



Welcome to The Arc@School's August webinar

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You can type questions about the material presented in the **Chat Box** section.

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We understand this topic will generate many questions. However, due to the limited time we have, we may not get to every question in the Chat Box. If we are unable to answer all questions, we will email a **Q&A document** to share after the webinar is over.

Andrew F: Advocating for High Expectations in Special Education

August 15th, 2019

- Ron Hager, Managing Attorney
- National Disability Rights Network

Unanimous United States Supreme Court Rejects “Barely More Than *De Minimis*” Educational Progress Standard Under IDEA

- *Endrew F. v. Douglas County School District RE-1*, 37 S.Ct. 988 (March 22, 2017)
- IDEA requires districts to provide “an educational program reasonably calculated to enable a child to make progress in light of the child’s circumstances.”
- Any review of the IEP will address “the question of whether the IEP is *reasonable*, not whether the court regards it as ideal.”
- Nevertheless, the “IEP must aim to enable the child to make progress,” which “reflects the broad purpose of the IDEA, an ‘ambitious’ piece of legislation.”

Andrew F. Continued

- For most children, FAPE will involve integration in regular education program and individualized special education calculated to achieve advancement from grade to grade.
- For those students FAPE “typically means ... providing a level of instruction reasonably calculated to permit advancement through the general curriculum.”
- Court did not hold every student with disability advancing from grade to grade is automatically receiving FAPE.

Andrew F. Continued

- For students for whom regular education is not “reasonable prospect,” their “IEP need not aim for grade-level advancement.”
- But educational program must be appropriately *ambitious* in light of circumstances, just as advancement from grade to grade is appropriately *ambitious* for most children in regular classroom.
- The goals may differ, but every child should have chance to meet *challenging* objectives.

Andrew F. Continued

- But whatever else can be said about it, this standard is *markedly more demanding* than the “merely more than *de minimis*” test applied by the Tenth Circuit.
- It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.
- The absence of a bright-line rule” should not be taken as an invitation for reviewing courts “to substitute their own notion of educational policy for those of the school authorities which they review.”

Post Andrew F. Decisions

Supreme Court Vacates and Remands Case in Light of Endrew F.

E.F. v. Newport Mesa Unified School District (9th Cir. March 21, 2017)

- Decided day before Endrew F.
- Ruled in favor of school district, noting student made “some” progress on speech and language goals using non electronic AT devices
- S.Ct. reversed and remanded to Ninth Circuit for reconsideration in light of Endrew F (Oct. 2, 2017).

Ninth Circuit Affirms on Remand

E.F. v. Newport Mesa Unified Sch. Dist. (9th Cir. 2018)

- Ninth Circuit affirms holding of district court
- Holds current FAPE standard consistent with *Endrew F*
- District did not deny FAPE by failing to assess for a high tech AT device before February 2012
- Student made some progress toward speech and language goals and district was using non-electronic AT devices to improve communicative skills
- District denied FAPE by failing to assess for high-tech AT after February 2012

Ninth Circuit Remands Case to Apply *Endrew F.*

M.C. v. Antelope Valley Union High School District (9th Cir. 2017) (cert. denied)

- “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.” [*Endrew F.*](#) In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can “make progress in the general education curriculum,” [*id.*](#), taking into account the progress of his non-disabled peers, and the child’s potential.
- No reported update

First Circuit Holds its FAPE Standard Comports with Andrew F.

Johnson v. Boston Public Schools (1st Cir. 2018)

- Court rejected parents' argument that Andrew F. raised the bar for evaluating adequacy of the IEP
- Held its FAPE standard was consistent with Andrew F.
- This court has announced that, “to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit,” and emphasized that this requires consideration of the individual child’s circumstances.

Second Circuit Holds School District Offered Student FAPE

D.B. v. Ithaca City School District (2d Cir. May 23, 2017) (summary order)

- In assessing substantive adequacy, we are mindful of IDEA’s mandate for “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” [Rowley](#); accord [Andrew F.](#) (holding that “school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances” and that “question is whether the IEP is *reasonable*, not whether the court regards it as ideal” (emphasis in original)).

Second Circuit Holds Failure to Assess Student in Person did not Deny FAPE

R.B. v. New York City Dep't of Educ. (2d Cir. Apr. 27, 2017) (summary order)

- We consider whether, substantively, the IEP is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” [Andrew F.](#) As to this latter requirement, the IEP need not bring the child to grade-level achievement, but it must aspire to provide more than *de minimis* educational progress. [Id.](#)

Second Circuit Holds Its FAPE Standard Comports with Andrew F.

Mr. P. v. West Hartford Board of Education (2d Cir. 2018), *cert den.*

- Court observed its prior decisions are consistent with standard enunciated in *Andrew F.*
- Court held district provided FAPE
 - During Junior and Senior years he achieved mostly “As” and “Bs”, met all of high school graduation requirements and participated in wrestling
 - While not dispositive, steady and timely progression through each grade and much improved grades and test scores indicate that he made substantial progress

Second Circuit Finds Similar IEPs do not amount to FAPE Violation

F.L. v. Board of Educ. of the Great Neck Union Free Sch. Dist. (2d Cir. 2018)
(unpublished)

- SRO determined that IEPs presented a description of R.C.L.’s needs consistent with what was before IEP team
- According to SRO IEPs were reasonably calculated to provide some meaningful benefit to student
- Second Circuit agreed with SRO “that that R.C.L. made steady progress each year and that his IEPs were individually tailored to his unique mix of strengths and deficits.”

Second Circuit Holds Evidence of Parental Participation in IEP Meetings Undercuts Charge of Predetermination

J.P. on behalf of J.P. v. City of New York Department of Education (2d Cir. 2017)

- Second Circuit agreed with district court that it was proper to defer to the conclusions by IHO and SRO that IEP for J.P. was appropriate as both decisions were “well reasoned and supported by the record.”
- Second Circuit also agreed with district court’s conclusion that IEPs for years subsequent to year at issue were of “limited probative value” on issue of whether current IEP was appropriate at time it was developed, as appropriateness of IEP “requires a prospective judgement by school officials.” (citing *Endrew F.*)

Third Circuit Holds its FAPE Standard Comports with Andrew F.

K.D. by and through Dunn v. Downtown Area School District (3d Cir. 2018)

- Under Third Circuit's standard, IEP must be reasonably calculated to enable child to receive meaningful educational benefits in light of student's intellectual potential and individual abilities
- Given nature of student's disabilities slow progress toward meeting IEP goals to be expected
- Court rejected parents' attempt to extend Andrew F.'s presumption of grade level advancement beyond fully integrated students

Dunn v. Downingtown continued

- Court rejected parents' arguments based on OSEP's FAPE guidance
- Parents read too much into letter
 - While it aspires to "close the gap," it does not specifically require grade-level goals for children who are not and cannot be fully integrated into regular classrooms. It never mentions a presumption. Nor does it suggest that all (or even most) disabled children can advance at a grade-level pace
- Guidance letters not entitled to *Chevron* deference
- Guidance is not persuasive
 - It does not address IDEA's language at all, let alone parse it

Third Circuit Holds School Offered FAPE

S.C. Through Helen C. v. Oxford Area School District (3d Cir. 2018)

- *Endrew F.* does not mean program has to be “perfect.”
- Student’s slow progress does not prove programs was deficient
- Student’s program appropriate because addressed behavior and enabled academic progress
 - Student kept pace with grade level and went from failing several classes to passing all of them
 - Program also addressed student’s behavioral issues and school added emotional support classroom

Fifth Circuit Holds its FAPE Standard Complies with *Endrew F.*

C.G. v. Waller Indep. Sch. Dist. (5th Cir. June 22, 2017) (unpublished)

- Although the district court did not articulate the standard set forth in *Endrew F.* verbatim, its analysis of C.G.’s IEP is fully consistent with that standard and leaves no doubt that the court was convinced that C.G.’s IEP was “appropriately ambitious in light of [her] circumstances.”

Fifth Circuit Reaffirms pre-Andrew F. FAPE Standard

Renee J. as next friend of C.J. v. Houston Independent School District (5th Cir. 2019)
(published)

- NDRN joined an amicus urging reconsideration of position in *C.G. v. Waller*
- Court reaffirmed that its pre-Andrew F. FAPE standard comports with Andrew F.

Fifth Circuit Holds District Did Not Offer FAPE

Dallas Ind. Sch. Dist. v. Woody (5th Cir. 2017)

- The District was obligated to “offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” See [Andrew F.](#) It did not. Kelsey had completed her coursework and was scheduled to graduate in a week. Placing her in public school for her final week of school would have been nonsensical and potentially devastating.
- The District made an offer on May 22, which it argues was within the permitted regulatory timeline. In light of the somewhat unusual circumstances here, though, the May 22 IEP “was insufficient to confer any educational benefit upon [Kelsey] at all.”

Eighth Circuit Finds Prior FAPE Standard Consistent with Andrew F.

I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs. (8th Cir. 2017)

- Rather, the obligation enforceable under the IDEA is to provide, if the IEP so requires, instruction that is “sufficient to enable” the child to attain the specified level of proficiency. That is consistent with generally applicable IDEA standards. See [Andrew F.](#) (IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”); [K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15 \(8th Cir. 2011\)](#) (student’s specialized services not deficient if they were “*sufficient to enable* her to achieve academic progress”).

Eighth Circuit Finds Prior FAPE Standard Consistent with Andrew F.

IZM, continued

- After oral argument, the Supreme Court again took up the IDEA substantive requirements first addressed in [Rowley](#), concluding that “[t]o 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.” [Andrew F.](#) That again is consistent with reading the regulation as requiring “all reasonable steps,” not perfect results.

Eighth Circuit Finds No FAPE Violation for District's Use of Restraint

Parrish v. Bentonville School District (8th Cir. 2018)

- District's IEPs and behavior intervention plans included detailed strategies to address children's behavioral problems and contained evidence that children were progressing academically
- District's strategies, while they might have been imperfect, complied with the IDEA
- Citing prior precedent: "It is 'largely irrelevant' if the school district could have employed 'more positive behavior interventions' as long as it made a 'good faith effort' to help the student achieve the educational goals outlined in his IEP."

Alternative strategies

Methodology

- The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method *most suitable* to the child's needs, was left by the Act to state and local educational agencies *in cooperation with the parents* or guardians of the child.

Rowley at 207 (emphasis added).

Access to the General Curriculum

- Present levels of performance--IEP must include how child's disability affects involvement and progress in general education curriculum
- Annual goals
 - IEP must include statement of measurable annual goals designed to meet child's needs that result from the disability to enable child to be involved in and make progress in general education curriculum
 - IEP Team's determination of how child's disability affects involvement and progress in general education curriculum is a primary consideration in developing the child's annual goals
- Needed services--IEP must include services to enable the child to be involved in and make progress in the general education curriculum

OSERS *Andrew F.* Implementation Q&A

- “Reasonably calculated”
 - Developing IEP requires prospective judgement by the Team based on “their own expertise, the progress of the child, the child’s potential, and the views of the child’s parents.”
 - IEP Team should consider services provided in past, “including the effectiveness of specific instructional strategies ... the child’s previous rate of academic growth, whether the child is on track to achieve or exceed grade-level proficiency, any behaviors interfering with the child’s progress, and additional information and input provided by the child’s parents.”
- “Progress appropriate in light of the child’s circumstances” reflects focus on individualized needs of particular child at core of IDEA

OSERS *Andrew F.* Implementation Q&A

- Opportunity to meet challenging objectives—each student must be offered IEP is designed to provide access to instructional strategies and curricula aligned to both challenging State academic content standards and ambitious goals, based on unique circumstances of that child
- For small number of students with significant cognitive disabilities, “performance can be measured against alternate achievement standard ... [which] also must be aligned with the State’s grade-level content standards.”

OSERS *Andrew F.* Implementation Q&A

- For students not making expected progress
 - IDEA provides for revisiting IEP if expected progress is not occurring
 - IEP Team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate ... services, and to ensure the IEP's goals are individualized and ambitious
 - Schools may need “to examine current practices for engaging and communicating with parents throughout the school year as IEP goals are evaluated and the IEP Team determines whether the child is making progress toward IEP goals.”
- For students with behavioral needs, when necessary to provide FAPE, must consider and provide appropriate goals and services

OSERS *Andrew F.* Implementation Q&A

- What should IEP Teams do differently
 - IEP Teams and other school personnel should be able to demonstrate that, consistent with provisions in child's IEP, they are providing special education and related services and supplementary aids and services;
 - Making program modifications;
 - Providing supports for school personnel;
 - Allowing for appropriate accommodations are reasonably calculated to enable child to make progress appropriate in light of child's circumstances and enable child to have chance to meet challenging objectives
 - Follow IEP development procedures

OSERS *Andrew F.* Implementation Q&A

- What should state education agencies do
 - “Review policies, procedures, and practices to provide support and appropriate guidance to school districts and IEP Teams to ensure that IEP goals are appropriately ambitious and that all children have the opportunity to meet challenging objectives.”



Questions?

Follow up questions?



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