Published March 28, 2017

PETRARCA, GLEASON,
BOYLE & IZZO, LLC
ATTORNEYS AT LAW

U.S. Supreme Court Raises the Bar on FAPE

Last week, the Supreme Court of the United States issued its decision in the case of *Endrew F. v. Douglas County School District.* The decision tackles a thirty-five-year-old question stemming from the U.S. Supreme Court's landmark ruling in *Board of Education of Hendrick Hudson Central School District v. Rowley*: what standard is used to determine whether or not a student received a free appropriate public education ("FAPE")?

Rowley was decided 1982 and held that a FAPE must be provided to all special education students. *Rowley* further required that a FAPE be tailored to the unique needs of a child with a disability by means of an individualized education program ("IEP"). *Rowley* also spelled out that the level of benefits of an appropriate education must be "reasonably calculated" to confer a "basic floor of opportunity," and emphasized that school districts were not required to maximize the potential of a student with disabilities. This has sometimes been referred to as the "serviceable Chevrolet" standard, because students are

19730 Governors Highway, Suite 10, Flossmoor, IL 60422-2083
Telephone: **708.799.6766** | Facsimile: 708.799.6866

not required to be offered a “Cadillac” education.

Somewhat problematically, the *Rowley* decision did not specify a test that courts should employ to determine whether or not a student receives an appropriate education. Instead, the U.S. Supreme Court held that the contours of an appropriate education must be decided on a case-by-case basis, in light of the individualized consideration of the unique needs of each eligible child. Since the *Rowley* decision, school districts, states, state courts and federal courts have developed varying standards for determining whether or not a student had received an appropriate education.

Endrew F. involved a test employed by the Tenth Circuit Court of Appeals for determining whether or not an appropriate education has been afforded to a student. The student in this case, Endrew (“Drew”) F., was diagnosed with autism at an early age, and had received an IEP through his local Colorado school district from preschool through the fourth grade. Drew’s then-fourth grade present levels included behaviors such as screaming in class, climbing over furniture and his peers, and occasionally running away from school. When Drew’s family received the school’s IEP recommendation for fifth grade, they noted that it was

substantially similar to the previous years' IEP, including the present levels descriptions, goals, services and placement. His parents believed that Drew's academic progress had stalled, so they unilaterally removed him to a private school that specialized in students with autism, where Drew progressed.

Drew's parents filed suit seeking reimbursement for their son's private school tuition. Drew's parents did not prevail at the administrative, district court or appellate court levels. In finding against Drew's parents, the Tenth Circuit Court of Appeals explained that it had long interpreted the requirement to provide an appropriate education to mean that the school district only had to confer a an "educational benefit '[that is] merely…more than *de minimis.*'" In applying this standard, the Tenth Circuit found that Drew had been making *some* progress. Thus, the parents' request for reimbursement was denied.

The parents sought an appeal to the U.S. Supreme Court, which on March 22, 2017, issued a unanimous decision by Chief Justice John Roberts rejecting the merely more than *de minimis* standard set out by the Tenth Circuit. The U.S. Supreme Court, in considering the Tenth Circuit's decision against the *Rowley* standard, found that "It cannot be the case that the

Published March 28, 2017

PETRARCA, GLEASON,
BOYLE & IZZO, LLC
ATTORNEYS AT LAW

[Individuals with Disabilities Education 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 Court reasoned that a student offered an educational program providing merely more than *de minimis progress* "can hardly be said to have been offered an education at all" because they would be receiving instruction "that aims so low [to] be tantamount to 'sitting idly…awaiting the time when they [are] old enough to drop out.'"

The U.S. Supreme Court's holding is clear: "The IDEA demands more." However, despite this clear holding, the Court refused to provide a bright-line standard for how to determine what amounts to an appropriate education. In fact, the Court stated that it was refusing to spell out such a standard because "the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." In remanding the case to the Tenth Circuit, the Court did explain, however, that a 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."

Although the Seventh Circuit – which is the United States Court of Appeals for Illinois, Wisconsin and Indiana – had previously applied a slightly different standard than the Tenth Circuit to determine what constituted an appropriate education, the *Endrew F.* case will certainly have an impact. The current standard used by the Seventh Circuit is that a school district must offer an IEP that is likely to produce educational progress, not regression or trivial advancement, and that a school district must offer more than mere trivial educational benefit to students in order to demonstrate an offer of an appropriate education. While this is not the *de minimis* standard ruled in *Endrew F.*, the Seventh Circuit's standard for an appropriate education is still an arguably low bar, requiring just barely more than trivial educational benefits. Accordingly, we anticipate that this issue will be ripe for additional lawsuits.

If you have additional questions about the U.S. Supreme Court's determination, the current standard used by the Seventh Circuit to determine an appropriate education, or this issue in general, please contact one of our attorneys in Flossmoor (708-799-6766) or Oak Brook (630-928-1200).