

SPECIAL EDUCATION LEGAL ALERT

Perry A. Zirkel
© May 2017

This latest monthly legal alert examines the immediate effects of the Supreme Court's *Endrew F.* decision on current cases specific to the substantive appropriateness of IEPs. It follows the usual format of a two-column table, with highlights (on the left) and practical implications (on the right). For a detailed analysis, see the following article, which will be posted after publication in late May at perryzirkel.com:

Perry A. Zirkel, "The Supreme Court's Decision in *Endrew F. v. Douglas County School District RE-1*: A Meaningful Raising of the Bar," *West's Education Law Reporter* (May 2017).

As described in the special, second legal alert in March 2017, the Supreme Court ruled in *Endrew F. v. Douglas County School District RE-1* that the substantive standard for FAPE under the IDEA is that the IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The court decisions within the immediate few weeks thereafter illustrate whether this refinement of *Rowley* is, as *Endrew*'s attorney asserted, a "game changer."

The clear majority of the court decisions during this limited post-*Endrew F.* period have affirmed district-favorable substantive FAPE rulings, which hearing officers had based on a pre-*Endrew F.* standard:

- In *Davis v. District of Columbia* (D.D.C. 2017), the court applied stricter scrutiny than did the hearing officer to reach the same district-favorable ruling for a mainstreamed child with SLD.
- In *Brandywine Heights Sch. Dist. v. B.M.* (E.D. Pa. 2017), the court reached the same result under *Endrew F.* as the hearing officer had obtained with the "meaningful benefit" standard for a child with autism in a self-contained placement.
- In *A.G. v. Bd. of Educ.* (S.D.N.Y. 2017), the court's affirming substantive FAPE analysis did not seem to differ from the hearing and review officer for a mainstreamed child with SLD.

It is too early to be definitive, but thus far the courts have not found *Endrew F.* to be a game change in the dramatic sense of a dramatic reversal in the pro-district outcome skew for substantive FAPE issues.

Although certainly subject to more experience, as the attorneys and judges become more familiar with the nuances of *Endrew F.*, the early decisions seem to suggest that courts have not clearly applied the *Endrew F.* Court's distinction from the mainstreamed context of *Rowley* and its seeming emphasis on the individual child's potential as another major factor.

<ul style="list-style-type: none"> • In <i>E.D. v. Colonial Sch. Dist.</i> (E.D. Pa. 2017), the court concluded that <i>Endrew F.</i> was not higher than the hearing officer’s “meaningful benefit” analysis, affirming the outcome for a mainstreamed child with SLI • In <i>K.M. v. Tehachapi Unified Sch. Dist.</i> (E.D. Cal. 2017) and <i>N.G. v. Tehachapi Unified Sch. Dist.</i> (E.D. Cal. 2017), the court affirmed the district-favorable substantive FAPE rulings with regard to two separate children with autism • In <i>T.M. v. Quakertown Cmty. Sch. Dist.</i> (E.D. Pa. 2017), the district-favorable outcome was the same with regard to a child with autism in a self-contained class as the hearing officer had decided under the “meaningful benefit” standard. 	<p>One of the significant baseline variables in such a pre- to post- <i>Endrew F.</i> analysis is whether the jurisdiction had previously adopted a “some benefit” or a “meaningful benefit” analysis. However, this factor has not been as consistently distinctive as one might have expected.</p> <p>Overall, the results for the first few weeks is that <i>Endrew F.</i> has not yet resulted in an outright reversed ruling concerning the substantive appropriateness of an IEP, but that its ad hoc, “it depends” formulation leaves substantial latitude for wide differences in outcome in light of the circumstances of each case.</p>
<p>In a second, smaller group of decisions, the courts have remanded the district-favorable ruling back to the hearing officer to reconsider in light of <i>Endrew F.</i>:</p> <ul style="list-style-type: none"> • In <i>M.C. v. Antelope Valley Union High Sch. Dist.</i> (9th Cir. 2017), the federal appeals court send the case back to the district court to determine whether it would reach the same district-favorable ruling under <i>Endrew F.</i> that it had obtained under meaningful benefit standard, with “commensurate opportunity” translation • In <i>C.D. v. Natick Pub. Sch. Dist.</i> (D. Mass. 2017), the court summarily remanded the case back to the hearing officer to determine whether the standard applied was different from <i>Endrew F.</i> and, if so, whether the outcome would be the same. 	<p>This smaller group of decisions fits more in an intermediate, inconclusive category than a definitive or dramatic game-changing characterization, because on remand the outcome could be either the same or the opposite, depending on not only the interpretation of the extent of the difference but also the application of this difference, which may not necessarily reverse the result.</p> <p>In these decisions, the reviewing court did not carefully or directly address this two-part analysis, instead delegating it to the lower adjudicative level.</p>
<p>In only one case thus far has the court interpreted <i>Endrew F.</i> with marked expansiveness, although only to affirm a parent-favorable ruling rather than to reverse a district-favorable one.</p> <ul style="list-style-type: none"> • In <i>Parish Sch. Dist. v. A.H.</i> (W.D. Ark. 2017), the court affirmed the hearing officer’s ruling that the successive BIPs were not substantively appropriate, first concluding that <i>Endrew F.</i> is “markedly more demanding” than the violated “some benefit” standard and second, in dicta, suggesting that <i>Endrew F.</i> might have implicitly expanded the entitlement for BIPs. 	<p>In this single decision, the most significant part was not the outcome, which was merely a reinforcement of the hearing officer’s substantive FAPE ruling, but the potential effect of <i>Endrew F.</i> in terms of strengthening the appropriateness standard for BIPs and FBAs.</p>