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From Rowley to Endrew F.: The Evolution of a Free Appropriate Public Education for Children with Disabilities

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From *Rowley* to *Endrew F.*: The Evolution of a Free Appropriate Public Education for Children with Disabilities

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I. INTRODUCTION

In 1982, the United States Supreme Court established the standard for school districts to provide a "free appropriate public education" (FAPE) to students with disabilities as required by the Individuals with Disabilities Education Act (IDEA).[1] In *Board of Education v. Rowley*, the Supreme Court ruled that in order to meet the FAPE requirement, school districts were required to provide students with disabilities an "educational benefit."[2] Thirty-five years later, in *Endrew F. v. Douglas County School District RE-1*, the Court revisited *Rowley* and stated that in order to provide a FAPE to children with disabilities, school districts must provide an educational program that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[3]

Even though *Endrew F.* articulated a new FAPE standard, the Court emphasized that it was not overruling *Rowley*.[4] The Court also took steps to narrow its decision. It warned that its new FAPE standard was not an "invitation" to courts to abandon the deference the Court gave to state educators in *Rowley*.[5] It also reaffirmed *Rowley*'s ruling that the IDEA does not require school districts to provide equal educational opportunities to children with disabilities.[6]

The Supreme Court's adoption of a new FAPE standard combined with its cautionary words about *Rowley* left several questions about *Endrew F.*'s impact. Primary among them was how the lower courts would interpret its FAPE standard. Did *Endrew F.* replace *Rowley*'s FAPE standard or just restate it? Did *Endrew F.* set a higher FAPE standard than *Rowley*? Despite the Supreme Court's denial, did *Endrew F.* open the door for courts to construe the IDEA to provide equal educational opportunity for students with disabilities? This article examines *Endrew F.*'s impact by tracing the evolution of FAPE standards among the courts and answers all three questions in the affirmative: 1) *Endrew F.*'s FAPE standard replaced *Rowley*; 2) it strengthened the FAPE standard in a majority of the circuits; and 3) it left the door open for the courts to construe the IDEA as requiring equal educational opportunities for children with disabilities.

Part II of this article provides a brief overview of the IDEA's essential elements, including its definition of a FAPE. Part III examines how the Supreme Court defined a FAPE in *Rowley*. Part IV explains the various FAPE standards the circuit courts implemented after *Rowley*. Part V focuses on *Endrew F.*, in which the Court explicitly rejected the lowest of these standards and adopted one that appears to be

1. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 203 (1982); *see also* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401–82 (2017) (codifying FAPE at § 1412(a)(1)).

2. *Rowley*, 458 U.S. at 200–01.

3. 137 S. Ct. 988, 999 (2017).

4. *See id.* at 998–99, 1001 ("Mindful that Congress . . . has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case.").

5. *Id.* at 1001.

6. *Id.*

higher than all of the circuit courts except one. Part VI documents how the lower courts have implemented *Endrew F.* Finally, Part VII explores whether *Endrew F.* could lead the courts to adopt the equal opportunity standard that the Court rejected nearly forty years ago.

II. OVERVIEW OF THE IDEA

A brief review of the IDEA helps to place the FAPE requirement in context. This review includes the IDEA's background, its federalist structure, its procedural requirements, the statutory definition of a FAPE, the least restrictive environment requirement, and the IDEA's remedial options.

A. The IDEA's Background

Following the Supreme Court's decision in *Brown v. Board of Education*,[7] a movement to create a right to education for children with disabilities was born. The movement documented legally sanctioned discriminatory practices by school districts that resulted in millions of children with disabilities being shut out from school and millions of others warehoused in unsuitable classrooms where they did not receive any education.[8] Congress passed the IDEA to ensure that children with disabilities received an appropriate education.[9]

B. The Federalist Structure of the IDEA

The IDEA provides federal funds to states to assist them in providing education to children with disabilities.[10] In return, the IDEA requires states to comply with the IDEA's requirements for educating those children, including providing a FAPE.[11] The states generally distribute these funds to local school districts, which are directly responsible for meeting the educational needs of children with disabilities.[12] Courts have cited the Spending Clause[13] and the Fourteenth Amendment's Enforcement Clause[14] as the sources of congressional authority to pass and enforce the IDEA.[15]

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7. 347 U.S. 483, 495 (1954) (deciding that segregation in schools based on race deprived students of equal protection of the laws guaranteed by the Fourteenth Amendment).

8. *See* Deborah N. Archer & Richard D. Marsico, Special Education Law and Practice: Cases and Materials 11 (2017).

9. 20 U.S.C. § 1400(d) (2017).

10. *Id.* § 1411(a)(1); Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982).

11. *Endrew F.*, 137 S. Ct. at 993; *see* § 1412(a)(1).

12. *See* B.J.S. v. State Educ. Dep't, 699 F. Supp. 2d 586, 599–600 (W.D.N.Y. 2010) (ruling that local school districts, not states, have the responsibility to provide a FAPE to children with disabilities).

13. U.S. Const. art. I, § 8, cl. 1.

14. *Id.* amend. XIV, § 5.

15. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295 (2006) ("Congress enacted the IDEA pursuant to the Spending Clause."); Dellmuth v. Muth, 491 U.S. 223, 227 n.1 (1989)

C. The IDEA's Procedural Requirements

The IDEA's procedural requirements are extensive, taking up a significantly larger portion of the statute than its educational requirements. The IDEA requires school districts to identify and evaluate children[16] to determine whether they have one of eleven enumerated disabilities and, by reason of the disability, need special education and related services.[17] If a child is eligible for special education, the school district must create a written individualized education program (IEP) for the child.[18] The IEP is prepared by a team that includes administrators, teachers, and the student's parents.[19] It contains a description of the student's disability, their level of academic achievement, annual goals, a description of how their goals will be measured, and the special education and related services the student will receive.[20]

The IDEA creates an administrative structure for filing complaints and allows judicial review of the administrative process. Any party may submit a complaint to the relevant school district regarding the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[21] The school district must provide the opportunity for an impartial administrative hearing to any party that files a complaint.[22] Any party aggrieved by the administrative process can file a complaint in court.[23] The reviewing court will "receive the record of the administrative proceedings," accept "additional evidence at the request of a party," and "bas[e] its decision on the preponderance of the evidence."[24]

D. The IDEA's Definition of a FAPE

The IDEA defines a FAPE as "special education and related services that . . . are provided in conformity with the [child's] individualized education program . . . ."[25] "Special education" is "specially designed instruction, at no cost to parents, to meet

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(assuming without deciding that Congress passed the IDEA pursuant to its authority under the Enforcement Clause of the Fourteenth Amendment).

16. § 1412(a)(3)(A).

17. § 1401(3)(A)(i)–(ii). The enumerated disabilities are "intellectual disabilities, hearing impairments . . ., speech or language impairments, visual impairments . . ., serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairment, or specific learning disabilities . . . ." § 1401(3)(A)(i).

18. §§ 1414(d), 1401(14).

19. § 1414(d)(1)(B)(i)–(vii).

20. § 1414(d)(1)(A)(i)(I)–(VIII).

21. § 1415(b)(6)(A).

22. § 1415(f)(1)(A).

23. § 1415(i)(2)(A). A civil suit "may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." *Id.*

24. § 1415(i)(2)(C)(i)–(iii).

25. § 1401(9).

the unique needs of a child with a disability . . . ."[26] Related services include "developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education . . . ."[27] Thus, to provide a FAPE, a school district must prepare an IEP that meets a child's educational needs and allows the child to benefit from that education. However, the IDEA does not define two of the key phrases in this definition: "meets" and "benefit."

E. The Least Restrictive Environment

The IDEA requires school districts to educate students with disabilities in what is known as the "least restrictive environment" (LRE). This means that:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[28]

The circuit courts have established different tests for determining whether a school district has satisfied the LRE requirement. These tests generally require a flexible, child-focused analysis to determine whether adequate education in the general education classroom can be achieved by using educational supports, and if not, whether the school has maximized the child's participation in other mainstream activities.[29]

F. Remedies

In civil cases, the IDEA gives judges broad authority to "grant such relief as the court deems is appropriate."[30] Courts have generally concluded that this provision does not allow judges to award monetary damages for IDEA violations.[31] Instead, the two primary forms of relief in IDEA cases are equitable in nature: reimbursement to parents who placed their child in a private school because the district school was

26. § 1401(29).

27. § 1401(26)(A).

28. § 1412(a)(5)(A).

29. *See, e.g.*, P. v. Newington Bd. of Educ., 546 F.3d 111, 113 (2d Cir. 2008). The term "mainstream" has become common parlance for the LRE requirement. *See id.* at 119 ("Educating a handicapped child in a regular education classroom . . . is familiarly known as 'mainstreaming.'") (quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1039 (5th Cir. 1989)).

30. § 1415(i)(2)(C)(iii).

31. *See* Archer & Marsico, *supra* note 8, at 647–49 (discussing the treatment of the IDEA provision by various federal circuit courts).

not providing a FAPE,[32] and compensatory education for services the school district did not provide to the child.[33]

III. BOARD OF EDUCATION V. ROWLEY

In 1982, the Supreme Court issued *Board of Education v. Rowley*, its first decision about the meaning of a FAPE—indeed, its first decision about the IDEA.[34] *Rowley* set the standard for providing a FAPE that would last for thirty-five years.

A. The Majority Decision

1. Facts

Amy Rowley was a deaf elementary school student at Furnace Woods Elementary School in the Hendrick Hudson Central School District in Peekskill, New York.[35] Even though Amy's academic performance was better than average and she had advanced from grade to grade, she understood "considerably less" in class than if she were not deaf, and as a result, was not meeting her full potential.[36]

The school district prepared an IEP for Amy that provided that she would be educated in a regular education classroom, use an FM hearing device, and receive instruction from a tutor for deaf people one hour per day and speech therapy three hours per week.[37] Amy's parents disagreed with this IEP and asked the district to provide her with a sign-language interpreter in all of her academic classes in place of some of the other services, but the district refused.[38]

Amy's parents requested an impartial hearing to challenge the district's decision. They claimed that the district's failure to provide Amy with a sign-language interpreter denied her a FAPE.[39] They lost the impartial hearing and the administrative appeal, but after challenging the administrative decision in federal court, they prevailed—both in the district court and on appeal.[40] The district court

32. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) (finding that the Education of the Handicapped Act—the former name of the IDEA—authorized courts to order public school authorities to reimburse parents for expenditures on private special education).

33. *See* Miener v. Missouri, 800 F.2d 749, 753–54 (8th Cir. 1986) ("[I]mposing liability for compensatory educational services . . . is necessary to secure the child's right to a free appropriate public education."); Archer & Marsico, *supra* note 8, at 671. Compensatory education is a remedy intended to "place disabled children in the same position they would have occupied but for the school district's violations of IDEA, by providing the educational services children should have received in the first instance." G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601, 608 (3d Cir. 2015) (internal quotations omitted).

34. 458 U.S. 176 (1982).

35. *Id.* at 184.

36. *Id.* at 185.

37. *Id.* at 184.

38. *Id.*

39. *Id.* at 185.

40. *Id.* at 185–86.

ruled, and the Second Circuit affirmed, that the IDEA required Amy's school district to provide Amy with the "opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[41] The district court suggested a test to determine whether a school district meets this standard: 1) Measure the student's potential; 2) compare the student's performance with their potential and determine if there is a shortfall; and 3) compare any shortfall with that of typically developing children.[42] The Supreme Court granted certiorari to consider the meaning of a FAPE under the IDEA.[43]

2. The Supreme Court's Definition of a FAPE

The Court, in an opinion by Justice William Rehnquist, rejected the district court's definition of a FAPE, stating that the district court developed it without reference to the IDEA's language or its legislative history.[44] The Court also rejected the Rowleys' argument that the IDEA requires school districts to provide students with disabilities "an equal educational opportunity" as an "entirely unworkable standard requiring impossible measurements and comparisons."[45] The Court formulated its own definition of a FAPE, but did so in six different ways over the course of its opinion:

> One: School districts must provide students with disabilities meaningful access to education.[46]
>
> Two: School districts must give students with disabilities access to special education.[47]
>
> Three: The IDEA provides a basic floor of opportunity to students with disabilities.[48]
>
> Four: School districts must provide some educational benefit to students with disabilities.[49]

41. *Id.*

42. *Id.* at 186.

43. *Id.*

44. *Id.* at 189–90.

45. *Id.* at 198.

46. *Id.* at 192 ("[I]n seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.").

47. *Id.* at 200 ("Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.").

48. *Id.* at 201 ("[T]he basic floor of opportunity provided by the Act consists of access to specialized instruction and related services . . . .") (internal quotations omitted).

49. *Id.* at 200 ("Implicit in the congressional purpose . . . is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.").

> Five: School districts must provide "access to specialized instruction and related services which are individually designed to provide educational benefit" to students with disabilities.[50]
>
> Six: School districts must provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[51]

These six standards can be organized into four different categories based on the amount of education a school district must apparently provide in order to comply with the requirements of a FAPE, from more to less:

Level of Benefit	Formulation
Meaningful access	Formulation One
Educational benefit	Formulations Five and Six
Some educational benefit	Formulation Four
Access to education	Formulations Two and Three

Thus, *Rowley*'s various FAPE standards can be seen as requiring school districts to provide students with disabilities access to education, some educational benefit, educational benefit, or meaningful access to education.[52]

3. The Court's Application of the FAPE Test

Having defined a FAPE, even imperfectly, the Court declined to adopt a single test for determining whether a school district provided a FAPE. Instead, it limited its ruling to the facts before it—a child with a disability "who is receiving substantial specialized education and related services, and who is performing above average in the regular classrooms of a public school system . . . ."[53] The Court stated that a child in these circumstances is receiving a FAPE if the child's IEP is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[54] The Court found that the school district was providing educational services to Amy that were calculated to meet her needs and the lower courts were wrong to conclude that the IDEA required the school district to provide her with a sign-language interpreter.[55] Accordingly, the Court reversed the decision of the Second Circuit.[56]

50. *Id.* at 201.

51. *Id.* at 203.

52. This chart and the two that follow in this article admittedly lack scientific or mathematical precision. They are based on informed judgments about open-ended and often inconsistent language that describes legal standards. Although they lack precision, the charts support broad conclusions. Here, the conclusion is that *Rowley* suggests more than one FAPE standard, and these standards are markedly different.

53. *Rowley*, 458 U.S. at 202.

54. *Id.* at 204.

55. *See id.* at 210.

56. *Id.*

B. Concurring Opinion

Justice Harry Blackmun concurred in the judgment. Based on his reading of the IDEA's legislative history and the intent of Congress, Justice Blackmun suggested a FAPE standard similar to what the district court articulated and the Rowleys pursued: "whether [the child's] program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal" to the one afforded her typically developing classmates.[57] Justice Blackmun concluded that the school district satisfied this standard for Amy.[58]

C. Dissenting Opinion

Justice Byron White, joined by Justices William J. Brennan and Thurgood Marshall, dissented. Justice White analyzed the IDEA's legislative history and concluded that it demonstrated a congressional intent to provide far more education to children with disabilities than the majority's standard.[59] Justice White identified terms in the IDEA's legislative history describing the education that Congress intended, including "full educational opportunity," "equal educational opportunity," and "maximum potential."[60] Based on the legislative history, Justice White concluded that the IDEA requires that children with disabilities be given an equal opportunity to learn.[61] Since Amy understood less than half of what happened in the classroom, he found that she did not have an equal opportunity to learn and thus was deprived of a FAPE.[62]

IV. CIRCUIT COURT INTERPRETATIONS OF *ROWLEY*

Given *Rowley*'s various FAPE formulations, the circuit courts had discretion in deciding which FAPE standard to adopt. Not surprisingly, courts in all but the Sixth Circuit—the only one to articulate the standard in light of the child's potential—adopted standards that fell within *Rowley*'s various categories. The standard for each circuit is described below:

> District of Columbia Circuit: The D.C. Circuit utilized the "some educational benefit" standard.[63]

57. *Id.* at 211 (Blackmun, J., concurring) (emphasis omitted).

58. *Id.* at 212.

59. *Id.* at 215 (White, J., dissenting).

60. *Id.* at 213–14.

61. *Id.* at 215.

62. *Id.*

63. *See, e.g.*, Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005) ("[T]he *Rowley* standard requires only that schools provide 'some educational benefit' . . . .") (quoting *Rowley*, 458 U.S. at 200); Kerkam v. Superintendent, D.C. Pub. Sch., 931 F.2d 84, 87 (D.C. Cir. 1991).

First Circuit: Appeals courts in the First Circuit phrased the FAPE standard somewhat differently. Some courts required a meaningful educational benefit.[64] Others required some educational benefit.[65]

Second Circuit: Appeals courts in the Second Circuit also phrased the FAPE standard differently. Cases differed on whether they defined the FAPE standard as requiring meaningful access or a benefit.[66]

Third Circuit: The Third Circuit required school districts to provide a significant and meaningful benefit.[67]

Fourth Circuit: The Fourth Circuit required school districts to provide meaningful education to children with disabilities, which it defined as "more than minimal, trivial progress."[68]

Fifth Circuit: The Fifth Circuit's position was that the IDEA does not require states to provide the best education, but that the IDEA's basic floor of opportunity means that the child's IEP must be likely to allow the child to progress and not regress, and that the progress must be meaningful, meaning more than trivial.[69]

Sixth Circuit: The Sixth Circuit, the only one to exceed the standards articulated by *Rowley*, held that an IEP must provide "a meaningful educational

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64. *See, e.g.*, Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79, 84 (1st Cir. 2012); D.B. v. Esposito, 675 F.3d 26, 34 (1st Cir. 2012) ("Hence, to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit.").

65. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 23–24 (1st Cir. 2008) ("An IEP need only supply 'some educational benefit,' not an optimal or ideal level of educational benefit, in order to survive judicial scrutiny.").

66. *Compare* T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 160 (2d Cir. 2014) ("To decide whether an IEP complies with the IDEA . . . [it must be asked] whether it was 'reasonably calculated to enable the child to receive educational benefits.'"), *with* M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 143 (2d Cir. 2013) ("[T]he door of public education must be opened in a meaningful way. That is, . . . [it] must provide the opportunity for more than only trivial advancement."), *and* Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 133 (2d Cir. 1998) ("IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results.").

67. *See, e.g.*, Coleman v. Pottstown Sch. Dist., 581 F. App'x 141, 147 (3d Cir. 2014) ("[A] school district . . . must supply an education that provides significant learning and meaningful benefit to the child.") (internal quotations omitted); Mary Courtney T. v. Sch. Dist., 575 F.3d 235, 240 (3d Cir. 2009); Shore Reg'l High Sch. Bd. v. P.S., 381 F.3d 194, 198 (3d Cir. 2004); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183–84 (3d Cir. 1998).

68. O.S. v. Fairfax Cty. Sch. Bd., 804 F.3d 354, 359 (4th Cir. 2015) ("Using [the term] 'meaningful' [is] simply another way to characterize the requirement that an [IEP] must provide a child with more than minimal, trivial progress."); *see also* Hall v. Vance Cty. Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985) ("Clearly, Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic achievement, no matter how trivial.").

69. R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 809 (5th Cir. 2012) ("The FAPE required by the IDEA 'need not be the best possible one, . . . [but] must be likely to produce progress, not regression or trivial educational advancement.'"); Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808–09 (5th Cir. 2003); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247–48 (5th Cir. 1997).

> benefit *gauged in relation to the potential of the child* at issue. . . . Accordingly, an IEP is insufficient if it provides 'only trivial educational benefit.'"[70]
>
> Seventh Circuit: In the Seventh Circuit, school districts were required to provide educational benefit, defined as more than just trivial progress.[71]
>
> Eighth Circuit: The Eighth Circuit utilized both "some educational benefit" and "slight or de minimis" FAPE standards.[72]
>
> Ninth Circuit: The Ninth Circuit utilized the educational benefit standard.[73]
>
> Tenth Circuit: The Tenth Circuit interpreted "some educational benefit" to mean merely "more than *de minimis*."[74]
>
> Eleventh Circuit: The Eleventh Circuit referred to *Rowley*'s FAPE standard as the "basic floor of opportunity standard."[75] Under this standard, school districts are not required to maximize educational benefits, but must provide some educational benefit measured by the child's individual needs.[76]

The chart below links each circuit's FAPE standard to the corresponding *Rowley* standard based on the level of educational benefit each circuit interpreted the FAPE standard to require. If a circuit has adopted two standards, it is placed in the higher of the two groups:

FAPE Standard	Circuits
Meaningful benefit in light of the child's potential	Sixth
Meaningful benefit/access	First, Second, Third, and Fifth
Benefit	Ninth
Some/more than trivial benefit	District of Columbia, Fourth, Seventh, Eighth, Tenth, and Eleventh

70. Woods v. Northport Pub. Sch., 487 F. App'x 968, 974–75 (6th Cir. 2012) (emphasis added); Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 862 (6th Cir. 2004).

71. M.B. v. Hamilton Se. Sch., 668 F.3d 851, 862 (7th Cir. 2011) ("[A]n IEP . . . enable[s] the child to receive an educational benefit 'when it is likely to produce progress, not regression or trivial educational advancement.'") (quoting Alex R. v. Forestville Valley Cmty. Sch. Dist. No. 221, 375 F.3d 603, 615 (7th Cir. 2004)).

72. *Compare* M.M. v. Lancaster Cty. Sch., 702 F.3d 479, 485 (8th Cir. 2012) ("[T]he IEP must provide some educational benefit . . . .") (quoting Park Hill Sch. Dist. v. Dass, 655 F.3d 762, 766 (8th Cir. 2011)), *with* K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 810 (8th Cir. 2011) (finding no IDEA violation when the child "enjoyed more than what we would consider slight or 'de minimis' academic progress").

73. *See* S.W. v. Governing Bd. of E. Whittier City Sch. Dist., 504 F. App'x 571, 572 (9th Cir. 2013) (finding that IDEA requirements were met when the student's IEP provided the child "with educational benefit"); K.S. v. Fremont Unified Sch. Dist., 426 F. App'x 536, 537–38 (9th Cir. 2011); J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 951 (9th Cir. 2010).

74. *See* Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 798 F.3d 1329, 1338 (10th Cir. 2015) ("[T]he 'some educational benefit' language in defining a [FAPE] . . . mean[s] that the educational benefit mandated by the IDEA must merely be 'more than *de minimis*.'"), *vacated*, 137 S. Ct. 988 (2017).

75. Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917, 920 (11th Cir. 2015).

76. *Id.*

With the exception of the Sixth Circuit, every circuit adopted a FAPE standard that correlated with one of *Rowley*'s standards. The Sixth Circuit's additional component—that the education be meaningful in light of the child's potential—foreshadows the Supreme Court's decision in *Endrew F.*

V. ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT

Thirty-five years after *Rowley*, the Supreme Court revisited the question of how much education a school district must provide to a student with a disability in order to provide a FAPE. In answering this question, it replaced *Rowley*'s various educational benefit standards with one that requires school districts to design an IEP that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[77]

A. Facts

Endrew F. involved a child who was diagnosed with autism at age two.[78] By the time Endrew reached fourth grade, his parents felt that his progress had stalled; his IEPs were basically the same from year to year.[79] After the school district again offered Endrew the same IEP for fifth grade, his parents removed him from the public school and placed him in a private school for children with autism.[80] Endrew's behavior and academic performance improved at his new school.[81]

Endrew's parents filed an administrative complaint seeking reimbursement from the school district for the tuition they paid to the private school.[82] They lost at the administrative level, the district court, and the Tenth Circuit: Applying its merely more than *de minimis* standard, the court of appeals found that the school district had not denied Endrew a FAPE.[83]

B. The Supreme Court's Definition of a FAPE

The Court in *Endrew F.* noted that *Rowley* did not adopt a single standard for evaluating whether a school district had provided a FAPE to a child with a disability.[84] It then stated, however, that the IDEA and *Rowley* "point to a general approach: 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

77. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017).

78. *Id.* at 996.

79. *Id.*

80. *Id.*

81. *Id.* at 996–97.

82. *Id.* at 997.

83. *Id.* at 991.

84. *Id.* at 993, 997–99.

child's circumstances."[85] The Court then elaborated on the key elements of its new FAPE standard: 1) reasonably calculated; 2) progress; 3) appropriate; and 4) in light of the child's circumstances.

The Court explained that "reasonably calculated to enable a child to make progress" reflects the concept that the IEP is prospective based on the educational expertise of school officials and input from parents; although it need not be ideal, an IEP must be reasonable in light of the child's circumstances.[86] The Court further explained that "progress" is part of the FAPE standard because the role of the IEP is to create a program that will help the child to advance academically and functionally.[87] In defining "appropriate progress," the Court explained that for a child "fully integrated in the regular classroom," the IEP "typically" should allow the child to pass his courses and advance to the next grade.[88] For children not reasonably expected to advance from grade to grade, the IEP is not required to enable the child to do so, but "the educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."[89] The need to view all of this through the prism of the "child's circumstances" is grounded in the IDEA's requirement that the special education the district provides be specifically tailored to the child's needs, that the child's educational program be individualized, and that schools educate children with a wide range of needs.[90]

The Court stopped short of describing what an "appropriate" education would look like on a case-by-case basis since the appropriateness of an IEP "turns on the unique circumstances of the child for whom it was created."[91] The Court rejected Endrew's parents' argument that the FAPE standard should require districts to provide students with disabilities an equivalent opportunity to achieve academically.[92] That standard, the Court pointed out, is similar to what the district court in *Rowley* adopted and virtually identical to Justice Blackmun's standard in his concurring opinion.[93] Noting that Congress had not made a statutory change to the definition of a FAPE since *Rowley*, the Court declined to interpret the IDEA in a way that the majority of the Court in *Rowley* rejected.[94]

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85. *Id.* at 999.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1000.

90. *Id.*

91. *Id.* at 1001.

92. *Id.* at 992.

93. *Id.* at 1001.

94. *Id.*

VI. THE LOWER COURTS' INTERPRETATION OF *ENDREW F.*

Several circuit courts have addressed *Endrew F.* and its impact on their FAPE standards. This Part describes these courts' responses to *Endrew F.*[95]

A. District of Columbia Circuit

In *Z.B. v. District of Columbia*, the court stated that *Endrew F.* "raised the bar on what counts as an adequate education under the IDEA."[96] The court then replaced its previous "some educational benefits" standard with *Endrew F.*'s standard: The IEP must be "reasonably calculated to make progress in light of the child's circumstances."[97]

B. First Circuit

The Court of Appeals for the First Circuit has not yet considered *Endrew F.*, but a district court in the First Circuit has shed light on its significance. In *C.D. v. Natick Public School District*, the district court's review of the administrative finding was pending when *Endrew F.* was decided.[98] Noting the First Circuit's previous "some educational benefit" standard, and that the hearing officer stated that an IEP must be "designed to meet the child's unique needs" and be "reasonably calculated to enable the child to receive educational benefit," the court remanded the case to the hearing officer with instructions to determine whether its standard was consistent with *Endrew F.*, and if not, to consider the case under the appropriate standard.[99]

C. Second Circuit

The Second Circuit announced its position on *Endrew F.* in *P. v. West Hartford Board of Education*.[100] The court stated that the FAPE standard it had adopted in its prior decisions was consistent with *Endrew F.*'s standard.[101] One of the decisions it cited, *A.M. v. New York City Department of Education*, used the "educational benefits" standard.[102] The other, *Walczak v. Florida Union Free School District*, stated that the

95. The various standards described in this section are based on decisions that were published as of October 1, 2018.

96. 888 F.3d 515, 517 (D.C. Cir. 2018).

97. *Id.* (quoting *Endrew F.*, 137 S. Ct. at 999); *see also* Middleton v. District of Columbia, 312 F. Supp. 3d 113, 121 (D.D.C. 2018); Pavelko v. District of Columbia, 288 F. Supp. 3d 301, 307–08 (D.D.C. 2018).

98. No. 15-13617-FDS, 2017 WL 2483551, at *1 (D. Mass. Mar. 28, 2017).

99. *Id.* at *1–2 (quoting Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 23–24 (1st Cir. 2008)); *but see* Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79, 84 (1st Cir. 2012) (adopting the meaningful benefit standard); D.B. v. Esposito, 675 F.3d 26, 34 (1st Cir. 2012) (adopting the meaningful benefit standard).

100. 885 F.3d 735, 756–57 (2d Cir. 2018), *cert denied*, 139 S. Ct. 322 (2018).

101. *Id.* at 757.

102. *See* 845 F.3d 523, 541 (2d Cir. 2017).

education must be "meaningful."[103] The court then affirmed the decision of the district court that the school had provided the child with a FAPE because it provided him with a "meaningful educational program that was reasonably calculated to enable P. to make progress appropriate in light of his circumstances."[104] In using *Endrew F.*'s standard to determine that the school district had provided the child with a FAPE, the court apparently equated its "meaningful" standard with "appropriate in light of the child's circumstances."

D. Third Circuit

Although the Court of Appeals for the Third Circuit has not addressed *Endrew F.*, district courts in the Third Circuit have been busy doing so. In *Montgomery County Intermediate Unit No. 23 v. C.M.*,[105] the Eastern District of Pennsylvania took an approach similar to the Second Circuit's. The court held that the Third Circuit's "meaningful benefit" standard was similar to *Endrew F.*; thus the hearing officer's FAPE standard that the IEP must be "reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential" was proper.[106] Another court created a test to implement *Endrew F.*: A school district must identify the child's intellectual potential, evaluate the child's educational needs, and implement a curriculum that produces reasonable progress in light of those needs.[107] One decision's analysis provides a roadmap for implementing *Endrew F.*'s appropriate progress test and is worth quoting in detail:

> Significantly, the factual record is preponderant that Student "failed to progress academically at more than a snail's pace." In fact, Student's progress was so incremental there was no reasonable basis to believe that Student could reach or accomplish IEP goals within a yearly term. Student's bench-mark scores well below grade expectations and the incremental progress reports on IEP goals further support the finding that Student was not receiving a meaningful education, was not making satisfactory progress, and was in fact falling behind his age and grade peers. . . . Thus, the educational program offered to Student during his sixth and seventh grade years was not reasonably calculated to allow Student to make appropriate progress under the circumstances. At best, the District offered Student an educational program promising *de minimis* academic progress. As such a program is insufficient, there is no basis for overturning the Hearing Officer's Decision.[108]

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103. 142 F.3d 119, 130 (2d Cir. 1998).

104. *P.*, 885 F.3d at 757.

105. No. 17-1523, 2017 WL 4548022, at *1 (E.D. Pa. Oct. 12, 2017).

106. *Id.* at *6.

107. T.M. v. Quakertown Cmty. Sch. Dist., 251 F. Supp. 3d 792, 797 (E.D. Pa. 2017).

108. Pocono Mountain Sch. Dist. v. J.W., No. 3:16-CV-0381, 2017 WL 3971089, at *9 (M.D. Pa. Sept. 8, 2017) (internal citations omitted).

E. Fourth Circuit

In a case in which the FAPE standard was not at issue, the Fourth Circuit acknowledged that its FAPE standard was similar to the Tenth Circuit's, which the Supreme Court rejected in *Endrew F.*[109] In a case in which the FAPE standard was dispositive, a district court in the Fourth Circuit ruled that *Endrew F.* had overruled *Rowley*.[110]

F. Fifth Circuit

In *C.G. v. Waller Independent School District*, the court equated its FAPE standard with *Endrew F.*'s.[111] The court below had applied the Fifth Circuit's four-factor FAPE analysis, which includes consideration of whether the IEP is individualized based on the student's assessments and academic performance and whether there are demonstrative academic and non-academic benefits.[112]

G. Sixth Circuit

In *Barney v. Akron Board of Education,* a court in the Sixth Circuit stated that in *Endrew F.*, the Supreme Court "revised the *Rowley* standard for what qualifies as an educational benefit" and that "an IEP would be judged as appropriate based on the individual child's potential."[113] Applying this standard, the court found that the student was benefitting from individualized instruction and was making measurable progress towards annual goals.[114]

H. Eighth Circuit

The Eighth Circuit referred to *Endrew F.* in a case involving a Minnesota statute, but did not issue a ruling on the applicability of *Endrew F.* in the Eighth Circuit.[115] A district court in the Eighth Circuit did address this issue, and found that *Endrew*

109. M.L. v. Smith, 867 F.3d 487, 496 (4th Cir. 2017) ("Our prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Endrew F.*").

110. *See* J.R. v. Smith, No. DKC 16-1633, 2017 WL 3592453, at *4 (D. Md. Aug. 21, 2017) ("[E]ven though the ALJ made her decision prior to the Supreme Court's articulation of the *Endrew F.* standard, she went beyond the 'more than *de minimus*' [sic] standard . . . and laid out an approach that evaluated what progress was appropriate in light of the child's circumstances, just as *Endrew F.* requires.").

111. 697 F. App'x 816, 819 (5th Cir. 2017).

112. *Id.*

113. No. 5:16CV0112, 2017 WL 4226875, at *11 (N.D. Ohio Sept. 22, 2017).

114. *Id.*

115. *See* I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch., 863 F.3d 966 (8th Cir. 2017).

F. overruled the Eighth Circuit's *de minimis* standard.[116] Other district courts in the Eighth Circuit have applied the *Endrew F.* standard as well.[117]

I. Ninth Circuit

The Ninth Circuit's response to *Endrew F.* has been inconsistent, but the weight of authority in the Ninth Circuit is that *Endrew F.* replaced its "educational benefit" FAPE standard. One decision ruled that *Endrew F.* clarified but did not overrule *Rowley* and that the Ninth Circuit's FAPE standard is consistent with *Endrew F.*[118] On the other hand, three decisions explicitly adopted *Endrew F.* without addressing whether it changed the Ninth Circuit's FAPE standard.[119] Two of these decisions developed tests to determine whether a school district met *Endrew F.*'s FAPE standard. In *Rachel H.*, the court stated that *Endrew F.* requires an IEP team to consider the child's achievement levels, describe how the child's disability affects the child's ability to perform, and set measurable goals.[120] In *M.C.*, the court interpreted *Endrew F.* to require a school to "implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can 'make progress in the general education curriculum,' taking into account the progress of his non-disabled peers, and the child's potential."[121]

J. Tenth Circuit

On remand from the Supreme Court, the district court in *Endrew F.* articulated the "new legal standard" for a FAPE: A child in a regular classroom should pass from grade to grade; the IEP for a child not in the regular classroom should be appropriately ambitious in light of the child's circumstances; an IEP must enable the child to make progress; and the progress must be appropriate in light of the child's circumstances.[122] Applying this standard, the court ruled that the district failed to provide *Endrew F.* a FAPE.[123]

116. *See* Paris Sch. Dist. v. A.H., No. 2:15-CV-02197, 2017 WL 1234151, at *4 (W.D. Ark. Apr. 3, 2017).

117. *E.g.*, D.L. v. St. Louis City Pub. Sch. Dist., 326 F. Supp. 3d 810, 820–21 (E.D. Mo. July 2, 2018); Albright v. Mountain Home Sch. Dist., No. 3:16-CV-3011, 2017 WL 2880853, at *2 (W.D. Ark. July 5, 2017).

118. *See* E.F. v. Newport Mesa Unified Sch. Dist., 726 F. App'x 535, 537 (9th Cir. 2018).

119. *See* J.M. v. Mayatoshi, 729 F. App'x 585, 586 (9th Cir. 2018); Rachel H. v. Dep't of Educ., 868 F.3d 1085, 1089 (9th Cir. 2017); M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 556 (2017).

120. 868 F.3d at 1089.

121. 858 F.3d at 1201 (internal citations omitted).

122. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 290 F. Supp. 3d 1175, 1181 (D. Col. Feb. 12, 2018).

123. *Id.* at 1186.

K. Eleventh Circuit

The Eleventh Circuit has not yet addressed *Endrew F.*, but a district court noted the significant difference between its previous more than *de minimis* standard and *Endrew F.*'s standard.[124] Nonetheless, the court ruled that deference to the administrative law judge's decision issued under the previous standard was appropriate as long as the legal implications of the findings were evaluated in accordance with *Endrew F.*[125]

L. Post-Endrew F. Summary

The following chart summarizes the circuit courts' responses to *Rowley* and *Endrew F.* If a circuit is italicized, it means that the court of appeals has not yet addressed the issue and the conclusion is based on a district court opinion. An asterisk indicates that a circuit adopted the meaningful benefit standard post-*Rowley*, but after *Endrew F.*, articulated its standard by using *Endrew F.*'s appropriate progress language.

Circuit	Post-Rowley	Post-Endrew F.
District of Columbia	Some benefit	Appropriate progress
First	Meaningful benefit	Appropriate progress[?]
Second	Meaningful benefit	Meaningful benefit*
Third	Meaningful benefit	Meaningful benefit*
Fourth	Some/more than trivial benefit	Appropriate progress
Fifth	Meaningful benefit	Meaningful benefit*
Sixth	Meaningful benefit in light of the child's potential	Appropriate progress
Seventh	Some/more than trivial benefit	N/A
Eighth	Some/more than trivial benefit	Appropriate progress
Ninth	Benefit	Appropriate progress
Tenth	Some/more than trivial benefit	Appropriate progress
Eleventh	Some/more than trivial benefit	Appropriate progress

This chart shows the pervasive impact of *Endrew F.* All of the circuits that had adopted a FAPE standard requiring some or more than trivial benefit have adopted the appropriate progress standard. The circuits that had adopted the meaningful benefit standard have maintained that standard, but now phrase it in appropriate progress terms.

124. *See* S.M. v. Hendry Cty. Sch. Bd., No. 2:14-cv-237-FtM-38CM, 2017 WL 4417070, at *2 (M.D. Fla. Oct. 5, 2017).

125. *Id.*

VII. DID *ENDREW F.* OPEN THE DOOR TO EQUAL EDUCATIONAL OPPORTUNITIES?

Rowley closed the door for at least thirty-five years on the possibility of equal educational opportunity for students with disabilities pursuant to the IDEA. *Endrew F.* stated that the door remains closed, but an analysis of the meaning of equal educational opportunity for children with disabilities—in conjunction with *Endrew F.*'s own language and the tests that some courts have developed to implement it—suggest that the next step in the evolution of the FAPE standard is equality of educational opportunity.

The Constitution does not require our public schools to offer equal educational opportunities to all students.[126] The educational opportunities that are available differ vastly among different school districts due to a number of factors, including financial resources, demographics, and availability of teaching resources.[127] In this sense, the concept of equality of educational opportunity for children with disabilities is an elusive one: Equal to what? Framed in the context of the IDEA's purpose to open the schoolhouse door to children with disabilities and provide them with an appropriate education, and as described in Justice White's dissent in *Rowley*, the concept of equal educational opportunity in special education is a local one: Children with disabilities should receive the same educational opportunity as typically-developing children in their school.

In describing the FAPE standard for children whose disabilities make it unlikely that they will be able to pass from grade to grade, the Court in *Endrew F.* stated, "The goals may differ, but every child should have the chance to meet challenging objectives."[128] This language plausibly describes the educational standard for public education. Many school districts, regardless of their resource constraints, might already be following this standard. All children, typically-developing and children with disabilities alike, are entitled to an opportunity to meet challenging objectives, which, by their very nature, are based on the capacity of the children to whom they apply.

District courts in the Third, Fifth, and Ninth Circuits have adopted detailed tests for determining if a child has received a FAPE, all of which move in the direction of an equal educational opportunity standard. The Third and Fifth Circuits' tests generally require a school district to evaluate a child and determine her potential, develop a program to make progress towards meeting that potential, and measure the outcome.[129] It is plausible that many public school districts already seek to provide educational programs that help all students reach their potential. The

126. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

127. *See* Diane Whitmore Schanzenbach et al., Fourteen Economic Facts on Education and Economic Opportunity 15 (2016), https://www.brookings.edu/wp-content/uploads/2016/07/education_facts.pdf (explaining that state educational expenditures per student vary due to a state's relative wealth); Alice Yin, *Education by the Numbers*, N.Y. Times Mag. (Sept. 8, 2017), https://www.nytimes.com/2017/09/08/magazine/education-by-the-numbers.html ("Minority students are more likely to be taught by inexperienced teachers . . . in thirty-three states.").

128. 137 S. Ct. 988, 992 (2017).

129. *See* C.G. v. Waller Indep. Sch. Dist., 697 F. App'x 816, 819 (5th Cir. 2017); T.M. v. Quakertown Cmty. Sch. Dist., 251 F. Supp. 3d 792, 797 (E.D. Pa. 2017).

Ninth Circuit's test explicitly adopts an equality test: It requires school districts to offer children with disabilities an educational program that "is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can 'make progress in the general education curriculum,' . . . taking into account the progress of his non-disabled peers, and the child's potential."[130] This test could be challenged as going beyond what *Endrew F.* allows, but perhaps it could withstand scrutiny. It does not require equality but lists equality as one factor to consider.

VIII. CONCLUSION

Endrew F. is a landmark decision that will likely guide special education law for the next two generations, as most circuit courts have already implemented its FAPE standard. It also opens the door to requiring equal educational opportunity for children with disabilities, a goal that Congress had for children when it passed the IDEA more than forty years ago. Ultimately, the full potential of *Endrew F.* will be realized with the continued dedication, commitment, and hard work of parents, educators, advocates, and children, who bring the IDEA to life.

130. M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 556 (2017).