



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

Bradford A. King, Attorney at Sands Anderson

A VASSP Bimonthly Publication • March 2018 • Vol. 1, No. 4 • www.vassp.org

ENDREW F: A “CLOSE CASE” OR A WHOLE NEW PARADIGM?

The United States Supreme Court refashioned the standard for assessing whether a special needs student is receiving a "free appropriate public education" (FAPE) in its March 22, 2017 *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* decision. On remand, the United States District Court for Colorado on February 12, 2018 reversed itself, ruling that *Endrew* did not receive FAPE and ordering the school district to reimburse his family for the expenses associated with *Endrew's* private school placement.

What Were Endrew's Educational Needs?

Endrew was diagnosed with autism at age two and later with ADHD. He attended public schools through fourth grade when his parents enrolled him in a private school specializing in educating students with autism. His parents believed the last proposed Individualized Education Program (IEP) was not reasonably calculated to provide *Endrew* FAPE as it was not substantially different than his prior IEPs. They argued the school district failed to conduct a functional behavioral assessment, implement appropriate positive behavioral interventions, supports or strategies, or develop an appropriate behavior intervention plan.

The Evolution of FAPE

The original FAPE standard from *Rowley v. Hendrick Hudson Sch. Dist.* asked whether a student's educational programming is "reasonably calculated to enable him to receive educational benefits." In *Endrew F.*, a due

process hearing officer, later the trial court and then the U.S. Court of Appeals for the Tenth Circuit found that *Endrew* received "more than *de minimis*" educational benefit. The trial court ruled that while his IEPs "did not reveal immense educational growth, they were sufficient to show a pattern of some progress on his educational and functional goals, and that the proposed IEP for the fifth grade continues that pattern." The Tenth Circuit said "this is without question a close case," but found the IEP rejected by the parents substantively adequate under *Rowley*. *Endrew's* parents appealed.

The Supreme Court revisited its 1982 *Rowley* decision and announced a new FAPE standard: the Individuals with Disabilities Education Act (IDEA) requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," which "is markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." For a child not integrated in the regular

“The goals may differ, but every child should have the chance to meet challenging objectives.”

United States Supreme Court

classroom the "educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives. . . . When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving

instruction that aims so low would be tantamount to 'sitting idly . . . awaiting the time when they were old enough to drop out.'"

The Supreme Court rejected *Andrew's* parents' position that FAPE requires an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities. However, reviewing courts may fairly expect educators "to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances."

Andrew Did Not Receive FAPE

On remand, the trial court last month held that *Andrew* did not receive FAPE based on the continued pattern of unambitious goals and objectives in his IEPs. The school district unsuccessfully argued that its proposed IEP was a reasonable calculation of educational progress, pointing to modified objectives in reading comprehension, writing, math, and communication, and enhanced inter-/intrapersonal goals. It said *Andrew's* circumstances – autism, ADHD, exceedingly low cognitive skills, serious behavior problems and pronounced sensory needs – significantly impeded his ability to access education; and the proposed IEP addressed his specific needs and provided a challenging educational program given his circumstances.

The District Court disagreed. "The district's inability to develop a formal plan or properly address Plaintiff's behaviors that had clearly disrupted his access to educational progress starting in his second grade year does, under the new standard articulated by the Supreme Court in this case, impact the assessment of whether the educational program it offered to [*Andrew*] was or was not reasonably calculated to enable

him to make progress appropriate in light of his circumstances. The district's inability to properly address [*Andrew'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 [proposed] IEP. . . It is axiomatic that because this was 'without question a close case' under the previous 'merely more than de minimis standard,' the facts of this case do not meet the rigor of the undeniably higher standard set by the Supreme Court." Further, "[w]hile I am not faulting the IEP team's work, nor am I implying that they were looking to provide [*Andrew*] with 'only the bare minimum,' the [proposed] IEP that was developed was a continuation of the poor progress on his educational and functional goals of his past IEPs. And, as such, the District was not successful in creating an educational program that was reasonably calculated to enable [*Andrew*] to make progress in light of his circumstances, in order to provide him with a substantive FAPE."

“...the District was not successful in creating an educational program that was reasonably calculated to enable [Andrew] to make progress in light of his circumstances, in order to provide him with a substantive FAPE.”

United States District Court for Colorado

Lessons Learned

It is unlikely that your school district would choose to defend (or pursue) due process in a "close case" such as this. Key considerations regarding student IEPs certainly should include: (1) data driven analysis of student progress under prior IEPs; (2) a thorough review of proposed IEP documents, checking for new goals/objectives and meaningful discussion of rationale for maintaining any current goals/objectives; (3) the impact of student behavior on academic and functional progress, and what efforts the school district has undertaken to address behavior; and (4) the educators' objective, well-informed judgments regarding what is appropriate for the student. Providing a floor of opportunity is not sufficient; a student's educational program and supports must truly be individualized to his or her unique circumstances.