Special Education Goes to the Supreme Court – Analysis and Impact of Endrew F. and Fry

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A. Introduction

This year, for the first time since 1982, the Supreme Court heard two cases interpreting the Individuals with Disabilities Act: one examining the level of education schools are required to provide students with disabilities, in *Endrew F. v. Douglas County Schools*, and in *Fry v. Napoleon Community Schools*, the Court interpreted the procedural requirements of the statute.

This paper will address what effect *Endrew F.* and *Fry* will have on school districts. First, this paper explores the development of the FAPE standard and its culmination in *Endrew F.* Then, the paper examines the procedural changes brought about by *Fry*. In both instances, the authors will opine on the practical impact of the Supreme Court cases going forward, particularly the impact on local school districts.

B. Development of the FAPE Standard in Special Education Culminating in *Endrew F.*

a. Statutory Requirements and IDEA

Congress passed the *Education for All Handicapped Children (EAHCA)* in 1975 in response to two federal cases, *Pennsylvania Association for Retarded Children v. Commonwealth*¹ (PARC) and *Mills v. Board of Education of District of Columbia*.² In PARC, the Pennsylvania district court found that a Pennsylvania statute excluding mentally retarded children from public education was unconstitutional. The case ended in a consent decree preventing the State from

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“deny[ing] to any mentally retarded child access to a free public program of education and training.”

Following suit from *PARC*, the D.C. district court in *Mills*, found that a handicapped child could not be “excluded from regular school assignment” unless the child is “provided (a) adequate alternative educational services suited to the child’s needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child’s status, progress, and the adequacy of any educational alternative.” Neither court in *Mills* nor *PARC* established what level of education was required for students – the courts only held that handicapped and disabled students cannot be prevented access to or be excluded from a public education.

In 1986, the *Education for All Handicapped Children Act of 1975* (EAHCA) was amended to require states to provide programs and services to children from birth. In 1990, the *EAHCA* was again amended and its name changed to the *Individuals with Disabilities in Education Act* (*IDEA*). Then, Congress passed the *IDEA* Amendments of 1997, which emphasized transition services for students with disabilities. Finally, the most recent amendments to the *IDEA* were passed in 2004 with the *Individuals with Disabilities Education Improvement Act of 2004*, which placed particular emphasis on enhanced accountability, bringing *IDEA* in line with the federal *No Child Left Behind Act*.

The general concepts of *IDEA* can be broken down into six main principles: 1) every child is entitled to a free and appropriate public education (FAPE); 2) schools are obligated to identify

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3 *PARC*, 334 F. Supp. at 1258.
4 348 F. Supp. at 878.
5 See Rowley, at 193.
6 See Public Law 99-457.
7 See Public Law 101-476.
8 See Public Law 105-17.
9 See Public Law 108-446.
and evaluate students suspected of having a disability (child find); 3) every student with a disability is entitled to an Individualized Education Plan (IEP), and the purpose of the IEP is to lay out a series of specific actions and steps through which educational providers, parents, and the student themselves may reach the child's stated goals; 4) students with disabilities must be educated in the least restrictive environment (LRE); 5) participation of the child and his/her parents is required, and 6) a student with a disability’s rights to the above is protected by a set of procedural safeguards.

The hallmark feature of the IDEA is its requirement that school districts provide FAPE for students with disabilities. IDEA defines FAPE as “special education and related services that—(A) have been provided at public expense, under public services 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 in the State involved; and (D) are provided in conformity with the individualized education program required under Section 1414(d) of [the IDEA].”\(^{10}\) However, the law lacked a tangible description of what FAPE would actually look like in practice or what courts and schools were expected to provide.

b. **Board of Education of the Hendrick Hudson Central School District v. Rowley**

The first case the Supreme Court heard interpreting Congress’s intent to provide education to disabled students was *Board of Education of the Hendrick Hudson Central School District v. Rowley*.\(^{11}\) Amy Rowley, a deaf kindergarten student, brought suit against her school for failure to provide her with an interpreter during class.\(^ {12}\) The school had provided Amy with hearing aids, as well as provided training for some staff members in sign language.\(^ {13}\) Amy’s parents believed, however, that in order for her to be in a regular kindergarten classroom, Amy would need the

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\(^{10}\) 20 USC § 1404(9).

\(^{11}\) 458 U.S. 176 (1982).

\(^{12}\) *Id.* at 184.

\(^{13}\) *Id.* at 184-85.
assistance of an interpreter and was being denied FAPE if the school could not provide an interpreter in the classroom to assist Amy during instruction.\textsuperscript{14}

The lower courts interpreted the \textit{Education for the Handicapped Act} to require that Amy be provided with an interpreter, finding that the “disparity between Amy’s achievement and her potential led the court to decide that she was not receiving a ‘free appropriate public education,’ which the court defined as ‘an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.’”\textsuperscript{15}

Upon granting certiorari, the Supreme Court looked at two questions: “What is meant by the Act’s requirement of a ‘free appropriate public education,’” and “what is the role of the state and federal courts in exercising the review granted by 20 U.S.C. §1415?”\textsuperscript{16} The Court found that the \textit{EHA} provided a “basic floor of opportunity” to students with disabilities.\textsuperscript{17} Focusing on the words “to benefit” in \textit{EHA}, the Court determined that basically any benefit provided to a disabled student satisfied the requirements under \textit{EHA}.

Further, the Court explained the appropriate analysis under 1415: “Therefore, a court’s inquiry in suits brought under 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.”\textsuperscript{18}

\textsuperscript{14} Id.
\textsuperscript{16} Rowley, 102 S. Ct. at 187.
\textsuperscript{17} Id. at 201.
\textsuperscript{18} Id. at 206-07.
In sum, the Court did not establish a bright-line rule for what is required for IEP’s. In fact, the Court determined that since each inquiry is so individualized to the student, that the creation of a bright-line standard would be impossible.\textsuperscript{19} In \textit{Rowley}, the Court set the dubious standard that students who are receiving some “benefit” from their education are receiving FAPE.\textsuperscript{20} The Court would not revisit this standard until 2017 when it granted certiorari for \textit{Endrew F.}

c. \textit{Endrew F. v. Douglas County School District R-I}

Endrew F. attended Douglas County School District from preschool through fourth grade. Diagnosed with autism at age two, he qualified for and received an IEP that was reviewed each year. His parents found his IEP to be inadequate in that they claimed he was not progressing each year academically and socially. As a result, his parents unilaterally moved Endrew to the Firefly Autism House, where he received an updated and progressive IEP and a “behavioral intervention plan.”\textsuperscript{21} Endrew began improving and progressing while at Firefly, and his parents again met with Douglas County School District about him transferring back to public school with an updated IEP – they believed his success under the new plan at Firefly proved that his IEP at Douglas was lacking.

Douglas School District presented Endrew’s parents with a new IEP that was similar to his old IEP. Thereafter, his parents filed a complaint against Douglas County School District for reimbursement of his tuition at Firefly with the Colorado Department of Education. They argued

\textsuperscript{19} \textit{Id.} at 198 (“The requirement that States provide ‘equal’ educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.”).

\textsuperscript{20} \textit{Id.} at 203-04. “Insofar as a State is required to provide a handicapped child with a ‘free appropriate public education,’ we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction . . . In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act, and if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”

\textsuperscript{21} \textit{Id.} at 996.
that the proposed IEP by Douglas was not “reasonably calculated to enable Endrew to receive educational benefits”\(^{22}\) and, therefore, they were denying Endrew FAPE.\(^{23}\)

The Colorado Department of Education administrator denied their claims, and so Endrew’s parents brought suit in federal court. The federal judge, relying on the findings in \textit{Rowley}, determined that Endrew had shown “minimal progress” under the plan written by the Douglas School District and this was enough to satisfy FAPE as required under \textit{IDEA}.\(^{24}\) The Tenth Circuit affirmed the lower court’s finding, determining that any progress meant that the IEP was adequate, holding that his IEP was “reasonably calculated to enable [Endrew] to make some progress.”\(^{25}\)

In the years since the Supreme Court issued its decision in \textit{Rowley}, a split developed between the Circuits with regard to the meaning of FAPE in general and the meaning of the “some benefit” standard set forth in \textit{Rowley} specifically. The “some benefit” standard set in \textit{Rowley}, had been largely surpassed by most circuits. The First,\(^{26}\) Second,\(^{27}\) Third,\(^{28}\) Fourth,\(^{29}\) and Sixth\(^{30}\) Circuits have included “meaningful” access to education as a requirement under FAPE, raising the level of requirement past the standard set in \textit{Rowley}. The Fifth Circuit requires “meaningful” access to education and “progress.”\(^{31}\) The Seventh\(^{32}\) and Eighth\(^{33}\) Circuits already explicitly required “progress” as a component of an adequate IEP. The Eleventh Circuit requires “adequate educational benefit based on surrounding and supporting facts” and the “child’s individual

\(^{22}\) \textit{See Rowley}, 458 U.S. at 207.
\(^{23}\) \textit{Endrew F.}, 137 S. Ct. at 997.
\(^{25}\) \textit{Endrew F. v. Douglas County School District RE J}, 798 F.3d 1329, 1338 (10th Cir. 2015).
\(^{26}\) \textit{D.B. v. Esposito}, 675 F.3d 26 (1st Cir. 2012).
\(^{27}\) \textit{M.W. v. New York Dept. of Educ.}, 725 F.3d 131 (2d Cir. 2013).
\(^{29}\) \textit{O.S. v. Fairfax County School Board}, 804 F.3d 354 (4th Cir. 2015).
\(^{31}\) \textit{Cypress-Fairbanks County Sch. Dist. v. Michael F.}, 118 F.3d 245 (5th Cir. 1997); \textit{R.P. v. Alamo Heights Independent Sch. Dist.}, 703 F.3d 801 (5th Cir. 2012).
\(^{32}\) \textit{M.B. v. Hamilton Southeastern Sch.}, 668 F.3d 851 (7th Cir. 2011).
Only the Ninth, Tenth, and D.C. Circuits have failed to raise their standards post-
Rowley to include progress or meaningful access to education.

To resolve this Circuit split, the Supreme Court granted certiorari to Endrew’s parents on September 29, 2016, agreeing to hear the first case interpreting IDEA since Rowley in 1982. The Court’s decision clarified what was meant to provide “some educational benefit,” determining that a school’s compliance with IDEA requires that it “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” In coming to this decision, the Court rejected the district’s argument that the statutory language of IDEA only requires access to a public education, but not any guarantee to any particular level of education. However, the Court also rejected the Parent’s position that FAPE is “an education that aims 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.”

For children in a regular classroom, progress is defined as being able to move adequately from grade to grade. According to the Court, this standard is grounded in the statutory definition of a FAPE and the very nature of an IEP. The Court explained that every IEP begins by describing a child’s present level of achievement, including explaining how the child’s disability affects the child’s involvement and progress in the general education curriculum. It then sets out annual measurable goals along with specialized instruction and services that the child should

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34 Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008).
35 J.L and M.L. v. Mercer Island Sch. Dist., 592 F.3d 938 (9th Cir. 2010).
36 Endrew F. v. Douglas County Sch. Dist. RE-1, 798 F.3d 1329 (10th Cir. 2015).
38 Endrew F., 137 S. Ct. at 999 (emphasis added).
39 Id. at 997-98.
40 Id.
41 Id. at 1000.
42 Id. at 994; 20 USC 1414(d)(1)(A)(i)(I)-(III).
receive. These are all with an eye towards progress in the general education curriculum. The focus of an IEP should be on the child’s progress, and that progress needs to be individualized to each student (hence, “individualized” education plan). A child’s progress may vary drastically from another child’s progress, and, therefore, an IEP is not, and never will be, a form document.

In sum, the Court found that the level of education required of schools to be in compliance with IDEA goes beyond the “de minimus” test, concluding that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than de minimus’ progress from year to year can hardly be said to have been offered an education at all.”

d. **FAPE for the Future**

As an example of how courts may begin to interpret the new standard set in *Endrew F.*, the Seventh and Eighth Circuits have already explicitly required “progress” as a component to satisfy FAPE. This standard was expounded upon in *Alex R. v. Forrestville Valley Community Unit School District No. 221.* Alex R. suffered from a variant of Landau-Kleffner Syndrome, a rare neurological disorder affecting his speech and comprehension, and some children experience hyperactivity, poor attention, depression, and irritability. Alex entered kindergarten with an IEP that required him to be “included in the regular-education classroom at [school] and provided for individualized instruction; the assistance of a classroom aide; an extended kindergarten day for instruction and therapy; and speech and language services for 60 minutes per week.” The district did change his IEP the following years as he progressed through the first and second grades.

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43 Id.
45 Id. at 1001.
46 375 F.3d 603 (7th Cir. 2004).
47 Id. at 606.
48 Id.
49 Id.
Upon entering third grade, Alex’s IEP required him “to study math and social studies in the regular-education classroom, and to study reading, language, and spelling in a resource room. He was to receive special speech and language training for one hour per week; a classroom aide; occupational therapy for two hours per semester; and social-work services for one hour per semester.”\textsuperscript{50} But, starting in third grade, Alex began to exhibit violent behavior, which included him attacking teachers and escalated to him filling a glove with rocks and hitting other students with it.\textsuperscript{51} After these incidents, his IEP was amended to include an “individual aide and a sensory diet.”\textsuperscript{52}

Alex also began leaving school grounds and attacking any personnel attempting to find and return him to school. These incidents climaxed with Alex leaving school, walking across the parking lot and down the street with teachers and personnel pursuing him.\textsuperscript{53} He walked to the edge of a cornfield, said “so long, suckers,” and ran into the field.\textsuperscript{54} He was found hours later, after extensive searching, stuck in a river bank suffering from hyperthermia. After this incident, he was moved to a special classroom for students with behavioral disorders with only eight students, but his episodes and behavior continued to escalate. It was at this point that Alex’s parents filed a due process complaint alleging the school had failed to provide Alex with FAPE.\textsuperscript{55}

The hearing officer who heard the matter found in favor of the parents, requiring that the school return Alex to the regular classroom, that it provide disability sensitivity training in every classroom from kindergarten to twelfth grade, and a variety of other accommodations. The district

\textsuperscript{50} Id. at 607-08.
\textsuperscript{51} Id. at 608.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 609.
\textsuperscript{55} Id.
appealed and the district court found that the school district had supplied Alex with an adequate FAPE because his plan adjusted every year to help his escalating behavior.\textsuperscript{56}

The Seventh Circuit upheld the lower court’s decision finding that the district “responded in a way that, based on its experience with Alex, appeared reasonably likely to produce progress.”\textsuperscript{57} Further, the court determined that Alex showed sufficient progress from first to second grade and then second to third grade.\textsuperscript{58} This progress demonstrated that “Alex’s IEP’s were ‘reasonably calculated’ to enable the child to receive educational benefits.” The court further determined that Alex’s deterioration was rapid and that the district had done everything it could to ensure his progress to this point regarding his behavioral health.\textsuperscript{59}

In sum, because the school district responded every time that Alex’s behavior escalated by amending and updating his IEP and their procedures and responses to his behavior, the Seventh Circuit determined that the school had reacted and adapted to the individual needs of Alex and attempted to help him progress through school. For this reason, the district was in full compliance with the IDE\textsuperscript{A}. This serves as an example of the new standard that the Court established in its holdings of \textit{Endrew F}.

Courts have already begun to apply the standard recently set in \textit{Endrew F.}, decided only on March 22, 2017. The Second Circuit in \textit{D.B. v. Ithaca City School District}, found that a non-verbal 18-year-old’s IEP was substantively adequate because it was “sufficiently tailored to her needs to ensure meaningful \textit{progress}.”\textsuperscript{60} The school district provided multiple screening and evaluation services for D.B. in its development of her IEP, and her IEP implemented and discussed

\begin{itemize}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.} at 616.
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} at 617.
\item \textsuperscript{60} 2017 WL 225839, *3 (emphasis added).
\end{itemize}
the findings of these evaluations, being “specifically designed to address her non-verbal deficits.”\(^6\)

Further, the Ninth Circuit remanded a case for review in light of the findings \textit{in Endrew F.} for a case involving a blind and developmentally delayed student suffering from Norrie Disease.\(^6\) The circuit court found that “the school must implement an IEP that is ‘reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can make progress in the general education curriculum,’ taking into account the progress of his non-disabled peers and the child’s potential.”\(^6\)

In sum, the circuit courts have begun to adopt the “progress” standard elucidated in \textit{Endrew F.}. For some circuits, namely the Seventh and Eight Circuits, this change will not be significant as these circuits already require this higher level of accommodation. However, for some circuits, such as the Tenth and D.C. circuits, Endrew F. could have a significant impact on how schools develop, implement, and accordingly adjust student IEP’s to be in compliance with the \textit{IDEA}.

e. \textbf{Practical Considerations to Ensure IEP’s are Tailored to the “Progress” Standard}

Based on the decision in \textit{Endrew F.}, school districts now have a clearer definition of FAPE. In particular, school districts should be cognizant when drafting an IEP of whether or not the IEP is designed to assist the student in making progress. In drafting the IEP for this purpose, the IEP team should take care to consider several things.

First, in determining whether or not a student made progress, it is imperative to begin with an accurate baseline. Present levels data needs to be current and accurate when writing an IEP so that it is clear where the student is starting. Present levels data should align with goals in the

\(^{61}\) \textit{Id.}
\(^{62}\) \textit{M.C. by and through M.N. v. Antelope Valley Union High School District}, 858 F. 3d 1198 (9th Cir. 2017).
\(^{63}\) \textit{Id.} at 1201 (citing \textit{Endrew F.}, 137 S. Ct. at 988).
previous IEP so that it is clear to the team which goals have been met and which goals have lacked success.

Second, goals must be written in a way that allows clear measurability. Teams often use the SMART goal process to ensure well-written goals. SMART goals are goals that are specific, measurable, assignable, realistic and time-based. Whether or not the IEP team uses the SMART goal model or a different model, the team should ensure that goals are written in a way that clearly delineates the expected outcome and the timeframe in which the outcome is expected to be reached.

Finally, and perhaps most importantly, if a student is not progressing during the school year, the IEP team must meet to review goals and adjust accommodations, modifications, and supports to improve progress. Too often, IEP teams view the IEP as a once-per-year obligation and do not review and adjust the document when the supports in the IEP are not helping the student make progress towards goals. The IEP team must be prepared to troubleshoot the lack of progress if, during the year, it is clear that the IEP does not contain the supports necessary for the student to succeed.

C. IDEA’s Exhaustion Requirements and the Effects of Fry v. Napoleon Community Schools, 137 S. Ct. 743 (2017)

a. Introduction to IDEA’s Exhaustion Requirements

It is not uncommon for parents and schools to disagree on what services and what level of services are required to be provided to their children. For that reason, the IDEA has established the formal procedures for resolving these types of disputes.64 In 1984, the Supreme Court heard Smith v. Robinson, a case involving the placement of Tommy Smith who suffered from cerebral palsy and a variety of physical and emotional handicaps.65 In a case where Justice Blackmun called the

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64 20 USC § 1415.
procedural history “complicated,” the question essentially came down to Tommy’s parents seeking awards for attorney fees and relief for claims brought under the Rehabilitation Act, § 1983, and § 1988. The respondent school district argued that the claims brought under the EHA, which does not statutorily allow for the recovery of attorney fees like the Rehabilitation Act, § 1983, and § 1988, bars the recovery of these fees under the other claims. In fact, the district alleged that the Smiths were attempting to “circumvent” the procedural bars of the EHA by filing additional claims under the Rehabilitation Act, § 1983, and § 1988.67

The Court determined that the EHA was the sole avenue for relief under claims brought against public educational bodies from students with disabilities: “We have little difficulty concluding that Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education.”68 In response to the Court’s limiting construction in Smith, Congress amended the EHA to include the following provision:

“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extend as would be required had the action been brought under this subchapter.”69

This additional provision provides that children still have remedies under ADA, the Rehabilitation Act, and other federal laws, such as § 1983 claims, but limited those remedies by providing that if they are also seeking remedy under the IDEA, they must exhaust all possible avenues of relief before seeking relief as required under the IDEA.

66 Id.; Id. at 1004.
67 Id. at 1005.
68 Id. at 1009.
69 20 USC 1415(l)
The exhaustion requirements of the IDEA are provided in 20 USC § 1415, and provide a roadmap for the requirements that parents must satisfy before seeking relief in state or federal court. First, to comply with the procedural exhaustion requirements under the IDEA, parents must file complaints concerning their child being denied FAPE with the local or state educational agency.\(^70\) Filing this complaint usually triggers a preliminary meeting between the parents and the school district, or other opposing party.\(^71\) Then, if the parties have not reached an agreement, they can elect to go to mediation.\(^72\) If after mediation the parties still cannot reach an agreement, there will be a due process hearing before an impartial hearing officer.\(^73\) If either party is unhappy with the outcome, the ruling of the due process hearing can be appealed to the state agency, if conducted preliminarily at the local level.\(^74\) It is only after parents have sought relief through the previous avenues that they may now seek judicial review in the state and federal courts.\(^75\)

b. Fry v. Napoleon Schools

In 2009, E.F., a child born with a severe form of cerebral palsy, obtained a Goldendoodle named Wonder to assist her with daily activities, such as “retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet.”\(^76\) When E.F. entered kindergarten, Napoleon Community Schools and Jackson County Intermediate School District did not permit her to have Wonder in school because her IEP already called for a human aide.\(^77\) After her parents petitioned, the school allowed her to have Wonder on a “trial basis,” but he was only

\(^{70}\) § 1415(b)(6).
\(^{71}\) § 1415(f)(1)(B)(i).
\(^{72}\) See §1415 (e).
\(^{73}\) § 1415 (f)(91)(A); see § 1415 (f)(3)(A)(i).
\(^{74}\) § 1415(g).
\(^{75}\) § 1415(f),(g); see Fry, 137 S.Ct. at 749.
\(^{76}\) Fry,137 S.Ct. at 751.
\(^{77}\) Id.
allowed in the back of the room and not able to assist E.F. during class. After the trial period was over, the school decided not to allow Wonder to return, and E.F. was left without her beloved Goldendoodle from 2009-2010.

Her parents filed a complaint with the Office of Civil Rights of the United States Department of Education (OCR), alleging that the school district had violated the Americans With Disabilities Act (ADA) and the Rehabilitation Act. The OCR did find that the school had violated the ADA and Rehabilitation Act by refusing to allow Wonder to accompany E.F. to school, but E.F.’s parents decided to transfer her to another school district that willingly allowed Wonder in the classroom anyway. They then filed suit in district court against the school district for damages for its refusal to allow Wonder to accompany E.F.

The district court dismissed the case, finding that E.F. and her parents had not properly exhausted all remedies as required under IDEA before pursuing the case in federal court. The court found that it was “irrelevant” that they did not “expressly plead an IDEA claim,” and that the IDEA was implicated enough to warrant the exhaustion requirements of the statute. The Sixth Circuit then upheld the dismissal of the lower court, determining that because the damages related “to the specific educational purpose of the IDEA” and because IDEA could have remedied these

78 Id.
79 Id.
80 The ADA expressly requires accommodations for services animals: “Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity’s facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.” 28 U.S.R. § 35.136(g) (2011).
81 Id.
82 Id.
83 Id. at 752.
85 Id. at *4.
harms, that the exhaustion requirements of IDEA were triggered; E.F. and her parents had simply failed to follow the procedures outlines in that statute.\textsuperscript{86}

c. What the Supreme Court Held and Its Reasoning

The Supreme Court granted certiorari on June 28, 2016, to review the procedural requirements of the \textit{IDEA}. In its opinion penned by Justice Kagan, the Court made two important determinations in its findings: (1) to meet the statutory standard that one must exhaust IDEA’s procedures before filing an action under the \textit{ADA}, the \textit{Rehabilitation Act}, or similar laws, a suit must seek relief for the denial of a FAPE, because that is the only “relief”\textsuperscript{87} that the \textit{IDEA} makes “available”\textsuperscript{88}; and (2) in determining whether a suit “seeks” relief for such a denial, a court should look to the substance, or gravamen (the essence or most serious part of a complaint or accusation), of the plaintiff’s complaint.\textsuperscript{89}

The Court based its reasoning on whether or not the law suit focused on the denial of FAPE, explaining that the “only relief that an \textit{IDEA} officer can give – hence the thing a plaintiff must seek in order to trigger §1415(l)’s exhaustion rule – is relief for the denial of FAPE.”\textsuperscript{90} Therefore, the exhaustion rule under §1415(l) depends fully on whether a lawsuit seeks relief for the denial of a free appropriate public education.\textsuperscript{91} A hearing officer is not able to even offer relief to a complainant for any remedy not involving the denial of FAPE.\textsuperscript{92} As the Court put it, going in front of a hearing officer with a claim for something besides FAPE would leave the complainant “empty handed.”\textsuperscript{93}

\textsuperscript{86} Fry v. Napoleon Community Schools, 788 F.3d 622, 625 (6th Cir. 2015)
\textsuperscript{87} The Court defined relief as “redress or benefit that attends a favorable judgment.” Fry, 137 S.Ct. at 753.
\textsuperscript{88} Fry, 137 S.Ct. at 753.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 754.
\textsuperscript{93} Id.
Further, the Court determined that in deciding whether or not a complaint implicated the denial of FAPE under the *IDEA*, they must look to the gravamen of each particular case, suggesting two clues for determining whether or not FAPE applies:

1. Could the claim be brought if the action occurred somewhere besides a school?
2. Could an adult at the school bring the same claim?\(^94\)

If the answer to either of these questions is “yes,” then the claims may not be implicating *IDEA* and do not require exhaustion of all remedies.\(^95\)

Finally, the Court dispels the Sixth Circuits approach that E.F.’s claim as “educational in nature.”\(^96\) The Sixth Circuit reasoned that the value of allowing Wonder adds to her sense of independence and social confidence, which is the sort of interest that IDEA protects.\(^97\) The Court found that this was not the same as asking whether the gravamen of E.F.’s complaint charges, and seeks relief for, the denial of FAPE.\(^98\)

In sum, the Court remanded the case back to the Sixth Circuit to determine whether or not E.F.’s complaint implicated FAPE under *IDEA*, through the avenues outlined in its opinion.

d. **How Fry is Effecting IDEA Procedural Requirements**

Under the decision in *Fry*, a student is no longer required to exhaust IDEA’s administrative proceedings requirements when alleging that a school has discriminated against her because of her disability, if her allegations do not include a denial of a free appropriate education. The Supreme Court amended the analysis, requiring that a student who seeks relief under the Constitution or statute other than *IDEA*, must not be seeking relief for denial of a FAPE. This decision has huge

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\(^{94}\) Id. at 756.

\(^{95}\) Id.

\(^{96}\) Id.

\(^{97}\) Id. at 758.

\(^{98}\) Id.
implications and effects for school districts, many of which have required that students exhaust all IDEA procedural remedies before filing suit in state or federal court, even for claims brought under the Constitution, the ADA, Section 1983, etc.\(^9\) Now those students may be able to bypass the IDEA exhaustion requirements and file suit in court before complying with 20 USC Section 1415.

The Eight Circuit has already heard a case under the new *Fry* procedural standard. In *J.M. v Francis Howell School District*, a student brought suit against a school district, claiming unlawful use of isolation and physical restraints under the Equal Protection Clause, § 1983, § 1988, Americans with Disabilities Act, Rehabilitation Act, and the Missouri Human Rights Acts.\(^{100}\) J.M., the student, had an IEP established under *IDEA* based on his diagnosis of “attention deficit hyperactivity disorder, autism spectrum disorder, anxiety disorder, separation anxiety disorder, panic disorder, Asperger's/autism spectrum disorder, and generalized anxiety.”\(^{101}\) The district court dismissed the claims brought against the school district because J.M. and his mother failed to fully exhaust all administrative remedies required under *IDEA*.\(^{102}\)

On appeal, the Eighth Circuit upheld the lower court’s decision, applying the new analysis supplied by *Fry*: “Except for Count IV [the Missouri state claim], the complaint does not use the word ‘discrimination.’ Rather, the complaint is based on how the use of isolation and physical restraints failed to provide proper ‘sufficient supportive services to permit [J.M.] to benefit from . . . instruction,’ and ultimately denied [J.M.] . . . the benefits of public education.”\(^{103}\) Because the essential question before the court involved J.M. being denied FAPE by the school, he was required to exhaust all procedural requirements under IDEA.

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\(^9\) 20 USC 1415(l)

\(^{100}\) *J.M. v. Francis Howell School District*, 850 F.3d 944, 946 (8th Cir. 2017).

\(^{101}\) *Id.* at 947

\(^{102}\) *Id.*

\(^{103}\) *Id.* at 949 (quoting *Fry*, 137 S. Ct. at 148–49).
e. Fry’s Impact on School Districts – and School Attorneys

Ironically, while the Endrew F. case brought more fanfare, Fry is likely the more impactful of the two cases, at least to a school attorney. While the Endrew F. FAPE standard did change the standard for FAPE in some Circuits, the majority of Circuits already required a standard higher than the \textit{de minimum} standard stricken by the Court. In those Circuits, very little will change. Conversely, the Court in Fry made a significant change to the way lawsuits related to disabilities will be handled going forward. The savvy plaintiff’s attorney may very well craft complaints that complain of \textit{IDEA} related issues, but present them to Federal Courts under the ADA or Section 1983 in order to pursue attorney’s fees or more significant damages. The Fry decision has the potential to increase litigation in special education matters extensively.

While the impact may be greater, it is also difficult for a school attorney to prevent these cases from being litigated. Practically speaking, the best way to avoid litigation in special education cases is to carefully comply with the FAPE standard, be proactive about building relationship with parents, and manage the disputes that arise locally as much as possible.

D. Conclusion

This year was an active year for special education before the Supreme Court. In Endrew F., the Court clarified the standard for FAPE. In Fry, the Court determined parameters for the exhaustion of administrative remedies when the remedies sought by a student fall outside of special education. While the full impact of these cases is unknown, it is expected that their names will become as common as \textit{Rowley} has been since it was decided in 1982.