Volume 2, Issue 3, April - June 2017

OCECD NEWSLETTER

Endrew v. Douglas County: IDEA Demands More: Inclusion & Progress in Regular Curriculum; IEP 'Tailored to Unique Needs'

by Peter Wright, Esq.

It's a great day! On March 22, 2017, the U.S. Supreme Court issued another unanimous ruling in favor of children with special needs and their parents.

Purpose of IDEA: Congress Acted to Remedy Children Excluded from School with Tragic Pervasive Stagnation

Justice Roberts noted that "[T]the broad purpose of the IDEA, an 'ambitious' piece of legislation enacted 'in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.' . . . A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." (Page 11)

NEWSLETTER SPOTLIGHT

Supreme Court Backs More Robust Standard for FAPE

Changes to Medicaid Waivers

The Court emphasized that full inclusion is the primary standard with the "child progressing smoothly through the regular curriculum." However, if the child is not fully included, then the school officials must look to the child's unique needs to develop an IEP which is "pursuing academic and functional advancement."

District Court Decision in Amy Rowley's case - Amy was Fully Integrated in Regular Ed Classroom

In the decision in *Endrew F. v. Douglas County Sch. Dist* (Opinion # 15–827), Chief Justice Roberts gave an in-depth analysis of the 1982 decision in *Rowley*. He discussed the District Court decision and the briefs filed with SCOTUS in that case. As he noted,

"The court acknowledged that Amy was making excellent progress in school: She was "perform [ing] better than the average child in her class" and "advancing easily from grade to grade." (Page 4)

"The IEP provisions [of IDEA] reflect *Rowley*'s expectation 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." (Page 11)

The earlier decision in *Rowley* "had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum." (Page 14)

"In view of Amy Rowley's excellent progress and the 'substantial' suite of specialized instruction and services offered in her IEP, we concluded that her program satisfied the FAPE requirement." (Page 5)

In 1982, "we expressly 'confine[d] our analysis' to the facts of the [Rowley] case before us." (Page 6)

Court Needs to Clarify Standards for Children with Disabilities Who Are Not Fully Mainstreamed

Justice Roberts explained that the old Rowley standard was applicable to children with disabilities who are fully integrated in a mainstream, full inclusion setting, but that it is not necessarily applicable in other settings. The Court is not reversing the 1982 *Rowley* decision, but is clarifying that a different standard needs to be used when children with disabilities are not fully mainstreamed.

The key to understanding the reversal in the *Rowley* District Court decision was that "the District Court ruled that Amy's education was not

"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.'"

-Supreme Court Chief Justice John G. Roberts Jr.

'appropriate' unless it provided her 'an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.'" (Page 4)

Amy Rowley was fully mainstreamed. Her test data, as charted out by the District Court judge, showed that Amy scored higher than her peers. But she was not reaching her full potential, which the District Court Judge believed to be the proper standard.

To correct the belief that IDEA requires a child to achieve her full potential, the Supreme Court held that "For children receiving instruction in the regular classroom, this would generally require an IEP "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (Page 5)

The Tenth Circuit held that Endrew's IEP was "reasonably calculated to enable [him] to make some progress . . . Accordingly, he had not been denied a FAPE [and] concluded that annual modifications to Endrew's IEP objectives were 'sufficient to show a pattern of, at the least, minimal progress.' Because Endrew's previous IEPs had enabled him to make this sort of progress, the [Tenth Circuit] court reasoned, his latest, similar IEP was reasonably calculated to do the same thing. In the court's view, that was all Rowley demanded." (Page 8)

The Tenth Circuit "acknowledged that Endrew's performance under past IEPs 'did not reveal immense educational growth' . . . But it concluded that annual modifications to Endrew's IEP objectives were sufficient to show a pattern of, at the least, minimal progress.'" (Page 8)

The Supreme Court criticized the decisions by the ALJ, District Court, and Tenth Circuit Court of Appeals in Endrew F's case.

"Some" Educational Benefit v. "Meaningful" Educational Benefit

Much earlier discussion of the *Endrew F.* case revolved around the phrases "some educational benefit" versus "meaningful educational benefit." This decision did not fully address these arguments but focused on progress, growth and being "fully integrated," as in the original *Rowley* decision.

Expectation: Most Children Will be Fully Integrated and Make Progress in the General Ed Curriculum

In defining FAPE for a child who is placed in a setting that is not fully integrated or mainstreamed, the Supreme Court noted that "The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgement by

Changes to Current Medicaid Waivers

Recent Updates to current Medicaid Waivers effective **April 1st,2017** can be found at: **www.dodd.ohio.gov**

Learn more about Complex Needs Policy & Technical Assistance

school officials. . .The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." (Page 11)

"The IEP provisions [of IDEA] reflect *Rowley*'s expectation 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." (Page 11)

"When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum." (Page 13)

The decision is clear. Being "fully integrated" and "making progress in the general curriculum" are the keys. If a child is not fully integrated, the focus shifts even more to the "unique circumstances of the child."

"IEP Must Enable Child to Make Progress: A Plan for Academic and Functional Advancement"

"The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." (Page 11)

In the decision, the Court opened with "A FAPE, as the Act defines it, includes both 'special education' and 'related services.' §1401(9). "Special education" is 'specially designed instruction . . . to meet the unique needs of a child with a disability'; 'related services' are the support services 'required to assist a child . . . to benefit from' that instruction." (Page 2)

Wrightslaw note: For our discussion about and the legal definition of a child with a disability, related services, and special education, see *Wrightslaw: Special Education Law, 2nd Ed.* at pages 49, 55, and 54.

Instruction Must be 'Specially Designed' to Meet 'Child's Unique Needs' Through an IEP

Later, the Court returned to these concepts: "A focus on the particular child is at the core of the IDEA. The instruction offered must be 'specially designed' to meet a child's 'unique needs' through an "[i]ndividualized education program." §§1401(29), (14)

An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. §§1414 (d)(1)(A)(i)(I)–(IV), (d)(3)(A)(i)–(iv)

Wrightslaw note: The IEP statute, 1414(d) begins on page 99 in *Wrightslaw: Special Education Law, 2nd Ed*.

Progress: IDEA Demands More

"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.'" (Page 14)

"The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (Page 14)

"We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." (Pages 15-16)

In closing, the Court returned to the importance of both parties being able to "fully air their respective opinions" and that school authorities should be able to offer "a cogent and responsive explanation for their decisions . . ."

Parents and School Authorities "Fully Air Respective Opinions on Progress the Child's IEP Should Pursue"

"At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. See §§1414, 1415. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities 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." (Page 16)

Wrightslaw note: The Endrew F. decision is located on Wrightslaw at: http://www.wrightslaw.com/law/caselaw/2017/ussupct.endrew.douglas.15-827.pdf

More Links

Educational Benefit: "Merely More Than De Minimis" or "Meaningful"? Supreme Court Revisits Requirements in *Endrew F. v. Douglas Co. Sch. Dist. RE-1* by Peter Wright, Esq. and Pamela Wright, MA, MSW

Revised: 03/23/2017
Created: 03/22/2017

- See more at: http://www.wrightslaw.com/law/art/endrew.douglas.scotus.analysis.htm#sthash.MFHEWp6C.dpuf

---

To remove your name from our mailing list, please click here

Questions? Please contact ocecd@ocecd.org or call 844-382-5452.

Ohio Coalition for the Education of Children with Disabilities

125 Executive Dr., Suite 200, Marion, Ohio 43302

www.ocecd.org

OCECD is the Ohio Parent Training and Information Center, funded by the U.S. Department of Education's Office of Special Education Programs, Grant #H328M150052. The content of this newsletter and any documents cited herein do not necessarily reflect the views or policies of the U.S. Department of Education.

CONNECT WITH US