MEMORANDUM

TO: **Members of the EDR Working Group**

FROM: **Kevin C. McDowell**

RE: **Some Issues Facing *IDEA* Adjudicators Nationwide**

Administrative adjudicators for any disputes face a number of common problems at the prehearing, hearing, and post-hearing stages. Administrative adjudicators for disputes arising under the Individuals with Disabilities Education Act (IDEA) have their own peculiar concerns. I have been asked to identify just a few of these.

Free Appropriate Public Education

Endrew F., By His Parents and Next Friends, Joseph F., et al. v. Douglas County School District RE-1, 137 S. Ct. 988 (2017).

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300 defines "free appropriate public education" (FAPE), but like most definitions, its practical meaning is defined more by circumstances. The 1982 *Rowley* decision (discussed *infra*) helped and didn't help. Some of the language employed by the Court was subject to conflicting interpretations. A disingenuous metaphor first appeared in *Doe v. Bd. of Ed. of Tullahoma City Schools*, 9 F.3d 455, 459 (6th Cir. 1993).

The argument was what level of services should be provided to an eligible student under the IDEA to satisfy the "some" educational benefit distilled from *Rowley*. The "automotive metaphor" used by the U.S. Sixth Circuit characterized the school district's requirement under the IDEA to provide "the educational equivalent of a serviceable Chevrolet" even though the parents demanded "a Cadillac solely for [their] use."

A "serviceable Chevrolet" may no longer be sufficient, however, if it does not meet the "unique needs" of a student.[1]

[1] This depends upon whether one accepted this "automotive metaphor" in the first place. A number of courts criticized—even ridiculed—this metaphor. See, *e.g.*, ***Nein v. Greater Clark County School Corp.***, 95 F. Supp.2d 961, 977 (S.D. Ind. 2000) ("In terms of the automotive metaphor, Greater Clark was providing the Neins a Chevrolet without a transmission —even if the engine might run, no power ever reached the wheels").

In ***Board of Education of the Hendrick Hudson Central School District v. Rowley***, 458 U.S. 176 (1982), the U.S. Supreme Court addressed FAPE for the first time. The *Rowley* Court determined that "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." The Court concluded that an eligible student's IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 200, 207. The decision, however, left many questions unresolved, expressly declining to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. In the years that followed, many Circuit Courts of Appeal concluded that the substantive right *Rowley* described was not so robust. *See, e.g.,* ***O.S. v. Fairfax County School Board***, 804 F.3d 354, 360 (4th Cir. 2015) (requiring only "a benefit that is more than minimal or trivial"); ***K.E. v. Independent School District***, 647 F.3d 795, 810 (8th Cir. 2011) ("some educational benefit"); ***P. v. Newington Board of Education***, 546 F.3d 111, 119 (2d Cir. 2008) ("more than only trivial advancement"); and ***Thompson R2-J School District v. Luke P.***, 540 F.3d 1143, 1149 (10th Cir. 2008)("merely . . . more than *de minimis*")

In 2017, the Supreme Court, in ***Endrew F. v. Douglas County School District***, rejected the Tenth Circuit's "merely more than *de minimis*" standard because, "[w]hen 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." 137 S. Ct. at 1001. Such a weak standard, the Court reasoned, was out of step with the IDEA's loftier guarantees and with *Rowley* itself. *Endrew F.* drove home the point that to "meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999.

The appropriateness of the "progress contemplated by the IEP" would be measured "in light of the child's circumstances." The instruction must be "*specially* designed" to meet a child's "*unique* needs" though an "*Individualized* education program." *Endrew F.*, 137 S. Ct. at 999 (emphasis original).

Some Recent Post-*Endrew* Cases

R.F. v. Cecil Co. Public Schools, 919 F.3d 237 (4th Cir. 2019). *Endrew F.* stated that IDEA's FAPE requirement requires that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999, rejecting the "some educational benefit" or "*de minimus* standard" previously employed by numerous federal courts. FAPE is reliant on "each child's unique circumstances." School's procedural violations—unilaterally adjusting general/special education classes and destroying raw data—did not violate IDEA's substantive requirements. The school provided a FAPE. The Fourth Circuit Court of Appeals also noted that its previous standard was not in concert with *Endrew F.*

Renee J. v. Houston Ind. Sch. District, 913 F.3d 523, 529 (5th Cir. 2019). The 5th Circuit's four-factor test for determining whether an IEP is reasonably calculated to provide a FAPE comports with *Endrew F.* The factors include whether:

1. The student's program is individualized on the basis of the student's assessment and performance;
2. The program is implemented in the student's LRE;
3. The services are provided in a coordinated and collaborative manner by key stakeholders; and
4. Positive academic and non-academic benefits are demonstrated.

J.M. v. Matayoshi, 729 Fed. Appx. 585, 2018 WL 3203422 (9th Cir., June 29, 2018). The Court found the IEP offered the student did provide him with a FAPE, despite severe bullying he experienced at school. An earlier IEP was deficient in this regard, but the IEP the student challenged in this case "was expressly designed to overcome the deficiencies in the prior plan, mandating a full-time aide for J.M. and containing a crisis plan, which provides that interaction with peers will be monitored by an adult and sets forth a protocol to stop bullying if it occurs." 729 Fed. Appx. at 586 (internal punctuation omitted). Under *Endrew*, the IEP was calculated to provide the student with the opportunity to make appropriate progress in light of his circumstances. *Id.*

See also ***Questions and Answers on U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District RE-1*** (USDE, December 7, 2017).[2]

Bullying as Denial of *FAPE*

On August 20, 2013, the Office of Special Education and Rehabilitative Services (OSERS) of the U.S. Department of Education (USDE) sent out one of its "Dear Colleague" letters. It touched upon a topic that other USDE agencies had addressed in other publications—bullying—but in a different context: the bullying of students with disabilities.

OSERS observed that "[b]ullying can involve overt physical behavior or verbal, emotional, or social behaviors (*e.g.*, excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors." *Id.* at 2. OSERS noted that "[s]tudents with disabilities are disproportionately affected by bullying." *Id*. Students who are bullied "are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression." *Id.*

One recurrent theme throughout the letter, however, is that the "bullying of a student with a disability that results in the student not receiving meaningful benefit constitutes a denial of a free appropriate public education (FAPE) under the [Individuals with Disabilities Education Act] IDEA that must be remedied." *Id*. at 1.

> The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide meaningful educational benefit to the student, the IEP Team must then determine

[2] Available at https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf (last visited July 24, 2019).

> to what extent additional or different special education or related services are needed to address the student's individual needs[] and revise the IEP accordingly.

Id. at 3. The concept that bullying of a student with a disability could be severe enough to constitute a denial of FAPE is a relatively new phenomenon.

T.K. and S.K., On Behalf of L.K. v. New York City Department of Education, 810 F.3d 869, (2d Cir. 2016) involves this very issue (and includes many of the warnings and observations in the "Dear Colleague" letter).[3]

Much of the bullying of L.K. occurred during her third-grade year (2007-2008). She had been originally classified as having autism spectrum disorder (ASD) but this label was later changed at the request of L.K.'s parents to learning disabled.[4] Her class was team-taught (general and special education teachers), but she was also provided 1:1 services by a "special education itinerant teacher" (SEIT).[5] While she did make academic progress, she also became the target of bullying by fellow students. This became so severe that she often came home crying, complained of bullying on nearly a daily basis, was late to school 16 times the spring semester, and became fearful of interactions with her classmates. She also brought dolls to school for support.

Some of the bullying incidents included:

- One student pinched her hard enough to cause a bruise and also stomped on her toes.
- Students would back away from her to avoid touching her.
- Students would not touch a pencil L.K. had touched, treating it as if it were contaminated. (The teacher "foolishly reinforced" the class behavior by labeling the pencil with L.K.'s name, apparently because the teacher considered L.K. to have "poor hygiene.")
- Students would push L.K. away from them.
- Students would trip her, laugh at her, and call her "ugly," "stupid," and "fat." (Once, when she was tripped, the teacher "berated" her for "making a scene" rather than correcting the students who tripped her.)
- A student drew a demeaning picture of her.
- A student made a prank phone call to her home.

One SEIT described the classroom as a "hostile environment" to L.K. All three SEITs stated that L.K. was constantly bullied by her classmates. Although concerns were expressed to the

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[3] The history of this dispute, it should be noted, occurred well before this "Dear Colleague" letter was issued. That doesn't really excuse the refusal to discuss the documented bullying of the student in her IEP Team meeting. The similarities between the "Dear Colleague" letter and the facts in this case are so striking that it may be that this dispute influenced the letter. The USDE, as *amicus curiae*, supported L.K. in this case.

[4] The IDEA does not specifically require a label in order to provide services. The label is primarily for funding purposes. FAPE is dependent upon addressing a student's "unique needs" and not any diagnostic label. See, *e.g.*, ***Heather S. v. Wisconsin***, 125 F.3d 1045, 1055 (7th Cir. 1997) and 20 U.S.C. § 1412(a)(5)(B)(i) (prohibiting States from creating funding mechanisms that encourage the provision of services based on categorical settings rather than on the "unique needs" of the child, as determined by the Individualized Education Plan (IEP)).

[5] It appears that L.K. had at least three SEITs during the 2007-2008 school year.

classroom teachers, the teachers "ignored their concerns about L.K.'s bullying." The teachers reportedly "neither intervened nor punished the students who bullied her."

In addition to the negative effects described *supra*, one SEIT reported that L.K. was experiencing difficulty in her "ability to initiate, concentrate, attend and stay on task with her homework assignments and activities after school." L.K. volunteered less in class and began counting the days until the end of the school year "when she might temporarily escape her tormentors."

Parental Attempts To Discuss Bullying

L.K.'s parents attempted to discuss the bullying with school officials, both within IDEA procedures and otherwise, but "were consistently rebuffed" in these efforts. Although the parents sought copies of incident reports and wrote to teachers and administrators, they received no responses. At the March 26, 2008, IEP Team meeting, the parents again tried to discuss the bullying of L.K., "but the school principal, without explanation, flatly refused to discuss the issue with them." A subsequent IEP Team meeting was held in June of 2008, but school officials again prevented them from discussing the bullying, indicating "it was an inappropriate topic to consider" when developing an IEP.

Just before the March IEP Team meeting, the parents did seek to enroll L.K. in a private school that specialized in addressing the educational needs of students with learning disabilities. They were required to deposit a non-refundable one-month tuition payment to the private school to secure enrollment for the next school year. The parents did not notify the school district of this until two days after the June IEP Team meeting. The parents rejected the proffered IEP and informed the school district they were enrolling L.K. in the private school and expected the school district to pay for the private placement.[6]

Administrative and Judicial Proceedings

This touched off two rounds of administrative and judicial proceedings. The parents initiated an administrative hearing under the IDEA, seeking tuition reimbursement for the 2008-2009 school year, claiming the school district failed to provide a FAPE to L.K. in large part because of their refusal to discuss the bullying of L.K. in the IEP Team meeting.[7] The parents lost before the Initial Hearing Officer (IHO) and before the State Review Officer (SRO).[8] The federal district

[6] Under circumstances as in this case, a school district can be obliged to reimburse the parents for private school costs even though the school district did not consent to the placement or refer the child, but such an order would have to be based on a determination the school district failed to make a FAPE available to the child. The amount of reimbursement can be reduced or denied under some circumstances, including where the parents did not timely inform the IEP Team that they were rejecting the IEP and enrolling the child in a private school. There are a number of factors a hearing officer or judge can consider when determining whether reimbursement should be ordered and, if so, how much and for what reasons. See 20 U.S.C. § 1412(a)(10)(C).

[7] A FAPE can be considered denied where the school district "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." 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

[8] IDEA permits States to have a two-tiered administrative hearing process. See 20 U.S.C. § 1415(f), (g).

court, however, reversed, finding that L.K. had a "right to be secure" while in school and that "significant, unremedied bullying could constitute the denial of a FAPE[.]" The district court developed a four-part test to determine whether bullying resulted in a denial of FAPE:

1. Was the student a victim of bullying?
2. Did the school have actual notice of substantial bullying of the student?
3. Was the school "deliberately indifferent" to the bullying, or did it fail to take reasonable steps to prevent the bullying?
4. Did the bullying "substantially restrict" the student's "educational opportunities"?

810 F.3d at 874.[9] The district court remanded the matter to the IHO to assess this case under the four-part test. The parents lost again (and lost as well before the SRO). On appeal again to the federal district court, the court granted summary judgment to the parents, finding that the school district's refusal to permit discussion of the bullying of L.K. within the IEP Team denied her a FAPE in violation of the IDEA. The district court also found that the private school was an appropriate placement for L.K. and that "the equities favored reimbursement" of the tuition costs to the parents. The school district timely appealed, but the three-member panel of the U.S. Second Circuit Court of Appeals was not inclined toward their arguments.

Appeal To the 2nd Circuit

From the outset, the 2nd Circuit was more concerned with whether the school district committed a procedural error sufficient enough to violate the IDEA. They stated the issue as:

> On appeal, we consider whether the [school district] violated the IDEA by denying [the parents'] request to discuss L.K.'s bullying despite their reasonable concern that the bullying interfered with L.K.'s ability to receive a free appropriate public education, also known as a "FAPE."

The Court didn't hold us in suspense, finding that the school district did deny L.K. a FAPE "by refusing to discuss an issue that…it acknowledges may substantially interfere with a child's learning opportunities."

The 2nd Circuit's Analysis

The Court noted that where an IEP is "substantively deficient," parents may reject the IEP, send their child to a private school, and seek reimbursement from the school district. 20 U.S.C. § 1412(a)(10)(C)(ii). Parents may also seek reimbursement under circumstances where the IEP is not "substantively deficient" but the parents were prevented from engaging in the decision-making process regarding the provision of FAPE to the parents' child. The Court was quick to add that not every procedural violation constitutes a denial of FAPE; rather, the procedural

[9] The Second Circuit Court of Appeals declined to adopt this four-part test. See *Id.* at 876, n. 3. Nevertheless, the district court's four-part test is similar to the one applied by the U.S. Supreme Court in ***Davis v. Monroe County Board of Education***, 526 U.S. 629, 119 S. Ct. 1661 (1999), a case determining whether peer sexual harassment violated Title IX. I have altered the district court's test by indicating the required notice must be "actual" rather than "constructive." This would align the test more with the one in *Davis*.

violation has to significantly impede the parents' participation rights, impede the child's right to a FAPE, or cause a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E).

Whether reimbursement for a private school placement is due a parent relies upon (1) the school district failing to provide a FAPE (which can occur through a significant procedural violation), and (2) a determination that the private placement the parent selected is appropriate to the child's needs.[10]

The Court acknowledged that whether bullying of a student with a disability can result in a denial of FAPE under the IDEA is a matter of first impression. The school districted conceded that this could occur where the bullying "reaches a level where a student is substantially restricted in learning opportunities."

> We note… that the [the school district's] concession recognizes that a child with a disability who is severely bullied by her peers may not be able to pay attention to her academic tasks or develop the social and behavioral skills that are an essential part of any education.

In this matter, the school district committed two significant procedural errors that "were integral to the development of L.K.'s IEP": when the school district refused to discuss the effect of bullying on L.K. at two separate IEP Team meetings. The "parents had reason to believe that the bullying would interfere with L.K.'s ability to receive meaningful educational benefits and could prevent L.K.'s public education from producing progress, not regression." *Id*. at 876 (citation and internal punctuation omitted).

There was sufficient, undisputed evidence of the negative effects on L.K.'s educational performance and experience from the bullying, including frequent tardiness, fear of attending school, crying, and complaining of the near-daily incidents of bullying.

The parents were rebuffed at every opportunity to discuss the bullying, including—and especially—within the framework of the IEP Team. "This constituted a procedural denial of a FAPE similar to other procedural violations that our sister circuits have held to constitute denials of a FAPE, such as predetermination of an issue prior to an IEP meeting [citation omitted] or the failure to inform parents about a fact significant to the development of the IEP [citation omitted]."

The Court rejected the school district's assertion the parents and L.K. "suffered no harm" since her IEP did address bullying to a certain degree and that "anti-bullying strategies are better addressed through channels other than the IEP."

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[10]See ***Burlington v. Department of Education***, 471 U.S. 359, 105 S. Ct. 1996 (1985) and ***Florence Co. School District Four v. Carter***, 510 U.S. 7, 114 S. Ct. 361 (1993). A parent can recover the costs of a private school placement where the public school district failed to provide a FAPE. The private school is not required to comply with the extensive requirements of IDEA.

> We are not persuaded. Denying L.K.'s parents the opportunity to discuss bullying during the creation of L.K.'s IEP not only potentially impaired the substance of the IEP but also prevented them from assessing the adequacy of their child's IEP.

By refusing "to discuss…bullying during the development of the IEP, the [school district] significantly impeded [the parents'] ability to assess the adequacy of the IEP and denied L.K. a FAPE."

This addresses only the first part of the reimbursement analysis (denial of FAPE). There is also the question whether the private school was appropriate to L.K.'s needs.

A private school placement is appropriate if it is "reasonably calculated to enable the child to receive educational benefits." The private placement need not be perfect nor is it required to comply with all the standards a public school must satisfy.

In this matter, the private school was appropriate to L.K.'s needs:

- The private school was approved by the state for private placements;
- The private school is devoted to educating students with learning disabilities;
- L.K. need a "more supportive academic environment" in "a small, special education class and school for children with solid cognitive potential who need a supportive and specialized approach for learning" (per private psychologist); and
- L.K. did, in fact, make across-the-board progress at the private school, both academically and behaviorally.

The fact the private school did not provide therapy and counseling services the school district would have provided does not render the private placement inappropriate. The parents were not required to demonstrate that the private school furnished every special service necessary to maximize L.K.'s potential; rather, they "need only demonstrate that the placement is reasonably calculated to enable [L.K.] to receive educational benefits." *Id*. at 878 (internal punctuation omitted). The parents, the Court found, had satisfied their burden in demonstrating the private school was appropriate for L.K.'s needs.

Lastly, the Court found the "balance of equities" favored reimbursement to the parents. The school district argued that the parents intended to send L.K. to the private school before the March IEP Team meeting. They had even reserved a placement by depositing a one-month tuition charge.

The Court disagreed, noting that the parents repeatedly "made good-faith efforts to resolve L.K.'s bullying problem at her public school" and "generally cooperated" with the school district "in the development of L.K.'s IEP." The deposit of the tuition was "precautionary" and not "any form of misconduct" on the part of the parents. The private school required the deposit. Had the parents waited, they may have "imperiled their ability to secure a spot for L.K. in the event their concerns about bullying remained unaddressed." To the extent the parents became adversarial, this would be understandable since the school officials who now complain are the same officials who ignored or rebuffed the parents' repeated attempts to discuss bullying and the effects this was having on their daughter. In addition, the parents did promptly notify the school district of

their intention reject the IEP and place L.K. at the private school after they received the IEP following the June IEP Team meeting.

> Ultimately, their decision to place L.K. at [the private school], rather than in public school, reflects a good-faith effort to find an appropriate placement for their daughter, not just a mere preference for a private school environment.

The district court's judgment in favor of the parents was affirmed.

Long v. Murray Co. Sch. Dist., 522 Fed. Appx. 576, 2013 WL 3015151 (11th Cir., June 18, 2013) (*per curiam*). To establish "disability harassment" under the ADA and Sec. 504, the student would need to show:

1. The plaintiff is an individual with a disability;
2. The plaintiff was harassed based on that disability;
3. The harassment was sufficiently severe or pervasive that it altered the condition of the plaintiff's education and created an abusive educational environment (typically, this is described as sufficiently severe, pervasive, or objectively offensive so as to deny the victim equal access to an education);
4. The school district ("appropriate person") knew about the harassment (actual knowledge); and
5. The school district was deliberately indifferent to the harassment.

Adversely Affects Educational Performance

Rose Tree Media School District v. M.J., 2019 WL 1062487 (E.D. Pa., March 6, 2019). The concept of "educational performance" is not limited to academic ability.

Purported Bias of the ALJ

> "Probably nothing is worse for a lawyer and client than to lose a case and then come to believe that the deck was stacked against them from the start because the adjudicator had a conflict of interest or bias….
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> "… Each losing party searches for every possible reason to attack a negative decision, and issues that were insignificant or evanescent before the decision suddenly and unfairly (to the other party and the adjudicator) become monumental…."
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> Chief Judge D. Brock Hornby, ***Falmouth School Committee v. Mr. and Mrs. B.***, 106 F.Supp.2d 69, 72-72 (D. Me. 2000).

Independent School District No. 283 v. E.M.D.H., by her parents, L.H. and S.D., __ F.Supp.3d __, 2019 WL 2240530 (D. Minnesota, May 24, 2019) ("[T]he District's allegations of bias by the ALJ have some merit. While not relevant to the rulings herein, the Court is particularly troubled

by the ALJ's denial of the District's request for a one-week extension of the hearing to accommodate the attorney for the District. Forcing the District to find substitute counsel who was unfamiliar with the case to represent the District at the hearing appears onerous and prejudicial").

Other Issues of Particular Interest to the Special Education Adjudicator:

Delay

The Unrepresented (Pro Se) Party

Discovery (Depositions, Protective Orders, Interrogatories, Request for Admissions)

Relevant Fact-Finding

Sanctions

"Stay-Put" Placement