



NASET's Q & A Corner

Questions and Answers (Q&A) on U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1

On March 22, 2017 the U.S. Supreme Court (sometimes referred to as Court) issued a unanimous opinion in *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. 988. In that case, the Court interpreted the scope of the free appropriate public education (FAPE) requirements in the Individuals with Disabilities Education Act (IDEA). The Court overturned the Tenth Circuit's decision that Endrew, a child with autism, was only entitled to an educational program that was calculated to provide "merely more than de minimis" educational benefit. In rejecting the Tenth Circuit's reasoning, the Supreme Court determined that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP [individualized education program] that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Court additionally emphasized the requirement that "every child should have the chance to meet challenging objectives." The *Endrew F.* decision is important because it informs our efforts to improve academic outcomes for children with disabilities. To this end, the U.S. Department of Education (Department) is providing parents and other stakeholders information on the issues addressed in *Endrew F.* and the impact of the Court's decision on the implementation of the IDEA. This issue of **NASET's Q & A Corner** focuses on the *Endrew F.* case and its impact on the field of special education.

On March 22, 2017 the U.S. Supreme Court (sometimes referred to as Court) issued a unanimous opinion in *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. 988. In that case, the Court interpreted the scope of the free appropriate public education (FAPE) requirements in the Individuals with Disabilities Education Act (IDEA). The Court overturned the Tenth Circuit's decision that Endrew, a child with autism, was only entitled to an educational program that was calculated to provide "merely more than de minimis" educational benefit. In rejecting the Tenth Circuit's reasoning, the Supreme Court determined that, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP [individualized education program] that is reasonably calculated to enable a child to make progress appropriate in light of the child's

circumstances.” The Court additionally emphasized the requirement that “every child should have the chance to meet challenging objectives.” The Endrew F. decision is important because it informs our efforts to improve academic outcomes for children with disabilities. To this end, the U.S. Department of Education (Department) is providing parents and other stakeholders information on the issues addressed in Endrew F. and the impact of the Court’s decision on the implementation of the IDEA. Because the decision in Endrew F. clarified the scope of the IDEA’s FAPE requirements, the Department’s Office of Special Education and Rehabilitative Services (OSERS) is interested in receiving comments from families, teachers, administrators, and other stakeholders to assist us in identifying implementation questions and best practices.

1. What were the facts surrounding the Endrew F. decision?

Endrew, a child with autism, attended public school from kindergarten through fourth grade. In April of 2010, Endrew’s parents rejected the 5th grade individualized education program (IEP) proposed by the Douglas County School District. Endrew’s parents believed the proposed IEP was basically the same as the previous IEPs under which their child’s academic and functional progress had stalled. Endrew’s parents subsequently withdrew him from public school and placed him in a private school that specialized in the education of children with autism. Endrew’s behavior in the private school setting improved significantly; his academic goals were strengthened and he thrived. This case arose because Endrew’s parents were unable to obtain tuition reimbursement for the cost of the private school placement. Endrew’s parents sought reimbursement for the private school tuition payments at a due process hearing, and subsequently sought judicial review of the hearing decision in the U.S. District Court for the District of Colorado after the hearing officer did not grant the relief they were seeking. The District Court affirmed the hearing officer’s decision, and they appealed to the U.S. Court of Appeals for the Tenth Circuit. In these proceedings, Endrew’s parents argued that the IEP proposed by the public school was mostly unchanged from his previous IEPs, under which he made “minimal progress.” The Tenth Circuit rejected the parents’ arguments and concluded that Endrew had received FAPE through the district’s IEPs because they were calculated to provide educational benefit that is merely more than de minimis (i.e., more than trivial or minor educational benefit). Endrew’s parents then appealed the case to the U.S. Supreme Court. The Court overturned the Tenth Circuit’s decision.

2. What is the crucial issue that was addressed in the Endrew F. decision?

Endrew F. clarified the substantive standard for determining whether a child’s IEP – the centerpiece of each child’s entitlement to FAPE under the IDEA – is sufficient to confer educational benefit on a child with a disability.

3. What was the Supreme Court’s final decision in Endrew F.?

The Court held that 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. In clarifying the standard, the Court rejected the “merely more than de minimis” (i.e. more than trivial) standard applied by the Tenth Circuit. In determining the scope of FAPE, the Court reinforced the requirement that “every child should have the chance to meet challenging objectives.”¹

4. How is FAPE defined in the IDEA?

Under the IDEA, FAPE is a statutory term.² It is defined to include special education and related services that (1) are provided at public expense, under public supervision and direction, and without charge; (2) meet the standards of the State educational agency (SEA), including IDEA Part B requirements; (3) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (4) are provided in conformity with an IEP that meets the requirements of 34 CFR §§300.320 through 300.324. Further, each child with a disability is entitled to receive FAPE in the least restrictive environment (LRE).³

5. Prior to Endrew F ., what did the Court say about the substantive standard for FAPE?

Prior to Endrew F ., courts relied on the landmark case Board of Education of Hendrick-Hudson Central School District v. Rowley. 458 U.S. 176 (1982) (“Rowley”). In Rowley, the Court held that Amy Rowley, a child with a disability involved in the case, would receive FAPE if her IEP was “reasonably calculated to enable the child to achieve educational benefits.” In Rowley, the Court did not establish any one test for determining educational benefit provided to all children covered by the IDEA. The Court did, however, discuss what appropriate progress would be for a child with a disability who was performing above average in the general education classroom with the supports included in her IEP. In Rowley, the Court emphasized that an IEP had to be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

6. What does “de minimis” mean and why did the Tenth Circuit Court apply the “de minimis” standard in the Endrew F. case?

“De minimis” is a Latin term which means too trivial or minor to consider. Because the Supreme Court in *Rowley* did not establish one particular test for educational benefit, lower courts (Federal District Courts and Circuit Courts) disagreed over how to determine educational benefit and applied different substantive standards. For example, prior to *Endrew F.*, six U.S. Court of Appeals Circuit Courts applied a “merely more than de minimis” standard when considering educational benefit. One of those courts was the U.S. Court of Appeals for the Tenth Circuit, where *Endrew* and his parents lived. Therefore, initially the court applied the “de minimis” standard to *Endrew*’s case. This meant that in order to meet its FAPE obligations, the school district only had to show that the child’s IEP was designed to provide a child with a disability more than trivial or minor educational benefit.

7. How did *Endrew F.* clarify the standard for determining FAPE and educational benefit?

With the decision in *Endrew, F.*, the Court clarified that for all students, including those performing at grade level and those unable to perform at grade level, a school must offer an IEP that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” This standard is different from, and more demanding than, the “merely more than de minimis” test applied by the Tenth Circuit. As the Court stated, “[t]he goals may differ, but every child should have the chance to meet challenging objectives.”

8. Does the standard in *Endrew F.* apply prospectively to IDEA cases?

Yes. The Supreme Court decisively rejected the “merely more than de minimis” standard used by the Tenth and other Circuits; therefore that standard is no longer considered good law. The Court explained, “[a] student offered an educational program providing merely more than de minimis progress from year to year can hardly be said to have been offered an education at all...The IDEA demands more.” Now, as a result of *Endrew F.*, each child’s educational program must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives.

9. Does the standard in *Endrew F.* only apply to situations similar to the facts presented in *Endrew F.*?

No. The standard that the Court announced in *Endrew F.* clarifies the scope of the FAPE requirements in the IDEA and, as such, applies to the provision of FAPE to any IDEA-eligible

child with a disability, as defined by the law. The standard in *Endrew F.* applies regardless of the child’s disability, the age of the child, or the child’s current placement.

10. What does “reasonably calculated” mean?

The “reasonably calculated” standard recognizes that developing an appropriate IEP requires a prospective judgment by the IEP Team. Generally, this means that school personnel will make decisions that are informed by their own expertise, the progress of the child, the child’s potential for growth, and the views of the child’s parents. IEP Team members should consider how special education and related services, if any, have been provided to the child in the past, including the effectiveness of specific instructional strategies and supports and services with the student. In determining whether an IEP is reasonably calculated to enable a child to make progress, the IEP Team should consider 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. As stated by the Court, “any review of an IEP must consider whether the IEP is reasonably calculated to ensure such progress, not whether it would be considered ideal.”

11. What does “progress appropriate in light of the child’s circumstances” mean?

The essential function of an IEP is to provide meaningful opportunities for appropriate academic and functional advancement, and to enable the child to make progress. The expectations of progress in the IEP must be appropriate in light of the child’s unique circumstances. This reflects the focus on the individualized needs of the particular child that is at the core of the IDEA. It also reflects States’ responsibility to offer instruction “specially designed” to meet a child’s unique needs through an IEP.⁶ While the Court did not specifically define “in light of the child’s circumstances,” the decision emphasized the individualized decision-making required in the IEP process and the need to ensure that every child should have the chance to meet challenging objectives. The IDEA’s focus on the individual needs of each child with a disability is an essential consideration for IEP Teams. Individualized decision-making is particularly important when writing annual goals and other IEP content because “the IEP must aim to enable the child to make progress.”⁷ For example, the Court stated that the IEP Team, which must include the child’s parents⁸ as Team members, must give “careful consideration to the child’s present levels of achievement, disability, and potential for growth.”

12. How can an IEP Team ensure that every child has the chance to meet challenging objectives?

The IEP must include annual goals that aim to improve educational results and functional performance for each child with a disability. This inherently includes a meaningful opportunity

for the child to meet challenging objectives. Each child with a disability must be offered an IEP that is designed to provide access to instructional strategies and curricula aligned to both challenging State academic content standards and ambitious goals, based on the unique circumstances of that child. The IEP must be developed in a way that ensures that children with disabilities have the chance to meet challenging objectives, as reflected in the child's IEP goals. Each child's IEP must include, among other information, an accurate statement of the child's present levels of academic achievement and functional performance and measurable annual goals, including academic and functional goals.⁹ This information must include how the child's disability affects the child's involvement and progress in the general education curriculum. How IEP Team members evaluate and assess this information, as well as the establishment of the child's IEP goals, will each contribute to ensuring the child has access to challenging objectives. The IEP Team's effectiveness in gathering and interpreting this information will ensure that, in establishing IEP goals, the child has the opportunity to meet challenging objectives. As the Court stated in *Endrew F.*, "the IEP must aim to enable the child to make progress."¹⁰ Determining an appropriate and challenging level of progress is an individualized determination that is unique to each child. When making this determination, each child's IEP Team must consider the child's present levels of performance and other factors such as the child's previous rate of progress and any information provided by the child's parents.

13. How can IEP Teams determine if IEP annual goals are appropriately ambitious?

As the Court stated, "advancement from grade to grade is appropriately ambitious for most children in the regular classroom;" however, the Court also noted that while these "goals may differ...every child should have the chance to meet challenging objectives."¹¹ In order to make FAPE available to each eligible child with a disability, the child's IEP must be designed to enable the child to be involved in, and make progress in, the general education curriculum.¹² The term "general education curriculum" is "the same curriculum as for nondisabled children."¹³ We have previously clarified that the phrase "the same curriculum as for nondisabled children" is the curriculum that is based on a State's academic content standards. This alignment, however, must guide, and not replace, the individualized decision-making required in the IEP process.

14. How can IEP Teams implement the *Endrew F.* standard for children with the most significant cognitive disabilities?

The Department recognizes that there is a small number of children—those with the most significant cognitive disabilities—whose performance can be measured against alternate academic achievement standards.¹⁵ Alternate academic achievement standards also must be aligned with the State's grade-level content standards. Therefore, annual IEP goals for children with the most significant cognitive disabilities should be appropriately ambitious, based on the

State's content standards, and "reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances."

15. What actions should IEP Teams take if a child is not making progress at the level the IEP Team expected?

An IEP is not a guarantee of a specific educational or functional result for a child with a disability. However, the IDEA does provide for revisiting the IEP if the expected progress is not occurring. This is particularly important because of the Court's decision in *Endrew F.*, which clarifies that the standard for determining whether an IEP is sufficient to provide FAPE is whether the child is offered an IEP reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances. At least once a year, IEP Teams must review the child's IEP to determine whether the annual goals for the child are being achieved.

The IEP Team also may meet periodically throughout the course of the school year, if circumstances warrant it. For example, if a child is not making expected progress toward his or her annual goals, the IEP Team must revise, as appropriate, the IEP to address the lack of progress.¹⁶ Although the public agency is responsible for determining when it is necessary to conduct an IEP Team meeting, the parents of a child with a disability have the right to request an IEP Team meeting at any time. If a child is not making progress at the level the IEP Team expected, despite receiving all the services and supports identified in the IEP, the IEP Team must meet to review and revise the IEP if necessary, to ensure the child is receiving appropriate interventions, special education and related services and supplementary aids and services, and to ensure the IEP's goals are individualized and ambitious. Public agencies may find it useful 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. IEP Teams should use the periodic progress reporting required at 34 CFR §300.320(a)(3)(ii) to inform parents of their child's progress. Parents and other IEP Team members should collaborate and partner to track progress appropriate to the child's circumstances.

16. Must IEPs address the use of positive behavioral interventions and supports?

Where necessary to provide FAPE, IEPs must include consideration of behavioral needs in the development, review, and revision of IEPs.¹⁷ IEP Teams must consider and, if necessary to provide FAPE, include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers.

17. How does the Endrew F. decision impact placement decisions?

Consistent with the decision in Endrew F., the Department continues to recognize that it is essential to make individualized determinations about what constitutes appropriate instruction and services for each child with a disability and the placement in which that instruction and those services can be provided to the child. There is no “one-size-fits-all” approach to educating children with disabilities. Rather, placement decisions must be individualized and made consistent with a child’s IEP. 19 We note that placement in regular classes may not be the least restrictive placement for every child with a disability. The IDEA Part B regulations specify that each public agency must ensure that a continuum of alternative placements (including instruction in regular classes, special classes, special schools, home instruction, placement in private schools, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services.20

18. Is there anything IEP Teams should do differently as a result of the Endrew F. decision?

The Court in Endrew F. held that 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 and expressly rejected the merely more than de minimis, or trivial progress standard. Although the Court did not determine any one test for determining what appropriate progress would look like for every child, IEP Teams must implement policies, procedures, and practices relating to (1) identifying present levels of academic achievement and functional performance; (2) the setting of measurable annual goals, including academic and functional goals; and (3) how a child’s progress toward meeting annual goals will be measured and reported, so that the Endrew F. standard is met for each individual child with a disability. Separately, IEP Teams and other school personnel should be able to demonstrate that, consistent with the provisions in the child’s IEP, they are providing special education and related services and supplementary aids and services; making program modifications; providing supports for school personnel; and allowing for appropriate accommodations that are reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances and enable the child to have the chance to meet challenging objectives.

19. Is there anything SEAs should do differently as a result of the Endrew F. decision?

SEAs should 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. States can help ensure that every child with a disability has an IEP that enables the child to be involved in and make progress in the general education curriculum and is appropriately ambitious in light of the child’s circumstances.21 While many States and school districts are already meeting the standard

established in Endrew F., this is an opportunity to work together to ensure that we are holding all children with disabilities to high standards and providing access to challenging academic content and achievement standards.

20. Has the Endrew F. decision affected parents' due process rights under the IDEA?

No. Parents can continue to use the IDEA Part B mediation and due process procedures if they disagree with IEP Team determinations about the special education and related services that are appropriate and necessary for their child to receive FAPE.²² As reflected in Endrew F., the IDEA provides a mechanism whereby parents may opt to place their child in a private school setting in circumstances where they believe FAPE has been denied. If a court or hearing officer determines that a school failed to make FAPE available in a timely manner prior to enrollment in a private school setting, that the private placement is appropriate, and that the parents provided notice to the school district, parents may recover the costs of the private placement.²³ Nothing in Endrew F. changes or amends these procedural due process rights.