A "Big 3" for South Carolina Special Education Leaders:

ED Eligibility, *Endrew F.*, and RTI/MTSS

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These slides provide an impartial outsider's overview of three NC CASE-selected **legal** issues.

The listed references, which are mostly available as free downloads at perryzirkel.com, provide more detailed and comprehensive analyses, including extensive supporting citations of the applicable statutes, regulations, and case law.

Emotional Disturbance (ED) Eligibility

Step #1: Alternate Prerequisites

*Has the child exhibited **one or more** of the following:*	YES	NO
• an inability to learn that cannot be explained by intellectual, sensory, or health factors?		x
• an inability to build or maintain satisfactory interpersonal relationships with peers and teachers?	x	X
• inappropriate types of behavior or feelings under normal circumstances?	**X**	x
• a general pervasive mood of unhappiness or depression?	X	X
• a tendency to develop physical symptoms or fears associated with personal or school problems?	x	x

Steps ## 2 and 3: Successive Qualifiers for the Applicable Prerequisite(s)

	YES	NO
2. *If #1 is YES, has the student exhibited said prerequisite(s) for **both** of the following*: • for a long period of time? - AND - to a marked degree?	X	X
3. *If #2 is YES, has the condition adversely affected the student's educational performance?*	X	**X**

Steps ## 4 and 5: The Problematic Exclusion and the Ultimate Criterion

	YES	NO
4. *If YES, is the student **solely** "socially maladjusted" (i.e., not also meeting the criteria in Steps ## 1-3)?*	X	X
5. *If NO, as the result of the condition meeting the criteria in Steps ##1-3, does the student require special education?*	X	X

Tentative Take-Aways re ED Eligibility

- Don't get lost in DSM-V diagnoses, instead focusing on the criteria of the ED definition.
- Similarly, although it merits due attention, don't over-rely on the so-called exclusion for social maladjustment. In close cases, examine *Springer v. Fairfax County School District*.
- Don't ignore or over-do the alternative classifications, especially IDEA OHI and, more generally, Section 504.
- Conversely, put the focus ultimately on the overlapping IDEA criteria of adverse effect and special education need.
- Keep in mind individualization and blurry boundaries—and, as a separate but overlapping issue, child find.

References re ED Eligibility

Bd. of Educ. v. S.G., 230 F. App'x 330 (4th Cir. 2007).

Springer v. Fairfax Cty. Sch. Dist., 134 F.3d 659 (4th Cir. 1998).

Sullivan, A. L., & Sadeh, S. S. (2014). Differentiating social maladjustment from emotional disturbance: An analysis of the case law. *School Psychology Review, 43*, 450–471.

Zirkel, P. A. (2013). Checklist for identifying students as eligible under the IDEA Classification of emotional disturbance (ED): An update. *West's Education Law Reporter, 286*, 7–11.

Endrew F. (2017)

The Level Directly Below the Supremes

The Tenth Circuit Court of Appeals' Decision:

In 2016, the Tenth Circuit Court ruled in favor of the district for the two dimensions of FAPE as applied to a child with autism in a segregated setting (where the requested relief was tuition reimbursement):

- [On the *procedural* side, the court ruled that gaps in progress reporting and lack of FBA/BIP constituted, at the second step, harmless procedural error.]
- On the *substantive* side, the court applied the some benefit standard to uphold the sufficiency of the IEP.

The Framework for the Supremes

The appeal was limited to the substantive side. The two competing standards across the jurisdictions were:

- "meaningful" benefit (e.g., Third and Ninth Circuits)
- "some" benefit (e.g., **Tenth and Fourth** Circuits)

In some jurisdictions, the substantive standard was not clearly or consistently settled.

The Supreme Court's Decision

The Holding:

The Court, on an 8-to-0 vote, held that the IEP must "reasonably calculated to enable [the] child to make *progress appropriate in light of the child's circumstances*."

- "reasonably" – confirming that optimal is not the standard
- "calculated" – confirming that the judgment is prospective and does not guarantee "any particular outcome"
- "progress" – "functional and academic advancement" as the essential function of the IEP

The Supreme Court's Decision (cont.)

The Dicta:

"the child's circumstances" (LRE distinction):

- integrated settings – retaining *Rowley*'s frame of reference of passing grades and annual promotion – not inflexible and automatic as "advancement through the general curriculum"
- other settings – "appropriately ambitious" analogy
  - "the goals may differ but … the chance to meet challenging objectives"
  - "careful consideration of the child's present levels of achievement, disability, and potential for growth"
  - declining a bright-line rule and specific elaboration

The Supreme Court's Decision (cont.)

The Dicta (cont.):

Overall level:

- markedly more demanding than "some benefit"
  - "aim[ing] so low would be tantamount to 'sitting idly . . . awaiting the time when they were old enough to drop out'" (quoting from *Rowley*)
- sidestepping "meaningful benefit" altogether
- rejecting "substantially equal to the opportunities afforded children without disabilities"

The Supreme Court's Decision (cont.)

The Dicta (cont.):

Judicial deference:

- repeating *Rowley* dicta for deference to school authorities
- but calling for school authorities to provide "a cogent and responsive explanation" for meeting the new, refined substantive standard

Ultimate outcome:

- remand for application of this substantive standard to this particular child (and inferably, if not met, to the child's unilateral placement)

The Immediate Aftermath

Range of Stakeholder Views:

One side:

- dramatic elevation
  - e.g., *Endrew F.* attorney: "a game changer"
  - e.g., Betsy DeVos: "a major victory for students with disabilities and their parents"

Other side:

- no increase and possible decrease
  - e.g., PA district lawyer: lower than "meaningful benefit"

The Immediate Aftermath (cont.)

Range of Stakeholder Views (cont.):

My tempered view:

- lack of rigor of the specified indicators in light of grade inflation and social promotion
- circular qualifier of "appropriate" even for "ambitious"
- benefit already assessed in terms of progress
- but repeated warning of non-bright rule - flexibility
- and potential of requiring "cogent" justification standard as applied to district defendants

The 1.5-Year Aftermath

Range of Case Law Rulings:

During the 18 months after its 3/22/17 issuance, the lower courts applied *Endrew F.* in the substantive FAPE rulings of 64 cases in which the hearing or review officer had ruled in the district's favor. Of the 66 latest relevant rulings …

- 5 (8%) were reversals, with 3 in favor of the parents (including the remand in *Endrew F.*) and 2 for districts
- 4 (6%) were remands for re-doing under the new standard (including two in your jurisdiction)
- 57 (86%) were unchanged (including 8 in the parents' favor)

The 1.5-Year Aftermath (cont.)

Analysis of Case Law Rulings:

The extent of change was approximately the same as for hearing and review officer decisions upon judicial appeal.

- the change was more pronounced in the "some" benefit jurisdictions but without a significant difference overall from the "meaningful" benefit jurisdiction

The analysis was cursory in the majority of cases.

- the most frequently cited dicta were "ambitious goals" and the distinctions for LRE and reasonable>ideal

A couple of cases recognized the extension of the standard to step 2 of procedural FAPE and tuition reimbursement.

Tentative Take-Aways re Endrew F.

- As a prophylactic, professional matter of best practice, use rigorous standards that emphasize parental participation and effective measurement and documentation of the child's progress.
- As an objective legal matter, beware of (a) extreme characterizations of *Endrew F.* that rely on selective dicta, such as unqualified use of "ambitious," and (b) overgeneralizations that blur the flexible, individualized nature of the standard.

Tentative Take-Aways (cont.)

- At the judicial level, the *Endrew F.* standard has not been a game changer, though "some" benefit jurisdictions warrant special attention.
- At the hearing/review officer level, the impact is less known but the judicial precedents will be a tempering force.
- At the real-world level of IEP meetings, the focus should continue to be on building trust via communication/ collaboration and due attention to professional norms beyond legal requirements rather than arguments and perceptions of *Endrew F.*

References re Endrew F.

Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

N.P. v. Maxwell, 711 F. App'x 713 (4th Cir. 2017).

Sauers v. Winston-Salem/Forsyth Cty. Bd. of Educ., 72 IDELR ¶ 10 (M.D.N.C. 2018).

Skidmore, C. A., & Zirkel, P. A. (2018). Judicial appeal of due process hearing rulings: The extent and direction of decisional change. *Journal of Disability Policy Studies, 29*, 22–31.

Zirkel, P. A. (2018). The aftermath of *Endrew F.* one year later: An updated outcomes analysis. *West's Education Law Reporter, 352,* 448–455.

RTI/MTSS

RTI: National Legal Snapshot

- Under the IDEA, the only reference to RTI is as a mandatory option for SLD identification.
- In corollary state laws, a minority of almost 20 states have opted to require RTI for SLD identification, with only 2 states requiring RTI for one (DE) or more (LA) other classifications.
- OSEP has issued several policy interpretations, and many states have issued corollary "guidance" specific to RTI.
- The case law specific to RTI is largely limited to one unpublished, parent-favorable court decision (CT) and relatively few hearing officer decisions that have been generally cursory and, in some cases, confusing, but almost entirely limited to SLD eligibility or child find.

MTSS: National Legal Snapshot

- The IDEA does not contain any reference to MTSS, but the ESSA provides a definition of MTSS and authorizes it for Title II literacy grants and identifies it as one of the permissible activities in the definition of "professional development" for teachers and other instructional personnel.
- OSEP has issues a few DCLs that refer to MTSS in tandem with or inclusive of RTI.
- Various state laws refer to MTSS, either overlapping, encompassing, or synonymous with RTI.
- Overall but not consistently, MTSS legally appears to be broader, extending to behavior and beyond SLD.

RTI and MTSS: N.C. Legal Snapshot

- The legal provisions for RTI and MTSS in North Carolina are within the state board of education (SBE) policies specific to SLD identification, which had continued the mandatory use of severe discrepancy until a 2016 addendum that changed to RTI/MTSS.
  - The effective date is 7/1/20 or, upon LEA notice of intent, before then.
  - These new policies include definitions of RTI and MTSS; require "RTI/MTSS" for SLD identification; and provide various relatively rigorous specifications for this purpose.
  - The MTSS guidelines extend more generally to (a) child find, (b) students with IEPs, and (c) behavior broadly.

Tentative Take-Aways re RTI/MTSS

- Differentiate professional proactivity, as evidenced in the NC implementation guidelines, from legal requirements, as reflected in the NC SBE's 2016 SLD addendum .
- Case law is negligible thus far, but the potential remains due to (a) the timing and contents of the addendum, (b) the broader and blurry boundaries of both child find and eligibility prong 2 (special ed need); and (c) varying parental expectations and perceptions.
- Be aware of the alternative enforcement mechanism of the SEA's complaint procedures process and, in light of the broader coverage of Section 504, OCR's corresponding complaint process.

Tentative Take-Aways re RTI/MTSS (cont.)

- In the overall context of special education litigation, RTI and MTSS are not legal priorities; the key is not legalism but professionalism, including creative collaboration, resourceful support, and evidence-based practices.
- The bottom line is that the implementation of RTI/MTSS is largely a matter of prudent local discretion rather than strict legal requirements or prohibitions, with effective educational leadership rather than fear of litigation, being the key to success.

References re RTI/MTSS

Greenwich Bd. of Educ. v. G.M., 68 IDELR ¶ 8 (D. Conn. 2016).

NC Addendum: http://ec.ncpublicschools.gov/2020PolicyAddendum.pdf

NC MTSS Guidelines: http://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/ncdpi-communication/2016-2017/ec-division-memos/20160830-mtss-guidelines.pdf/view & http://www.livebinders.com/play/play?id=2052295

Zirkel, P. A. (2017). RTI and other approaches to SLD identification under the IDEA: A legal update. *Learning Disability Quarterly, 40*, 165–173.

Zirkel, P. A. (2018). Response to intervention and child find: A problematic intersection? *Exceptional Children, 84*, 368–383.

Zirkel, P. A. (2018). Response to intervention: Law v. lore. *Learning Disability Quarterly, 41*, 113–118.