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MEMORANDUM

TO: Superintendents, Principals, and Special Education Administrators
COPY: VSA, VPA, VSBA, VCSEA, VT-NEA
FROM: Rebecca Holcombe, Ed.D., Secretary of Education
SUBJECT: FAPE obligation under IDEA
DATE: July 27, 2017

This memo is intended to support Vermont administrators and special education staff in understanding the implications of the United States Supreme Court decision *Andrew F. v. Douglas County School District RE-1*, [69 IDELR 174](#) (2017) (2017)¹. The Court's unanimous decision on March 22, 2017, said that in order for a district to meet its free and appropriate public education (FAPE) obligation under the Individuals with Disabilities Education Act (IDEA)², it must, "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Background:

Andrew F. was diagnosed with autism at age two and qualified as a child with a disability under the IDEA who is entitled to a FAPE. He attended public school from preschool through fourth grade and each year his IEP team drafted an IEP that addressed his educational and functional needs. In fourth grade, his parents became dissatisfied with his progress in that he still exhibited behaviors that limited his ability to access learning in the classroom. The parents believed his progress had stalled and that he was failing to make meaningful progress toward his goals. They held that only a thorough overhaul of the school district's approach to his behavioral problems would reverse the trend. When his fifth grade IEP was, in their view, essentially the same as in prior years, the parents removed Andrew from the school and enrolled him in a private school that specialized in educating children with autism. Andrew made some behavioral and educational progress at the new school that had previously eluded him. Six months after changing schools, the parents met again with the public school, which presented a new plan. The parents considered it inadequate because they believed that it did not significantly differ from the earlier plan despite the fact that Andrew's experience suggested that he would benefit from a different approach. The parents sought reimbursement of his tuition from the Colorado Department of Education. The case eventually made its way to the U.S. Supreme Court which vacated the decision and sent it back to the Tenth Circuit for further proceedings consistent with the Court's opinion.

¹ 2017 WL 1066260 (March 22, 2017).

² In exchange for accepting federal funds, states agree to comply with a number of conditions. One of these conditions is the IDEA-imposed requirement to provide FAPE in the form of special education and related services.

Summary:

The Court's unanimous decision in *Andrew F. v. Douglas County Sch. Dist.* said that in order for a district to meet its FAPE obligation under the IDEA, it must, "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The *Andrew F.* decision also emphasized that a student's goals need to be ambitious even when those goals don't aspire to grade-level advancement in a general education classroom.

This decision updates the long-used standard established in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, [553 IDELR 656](#) (U.S. 1982), and rejects the 10th Circuit Court of Appeals' opinion that FAPE is met if an educational program provides "merely more than de minimis" benefit.

The Court also rejected the parents' position that a free appropriate education is "an education that aims to provide a child with disabilities opportunities to achieve academic success, attain self-sufficiency and contribute to society that are substantially equal to the opportunities afforded the children without disabilities."

Rather, the decision acknowledges that *when a child is fully integrated into the classroom*, as the Act prefers, what IDEA typically requires is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. Thus, for most children, a free appropriate education will involve integration in the regular classroom and individualized special education calculated to achieve advancement grade to grade. Given, however, the child-focused aims of the Act, a different approach may be required for children who are not fully integrated into the classroom.

The Court did not elaborate on what "appropriate" progress will look like from case to case, noting that adequacy of a given IEP will depend upon the unique circumstances of the child for whom it was created. It merely said that after the IEP process, which ensures parents and school representatives the opportunity to fully present their respective opinions on the degree of progress a child's IEP should pursue, "a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." The standard for reviewing the IEP continues to be whether it is reasonable, not whether it is ideal.

What does this mean for Vermont?

Vermont has consistently supported a FAPE for students with disabilities by providing educational programs that provide "merely more than de minimis" benefit. With that in mind, teachers and local education agencies who make decisions and provide services to students with disabilities should consider the following suggestions³ to assist in demonstrating the provision of a FAPE:

1. IEP teams must avoid procedural violations that could constitute, in and of themselves, a denial of FAPE. Teachers should be trained on the IEP process and understand the

³ Tips to Assist in Demonstrating the Provision of a FAPE (with minor adaptations). Contributed by: Julie Weatherly, Esq., Mobile, Alabama

general state and federal laws for providing a FAPE. For example, in order to avoid some of the most frequent violations:

- a. Parents must always be given the opportunity to participate in any decision making related to their student's disability.
 - b. Placement decisions must be made based on the student's unique needs and circumstances and must never be pre-determined by the IEP team.
 - c. All members of the IEP team must be present during an IEP meeting unless other arrangements are made prior to the meeting.
2. IEP teams must understand that FAPE and educational benefit/progress are assessed based upon an individual student's unique needs and abilities and offer an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."
 3. IEP teams, when developing the content of a student's IEP and subsequently reviewing it, must be sure that the present levels of performance and annual goals are based upon data and needs that are *current*.
 4. IEP teams must ensure that the annual IEP goals are *appropriate* and *measurable*.
 5. IEP teams must measure progress on annual goals (and objectives/benchmarks, if applicable) and have specific data available to demonstrate that progress has been made.
 6. If the student is not making sufficient progress on a regular basis, the IEP team should reconvene.
 7. IEP teams should not recycle or reuse present levels or goals, particularly where the student has not made progress on the goals.
 8. IEP teams should be careful when relying on grades or advancement from grade to grade as evidence of a FAPE or educational benefit. Careful progress monitoring of IEP goals through specific data collection and analysis will provide an additional and more reliable measure of a student's progress and evidence of a FAPE.
 9. IEP teams should document all of the school's reasonable and good faith efforts to provide FAPE, especially with students who are not making a great deal of progress.

Conclusion

The suggestions listed above may provide a useful framework for IEP team members in their development of an IEP. In the end, *Andrew F. v. Douglas County School District* requires that the IEP team must be able to "offer a cogent and responsive explanation for their decisions that shows a disabled child's individual education plan (IEP) is reasonably calculated to enable the child to make progress appropriate in light of his circumstances."