YOUNG, MINNEY & CORR, LLP

LEGAL ALERT

IEP Teams Must be Aware of New Higher Standard When Making an Offer of FAPE

On March 22, 2017, the Supreme Court of the United States ("Supreme Court") in *Endrew F. v. Douglas County School District*, raised the standard for what it means to provide a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Previously, the Supreme Court held in *Hudson Central School Dist. v. Rowley* (1982), that a child has received a FAPE if the IEP is "reasonably calculated to enable the child to receive educational benefits," also referring to this standard as "some educational benefit." However, the Supreme Court confined its ruling to that particular case rather than creating a "bright-line rule." Since *Rowley*, the "some educational benefit" standard has been interpreted by many circuit courts, including the Ninth Circuit, which governs the standard for California public schools under federal law, to require schools to show the student made more than *de minimis* progress in his/her educational program. Thus, if students were making some educational progress, so long as it was more than *de minimis*, schools were generally found to be providing FAPE.

In *Endrew*, the Supreme Court clarifies and heightens the FAPE standard: "To provide a FAPE, "a school must offer an IEP reasonably calculated to enable a child **to make progress appropriate in light of the child's circumstances**." To meet this standard, first and foremost, each of the required procedural elements of the IEP should be "carefully constructed" based on the individual child. When completing all procedural elements, like goals and present levels of performance ("PLOP"), schools 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." In addition, the child's educational program must, "be appropriately ambitious in light of his circumstances." So long as a school can show its work in this manner, however, the Court explicitly encourages deference to the "expertise and exercise of judgement by school authorities."

Recommendations

Based on *Endrew*, short of legislation amending the IDEA, the new FAPE standard will apply to all public schools, including charter schools. Further, because *Endrew* clarifies existing law, it may be used by the Office of Administrative Hearings or courts in reviewing challenges to IEPs already in place. While we anticipate many questions about this standard will be further addressed by the courts, we can provide some immediate practical guidance moving forward to allow charter schools to offer a cogent and responsive explanation for IEP team decisions:

- Ensure that PLOPs and the notes section of the IEP summarize the data and information considered by the IEP team to determine the "child's circumstances."
- Avoid goals, transition, plans and accommodations that merely complete the form—complete all procedural requirements of the IEP considering the unique circumstances of the child.
- The IEP team needs to create goals that are appropriately ambitious for that child, meaning the IEP team must look at the unique needs and potential for the individual student.
- Thoughtfully use the notes section of the IEP to summarize discussions of assessments, accommodations, services, least restrictive environment/placement, and parent questions. In this way, the IEP team can show

its work and that the IEP is reasonably calculated to enable the child to make progress in light of that child's circumstances.

For additional information about the ruling and its impact and for assistance in creating or updating school policies or IEPs to conform with these requirements, please contact Megan Moore at mmoore@mycharterlaw.com or Lisa Corr at lcorr@mycharterlaw.com or at 916-646-1400.

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