CHARTER SCHOOL LEGAL BRIEF

Table of Contents

THE ISSUE:

Receiving an offer of adequate space under the 2014 Facilities Access Legislation

Background: Under legislation passed in 2014, charter schools commencing instruction or expanding grades in 2014 and thereafter have access to facilities assistance ("facilities access legislation"). Education Law Section 2853(3)(e). This facilities access legislation provides that once a school requests co-located space, the New York City Department of Education (DOE) must either offer the school co-located space or private space at no cost within a statutory time frame. If DOE fails to make an offer of space that is "reasonable, appropriate and comparable" or makes no offer at all, the school then has the ability to appeal and receive rental assistance. Education Law Section 2853 (3)(e)(1). Since 2014, most of the schools that have requested co-located or private space have not received an offer of space. As such, their appeals have largely not centered on the question of whether an offer was "reasonable, appropriate and comparable." In the below case, the Boys Preparatory Charter School of New York ("Boys Prep") challenged an offer of co-located space on the grounds that it was not adequate.

The Case: Boys Prep requested co-located space in 2013 for their school slated to open in the 2014-15 school year. It was offered co-located space in that same year, but it was insufficient to accommodate the planned K-5 school; DOE offered co-located space for two sections per grade when the Boys Prep charter agreement allowed it to provide three. Appeal of Boys Preparatory Charter School of New York[1] ("Commissioner's Appeal"). Having at that time no other option (and not knowing the future facilities access legislation to come), Boys Prep accepted the space. The Panel for Educational Policy (PEP) approved the co-location in June 2013. After the enactment of the 2014 facilities access legislation, Boys Prep formally requested space for facilities because their present co-location was not "reasonable, appropriate and comparable." DOE denied the request for additional or different co-located space, stating that it had made an adequate offer when it gave Boys Prep the space in 2013. Boys Prep appealed to the New York State Commissioner of Education ("Commissioner").

In its appeal, Boys Prep argued that DOE had failed to offer "reasonable, appro-priate and comparable" space pursuant to the facilities access legislation. DOE responded that the appeal was not timely because Boys Prep accepted the co-located space and did not challenge the PEP's decision in 2013. The Commissioner disagreed with DOE's claim, finding that the 2014 facilities access legislation provided an "additional mechanism for charter schools to request co-location space" and therefore while an appeal of the PEP's decision

[1] Appeal of Boys Preparatory Charter School of New York, 55 Ed Dept Rep, Decision No. 16889, 2, March 24, 2016, available at http://www.counsel.nysed,gov/Decisions/ volume55/d16889

under Education Law Section 2853(3)(a-5)[2] was not timely, it was timely for Boys Prep to seek relief under the 2014 facilities access legislation. Commissioner's Appeal at 2. The Commissioner also found that because Boys Prep first commenced instruction in the 2014-15 school year, all of its grades were eligible for reasonable, appropriate and comparable space. *Id.* at 3-4.

The Commissioner then turned to the question of whether the space offered was reasonable, appropriate and comparable. In making that decision, the Commissioner relied on DOE's own Instructional Footprint, defined by DOE as "a tool to assist in the analysis and assessment of space usage in DOE buildings." Using that framework, the Commissioner found the space offered was not comparable. Under the 2013 co-location that DOE had offered, Boys Prep was assigned only 14 ¾ rooms for the upcoming school year when, if the Instructional Footprint had been followed, Boys Prep should have been assigned a minimum of 20 rooms. Commissioner's Appeal at 4. The Commissioner, therefore, found that the space offered to Boys Prep was not "comparable" to space offered to district schools as it did "not meet the requirements of the Footprint, DOE's standard for the usage of space in DOE's buildings." *Id.* at 4.

Finally, the DOE also argued that even if the space were not comparable it was barred from making a different or additional offer of space because of revisions to Education Law making permanent all co-locations approved by the PEP prior to January 1, 2014 (a provision passed to stop Mayor de Blasio from backing out of the co-locations that the PEP had already approved under the previous administration). The Commissioner rejected that argument, holding that this restriction ensured Boys Prep did not have its space taken away without consent; it did not, however, as DOE maintained, restrict DOE either from offering additional space or relieve DOE of its obligation to ensure that any space offered was comparable. DOE appealed the Commissioner's decision to the Supreme Court (trial court) in Albany.

On appeal, the DOE argued that because this was a case interpreting the facilities access statute, the court should overturn the Commissioner's decision under a *de novo* standard of review. The court disagreed, finding that given the "complex network of statutes and regulations governing charter schools," the Commissioner's decision was "precisely the type of fact-based determination to which deference is accorded so long as it is rational and reasonable." *New York City Department of Education v. Boys Preparatory Charter School of New York,* No. 904187, 5 (Albany Sup. Ct. 2017) (*"Boys Prep"*). The DOE next argued that the "reasonable, appropriate and comparable" standard only applied to offers of private space, arguing that the statute uses the term "space" to refer only to private space and not a co-location site.[3] The court disagreed and found the Commissioner's determination that the standard applied to offers of both co-located and private space was reasonable.[4] Furthermore, the court found that "[h]ad the Legislature intended to make such a distinction, it could have worded [the section of 2853(3)(e)] differently to ensure that such an intent was made plain." *Boys Prep* at 6.

DOE also argued on appeal, for the first time, that it was not obligated to provide co-located space that was "sufficient to meet their footprint allocation." *Boys Prep* at 7. The court did not consider this claim, finding that an argument cannot be raised for the first time on appeal. However,

WHAT'S NEXT?

The DOE did not appeal the trial court's decision and therefore this decision is final. It is possible that another case with the same issues could still be filed and then, if necessary, appealed to the Appellate Division. However, given that there are not many instances where DOE is offering co-located space under the 2014 facilities access legislation, it may be a while before there is another similarly situated case. Furthermore, there are a limited number of schools that would be in the same position as Boys Prep – having received co-located space for their school prior to the change in law, but commenced instruction for all their grades during or after the 2014-15 school year.

[2] Education Law Section 2853(3)(a-5) provides that, charter schools must follow a specific process to be co-located and any party seeking to appeal a co-location approved by the PEP must be submitted to the Commissioner within thirty days, of the PEP's approval.

[3] Under the facilities access legislation, the DOE was required to either offer the charter school co-located space in a public school building or free space in another private or public facility. Education Law Section 2853 (3)(e)(1).

[4] For example, another part of the 2014 facilities access legislation provides "[i]f the appeal results in a determination in favor of the city school district, the city's offer shall be final and the charter school may either accept such offer and move into the ***space*** offered by the city school district at the school district's expense." Education Law Section 2853(3)(e)(4) (emphasis added).

the court noted that it was reasonable and rational for the Commissioner "to determine that the allocated space was not reasonable, appropriate and comparable in light of the fact that it failed to meet the requirements of the very tool used by petitioner to assist in the analysis and assessment of space in its buildings." *Boys Prep* at 7.

The court also dismissed DOE's claim that it was precluded from changing Boys Prep co-location because all co-locations made prior to January 1, 2014 were made permanent. The court found it was reasonable for the Commissioner to conclude that the restriction would only apply if the charter school withheld consent, which Boys Prep had not done by requesting alternative space. *Boys Prep* at 6. Lastly, the court dismissed DOE's claim that the Commissioner's decision was entitling Boys Prep to both rental assistance and co-located space, when Boys Prep had "repeatedly stressed through the proceedings that it would vacate the co-located space... upon provision of rental assistance." *Id.* at 7. The court dismissed and did not address DOE's remaining contentions that the facilities access law does not apply to charter schools that have already been co-located, and that Boys Prep was time barred from bringing the appeal because it did not challenge the original 2013 co-location process. *Id.* at 8.

WHAT DOES THIS MEAN FOR CHARTER SCHOOLS IN NEW YORK CITY?

This decision makes clear that in order for DOE to fulfill their statutory duties, every offer of co-located or private space at no cost made pursuant to the facilities access law must be space that is "reasonable, appropriate and comparable" to district schools. This decision also provides some clarity on the definition of "comparable," namely, as it stands now, that for an offer to be comparable it must meet the minimum requirements of the Instructional Footprint that DOE has created. Because this issue was not briefed properly during the appeal, it is unclear whether DOE would be able to successfully argue in another case to the Commissioner or court that DOE is not bound to allocate a charter school's space sufficient to meet the Instructional Footprint as there are many district schools that are co-located with less space than the Instructional Footprint. Charter schools receiving offers of co-located space should always compare their offer to the Instructional Footprint before accepting it. The decision also makes clear that schools that were co-located prior to January 1, 2014 are eligible for rental assistance as long as the grades commenced in the 2014-15 school year or later.

THE ISSUE:

United States Supreme Court rejects "merely more than *de minimis*" educational benefit standard for students receiving services under the Individuals with Disabilities Education Act

Background: Under the Individuals with Disabilities Education Act (IDEA), students with disabilities (SWDs) in school districts that receive federal funding have a right to a "free and appropriate public education" (FAPE), delivered through an "individualized education program" (IEP). 20 U.S.C. Section 1401(9)(D), 1412(a)(1). Though passed in 1975, it was not until 1982 that the United States Supreme Court first determined that IDEA required more than access to FAPE; it also required that the IEP result in educational benefits to a SWD. *Board of Education v. Rowley*, 458 U.S. 176 (1982). However, the court in *Rowley* declined to establish a general standard for what that benefit was to be and how to determine whether it was adequate. Over time, the appellate circuit courts[5] have split on what the educational benefit standard should be, particularly for a student not fully integrated in the regular classroom. Some circuits have interpreted *Rowley* as requiring only a "minimum" benefit standard, meaning that as long as the IEP is designed to achieve "merely...more than *de minimis*"

[5] The United States courts of appeals are the intermediate appellate courts of the United States federal court system broken out into 13 geographic districts, or circuits as they are officially known.

progress, FAPE has been satisfied. *Endrew F. v. Douglas County School Dist.*, 798 F.3d 1329 (10th Cir., 2015). Other circuits have adopted a higher, "meaningful benefit" standard. *See e.g. Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999). Finally, 35 years after *Rowley*, the Supreme Court re-examined their decision in the below case and attempted to provide some clarification of what standard of educational benefit is required under IDEA. Notably, the National Alliance for Public Charter Schools filed a "friend of the court" brief advocating for a higher standard as did special education advocacy organizations and the National Education Association. Not surprisingly, the various organizations representing school districts (e.g., New York State School Boards Association representing NYC DOE) filed briefs asking the court to maintain the *de minimis* standard.

The Case: In *Endrew F. v. Douglas County School Dist.*, 137 S.Ct. 988 (2017), parents of their son, Endrew, removed him from the district school because they "believed his academic and functional progress had stalled." *Endrew F.* at 991. Endrew was diagnosed with autism and after years in the district school had "IEPs [that] largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims." *Id.* at 996. Because he wasn't making progress, his parents placed him in a private school that specializes in students with autism and sought reimbursement from the school district for that tuition.[6] When the district refused to reimburse Endrew's parents for the private tuition, they filed a complaint with the Colorado Department of Education under IDEA. The Department of Education refused to order the district to pay for private tuition finding that Endrew's parents were unable to prove the district had not provided Endrew with FAPE. *Id.* at 997.

WHAT'S NEXT?

As it is the highest court in the United States, there is no appeal of the Supreme Court's decision in *Endrew F.* and the decision is binding on all courts. The Supreme Court has remanded the decision back to the district court after vacating the Tenth Circuit's decision, which means Endrew's parents will be reimbursed for the private school tuition. While this case probably creates more questions than answers, it is clear that based on the facts of *Endrew F.*, where a student is being given substantially the same IEP for years and not making progress, the services being provided by the district are not meeting the new standard espoused by the Supreme Court.

The district court (the first level of federal court) affirmed the decision by the education department. The court found that "annual modifications to Endrew's IEP objectives were "sufficient to show a pattern of, at the least, minimal progress." *Id.* Endrew's parents then appealed to the Tenth Circuit (one of the appellate circuit courts), where that court held that under *Rowley*, a student's IEP was "adequate as long as it is calculated to confer an educational benefit [that is] merely...more than *de minimis.*" *Id.* at 997 (internal quotation marks omitted). The court reasoned that Endrew's IEP had allowed him to make "some" progress, even though he was making more progress at the private school. *Id.* The parents appealed to the United State Supreme Court for review and the Court agreed to hear the case.

The Supreme Court began its analysis by acknowledging that while *Rowley* did not create a standard by which to judge the adequacy of the educational benefit, the decision and statutory language of IDEA point to a "general approach." *Endrew F.* at 999. The Court then found that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* The Court was clear that this standard was "not a formula," but it was "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit. *Id.* at 1000. Because Endrew was being educated outside of the regular classroom, the Court continued that "[i]t cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom (which were the underlying facts in *Rowley*), but is satisfied with barely more than *de minimis* progress for children who are not." *Id.* at 1001. However, the Court would not embrace the higher standard advocated by Endrew's parents, namely that students with disabilities must have the opportunities that are "substantially equal to the opportunities afforded children without disabilities" that would provide Endrew with an opportunity to "achieve academic success" and "attain self-sufficiency." *Id.*

While the Court rejected the minimal standard that the Tenth Circuit and other courts had previously used, the Court would not elaborate on what appropriate progress would look like beyond "in light of the child's circumstances." *Endrew F.*

[6] In an earlier Supreme Court case, the Court had held that parents are entitled to reimbursement for private school tuition if they withdraw their child from a district that has not provided their child with FAPE under IDEA. *Florence County School Dist. v. Carter*, 510 U.S. 7 (1993).

at 999. The Court also made clear that deference should still be given to school authorities, finding that "absence of a bright-line rule, however, should not be mistaken for an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities." *Id.* at 1001. Therefore, similar to what happened after *Rowley*, it will be up to the federal courts to interpret this decision over time and apply it to the fact patterns that come before them.

WHAT THIS MEANS FOR CHARTER SCHOOLS IN NEW YORK CITY:

Charter schools, like districts, are subject to the requirements of IDEA, and, therefore, *Endrew F.* is binding on them. However, it is unclear if the effect of *Endrew F.* will be significant. First, in New York City charter school students' IEPs are developed and approved by the New York City Department of Education's Committee on Special Education (CSE), in consultation with parents and teachers at the charter school. They are not developed directly by the charter school. As a result, where parents are dissatisfied with a student's progress, the school district in which the charter school is located is ultimately responsible for ensuring that the student is receiving the FAPE that he or she is due. Where, for instance, a court finds that the IEP (and the child's progress thereto) is inadequate under the standard articulated in *Endrew F.*, the school district's CSE will be charged with changing the IEP to meet the standard. Of course, it will be up to the charter school to implement faithfully that revised IEP. Moreover, as is likely to be the case, parents seeking recourse under this standard will often not be asking for a reworking of the IEP or its implementation; many, if not most, will be seeking placement in a private school setting and tuition reimbursement. As charter schools are not the LEA, it will be up to the NYC DOE to defend these cases and it will be NYC DOE which will also be the party held liable for such tuition reimbursement should it be granted.

Second, as the Supreme Court made clear in its decision, while it rejected the *"de minimis"* standard as satisfactory, it did not enunciate a clear standard to substitute for it. At the same time, it also made clear that it would not permit courts to second guess the judgement of school districts and state administrative proceedings. For example, in a recent Second Circuit case, the court affirmed a determination by the New York State Review Officer (SRO)[7] that FAPE had been satisfied for a student with autism. *R.B. v. New York City Department of Education*, 2017 WL 1507784, *1 (2d Cir. 2017). Unlike in *Endrew F.*, where the parent's claimed that the IEP goals were unchanged from year to year, here the allegation was that the SRO had incorrectly determined that the IEP's postsecondary goals and transition services were appropriate. *Id.* at *1. The court upheld the SRO's decision, finding that under *Endrew F.* the "IEP need not bring the child to grade-level achievement, but it must aspire to provide more than *de minimis* educational progress." *Id.* at *2. The court looked at the IEP transition activities (such as trips into the community to purchase items, learning to budget, and using appropriate phone and workplace etiquette) and agreed with the SRO that FAPE had been satisfied as the IEP was "reasonably calculated to provide [the student with] the postsecondary goals and transition services required "by IDEA." *Id.* at *3. While this is just one case, it is easy to see how each student's appeal will be based on the specific facts of their case and may not be impacted by *Endrew F.* Following the *Endrew F.* decision, advocates for students with disabilities hailed the decision as a huge win that would change the educational expectations for children and the services provided. However, advocates for school districts stated that this would not have a big impact on district practices, because the standard is still flexible and left to the districts to implement. It may take many years before it is better understood what the new *Endrew F.* standard means. Regardless, it is still clear that *Endrew F.* was a win for students in that the "merely more than *de minimis*" standard has been clearly rejected by the highest court in the United States.

[7] Parents have the right to file a complaint with respect to any matter relating to identification, evaluation, placement of a student with disability as well as the provision of FAPE. In New York, if a parent disagrees with the CSE's determination, the parent can first appeal to an Impartial Hearing Officer, and this decision can then be appealed to the a State Review Officer by either the parent or district.