ENDREW F. AND THE COURT OF APPEALS: REASONABLY CALCULATED TO PROVIDE MEANINGFUL BENEFIT IS STILL THE STANDARD.

Karl A. Romberger, Jr.
kromberger@sweetstevens.com

Over time, precedential cases, like copies of copies, get re-interpreted and once clear legal guidance becomes blurred. The initial burst of IDEA cases some thirty years ago instructed that school district liability is not based on student outcomes, but instead is based on facts known when the IEP was developed. In other words, what makes an IEP "reasonably calculated?" The question, for public schools, has always been "why did you do this?" Last month, the court of appeals reaffirmed these controlling principles and rejected the argument that *Endrew F.* changed it all.

The U.S. Court of Appeals for the Third Circuit (which covers Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands) confirmed that the Supreme Court's *Endrew F.* decision did not change the circuit court's long-standing "meaningful benefit" standard. "Our precedents already accord with the Supreme Court's guidance in *Endrew F.,* so we continue to apply them." *K.D. ex. rel. Dunn v. Downingtown Area Sch. Dist.,* C.A. 17-3065, slip op. at 4 (3d Cir. Sept. 18, 2018). With this immediate issue resolved, the circuit court reiterated, and made quite clear, how its precedents and *Endrew F.* align.

So closing the gap is, still, not the standard. While grade-level progress might be the proper expectation for "fully integrated" students, it is not so for others. Given K.D.'s needs, placement, and instructional interventions, "there is no reason to presume that she should advance at the same pace as her grade-level peers." *K.D.,* slip. op. at 14. Outcome is not the standard; rather, what is reasonable at the time, in light of her unique circumstances, is the standard.

So liability is, still, not a retrospective look at progress. "K.D.'s slow progress does not prove that her IEPs were not challenging enough or updated enough." *K.D.,* slip. op. at 15. Importantly, "Downingtown was willing and able to review and revise K.D.'s IEPs throughout her education." *K.D.,* slip. op. at 16. By continually taking data, analyzing data, and actively responding to the data, "Downingtown set appropriately challenging goals for K.D." *K.D.,* slip. op. at 16. Critically, the evidence established that Downingtown remained aware of K.D.'s slow progress and kept trying to improve her programming in response to K.D.'s performance and [the private] report. And while it repeated some goals, Downingtown "did not simply hand out the same IEP year after year," but repeated foundational skills where needed to address "the challenge of teaching even fundamental skills to [K.D.]." Downingtown had explained clearly why it chose the programs it did and how they addressed K.D.'s needs. *K.D.,* slip. op. at 9-10. Liability is based on a school district's failure to act.

That explanation is vital to the question of reasonably calculated and meaningful benefit under the *Endrew F.* case and *K.D. Endrew F.* says the outcome often rests of the educators' "cogent explanations," and *K.D.* emphasizes that "[w]hen schools use their expertise to address each child's distinct educational needs, we must give their judgments appropriate deference." *K.D.,* slip. op. at 4. So remember - the best defense to liability is controlling your own actions, in particular : take data, analyze data, and respond to data.

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