

No. 17-1699

IN THE
Supreme Court of the United States

MR. P, ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF
M.P.,

Petitioners,

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

The Petitioners dispute the Respondent's recitation of the facts and claims throughout their Brief in Opposition. This reply brief focuses solely on the most egregious claims of the Respondents. In its submission, it appears the Respondents both misunderstood and misapplied the question presented by the Petitioners. The Petitioners, as thoroughly explained throughout the Petition for Writ, are not asking for this Court to expand the IDEA or create a separate FAPE standard for children with mental health disabilities, but instead are seeking clarification that under the IDEA, students with mental health needs who qualify for special education are entitled to the same standard of FAPE as other disability categories.

ARGUMENT

- I. The basis for the Question Presented was raised as an issue in the lower courts and the Parents have continuously asserted that their son was denied FAPE based on his individualized mental health needs. The Petitioners have further continuously stated that the board failed to address M.P.'s mental health needs and in finding FAPE despite his lack of progress in his disability, the hearing office and subsequent lower courts did not correctly apply FAPE

The Respondents' claim that the substantive attack on the Student's IEP in the courts below was focused on an alleged failure to provide M.P. with

social skills instruction, as well as goals and objectives addressing those areas, and that the Parents claimed the Options program was superior to that found appropriate by the IHO is both misleading and inaccurate. (Respondents' Brief in Opposition p. 20). The Petitioners filed for due process on March 24, 2014 claiming the Board failed to provide M.P. a FAPE for the 2011-12, 2012-13 and 2013-14 school year. (App. 92-93). The foundation of the Petitioners FAPE claim, which has been reiterated throughout the case, was that the Board's program did not provide a free appropriate public education for a student with psychosis, autism and homicidal and suicidal ideation. Specifically, the Petitioners have continuously raised the issue that the Board's program could not address the student's mental health needs. The Board's claim that the Petitioners substantive claims focused on a lack of social skills programming is not supported by any document filed by the Petitioner. While the Petitioners did raise the issue that this student with autism was not provided with social skills instruction, the main issue presented at all times has been that M.P. was denied FAPE due to his mental health.

Further, throughout the Respondents' brief, the question presented is misconstrued and misapplied. Contrary to the assertion raised by the Respondents, The Petitioners are not asking for a different standard for assessing FAPE for students with mental health needs, they are instead asserting that these students are entitled to the same standard of FAPE as other disability categories.

In complaints filed with both the District Court

and Second Circuit, the Petitioners challenged the Court's reliance on grades and test scores when evaluating M.P.'s IEP for mental health needs and raised the concern that an appropriate education is more than passing grades and scores on standardized assessments. For example, the Second Circuit held that the District provided M.P. a meaningful education program because after he was first hospitalized, the District allowed his teachers to give him a "P" or a pass for low grades and provided a resource study hall. (Pet. App p. 44). While the court approved modifying his grading system, it did not find issue with the fact that the Board failed to provide any form of counseling to address his suicidal ideation, and subsequent hospitalization nor did it do anything to address the fact that he had been bringing a knife to school. The Petitioners assert that this is not in line with the intention and purpose of IDEA.

The Petitioners are asking the Supreme Court to clarify that IDEA does clearly encompass students with emotional disturbance, and therefore under the IDEA they are entitled to the same standard of FAPE as students with other disabilities, namely progress in their actual identified category of disability.¹ The foundation of this idea has been established throughout all proceedings. As noted in the Petitioners' Writ, the Supreme Court has clarified the IDEA in previous Supreme Court cases. (Petitioners Writ p. 30-31).

¹ Neither a hearing officer nor a District Court has the authority of the U.S. Supreme Court to clarify legislation on a national level, thus raising the question presented in this manner at the hearing or lower court level would not have been proper.

The Respondents' reliance on *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) is misplaced. In *Zivotofsky*, the Court remanded the matter because the question presented had not been raised earlier. In the case at hand the foundation of the question, that the Student was denied a FAPE due to the failure of the district to address his mental health and that the Hearing Officer and lower Courts relied predominantly on his grades and standardized test scores, was raised throughout the entire history of the Petitioner's case.²

From the onset of this litigation, Petitioners were clear and unequivocal in their position that the IDEA includes a requirement that for FAPE to be provided, a student must make progress in the individual disability category identified. (See Pet. App p. 46). The Petitioners sought to have the Second Circuit opine on this issue. However, the Second Circuit's decision instead confirmed that district courts analyze denial of FAPE claims arising from students with mental health needs categorized under Emotional Disturbance differently than other disability categories. This Court should consider the question presented so as to ensure that all courts analyze such claims uniformly and consistently.

II. As outlined in the Petitioner's Petition for Writ of Certiorari, the standard of FAPE applied for

² Neither a hearing officer nor a District or Circuit Court has the authority of the U.S. Supreme Court to clarify legislation on a national level so presenting the question presented in this format at the hearing or lower court level would not have been proper.

students with mental health needs depends on the Circuit in which the student resides in.

The Petitioners were clear in their Petition for Writ that depending on the Circuit in which a student resides, students who qualify for special education under the category of emotional disturbance are receiving different treatment under the IDEA. The Respondents' allegation that such an argument is irrelevant holds no weight.

Further, the eligibility cases that the Respondent referred to are relevant when considering the question presented. (Respondents' Brief in Opposition p. 21). Children with mental health needs are being denied eligibility based on grades and test scores. These cases highlight the disparate treatment of children with mental health needs. See *Mr. I. ex rel. L.I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007); *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2017).

The Third Circuit in *Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423 (3d Cir. 2013)) demonstrated how mental health concerns, even where there is an impact on education, have been separated from traditional educational concerns. This present case demonstrates how a student like M.P., whose mental health deteriorated throughout his special education program that was supposed to be tailored to his mental health needs, could nevertheless be deemed to have received a FAPE based exclusively on the fact that he received grades of A's and B's. Petitioners turn again to the argument raised in their initial brief, that it is not clear what the purpose of IDEA is

if it is not intended to prepare students for independent living, employment and post-secondary education, as stated by Congress. It is not clear what achieving passing grades does to further this purpose for a student who is not able to function in society because their specific special education needs were not met.

- III. The Respondents' argument that the IDEA does not include mental health needs contradicts the IDEA which has an explicit category for students with mental health needs and exemplifies the problem, that many school districts believe students with mental health needs are not entitled to services individualized to their unique needs, and lower courts across the country analyzing such claims treat these students differently than other IDEA eligible students.

The Respondents' claim that the IDEA does not cover mental health is contradicted by the IDEA itself. The IDEA includes the category of "emotional disturbance" which is defined as:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or

feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section. 34 C.F.R. § 300. 8 (c) (4). (emphasis added).

By definition, Emotional Disturbance as a category necessitates that there be a difficulty in the social or emotional functioning of a student. Mental health conditions such as anxiety, depression, bipolar disorder, psychosis, schizophrenia and borderline personality disorder, implicitly implicate social or emotional impairments in those students diagnosed with such conditions. Therefore, students suffering from such mental health conditions are found eligible under the IDEA with an Emotional Disturbance. Said differently, if a student did *not* have a social or emotional impairment, they could not be found eligible as a student with an Emotional Disturbance. By their response, the Respondents' want this Court to ignore the plan language of the IDEA regarding what is required to ensure a FAPE for all students labeled with an Emotional Disturbance. The Respondents' argument is a symptom of the greater

problem raised by the Petitioners.³

To further clarify, the Petitioners are not asking this Court to create a new “classification” under the IDEA or expand the meaning of the IDEA. In fact, Petitioners are requesting only that this Court clarify that the IDEA must be applied equally to all categories of disability and that school districts not be allowed to provide a lesser standard of FAPE to students identified as Emotionally Disturbed. The Petitioners are requesting that when a student has identified mental health needs that all parties have agreed have an adverse impact on his or her education, that those mental health needs be programmed for and that the standard of FAPE not be based on grades and test scores.

The Respondents themselves acknowledged that absent an adverse effect on *educational* performance, a child with mental health impairment is not entitled to special education... (Respondents’ Brief in Opposition p. 27) (Emphasis added). In continuing to find M.P. eligible for special education as a student with an Emotional Disturbance, the Respondents were acknowledging that his mental health adversely impacted his educational performance. Thus, M.P.’s programming should have

³ The Respondents asserted that the Petitioners included “misleading” facts in the Petition for Writ yet the statistics speak for themselves. The fact stands that 37 percent of students with a mental health condition age 14 and older drop out of school. This is the highest dropout rate of any disability group. NAMI, *Mental Health Facts, Children and Teens*, <https://www.nami.org/NAMI/media/NAMI-Media/Infographics/Children-MH-Facts-NAMI.pdf>.

been targeted to address his mental health needs.

While the Respondents claim that requiring school districts to look for progress in the area of a child's actual area of disability is unworkable under existing law, this Court stated in *Endrew F.* that "a focus on the particular child is the core of the IDEA." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 197 (2017); 20 U.S.C.A § 1400 et. seq. This Court further clarified that in order for a Board to meet its substantive obligation under the IDEA, the school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Id.* at 999. Therefore it is unclear on what basis the Board is stating that requiring a student to make progress in light of his or her circumstances, which for M.P is significant mental health impairments, is inconsistent with the IDEA. In fact, such requirement is absolutely in line with the IDEA as well as this Court's interpretation of the Act.

Further, the Petitioners were not asking for Courts to micromanage IEPs as the Respondents claim any more than a Court would "micromanage" the IEP of a dyslexic student by expecting that it would be designed to improve that student's ability to read. Instead, Petitioners have demonstrated through M.P. that the Board failed to provide him with an appropriate education and in doing so highlighted the issue that children who qualify for special education due to mental health concerns are not provided the same level of FAPE as students with other disabilities. While the Petitioners appreciate that the Respondents' suggestion to pursue a

legislative solution, the IDEA was created to protect children with disabilities and ensure that all eligible children are provided a Free Appropriate Public Education. The legislation exists. The Petitioners are simply asking for clarification that the federal statute is applied equally to all disability categories.

IV. The Court of Appeals Did Not Apply the Correct Standard to Evaluate Whether the Board's Program Provided FAPE

The Second Circuit was very clear on their reasoning for finding that the Board provided FAPE, relying predominantly on test scores, attendance and grades.⁴ This is in violation of both the IDEA and this Court's decision in *Endrew F.* *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).

The Second Circuit indicated that “grades are an important indication of any student’s progress. (Pet. App. 47). The Second Circuit further included testimony regarding M.P.’s reading level and noted that M.P. was able to read magazines as support for

⁴ While the Board and lower courts rely on comments from Mrs. P to support progress in social and emotional areas, Mrs. P’s testimony has been misrepresented. Given the Parents filed for due process claiming a denial of FAPE, the Parents have consistently held that M.P. did not make progress in light of his circumstances.

the finding that FAPE was provided.⁵ (*Id.* p. 48). They further noted that M.P. was an “A” and “B” student who scored Proficient on standardized testing. (*Id.*). The Second Circuit relied on this information when determining that the Board provided FAPE, they provided little to no consideration of his social or emotional progress and lack thereof. They did not consider that he punched a student repeatedly with such force that he broke his own hand in his senior year and at the end of that year, that he was hospitalized for wanting to kill himself and his former psychiatrist. (*Id.* p. 81). Nor did they consider the fact that the Hearing Officer found that he had thoughts about killing his former psychiatrist on several occasions (*Id.* p. 102) and was a “high risk to hurt somebody, kill somebody, damage somebody.” (*Id.* p. 103). Instead the Second Circuit and the lower courts focused on the fact that M.P. was an A and B student. Again, it is not clear what the purpose of the A’s and B’s were for this student whose mental health declined in his inappropriate program such that he had his first serious physical assault and second hospitalization for homicidal ideation at the end of his time at the Strive program. (*Id.* p.20).

Further, the Respondent fails to include that in achieving passing grades, the academic expectations were modified and lowered for M.P and he retook classed due to the limited courses offered. (*Id.* p. 55, 81). The fact that he was only able to last mere

⁵ M.P. had a Full Scale IQ of 108, placing him in the upper limits of the average range and his verbal comprehension placed him in the 98th percentile. (Pet. App p. 98).

weeks in the public high school after it was claimed by the Board that he made success in Strive such that he could begin to reintegrate into his community school indicates that Strive did not appropriately address his significantly emotional needs. Clearly, this program was not appropriately providing instruction to prepare him for a functional future nor were the claims of “progress” in the program evidenced in any real world situation.

In the case at hand, M.P.’s circumstances included significant mental health concerns, yet the Board and the subsequent courts reviewing this matter relied on areas that did not relate to his disability to find progress. While the Respondents try to claim that the Courts did not just look at academic progress, the record does not support such an assertion.

Further the Respondents stated M.P.’s hospitalizations did not originate from school. (Respondents’ Brief in Opposition p. 25). Yet, one of M.P.’s hospitalizations occurred when his parents asked him about failing grades and another occurred due to “homicidal ideation.” (Pet. App p. 9, 20). Whether M.P. wanted to kill someone inside or outside of the school, this type of thought process would significantly impact his access to his education. (Pet. App p. 59, 100-101.).

CONCLUSION

The Petitioners are not seeking for the IDEA to promise a certain outcome nor do they believe that FAPE should be viewed through “different lenses”

that depend on the disability category. Instead, Petitioners are seeking this Court to clarify that children with mental health needs are equally entitled to FAPE and must make progress in light of their individualized circumstances as required by IDEA.

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Respectfully submitted,

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