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Endrew v. Douglas County School District

On March 22, 2017, the Supreme Court clarified the standard for determining whether a school district has offered a special education student a free and appropriate public education ("FAPE"). Specifically, in *Endrew v. Douglas County School District*, the unanimous Supreme Court held: "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." Slip Op. at 11.[1] In reaching that conclusion, the Court rejected the standard used by the Tenth Circuit, which required that an IEP be calculated to "confer an 'educational benefit that is merely more than *de minimis.*'" *Id.* at 8 *citing* Tenth Circuit Opinion (internal punctuation omitted).

While this is an important decision that clarifies school districts' obligations to students eligible for IEPs and resolves an apparent split among Circuit Courts of Appeals, we expect there to be little practical effect of this decision[2] in most cases in Massachusetts, where Courts and the BSEA have long interpreted the IDEA to require IEPs to be reasonably calculated to allow the student to make effective progress commensurate with his or her abilities.

Chief Justice Roberts delivered the 16-page opinion of the Court. There were no dissenting or concurring opinions.

Factual and Procedural Background

The facts and procedural background of this case are straightforward. The student at issue, Endrew, had been diagnosed with autism and was on an IEP. He attended his public school in Douglas County, Colorado, from preschool through fourth grade. By fourth grade, his parents were dissatisfied with the education Endrew was receiving in public school and

[1] A copy of the slip opinion can be found at: https://www.supremecourt.gov/opinions/16pdf/15-827_0pm1.pdf
[2] It can be expected that BSEA and the First Circuit will have to issue decisions making clear that the standard they have long applied for FAPE is the same as the standard set forth in *Endrew* or to otherwise clarify differences.

unilaterally placed him in a private school for students with autism. The parents' position was that, in public school, Endrew's progress in functional and academic areas had stalled, as evidenced by the fact that his IEP largely carried over the same goals and objectives annually.

At the private school, Endrew's behavior improved significantly, which, in turn, allowed him to make progress academically. Six months after Endrew's parents unilaterally placed, him, the parents and representatives of the school district met. The district proposed a new IEP, which the parents believed did not differ meaningfully from the previous IEPs. The parents rejected that proposed IEP and filed for a hearing, seeking reimbursement for Endrew's private school tuition.

To prevail at the hearing, the parents had to show that the district had not provided Endrew FAPE in a timely manner before his enrollment in private school. Referencing long-standing Supreme Court precedent, the *Rowley* decision (discussed more below), the parents argued that the proposed IEP was not reasonably tailored to enable Endrew to receive educational benefits and, therefore, denied Endrew FAPE. The administrative law judge disagreed and denied relief.

The parents appealed to the Federal District Court. That court recognized that Endrew's performance under the previous IEPs "'did not reveal immense educational growth'" but concluded that the annual modifications to Endrew's IEP objectives "were 'sufficient to show a pattern of, at the least, minimal progress.'" *Id.* at 8, quoting District Court decision, 2014 WL 4548439 (D. Colo., Sept. 15, 2014). The District Court reasoned that if Endrew had made that type of progress under the previous IEPs, then he would be expected to make the same progress under the proposed IEP. The District Court, thus, affirmed the administrative law judge's decision. *Id.*

The parents appealed to the Tenth Circuit, which also affirmed. The Tenth Circuit based its decision on its interpretation of the *Rowley* case's instruction that IEPs must be reasonably calculated to confer "some educational benefit." Under the Tenth Circuit's interpretation of *Rowley*, IEPs need only be calculated to confer "an 'educational benefit that is merely more than *de minimis.*'" *Id.*, *citing* 798 F.3d at 1338 (internal punctuation omitted). The Tenth Circuit held that the IEP offered FAPE because it was reasonably tailored to allow Endrew to make *some* progress.

The parents appealed to the Supreme Court, which Court granted certiorari. As discussed more below, the Supreme Court reversed the Tenth Circuit, rejecting the "merely more than *de minimis*" standard and remanded the case for further proceedings under the correct standard.

Discussion of the *Rowley* Decision

The Supreme Court began its opinion with an in-depth discussion of the 1982 *Rowley* decision. In that case, the Court held that the IDEA "establishes a substantive right to a 'free appropriate public education' for certain children with disabilities" but declined to "endorse any one standard for determining 'when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act.'" *Id.* at 1, *quoting Rowley*, 458 U.S. at 202.

Since the lower courts' decisions hinged on their (incorrect) interpretation of that precedent, the Supreme Court began by summarizing both the *Rowley* decision and the IDEA's general dictates.

By way of brief background, the IDEA offers states federal funding to assist with educating students with disabilities if the state agrees to comply with various statutory conditions, including providing FAPE to all eligible children. FAPE includes both "special education" and "related services." *Id*. at 1-2, *citing* 20 U.S.C. § 1400 *et seq.* The statute defines "special education" as "'specially designed instruction … to meet the unique needs of a child with a disability" and "related services" as "the support services 'required to assist a child … to benefit from' that instruction." *Id*. at 2, *quoting* 20 U.S.C. § 1401. *Rowley* was the first time the Court addressed the FAPE requirement.

The *Rowley* case involved Amy Rowley, a first grader with a hearing impairment. Amy's school district offered her an IEP under which she would be educated in an inclusion classroom where the teacher would use a school-provided FM device to amplify the teacher's speech. The parents argued that the school district should provide a sign language interpreter in order to meet its obligation to offer Amy FAPE. The District Court agreed with the parents. Although Amy was performing better than average in class and easily advanced from grade to grade, the District Court noted that Amy understood less than her classmates because of her hearing impairment. The District Court then reasoned that to provide Amy FAPE, the school district had to provide her "'an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.'" *Id*. at 4, *quoting Rowley,* 458 U.S. at 185-86. The Second Circuit agreed with the District Court and affirmed. *Id.*

On appeal, the Supreme Court reversed. Before the Supreme Court, the parents argued that the school district was obligated to provide Amy with an education and services that would provide her an "'equal educational opportunity'" to here non-disabled peers. *Id*. The school district argued that "the IDEA 'did not create substantive individual rights,'" but rather "the FAPE provision was […] merely aspirational." *Id.* The *Rowley* Court did not accept either argument.

Instead, the *Rowley* Court "charted a middle path," holding that the FAPE requirement is satisfied "if the child's IEP sets out an educational program that is 'reasonably calculated to enable the child to receive educational benefits.'" *Id.* at 5, *quoting Rowley*, 458 U.S. at 207. Since Amy was making "excellent progress" in her inclusion classroom, was able to advance from grade to grade, and received specialized instruction, the Court in *Rowley* concluded that the school district offered her FAPE. The Court limited its decision to the facts of that case, however, and "declined 'to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.'" *Id*. at 6, *quoting Rowley,* 458 U.S. at 202.

Standard for FAPE Established in *Endrew*

In the *Endrew* decision, the Supreme Court answered the "hard question" left open in the *Rowley* case and established a standard for determining whether a school districted has offered an eligible student FAPE. That standard is as follows: "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." *Id.* at 11.

The Court declined to elaborate on what "appropriate" progress would look like in any given case, reasoning that "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* at 15-16. The Court further explained that courts adjudicating disputes about the appropriateness of an IEP should give some deference to school districts, "based on the application of expertise and the exercise of judgment by school authorities." *Id.* That said, "[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.*

The Court explained its holding with reference to the IDEA and the *Rowley* decision. With respect to the use of the phrase "reasonably calculated," the Court stated that that language references the need for some "prospective judgment by school officials," informed by their expertise and the input of the parents. *Id.* at 11. That language also makes plain that the IEP need not be "ideal." As the Court explained: "Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.*

Further, the Court noted that tying the appropriateness of a student's IEP to the student's progress in light of his or her circumstances "should come as no surprise" since "[a] focus on the particular child is at the core of the IDEA." *Id.* at 12. The Court explained that the IDEA was an "'ambitious'" piece of legislation, with the broad purpose of addressing the perception that students with disabilities "'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Id.* at 11, *quoting Rowley*, 458 U.S. at 179. "A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Id.*

Rejecting the school district's attempts to minimize the IDEA's requirements with respect to the contents of the IEP as mere procedural, rather than substantive requirements, the Court concluded that the IDEA's requirements that IEPs contain a description of the student's current level of achievement, a discussion of how the child's disability affects his or her progress, a statement of measurable annual goals, and a description of the specialized instruction and services the student will receive "provides insight into what it means, for purposes of the FAPE definition, to 'meet the unique needs' of a child with a disability." *Id.* at 13.

For children like Amy in the *Rowley* case, where progress may be monitored through the ordinary systems used in inclusion classrooms, an IEP should be "'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade'"[3] under the general curriculum. *Id.* at 12, *quoting Rowley,* 458 U.S. at 203-04. That goal may not be appropriate for all children, however. Nonetheless, while ["t]he goals may differ, […] every child should have

[3] The Court preempted arguments that a student *must have* been offered FAPE if he or she progressed from grade to grade in a footnote, stating: "We declined to hold in *Rowley*, and do not hold today, that every handicapped child who is advancing from grade to grade … is automatically receiving a FAPE." *Id.* at 14, n.2 (internal quotations and punctuation omitted).

the chance to meet challenging objectives." *Id.* at 14. Providing a child with an education that allows for "merely more than *de minimis*" progress, the standard applied by the Tenth Circuit, does not suffice. The Court preempted arguments that a student *must have* been offered FAPE if he or she progressed from grade to grade in a footnote, stating: "We declined to hold in *Rowley,* and do not hold today, that every handicapped child who is advancing from grade to grade … is automatically receiving a FAPE." *Id.* at 14, n.2 (internal quotations and punctuation omitted).

In addition to overturning the Tenth Circuit's "merely more than *de minimis* standard, the Court rejected both parties' positions. The school district took the position that *Rowley* "established that an IEP need not promise any particular *level* of benefit," so long as it is reasonably calculated to provide *some* benefit, as opposed to *none.*" *Id.* at 9, *quoting* Br. for Respondent at 15 (internal quotations omitted). To support that position, the school district relied on various statements in *Rowley*, which the Supreme Court concluded were taken in isolation, and out of context. *Id.* The Court elaborated that the school district's arguments ran counter to other key points in *Rowley*, including statements about the difficulty in determining when benefits were "sufficient" or "adequate." The Court reasoned that "[i]t would not have been 'difficult' for us to say when educational benefits are sufficient if we had just said that *any* educational benefit was enough.'" *Id.* at 10. Moreover, if "any benefit" were the standard, it would not have been difficult for the *Rowley* court to announce a standard for determining whether a school district has offered FAPE. *Id.* at 10-11.

The Court also rejected the parents' argument that FAPE is "'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.'" *Id.* at 15, *quoting* Br. for Petitioner at 40. The Court reasoned that the parents' position was "virtually identical" to Justice Blackmun's "formulation" in his concurring opinion in *Rowley.* Since the majority rejected that position in *Rowley* and Congress did not materially change the statutory language relative to FAPE, the Court "decline[d] to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in" *Rowley. Id.*

Having found that the lower courts' "merely more than *de minimis*" was too low a bar for measuring FAPE, the Supreme Court reversed and remanded for further proceedings consistent with its decision.

Discussion

As noted above, we do not anticipate the Supreme Court's holding in *Endrew* to have much impact in Massachusetts, where the long-standing standard for FAPE has been that an IEP be reasonably calculated to allow an eligible student to make effective progress commensurate with his or her abilities. We do expect, however, that the BSEA and First Circuit will need to issue rulings to that effect. In particular, the Court's reference to a student's "circumstances" as opposed to a student's "abilities" may lead to some arguments about what Teams should consider when developing IEPs.

Additionally, it is worth noting that although the Supreme Court struck down the low bar the Tenth Circuit had set for school districts, much of the language in the case is deferential to school districts and their personnel. For example, as noted above, the Court expressly instructed reviewing bodies to give some deference to school district decisions and was clear that IEPs need to be "reasonable," not "ideal."

Accordingly, while there may be some initial discussion about how the *Endrew* decision may change the analysis for a small group of cases, we expect that there will be little impact in Massachusetts.