

No. ____

IN THE
Supreme Court of the United States

M.P.,
Petitioner,

v.

WEST HARTFORD BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are students with mental health needs entitled to the same standard of FAPE as other disability categories?

PARTIES AND RULE 29. 6 STATEMENT

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

- Petitioner M.P. was the plaintiff in the district court and the appellant in the court of appeals.
- West Hartford Board of Education, defendant and appellee below

There are no publically held corporations involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mr. and Mrs. P. respectfully petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1) is published at 885 F.3d 735. The opinion of the United States District Court for the District of Connecticut (Pet. App. 51) is published at 2016 WL 5660389. The opinion of the State of Connecticut Due Process decision (Pet. App. 92) is published at Connecticut State Department of Education 14-0440.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 23, 2018. Pet. App. 1a. This court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C Sec. 1400 et seq., requires that public schools receiving federal funds for special education services provide each child with a disability a “free appropriate public education.” 20 U.S.C § 1401(9). These special education services must be “provided in conformity with the

individualized education program required” under the IDEA. *Id.*

INTRODUCTION

This matter raises the issue of what it means to make progress under IDEA. Congress has clarified that the purpose of IDEA is to prepare students for a functional future, including post-secondary education, employment and independent living. 34 CFR.300.1. For students with disabilities who qualify under IDEA, programs must be individually created and designed for students to make progress, markedly more than de minimis progress. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). For a student who is receiving special education due to mental health needs, progress would need to be made in the area of mental health in order to allow for such a future. For this particular population, getting good grades, especially in segregated programs, does not equate to having a functional future and becoming an employed, contributing member of society. However, the Second Circuit in this matter focused on grades and scores on state testing as predominant measures of progress for a student with significant mental health needs, ignoring the decline in mental health functioning, the actual identified area of need.

For students who do not have their mental health needs addressed as part of their educational program, the consequences can be dire. The results of such failure can range from chronic unemployment, a lifetime of state benefits, homelessness, incarceration to suicide and even

homicide. Many of the adults facing these situations received passing grades and a diploma. Schools are uniquely positioned to address the mental health of students given that children spend the majority of the waking hours of their developmental years in school. Further, schools are charged with providing an individualized program to target each eligible student's area of identified weakness and to create a program that would result in progress in those areas. However, students with mental health issues have not received the attention they require within the education system, even in light of the increase in child suicides and school shootings. The expectations of progress for students with mental health needs are extraordinarily low. In order to allow these students to have functional futures and to allow them to receive their full rights under IDEA, a standard and expectation of progress in the area of mental, social and emotional functioning is required.

We need only consider why IDEA was created in order to come to this conclusion. If the focus is on passing grades but does not also include preparing students to be employable, independent and contributing members of society, it seems that the purpose attributed to the Act becomes meaningless. Education must include preparing these students for a functional future.

Indeed, the fact that a student with mental illness is capable of academic success tells us little about his or her capacity for employment or independent living if the student is unable to

translate those academic achievements into socially acceptable behavior.

This case highlights the problem with considering grades and scores on state testing as the main measures of progress. M.P. is a bright student who was never identified by the Board as having a learning disability. His eligibility category is Emotional Disturbance and his diagnoses includes Psychotic Disorder and Autism. (Pet. App. 5). However, the Second Circuit relied on grades and state testing to demonstrate progress despite the fact that grades and test scores were not identified in his IEP as areas of weakness and despite the fact that he was in a segregated, modified program with only three teachers, no general education teachers, no homework and not enough courses, requiring M.P. to repeat courses over again to fill his day. (Pet. App 16, 55). By doing this, the board failed to address the IDEA's requirement that each student with a disability receive an individualized program to address their unique needs. And further, they failed to address his decline in social and emotional functioning and his absolute lack of preparedness for any kind of functional future. His IEP did not target his autism or his psychosis. (Pet. App. 58). His acts of aggression toward the end of his high school tenure were markedly more extreme than they had been at any point in his time within the Board's program (Pet. App 18) and his attendance was affected by skipping classes, a suspension and arrest and a hospitalization. (Pet. App 18-20).

Further, this student's IEP created a transition program for after high school that did not

target his mental health or autism, did not provide staff trained in his specific areas of weakness and created goals and objectives that were not based on M.P. or his needs. (Pet. App. 25-26). It was not individualized to M.P. or his needs. (Pet. App. 49-50). Despite his lack of progress in his high school program, the transition program would have provided less intervention.

If a student with dyslexia initially tested as reading a year behind his peers and then after years of receiving services, declined to reading six years behind his peers and was not a functional reader, but he received A's and B's it would be highly unlikely that he would be found to have made progress. The same accountability that is expected in educating students with other disabilities needs to be applied to educating students with mental health needs in order to ensure authentic implementation of IDEA. One would believe that the seventeen deaths from the Parkland shooting and the twenty six deaths from the Sandy Hook shooting demonstrate the need for schools to address the mental health of students with disabilities.

The Second Circuit erroneously found that M.P. made progress in his high school program and that the transition program offered by the Board was appropriate (Pet. App 2.), thereby denying him the opportunity to be an employable, independent, contributing member of society. This appeal affords this Court an important opportunity to clarify the standard for assessing whether a school district provided a FAPE to a student with mental illness where, notwithstanding receiving passing grades, the

student has not learned the skills needed to manage his emotional reactivity or cope in regular settings and, consequently, is not qualified for employment and is destined to be institutionalized for life.

STATEMENT OF THE CASE

A. Legal Background

The IDEA provides federal funds to States to ensure that children with disabilities are receiving an appropriate education. The IDEA conditions funding on compliance with statutory requirements, including the requirement that every eligible child must receive a “free appropriate public education.” (FAPE) 20 U.S.C. § 1401(9)(D), 1412(a)(1). *Endrew F.*, supra. 137 S. Ct. 988.

The IDEA was developed out of the 1975 Education for All Handicapped Children Act, Pub L. No. 94-142, 89 Stat. 733 (1975). This Act was created to ensure that students with disabilities would be given equal access to an education. *Bd. Of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S 176 (1982). Prior to that time, children with disabilities were not afforded access to public schools. *Id.* These children were “either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.” *Rowley*, supra 458 U.S at 179 (alteration in original) (quoting H.R Rep. No. 94-332, at 2 (1975). Senate reports noted that “public agencies and taxpayers will spend billions of dollars

over the lifetime of these individuals to maintain such persons as dependents and minimally acceptable lifestyles.”¹ The Senate further stated providing “appropriate educational services now means that many...individuals [with disabilities] will be able to become a contributing party of our society...”² Congress stated in the IDEA that improving educational results for children with disabilities is an essential element of national policy to ensure equality of opportunity, full participation, independent living and economic self sufficiency for individuals with disabilities.³

As acknowledged by this Court in *Honing v. Doe*, 484 U.S. 305 (1988), among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet. See S.Rep. No. 94-168, p. 8 (1975), U.S.Code Cong. & Admin.News 1975, p. 1425 (hereinafter S.Rep.). *Honing*, 484 U.S. at 309. Congress amended federal statute twice, in 1997, creating IDEA and 2004. Pub. L. No. 105-17, 111 Stat 37 (1997); Pub. L. No 108-446, 118 Stat. 2647 (2004).

¹ Kevin Golembiewski, *Disparate Treatment and Lost Opportunity: Courts' Approach to Students with Mental Health Disabilities under the Idea*, 88 Temp. L. Rev. 473, 481 (2016); S. Rep. No. 94-168, at 9 (1975).

² Id; 121 Cong. Rec. 19,492 (1975) (statement of Sen. Williams).

³ Id; 20 U.S.C. § 1400(c)(1)

The question of what exactly FAPE is for children with disabilities is a hard fought issue. Parents fight for the same chance at a future as non disabled students receive, and Boards of education typically have fought for the lowest standard of FAPE with no more than minimal expectations. *Rowley*, supra. 458 U.S. 176; *Endrew F.*, supra. 137 S.Ct. 988. This Court first addressed the question of FAPE in *Rowley*, 458 U.S. 176 and stated that the IDEA requires that a student’s educational program be “reasonably calculated to enable the child to receive educational benefits.” Id. at 207.

In 1990, Congress found that children with serious emotional disturbance was the most underserved population of students with disabilities.⁴ Between 1995 to 2004 only 0.7% of all students were found eligible for special education under the classification of emotional disturbance.⁵

In the 2004 amendment to IDEA, Congress clarified that the purpose of Act is to ensure that children with disabilities receive a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for post-secondary education, employment and

⁴ Kevin Golembiewski, *Disparate Treatment and Lost Opportunity: Courts' Approach to Students with Mental Health Disabilities under the Idea*, 88 Temp. L. Rev. 473, 481 (2016); H.R Rep. No. 101-544 at 39 (1990).

⁵ Id; 1 U.S. Dep't of Educ., *28th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act 42* (2006), <https://www2.ed.gov/about/reports/annual/osep/2006/parts-b-c/28th-vol-1.pdf>.

as appropriate independent living. 20 U.S.C Sec. 1414 (d) (1) (A) (i) (VIII). Congress recognized there was a problem with overreliance on the compliance models and schools were driven by compliance of paperwork or checking boxes rather than using research based approaches or focuses on the end results.⁶ These amendments were intended to clarify federal mandates and increase state and local accountability for educating children with disabilities.⁷ Additionally, Congress emphasized the importance of scientifically based practices throughout special education.⁸

Congress further clarified in 2004 that even students who have not failed and are advancing from grade to grade must be provided a FAPE if they have a disability and require special education, which would counter the argument that grades and grade advancement are the sole criterion for determining if a FAPE has been provided. 34 CFR 300.101 (c). Further, IDEA states that students who are eligible for special education are entitled to specialized instruction to address the unique needs of the child *and* to ensure access to the curriculum and that the child meets state level standards, clarifying that meeting state standards is not the main criterion. 34 CFR 300.320(a)(2)(A-B). (Emphasis added).

⁶ Yell Mitchel, Shriner James, et al, *Individuals with Disabilities Education Improvement Act of 2004 and IDEA Regulations of 2006: Implications for Educators, Administrators and Teacher trainers*, Focus on Exceptional Children, Vol. 30.1 (2006)

⁷ Id.

⁸ Id.

Endrew F. is the most recent decision to address the standard of FAPE to be provided to children with disabilities. *Endrew* clarified that in order to provide FAPE, the program must be appropriately ambitious in light of the child's circumstances and that every child should have the chance to meet challenging objectives. *Endrew F.*, 137 S. Ct. at 992. This court acknowledged that the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. *Id.* It was clarified by this Court that the standard is markedly more than de minimis. *Id.* at 1000.

The essential function of an IEP is to set out a plan for pursuing academic and functional advancements. *Id.* The IEP is the means by which special education and related services are tailored to the unique needs of a particular child under the IDEA. 20 U.S.C.A. § 1414(d)(1)(A) (i)(I–IV); *Endrew F.*, supra., 137 S. Ct. at 197. In developing a child's IEP the team must consider the strengths of the child, the parent's concerns, the results of the most recent evaluation of the child and the academic, developmental and functional needs of the child. 32 C.F.R. § 300.324. The IEP is the "centerpiece" of a student's entitlement to FAPE. *Honig*, supra. 484 U.S. at 311.

In planning for a functional future, Congress recognized the importance of transition planning for students with disabilities and under the IDEA once a student turns sixteen the IEP must plan for a student's transition from high school to post-secondary life. 20 U.S.C §1401 (34). Under the

IDEA, the IEP must have appropriate measurable postsecondary goals. 34 CFR § 300.305(e). The IDEA specifies that transition goals should be based on assessments related to training, education, employment and independent living skills. 20 U.S §1401 (34). The transition services are required be based off the student's transition needs. 34 CFR § 300.320. States are provided federal funds for transition services and planning. 34 CFR § 300.704 (b) (4) (vi).

Further, transition services must be designed within a results-oriented process, be focused on improving academic and functional achievement of the child and must be based on the individual child's needs, taking into account the child's strengths, preferences, and interests and includes instruction, related services, community experiences, development of employment and post-school adult living objectives and if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. 34 C.F.R. § 300.43.

B. Factual Background

Petitioner M.P is diagnosed with High Functioning Autism/Asperger's, Processing Disorder Predominantly Nonverbal L.D. and Executive Subtype and Psychotic Disorder Nos. (Pet. App. 4-5). He is eligible to receive special education under the emotional disturbance classification. (Pet. App.13). As emotional disturbance is one of the disabilities categorically

covered by the IDEA, M.P is entitled to the Act's protections. 20 U.S.C. Sec. 1401 (3) (A).

When M.P was a sophomore he began to experience mental health concerns and had suicidal and homicidal ideation. (Pet. App.53). In December 2011, in response to being asked about his declining grades, he had to be hospitalized for suicidal ideation. (Id.). He advised the hospital staff that he had been bringing a knife to school. (Pet. App. 101). While inpatient he threatened to blow up the hospital and talked about attacking people at school. (Pet. App. 102). The school was aware of his hospitalization and the events leading up to it. (Pet. App.9). In January 2012 the Board placed him on a plan pursuant to Section 504 due to his diagnosis of ADHD (Pet. App.5) and allowed him to drop classes if he wanted to. They assigned a counseling intern to his case but did not provide direct counseling. (Pet. App. 10-11). By February 2012 M.P's mental health deteriorated, and he could no longer attend school. (Pet. App. 11). In March 2012, his parents referred him for special education. (Id.). The Board refused to find him eligible for special education. (Id.). The Board noted he was struggling with anxiety and school refusal but would not provide special education support. (Id.). In April 2012, his parents referred him for special education again. (Pet. App. 12). He was hospitalized "due to emotional concerns." (Id.). The Board did not find him eligible. (Id.). In May the Board finally evaluated M.P and he was again found not eligible for special education. (Pet. App. 14). At a PPT in June M.P. was found eligible for

special education. (Id.). M.P never returned to school that year. (Id.).

For M.P's junior year the Board recommended the Strive program. (Pet. App 15). Strive is an alternative special education program within the district. (Pet. App 55). They have only three teachers, do not assign homework and have limited course offerings. (Pet. App. 81). In July 2012 an independent neuropsychologist diagnosed M.P. with psychosis and Asperger's syndrome and stated that M.P required more than the Strive program and recommended consideration of a program addressing psychosis. (Pet. App. 15). A clinical interview showed M.P's thinking to be characterized by irrational beliefs, paranoid patterns of thinking and difficulty distinguishing reality from fantasy. (Pet. App. 99). The neuropsychologist found aggressive and morbid themes were prevalent in Student's thinking. (Id.).

He was placed at Strive for the 2012-13 school year. (Id.). In May 2013 the Board noted that he had concrete thinking, did not pick up on social cues and yet recommended he return to the public high school for part of his day and provided no social skills instruction or counseling at the high school. (Pet. App. 16). In fact, no supports or services were provided at the public high school nor did they have any regular teachers at the PPT. (Id). The IEP from May noted progress based on a 3.0 GPA but did not discuss any progress in the area of mental health. (Pet. App 16). Having no regular education teacher was not found to be a violation of FAPE by the

Second Circuit despite the fact that it is required by IDEA. (Pet. App 37-38).⁹

After his transition back to the public high school M.P quickly deteriorated in the general education program. (Pet. App 17). He had many absences and by October had a break down in school and refused to go back. (Id.). He was placed back at Strive full time. (Id.). In December, M.P repeatedly punched another student so badly that he broke his hand, was arrested and suspended. (Pet. App 18; Pet. App. 58). In May 2014 after two years in the Board's special education program he was hospitalized for a week after he took a knife and ran out of the house to kill his former psychiatrist. (Pet. App. 20). In June, the Board offered the Achieve Program for the 2014-15 school year. (Id.). Achieve was located in the same building as Strive and

⁹ In Connecticut schools are legally obligated to ensure parents receive their child's IEP five days after a PPT is held. CT ADC § 10-76d-13 (6). The Second Circuit affirmed that it was not a violation of FAPE when the Board did not provide M.P's IEP to the parents for six months, even when there was documentation that the parents did not know what was going on within their child's program. (Pet. App 38-39). Further, the Second Circuit found waiting from December to June to find M.P. eligible for special education services, watching him go from having declining grades, to becoming suicidal and then homicidal and not able to return to school and then continuing to wait four more months before finding him eligible was appropriate. (Pet. App 66-71). Further, the Second Circuit affirmed that parents could be given consistently inaccurate IEP's inaccurately listing the services to be provided and that would did not result in a procedural violation that denied FAPE. (Pet. App 78). These gross procedural violations were found to either be no violation at all or violations that did not rise to the level of a violation of FAPE.

progress was tracked through community based situational assessments. (Id.). No evaluations were conducted, no additional services were recommended prior to placement in Achieve and in fact the Board recommended an in district community based transition program with no safety provisions. (Id.). The Board did not address and the Second Circuit did not acknowledge that he had just assaulted a student a few months prior and was hospitalized for attempting to leave his house with a knife to kill his psychiatrist. (Pet. App. 18-20). The Board focused his IEP on transition goals. (Pet. App. 86). However, the transition goals were not tied to M.P.'s transition needs. The program itself could not support M.P. attending college despite the fact that college was his transition goal. (Pet. App 113). The District Court acknowledged that goals and objectives were drafted for M.P without reviewing his record or meeting him. (Pet. App. 87). Despite his autism diagnosis, there were no goals for social skills and there were no goals addressing his psychosis or homicidal or suicidal ideation, his resistance to counseling, the inappropriate comments he made or the violent physical assault he perpetrated on another student just a few months prior. (Pet. App. 18, 33, 81).

C. Proceedings Below

1. M.P's parents filed a due process complaint in 2014 seeking placement at Options, a state approved transition program with experience in working with students like M.P. who are in danger of hurting or killing others, for the 2014-2015 school year and compensatory education. (Pet. App 96, 121). The

parents maintained that the program provided from June 2012 through June 2014 denied M.P. a FAPE and that the program proposed for the 2014-2015 school year was not appropriate and denied M.P. FAPE. (Id.). The hearing officer found that although M.P. was in danger of killing someone at all times, he had been provided a FAPE and the transition program offered by the Board was appropriate. (Pet. App. 103, 134-136). She did order specialized transportation until such time as the team felt it was no longer necessary. (Id.). She found that the procedural violations raised by the Parents were either not procedural violations or did not deny M.P. a FAPE. (Id.).

2. M.P.'s parents appealed the hearing officer's decision in the U.S. District Court of Connecticut basing jurisdiction on 20 U.S.C. sec. 1415. (Pet. App. 51). The District Court affirmed the decision of the Hearing Officer relying primarily on grades and performance on state testing as measures of progress and found the transition program to be appropriate. (Id.). The Court further felt that the multitude of procedural violations raised by the Parent either were not violations at all or did not deny M.P. FAPE. (Pet. App. 51-91). The District Court refused to acknowledge his uncontested diagnosis of psychosis.

3. The Second Circuit affirmed the decision of the District Court, basing progress primarily on grades and scores on standardized testing, finding the transition program appropriate and finding that the multitude of procedural violations raised by the Parents were either not procedural violations or did

not deny M.P. a FAPE. (Pet. App. 1-50). The Second Circuit also relied on grades and performance on state testing as measures of progress. (Id.).

REASONS FOR GRANTING THE WRIT

I. The Question Presented Is Important to Students With Disabilities, Their Families, Schools and Society.

Mental health, and specifically the mental health of students served by the IDEA has become an increasingly important issue. Twenty percent of youth ages thirteen to eighteen live with a mental health condition.¹⁰ Half of all chronic mental illness begins by age 14.¹¹ More than 40% of adolescents from the ages of 13 to 17 have experienced a mental health problem by the time they reach seventh grade.¹² It is proposed that 12% to 13% of the school-aged population are at risk for or have a mental health-related problem that affects their educational performance at any point in time.¹³ Data collected by

¹⁰ National Alliance of Mental Health, *Mental Health Facts Children and Teens*, (2014)

<https://www.nami.org/NAMI/media/NAMI-Media/Infographics/Children-MH-Facts-NAMI.pdf>

¹¹ Id.

¹² Substances Abuse and Mental Health Services Administration, *Age and Gender Based Populations*, 2018, <https://www.samhsa.gov/specific-populations/age-gender-based>

¹³ Forness SR, et al., *Special education implications of point and cumulative prevalence for children with emotional or behavioral disorders*. Journal of Emotional and Behavioral Disorders. 2012.; Forness, et al., *Prevalence of Students with EBD: Impact on General Education*, Beyond Behavior, 2012; Merikangas et al., *Lifetime Prevalence of Mental Disorders in*

the CDC between 1994 and 2011 show an increasing trend in the number of cases of mental disorders among children and youth.¹⁴ Less than 40% of children and youth with mental health needs are identified and receive appropriate services.¹⁵ In 2010, schools represented the primary service delivery system for 2.9 million children and youth or 12.5% of the school population.¹⁶ Thus, schools are a critical service delivery system for students with mental health service needs.¹⁷

As recently as 2016, suicide became the third leading cause of death in youth ages 10-24 and ninety percent of those who died by suicide had an underlying mental illness.¹⁸ According to National Alliance of Mental Health, over one third of students with a mental health condition age fourteen and older drop out of school. This is the highest dropout rate of any disability group under the IDEA.¹⁹ Further, seventy percent of youth in

US Adolescents: Results from the National Comorbidity Study, J Am Acad. Child Adolesc. Psychiatry, 2010

¹⁴ Center for Disease Control and Prevention, *Mental Health Surveillance among Children, United States 2005-2011*, 2013; Mitchell Yell, et. al, *Mental Health Services, Free Appropriate Public Education, and Students With Disabilities: Legal Considerations in Identifying, Evaluating, and Providing Services*, Journal of Positive Behavior Interventions, 2017 .

¹⁵ Id.

¹⁶ Id

¹⁷ Id; Kazak et al., *A Meta-systems approach to evidenced based practices for children and adolescents*, NCBI, 2010

¹⁸ National Alliance of Mental Health, *Mental Health Facts Children and Teens*, (2014)

<https://www.nami.org/NAMI/media/NAMI-Media/Infographics/Children-MH-Facts-NAMI.pdf>

¹⁹ Id.

state and local juvenile justice systems have mental illness.²⁰ An estimated twenty six percent of homeless adults live with serious mental illness and an estimated forty six percent live with severe mental illness and/or substance use disorders.²¹ Since Columbine, more than 187,000 students have been exposed to gun violence at school.²² On average in 2018, there has been one school shooting every week this year.²³ Further, fifty eight percent of student with emotional disturbance are arrested within five years of leaving school.²⁴

The increase in suicides, school shootings and the number of students with mental health needs dropping out of school and those ending up in the juvenile justice system demonstrates the need for a clear mandate that students with identified mental health needs who are eligible for special education must receive specialized instruction in the area of mental health and further that they are entitled to a program designed to allow them to make progress in light of his or her circumstances. This means an individualized program designed for the student to

²⁰ Id.

²¹ National Alliance on Mental Illness, *Mental Health Facts In America*, <https://www.nami.org/NAMI/media/NAMI-Media/Infographics/GeneralMHFacts.pdf>

²² Chiu Allyson, Horton Alex, *Scarred by School Shootings*, The Washington Post, March 2018

²³ Ahmed, Saeed, *School Shootings so Far in 2018*, CCN, May 2018

²⁴ Ann M. Aviles, Tanya R. Anderson & Erica Davila, *Child and Adolescent Social-Emotional Development Within the Context of School*, 11 *Child & Adolescent Mental Health* 32, 35 (2006).

make progress within the general education setting and includes consideration of an outplacement when the public school is not able to meet his or her needs. The program must be designed to prepare students for a future to include post-secondary education, employment and independent living.

Endrew F. clarifies that the essential function of the IEP prepared pursuant to the IDEA is to set out a plan for pursuing academic *and functional advancement*. *Endrew F.*, supra 137 S. Ct. at 999 (emphasis added); See § 1414(d)(1)(A)(i)(I)–(IV) This Court recognized that there must be a focus on the particular child as that is the core of the IDEA. *Id.*; 20 U.S.C. § 1400 et seq. Further, this Court established that every child should have the chance to meet challenging objectives. *Id.*; 20 U.S.C. § 1414 (d)(1) (A) (i) (I-IV). While the Second Circuit stated that the decision in the instant case was aligned with the standard established by *Endrew F.*, it is in fact in direct contradiction to the standard set forth by that case.

Children with mental health needs across the country are not receiving an appropriate education and the impact on these children and society are significant. Allowing schools to rely on grades, advancing from grade to grade and scores on standardized testing as the main measures of progress for students with emotional disturbance and not mental and emotional functioning results in denials of FAPE for these students.²⁵ Under the

²⁵ Additionally, the Circuit Court's claim that being in the self-contained program at Strive was the same as being in a regular education classroom as set forth in *Endrew* and *Rowley* because

IDEA schools are required to look individually at students with special education needs, regardless of disability category and devise a plan that is designed to be effective and is based on their unique needs with heavy emphasis on teaching strategies to allow students to be able to be independent and functional in society despite mental health needs. See *Andrew F.*, supra 137 S.Ct. 988. When IEPs do not address these needs, children are sitting idly waiting to either drop out or get passed through to graduation. With students committing suicide and taking part in school shootings at ever increasing rates, this has become a problem that affects society at large. It would not make sense to find that a student with clear mental health issues received a FAPE because they received passing grades when the failure to address his or her mental health needs resulted in harm to him or herself or others or resulted in that student having no ability to have a functional future. Providing nominal counseling to any student with emotional needs, often with a staff who has insufficient background and training to appropriately address the needs of this population is not effective and does not allow for progress. Minimizing mental health needs and focusing solely on academics is a

they followed a similar curriculum is not an accurate statement. (Pet. App 47-48). Being in a regular education class means being in the regular public high school classroom, not a segregated setting without even one regular education teacher. This distinction became exceedingly clear when he lasted mere weeks in the part day regular education environment. (Pet. App p. 58). Further, as acknowledged by the District Court, Strive was an alternative program that followed modified curriculum. (Pet. App 55).

dangerous standard both for children with mental health needs and for society at large. Parents, such as Mr. and Mrs. P. often provide extensive private counseling and psychiatric care outside of school. (Pet. App 102). However, for the majority of the available hours of the week during the school year, children are in school and it is in school that they are entitled to and require a program and services that address their identified area of need.

Further, looking to M.P.'s grades as dispositive of progress is misleading. As discussed above, his aggression intensified over time and he was never able to return to his regular public school because he had never learned the coping techniques, self-regulation and ability to sustain in a difficult situation without becoming agitated and aggressive. (Pet. App. 17). As found by the Hearing Officer, without constant clinical intervention, supervision and monitoring M.P has a "...high risk to hurt somebody, kill somebody, damage somebody." (Pet. App 103).

So the passing grades that he received, the credits he earned and the score on the state assessment meant nothing to his ability to function out in the world. While there was no expectation that the Board would cure his mental health issues or autism, progress within his area of disabilities was expected and did not occur because the IEP did not target these areas. Schools are required to implement programs for students under all special education classifications that allow them to make progress in light of their circumstances even though

there is no expectation that any student can be “cured” of his or her disability. M.P. did not make progress because he was never provided with the kind of services and program that would have allowed for progress. He was never appropriately taught the very teachable coping skills that would allow him to find other ways to handle distress other than deciding that the target of his distress needs to be eliminated. Data was never collected on *his* specific behaviors, including making inappropriate comments, assaulting a student, and being at risk of hurting or killing someone at all times, or his response to intervention.

In determining that he was provided a FAPE, the lower courts considered his attendance in addition to his grades. (Pet. App 16). However, while M.P did attend Strive he demonstrated that after an entire year at Strive he could not return to the regular public high school which he had previously attended successfully. (Pet. App. 17). In his final year in Strive, he was not consistently attending class in the fall while placed unsuccessfully in the regular high school (Id.), had to miss school when he was suspended and arrested (Pet. App. 18) and again when he was hospitalized. (Pet. App. 20). In Strive, he was in essence simply idly waiting until he could either drop out or graduate. As stated above, the IDEA requires more than a body in a seat in a watered-down program. Progress needs to be tied to student’s disabilities and while he was attending school in a segregated small setting with a modified curriculum with classes that he had to repeat because there were

not enough courses for him to take, his mental health worsened over time. M.P. was provided with the counseling that all students at Strive received, irrespective of the fact that he would not engage in that counseling as testified by the counselor. (Pet. App. 120). His program was not individualized to his unique needs. (Pet. App 50). And again, the IEP for Achieve was not created with any information about the student, could not meet his transition needs and could not provide the trained staff to allow him to make progress in his social and emotional functioning while keeping himself and those around him safe. (Id.).

Allowing schools to provide inappropriate services and fail to address areas of identified weakness in the IEP, denies a student the opportunity for a FAPE, denies them the opportunity for ambitious goals and objectives and denies them a program tailored to their individualized needs.

Just as there are evidence-based literacy programs and evidence-based autism programs, there are evidence based mental health interventions such as Dialectic Behavioral Therapy (hereinafter

DBT)²⁶ and Cognitive Behavioral Therapy.²⁷ Evidenced based interventions are expected in areas of disabilities such as Autism, Dyslexia other Learning Disabilities. See *M.H v. NYC Dept. of Educ.*, 685 F.3d 217 (2nd Cir, 2012). However, in the area of mental health schools are allowed to continue to check the boxes and provided the same counseling to a student who presents with anxiety as they provide to students with psychosis and suicidal and homicidal ideation. There are students such as M.P. who have disabilities that cannot be appropriately programmed for with the services available in the public school or cases where a school district waited so long to identify and program for the student that they now require a higher level of programming. However, for many students with mental health needs, implementation of an effective IEP within the general education setting that targets the area of mental health will likely decrease the amount of students who require out of district placements.

²⁶ Canadian Agency for Drugs and Technologies in Health (CADTH), *Dialectical Behavior Therapy in Adolescents for Suicide Prevention: Systematic Review of Clinical-Effectiveness*, CADTH Technol Overv. 2010; Published online 2010 Mar 1. PMID: PMC3411135 PMID: 22977392; DBT, an evidenced based therapeutic approach was offered at Options, the program sought by the family.

²⁷ Stefan G. Hofmann, et. al, *The Efficacy of Cognitive Behavioral Therapy: A Review of Meta-analyses*, Cognit Ther Res. 2012 Oct 1.

The IDEA was created to protect all students with disabilities and it is time that it was fairly extended to students with mental health needs.

II. Having a standard of FAPE for students with mental health issues that is tied to their mental health needs is essential for effective implementation of IDEA.

a. An Inconsistent Standard is Untenable For All Parties

Currently, there is no clear standard of FAPE for children with mental health needs. This is discrepant from other disabilities. For example, when measuring the progress of a student with a reading disability, courts properly look to whether the school implemented a reading program and progress in reading is a determining factor in establishing whether a FAPE has been provided. See *R.R. v. Wallingford Bd. Of Ed.*, 35 IDELR 32 (2001). (District Court found the failure to provide an appropriate reading program was a violation of FAPE.). If a child has autism, courts look for progress in social functioning as a marker of whether FAPE has been provided. See *F.O v. NYC Dept. of Educ.*, 976 F. Supp. 2d 499 (S.D.N.Y, 2005). (Court found out of district placement appropriate because student progressed in the area of social functioning) ; *L.O v. NYC Dept. of Educ.*, 822 F.3d 95 (2nd Cir. 2016) (court looked to whether the IEP appropriately addressed social interaction

for a student with autism.); *M.H v. NYC Dept. of Educ.*, 685 F.3d 217 (2nd Cir, 2012) (Found the SRO's failure to consider any of the evidence regarding the ABA methodology and its propriety for the student was failure of the court and therefore the decision did not require deference and the Parent's outplacement which provided ABA programming was appropriate.). If a child has a mental health concerns, some Circuits look to grades and advancement from grade to grade as measures of progress, irrespective of whether there has been any improvement in the identified area of disability. However, in some Circuits, education includes more than just grades and test scores.

It is clear that the outcome you obtain is based on the Circuit in which you reside. The first Circuit has held that the IDEA entitles qualifying children to services that "target all of [a child's] special needs, whether they be academic, physical, emotional or social." *Mr. I ex rel. L.I v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Circuit, 2007). In this eligibility case, the student was a bright young girl who was excelling academically but struggling emotionally. She had anxiety, Asperger's, depression and she self-harmed while in the school building. *Id.* at 6. Following an argument over an academic assignment she tried to kill herself. The Board denied her eligibility for special education. The Court found that her condition did affect her educational performance and that her attempted suicide could not be isolated from her underlying condition and instead

was a manifestation of her Asperger's and associated depression. *Id.* at 19. The first circuit was clear that both academic and nonacademic areas needed to be considered under Maine law, however the Court was clear that this standard was fully in line with the expectations of the IDEA. *Id.* at 10. It acknowledges that educational performance encompasses more than academics. *Id.* at 12.

In the case of *L.J by and through Hudson v. Pittsburg Unified School District.*, 850 F.3d 996 (9th Circuit, 2017) the ninth Circuit found that the district needs to consider behavior, academic progress and social needs of students with disabilities in eligibility determinations. *L.J.*, supra 850 F.3d at 1004. In that case the Court found that the fact that the student threatened to kill himself outside of school was immaterial and that being hospitalized affects a student's education. *L. J.*, supra 850 F.3d at 1006. Further, the Court held that not providing records to a Parent deprived them of the right to make informed decisions about their child.

Alternatively, the third circuit held in *Munir v. Pottsville Area School District*, No. 12-3008 (3d. Cir Jul. 25, 2013) that a parent could not recover tuition reimbursement because the child's multiple suicide attempts were deemed to be an emotional need and not educational.

The fourth circuit held in *Shaw v. Weast*, 364 Fed.Appx 47 (4th Circuit, 2010) found that a student with Post Traumatic Stress Disorder, clinical

Depression and Bipolar Disorder received a FAPE because she received credits, despite her increasing decline in mental health including self-mutilation at school, multiple suicide attempts, including walking into traffic and inability to return to the school program. The court denied reimbursement to the parents for a residential placement because they stated her emotional needs were related to safety and were not educational.

And in the instant case, the student's aggression increased during his senior year, he was only able to last mere weeks in a partial day back to the public high school, was arrested and suspended for the physical assault of another student, missed school due to his suspension, became actively homicidal in taking a knife to kill his psychiatrist and had to miss school due to his hospitalizations and received his good grades repeating courses he had already passed. (Pet. App. 1-22). However the Second Circuit looked to those grades and performance on a state assessment in determining that he received a FAPE. (Pet. App 34, 45). Further, they found the IEP for his transition year appropriate despite the fact that it did not address any of his aggressions and would place him in the community. (Pet. App 23-50).

This case provides a vehicle to address the question of whether FAPE for students with mental illness requires progress in his or her identified area of need, whether education encompasses more than mere passing grades. Congress has mandated that

all areas of suspected disability must be evaluated, and goals and objectives created to address both the child's needs to enable them to progress in the general education curriculum and to meet all of the child's other educational needs that result from their disability, thereby it does not make sense to measure progress only on grades and state assessments. 34 CFR 300.320(a)(2)(A-B).

Creation of a clear standard of progress, that progress in mental health is part of FAPE and not just grades and scores on state assessments, will allow the law to be applied consistently across the country. Schools would be required to appropriately program for children with mental health needs with evidenced based programs that would ensure student's IEPs are tailored to the student's individualized needs with the aim for progress in the targeted areas. This is consistent with the letter and purpose of IDEA.

III. This Court has Granted Review To Clarify the IDEA.

Since the Court first addressed the standard of FAPE in *Rowley*, this Court has recognized the legal complexities within the IDEA's and its importance to families with children with special needs and boards of education. The Court has heard several cases regarding the IDEA. See, e.g. *Winkelman ex rel. Winkelman v. Parma Cty. Sch. Dist.*, 550 U.S. 516 (2007) (addressing parental rights in regard to prosecuting IDEA claims on own behalf); *Arlington Cent. Sch. Dist.*, 550 U.S. 516 (2007) (addressing

parental right to request expert fees); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (addressing the burden of proof in IDEA cases at the administrative hearing level); *Honing*, 484 U.S. 305 (1988) (addressing the question of “stay put” and student discipline with special education); *Endrew F. supra. 137 S. Ct. 988* (addressing the FAPE standard)

IV. This Case Is An Excellent Vehicle For Resolving the Question Presented.

At minimum, students spend over thirty hours a week for twelve years of their life within the public school setting. It is paramount that during this period of their lives, children with disabilities get the services they require under Federal law in order to have the opportunity to have a functional future and become contributing members of society. This case demonstrates the consequences when the IDEA is violated and children with mental health needs do not receive the supports they require. This case provides a clear opportunity to answer the question of FAPE for children with mental health needs and affirm the IDEA which states children must receive a FAPE and a program tailored to their individualized needs. This means that courts cannot look at passing grades and find progress when the student is deteriorating in the area of their disability. The IDEA requires education to mean more than simply passing grades.

The Second Circuit’s decision is final and resolution of the question presented will likely be

outcome determinative. If the Court holds that the Second Circuit upheld a proper standard, M.P.'s case is over. Yet, it is unlikely M.P.'s IEP would have been found to be appropriate if he was labeled under the Autism classification or any of the other eligibility categories because the goals and objectives and the services were not tailored to his unique needs. Further, the IEP itself did not identify grades or state assessments as areas of weakness for M.P. to be targeted yet this was the standard enforced by the hearing officer, the district court and the second circuit.

If this Court determines that a FAPE must be tied with appropriate progress in the area of a student's disability, it could decide whether M.P.'s IEP met that standard given the facts already fully developed below – as it did in *Rowley* and *Andrew F* – or it could remand to allow the lower courts to apply the new standard.

V. The Second Circuit Erred in Finding that grades and scores on state tests were the primary vehicle for determining progress for a student with mental health.

In 1997 Congress acknowledged that children with disabilities were not receiving a free appropriate public education and overall the education system provided low expectations for these students. 20 U.S.C sec 1400 (c) (3). When the IDEA was amended Congress attempted to address the need for equality of opportunities, full participation, independent living and economic self

sufficiency for individuals with disabilities. 20 U.S.C sec. 1400 (c) (1). One such change was the requirement for schools to issue progress reports and document “academic achievement and functional performance.” 20 U.S.C sec. 1414 (d) (1) (A)(i) (III), (VI) (aa) (added in 2004.) Further, services needed to be based on peer-reviewed research whenever practicable. *Id.* sec. 1414 (d) (1) (A) (i) (IV) (added in 2004).

- a. ***Andrew F.* is consistent with the idea that an IEP should focus on a child’s area of disability and therefore progress should be monitored based on the actual area of disability.**

Andrew F. was diagnosed with autism and his parents believed his academic and functional progress had stalled. *Andrew’s* parents removed him from the public school and enrolled him in a private school where he made significant progress. This Court held that to 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. Andrew F.*, *supra* 137 S. Ct. at 991 (emphases added). An IEP must aim to enable the child to make progress as the essential function of an IEP is set out a plan for pursuing academic and functional advancement. This reflects the focus on the particular child that is at the core of the IDEA that every child should have the chance to meet challenging objectives. *Id.* Therefore, when a court upholds an IEP which had no goals to address

social skills for a student with autism and no goals or objectives addressing a student's psychosis and upheld an IEP that did not address his transition goals it is inconsistent with the standard established under *Endrew F* to say such a program is appropriate. In order for an IEP to be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, the IEP must actually address the child's circumstances. When this occurs, there are goals and objectives linked to a child's disability and progress would be monitored based on those goals and objectives, not solely on grades or standardized tests. Otherwise, the purpose of the IDEA, to prepare students for employment, post secondary education and independent living cannot be fulfilled.

CONCLUSION

For the foregoing reasons the Parents respectfully request that the petition for Writ of Certiorari be granted.

Respectfully submitted,

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