



Education Rights Counsel

Understanding Special Education “Due Process”

Presented to



Introduction to ERC

Vision: All students stay in school and thrive

Mission: Creating systemic change by removing legal barriers to educational equity.

Motto: Building an alliance of education advocates.

- ▶ We train Families, Lawyers, Probation, CASAs, Community Advocates, and Educators:
 - ▶ We teach Rights & Responsibilities
 - ▶ We serve as Sounding Board (helping others navigate cases for the benefit of clients)
- ▶ We do Research to inform our Community
- ▶ We provide Consults and Individual Representation
 - ▶ Direct Calls
 - ▶ Court Appointments

**OUR GOAL TODAY: TO SUPPORT, INFORM and
EMPOWER YOUR UNDERSTANDING OF PARENTAL
RIGHTS AND “DUE PROCESS”**





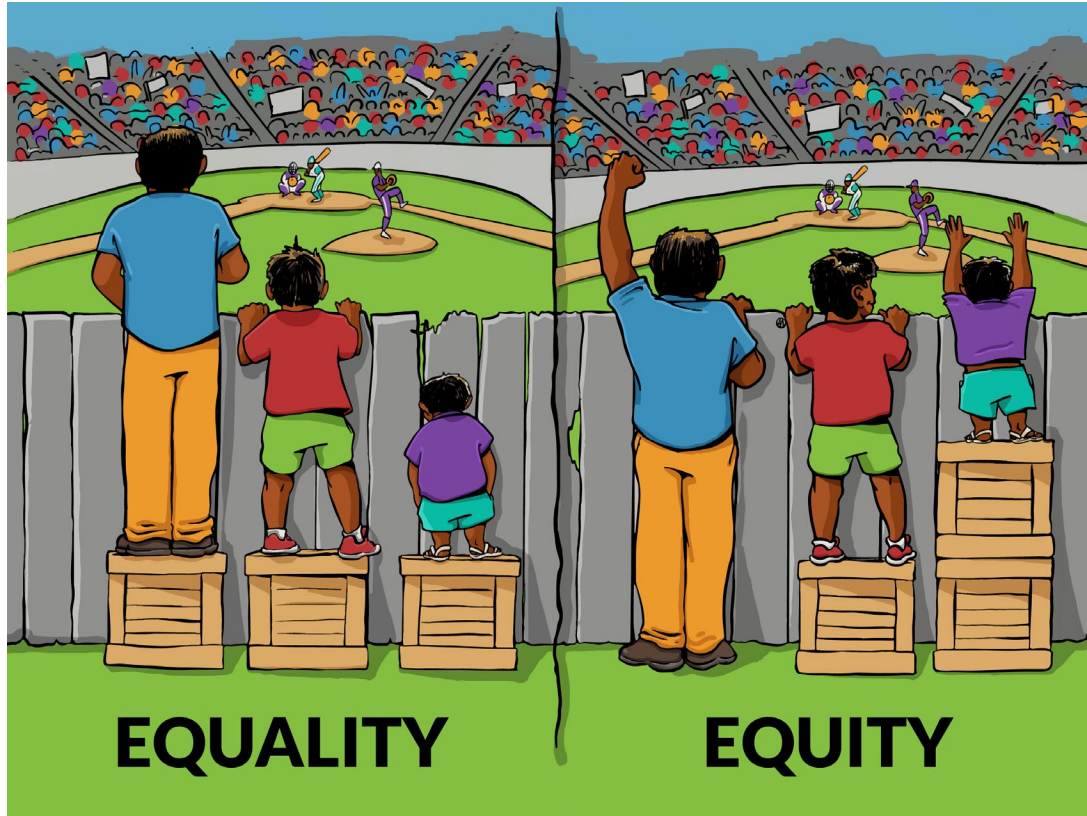
Q: What do students
with disabilities have
guaranteed to them by
state and federal law?

A: FREE **APPROPRIATE** PUBLIC
EDUCATION

**FAPE: An IEP that is “reasonably
calculated to enable a child to
make progress appropriate in
light of the child’s
circumstances”**

Andrew F. Douglas County School District RE-1, 137 S. Ct. 988 (2017)

FAPE is about Equity



- ▶ FAPE is a civil right rooted in the Fourteenth Amendment of the United States Constitution, which includes the Equal Protection and Due Process clauses.
- ▶ Equality and Equity are not the same. Both seek fairness, but
 - ▶ Equality presumes we all start at the same point and then are treated exactly the same.
 - ▶ Equity acknowledges that not all people begin from the same place, and so need different opportunities to achieve education.

Federal Constitutional Due Process

- ▶ The clause in Section One of the Fourteenth Amendment to the United States Constitution provides:

...nor shall any State deprive any person of life, liberty, or property, without due process of law.

- ▶ The Due Process Clause prohibits state and local governments from depriving persons of life, liberty, or property without a fair procedure.* The Supreme Court has ruled this clause makes most of the Bill of Rights as applicable to the states as it is to the federal government, as well as to recognize substantive and procedural requirements that state laws must satisfy.

* A fair procedure generally means "notice and an opportunity to be heard."

Quick Reminder of Where Your Rights Arise

	Individual with Disabilities Act: (IDEA) 1975	Section 504: 1973	Americans with Disabilities Act: (ADA) 1990
Type of Law	Education	Civil Rights	Civil Rights
Funding	Federal/State	Local	Federal/State
Purpose	FAPE birth thru 21	FAPE & equal access to education	Equal access to education
Disabilities	13 categories	All disabilities	All disabilities
Evaluation	MDT eval upon request - 60 days	Applies to any student with a disability, with a record of disability or regarded as disabled	Applies to any student with a disability, with a record of disability or regarded as disabled
Plan	IEP - Services & Accommodations	Plan, written or unwritten, for accommodations	Accommodations

IDEA Dispute Resolution

- ▶ Timely communication between parents and public agency staff can often help resolve disagreements that may arise regarding the educational services provided to a child with a disability.
- ▶ However, when those informal efforts prove unsuccessful, IDEA's three dispute resolution mechanisms:
- ▶ Mediation
 - ▶ A trained mediator assists parties in conflict to communicate and make voluntary informed choices in an effort to find a mutually acceptable resolution to a dispute
- ▶ State complaint
 - ▶ A written allegation by an individual or organization that a school district has not followed special education law within the last calendar year.
- ▶ Due process complaint procedures
 - ▶ A legal process used by parents and districts to make a decision on issues within a hearing; the HO's decision is final & binding unless appealed.





It's not easy...

- ▶ Special education litigation is complex.
- ▶ Special education litigation should not be taken lightly.
- ▶ Parents should pursue a due process hearing if there are no other reasonable alternatives, or if there is an urgent issue that must be considered by the school system for your child as soon as possible.
- ▶ SETTLEMENT OF DISPUTES:
 - ▶ While you can propose almost any type of settlement, you should be prepared in most special education settlements to agree to a confidentiality clause.
 - ▶ Judicial rulings are likely to be more limited: Generally, judges may award compensatory education, reimbursement of expenses, or order a school system to pay for a private placement.
 - ▶ Legal barriers to payment for private schooling are difficult to overcome, because a parent must prove the school system failed to provide FAPE; must further prove the proposed or selected private placement for the child is appropriate; and that the parent complied with the procedural requirements for requesting private placement.

What is supposed to happen?

- ▶ State has to establish procedures
- ▶ They have to include parent examination of records and educational surrogates if applicable
- ▶ PWN for changes or refusal to make changes
- ▶ Native language
- ▶ State has due process rules



Equity in Case Law

- ▶ The most important IDEA decision in the past 30 years is Endrew F. v Douglas County School District (CO).
- ▶ In this case, the SCOTUS ruled on “how much benefit must be provided” to a student.
- ▶ Prior to this case, circuits were split, based on a prior Supreme Court case, Rowley v. Hendrick Hudson school district. In Rowley, the Court discussed that implicit in the IDEA is that education must “confer some educational benefit.” Some courts held that this meant “meaningful benefit” while others hewed to a “de minimus” standard (including the 8th Circuit).
 - ▶ Prior to Endrew F., FAPE was sometimes a paperwork/cookie-cutter process.
 - ▶ In many cases, this is still a problem, but there is now case law that can be used to effectuate rights more clearly.

IS A LEVEL OF EDUCATION REQUIRED?

- ▶ The IDEA does not guarantee any particular level of education and "cannot and does not" promise any particular educational outcome. *Endrew F. v. Douglas County Sch. Dist. RE-1*, [69 IDELR 174](#) (U.S. 2017) (citing *Hendrick Hudson Cent. Sch. Dist. v. Rowley*, [553 IDELR 656](#) (U.S. 1982)).
- ▶ According to a well-worn analogy from the 6th U.S. Circuit Court of Appeals, FAPE does not require a "Cadillac." Rather, it requires a "Chevrolet."



LEVEL OF EXPECTED PROGRESS REQUIRED BY ENDREW F.

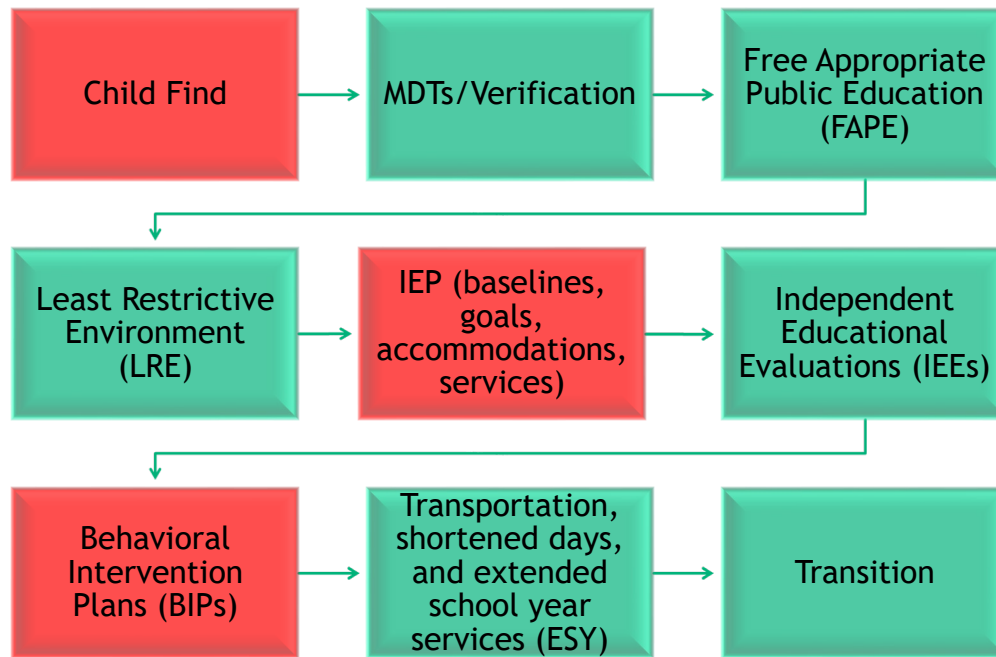


- ▶ When a child is not fully integrated in the regular classroom and not able to achieve on grade level, his IEP need not aim for grade-level advancement.
- ▶ "But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." Endrew F. v. Douglas County Sch. Dist. RE-1, [69 IDELR 174](#) (U.S. 2017).

Supreme Court Cases of Note (in addition to Rowley and Endrew F)

- ▶ Fry v. Napoleon Community Schools : Exhaustion of Remedies – if the same fact scenario gives rise to a claim under 504 or ADA, most courts hold that you must attempt resolution through IDEA before bringing a discrimination case.
- ▶ Irving v. Tatro: “related services” as opposed to “medical services.” (clean intermittent cath was related service because it was necessary for the student to attend school).
- ▶ Burlington v. Mass Bd.of Ed: Right for parents to be reimbursed for private education when IEP and placement are inadequate or inappropriate (e.g., denial of FAPE).
- ▶ Honig v. Doe: The stay-put provisions of IDEA “intended to strip schools of the unilateral authority to exclude disabled students from school.”
- ▶ Florence County School Dist. v Shannon Carter: Reimbursement for private school doesn’t necessarily require that the private school meet state education standards.
- ▶ Buckhannon v. West VA DOE: In order to obtain attorney’s fees as a “prevailing party,” the party must secure a judgement on the merits or a court-ordered consent decree.
- ▶ Schaeffer v. Weast: Absent a state statute to the contrary, the party seeking relief bears the burden of proof in an administrative due process hearing.
- ▶ Arlington v. Murphy: IDEA’s provision permitting “reasonable attorney’s fees” to a prevailing parent does not authorize recovery of fees for expert’s services.
- ▶ Jacob Winkleman v. Parma City Schools: Parents may pursue claims under IDEA on their own behalf, as the rights conferred to parents under IDEA exist independently from the rights of the child.

IDEA Provisions



Issues Raised in Due Process/Court Complaints

Placement

Meaningful participation

Statutes of Limitations

Procedural violations

- Timing of MDTs and IEPs
- Progress Reports
- Notice of Rights
- Records not provided

Discrimination on the basis
of disability

Exhaustion of Remedies

Related services as opposed
to Medical Services

Right for parents to be
reimbursed for private
education when IEP and
placement are inadequate
or inappropriate (e.g.,
denial of FAPE).

Stay-Put

Attorney's Fees

Payment for IEEs

Other Failures to provide
FAPE (lack of progress, lack
of access to extra-
curriculars, lack of services
that will support goals)

The Complaint

- ▶ The “parent” (or counsel) files a Complaint: 2-year “statute of limitations”
- ▶ A Hearing Officer is assigned. HO has original jurisdiction.
- ▶ Depending on the state there can be one or two HO-level procedures before an appeal can be had.
- ▶ “Stay Put” may apply, in which case a motion needs to be filed with the HO
- ▶ The Hearing allegedly will take place within 45 days...



Pre-Hearing Conference

- ▶ 006.01B. The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

Discovery

- ▶ 006.02A. The hearing officer, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.
- ▶ 006.02B. Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:
 - ▶ 006.02B1. Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;
 - ▶ 006.02B2. State the reasons supporting the motion;
 - ▶ 006.02B3. Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and
 - ▶ 006.02B4. Be filed with the hearing officer. The moving party must serve copies of all such motions to all parties to the special education contested case and to the Department.
- ▶ 006.02C. Other than is provided in subsection 006.02B4 above, discovery materials need not be filed with the hearing officer or served on the Department.

Continuances

- ▶ Except as specified in subsection 007.07C2 for expedited hearings, the hearing officer may, in his or her discretion, grant specific extensions of time or continuances of hearings beyond the forty-five (45) day time limit for rendering a final decision in subsection 004.18 at the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties and the Department.
- ▶ 006.03A. Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:
- ▶ 006.03A1. Illness of the party, legal counsel or witness; 006.03A2. A change in legal representation; or 006.03A3. Settlement negotiations are underway.

The Hearing

- ▶ Opening Statement (Burden of Proof is on the Petitioner)
- ▶ Presentation of Evidence
 - ▶ By Petitioner
 - ▶ By Respondent
 - ▶ Rebuttal by Petitioner
 - ▶ Surrebuttal by Respondent
- ▶ Examination of Witnesses
 - ▶ Direct
 - ▶ Cross
 - ▶ Redirect
 - ▶ Recross
- ▶ Closing Arguments OR Briefs

What do I have to show/prove in a Complaint?

- ▶ DENIAL OF FAPE and/or failure to provide FAPE in the LRE
- ▶ In considering an IDEA complaint, the hearing officer is supposed to make his/her decision “on substantive grounds based on a determination of whether the child received a free appropriate public education.
- ▶ “In matters alleging a procedural violation, a hearing officer may only find that a child did not receive a free appropriate public education” if the procedural violations resulted in substantive harm.
- ▶ Procedural violations that can arise to a denial of FAPE include Child Find, Evals, the IEP process, etc.

What Remedies Are There?

- ▶ Substantive violations typically amount to denials of FAPE, thereby entitling parents and students to compensatory relief.
- ▶ Procedural violations, on the other hand, can entitle a party to injunctive or compensatory relief depending on the effect of the violation
- ▶ A procedural violation can only lead to a compensatory-type remedy such as compensatory education and/or tuition reimbursement when it constitutes a denial of FAPE by causing “substantive harm to the child or his [or her] parents.”
- ▶ More specifically, the IDEA provides that a procedural violation will only amount to a denial of FAPE if it: “impeded the child’s right to a free appropriate public education; significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; or caused a deprivation of educational benefit.”
- ▶ However, where the violation is a “mere technical contravention of the IDEA”, retrospective relief will not be awarded. Where the procedural violation does not cause substantive harm to the student or impede parents’ opportunity to participate, a court may award injunctive relief, ordering the LEA to prospectively comply with the procedural provision in question, but cannot award compensatory education or tuition reimbursement. Finally, it has been noted that “[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not.”

What is included in Compensatory Relief?

- ▶ Compensatory Education
- ▶ Private School Tuition Reimbursement
- ▶ Reimbursement for private evaluations
- ▶ Prospective relief: an order to do something in the future, like develop and offer an appropriate plan/placement
- ▶ What about Attorneys fees?
 - ▶ Separate filing when you can show that the relief you receive was greater than that offered at settlement

Damages are generally NOT available

- ▶ The great majority of circuit courts require exhaustion of IDEA administrative remedies, regardless of whether or not the lawsuit is filed under the IDEA.
- ▶ No circuit court has explicitly permitted a **direct claim** for damages under the IDEA.
- ▶ Courts are split on the issue of whether claims for monetary damages may be made pursuant to Section 1983 lawsuits to enforce the IDEA.
- ▶ It is likely that a student must prove intentional discrimination or bad faith

*IDEA provides broad discretion to award damages it deems appropriate based on the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C)(iii).

- ▶ If you have a claim that lies in Section 504 and/or ADA, damages may be available, but note that it is a separate filing.
- ▶ The Individuals with Disabilities Education Act (IDEA) preserves the rights of children with disabilities to bring claims under the Constitution and federal anti-discrimination statutes, so long as they exhaust the IDEA's administrative procedures if their non-IDEA suit "seek[s] relief that is also available under [the IDEA]." 20 U.S.C. § 1415(l).

Questions?

