Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

July/August 2017 www.nassaubar.org Vol. 66, No. 11

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SAVE THE DATES

BBQ @ the BAR
NCBA Annual BBQ
Thursday, September 7, 2017
5:30-7:30 p.m.
Pre-registration Required
See Insert and pg 6 for details

OKTOBERFEST
Friday, September 27, 2017
5:30-8:30 p.m.
Details Coming Soon!

JUDICIARY NIGHT
Thursday, October 19, 2017
5:30 p.m. at Domus
Details pg 6

OPEN HOUSE
Thursday, October 26, 2017
3-5 p.m. & 7-9 p.m.
Volunteer lawyers needed to give consultations
Contact Gale D. Berg (516)747-4070 or gberg@nassaubar.org

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OF NOTE

NCBA Member Benefit - I.D. Card Photo
Obtain your photo for Secure Pass Court ID cards at NCBA Tech Center

Only For New Applicants
Cost $10 • September 12, 13 &14, 2017
9 a.m.- 4 p.m.

UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, August 10, 2017 12:45 p.m. at Domus

Thursday, Sept. 14, 2017 12:45 p.m. at Domus

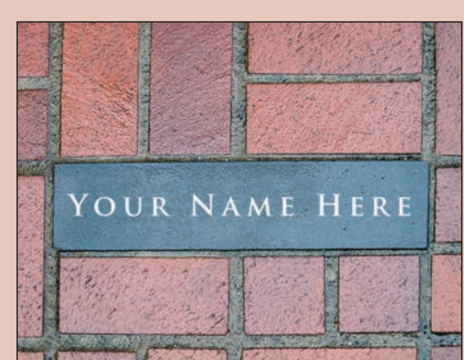
Pathway to the Bar

Your Permanent Connection to the Legal Profession

Buy a brick, inscribe your name in Domus history!

Four score and seven years ago, on January 27, 1930, the leaders of our Association broke ground to build our home, cementing the Nassau County Bar Association as the center of Nassau's growing legal community. Affectionately known as Domus, this magnificent home, modeled after the Inns of Court, provides a full complement of services for our members: professional, educational, social and charitable. Domus provides the place that evokes feelings of belonging, warmth, caring and pride in the profession and underscores our valuable contributions to the community. Only a handful of bar associations across the county can boast of having their own true home.

Through ingenuity, enthusiasm and generosity, the attorneys who are members of the Bar are able to provide free legal clinics, top legal education seminars, judicial candidate evaluations, mediation and arbitration services, lawyer referrals, charitable grants to those most in need, and much more. The majority of funds to support these programs and services comes from membership dues, but they are insufficient to cover the entire cost. In our effort to generate new sources of revenue, we are offering a renewed opportunity to be an everlasting link to the Nassau County Bar Association by reviving our highly successful buy-a-brick program.



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Through our new Pathway to the Bar Campaign, you can inscribe your name or firm name, honor a relative or peer, congratulate a law school grad or other achievement, remember a loved one, or compose another message for a brick or plaque that will be permanently placed around the flagpole in front of our building in Mineola.

A dedicated brick is an enduring testimonial to the mission of the Nassau County Bar Association and the legal profession and, at the same time, helps provide the needed funding to support our mission of service for all and preserve our legacy.

For more information contact Valerie Zurblis at (516)747-4070 x204 or vzurblis@nassaubar.org

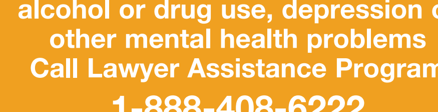
MEMBERS ONLY

Expand Your Business, Stay Abreast of Issues in Your Area of Practice, Join NCBA Committees

Important Reminder: Renew Your Committee Membership

To continue your participation and receive notices from committee chairs, you must renew your committee membership every year. Indicate your choices on the membership renewal form or online anytime during the year. The calendar of committee meetings is in every issue of the *Nassau Lawyer*, as well as online. The complete list of 2017-18 committees and committee chairs is on page 13. For further information, contact Stephanie Pagano in the Membership Department (516) 747-4070 or spagano@nassaubar.org.

See MEMBERSHIP, Page 13

CONFIDENTIAL HELP IS AVAILABLE TO LAWYERS AND JUDGES


alcohol or drug use, depression or other mental health problems
Call Lawyer Assistance Program
1-888-408-6222

BBQ at the Bar

NCBA's Annual BBQ
Thursday, September 7, 2017
5:30 - 7:30 p.m.
Members, bring a non-member colleague.
Prospective members are welcome.

WATCH THE MAIL FOR YOUR INVITATION
FREE EVENT
PRE-REGISTRATION REQUIRED
Call or email
(516)747-4070 or events@nassaubar.org
Questions? Contact Special Events
Corporate Partners:
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Judiciary Night
Thursday, October 19, 2017
5:30 p.m. at Domus
Join the Officers, Directors
and Members
of the Association as we
salute the Judges of our County

$75 per person NCBA members
$135 per person non-members

Watch the mail for your invitation!
Questions? Contact Special Events
(516)747-4070 or events@nassaubar.org

Education/Constitutional Law

Endrew F.: The U.S. Supreme Court's New Standard for Students with Disabilities in Practice

Laura A. Ferrugiari

Timothy M. Mahoney

The United States Supreme Court recently issued a rare decision, the first since 1982, ruling on the extent of entitlement a child with disabilities has in a school setting under the Individuals with Disabilities in Education Act ("IDEA"). However, and as discussed below, it is unclear whether the court's decision will have any notable impact on special education in New York.

In the seminal case, *Board of Education v. Rowley*, the Supreme Court held that, in order for a school district to meet its obligation to provide FAPE (a "free appropriate public education"), a child's program must be reasonably calculated to confer an educational benefit.[1] That case was significant because the child who alleged a denial of the student's right to a FAPE[2] was performing better than most of those in her general education class. The Court left the legal standard for "educational benefit" undefined, and declined to establish one test for determining the adequacy of educational benefits under law.[3] Since that time, federal courts across the country have issued different rulings regarding that standard.

In a case authored by Supreme Court Justice Neil Gorsuch, then of the Tenth Circuit Court of Appeals, it was held that schools must provide a "merely more than *de minimis"* standard to satisfy FAPE.[4] In New York, the standard was arguably somewhat different; a school district was required to offer an individualized education program ("IEP")[5] that is "reasonably calculated to provide some meaningful benefit."[6] The notion of "some meaningful benefit" has been viewed as a higher standard from "merely more than *de minimis*."[7]

In *Endrew F.*,[8] the parents of a fourth grade autistic youngster unilaterally withdrew their child from public school after his IEP proposed a program for fifth grade that closely resembled prior years' IEPs, including the same goals year after year. The child had been educated in the public school district since pre-school, and by fourth grade, the parents believed that his progress had stalled. According to the hearing record, the child exhibited multiple behaviors in the classroom that inhibited his ability to learn. The parents sought tuition reimbursement for their unilateral private school placement, where the child made "significant progress" during fifth grade.[9]

The impartial hearing officer and two federal courts found that the public school's program provided the child with some educational benefit, and therefore denied the parents' request for tuition reimbursement. The Tenth Circuit interpreted *Rowley* to indicate that Endrew's IEP was adequate, as it was calculated to confer an educational benefit that is merely more than *de minimis*.[10]

The parents argued before the Supreme Court that FAPE required a "meaningful educational benefit" standard. They claimed that IDEA required the school district to offer the child a program that is "reasonably calculated to provide" him with educational opportunities that are "substantially equal" to those offered to regular education students.[11] The school district argued that the IEP was required to provide some benefit, as opposed to none.[12] The United States, appearing as amicus curiae to the parents, proposed a standard which would require a school district to offer a program "to give eligible children with disabilities an opportunity to make significant educational progress, taking account of the child's unique circumstances."[13]

For a child being fully integrated in the regular education environment, the Court reiterated what it stated in *Rowley*, that educational progress means passing marks and advancement from grade to grade. The Court did note that the converse is not always the case, that not every disabled child advancing from grade to grade is automatically receiving FAPE.

For a child who is not educated in the regular education environment, and who is not functioning on grade level, a standard of "barely more than *de minimis* progress" is no longer considered appropriate. Rather, although grade level advancement may not be the standard to view progress, it should be "markedly more demanding" than "merely more than *de minimis*." The Court explained that:

"[A child's] IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child's educational 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 goals may differ, but every child should have the chance to meet challenging objectives."[14]

Notably, the Court refused to impose a standard which would require a disabled child to receive an education that aims to provide opportunities for academic success, self-sufficiency, and to contribute to society, similar to those opportunities afforded children without disabilities. The Court also refused to impose a blanket standard of "appropriate" progress. "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."[15]

Federal courts in the Second Circuit

See NEW STANDARD PRACTICE, Page 24

NCBA Committee Meeting Calendar • August 3 - September 14, 2017

Questions? Contact Stephanie Pagano (516) 747-4070 spagano@nassaubar.org

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change.

Check website for updated information: www.nassaubar.org

Community Relations & Public Education
Thursday, August 3
12:45 p.m.
Moriah Adamo

Association Membership
Wednesday, August 9
12:45 p.m.
Adam D'Antonio

Publications
Thursday, August 10
12:45 p.m.
Rhoda Andors/Anthony Fasano

Access to Justice
Thursday, August 17
12:30 p.m.
Joseph Harbeson/Richard Collins

Hospital & Health Law
Thursday, September 7
8:30 a.m.
Douglas Nadjari

Community Relations & Public Education
Thursday, September 7
12:45 p.m.
Moriah Adamo

Ethics
Monday, September 11
5:30 p.m.
Kevin Kearon

New Lawyers
Monday, September 11
6:30 p.m.
Jamie Rosen/John Stellakis

Plaintiff's Personal Injury
Tuesday, September 12
12:30 p.m.
John Coco

Labor & Employment
Tuesday, September 12
12:30 p.m.
Christopher Marlborough

Real Property Law
Wednesday, September 13
12:30 p.m.
Patrick Yu

Association Membership
Wednesday, September 13
12:45 p.m.
Adam D'Antonio

Matrimonial Law
Wednesday, September 13
5:30 p.m.
Jennifer Rosenkrantz

Publications
Thursday, September 14
12:45 p.m.
Rhoda Andors/Anthony Fasano

New standard practice

Continued From Page 6

have so far incorporated the Supreme Court's standard articulated in *Endrew F.* with little to no commentary or analysis.[16] As of the time of this article, practitioners must still wait to determine what, if any, effect the Supreme Court's decision will have in this jurisdiction.

For all the hype and hyperbole orbiting this case, and in light of its treatment to date in the Second Circuit, it does not appear that a Committee on Special Education's ("CSE") responsibility to develop an *individualized* education plan has changed dramatically, nor has the manner in which CSEs should make program and placement recommendations, at least here in New York. Furthermore, a school district's burden to establish that it has offered a child FAPE remains constant. However, this case does stress the importance of preparing an individualized IEP, and collecting and reporting data. The Court said, an IEP "is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."[17]

In a dispute between a parent of a disabled child and a school district, the latter has the burden of establishing that a child made progress in its recommended program.[18] Now more than ever, a system of data collection, which reflects that a child has made progress on each of his or her IEP goals, will support a placement recommendation for the following school year, especially in the event the school district must defend its CSE's IEP recommendation in an administrative hearing. Such a data system will also provide baseline data to support the formation of subsequent goals. That evidence, together with measurable goals which match the child's social, physical, academic and management needs, will help a school district establish that its IEP is reasonably calculated to enable a child to make progress consistent with his or her unique circumstances, and will provide what the Court calls a "cogent and responsive explanation" for the IEP recommendation.[19]

A few takeaways from the Court's decision reveal this new landscape, suggesting a road map for school districts and parents alike to ensure children with disabilities receive appropriate services and supports under IDEA:

- A reviewing agency or court must consider "whether the IEP is reasonable, not whether the court regards it as ideal."
- Instruction should be "specially designed" to meet a child's "unique needs."
- The "reasonably calculated" provision requires a "fact intensive exercise" or prospective assessment of progress by school officials, based on their expertise and the opinions of the parents or guardians.
- The IEP must aim to enable the child to make progress (academic and functional advancement).
- The degree of the child's progress "must be appropriate in light of the child's circumstances." In other words, whether the IEP is adequate will depend on the unique circumstances of each child.
- An IEP does not have to provide educational opportunities that are "substantively equal" to those provided to regular education students.
- An educational program providing a student "merely more than *de minimis*" progress is not sufficient.
- A court's deference to the judgment of school authorities is warranted where the school authorities are able to provide a "cogent and responsive explanation for their decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances."[20]

CSE members should ensure that the student's IEP goals provide reasonable expectations based upon an individual child's needs and abilities. The effect of this decision within a particular school district will greatly depend on the extent its CSE strives to offer the bare minimum of services. However, the National Association of State Directors of Special Education, appearing as *Amicus Curiae* in support of neither party in *Endrew F.*, suggested that special education teams and CSEs across the country already hold themselves to a higher standard than that described in the now-overruled Tenth Circuit. Certainly, there does not appear to be a committee that asks, "what is the *least* amount of support we can offer under FAPE?"[21] In reviewing recent cases citing to *Endrew F.* in New York, it appears that the Supreme Court's holding was already in effect in our state.

Distilling the above, CSEs should ensure that measurable annual goals are drafted based on data that reflects the student's current abilities. This data should be used to identify baseline performance, and measurement criteria should reflect high expectations for achievement. Finally, such goals should be truly individualized and not taken from a "goal bank" or other source.

Laura A. Ferrugiari is a Partner at Frazer and Feldman, LLP, Garden City and Past President of the NCBA Education Law Committee.

Timothy M. Mahoney is an Associate with the firm. Frazer and Feldman, LLP, has assisted and advised school districts in IDEA matters and represented school districts in all levels of special education litigation.

1 *Bd. of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 201 (1982) ("… [I]t satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.).
2 20 USC § 1401(9)(The IDEA defines FAPE to mean "special education and related services that: (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of [Title 20 of the United States Code].").
3 *Id.* at 209.
4 *Thompson R2-J Sch. Dist. v. Luke P.*, 50 IDELR 212 (10th Cir. 2008).
5 See 8 NYCRR § 200.1(y). An IEP is the plan which describes a student's abilities, special education needs, goals for the upcoming school year, and classroom program, services, and supports to be provided to meet those goals. *See also* 20 USC § 1401(9)(D), 1414(d)(1)(A); 34 CFR § 300.22, 300.34, 300.39, and 300.320.
6 *Mrs. B v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2d Cir. 1997).
7 *Id.* at 1121, citing *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3d Cir.1988).
8 *Endrew F. v. Douglas Co. Sch. Dist. Re-1*, 137 S.Ct. 988 (2017)
9 *Id.* at 996-97.
10 *Id.* at 997, 1001.
11 *Id.* at 998.
12 *Id.*
13 *Brief for the United States as Amicus Curiae in Support of Petitioner, F. v. Douglas County School District RE-1*, 2016 WL 6873024 (U.S.), 6-7 (2016).
14 *Endrew F.*, 137 S.Ct. at 1000.
15 *Id.* at 1001.
16 *See, e.g., Harriongton, Jamesville Dewitt Central Sch. Dist.*, 2017 WL 1327719 (N.D.N.Y. Apr. 11, 2017); *R.B. v. New York City Dep't of Educ.*, 2017 WL 1507784 (S.D.N.Y. Apr. 27, 2017); *D.B. v. Ithaca City Sch. Dist.*, 2017 WL 2258539 (2d Cir. May 23, 2017); *M.M. v. New York City Dep't of Educ.*, 2017 WL 1194685 (S.D.N.Y. Mar. 30, 2017; *A.G. v. Board of Educ. of the Arlington Cent. Sch. Dist.*, 2017 WL 1200906 (S.D.N.Y. Mar. 29, 2017).
17 *Id.* at 999.
18 Educ. Law § 4404(1)(c).
19 *Endrew F.*, 137 S.Ct. at 1002.
20 *Id.* at 998-1001.
21 *Brief of AASA, the School Superintendents Association: Case, the Council of Administrators of Special Education; the Association of School Business Officials International: and Five Other Educational Organizations as Amici Curiae in Support of Respondent. F. v. Douglas County School District Re-1*, 2016 WL 7450494, pgs. 32-33 (U.S.), 32 (2016).