

AUTISM AND THE LAW

Part 1: How 'Endrew' Can Improve Future Educational Prospects

By Lawrence R. Jones

This article is the first of a four-part special series on autism, in honor and recognition of National Autism Awareness Month.

In March, 2017, the U.S. Supreme Court issued its opinion in *Endrew F. v. Douglas County School District*, 580 U.S. ___, 137 S.Ct 988, 197 L. Ed. 2d 335 (2017). In *Endrew*, the court overturned a 10th Circuit Court of Appeals decision holding that a child with autism in a non-mainstreamed, special education program, under an Individualized Education Plan (IEP) was entitled only to an educational program that was calculated by the child's school district to provide "merely more than a de minimus" benefit. In a unanimous opinion authored by Chief Justice Roberts, the Supreme Court held that to meet its legal obligation under the Individuals with Disabilities Education Act

Lawrence R. Jones is a former New Jersey Superior Court Judge, who retired from the Bench in 2017. Prior to his appointment to the Judiciary, he served as a gubernatorial appointee to both the New Jersey Council on Developmental Disabilities and the Adults with Autism Task Force.



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(IDEA), "a school district must offer the special needs student an Individualized Education Plan (IEP) that is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 14-15, 16.

The court emphasized that, in dealing with a special-needs child who is not mainstreamed, "the goals may differ" from those for a child in a regular education curriculum. *Id.* at 14. Nonetheless, "every child should have a chance to meet challenging objectives." *Id.* Moreover, the court held that while a primary standard for a fully included student may involve the child "progressing

smoothly through the regular curriculum," a different circumstance exists when a child is not fully included. *Id.* In such instance, school officials must look to the disabled child's unique needs to develop an IEP that is "pursuing academic and functional advancement." *Id.* at 11. Further, in a statement of interpretation dated Dec. 7, 2017, the U.S. Department of Education announced that, "The *Endrew F.* decision is important because it informs our efforts to improve academic outcomes for children with disabilities." Accordingly, *Endrew* essentially raises the legal bar for school districts in meeting their responsibilities

for overseeing the preparation of IEP plans for students with Autism Spectrum Disorder.

Under the spirit of *Endrew*, IEP plans must logically be approached and prepared with a constructive, creative and reasonably expansive mindset in order to meet a student's needs, with more than "de minimus" progress in mind. In this respect, a post-*Endrew* IEP plan for a special-needs student will reasonably involve: (a) developing meaningful objectives which (b) are challenging to an individual student, in terms of (c) addressing both academic and *functional* needs of the student as underscored by the court itself.

For certain, functional advancement means something beyond mere academic advancement. Otherwise, there would have been no need for the court to include the qualifying words "and functional" after the word "academic." These terms are expansive enough to include countless different potential components of meaningful IEP plans, which are designed to educationally and functionally assist a special-needs child on the path to adulthood.

Because of the inherently broad scope of the term "functional," as set forth in the context of a remedial Supreme Court decision, parents, school personnel, lawyers and judges may be analyzing and debating the meaning of this term under *Endrew* for years or decades to come. As *Endrew* is a relatively new case, there has been little opportunity for the development of a body of subsequent case law interpreting the scope of its language. Applying logic and

common sense, however, a reasonable person may reasonably conclude that, as a matter of law and social policy, *Endrew* expands the lens of focus in a pro-child manner upon not only the child's academic progress, but also the child's non-academic, functional progress and the need, when applicable, to improve a child's social skills to help meet a long-term "challenging objective" of achieving future independence and employability following graduation.

Since an IEP is an individualized education plan, each plan must be uniquely designed and tailored to appropriately fit each child's needs. While sometimes overlooked in the IEP process, it is clear that an underlying goal and purpose of any IEP, when possible, is "to prepare students for further education, employment and independent living." 300 C.F.R. 300.1. Hence, in preparing a child with special needs for the possibility of future employment and independent living, the focus must often logically be as much on a child's social deficits and challenges as on purely academic ones.

As expressly noted by the Supreme Court in *Endrew*, autism is a neurodevelopmental disorder generally marked by various behavioral components, including *impaired social and communicative skills*. *Id.* at 6. Further, under the DSM-5 for neurodevelopmental disorders, autism spectrum disorder includes deficits in *social* communication and interaction, and restrictive repetitive behaviors, interests and activities. Social communication deficits are particularly prevalent with

children who have Asperger Syndrome or "Asperger's"—which is often referred to as a high functioning form of ASD. Some students with Asperger's may perform exceptionally well in mainstream scholastic settings and even achieve test scores and grades which far exceed their non-disabled peers. Notwithstanding such academic success, the social deficits that often accompany Asperger's can, in certain instances, seriously obstruct a child's ability to successfully obtain or maintain a job later in life.

While academics are certainly important in the realm of special education, social skills are often at least as important—if not even more important—for long-term goals such as the child's future employability and independence. If a student has academic challenges but strong social skills, he or she may actually have a greater chance of obtaining and maintaining long-term meaningful employment than a student with strong academic skills but very poor social skills. Yet, time and time again, child study teams and other applicable school personnel often move a child with Asperger Syndrome and severe social challenges through the scholastic system without adequate supports to meet his or her needs, simply because the student has achieved good grades and performed well on standardized tests designed to measure progress. In essence, the child may fly under the radar for years, while receiving little or none of the educational help that could be most relevant and

beneficial to helping meet his or her special needs on the road to potential independence.

While an advancement from grade to grade may be appropriately ambitious for “most” children in a regular classroom setting, the *Endrew* court explicitly cautioned that this concept “should not be interpreted as an inflexible rule.” *Id.* at 14, note 2. Rather, the court expressly declined to hold that every special-needs child who is advancing from grade to grade is automatically receiving a free and appropriate education. As *Endrew* noted, an IEP is not a form document, but is “constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Id.* at 12. Such consideration should then be utilized to create an educational program that is “appropriately ambitious” in light of the circumstances, and which allows the special-needs student to strive for challenging objectives and goals. *Id.* at 14. The adequacy of an IEP turns on the unique circumstances of the child for whom it was created. *Id.* at 16.

Accordingly, while *Endrew* factually focused upon an autistic student who was placed outside of a mainstreamed, regular education setting, the ambitious spirit of the opinion arguably and logically applies, on an educational basis, to addressing the challenging social needs of students with high-functioning autism and/or Asperger Syndrome who may have in fact been placed

in mainstreamed classrooms, but who nonetheless still critically suffer from major social deficits and challenges which need to be appropriately addressed as part of a functional IEP plan. The overlooking or glossing over of such components of the disorders in educational planning may severely undermine the express purpose of the IDEA in helping further prepare such students for future education, employment and independent living.

Programs with an intense focus on the enhancement of social skills may be highly appropriate under *Endrew* as part of the “challenging objectives” for legal consideration by parents and school districts in the formulation of appropriate IEP plans. In the context of developing post-*Endrew* IEP plans for children with autism, Asperger’s and other ASD-related disabilities, there is often a very legitimate need to place social skills on as important a level as academic skills. Historically, there has been an overwhelming focus in the plan on academics, but comparatively little focus on specific plans, exercises and goals relating to the child’s need for developing and/or improving social skills. Further, some IEPs address the issue of social skills in an overgeneralized manner, without any specific, detailed plan, such as how such improvement is designed to take place, or how success will be incrementally measured over time, or who will be doing the measuring and analysis of progress, or the

need for periodic adjustments of an ongoing program in order to reach certain milestones and goals.

Some academic traditionalists or purists take the position that education in school is supposed to be primarily about academics, and that ancillary concerns such as “socialization” are of secondary importance. Given the purpose of our special education laws and policies, however, such a viewpoint is arguably out of step with the expansive spirit of *Endrew* itself. In fact, there is an often overlooked, or unknown, federal regulation found at 34 C.F.R. 300.320(a)(4), which states that, when possible, an IEP is to be designed with a goal to enable the child to not only advance appropriately toward attaining annual goals, and to be involved in and make progress in the general education curriculum, but also to participate in extracurricular and other nonacademic activities, and participate with other children with disabilities and non-disabled children. Accordingly, in creating an appropriate IEP plan, the federal regulations to IDEA require consideration and focus not only on the student’s academic needs, but on non-academic needs as well.

By intensifying focus upon not only a child’s academic needs but social needs in creating a functional IEP, educators and parents can jointly improve the quality of services provided to many children with autism in a more expansive manner, consistent with the ambitious spirit of *Endrew* itself. ■