

SPECIAL EDUCATION LAW ALERT: THE LESSONS OF *ENDREW F.*

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As a service to CASE members, this periodic legal alert follows the usual format of a two-column table, the highlights (on the left) and practical implications (on the right) of major new legal developments. This special alert departs from the usual monthly order to provide a second one for March due to the issuance of the Supreme Court's first substantive IDEA decision since 2009.

1. For the substantive dimension of FAPE under the IDEA, the Supreme Court recently issued its major decision in *Endrew F.* on the required substantive standard for an IEP.

On March 22, in *Endrew F. v. Douglas County School District RE-1* (2016), the Supreme Court unanimously held that the substantive standard for FAPE under the IDEA is that the IEP be “**reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.**” Neither the parents nor district in this case conclusively won, because the Supreme Court remanded this issue to the lower court to apply this standard within the established multi-part test for tuition reimbursement, which the parents seek for their private placement of their child with autism.

According to the Court, this standard is “markedly more demanding” than the some, or more than *de minimis*, benefit standard of the Tenth Circuit in this case but less than the commensurate, or substantially equal, opportunity standard that the parents proposed. It is an ad hoc, individualized standard rather than a bright-line formula. It will mean a more careful focus on progress and, inevitably less predictability and more litigation until the lower courts moderate this growth by developing the multiple factors for application of this standard.

Although retaining the flexibility and deference of *Rowley*, at a more nuanced level the *Endrew F.* Court further emphasized the role of parents in the IEP process, observing that (a) “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” and (b) judicial deference to school authorities will depend on their having provided parents in the IEP process with the opportunity to “fully air their ... opinion[] on the requisite degree of progress” and, upon dispute resolution in cases of disagreement, to provide “a cogent and responsive explanation” of the district’s IEP decision.

For the parallel increased weighting of role of parental participation on the procedural side of FAPE in both in the 2004 amendments and the subsequent case law, see the following article:

- Zirkel, P. A. (2016). Parental participation: The paramount procedural requirement under the IDEA? *Connecticut Public Interest Law Journal*, 15, 1–36.

In any event, these *Endrew F.* Court comments, or “dicta,” are—in addition to its substantive ruling—likely to further increase the amount and moderate the pro-district outcomes trend of FAPE litigation.

2. For the procedural dimension of FAPE, the part of the lower court's ruling in *Andrew F.* that was not on appeal serves as a reminder of the continuing case law trend that shows the difference between professional best practice and judicial requirements for FBAs and BIPs when the child's behavior impedes the learning of the child or other children.

The unchanged Tenth Circuit Court of Appeals ruling in *Andrew F.* illustrated the two-part, harmless-error approach regarding FBAs and BIPs as procedural FAPE issues. In the more recent examples of and the more recent, lower court examples of *Department of Education v. Leo W.* (2016) and *C.M. v. New York City Department of Education* (2017), federal district courts ruled the lack of an FBA or BIP in the IEP of a child with disabilities who exhibited the requisite learning-impeding behavior was a harmless procedural violation not amounting to denial of FAPE where the IEP as a whole, including its behavior-related provisions, met the substantive standard for FAPE.

Two recent articles provide more comprehensive analyses of this continuing and rather consistent district-deferential trend:

- Collins, L.W., & Zirkel, P. A. (2017). Functional behavior assessments and behavior intervention plans: Legal requirements and professional recommendations. *Journal of Positive Behavior Interventions*. doi: 0.1177/1098300716682201
- Zirkel, P. (2017). An update of judicial rulings specific to FBAs or BIPs under the IDEA or corollary state laws. *Journal of Special Education*. doi:10.1177/0022466917693386

Thus, a fuller view of *Andrew F.* serves as a reminder of the interrelated procedural and substantive sides of FAPE in the IEP process and resulting litigation.