LETTER TO KANSAS HEARING OFFICERS, MEDIATORS AND COMPLAINT INVESTIGATORS:

3/22/17

Dear Kansas Hearing Officers, Mediators and Complaint Investigators, here is another "short" letter. This one is a little early, but there has been a big development in special education case law. This morning, the United States Supreme Court issued its decision in the ***Endrew F.*** *case. I referenced this case in my last letter to you. In this case the Supreme Court reviewed the meaning of the term "Free Appropriate Public Education" and the Supreme Court's previous decision on that subject in Hendrick Hudson Central School Dist. v. Rowley (1982).*

In the **Rowley** case, the United States Supreme Court ruled that the term "free appropriate public education" (FAPE) meant an IEP reasonably calculated to provide some educational benefit. In the 35 years since that case, the Circuit courts have split on what "some educational benefit" means. Some courts said it means "meaningful benefit" and other courts, such as the 10th Circuit (where Kansas is and where the Endrew F case was litigated), said "some educational benefit" meant only more than de minimis, or only more than trivial, benefit. That only "more than de minimis" standard is the standard the 10th Circuit used in the Endrew F. case. In Endrew F., the United States Supreme Court ruled that the "more than de minimis" standard was not the correct standard, and remanded the case back to the 10th Circuit to apply the Supreme Court's newly articulated standard for FAPE.

The court used terminology from the term "free appropriate public education" to fashion its new standard. The court said in order to provide a free appropriate public education, "a school must offer an **IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances**." This is the new FAPE standard to be used in all circuits.

The court also added this statement, **"The 'reasonably calculate' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials."** This statement means that the court will continue to refrain from using the benefit of hindsight to judge an IEP. An IEP is not inappropriate simply because a student fails to make progress. Rather, FAPE is a prospective process. That is, the court will look at what the IEP team knew at the time it drafted the IEP, and with that knowledge, determine whether the IEP was reasonably calculated at that moment in time to provide an appropriate education. The Supreme Court added that this standard requires an IEP reasonably calculated to enable a child to make **progress appropriate in light of the child's circumstances, and not whether a court regards it as ideal.**

So, what does appropriate mean? The Supreme Court gave some guidance on this issue. It said:

- The IEP must aim to enable the child to make **progress**;
- The required progress must be in **light of the child's circumstances**;
- There is a **wide range of children with disabilities and the benefits obtainable** by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end;

- For children who are **fully integrated** in the regular classroom, an **IEP "typically should" be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade;**
- **If advancing from grade to grade is not a reasonable prospect** for a child, the IEP need not aim for grade-level advancement. But the **student's educational program must be appropriately ambitious in light of the student's circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom**. The **goals** for these students may differ, but **"every child should have the chance to meet challenging objectives."**
- There is **no bright-line rule**, the adequacy of a given IEP turns on the unique circumstances of the child;
- The **"more than de minimus benefit standard is rejected**;
- A **high standard proposed by the student in this case**, consisting of an IEP reasonably calculated to **provide a child with opportunities to achieve academic success, attain self-sufficiency, and to contribute to society that are substantially equal to the opportunities afforded children without disabilities, is also rejected**; and
- Deference is given to school officials based on the application of expertise and the exercise of judgment, but "A reviewing court may fairly expect those **authorities to be able to offer 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 circumstance**.

I believe the one thing the court said that everyone will probably agree with is that this decision does not establish a bright line for FAPE. Arguments regarding what constitutes FAPE, which is now an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, will surely follow and be as contentious as ever. But, for now, at least, there is a single standard for all states. The message for you hearing officers, complaint investigators, and mediators is that school officials must consider the potential of a child when developing an IEP and ensure that the IEP meets the individual needs of the students in light of the student's circumstances, but also be aware that the court also said the IDEA does not require schools to provide an ideal education.

HAVE A GREAT SPRING!!!

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