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***Andrew's Game:*
Tips and Best Practices for Demonstrating
FAPE Following the "New" Standard**

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I. Introduction

In March 2017, the Supreme Court issued its first decision in 35 years regarding IDEA’s FAPE standard. While the decision fully embraced the *Rowley* standard that was already in place, it also provided further guidance on what it means to provide FAPE. This presentation aims to review the standard articulated in *Endrew* and provide some suggested tips and best practices for schools to ensure that they are able to demonstrate FAPE under the updated standard.

II. *Endrew F.* Overview: Planet of the FAPes

A. The *Rowley* Standard

The Individuals with Disabilities Education Act (“IDEA”) requires a school district to provide a free appropriate public education (“FAPE”) to its special education students. In the 1982 *Rowley* decision, the U.S. Supreme Court formulated a two-part test to determine whether FAPE was provided in cases under the IDEA. To determine if a school has provided a student FAPE, courts and hearing officers must decide:

- (1) Whether the school district has complied with the procedures set forth in the IDEA; and
- (2) Whether the IEP developed pursuant to the IDEA is **reasonably calculated to enable the child to receive some educational benefit.**

Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 206-07 (1982).

B. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017)

In *Endrew*, the Court was asked to decide whether a public school’s educational program which only afforded a student “minimal progress” met the FAPE standard. The Court rejected a lower court’s holding that an IEP need only provide “more than *de minimis* progress” to provide a FAPE. At the same time, the Court rejected the parents’ position that an IEP must provide “educational opportunities to children with disabilities that are ‘substantially equal to the opportunities afforded to children without disabilities.’” Instead, the Court embraced its prior holding in *Rowley* while providing further clarity to long-standing precedent.

Clarifying *Rowley*, the Court in a unanimous Opinion stated:

Rowley sheds light on what appropriate progress will look like in many cases: For a child fully integrated in the regular classroom, an IEP typically should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” * * * *Rowley* did not 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. **A child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child’s educational program must be appropriately ambitious in light of his**

circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

The Court continued:

[T]he “reasonably calculated” qualification reflects a recognition that **crafting an appropriate program of education requires a prospective judgment by 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. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

Further, the Court reiterated the understanding in *Rowley* that the IDEA cannot and **does not promise “any particular [educational] outcome.”** Ultimately, to meet its substantive FAPE obligations, a school district “must offer an IEP **reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.**” Though this rejects the “de minimis” standard applied by some courts, it also recognizes that the IDEA’s requirements are not outcome-based, and frames the standard in terms of a child’s unique individual circumstances.

C. *Andrew’s Impact*

The Court in *Andrew* articulated a more specific test to determine whether a school has provided FAPE to a disabled child: A school must offer an educational program embodied in the IEP that is both “appropriately ambitious” and “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” This standard is more demanding in that it rejects any “de minimis” formulation and imposes a requirement of ambitiousness. At the same time, however, it is not a departure from *Rowley* and is largely consistent with the standard that many courts and hearing officers were already applying.

For example, in *E.D. by and through T.D. v. Colonial Sch. Dist.*, 2017 WL 1207919 (E.D. Penn. 2017), a hearing officer had concluded, pre-*Andrew*, that the student had not been denied a FAPE. On appeal, the court held, in reviewing the decision post-*Andrew*, that the hearing officer’s standard was nevertheless sufficient, noting that “the standards employed by the Hearing Officer do not differ substantively from the standards adopted by the Supreme Court in *Andrew F.*” The Court noted that the Third Circuit had already rejected the *de minimis* standard, and that the hearing officer applied a standard that was effectively consistent with *Andrew*: The standard employed by the Hearing Officer required that E.D.’s IEP “specify education instruction designed to meet [her] unique needs” and that it “be accompanied by such services as are necessary to permit [her] to benefit from the instruction.” (*Id.*) The Hearing Officer further stated that “[m]eaningful benefit means that an eligible child's program affords ... her the opportunity for significant learning.” (*Id.*) Based on this standard, the Hearing Officer’s assessment of the administrative record is consistent with *Andrew*.

By contrast, the *Andrew F.* case itself was remanded to the district court to apply the new standard, and the court reached a different result. The court noted that its “previous ruling in this case was that while the additions and modifications in [Andrew’s] IEP objectives from year to year did not reveal immense educational growth, they were sufficient to show a pattern of, at the least, minimal progress.” But that progress was insufficient to show that the District “created an educational plan that was reasonably calculated to enable him to make progress.” The changes in the IEP over time were “very limited.” The judge opined:

While I am not faulting the IEP team’s work, nor am I implying that they were looking to provide Petitioner with “only the bare minimum,” the April 2010 IEP that was developed was a continuation of the poor progress on his educational and functional goals of his past IEPs. And, as such, the District was not successful in creating an educational program that was reasonably calculated to enable Petitioner to make progress in light of his circumstances, in order to provide him with a substantive FAPE.

Andrew F. v. Douglas Cnty. Sch. Dist., 2018 WL 828019 (D. Colo. 2018).

In sum, while application of the *Andrew* standard is largely case-specific, the Court did offer schools (and lower courts) some guidance concerning the test’s meaning and application. First, the adequacy of a child’s IEP is ultimately determined by his unique circumstances. Second, courts should defer to school authorities’ expertise and professional judgment with respect to what constitutes an IEP that is “appropriately ambitious” and “reasonably calculated to enable a child to make progress appropriate in light of his circumstances.” The Court’s ruling, therefore, underscores the importance for educators to reach cogent decisions regarding a child’s IEP and to methodically document the reasoning behind those decisions. A court will likely find that an IEP is insufficient if no record exists explaining its contents and the means by which its services were developed.

III. Tips and Best Practices for Demonstrating FAPE under the *Andrew* Standard.

A. Gathering Relevant Information about the Child’s Educational Needs

Do not use or rely on just one assessment tool to gather relevant information for eligibility determinations or IEP development, even if the parent favors it.

- A variety of assessment tools¹ and strategies should be used to gather relevant information, including information provided by parent, to assist in determining whether the child is eligible and IEP’s content.
- Selection of testing or evaluation instruments is left to a school’s discretion.²

¹ The IDEA specifically prohibits the use of a one-test assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 C.F.R. § 300.304(b)(2).

² *Letter to Baumtrog*, (OSEP 2002)

- The evaluation must include all existing data, classroom observations, and information provided by parent.³
- The IEP Team and other qualified professionals must review existing evaluation data, including⁴:
 - a. Evaluations and information provided by parents;
 - b. Current classroom-based, local, or state assessments, and classroom-based observations; and
 - c. Observations by teachers, related services providers.

When a parent disagrees with a school's evaluation and requests an Independent Education Evaluation ("IEE"), the school should pay for the IEE.

- Parents always have the right to obtain an IEE at their own expense.⁵
- Parents have the right to an IEE *at public expense* if they disagree with school's evaluation. **Unless:**
 - a. The school demonstrates *in due process* that its own evaluation was appropriate; **or**
 - b. The school demonstrates *in due process* that an evaluation sought by the parent does not meet school criteria
- If a parent requests IEE at public expense, school must, without unnecessary delay:
 - a. Request a *due process hearing*; **or**
 - b. Provide the IEE at public expense
- There is no specific time limit for responding to parent's request for IEE, but a school must act "without unreasonable delay." Whether a delay is unreasonable will turn on the facts.
- The same criteria that apply to school evaluations apply to IEEs at public expense, including criteria regarding the evaluation's location and the examiner's qualifications.⁶
- If a parent obtains an IEE at public expense or shares an evaluation obtained at private expense, the school must consider results when making decisions involving provision of FAPE (provided the IEE meets the school's criteria).
- While the school must consider results of IEE, it has no obligation to adopt the evaluator's recommendations or conclusions.

³ 34 C.F.R. § 300.305.

⁴ 34 C.F.R. § 300.305(a)(1).

⁵ 34 C.F.R. § 300.502.

⁶ 34 C.F.R. § 300.502(e)(1).

B. Crafting the Child's Educational Program

Make sure that the annual IEP goals are both measurable and aligned to the Present Levels of Performance.

- IDEA requires that each IEP include a statement of the child's present levels of academic achievement and functional performance, including: How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).⁷
- The description must contain sufficient detail to allow the IEP Team to determine the extent of the child's abilities and special education needs.
- The IEP must include a statement of **measurable annual goals**, including academic and functional goals designed to: (1) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (2) Meet each of the child's other educational needs that result from the child's disability.⁸
- Purpose of this requirement is to permit the IEP Team to determine whether the pupil is making progress in an area of need.
- IDEA does not identify the amount of specificity that is required for IEP goals. However, one administrative law judge has suggested that a well-written IEP goal should pass the "stranger test." Under that test, an IEP goal is appropriate if a person unfamiliar with the IEP would be able to implement the goal, implement the assessment of the student's progress on the goal, and determine whether the student's progress was satisfactory.

Including information in an IEP beyond what is required may create a legal obligation to provide a service for the IEP's duration, regardless of whether the service is necessary for FAPE.

- Nothing in the IDEA requires a school to include additional information in a child's IEP beyond what is explicitly required.
- IEP does not need to include:
 - Identity of particular teachers, materials to be used, or educational methodology.
 - Services unrelated to special education.

⁷ 34 C.F.R. § 300.320(a)(1).

⁸ 34 C.F.R. § 300.320(a)(2)(i).

- Recommendations submitted to or discussed at IEP meetings, but not adopted.
- Extracurricular activities that are not considered part of a student's appropriate educational program.
- Refrain from identifying the special education teacher as the sole service provider of special education services, and consider adding “special education staff” and/or “paraprofessional” if an aid is utilized.

C. Documenting IEP Team Discussions and Determinations

PWNs should be detailed documentary evidence of what transpired at an IEP Team meeting. Consider forwarding the draft PWN to your school attorney for review before issuing it to parents.

- PWN must include:⁹
 - Description of action proposed/refused.
 - Explanation of why proposes/refuses to take action.
 - Description of each evaluation procedure, assessment, record, or report the school used as a basis.
 - Statement that parents have protection under Part B’s procedural safeguards.
 - Sources for parents to contact to obtain assistance in understanding procedural safeguards.
 - Description of other options that IEP team considered and reasons why rejected.
 - A description of other relevant factors.
- Verbal notice does not fulfill the PWN requirements.
- PWN provided in language understandable to general public and also in parent’s native language unless clearly not feasible.¹⁰
- PWN required when a school acts to initiate/change the identification, evaluation, or educational placement of a child or provision of FAPE.¹¹
- Must also provide parents notice of procedural safeguards.¹²

⁹ 34 C.F.R. § 300.503(b).

¹⁰ 34 C.F.R. § 300.503(c).

¹¹ 34 C.F.R. § 300.503(a).

¹² 34 C.F.R. § 300.504(a).

D. Monitoring the Child's Progress

When it appears to the special education teacher through data collection that a student is experiencing greater difficulty progressing towards his/her annual goals than expected, an IEP Team meeting should be called to discuss the goals, the student's progress, and the IEP's possible modification.

- IEP must include a description of: (1) How the child's progress toward meeting the annual goals will be measured; and (2) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.¹³
- School does not need to utilize standardized tests in order to measure a student's progress toward IEP goals.
- Student's failure to make measurable progress toward goals and the team's renewing of IEP goals the student has still not mastered can be evidence that the IEP is flawed.
- If a student fails to make progress within a reasonable period of time, it is the school's responsibility to convene an IEP team meeting to address the student's lack of progress.¹⁴
- The IDEA already requires schools to revise an IEP, "as appropriate . . . to address any lack of expected progress toward the annual goals. . . ."¹⁵ If a child masters one or more goals earlier than expected, a court could potentially view his/her IEP as insufficiently ambitious. Alternatively, if it is clear that a child is not making progress toward his goals, the IEP could be regarded as excessively ambitious.
- Under the IDEA, the District is ultimately responsible for providing FAPE. As soon as either situation described above presents itself, a school district should consider whether it is appropriate to promptly convene an IEP Team meeting for the purpose of reviewing additional or replacement goals, respectively.

IV. Conclusion & Questions

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¹³ 34 C.F.R. § 300.320(a)(3).

¹⁴ 34 C.F.R. § 300.324(b)(ii)(A).

¹⁵ 34 C.F.R. § 300.324(b)(2)(A).