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LEGAL UPDATE

March 23, 2017

To: Superintendents, Member School Districts (K-12)

From: Carl D. Corbin, General Counsel 

Subject: Supreme Court Establishes New Substantive Standard for IDEA
Memo No. 10-2017

On March 22, 2017, the United States Supreme Court issued a unanimous decision in *Endrew F. ex rel. Joseph F. v. Douglas County School District, RE-1*¹ that establishes a new substantive standard² for the provision of a Free Appropriate Public Education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”):

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances. (pg. 11).

The Court rejected the school district’s position that the IDEA only provided procedural requirements and has no explicit substantive standard for student progress. The Court also rejected the parent’s position that the IDEA 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.” (pg. 15).

The Court declined to provide further guidance on what “appropriate” progress for a student will look like under the Court’s new substantive standard stating the “adequacy of a given IEP [Individualized Educational Program] turns on the unique circumstances of the child for whom it was created.” (pgs. 15-16). The Court did opine that appropriate progress for a student “... fully integrated in the regular classroom, as the Act prefers... typically means ... providing a level of instruction reasonably calculated to permit advancement through the general curriculum.” (pgs. 13-14). The Court stressed that appropriate progress will be judged taking into account the student’s particular “circumstances” and that for students who are not reasonably expected to make grade level advancement each year, the IEP should be “appropriately ambitious in light of [the student’s] circumstances.” (pg. 14). The Court asserted that lower courts should not “substitute their own notions of sound

¹ Available at: https://www.supremecourt.gov/opinions/16pdf/15-827_0pm1.pdf.

² This decision clarifies/modifies the legal standard of “some educational benefit” from *Board of Ed. of Hendrick Hudson Central Sch. Dist., Westchester City v. Rowley* (1982) 458 U.S. 176.



educational policy for those of the school authorities which they review.” (pg. 16). However, deference to school authorities should be granted based on the expertise and exercise of good judgement by the school authorities.

Facts of the Case

Andrew was diagnosed with autism at the age of two and attended a public school from preschool through fourth grade. Andrew was reported to be a humorous child with a sweet disposition; however, he also engaged in significant maladaptive behaviors (such as screaming in class, climbing over furniture and other students, and eloping from school) and suffered from severe fears (such as flies, spills, and public restrooms). Andrew’s parents asserted that his educational progress had “essentially stalled” with the goals and objectives from his previous annual IEP being carried over to his new IEP year after year and he was failing to make meaningful progress. For the fifth grade, Andrew’s parents unilaterally placed him in a private school (Firefly Autism House) at which a behavioral intervention plan [BIP] was developed that addressed most of his maladaptive behaviors and he was able to “make a degree of academic progress that eluded him in public school.” Andrew’s parents subsequently filed a request for a due process hearing, which they lost, and they also lost their appeals to Federal District Court and the Tenth Circuit Court of Appeals. In issuing its decision, the Supreme Court remanded the case for the lower court to issue a new decision in light of its ruling in *Andrew F.*

Implications for Local Educational Agencies (“LEAs”)

- LEAs should ensure IEPs are developed based on the individual learning needs of each student with appropriate goals established based on measurable baselines in all areas of educational need.
- If a student appears to be making little progress towards the student’s IEP goals a LEA should not “carry over” IEP goals from year to year that are the same or similar as this may indicate the student is failing to make “appropriate progress.” Rather, the LEA should implement additional education interventions such that the student makes reasonable progress in light of the student’s individualized learning needs. The Court, in *Andrew F.*, stated the student’s progress at the private school was due to the development of a BIP suggesting the student could have made as much progress in the public school if only the school had tried other educational interventions such as a BIP.
- Although substantive FAPE is judged with respect to what the IEP team “reasonably calculates” at the time the IEP is developed, LEAs should be prepared to present data showing that a student has made “appropriate” progress. This will require assessment to establish good baselines, educational interventions delivered with fidelity, and post-intervention assessment to show progress.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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