

Addressing the Need for Progress in Special Education: Understanding Endrew F. and the Role of Special Educators

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Abstract

The Supreme Court case of *Endrew F. v. Douglas County District RE-1* (2017) has renewed interest in the Free and Appropriate Public Education (FAPE) mandate of the Individuals with Disabilities Act (IDEA). The court's ruling expands the term "appropriate" to a consideration of progress for academics and behavior. This shift has significance to many who work with students with disabilities in schools. Specifically, special educators will need to ensure that they are assessing and monitoring academics and behavioral, such as incorporating functional behavior assessments (FBAs) into the development of appropriate behavior intervention plans (BIPs) and considering overall progress during Individualized Education Programs (IEP) development. This paper will address the history of IDEA, its connection with FAPE, and discuss the seminal cases of *Rowley* and *Endrew F.* and their implications for IEP teams. Considerations and recommendations for addressing FAPE for students will be provided, focusing on implications for the IEP, Multi-tiered Systems of Support (MTSS), and Behavior Intervention Plans (BIPs).

Keywords: *Endrew F.*, IDEA, FAPE, behavior intervention plan, MTSS, IEP, special educators

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The history of students with disabilities in public education has not been a tale of smooth sailing but rather a turbulent journey through choppy water. Often, such students were excluded from full participation in education, with limited interaction with their peers without disabilities. Compulsory attendance laws in the 1800s through the turn of the century were extended to most students including immigrants and the poor, resulting in the inclusion of individuals with diverse backgrounds in mass learning; yet, students with physical or mental disabilities remained excluded. These students were not compelled to attend schools (Katz, 1976) and if they did seek education, were taught at home or other exclusionary settings (Wright & Wright, 2007). Eventually, physical and mental examinations became required in the schools, and students with disabilities continued to remain excluded, attending separate schools or classes that focused on technical skills (Spaulding & Pratt, 2015). Some state statutes excluded such students from education if considered "uneducable," which was tied to a determination that they had not reached beyond the mental age of five (e.g., Pennsylvania; Koseki, 2017), and if it was "...believed that the child would not benefit from education or if the child's presence would be disruptive to others" (Wright & Wright, 2007, p. 8). Historically, students with disabilities were

excluded from public schools and if they were afforded the opportunity, the education provided was not necessarily “appropriate” (Yell, Katsiyannis, & Hazelkorn, 2007). In these early days, teachers were often involved in determining if a student could be included in schools with their peers.

Seminal Court Cases

In the 1950s, the civil rights of students to attend public school were litigated in *Brown v. Board of Education* (1954). In that case, the court ruled that segregation of children (in this case, African Americans) on the basis of race was a violation of the U.S. Constitution and that these children had the right to a public education. However, this case did not apply to students with disabilities. It was not until the 1970s in the seminal cases of *Pennsylvania Association for Retarded Children v. Commonwealth* (1971; *P.A.R.C.*) and *Mills v. Board of Education of District of Columbia* (1972) that the education of students with disabilities was addressed, initiating the need for those with expertise to support these students and their teachers. These cases established the precedence of including students with disabilities in public education in conjunction with findings that students with severe disabilities could be educated effectively (Hargrove et al., 1983), suggesting that there would be a benefit for students with even the most severe disabilities to receive a public education.

Statutory Authority

Despite strong legal and initial research support, students with disabilities still remained excluded (Yell, Rogers, & Rogers, 1998), and the need to establish clear laws that supported the right for students with disabilities to be educated in public schools was essential. Parent, teacher, and administrator organizations (e.g., Association for Persons with Severe Handicaps, National Association for Retarded Citizens (ARC); Council for Exceptional Children) joined together to promote the education of students with disabilities in the public school. Congress ultimately passed a law and in 1975, President Ford signed the Education for All Handicapped Children Act, the precursor to the Individuals with Disabilities Act (IDEA). The law and subsequent related regulations included several provisions, such as procedural safeguards (e.g., notice, consent), evaluation and the concepts of a Least Restrictive Environment (LRE; educational environment in which a student would be educated), and Free Appropriate Public Education (FAPE; how a student would be educated). Of the provisions, FAPE was considered the “cornerstone” of IDEA for students with disabilities (Zirkel, 2013, p. 497) and began to allow children with disabilities to attend public school with their peers without disabilities. This also triggered the need for specialized teachers in “special education” to assist in the selection and placement of students in these specialized services and in the determination of what the appropriate services would encompass.

Statutory Language of FAPE

Under IDEA, special education is defined as, “specially designed instruction, at no charge to the parents or guardians, to meet the unique needs of a child with a disability” (IDEA, 20 U.S.C. § 404[a][16]) and includes the provision of related services (e.g., transportation, occupational therapy) up until graduation or their 22nd birthday. In general, FAPE addresses the cost (free), the nature (public), and the how (appropriate education) that is intertwined with providing special education. Statutorily, the words of FAPE were written as follows in IDEA (20 U.S.C. §1401(9)):

Free appropriate public education. The term “free appropriate public education” means special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the state educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and
- (D) are provided in conformity with the individualized education program required under §1414(d) of this title.

Although some of the terms of FAPE might seem clear, the term “appropriate” was murky. The statutory language specified clear procedures (such as the development of an IEP), but neglected the more substantive aspects of what FAPE actually constituted, such as a certain level of education (e.g., grade level in reading; Yell, Katsiyannis, & Hazelkorn, 2007). In addition, as FAPE depends on the individual’s circumstance, it allowed different perspectives on what was appropriate that might not align. For example, schools and parents might have different ideas of what was appropriate for the same student. After the passage of IDEA, litigation included questions on FAPE, and these issues often looked at the interpretation of what would be considered “appropriate.” The case of *Rowley* included such a query.

***Rowley* (1982)**

In the *Board of Education of the Hendrick Hudson School District v. Rowley* (*Rowley*), Amy Rowley was a student who was deaf in a general education elementary school classroom. The school had initially offered the use of an FM wireless hearing system and a sign language interpreter in kindergarten; however, the interpreter was removed after two weeks because Amy did not appear to need this service. Since Amy continued to do very well academically compared to other students, the school again decided she did not need an interpreter the following year. Her parents argued that she would achieve more with the interpreter and filed a lawsuit alleging a violation of FAPE. Ultimately when the case went to the Supreme Court, the justices considered the question of “What is meant by the Act’s requirement of a “free appropriate public education?” (*Rowley*, 1982, p. 186). The decision discussed the importance of complying with procedural law and that the intent of the statute was not to establish a substantive level of an educational benefit (*Rowley*, 1982, p. 189-190). Justice Rehnquist wrote: “Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any level of education once inside” (*Rowley*, 1982, 192). The Court rejected the argument for “equal educational opportunity” (*Rowley*, 1982, p. 198), instead focusing on the idea of “some educational benefit” (*Rowley*, 1982, p. 200) and remanded the case to the lower court for decision.

Most importantly to subsequent decisions, *Rowley* contained a two-part test that was not meant to be a bright-line test, but more a way to consider each student’s needs: “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?” (*Rowley*, 1982, p. 206-207). In practice, this ended up being used as a bright-line test, becoming the basis for schools to use when considering FAPE. In order to violate the first part, the school must have made a procedural violation. For example, failing to

provide notice for a meeting meant that parents were unable to participate or the general education classroom teacher was not included in the IEP planning. As for the second part, schools must provide “some educational benefit,” yet; the level was not made specific and required a case-by-case determination. It is notable that Amy Rowley was considered more advanced than other students academically and not considered a behavioral distraction, as would be the case with *Andrew F.* when the FAPE standard was revisited. For *Rowley*, the court ruled that the school provided FAPE because there was not a procedural violation, and she had received an educational benefit without the provision of a sign language interpreter.

Subsequent Cases and Standards

After *Rowley*, there was still ambiguity in how to interpret what was meant by “reasonably calculated” and to what degree of benefit “some educational benefit” would entail, especially as *Rowley* had suggested that FAPE needed to be determined on a case-by-case basis. This uncertainty initiated and continued to lead to lawsuits on whether an education offered to a student with disability violated FAPE, with many of the arguments centered again on setting a level for “educational benefit.” For instance, in *Hall v. Vance County Board of Education* (1985), the Court indicated that the school needed to provide a “serviceable Chevrolet rather than a Cadillac” when discussing the continuum of education benefit (p. 459-460). *Timothy W. v. Rochester School District* (1989) added that benefits of FAPE extended beyond academic to include functional (e.g., behavioral) education. *J. C. v. Central Regional* (1996) ruled that there had to be more than a *de minimis* (i.e., trivial or minor) educational benefit. In short, there were several standards of educational benefits suggested by different courts across more than three decades on what constituted FAPE, and special educators have had to adjust their assessment, data monitoring and support provided to an IEP team based on the most recent court rulings to maintain compliance.

While the question of educational benefit continued in the courts, changes were made to the IDEA statute itself that implied that the standard of FAPE might need to focus on higher expectations for students with disabilities (Zirkel, 2013), and thus the movement of results-driven language became commonplace. For example, the 1997 amendments to IDEA included provisions that an IEP has to have measurable goals and that students with disabilities should be included in statewide assessments, and the 2004 amendments included an emphasis on “results” that incorporated the use of peer-reviewed research in determining programming (Yell, Katsiyannis, & Hazelkorn, 2007). In addition, violations of FAPE would not prevail unless the procedural violations impacted more substantive violations such as the right to FAPE, denied parent participation in the delivery of FAPE, or led to the loss of educational benefits (Yell & Bateman, 2017; IDEA, U.S.C. §1415(f)(3)(iii)). This “harmless error approach” (Zirkel, 2013) eroded the original intent of the statute’s importance of procedure and made it more important to consider a more unified standard for FAPE.

As the years progressed, circuit courts determined that there were different ways of interpreting the meaning of benefit under FAPE (Yell & Bateman, 2017). Some Circuit Courts followed a higher standard seemingly connected to a “meaningful benefit” (3rd, 6th, 5th Circuit Courts), others adopted a “slightly more than trivial or *de minimis*” (2nd, 4th, 7th, 8th, 10th, & 11th Circuit Courts), had no clear standard (1st Circuit), or had a mixed one (9th Circuit; Yell & Bateman, 2017). This split in the courts meant that a student who was educated in one state might receive

different special education services if they crossed into another jurisdiction (i.e., circuit court area) that used a different standard. Success for a lawsuit could then depend on where the student was living and what standard was being applied, and one such example of variation in circuit court rulings was the case of *Andrew F.*

Andrew F. v. Douglas County District RE-1 (2017; Andrew F.)

Andrew was receiving special education for autism and had been provided an IEP. He also had a diagnosis of ADHD. Based on teacher accounts, the court reported that he would “scream in class, climb over furniture and other students, and occasionally run away from school...He was afflicted by severe fears of common-place things like flies, spills and public restrooms” (*Andrew F.*, 2017, p. 7). When his IEP did not change in 4th grade and Andrew showed a lack of progress, his parents enrolled him in a private school that provided increased academic goals and a behavioral intervention plan. Andrew’s behavior improved, which allowed him to make academic gains and encouraged his parents to re-enroll him in the public school. When the proposed IEP at the public school failed to address his behavior, his parents maintained his placement at the private school and sought compensation for school tuition from the district for denial of FAPE. After the Administrative Court (due process) and District Court, determined that Andrew had received a benefit, the Appellate Court reaffirmed the lower courts, finding that Andrew was receiving “some educational benefit” with the public school IEP that they declared as merely more than *de minimis*. His parents then appealed to the Supreme Court which in 2017 granted *certiorari* (i.e., decided to hear the case) on the issue of the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (U.S. Supreme Court, 2016).

Arguments

There were three main arguments for different standards at the Supreme Court hearing. Neal Katyal, the attorney for the school district, argued the term “some benefit” which he equated with more than *de minimis* (U.S. Supreme Court, 2017, p. 40). The attorney for the student and parents, Jeffrey Fisher, argued for “substantially equal opportunity,” which was a much higher benefit (U.S. Supreme Court, 2017, p. 3) tied with the provision of the same benefits provided to students without disabilities. Finally, Irv Gornstein, a Counselor to the Solicitor General for the United States Department of Justice suggested that there should be significant progress toward grade-level standards if possible (U.S. Supreme Court, 2017, p. 25); and regardless, should be reasonably calculated to make progress that is appropriate in light of the child’s circumstances. This latter part referred to the original main ruling (the holding) from *Rowley* (U.S. Supreme Court, 2007, p. 24).

Court Questions

The Supreme Court justices asked many questions of the attorneys and their responses highlighted the ambiguity existing in the current law. For example, Justice Breyer questioned the attorney for the school on how he would look at what is meant by “some benefit:”

Mr. Katyal: “Some benefit.”

Justice Breyer: “You could say some benefit or you could say some benefit.”

Mr. Katyal: “Yeah.”

Justice Breyer. “All right. Now that’s an ambiguity.”

Mr. Katyal. “Yes” (U. S. Supreme Court, 2017, p. 45).

Justice Alito also had some queries on what was meant and linked it to the idea of progress:
Justice Alito: “Read them literally, it’s not clear to me that they mean anything different. Now, ‘progress’ benefit. Yeah, I don’t see how you can have a benefit unless you’re making some progress” (U. S. Supreme Court, 2017, p. 47).

Chief Justice Roberts also looked at what was meant by “meaningful:”
“Significant - ‘significant,’ ‘meaningful.’ Whatever. It’s more than simply *de minimis*. It suggests that you can’t just look at something and say, aha. Here, that was helpful, that was helpful, because it’s—the whole package has got to be helpful enough to allow the student to keep up with his peers” (U. S. Supreme Court, 2017, p. 49).

Ruling

Ultimately, in *Endrew F.* the U. S. Supreme Court reaffirmed the language from *Rowley* that a student’s education must be “reasonably calculated” but expanded it to specifically consider progress. The ruling stated, “To meet its substantive obligation under IDEA, 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.*, 2017, p. 11). The court rejected the idea that “some benefit” was equivalent to “merely more than *de minimis*,” (*Endrew F.*, 2017, p. 14) and acknowledged that cases must be decided considering the “unique circumstances of the child” rather than a “bright-line rule” (*Endrew F.*, 2017, p. 15-16). The court also rejected the substantially equal argument put forth by the attorney for the parents (*Endrew F.*, 2017, p. 15); an argument for equal opportunities provided to students with and without disabilities. The Court acknowledged that while there was a range of needs for students with disabilities and for students who are fully integrated in classrooms, there must be a consideration of progress in the grade level curriculum to “achieve advancement from grade to grade” (*Endrew F.*, 2017, p. 13). For students who are not fully integrated, the educational program must be “appropriately ambitious in light of his circumstances” (*Endrew F.*, 2017, p. 14). The Court suggested that, “A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act” (*Endrew F.*, 2017, p. 11). The court was remanded (e.g., sent back to the lower level court) with the new standard to determine if Endrew had received FAPE. Ultimately, the lower Circuit Court used the new standard and decided that there was now a violation of FAPE with Endrew’s family being awarded reimbursement for tuition and other costs (e.g., “reasonable attorney fees;” *Endrew F.*, 2018, p. 22).

Implications for Special Educators

Special educators are essential members of schools and IEP teams that support both the ability of students' learning and educators' teaching. They apply their expertise in assessment, curriculum, and interventions to ensure student success academically, socially, behaviorally, and emotionally. The case of *Endrew F.* and its interpretation of FAPE have several implications for special educators as they partner with families, teachers, administrators, and other professionals to create safe, healthy, and supportive learning environments that strengthen connections between the home, school, and community. In particular, special educators should be fully

aware of the central issues surrounding *Endrew F.* and the change in redefining “appropriate” for FAPE. Of particular importance is the word “progress” which exceeds previous legal cases that focused on benefit. This has implications for evaluation, such as examining what a student might be able to learn and considering how to measure that learning. Therefore, implementing appropriate interventions must be derived from an accurate assessment to allow for explicit measurement of “progress” specific to a student’s circumstances. Due to *Endrew F.*, special educators must be keenly aware of the overall considerations involving the new change in standard and its impact on the state where they work, and consider how to address student progress appropriately to both maintain the IEP team in compliance with the law and ensure that student goals are results-driven.

Change in Standard

As *Endrew F.* has shifted the consideration of FAPE from benefit to progress and rejected the “*de minimis*” standard, this will result in changing standards across several states. In essence, the Circuit Courts that followed the original benefit and *de minimis* standard will likely need to adjust and reflect the higher standard, and most likely affecting the following states that followed the lower standard: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New Hampshire, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming (Yell & Bateman, 2017). For special educators in those states, practices that have previously met FAPE may need to be reconsidered. For example, when the case was sent back to the lower court from the Supreme Court with the new standard, the lower court decided that there was not enough benefit for *Endrew F.* and that there was a denial of FAPE (*Endrew F.*, 2018). In order to show a benefit, progress needed to be made for both academic and functional or behavioral goals, which could mean that a special educator would be involved in the assessment for and development of result-driven individual goals of a student’s IEP measuring progress and benefit. For the other states that had followed a higher standard, care should still be given to ensure IEP’s are following the *Endrew F.* connections to student progress and maintaining the measurement of progress across special education programs.

Again, the *Endrew F.* ruling mirrored some of the language of *Rowley* but shifted the focus by changing the wording from “benefit” to “progress.” As Turnbull, Turnbull, and Cooper (2018) wrote, “It is *Rowley*-plus, a beefed-up middle path” (p. 126). As *Rowley* was not overturned, schools are still required to continue to consider of *Rowley*’s first part emphasis on complying with procedure, such as ensuring parents are invited to an IEP meeting. However, more of the change comes with the second part (Yell & Bateman, 2017). For *Rowley*, the test is: “...is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley*, 1982, p. 206-207). For the new standard under *Endrew F.*, the test is “To meet its substantive obligation under IDEA, 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.*, 2017, p. 11). The *Endrew F.* standard focuses its benefit on measuring progress based on the unique circumstances of the student and has direct implications for special educators as outlined below.

Appropriately Addressing Progress

In order to help schools interpret the *Andrew F.* ruling, the U.S. Department of Education (U.S. DOE) released a Questions and Answers (Q& A) Memorandum on *Andrew F.* describing the facts of the case, the history of FAPE and *Rowley*, and addressing questions to help states and schools understand the importance of the *Andrew F.* decision and its impact on schools for deciding FAPE (U.S. DOE, 2017). Most importantly the document clarifies that the new substantive standard was higher than the “merely more than *de minimis*” used by several Circuit Courts. As for recommendations, the Q & A Memorandum suggests that the IEP team should “consider the child’s previous rate of academic growth, whether the child is on track to achieve or exceed grade-level proficiency, any behaviors interfering with the child’s progress, and additional information and input provided by the child’s parents” (U.S. DOE, 2017, p. 5) and include a consideration of both academic and behavioral or functional progress which are individually examined and identified by the IEP team. For students with disabilities, this entails establishing measurable academic and functional or behavioral goals that reflect the present levels of academic achievement and behavioral or functional performance, and the use of curricula and strategies that are aligned with state standards (U.S. DOE, 2017). To ensure the goals are appropriately ambitious and match the unique needs of the student, goals should reflect progress in the general education curricula that is consistent for all students.

For students who are more impacted by significant cognitive disabilities, the goals should still be ambitious but can be weighed by the student’s circumstances and connection with Present Levels of Academic Achievement and Functional Performance (PLAPFF), with functional involving a consideration of behavior. (In the past, the PLAPFF was called the Present Levels of Performance (PLOP) but amendments to the IDEA changed the wording to PLAPFF to reflect the importance of considering functional and behavioral goals including academics). In order to ensure adequate monitoring of progress, the Q & A Memorandum suggests that IEP teams meet, examine progress or lack thereof, and change the special education services if progress is not made, still keeping in mind the changes should be appropriately ambitious (U.S. DOE, 2017, p. 8). Overall, the U.S. DOE suggests three key practices for both IEP teams, and the special educators:

1. Identifying present levels of academic achievement and functional performance;
2. The setting of measurable annual goals, including academic and functional goals; and
3. How a child’s progress toward meeting annual goals will be measured and reported so that the *Andrew F.* standard is met for each individual child with a disability (U.S. DOE, 2017, p. 9).

Under the new standard, special educators should help the IEP team ensure that the IEP enables a student to make progress on an educational benefit in accordance to the student’s unique circumstances during assessments, development of the IEP, and ongoing measurement. Further importance, special educators should continue to encourage meaningful parent participation.

Assessment and IEP Development

IDEA contains several provisions that align with assessment and the development of an IEP that directly impacts special educators. While special educators might assist as IEP team's assessment expert in conjunction with school psychologists, they should help in considering the validity of assessments used in the district and at the school so that they generate accurate information to ensure that the specialized instruction can produce progress "in light of the child's circumstances." Overall, IDEA requires that a variety of technically sound (e.g., valid) assessment tools and strategies be used (20 USCS Section 1414(b)(2)(C)). Special educators can assist the team in the initial assessment process. This will require not only being familiar with assessments available, but also potentially being a voice of accountability if working with district-mandated assessments.

Equally addressing the academic and behavioral or functional challenges for students with disabilities is necessary; yet, applying the new standard to school practice could become challenging for those in the field. Assessment information must be included for academic and functional (e.g., behavioral) needs in the PLAPFF that can help to establish initial levels to detect progress and identify the direct needs of the student (20 USCS Section 1414(b)(2)(A)). Special educators should ensure that all necessary academic and functional assessments are completed and documented in the PLAPFF. Special educators should make sure that assessments from the PLAPFF will set the stage for baseline and ongoing data that monitors a student's progress to ensure that a student's IEP is sufficiently challenging "in light of the child's circumstances" and that can be used to determine whether or not a student has received services that may be lacking and inappropriate for benefit and progress.

Special educators should also make sure that written goals are observable and measurable and that data are collected before the implementation of an IEP. With the new emphasis on measurement toward progress to ensure FAPE, for functional or behavioral goals it will be important to establish baseline behaviors and identify the function of those behaviors through initial assessment prior to student intervention. To develop an individualized goal that is specific to the student's needs, initial data are required to accurately develop appropriate benchmarks based on the student's specific circumstances. Additionally, aligning the goals with the general education curriculum, if appropriate must be considered. If goals are not appropriate, they must still be considered ambitious for the students' benefit and progress to incorporate the *Andrew F.* standard.

Ongoing Measurement

Special educators should also assist the IEP team in the ongoing measuring of progress for students in special education. Under IDEA, IEP's should include the measurement of annual goals (functional and academic) and description of the progress towards achieving the goals and when updates will be given (20 USCS Section 1414(d)(1)(A)(i)(II & III)). Further, the need for data collection is essential in order to determine (a) accuracy of the function of behavior, (b) appropriateness of the interventions selected based on the function, and (c) status of progress made through analysis. Maintaining data collection for continuous improvement allows for ongoing analysis of the IEP goals to be shared with the parents periodically and remains an integral part of the measurement of progress for a student with disabilities.

Parent Participation

Additionally, part of the problem with the *Andrew F.* case was a lack of acting on the concerns of Andrew's parents. For example, as part of the procedural safeguards, IDEA requires that IEP teams include parent information when assessing a student (20 USCS Section 1414(b)(2)(A)). Andrew's parents raised the lack of progress and inadequacies with the IEP as well as behavioral issues that were not addressed several times. After pulling him from the school and placing him into a private school where he showed progress, they re-enrolled him in public school and asked the IEP team to address his behavior to ensure he maintained the progress he had demonstrated in the private setting. Unfortunately, the IEP team did not change the IEP or adjust behavioral planning after he transitioning back to maintain success. Under IDEA, IEP development should consider the strengths of child, concerns of parents, results of evaluations, academic, developmental and functional needs and consideration of special factors, such as behavior (20 USCS Section 1414(d)(3)(A&B)). Special educators should recognize the importance of a parent's participation on the IEP team as an integral member and include their feedback into assessments, goal planning, IEP development, and delivery of services. As the child receives special education, multiple opportunities for parent engagement abound to include and encourage parental participation and communicate strengths and needs as part of the special education progress.

Alignment with General Education and Multi-Tiered System of Supports (MTSS)

MTSS includes a data-based problem-solving process to identify students that are unresponsive to the core instruction and determines the intensity/focus of instruction/interventions designed to meet students' behavioral and academic needs including their social and emotional needs for continual improvement through early identification. With the new emphasis for FAPE on considering the general education curriculum for students who can be fully integrated and the need for data to determine progress, special educators should consider whether their schools are using MTSS, such as school-wide Positive Behavior Intervention and Support (PBIS), to address the needs for *all* students within and across schools in general education. Although flexibility with IDEA funds can be used for MTSS, *Andrew F.* did not mandate the use of MTSS because MTSS is not the same as special education. While MTSS is a general education initiative, it is considered best practice for organizing resources to meet the needs of all students in a school. As well, MTSS should be considered by the special educators working in a school since FAPE requires a consideration of progress in general education for some students who can be fully integrated.

More specifically, MTSS applies a tiered system of intervention with universal supports at Tier 1 addressing all students, targeted supports at Tier 2 focusing on smaller groups (about 15%), and intensive supports at Tier 3 for individual students (about 5%) (Algozzine & Algozzine, 2007; Sugai & Horner, 2002, 2009). As data identify students not responding well to the universal interventions (e.g., display of behavioral expectations, adherence to rules in specific settings, etc.), the intensity of behavioral supports may increase in a supplemental, yet, not supplanted approach. In other words, all students (including students in special education) receive universal supports regardless of needs, but some may receive additional instructional minutes for increasing their skill repertoire to enhance success at the universal level. As student needs increase and/or decrease across this continuum of supports, the fluidity of supports provided move with the student based upon their specific need (i.e., unique circumstances). This means

that students with disabilities and with IEPs might be involved in tiered interventions, but might also require even greater specialized instruction through special education and their IEP.

With MTSS, the effectiveness of both academic and behavior supports within MTSS should be frequently and consistently monitored to determine whether (a) the intervention is working and is no longer needed, (b) the intervention is working and should be continued, or (c) the intervention is not working, and therefore a different (and possibly more intensive) intervention should be implemented. Ongoing assessments, such as initial screening and progress monitoring matched to the needs of the student drive the appropriate level of intervention for both behavior and academics.

To reiterate, *Andrew F.* does not require that schools use MTSS for students with disabilities. However, *Andrew F.* does include a consideration of progress in the general education curriculum for students who can be fully integrated. Special educators should ensure that students with disabilities are screened along with their peers in the general education curriculum to identify any gap that does not require specialized instruction of special education, assist in establishing appropriate goals through the initial baseline data and engage in ongoing progress monitoring. Through data analysis, a special educator should consider the student's level of need by examining progress for both academics and behavior across the tiers. As well, special educators might consider if the needs of their students can be met in general education using the school's established MTSS interventions. Although the IEP governs specific special education instruction and is what is most relevant to *Andrew F.*, teachers that participate in schools using MTSS should ensure they are considering progress in their supports provided to all students including students in special education whose needs are being addressed through MTSS.

Behavior Intervention Plans (BIPs)

BIPs, sometimes referred to as Behavior Support Plans (BSPs) are used for students who have behavioral challenges that require direct intervention and are often developed in conjunction with the IEP. A behavior specialist relies on a functional behavior assessment (FBA) to identify why (function) the behavior is occurring and uses this assessment to select interventions most likely to work for the student. The interventions are then written into the BIP and data are collected prior to initiating the interventions and throughout the implementation of the intervention to gauge progress.

With *Andrew F.*, Andrew was displaying behaviors that were severe enough that the private school developed a Behavior Intervention Plan. Once the BIP showed behavioral improvement, Andrew also began to make academic gains. In the public school, the behaviors noted were raised by the parents, but were not addressed in either the IEP or through a BIP even when he returned to the school after showing progress in the private setting. Without even addressing and assessing the behaviors initially, no progress could be measured in the public school.

In the final decision made by the Circuit Court after applying the new standard from the Supreme Court, the Circuit Court stated, "Moreover, despite his maladaptive and disruptive behaviors that prevented his ability to access education, the district failed to conduct a functional behavioral assessment, implement appropriate positive behavioral interventions, supports or strategies, or develop an appropriate Behavior Intervention Plan (BIP; *Andrew F.*, 2018, p. 7). His parents

argued, “. . . that Petitioner’s lack of progress, and a proposed IEP that was a continuation of that pattern, coupled with the failure to provide reporting and behavior assessment/intervention, resulted in a denial of a FAPE” (*Andrew F.*, 2018, p. 8).

In applying the new *Andrew F.* standard, the Circuit Court determined that changes made by the school on the IEP were

. . . only updates and minor or slight increases in the objectives, or carrying over the same goals from year to year, or abandonment if they could not be met. The April 2010 IEP was clearly just a continuation of the District’s educational plan that had previously only resulted in minimal academic and functional progress. (*Andrew F.*, 2018, p. 16).

The Circuit determined that this was insufficient. “The District’s inability to properly address Petitioner’s behaviors that, in turn, negatively impacted his ability to make progress on his educational and functional goals, also cuts against the reasonableness of the April 2010 IEP” (*Andrew F.*, 2018, p. 17). The Court declined to decide on whether Andrew was making progress in the private school; yet, suggested that there was a lack of progress in the public school, including not having a set FBA and BIP that inevitably resulted in a denial of FAPE. It is important for special educators to remember that they are often the direct liaison between the school team and the families. Remembering to consult and collaborate with parents and the IEP team on behavior concerns is critical. If an FBA is needed to design a BIP, data will need to be continually collected before and during the delivery of services to assess and monitor behavioral progress and student outcomes can be more impactful with parent participation.

Conclusion

In sum, it is now the responsibility of the IEP team and special educator to ensure that not only the IEP enables a student to receive educational benefit, but also that there is also an emphasis on the progress a student can make in accordance to their unique circumstances. More than ever, special educators must measure and record progress where students with disabilities are educated in general education through MTSS, the IEP, and in the BIP. If these activities do not occur, it will be far more challenging for the IEP team to claim that they are providing FAPE for the student with disabilities. Special educators are an integral part of the IEP team and assist in the completion of valid assessments, identification of student specific needs derived from data, providing the recommended interventions based on the assessments and student’s circumstances, analyzing results to determine student progress, and continuing to serve as the liaison to the parents and caregivers for continual engagement. The case of *Andrew F.* has raised the legal standard from minimal provided benefit to a consideration of progress, making the role of the special educator vital in the provision of FAPE.

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