resolve the impasse.

Informed Consent for Special Education

"Consent" in the special education context means a parent:

- Has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication;
- Understands and agrees in writing to the carrying out of an activity, which is described in writing, for which the parent's consent is sought
- Understands that consent is voluntary and may be revoked at any time.

COMAR 13A.05.01.03(12)

Informed Consent for Education

When parental consent is required:

- For a child to be initially assessed for special education
- Before any subsequent evaluations related to special education
- Before implementation of special education services
- Before an agency representative is invited to an IEP meeting to discuss transition services
- To excuse an essential IEP team member's attendance at a meeting

COMAR 13A.05.01.13

Informed Consent for Education

When consent is not needed or can be legally challenged by the school system:

- Before reviewing existing data about a student
- Before administering a test that is given to all students
- Before a reevaluation assessment if the school requested consent and the parent failed to respond.
- NOTE: If a parent refuses to consent to assessments, a school system may pursue the assessment through mediation or due process.

COMAR 13A.05.01.13

Informed Consent for Special Education

If a parent revokes consent:

- The revocation is not retroactive and does not negate earlier actions after consent was given
- If the parent revokes consent for special education services after the child is provided special education, the school is not required to amend the student's education records to remove any references to the child's receipt of special education

COMAR 13A.05.01.03(12)

Informed Consent for Education: Parental Consent

A child's parents are the child's "natural guardians" and are "jointly and severally responsible for the child's support, care, nurture, welfare, and education."

(Section 5-203 of the Family Law Article of the Maryland Annotated Code)

**Informed Consent for Education:
Divorced or Separated Parents**

“Unless otherwise ordered by a court, access to medical, dental, and educational records concerning the child may not be denied to a parent because the parent does not have physical custody of the child.”

(Section 9-104 of the Family Law Article of the Maryland Annotated Code)

Informed Consent for Special Education

Parental consent is required even if the student is 18 years old **unless** the student has not been adjudged incompetent and:

- The parents are **unavailable or unknown**; or
- The parents **have not, cannot, and will not participate in special education decision making**; or
- The child lives outside the parents’ home and is not in custody of a public agency

(Section 8-412.1 of the Education Article of the Maryland Annotated Code)

**Top Fifteen Tips
To Ensure Parents
Are Equal Partners**

Top Fifteen Tips To Ensure Parents Are Equal Partners

#1: There should be honest and candid discussions between parents and school staff members – if you don't know the answer to their questions, say so.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#2: Parents and key school staff members should meet before the IEP Team Meeting to discuss their concerns and goals for the meeting.

Top Fifteen Tips To Ensure Parents Are Equal Partners

(#2 cont.) Parents should ask that the staff member they feel the most comfortable schedule a time to talk with parents at least a week before the IEP Team Meeting to explain the issues that may come up in the meeting. The school staff member should allow plenty of time to answer the parents' questions about the meeting.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#3: Let the IEP Chairperson know if there are specific staff members that you would like to have at the meeting. The School should try to ensure those staff members are invited to the meeting.



Top Fifteen Tips To Ensure Parents Are Equal Partners

(#3 cont.) The IEP Team Meeting Notice should list the full names and positions of each school team member who will be coming.

Top Fifteen Tips To Ensure Parents Are Equal Partners

(#3 cont.) Parents should review the **meeting notice** carefully to make sure they understand it and that everything they want to discuss in the meeting is listed as a purpose of the meeting. If the notice is confusing or unclear, parents should request that it be clarified to include the issues that they would like to be discussed.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#4: Parents should receive copies of all documents that the IEP Team will review at the meeting at least one week in advance.

These documents should include:

- Draft IEP
- Progress Reports
- Assessments

If possible, parents should provide any Reports, Assessments or IEP Goals and Objectives that they would like to be included on their child's IEP.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#5: At the beginning of the IEP Team Meeting, have each school staff member introduce themselves, describe their role in the child's school day and what their expertise is. The school should provide name plaques with each team member's name and title.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#6: During the IEP Team Meeting, do not use acronyms without first explaining what the term means and how it relates to the discussion. Do not put the parents in the position of having to ask what a term means. If acronyms or other undefined terms are used, parents should request that school staff members define or explain the terms.

Top Fifteen Tips To Ensure Parents Are Equal Partners

(#6 cont.) Some parents agree to provisions being added or dropped from their child's IEP even when they do not understand what they are agreeing to. They may be embarrassed because they do not understand "IEP SPEAK" which often consists of acronyms that only the school staff may be able to decipher.

Top Fifteen Tips To Ensure Parents Are Equal Partners

(#6 cont.) It's important to make sure the IEP is as specific as possible. Many IEPs say the child's progress will be tracked by "teacher reports." Year after year of IEP progress reports will say a child is "making progress." It's difficult for parents to challenge those assertions without specific data
(34 C.F.R. § 300.320(a)(3))



Top Fifteen Tips To Ensure Parents Are Equal Partners

#7: After the IEP is complete – but before any meeting to review progress – it's helpful for teachers and parents to meet and review how data is collected. Take a look at what data sheets are already prepared.
Make sure parents have a chance to review all progress data before the meeting.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#8: Make sure that progress is clearly and specifically defined. Is it a certain number of times per class period? Who will be tracking that progress? Consider providing data – rather than just "Teacher Reports," put together data collection sheets, and have teachers fill them out.



Top Fifteen Tips To Ensure Parents Are Equal Partners

#9: School staff members should take the time to listen to the parents. They should ask them questions about their child that are relevant to the concerns they are raising. Be patient. Parents should prepare a "Parent Statement" before the meeting to ensure that all of their concerns are discussed at the meeting.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#10: When there is a matter that requires parental consent, IDEA requires you to ensure that the parents understand what they are agreeing to or what they are rejecting.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#11: Truly informed consent requires knowledge of what is being offered, what the alternatives are, and what the risks are.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#12: School staff members owe an ethical and legal obligation to their students. Because parents are the legal decision makers for their children, school staff members must ensure parental involvement in each phase of the IEP process.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#13: If tempers or emotions are rising in the IEP Team Meeting, take a break. Give staff members and parents time to cool down.

Top Fifteen Tips To Ensure Parents Are Equal Partners

(#13 cont.) It's easy to say, "Keep calm." But there are some other ways to avoid losing your cool during the meeting.



Top Fifteen Tips To Ensure Parents Are Equal Partners

#14: Some parents agree because they don't want to upset school staff or simply don't like conflict. For many reasons, some parents will end up saying "OK" to IEP provisions that they really don't like or understand.

Top Fifteen Tips To Ensure Parents Are Equal Partners

#15: If parents are communicating their concerns in emails, phone calls or when they see staff members in the hallways, be proactive.

Top Fifteen Tips To Ensure Parents Are Equal Partners

(#15 cont.) Schedule a parent/teacher conference or an IEP Team Meeting. Invite Central Office Staff Members or other supervisory staff to the meeting. They may be able to offer other resources or expertise to address the problem.

2018 Update in Special Education Law

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