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## Introduction: A Symposium on Special Education Law: Past, Present, and Future

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RICHARD D. MARSICO

## Introduction: A Symposium on Special Education Law: Past, Present, and Future

63 N.Y.L. SCH. L. REV. 11 (2018–2019)

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This symposium was the brainchild of Daniel Oquendo, a 2018 graduate of New York Law School.<sup>1</sup> Daniel was motivated to attend law school to help families avoid the tragedy his family faced in 2014 when his brother Avonte, a New York City special needs student, drowned in a nearby river after he left school through an unattended exit without anyone in authority noticing. Daniel thought a symposium would allow him to honor his brother and be a fitting capstone to his legal education.

He proposed the idea to me in 2017 when he was a student in my special education law class. I enthusiastically agreed; not only was I happy to participate in Daniel's memorial to his brother and his law school capstone, but a symposium in 2018 would be perfectly timed to address two highly anticipated United States Supreme Court decisions in special education law.

Our expectations were met. In the course of one month in 2017, the Court issued its decisions, first in *Fry v. Napoleon Community Schools*,<sup>2</sup> and next in *Endrew F. v. Douglas County School District RE-1*.<sup>3</sup> Both were landmark decisions and offered much to discuss and analyze: The first two panels of the symposium were dedicated to their impact, followed by a third panel that considered systemic challenges and proposed reforms to providing special education to students with disabilities in New York City.<sup>4</sup> In addition to these panels, Amy Rowley and her father, Clifford, whose case on behalf of Amy went to the U.S. Supreme Court in 1982,<sup>5</sup> spoke to symposium attendees.

The articles in this Issue of the *New York Law School Law Review* document society's failure to meet the educational needs of children with disabilities by establishing a low standard of the "free appropriate public education" (FAPE) that the Individuals with Disabilities Education Act (IDEA) requires;<sup>6</sup> the failure of school districts to provide adequate training to students with autism; the limited judicial redress available to children with disabilities who allege that their schools have discriminated against them; delays in providing special education standards; and the failure of school districts and family courts to coordinate so that students in juvenile delinquency proceedings receive needed educational services to address their behavioral issues.

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1. Daniel Oquendo was a Legal Scholarship Editor of the 2017–2018 *New York Law School Law Review*. He received his J.D. from New York Law School in 2018 and is an associate at Cleary Gottlieb Steen & Hamilton LLP. See his article in this Issue: Daniel Oquendo, *Failing the Most Vulnerable Among Us: The Lack of Redress for Children with Disabilities*, 63 N.Y.L. SCH. L. REV. 61 (2018–2019).

2. 137 S. Ct. 743 (2017).

3. 137 S. Ct. 988 (2017).

4. For the Continuing Legal Education materials from the symposium, see *From Rowley to Endrew F.: The Meaning of a FAPE*, N.Y.L. SCH. (Mar. 23, 2018), <http://www.nyls.edu/impact-center-for-public-interest-law/wp-content/uploads/sites/140/2018/03/CLE-Materials-Panel-1-Revised-1.pdf>.

5. *See* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Amy June Rowley, who is deaf, was an elementary school student in Peekskill, New York when the U.S. Supreme Court decided that federal law did not require her school to provide her with a sign-language interpreter. *Id.*

6. *See* 20 U.S.C. § 1412(a)(1) (2017).

But the articles also offer hope for the future of special education. They argue that *Andrew F.* raises the standard for providing a FAPE to children with disabilities;<sup>7</sup> propose changes to evidentiary rules and procedures for providing special education;<sup>8</sup> and explore other methods of meeting the educational needs of children with disabilities.<sup>9</sup> Amy Rowley exhorted members of the audience to work to implement these and other reforms:

It's up to people [like you] to advocate for special education, to raise the bar and hold it strong and high for all deaf children, for children with all disabilities, so all of them can reach their potential. If we don't continue to fight for these students, who will?<sup>10</sup>

The brief introduction that follows does not capture the full depth and breadth of the articles but tries to identify their common themes and whet the reader's appetite for more. This introduction is arranged by panel: The articles under Panel One review the evolution of the FAPE standard; the articles under Panel Two address access to the courts to vindicate rights under the anti-discrimination laws; and the Panel Three articles identify systemic problems and solutions in the provision of special education.

#### I. PANEL ONE: FROM ROWLEY TO *ENDREW F.*: THE MEANING OF A FAPE

Amy Rowley's moving account of her family's heroic efforts to obtain a service that was necessary to provide her a basic education offers insight into the impact that the judiciary's failure had on her personally. But Amy, Gary Mayerson,<sup>11</sup> and I agree that *Andrew F.* offers new hope that the standard for educating children with disabilities will be raised to the level that the Rowleys envisioned when they read about a new law that would enable Amy to attend their local public school, and sent her to school assuming their request for a sign-language interpreter for Amy would be fulfilled.

One compelling lesson to learn from the Rowleys is that the legal system often has a blind spot for the human aspect of the cases that come before it, which only expands as cases climb the appellate ladder, resulting in decisions based on cold and

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7. See Richard D. Marsico, *From Rowley to Andrew F.: The Evolution of a Free Appropriate Education for Children with Disabilities*, 63 N.Y.L. SCH. L. REV. 29 (2018–2019); Gary S. Mayerson, *Generalization After Andrew F.: Shrinking the Gap Between Access and Outcome for Students Diagnosed with Autism*, 63 N.Y.L. SCH. L. REV. 51 (2018–2019).

8. See Oquendo, *supra* note 1.

9. See *id.*; Lisa F. Grumet, *Court-to-School Pipelines: Meeting Special Education Needs for Students on Juvenile Probation in New York*, 63 N.Y.L. SCH. L. REV. 73 (2018–2019); Samantha C. Pownall, *Education Delayed Is Education Denied*, 63 N.Y.L. SCH. L. REV. 95 (2018–2019).

10. *Address by Amy June Rowley, Ph.D., Professor, California State University, East Bay*, 63 N.Y.L. SCH. L. REV. 21, 27 (2018–2019).

11. Gary Mayerson is a 1979 graduate of the Georgetown University Law Center and is the founder of Mayerson & Associates, the first law firm in the nation dedicated to the representation of individuals with autism.

old records bereft of life. Many of the key facts that Amy related about her story did not make their way into the Supreme Court's decision. These include her school's haphazard experiment with an interpreter that was doomed to fail; how her mom—a teacher herself—had to teach Amy every afternoon what she had missed in school that day, denying her the chance to play and have fun with the other kids; and how the interpreter she finally received in third grade not only helped Amy academically, but allowed Amy access to all aspects of her school life, including relating to the other children.<sup>12</sup>

When the Supreme Court issued *Rowley*, ruling that Amy's school was not required to provide her with an interpreter, it was a blow to Amy and her family:

[The Supreme Court] felt that, based on my ability to pass the classes that I had previously, that I was doing okay. I was passing my classes, and they considered that a success. That was a terrible outcome for me and my parents, who worked so hard.<sup>13</sup>

Amy faced many other obstacles in school after this decision, including a physically abusive teacher and an inability to understand what was happening in class, but she persevered, and now has a doctorate and is a professor at California State University, East Bay. But not all stories like Amy's have happy endings. At least moving forward, *Andrew F.* offers hope.

In my article in this Issue, I document the path the Supreme Court and circuit courts have followed in establishing the standard for educating children with disabilities.<sup>14</sup> In *Rowley*, the Court rejected the Rowleys' claim that the IDEA requires school districts to provide an equal educational opportunity to students with disabilities. Instead, the Court established a standard that required school districts only to provide access to education that is "meaningful."<sup>15</sup> Applying this standard to Amy, the Court ruled that because she was passing her courses and moving from grade to grade, the district was providing her with an educational benefit. Following *Rowley*, the circuit courts applied their own spin, many of them defining an educational benefit to require less than what *Rowley* required. *Andrew F.* rejected the lowest of these standards—the "merely more than *de minimis*" test.<sup>16</sup> In doing so, it reformulated the FAPE standard. Now, school districts must provide students with disabilities an education that is "appropriately ambitious" in light of their individual circumstances.<sup>17</sup> This holding raises the FAPE standard, hewing far closer to what the Rowleys proposed and the Court rejected.

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12. See *Rowley Address*, *supra* note 10, at 23–24.

13. *Id.* at 24–25.

14. See Marsico, *supra* note 7.

15. Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982).

16. 137 S. Ct. 988, 1001 (2017).

17. See *id.* at 992.

Gary Mayerson's article in this Issue demonstrates one way that *Endrew F.* offers hope to children with autism.<sup>18</sup> Mayerson explains how the pre-*Endrew F.* “*de minimis*” standard failed children with autism who require specialized instruction to learn the skill of generalization—the ability to apply skills and behaviors learned from one setting to another. Autism clinicians agree that teaching generalization to students with autism is essential, yet virtually all pre-*Endrew F.* federal court decisions rejected the claim that the IDEA requires it. Citing language from *Endrew F.* and its “more robust” standard, Mayerson makes a strong argument that this new standard requires school districts to teach generalization skills to students with autism who need it.<sup>19</sup>

## II. PANEL TWO: *ENDREW F. AND FRY*

Federal law—including the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504)—prohibits discrimination against children with disabilities and provides monetary damages for violations.<sup>20</sup> Title IX of the Education Amendments of 1972 also applies when a student with a disability reports sexual misconduct at school.<sup>21</sup> These laws are meaningless unless children and their parents are able to enforce them.

Daniel Oquendo's article addresses an obstacle that the Federal Rules of Evidence pose for children with disabilities in obtaining redress for sexual and other forms of abuse suffered in school.<sup>22</sup> The article focuses on *Doe v. Darien Board of Education*, in which the United States District Court for the District of Connecticut ruled that the hearsay statements of a twelve-year-old boy with Down syndrome were inadmissible as proof that he notified the school principal and psychologist about his abuse.<sup>23</sup> Because of his disability, Doe was unable to testify, and because the key evidence that school officials were aware of the abuse were his inadmissible hearsay statements, the court barred the evidence at trial and the school board and the district were ultimately found not liable.<sup>24</sup> Oquendo proposes 1) that the Federal Rules of Evidence be revised to include a new hearsay exception for children with disabilities who have a documented communication difficulty; 2) that the courts interpret the excited

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18. See Mayerson, *supra* note 7.

19. See *id.*

20. See 42 U.S.C. §§ 12101–213 (2017); 29 U.S.C. § 794 (2017).

21. Title IX provides in pertinent part that “no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a); see also U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 6 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

22. See Oquendo, *supra* note 1.

23. See 110 F. Supp. 3d 386 (D. Conn. 2015).

24. See *id.* at 403; Martin B. Cassidy, *Former Darien School Aide Found Guilty of Sex Abuse*, NEWS TIMES (Aug. 13, 2015, 6:55 AM), <http://www.newstimes.com/news/article/Former-Darien-school-aide-found-guilty-of-sex-6441870.php>.

utterance and residual hearsay exceptions more broadly in cases involving children with disabilities; and 3) that Congress fully fund the IDEA to ensure adequate resources are available to provide school officials with better training to detect and aid in the prevention of sexual abuse of children with disabilities at school.

The IDEA creates another obstacle for children with disabilities who seek monetary damages for violations of the ADA and Section 504: They must exhaust their IDEA administrative remedies prior to filing a lawsuit if the complaint is “seeking relief that is also available” under the IDEA.<sup>25</sup> But unlike the ADA and Section 504, monetary damages are generally not available for IDEA violations.<sup>26</sup> The conclusion of this syllogism should be that when parents file a lawsuit pursuant to the ADA or Section 504 seeking monetary damages for disability discrimination against their child, the IDEA’s exhaustion requirement does not apply. This is not, however, how the lower courts have ruled. Instead of adopting the plain meaning of the exhaustion exception, courts have held that plaintiffs must first exhaust the IDEA’s administrative remedies if there is *any* relief the IDEA can provide, regardless of whether the plaintiffs seek that relief.<sup>27</sup>

When the Supreme Court granted certiorari in *Fry*<sup>28</sup>—its first venture into the IDEA’s exhaustion requirement—it seemed that the Court might be ready to straighten things out. Instead, it created a two-part test for determining whether the exhaustion requirement applies to claims for monetary damages for disability discrimination—a test that is not derived from the statutory language of the exception and does little to clarify the confusion over when the exception applies. Consider the following two hypotheticals, both of which are based on real-life cases that took place prior to *Fry*:

#### Hypothetical One

Charlie F. suffers from attention deficit disorder and panic attacks. Charlie F.’s disabilities cause him to be disruptive in class. His teacher asked the class to publicly air their complaints against Charlie and they did, causing Charlie to lose confidence and self-esteem. This led to fights and the disruption of Charlie’s educational program. Charlie’s parents wanted to sue the school district for monetary damages and they consulted an attorney.<sup>29</sup>

#### Hypothetical Two

E.M. suffers from muscular dystrophy that limits his ability to engage in physical education. E.M.’s individualized education program (IEP) limited

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25. 20 U.S.C. § 1415(l) (2017).

26. *See, e.g.*, Mark H. v. Lemahieu, 513 F.3d 922, 929 (9th Cir. 2008) (“Although injunctive relief is available under the IDEA, ordinarily monetary damages are not.”) (internal quotations omitted); *see also* DEBORAH N. ARCHER & RICHARD D. MARSICO, SPECIAL EDUCATION LAW AND PRACTICE: CASES AND MATERIALS 644–50 (2017).

27. ARCHER & MARSICO, *supra* note 26, at 567–69.

28. 137 S. Ct. 743 (2017).

29. *See* Charlie F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996).

his participation in physical education. But E.M.'s physical education teacher required him to engage in more intense physical activity than permitted by his IEP, and as a result, he suffered kidney damage. E.M.'s parents wanted to sue the school district for monetary damages and they consulted an attorney.<sup>30</sup>

The attorneys in Hypotheticals One and Two counseled their clients identically. First, they presented the good news: The ADA and Section 504 prohibit discrimination on the basis of disability, and the facts create a plausible claim for relief under both statutes. Then, they presented the bad news: The IDEA requires them to exhaust the IDEA's administrative remedies prior to bringing a lawsuit. But since the IDEA does not provide for monetary damages—which is the only form of relief they were seeking—they may not need to exhaust the IDEA's administrative remedies after all.

However, their attorneys presented an important caveat: The courts have construed the exhaustion provision to require exhaustion if *any* relief is available under the IDEA, whether the families seek it or not. “What should we do?” the parents asked their attorneys. There was no good answer. The attorneys explained that since the courts were inconsistent, it was unclear whether they would be better off playing it safe and exhausting administrative remedies and delaying filing a lawsuit, or taking a chance and suing in federal court.

In *Fry*, the Supreme Court attempted to answer their question. The parents in *Fry* obtained a trained service dog named Wonder for their daughter, E.F., who has cerebral palsy.<sup>31</sup> Wonder helps her live independently by performing tasks like retrieving dropped items and helping her with the toilet, her walker, the doors, the lights, and her coat.<sup>32</sup> The Frys asked E.F.'s school to allow Wonder to attend E.F.'s kindergarten class, but the school refused, stating that E.F.'s IEP included a one-to-one aide to assist her during the day and the dog was thus not necessary.<sup>33</sup> The Frys claimed this refusal violated the ADA and Section 504, but the lower courts dismissed their suit for failure to exhaust the IDEA's procedures.<sup>34</sup> The Supreme Court vacated the judgment and remanded.

The Court ruled that in determining whether a plaintiff is “seek[ing] relief that is also available” under the IDEA, a court “should look to the substance, or gravamen, of the plaintiff's complaint,” which can be gleaned by a two-step inquiry.<sup>35</sup> First, the court can ask two hypothetical questions; an affirmative response to both serves as a strong indicator that the gravamen is something other than the IDEA: 1) whether the plaintiff could have brought the same complaint against a public facility that is not a school; and 2) whether an adult at the school could have brought the same

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30. See *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564 (7th Cir. 2004).

31. 137 S. Ct. at 750–51.

32. *Id.* at 751.

33. *Id.*

34. *Id.* at 751–52.

35. *Id.* at 752.



claim.<sup>36</sup> Second, a court can look to the history of the proceedings, including, for example, whether the plaintiff initially utilized the IDEA's administrative proceedings to resolve the dispute; if the case originated as a request for an impartial hearing based on an IDEA violation, this is a strong indicator that the gravamen involves the IDEA.<sup>37</sup> Because the lower courts did not consider these factors, the Court remanded the case for reconsideration.<sup>38</sup>

We can now return to our hypotheticals, this time with *Fry*'s test in mind. The family in Hypothetical One, whose child was publicly degraded by his classmates at the behest of their teacher, need not exhaust administrative remedies before pursuing a claim in court because both of *Fry*'s hypothetical questions are answered affirmatively: First, the same claim could be brought against a public facility that is not a school; and second, an adult at the school could sue for damages if humiliated by a school official. Thus, the parents in Hypothetical One can immediately commence their lawsuit and seek monetary damages.

But the family in Hypothetical Two, whose disabled child suffered serious injury during gym class, would need to first exhaust the IDEA's administrative remedies: They could not have brought the claim against a public facility that is not a school since the claim involves physical education class, and an adult at the school could not bring the claim because they would not be enrolled in physical education class.

In both cases, the teacher harmed the student, the teacher was acting outside the child's IEP, and the families did not seek an IDEA remedy but instead sought monetary damages. Yet a post-*Fry* analysis leads to different outcomes for both families: The family in Hypothetical One can bypass exhaustion and immediately seek redress in court, but the family in Hypothetical Two cannot. Applying *Fry* to each hypothetical yields opposite results, despite the lack of any meaningful distinction between the two.

The *Fry* Court's failure was looking to the gravamen of the complaint rather than the plain meaning of the IDEA's exhaustion requirement. The statutory language of the requirement does not refer to the substance of the complaint; it looks to the relief the complaint seeks.<sup>39</sup> A test based on the plain language of the IDEA would be: 1) What relief is the plaintiff seeking?; and 2) is that relief also available under the IDEA?

### III. PANEL THREE: SYSTEMIC CHALLENGES AND REFORMS IN NEW YORK CITY

In their articles, Professors Samantha Pownall and Lisa Grumet identify the consequences of mishandling the educational needs of children with disabilities.<sup>40</sup>

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36. *Id.* at 756–57.

37. *Id.*

38. *Id.* at 758–59.

39. *See* 20 U.S.C. § 1415(*l*) (2017).

40. *See* Pownall, *supra* note 9; Grumet, *supra* note 9. Professor Pownall teaches the Education Law Clinic, Children and the Law in Practice, and Legal Practice at New York Law School. Professor Grumet is a

Pownall's article reports significant delays in evaluating and providing educational services to children with disabilities in New York City. Her proposed reforms include implementing an accurate database to track each step the Department of Education (DOE) takes pursuant to the IDEA's mandatory identification, evaluation, and placement process; more state audits of the DOE's IDEA implementation record; promulgating clear and consistent policies to comply with the IDEA's provisions relating to pendency, related services, and independent educational evaluations; resolving hearings expeditiously; and providing parents with mandatory documents, including prior written and procedural safeguards notices.

Professor Grumet's article focuses on the fate of students with disabilities in New York State who are arrested outside of school. Grumet points out that these students often do not receive the educational services they need to address their behavioral issues because of the lack of coordination between family courts and schools. Schools are not parties to juvenile delinquency proceedings, family court does not have authority to order school districts to provide particular educational services to students, and school districts may not even receive notice when a student is engaged in a juvenile delinquency proceeding. Grumet identifies several approaches to improve the coordination between family court and schools and recommends the creation of an education advocate for students with disabilities who are engaged with the juvenile justice system. Such an advocate would work with students to make sure that they are properly evaluated by their school district and receive appropriate educational services.

#### IV. CONCLUSION

The articles in this symposium Issue of the *New York Law School Law Review* are much richer than the outline I offer in this Introduction; I encourage you to read them.

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