Legal Alert

KEANE & BEANE P.C.
ATTORNEYS AT LAW

Multi-Faceted Law Firm. Singular Client Focus

www.kblaw.com

Contact:
Stephanie M. Roebuck
Keane & Beane, P.C.
sroebuck@kblaw.com
P (914) 946-4777
F (914) 946-6868

White Plains Office
445 Hamilton Avenue
White Plains, NY 10601
P (914) 946-4777
F (914) 946-6868

Fishkill Office
200 Westage Business Center
Suite 120
Fishkill, NY 12524
P: 845 896-0120

ENDREW F. v. DOUGLAS CTY. SCH. DIST.
The Supreme Court Rules on What is a Free and Appropriate Education

March 22, 2017

Keane & Beane, P.C.

Education Law Practice

Stephanie L. Burns
Ralph C. DeMarco
William Kang
Ronald A. Longo
Stephanie M. Roebuck
Jaclyn G. Goldberg
Suzanne E. Volpe

The Supreme Court of the United States issued a decision today in the case of *Endrew F., et al. v. Douglas Cty. Sch. Dist.* In this decision, the Supreme Court sets forth the standards of what is a free and appropriate education ("FAPE") under the Individuals With Disabilities Act ("IDEA"). This unanimous decision revisits the Court's seminal decision in *Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), and provides guidance for Committees on Special Education regarding the recommendations of programs for classified students.

The facts in *Endrew F.* are not integral to the Court's ruling, but as background, these are the particulars: the student has a diagnosis of autism and received special education services through the school district from preschool through fourth grade. His parents, who argued that he was no longer making progress and that his Individual Educational Program ("IEP") was similar to previous recommendations in his IEPs, removed him from public school and parentally placed him in a special education school where he made progress. The parents sought tuition reimbursement from the school district, which was denied on the administrative level, the district court level and at the Tenth Circuit Court of Appeals. In determining that Endrew F. received a FAPE, the Circuit Court ruled that IEPs are adequate so long as the program is calculated to provide "educational benefit [that is] merely…more than *de minimus*" and that the program is "reasonably calculated to enable [the student] to make some progress." The parents appealed to the Supreme Court.

The Supreme Court vacated the Tenth Circuit decision and remanded the case for further review, based upon the standard the Tenth Circuit used in determining whether Endrew F. was offered FAPE. In its decision, the Supreme Court sets forth standards, but provides no "bright line" rules, recognizing that the IDEA calls for individualized programs based upon the unique needs of students.

Initially, the Supreme Court re-states the obligation of school districts under the IDEA and *Rowley*, namely, "a school must offer an IEP reasonably calculated to enable a child to make progress in light of the child's circumstances." The Court acknowledges that in determining what is reasonably calculated will be a "prospective judgment" on the part of school officials, whose expertise, along with the parents' input should be considered. In this regard, the Court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal."

In determining reasonableness, the programmatic instruction "offered must be '*specially* designed' to meet a child's '*unique* needs' through an '*[i]ndividualized* education program." (Emphasis provided, citing the IDEA, §§1401(29), (14)). For classified students placed in the mainstream (which the Court notes is the preference under the IDEA), measurement of the reasonableness standard will focus on achieving passing marks and advancing from grade to grade.

For students not fully integrated in the mainstream, the Court recognizes that *Rowley* offered no guidance regarding the reasonableness standard. Indeed, if it is not likely that a student will be able to achieve on grade level in the mainstream setting, then the IEP "need not aim for grade-level advancement. But his 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." The Court states specifically that the standard "is markedly more demanding than the 'merely more *de minimus*' test" that the Circuit Court used to deny the parents relief. As the Court wrote, "It cannot be the case that the [IDEA] 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 minimus* progress for those who cannot." Ultimately, what this means is that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

In ruling for the parents on its review of the Tenth Circuit's ruling, the Court was careful to reject the parents' stated standard for appropriateness under the IDEA. According to the Court, the parents posited that to achieve FAPE the program must provide "an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities." The Court found that such a standard was not required either by the IDEA or its previous ruling in *Rowley*.

The Court's decision ends with language cautioning fact-finders who will be charged with making decisions as to FAPE moving forward, to wit:

"We will not attempt to elaborate on what 'appropriate' progress will look like from case to case. It is the nature of the [IDEA] and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' At the same time, deference is based on the application of expertise and the exercise of judgement by school authorities."

Ultimately, under *Endrew F.*, CSEs maintain the responsibility to prospectively recommend a program that will provide a classified student educational opportunities to learn, tailored to their unique needs, and which allows them to make progress consistent with those unique needs. The focus will rest on can the CSE justify is recommendation of the program as providing all the elements needed to allow the student to make progress that is more substantial than *de minimus* given the student's specific disability and how that impacts him and his learning.

Keane & Beane attorneys look forward to working with you if you have any questions about this decision or program recommendations in light of same.

KEANE & BEANE P.C.
ATTORNEYS AT LAW

Multi-Faceted Law Firm. Singular Client Focus

www.kblaw.com

About Our Firm:

Located in White Plains, NY, Keane & Beane has provided the highest quality legal counsel to its clients – in the Hudson Valley and beyond – for over 30 years. At Keane & Beane, you get the best of two worlds: The breadth and depth of professionals and practice areas usually found only at a large law firm, with the accessibility, personalized service and loyalty to clients of a smaller firm. Our Practice Areas are Business Transactions, Construction, Education, Elder Law, Environmental Law, Intellectual Property & Technology Law, Labor & Employment, Land Development & Zoning, Litigation, Municipal Law, Real Estate and Trusts & Estates.

Please visit www.kblaw.com and feel free to contact any of our attorneys. If you need immediate assistance, please contact our Office Manager, Barbara Durkin, at (914) 946-4777 or bdurkin@kblaw.com