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U.S. Supreme Court Articulates Standard for FAPE

In a unanimous decision issued March 22, 2017, the United States Supreme Court held that to meet its obligation to provide a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), a school district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827 (U.S. Mar. 22, 2017). In doing so, the Court rejected the Tenth Circuit's holding that FAPE requires an educational benefit that is merely "more than *de minimis*," and called the new standard "markedly more demanding." The Court also rejected the standard proposed by the parents that FAPE requires children with disabilities to have opportunities "substantially equal to the opportunities afforded children without disabilities."

History of the FAPE Standard

The Supreme Court first addressed the standard for FAPE in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176, 207 (1982). The Court stated that a child has received FAPE if the child's IEP sets out an educational program that is "reasonably calculated to enable the child to receive educational benefits." Since *Rowley* was decided, federal courts of appeals have used different terms to describe the educational benefit required by IDEA and expressed by *Rowley*. Some courts have held that IDEA requires only "some educational benefit" which has been described as more than *de minimis* benefit, and others have held that IDEA requires a meaningful educational benefit.

The Supreme Court's New Decision

In the most recent United States Supreme Court decision, *Endrew F.*, the Court further explained the *Rowley* standard. *Endrew F.* involved an autistic child whose parents argued that the child's progress had stalled as the child's IEP carried over the same basic goals and objectives from year to year. The school district in *Endrew F.* had relied upon the standard established by the Tenth Circuit in arguing that IDEA merely required "some" educational benefit, as opposed to none. The Supreme Court agreed that IDEA did not guarantee any particular level of education or promise any particular outcome. However, the Court rejected the Tenth Circuit's "more than *de minimis* standard." The Court also rejected the parents' "substantially equal" standard, noting that despite opportunities to do so since the *Rowley* decision, Congress has not changed the statutory definition of FAPE to include the concept of "substantially equal."

In *Endrew F.*, the Supreme Court held that FAPE requires "an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court explained that to meet this standard, a school district must craft an appropriate program that is reasonable, not necessarily ideal. Consistent with the core of IDEA, the program must be specifically designed to meet the unique needs of the child. For a student placed in a regular education classroom, the IEP should be reasonably calculated to enable the student to achieve passing marks and advance from grade to grade. For a student not fully integrated into the regular education classroom, the IEP must be "appropriately ambitious" in light of the student's circumstances. The court declined to define what appropriate progress will look like for a student in the abstract, and expressly stated that the absence of a bright-line rule is not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Rather, courts must give deference to the "expertise and the exercise of judgment" by school authorities who can be expected to offer a "cogent and responsive explanation" for their decisions.

How Wisconsin School Districts Should Respond to the New Decision

In previous cases applying the *Rowley* standard, courts in the Seventh Circuit and administrative law judges in Wisconsin have varied in their description of the FAPE standard, describing it at times as "educational benefit," "meaningful educational benefit," "some educational benefit" and "some meaningful educational benefit" and stating that an appropriate IEP must be "likely to produce progress, not regression or trivial educational advancement." Despite these various descriptions, the standards applicable to Wisconsin school districts are largely in line with the Supreme Court's decision in *Endrew F*. For Wisconsin school districts, *Endrew F.* is a reminder that educational progress is the expected outcome of an IEP and that an IEP must include goals that are "appropriately ambitious" given the unique circumstances of the child.

To provide FAPE, districts must carefully develop each IEP to ensure it contains challenging goals and the aids and services a student needs to meet those goals. The IEP itself should clearly document the district's consideration of the child's individual circumstances in determining goals and measuring progress. In addition, districts must continue to faithfully implement the IEP. If a student is not progressing toward his or her goals, districts should reconvene the IEP team to review the IEP and its implementation. If little or no progress has been made, the district should determine and state why in the IEP. If the IEP team determines that the child cannot progress, despite all of these efforts, the IEP should reflect that determination and explain the basis for the determination, taking into account the child's individual circumstances. This will prepare districts, when challenged, to provide parents, courts and administrative agencies "a cogent and responsive explanation for their decisions." Districts are advised to create any additional documentation necessary to be able to present the cogent, responsive explanations required in IEP meetings, due process hearings and court proceedings.

The full opinion of the United States Supreme Court can be found here: https://www.supremecourt.gov/opinions/16pdf/15-827_0pm1.pdf

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