ANDREWS & PRICE

SPECIAL EDUCATION ALERT

Published in Cooperation with the University of Pittsburgh Tri-State Area School Study Council

MAY, 2017

SPECIAL POINTS OF INTEREST:

- **The U.S. Supreme Court recently held that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.**
- **This is not a significant change in Pennsylvania as the 3rd Circuit has already rejected the "some progress" standard.**
- **The 3rd Circuit has long held that a student's IEP must confer "meaningful education benefit" and "significant learning."**

INSIDE THIS ISSUE:

Is The New FAPE Standard Really New In The 3rd Circuit?

The United States Supreme Court recently issued its first decision that analyzed the standard school district's must meet in providing an appropriate education to students with disabilities under the IDEA since the landmark case of The Board of Education of the Hendrick Hudson Central School District v. Rowley in 1982.

In Endrew F. v. Douglas County School District, parents of a student with autism filed for due process against a Colorado school district under the IDEA, alleging that the District failed to provide their son with an appropriate special education program. They sought tuition reimbursement for a unilateral private placement.

The Hearing Officer, District Court and 10th Circuit Court of Appeals all denied tuition reimbursement, finding that Drew made "some progress" in his school district placement.

The Supreme Court vacated those decisions and held that 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.

Read More about Endrew F on pages 3-6

Another Supreme Court Case on Exhaustion

Although the big news was on Endrew F. the U.S. Supreme Court ruled on another special education case in 2017 involving exhaustion. Plaintiffs bringing suits under the ADA, Section 504 or other statute that seeks relief that is also available under the IDEA must first exhaust administrative remedies. However, exhaustion is unnecessary when the suit alleges issues other than the denial of the IDEA's core guarantee of FAPE.

CASE LAW UPDATE

Downingtown Area School District v. K.D.
Commonwealth Court of PA
Gifted Acceleration

FACTS: K.D. was a 5th grade gifted student in the District. In 2nd grade, K.D.'s gifted math needs were provided as enrichment through 1:1 instruction, independent work and computer based instruction. However, this programming was not optimal as the student sought out socialization and used the computer to play games rather than math.

As a result, the GIEP Team revised his GIEP to provide acceleration from 3rd grade to a 4th grade regular education math class at his elementary school. This math acceleration continued in 4th grade with placement in 5th grade math.

However, elementary school only went through 5th grade. All 6th graders in the District were housed in their own building. Parents wanted K.D. to take 6th grade math at the 6th grade building first thing in the morning, with the school district transporting him back to the elementary school thereafter. The school district, in order to avoid the transition and missed instruction time, instead purchased an online 6th grade math curriculum that K.D. could do on his own at the elementary school.

Parents did not agree and filed for due process.

DECISIONS: At the hearing, both the student and parents testified to the downsides of the 2nd grade on-line math class. The student had little interaction with peers, was not able to easily interact with a teacher. Parents testified that he had difficulty learning with prior on line math programs and that K.D. played games. They also testified that prior programs were not individualized. They also felt that the program the District was proposing for 6th grade was not only not individualized, but was a different curriculum than that being taught to other 6th graders.

The District testified that K.D. does not do well with transition and felt that the online math program would reduce transitions from having to travel to a different school building. They also felt that the online program was appropriate as it would allow him to work at his own pace and he would not have to miss other classes as he would if he were moving to another building.

Both parties agreed however that the grade level acceleration in 3rd and 4th grades were appropriate and beneficial for K.D. and that he performed well in accelerated math.

The Hearing Officer found that the proposed program for 5th grade was a significant departure from prior successful programming and there was no evidence that the change was necessary to meet K.D.'s gifted needs. The hearing officer held that when a student's gifted education is working, the school cannot substantially alter that programming without evaluating the student's needs. The Commonwealth Court also found that the District's proposed online math program was not tailored to K.D.'s individual gifted needs. Testimony showed that the student was not previously successful in an online math class and that he did well when he was accelerated into a math class taught by a teacher with other students.

Both the hearing officer and the Court stopped short of saying that the school district must move the student to the 6th grade building to receive his instruction. The School district could use its discretion in where the student could take a 6th grade math class.

IMPLICATIONS: While on line course may be appropriate sometimes, they are not appropriate all of the time. Several other hearing officer opinions have found on line classes to be inappropriate based on the student's needs. The IEP or GIEP Team must determine an online course to be appropriate for the individual student prior to making the recommendation.

FAPE

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While this certainly is a much higher standard than "some progress" as interpreted by the 10th Circuit, the 3rd Circuit has long held Pennsylvania school district's to a standard very similar, if not even more stringent, that the new U.S. Supreme Court's ruling.

SUPREME COURT'S DECISION IN ROWLEY

The U.S. Supreme Court first reviewed the standards that schools must meet under the IDEA in Board of Education of the Hendrick Hudson Central School District v. Rowley. In that case, the Court held that a child with a disability has the right to receive a free, appropriate public education (FAPE) which is met when the child's IEP is "reasonably calculated to enable the child to receive educational benefit." In that case, the Court held that a school district was not required to provide Amy Rowley, a deaf student, with a sign language interpreter because the program offered by the school district was appropriate. The Court held that Amy's IEP was reasonably calculated to enable her to receive educational benefit. She participated in the regular education classroom, received good grades and was advancing from grade to grade. Therefore, the school district was not required to provide additional services.

The Court specifically held that school districts are not required to maximize a child's potential or provide the best services. However, the Court also stressed that the provision of FAPE was fact specific and no bright line test was established. As such, this issue of whether a child's special education program is "appropriate" remains the issue of the majority of special education due process hearings.

FACTS OF ENDREW F.

Endrew (Drew) was diagnosed with autism at age 2. He was enrolled in the Douglas County School District in Colorado from preschool through 4th grade. Drew received special education services under the IDEA during that time. Although Drew was described as sweet and compassionate, he continued to have multiple behaviors that inhibited his learning in the classroom. He would scream in class, climb over furniture and students and occasionally run away from school. He has severe fears of some common things like flies, spills and public bathrooms.

By fourth grade, parents became dissatisfied with his progress. They felt his academic and functional progress had stalled and that his IEPs largely contained the same goals and objectives from year to year. His parents felt that the District needed to completely overhaul their approach to deal with his behaviors, but in 5th grade, the District offered them an IEP that was in their view, very similar to his prior IEPs.

Parents removed Drew from his school and placed him in a private school that specializes in educating children with autism. Drew responded positively to the behavior intervention plan developed by the private school and his behaviors improved significantly. As a result he was able to make academic progress as well.

Six months later, the parents met with Douglas County school officials. The District presented a new IEP, but again, the parents considered the IEP to be substantially the same as prior IEPs and did not offer the level of behavior support that they claimed was working well at the private school. Parents kept Drew in the private school and filed for due process seeing tuition reimbursement.

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LOWER COURT DECISIONS

While the District Court acknowledged that Drew's performance under prior IEPs did not show "immense educational growth," the court concluded that the revisions made to annual IEPs were enough to show a pattern of at least minimal progress. As such, the Court reasoned that a similar IEP would yield at least the same thing.

The 10th Circuit affirmed. Relying on Rowley, the Court held that instruction and services furnished to children with disabilities must be calculated to confer "some educational benefit." The 10th Circuit has interpreted this to mean that a child's IEP is adequate as long as it is calculated to confer educational benefit that is merely more than de minimis. Applying this standard the 10th Circuit found that Drew's IPE allowed him to make "some progress" which was not a denial of FAPE. Tuition reimbursement was therefore, denied.

ARGUMENTS

School District's Argument

The School District relied heavily on several passages throughout the Rowley decision. Quoting Rowley, they argued that the Court then held that "an IEP does not promise any particular level of benefit" as long as it is "reasonably calculated to provide some benefit, as opposed to none." The District further emphasized the language that the IDEA requires States to provide access to instruction that is "sufficient to confer some educational benefit" reasoning that any benefit, however minimal satisfies this standard. Further, the District argues that the Rowley Court adopted a "some educational benefit" standard when it wrote that the intent of the IDEA was "more to open the door of public education to handicapped children . . . than to guarantee any particular level of education."

Parents' Argument

Drew's parents argued that the IDEA goes even further and requires schools to provide 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 to children without disabilities." This argument is similar to that made by Amy Rowley's parents.

SUPREME COURT OPINION

The U.S. Supreme Court disagreed with both positions. With regard to the school district's argument that they are simply required to provide a program that offers the child "some educational benefit," the Court noted that the IDEA was enacted because children with disabilities were receiving little to no education. If schools were required to provide only "some benefit" to children with disabilities, it would not fulfill the purpose of the IDEA and as Justice Roberts said, "would do little to remedy the pervasive and tragic academic stagnation that prompted" the IDEA's enactment.

The Court acknowledged that the Rowley Court used the phrase "some educational benefit," however, the Court pointed out that Rowley addressed a very fact specific situation wherein a fully included child with a hearing impairment was outperforming many of her peers. In that case, the current Supreme Court observed that earning passing grades and advancing from grade to grade would suggest an IEP reasonably calculated to provide FAPE.

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However, for children that are not fully included and not able to achieve at grade level, the Court concluded that their goals should also be ambitious in light of the circumstances. Similar to Rowley, this Court again did not create a bright line test. Instead it found that an IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. This will be a fact based determination and will differ from child to child. The determination of whether an IEP meets this standard should be made at the time the IEP was written, reviewing both the expertise of the school district and the input from the parents. The Court continues to hold that "any review of an IEP must appreciate that the question is whether the IEP is *reasonable,* not whether the court regards it as ideal."

The Court also rejected the parents' argument that FAPE requires schools to provide services or opportunities equal to those provided to their nondisabled peers. This argument was rejected in Rowley and the Court found no change in the law would lead to a different conclusion.

IS THERE SIGNIFICANT CHANGE IN PA?

Pennsylvania Courts have already rejected the "some educational benefit" standard and have adopted a more stringent standard. In Polk v. Central Susquehanna Intermediate Unit 16, the 3rd Circuit held that a student with a disability must receive meaningful benefit from his education and is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a 'trivial' or '*de minimus*' educational benefit. The 3rd Circuit further held that "[m]eaningful benefit means that an eligible child's program affords ... him or her the opportunity for significant learning." This standard is already very similar, if not the same as that set by the U.S. Supreme Court.

Since Endrew F. was issued, Pennsylvania District Courts have analyzed how the decision impacts at least three pending special education cases that were already pending in Court. Two of the decisions applied Endrew F. while the other contained additional analysis regarding whether the Endrew F. decision changed the FAPE analysis for the claim. In E.D. v. Colonial School District, parents claimed that the hearing officer's decision that their child received FAPE was wrong in light of the "new heightened standard" set forth in Endrew F. The District Court for Eastern District of Pennsylvania rejected that argument, citing Polk, and holding that the Third Circuit had already rejected the "de minimis standard" addressed in Endrew F. in lieu of a more stringent standard. The Hearing Officer in that case had already employed a "meaningful educational benefit" standard that required "significant learning" and therefore was in accord with Endrew F.

These three cases continue to stress that IEP is the cornerstone of the educational delivery system. The IEPs must be individually tailored to the child's unique needs and must be developed after careful consideration of a child's present levels of performance, disability and potential for growth. The IEP must contain a comprehensive plan that includes a statement of the child's present level of academic and functional performance, describe how the child's abilities and circumstances affect the child's involvement and progress and set measurable goals with a description of how progress toward meeting those goals will be gauged.

While progress continues to be the essential measuring stick for the IEP, it should be judged at the time it was written, not at some later date. Further, the school districts are not required to maximize the educational potential of a child or provide opportunities equal to those afforded to non-disabled peers.

Therefore, while a lot will change in other parts of the country, do not expect significant changes in Pennsylvania.

FAPE

Although the standard has not changed significantly in Pennsylvania, IEP Team should consider and discuss the following at IEP Team meetings:

* What are the child's circumstances and potential that may be interfering with progress?

* Does the IEP allow the student to progress academically, behaviorally, socially, emotionally given those circumstances and potential?

* Do the Present Education Levels document the progress that the child has made during the past year?

* Are there any problems from the prior IEP and are they addressed and documented through changes to the child's IEP?

* If the child did not receive meaningful educational benefit or significant learning, what changes to the educational program are documented in the IEP?

* Are there new or different areas of concern that must now be addressed in the IEP?

* Is it evident through the wording of the IEP that the goals are at a higher level or are more challenging that the year before?

* Have we documented and are we able to articulate the decisions that were made by the IEP Team in developing the child's educational program?

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If you have a special education issue you would like to see addressed in subsequent issues of this newsletter, please write to or e-mail Trish Andrews at the above address.

Andrews & Price, LLP is the pre-eminent law firm in Western Pennsylvania in the practice of Public Sector Law. Our attorneys have more than 60 years of combined experience servicing School Districts. We provide a full range of legal services to our clients, including serving as Solicitor for various school districts, serving as special counsel for special education due process hearings, presenting seminars relating to the Reauthorization of IDEA and representing our clients in all types of litigation, including defense of numerous civil rights suits in federal and state Court.

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TRI-STATE AREA SCHOOL STUDY COUNCIL

Tri-State Area School Study Council of the Administrative and Policy Studies Department of the School of Education of the University of Pittsburgh seeks ways to increase organizational capacity in schools through problem solving, technical service, and staff development so all students will be better prepared to make contributions to both our democratic society and the world community.

Tri-State was founded in 1948 by Dr. Maurice Thomas. Since its inception, Tri-State has provided a wealth of comprehensive technical assistance, strategic planning, and employment searches to school districts in the Western Pennsylvania region. Tri-State's vast knowledge and experience base draws upon a membership of 100+ school districts and a team of leaders and consultants with rich backgrounds in education, including former school superintendents and professors of education.

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Consult Your Solicitor!

The legal issues discussed herein are for the purpose of providing general knowledge and guidance in the area of special education. This newsletter should not be construed as legal advice and does not replace the need for legal counsel with respect to particular problems which arise in each district. As each child is unique, each legal problem is unique. Accordingly, when districts are faced with a particular legal problem, they should consult their solicitor or with special education counsel to work through the issues on a case by case basis.