ENDREW, *FRY*, AND *G.L.*, OH MY!

IDEA HEARING OFFICER TRAINING
NEW YORK STATE EDUCATION DEPARTMENT
MONDAY, OCTOBER 16, 2017 (ALBANY AREA)
THURSDAY, OCTOBER 26, 2017 (NYC)

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Only time will provide us with a better understanding of the full implications of *Endrew F.*,[1] *Fry*,[2] and *G.L.*[3] However, the published cases since these three cases were decided help us to understand how the various jurisdictions/courts are interpreting *Endrew F.*, *Fry*, and *G.L.* What follows are some practical pointers to keep in mind when wrestling with *Endrew F.*, *Fry*, and *G.L.* related matters.

Endrew F.

- There is an open question of whether the *Endrew F.* decision clarified, or expanded upon, the *Rowley*[4] standard. Each of us may have differing opinions. Given its relative infancy, it is, therefore, advisable that, during the prehearing conference, you consider asking counsel for their view. Recall that there is much that the Court did not define in the opinion and will require further discussion, including what "appropriately ambitious," "challenging objectives," and "markedly more demanding" than *de minimis* mean in operation and in what situations will eligible students who are fully integrated in the regular classroom and are achieving at grade level be considered not to be receiving an appropriate education in light of their individual circumstances. Asking the parties for their opinion early in the process on these weighty words and matters should help to get the parties on the same page on what evidence is relevant to apply the test.

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[1] *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 69 IDELR 174 (U.S. 2017).

[2] *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 69 IDELR 116 (U.S. 2017).

[3] *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 66 IDELR 91 (3d Cir. 2015).

[4] *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982).

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- With the "clarified/expanded" standard now being, "enable the child to make progress appropriate in light of the child's circumstances," the importance of the present levels of academic achievement and functional performance (PLAAFP) statement is heightened. The PLAAFP statement should provide a comprehensive understanding of the student's current educational circumstances. Without this baseline of current performance (i.e., strengths, deficits, interests, and learning style), it is difficult to draft measurable and relevant annual goals, measure future progress, and, ultimately, determine whether the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." It may be, therefore, imperative of the hearing officer to prompt/encourage counsel to ask clarifying questions of appropriate witnesses in an attempt to gain a clearer understanding of the student's current performance. And, if doing so does not provide the clarification desired, the hearing officer should ask further questions.

- For various reasons, a court may remand a pending case to a lower court / hearing officer to determine whether FAPE was provided to the student when the IEP is reviewed under the "clarified" standard. A remand is not an option for the hearing officer.

  If you are sitting on a pending case filed prior to March 22, 2017, the date the Court rendered its decision in *Endrew F.*, the parties should be asked as soon as possible for their positions as to *Endrew F.'s* impact, if any, on the case at hand and decide the case using the "clarified" standard. Not doing so may affect the record and the decision, and may result in remand from the court if the matter is appealed.

Fry

- At the 16th National Academy for IDEA Administrative Law Judges and Impartial Hearing Officers in June 2017 (hereinafter, "Academy"), a panel of experts discussed the fallout from the *Fry* decision and noted three trends since *Fry* was decided:

  ⇒ there is more awareness of Section 504 of the Rehabilitation Act;

  ⇒ some parents' counsel seeking compensatory damages pursuant to Section 1983 (based on alleged violations of Section 504 and the American with Disabilities Act) are conceding in their due process complaint filings that their clients were not denied FAPE. By conceding no denial of FAPE, the hearing officer is without a basis to grant any relief whatever, resulting in dismissal of the due process complaint. The dismissal would provide confirmation of the exhaustion of the IDEA remedies, which is precisely what counsel is seeking. The panelist also noted that others are going directly into court conceding that FAPE was not denied in the hopes of avoiding any

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exhaustion of remedies claims.

⇒ lawyers are using the IDEA due process hearing to exact findings of fact that would be helpful in their Section 504 court-litigated claims.

G.L.

- In remands, courts are directing hearing officers to determine the date when the parent "knew or should have known" of the alleged action that forms the basis of the complaint (i.e., the KOSHK date) for each claim.[5] This approach makes sense, and other courts are following suit.

- When the statute of limitations (SOL) is raised as an affirmative defense, the hearing officer must first determine the KOSHK date for each claim in which the KOSHK date is in dispute. Though the non-complaining party (typically the school district) carries the burden of proving that a claim is time-barred, the complaining party (typically the parent) should nonetheless be given an opportunity to offer contrary evidence.

- Establishing the KOSHK date is not the end of the inquiry when the school district raises the affirmative defense against a parent's claim(s). The IDEA permits the parent two exceptions to the SOL. If it is determined that the claim was filed two years after the KOSHK date, the claim may nonetheless be heard if the parent can demonstrate that the local educational agency (LEA) misrepresented that it resolved the problem that forms the basis of the parent's complaint or the LEA withheld information IDEA requires be provided to the parent.[6] When the parent alleges an exception, the hearing officer should specifically identify which exception is alleged and obtain the necessary information – whether by stipulation, affidavit, or limited hearing – to decide.

  Consideration should also be given to the following matters:

  ⇒ The IDEA does not define the term "misrepresentation." Though courts have generally construed its meaning narrowly, it may be worthwhile to get the parties position on the meaning of "misrepresentation."

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[5] *See*, *e.g.*, *E.G. v. Great Valley Sch. Dist.*, 2017 WL 2260707, 70 IDELR 3 (E.D. Pa. 2017) (reasoning that although the parent had knowledge of the school district's conduct when it occurred, the hearing officer never determined the KOSHK date for "each alleged violation"); *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 67 IDELR 239 (D.D.C. 2016) (adopting *G.L.* and remanding the matter to the hearing officer with instructions to "reconsider the timeliness of [all] claims, analyzing each alleged IDEA violation individually.")

[6] 34 C.F.R. § 300.511(f).

⇒ The IDEA requires that a copy of the procedural safeguards be given to the parent upon initial referral or parental request for evaluation and at least one time per school year thereafter. The procedural safeguards must also be given upon receipt of the first state complaint and due process complaint in a school year; at the time a decision is made to make a disciplinary removal that constitutes a change in placement; and, upon the request of the parent.[7]

What if, the school district fails to provide the procedural safeguards in the year the alleged action that forms the basis of the complaint occurred but had done so in previous years? Would such omission excuse the application of the SOL?

- To resolve such fact disputes (i.e., KOSHK date, applicability of exception) will require the making of a record, usually by a recorded or transcribed telephone conference call. Given the need to make this determination as soon as possible (i.e., to know whether the claim is even hearable and limit unnecessary preparation), the specific fact issues to be determined regarding the SOL should be identified. In addition, arrangements for a limited hearing should be made during the prehearing conference, including setting the date and time for the limited hearing, discussing necessary witnesses and documentary evidence, and establishing the disclosure date.

  Finally, the hearing officer should also set a date by when the parties can expect his/her decision on the applicability of the SOL. Because it should be rendered sooner than later to allow the parties to adequately prepare for the hearing, the hearing officer should consider providing the parties with his/her conclusion(s) as to whether the claim(s) is/are hearable, but advising the parties that detailed factual findings and conclusions of law will be set forth in the final decision.

- With *G.L.* and other courts[8] clarifying that "IDEA's broad equitable remedies are tied more closely to the child's needs than to specific deprivations he suffered or when they were suffered,"[9] the fashioning of a compensatory education services remedy may become even more difficult.[10] Here are but a

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[7] 34 C.F.R. § 300.504

[8] *See, e.g.*, *Avila v. Spokane Sch. Dist. 81*, 852 F. 3d 936 (9th Cir. 2017); *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35 (D.D.C. 2016).

[9] *Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35 (D.D.C. 2016).

[10] In *G.L.*, where the issue giving rise to an alleged violation of the IDEA is more than two years old, the claim is barred if the parent did not file the due process complaint within two years of the KOSHK date, unless an exception applies. However, where the alleged violation is ongoing to the previous two years, and the parent timely files a due process complaint within two years from when the parent reasonably discovered the violation, the Third Circuit suggests that a hearing officer or court may remedy the entire period of the violation however far back it dates. In essence, in the

few matters to consider and discuss with the parties, as appropriate:

⇒ What effect would subsequent IEPs have on fashioning a remedy if the subsequent IEPs addressed to some extent the harm of which the parent complains?

⇒ How do variations in the student's rate of progress over the entire period of denial – a factor to consider under *Reid's*[11] qualitative approach – will be quantified?

⇒ How do private services provided by the parent addressing the harm factor into the overall remedy? Should the parent be made whole?

⇒ If a substantial award, how should it be implemented to avoid educationally overloading the student (e.g., online education, summer camp, summer classes, or specialized private schooling)?

⇒ Should the remedial order read "make available" rather than "provide" compensatory services to avoid complications arising from the student not being able to receive the services or just refusing to obtain/accept the services?

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Third Circuit and in those jurisdictions that follow its lead, where the parent neither knew nor reasonably should have known of the special needs of their child or of the school district's failure to respond appropriately to those needs, *G.L.* places as much of a burden on the school district to identify within a reasonable time period any educational failures resulting from an inappropriate IEP or placement and to work with the parent and the IEP team to expeditiously design and implement an appropriate program. The failure of the school district to take appropriate and timely action may result in greater liability for the school district that extends beyond the two years prior to the KOSHK date.

[11] *Reid v. Dist. of Columbia*, 401 F.3d 516, 43 IDELR 32 (D.C. Cir. 2005).

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