

LEGAL ALERT

April 7, 2017

Supreme Court Clarifies FAPE Requirement- What does it mean for New Jersey Schools?

By Alison Kenny, Esq.

For almost 35 years, a public school was deemed to have satisfied the Individuals with Disabilities Education Act (IDEA) requirement of a free appropriate public education (FAPE) if it offered a student with a disability an IEP that was “reasonably calculated to confer an educational benefit on the child.” This standard was established by the Supreme Court of the United States in Board of Education of the Hendrick Hudson Central School District v. Rowley¹, 458 U.S. 176 (1982). Recognizing the “wide spectrum” of students with disabilities that public schools are required to educate, the Court in Rowley chose *not* to establish any one test for determining if FAPE was offered. This left the lower courts to apply the definition of FAPE to the unique facts of each IDEA case to determine if a student’s IEP was reasonably calculated to confer education benefit.

In New Jersey, which is part of the Third Circuit, Rowley was interpreted to mean that schools must offer an IEP that is reasonably calculated to provide *significant* learning and confer *meaningful* educational benefit. However, many other circuits interpreted Rowley to only require that students with disabilities received *some* educational benefit and that FAPE was satisfied if the child made more than *de minimis* progress². To resolve a split among the circuits regarding *how much* educational benefit a student with disabilities had to be offered in order for FAPE to be satisfied, the Supreme Court last week issued its decision in Andrew F. v. Douglas County School District³, 580 U.S. ___ (2017).

In a unanimous decision that vacated the judgment of the Tenth Circuit Court of Appeals, the Court held that the IDEA requires a public school to offer “an educational program reasonably

¹ The student in Rowley was a hearing impaired first grader. Through the use of an FM system, speech therapy, and specialized tutoring, she was performing better than average in her general education classroom and easily advancing from grade to grade. Her parents filed suit against the district seeking a sign language interpreter so that she had the opportunity to achieve her full potential.

² This was the standard applied by the Tenth Circuit Court of Appeals and the United States District Court for the District of Colorado in their decisions in Andrew F. v. Douglas County School District.

calculated to enable a child to make progress appropriate in light of the child’s circumstances” and that the “adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” However, similar to Rowley, the Court chose not to establish a bright-line rule or test for determining whether a student is offered FAPE. Thus, determining whether FAPE was offered remains a fact sensitive inquiry based on the needs and abilities of the individual student.

Endrew F. establishes that “for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” “If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his 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.”

It is now clear that the FAPE standard “is markedly more demanding than the “merely more than *de minimis*” test applied by the Tenth Circuit” in its Endrew F. decision. Arguably, the standard used in New Jersey - requiring IEPs that were reasonably calculated to offer significant learning and confer meaningful educational benefit - is higher than the standard now set by the Supreme Court. If you have any questions about the impact of this decision on your district’s special education programming, please contact us.

DISCLAIMER: This Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.

³ Endrew F. was an elementary aged student with Autism whose behaviors inhibited his learning. He had a history of: climbing over furniture and other students, hitting things, and screaming; he had run away from school; and twice removed his clothing and gone to the bathroom on the floor of the classroom. It appears that the district did not implement a behavior intervention plan for Endrew. Reportedly, his IEP goals and objectives remained largely unchanged from year to year. When his behaviors continued to escalate, his parents enrolled him in a private school for children with autism and filed for due process seeking reimbursement for the unilateral placement. The parents lost the due process hearing and appealed to the U.S. District Court and the Tenth Circuit Court of Appeals, which both upheld the hearing officer’s finding that the district had offered Endrew FAPE. Notably, the burden of proof was on the parents at the due process hearing; in New Jersey the burden is on the board.