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Second Circuit Holds *Endrew F.* Did Not Heighten FAPE Standard in Second Circuit; Rejects Parents' Procedural Claims and Request for Private Transition Program

On March 23, 2018, the U.S. Court of Appeals for the Second Circuit issued an important precedential opinion in *Mr. P. & Mrs. P. v. West Hartford Board of Education*, 885 F.3d 735, (2d Cir. 2018).¹ In its decision, the Second Circuit held that the U.S. Supreme Court's recent decision in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), did not heighten the standard to assess whether a school district offered a student an individualized education program ("IEP") that provided a free appropriate public education ("FAPE") in jurisdictions covered by the Second Circuit (Connecticut, New York and Vermont). The Second Circuit also ruled in favor of the school district, West Hartford, on all other issues, including numerous procedural claims, and rejected the parents' request for a private transition program similar to the one offered by the district.

I. Background

The student in this case had been referred by his parents to a planning and placement team ("PPT") meeting in the spring of his sophomore year after a decline in his grades and attendance. He had recently become eligible for a Section 504 plan for ADHD in December of 2011 and the school's student assistance team had convened earlier that month after the student had been hospitalized from home. The student stopped attending school in February and the district provided home tutoring to him at that time.

At the initial referral PPT in March of 2012, the parents noted that the student had begun to improve with his medication and the PPT determined he was not eligible for special education. The parents made a second PPT referral in April 2012 after the student was hospitalized a second time from the community for emotional concerns. The district recommended a psychiatric consultation and behavioral rating scales as part of an initial evaluation (the student did not have any academic concerns). The PPT then reconvened in May of 2012 to review the evaluations. The PPT noted that, while the student had been successful with his tutoring, the district extended the tutoring through the summer as compensatory services because there had been some inconsistencies in the tutor's provision of the services. The PPT agreed to reconvene in June of 2012, and at the June PPT, the team determined the

¹ http://www.ca2.uscourts.gov/decisions/isysquery/74e11b3a-5dc6-4887-8df3-287e3aaa7b5d/16/doc/16-3618_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/74e11b3a-5dc6-4887-8df3-287e3aaa7b5d/16/hilite/

student was eligible for special education under the category of emotional disturbance and recommended the student attend STRIVE—the district’s high school program for students who require an alternative setting with behavioral supports—for the 2012-2013 school year, the student’s junior year.

The student did very well at STRIVE during his junior year. His attendance improved significantly, he earned grades in the A and B range, passed the CAPT test, was consistently on the highest level for behavioral performance, and mastered his goals and objectives. Based on his success at STRIVE during his junior year, the PPT met in May of 2013 for his annual review and recommended a partial day transition back to his home high school at the beginning of the 2013-2014 school year for his senior year. However, in the fall of 2013, the student’s senior year, he had several unexcused absences from class at his home high school and, when asked about his class attendance by school staff, threatened to leave the school. The district and the parents agreed to return the student full-time to the STRIVE program for the remainder of his senior year. Back at STRIVE full-time, the student again did very well academically and behaviorally, with the exception of one physical altercation he got into with another student to try to defend a female classmate. Over the course of the student’s time at STRIVE, he also participated in the district’s Career and Vocational Education class, which included instruction in skills such as completing resumes and job applications, researching and developing career goals, and visiting community colleges.

At the student’s annual review in June of 2014, the PPT recognized that the student had met the district’s academic course graduation requirements, but agreed he required additional transition services. As a result, the PPT recommended placement at the district’s post-secondary program, ACHIEVE for the 2014-2015 school year. As part of the ACHIEVE program, the PPT recommended the student’s program include working at various work sites in the community with a job coach, transition-related instruction, including both classroom and community-based components, and counseling. The PPT also noted the opportunity for the student to attend community college part-time as part of his program.

The parents rejected the PPT’s proposed post-secondary program at ACHIEVE and instead requested the district fund the student’s attendance at a private, for-profit transition program and requested two years of compensatory education. Believing that it had provided an appropriate program for the student at STRIVE and had offered an appropriate program at ACHIEVE, the district denied the parents’ requests.

II. Due Process and the Parents’ Initial Appeal to District Court

The parents filed for due process, alleging a host of procedural violations over the relevant two-year period, that the district had not provided FAPE to the student at STRIVE and that ACHIEVE was not an appropriate placement. The parents requested compensatory education and placement at their preferred private, for-profit transition program.

After seven days of hearing, the due process hearing officer ruled for the district on all claims in October of 2014. The hearing officer found that the district (1) had either complied with

the IDEA's procedural requirements or any procedural errors did not amount to a denial of FAPE; (2) the district had provided the student with FAPE; and (3) the proposed program at ACHIEVE was appropriate with the exception that the district was told to clarify that the student would receive private transportation at ACHIEVE until the PPT determined he had the skills to use other means of transportation.

The parents appealed the hearing officer's decision to the U.S. District Court for the District of Connecticut. On September 29, 2016, the District Court granted the district's motion for summary judgment on the administrative record, and thus affirmed the hearing officer's decision in its entirety. The parents then appealed the District Court's decision to the Second Circuit.

III. Impact of *Andrew F.* Decision During Second Circuit Appeal

Significantly, after the parents filed their initial brief in the Second Circuit appeal, the Supreme Court issued its decision in *Andrew F.*, which addressed the standard of FAPE required by the IDEA. In 1982, the Supreme Court had held in *Board of Education v. Rowley*, 458 U.S. 176, 207 (1982), that school districts must offer an IEP that is "reasonably calculated to enable the child to receive educational benefits." In the following 35 years since *Rowley*, different lower courts had interpreted that standard differently. As an example, the U.S. Court of Appeals for the Tenth Circuit had held that the *Rowley* standards required an IEP to provide an "educational benefit that is merely . . . more than *de minimis*." *Andrew F.*, 137 S. Ct. at 997 (brackets omitted).

In its March 22, 2017 decision, the Supreme Court in *Andrew F.* rejected the Tenth Circuit's "merely more than *de minimis*" standard. In doing so, the Supreme Court clarified (but did not overrule) its *Rowley* standard and held 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.*, 137 S. Ct. at 999.

While after *Andrew F.* was decided, it was clear that the Tenth Circuit's "*de minimis*" standard did not pass muster, it was an open question whether other courts' interpretations of *Rowley*'s FAPE standard would survive *Andrew F.* Indeed, education and advocacy groups, as well as lawyers, had varying opinions about whether *Andrew F.* raised the FAPE standard across the board or if its holding was limited to courts that used the "*de minimis*" standard.

Addressing this question squarely, West Hartford successfully argued in *Mr. P.* that the Second Circuit's existing FAPE standard was consistent with *Andrew F.* In agreeing with the district, the Second Circuit held that:

Prior decisions of this Court are consistent with the Supreme Court's decision in *Andrew F.* Hence, this Court has emphasized that the substantive adequacy of an IEP

is focused on whether an IEP was ‘reasonably calculated to enable the child to receive educational benefits’ and ‘likely to produce progress, not regression.’

Mr. P., 885 F.3d at 757.

Thus, with this precedential decision, it is now clear that in the Second Circuit (including Connecticut, New York and Vermont), *Andrew F.* did not change or raise the substantive standard to analyze whether an IEP offers a student FAPE.

IV. Favorable Ruling on the Merits

A. FAPE

After addressing the FAPE standard issue, the Second Circuit concluded that the district met its obligation to provide or offer FAPE to the student. The court noted that, even before the student was formally identified to be eligible under the IDEA in his sophomore year, the district addressed the student’s needs by offering accommodations related to grades and schoolwork, providing additional help and homebound tutoring when the student refused to attend school. The court also recognized that the district provided the student with FAPE during his junior and senior years at the STRIVE program, where he passed the CAPT test, achieved mostly As and Bs, and met the district’s graduation requirements. The court further noted that the student had also made social, emotional and behavioral progress at STRIVE, and that the student even participated in school athletic programs at his home high school. In its FAPE analysis, the court put particular emphasis on the fact that STRIVE’s curriculum was aligned with the district’s general education curriculum and his academic progress was indicative of his overall progress. The court explained that “[w]hile [grades are] not dispositive, [the student’s] steady and timely progression through each grade and his much improved grades and test scores indicate that he made substantial progress at STRIVE.” *Mr. P.*, 885 F.3d at 759.

The court also concluded that, with the clarification to the student’s transportation identified by the hearing officer, the district’s proposed ACHIEVE program was reasonably calculated to allow the student to continue to make progress in light of his circumstances.

B. Procedural Claims

In addition to arguing that the district did not provide IEPs that provided or offered FAPE, the parents claimed that the district violated numerous procedural requirements of the IDEA. Under the IDEA, a procedural violation does not entitle a parent to relief unless it impedes the student’s right to FAPE, causes a deprivation of educational benefits or significantly impedes the parents’ opportunity to participate in the PPT process.

The Second Circuit rejected all of the parents’ procedural claims and held that the district either met the procedural requirements of the IDEA or that any procedural error did not

affect the parents' participation in the PPT process or the student's receipt of FAPE. Two particularly noteworthy procedural claims the court rejected include those relating to child find and the parents' demands for information about the qualifications of paraprofessionals who might have worked with the student in the ACHIEVE program. An analysis of these procedural issues is below:

- **Child find**: The parents argued that the district violated its child find obligation essentially by not identifying the student earlier than it did. The court noted that, for a district to violate the child find requirement, a parent “must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.” *Mr. P.*, 885 F.3d at 750. The court noted that reasonable suspicion of a disability existed after the student's second hospitalization in April of 2012. The PPT reconvened at that time and recommended an initial evaluation, and thus the court determined the district complied with its child find obligation. The court held that:

The District acted reasonably: it provided [the student] with immediate support and accommodations when he began having trouble in December; it ordered a psychological evaluation and psychiatric consult when [the student]'s trouble persisted; and it found [the student] eligible for special education a month after the evaluation and consult were complete. All told, three months—during which time there were three PPT meetings, a psychological evaluation, and a psychiatric consult—intervened between the time the parents initially referred [the student] for special education and the meeting where the district found [the student] eligible. We therefore agree with the district court that the District acted with sufficient expedition once it had a reasonable suspicion that [the student] might require special education.

Id. at 751-52.

- **Providing qualifications of paraprofessionals**: The court rejected the parents' claim that failing to provide the parents with the specific qualification of the paraprofessionals who would work with the student in the ACHIEVE program constituted a procedural violation of the IDEA. The court first recognized that the parents “cite[d] no authority for the proposition that the District was required to provide them with the specific qualifications of the paraprofessionals for the proposed ACHIEVE program.” The court further explained that, when challenging a district's proposed program, “[r]ather than focusing on the qualifications of the paraprofessionals expected to staff the program, the appropriate inquiry is into the nature of the program actually offered in the written plan.” *Mr. P.*, 885 F.3d at 755 (internal quotation marks omitted). The court also noted that the special education teacher from ACHIEVE attended the June 2014 PPT meeting to explain the ACHIEVE program to the parents, and the court observed that the paraprofessionals who worked in ACHIEVE had between 8 and 25 years'



experience and had worked with students with similar profiles. The court concluded that the district did not commit a procedural violation by not providing specific details about the paraprofessional staff beyond the information it did provide.

V. Practical Implications of *Mr. P. & Mrs. P. v. West Hartford*

Mr. P. and Mrs. P. v. West Hartford Board of Education is a welcome decision for school districts in Connecticut. In the wake of *Endrew F.*, this case reaffirmed that schools in Connecticut have been adhering to the proper FAPE standard all along. In addition, its analysis of procedural claims, particularly with respect to child find obligations, will serve as useful guidance to school districts, especially when navigating the onset of mental health issues. Moreover, *Mr. P.* is also important in that it acknowledges the appropriateness of a robust and comprehensive district-run post-secondary transition program. We encourage special education and pupil personnel administrators to review this decision, which is now binding precedent for federal courts in Connecticut.

Shipman & Goodwin LLP Attorney Susan C. Freedman argued this case at the Second Circuit. Attorneys Freedman, Peter J. Murphy and Peter J. Maher were on the brief.

Questions or Assistance:

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