



Questions and Answers: Andrew V. Douglas County School District

WRITTEN BY: ANDREA L. JOLLIFFE, ESQ.

The U.S. Supreme Court unanimously decided an important special education case on March 22, 2017. In Andrew F. v. Douglas County School District, SCOTUS ruled on how much benefit Individualized Education Programs (IEP) must provide to students. Many are wondering whether the decision is a game changer for special education. Andrea L Jolliffe, a partner in the HBS Education Practice Group, has prepared a Q&A to provide guidance on important aspects of the decision to Georgia school districts:

What was the issue before the U.S. Supreme Court in Andrew?

Andrew F. is a student with autism who attended the Douglas County School District from preschool through fourth grade and had multiple interfering behaviors. **The IEP proposed in fifth grade largely carried over the same basic goals and objectives from previous years.** The parents removed Andrew from school, enrolled him in a private school specializing in teaching students with autism, and sought reimbursement for the private school placement. The issue before the Court was whether Andrew had been denied his right to a free appropriate public education (FAPE) - a question that required the Court to further define FAPE.

Had the Court previously considered the meaning of the FAPE requirement set forth in IDEA?

Yes. The U.S. Supreme Court first addressed the FAPE requirement in *Rowley*, a 1982 case involving a first grader with impaired hearing. IDEA provides a rather unhelpful definition, defining FAPE as special education and related services provided **“in conformity with the [student’s] individual education program.”** In *Rowley*, the Court held compliance with FAPE depends on: (1) whether the district followed IDEA’s procedures; and (2) whether the IEP developed through those procedures is **“reasonably calculated to enable the child to receive educational benefits.”** The analysis is often the *Rowley* two prong test. In *Andrew*, the Court considered the “educational benefit” required under the second/substantive part of the *Rowley* test.

What were the positions of the parties in the Andrew?

The School District argued FAPE required *“some educational benefit”* - a benefit that is *“merely more than de minimus.”* The parents argued FAPE required an education program that was designed to provide opportunities *“substantially equal to the opportunities afforded students without disabilities.”* The Court rejected both interpretations of the FAPE requirement.

How did the Supreme Court interpret the FAPE requirement in Andrew?

The Court held, **“a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”** For most children, a free appropriate public education (FAPE) will involve integration in the regular classroom and individualized special education *“reasonably calculated to enable the child to achieve passing marks and advance from grade to grade”* in the general education curriculum. For a child not fully integrated into the regular education classroom, his IEP **“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.”** **Except renewed emphasis on passing grades, and increased advocacy for “appropriately ambitious” goals and “challenging objectives.”**

What does the Court’s decision in Andrew mean for special education professionals?

Any recommendation to continue goals and objectives from year to year should be carefully reviewed and thoroughly explained within the four corners of the IEP. Importantly, the Court held school officials must **“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.”** **We can anticipate this language will be cited to shift the burden to school officials to defend IEP goals and objectives as “appropriately ambitious” and sufficiently challenging.**



What if a student is not making sufficient progress toward IEP goals and objectives?

The absence of sufficient progress to meet goals and objectives during quarterly progress reporting should be treated just like a failing grade on a quarterly report card. If progress monitoring data doesn't show a trend line with an upward trajectory, the District should consider a progress monitoring meeting with the parents to address the need for: (a) additional, tiered/progressive objectives to address deficits in prerequisite or foundational skills necessary to make progress; (b) instructional accommodations or instructional modifications specific to the lack of progress; (c) supplemental aids or services that would support goal acquisition; (d) the use of a continuum of evidence-based interventions; (e) the need for additional assessments, evaluations or screening to enable the student to make progress. It is important that special education professionals inform parents about how adjustments have been made to enable the child to make progress appropriate in light of the child's circumstances.

What if the student meets their goals and objectives before the next annual review?

Given the Court's language regarding "appropriately ambitious" goals and "challenging" objectives, the IEP team should meet to review and revise goals that have been attained in target areas of need. Unless the IEP team has expressly contemplated tiered/progressive/sequential goals or objective (i.e., where mastery of one goal or objective is contemplated before work on another) within the four corners of the IEP, mastery of goals in one area of need should not be treated as creating more time to work on other goals.

Does the Supreme Court's decision impose a more stringent standard on Georgia school districts?

In *Endrew*, the Supreme Court considered the degree of progress required to establish the provision of a FAPE. The Tenth Circuit (CO, KS, NM, OK, UT, WY) said FAPE requires progress that is "more than merely *de minimus*" focusing on the "basic floor of opportunity" standard from *Rowley*. The Eleventh Circuit (GA, FL, AL) has emphasized other aspects of *Rowley*, defining FAPE as "**personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.**" When referring to the "basic floor of opportunity" language from *Rowley*, the Eleventh Circuit has clarified such opportunity must "**consist[] of access to specialized instruction and related services.**" Before *Endrew*, the Eleventh Circuit Court of Appeals found a denial of FAPE based on:

- The failure to propose an evaluation when faced with evidence of the student's hearing loss and "subpar academic performance. *Phyllene W. v. Huntsville City Bd. of Educ.*, 630 Fed. Appx. 917 (11th Cir. 2015).
- The failure to develop an IEP addressing deficits in stress management and reading comprehension. *R.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014).
- The use of "boilerplate goals" in an IEP (i.e., 9th grade reading goals for student with 1st grade reading level). *Jefferson County Bd. of Educ. v. Lolita S.*, 581 Fed. Appx. 760 (11th Cir. 2014).
- The failure to provide vision therapy to a student with significant visual problems. *DeKalb County Sch. Dist. V. M.T.V.*, 164 Fed. Appx. 900 (11th Cir. 2006).

The Eleventh Circuit has never articulated a "more than merely *de minimus*" standard. However, *Endrew* will likely increase the burden on school districts to better explain the appropriateness of goals and objectives and efforts made to enable the student to make progress "appropriate in light of the student's circumstances"

Does Endrew require that a school district develop an IEP to maximize a student's potential?

No. In *Weiss v. Sch. Bd.*, 141 F.3d 990 (11th Cir. 1998), the Eleventh Circuit held FAPE does not require a District to maximize a student's potential or provide an education according to the dictates of parents. The decision is consistent with *Endrew* and remains good law. However, *Endrew* clarifies IEP goals and objectives must be "challenging" and "appropriately ambitious" in light of the student's circumstances.