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The disparity between what Congress promised and what it delivers creates financial challenges for education leaders as they seek funding to provide for all students.

Meeting the Needs of Students with Disabilities

By Charles J. Russo, J.D., Ed.D. & Allan G. Osborne, Jr., Ed.D.

The Individuals with Disabilities Education Act (IDEA, 2005) requires states, through local school boards, to provide students with disabilities with a free appropriate public education (FAPE) in the least restrictive environment consistent with the content of their Individualized Education Programs (IEPs). As important as it is to educate students with disabilities, the cost of serving these children is much higher than that of their peers in regular education.

In the IDEA, Congress included language stipulating that the federal government would pay up to 40% of the excess cost associated with educating children with disabilities (20 U.S.C.A. § 1411(a)(2) (A)(ii)). However, Congress has never come close to providing this level of funding. The disparity between what Congress promised and what it delivers creates financial challenges for education leaders as they seek funding to provide for all students.

The first Supreme Court review of the Education for All Handicapped Children Act, renamed the IDEA in 1990, addressed the level of services to be afforded children with disabilities. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), a dispute from New York over whether a student with a hearing impairment was entitled to the services of a sign-language interpreter, the Supreme Court ruled that the local board did not have to provide her with such assistance. The Court held that the board only had to offer the student a program providing “some educational benefit” (p. 200) rather than one designed to maximize her abilities.

Over the years, while paying lip service to the importance of *Rowley*’s “some educational benefit” standard, the Third Circuit (*Polk v. Central Susquehanna Intermediate Unit 16*, 1988, p. 184; *Oberti v. Board of Education of the Borough of Clementon*

School District, 1993) and Sixth Circuit (*Deal ex rel. Deal v. Hamilton County Department of Education*, 2004) upped the ante by requiring boards to provide students with IEPs with programs affording them “meaningful benefit.”

Most recently, the Tenth Circuit upheld *Rowley*’s “some educational benefit” standard in *Andrew F. v. Douglas County School District RE-1* (2015). In *Andrew F.*, the panel affirmed that a school board in Colorado complied with the IDEA by providing a child with autism with a program granting him “some educational benefit.” Later courts have interpreted this standard as requiring more than trivial or *de minimis* educational progress, adding to the confusion by failing to define what boards must provide.

In light of the split between federal circuit courts, the Supreme Court entered the fray over the level of services school boards must provide students with disabilities in order to establish a national standard.

Andrew F. v. Douglas County School District RE-1

Andrew F. involved a student in Colorado with autism and attention deficit hyperactivity disorder whose disabilities affected his cognitive functioning, language, and reading skills along with his social and adaptive abilities. The student attended a public school from preschool to fourth grade, receiving special education and related services pursuant to his IEP. The child’s parents, dissatisfied with their son’s progress in fourth grade, rejected the IEP educators developed for the fifth grade, removed him from the public school, and enrolled him in a private school that specialized in educating children with autism.

On removing their son from the public school and placing him in the private

setting, the parents filed a due process complaint seeking tuition reimbursement for the latter. The parents claimed that public school officials committed procedural errors by not adequately reporting their son's progress, not conducting a functional behavioral assessment (FBA), and not implementing a behavior intervention plan (BIP). The parents further contended that the proposed IEP was substantively inadequate because it did not allow their son to make meaningful progress in school.

Judicial History

Convinced that school officials provided the child with a FAPE, an administrative law judge (ALJ) denied the parents' request for tuition reimbursement. Subsequently, in an unpublished opinion, the federal trial court in Colorado upheld the ALJ's adjudication on the basis that the parents failed to prove board officials violated the IDEA by not providing their son with a FAPE (*Andrew F. v. Douglas County School District RE-1*, 2014).

On further review, the Tenth Circuit affirmed in favor of the school board (*Andrew F. v. Douglas County School District RE-1*, 2015). As an initial matter, the panel agreed that the procedural errors the parents alleged did not deny their son a FAPE. While educators conceded that their descriptions of the child's progress on the IEP could have been better, the court relied on substantial evidence in the record that the parents were well aware of the student's progress and actively participated in his education.

The court pointed out that the parents were in constant communication with their son's teacher via face-to-face meetings as well as a notebook they sent back and forth about his behavior and other school activities. In addition, educators sent the parents quarterly progress reports along with report cards. Therefore, the court was satisfied that any gaps in reporting on the

goals and objectives of the child's IEP did not prevent the parents from participating meaningfully in their son's education.

The Tenth Circuit was unable to uncover the procedural defect the parents alleged when educators chose not to conduct an FBA or develop a BIP for their son. Noting that the student was never subjected to a disciplinary change in placement, the court remarked that the IDEA required educators only to consider behavioral interventions. According to the court, educators met their duty because the IEPs included behavior plans that identified some of the child's problem behaviors and spelled out ways to manage and reduce his misbehaviors.

The issue presented in Andrew F., namely whether children with disabilities should receive educational programming designed to provide "some education benefit" or "meaningful benefit" is, to say the least, difficult and will likely be costly for school boards.

On another aspect of the procedural issue, the court recognized that educators were in regular contact with the parents about their son's actions as administrators arranged for autism and behavioral specialists to meet with his team to devise a new IEP for the child. The court observed that the new IEP was never implemented because the parents withdrew their son from school.

These facts persuaded the court that the record was filled with ways in which educators dealt with the child's behavioral issues. In sum, the court agreed that board officials complied with the IDEA by considering behavioral interventions in

determining that the child did not need a formal FBA and/or BIP.

The court began its analysis of the parents' substantive challenges to their son's IEP by reviewing their claim that the Tenth Circuit adopted the heightened meaningful educational benefit standard by which to judge the adequacy of his FAPE. Citing its own precedent (*Urban v. Jefferson County School District R-1*, 1996; *Thompson R2-J School District v. Luke P.*, 2008), the court dismissed this claim, emphasizing that it always "subscribed to the Rowley Court's 'some educational benefit' language in defining a FAPE" (p. 1338). In fact, the court explained that it specifically declined to follow the higher standard of meaningful educational benefit advanced by the Third Circuit (*Sytsema v. Academy School District No. 20*, 2008).

Rounding its analysis, the court considered whether the board's proposed IEP met Rowley's "some educational benefit" standard. Relying on evidence of progress the child made under his previous IEPs, the court agreed that this strongly suggested that the IEP proposed for his fifth grade year was reasonably calculated to confer educational benefit. The court also decided that the child's annual goals and objectives increased in difficulty from one year to the next, reflecting the progress he was making.

Further, the court concluded that educators worked collaboratively with the child's parents as well as other service providers to address his behaviors as they arose while calling in specialists to address his actions when they escalated and so affirmed that the proposed IEP offered the child a FAPE.

Discussion

In a perfect world, districts would not have to worry about having adequate financial resources to serve all children. However, at a time when the economy is less than robust, acquiring the resources to educate

all children presents educators with challenges. At the same time, educators do not want to be forced to make utilitarian judgments about which children are entitled to costly educational services.

The issue presented in *Andrew F.*, namely whether children with disabilities should receive educational programming designed to provide “some education benefit” or “meaningful benefit” is, to say the least, difficult and will likely be costly for school boards. Moreover, while the Supreme Court is one member short of a full bench insofar as the late Justice Scalia has yet to be replaced, its having granted review more than seven months after his passing suggests that the Justices will reach a majority judgment on the appropriate standard.

Regardless of what standard the Supreme Court enunciates, it is important to recall that the “I” in IDEA stands for “individuals.” In other words, the Court cannot create a “one size fits all” standard for children with disabilities. Even if the Court creates a clearer standard, a meaningful benefit for one child may be a minimal benefit for another student.

Consequently, regardless of the outcome in *Andrew F.*, courts likely will continue evaluating the standard on a case-by-case basis in light of each child’s unique needs. Such an outcome is not necessarily bad because each case will help develop a clearer understanding of what is required of school boards even as doing so raises costs when they must provide heightened levels of services.

Disputes over the appropriate standard for providing FAPes for students with disabilities are not exercises in semantics. “Some” can mean more than nothing while “meaningful” suggests something extra. While some courts have used

“meaningful” to describe a standard as being more than trivial, the Third Circuit made it clear that it referred to a standard designed to confer significant benefits on students. Even though this standard sets a higher criterion, it stops short of ordering boards to offer the best possible education or one maximizing the potential of children.

Even though this standard sets a higher criterion, it stops short of ordering boards to offer the best possible education or one maximizing the potential of children.

If anything, should the Supreme Court mandate a “meaningful benefit” standard requiring more than *de minimis* programming in *Andrew F.*, it is unlikely to end litigation over what constitutes a FAPE. Instead, debates will rage over whether children must receive programming designed to help them achieve in a manner consistent with their abilities by having educational opportunities equal to those of their classmates who are not disabled. What remains of paramount importance for SBOs, their boards, and other educational leaders, are questions about how much more such a change would cost school systems dealing with already tight budgets and whether Congress will offer additional financial aid to enable boards to educate all children equitably.

Conclusion

Whether the Supreme Court unequivocally establishes a clear standard of educational programming school boards must offer students with disabilities in *Andrew F.* remains to be seen. Yet, even if the Court creates such a standard, given

the individualized nature of IEPs, achieving it can be elusive.

What is relatively certain, though, is that regardless how the Court rules, litigation will continue over how much more boards must spend to educate students with disabilities. Accordingly, it behooves SBOs and other education leaders to keep abreast of developments such as *Andrew F.* in the ever-changing world of the law of special education.

References

Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).

Deal ex rel. Deal v. Hamilton County Department of Education, 392 F.3d 840 (6th Cir. 2004).

Andrew F. v. Douglas County School District RE-1, 2014 WL 4548439 (D. Colo. 2014), 798

F.3d 1329 (10th Cir. 2015), *cert. granted* --- S. Ct. ---, 2016 WL 5416228 (Mem) (Sept. 29, 2016).

Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 *et seq.* (2005), as cited.

Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1204 (3d Cir. 1993).

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

Sytsema v. Academy School District No. 20, 538 F.3d 1306 (10th Cir. 2008).

Thompson R2-J School District v. Luke P., 540 F.3d 1143 (10th Cir. 2008).

Urban v. Jefferson County School District R-1, 89 F.3d 720 (10th Cir. 1996).

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