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Notes

IS THAT APPROPRIATE?: CLARIFYING THE IDEA'S FREE APPROPRIATE PUBLIC EDUCATION STANDARD POST-*ENDREW F.*

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ABSTRACT—The Individuals with Disabilities Education Act (IDEA) requires schools to provide all students who qualify for special education services with a free appropriate public education (FAPE). However, the IDEA does not specify how much substantive educational benefit students must be afforded in order to receive a FAPE, leaving this question for the courts. For over thirty years, courts split over the amount of educational benefit that school districts must provide to their special education students, leading to significant confusion and anxiety among parents and school officials regarding their legal rights. The Supreme Court sought to clarify this standard in *Endrew F. v. Douglas County School District RE-1* by ruling that special education students must receive an education that would allow them to make "appropriate progress" based on their individual circumstances. Unfortunately, the Court's new standard created additional ambiguity and left lingering questions among stakeholders within the education community regarding school districts' obligations to these students. This Note addresses these questions by identifying the implications of the Court's appropriate progress standard for students, teachers, and school operations, and proposes that courts adopt a two-part test for applying the new standard that evaluates both the procedures of particular institutions and the substantive value of students' individualized curricula. Defining the FAPE requirement this way would clarify the standard and provide stability in an area of law plagued by inconsistency.

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INTRODUCTION

In the 2015–2016 school year, 6.7 million public school students between the ages of three and twenty-one—representing 13% of all public school students in the country—received special education services.[1] One of these students was Endrew F., a fifth-grade boy who was diagnosed with autism and attention-deficit/hyperactivity disorder (ADHD) as a child. Because of his disabilities, Endrew had problems communicating personal needs and emotions, interacting with others in social routines and play, and coping with his severe fears of everyday stimuli—such as flies, spills, and public restrooms. Endrew also had compulsive and disruptive behaviors that surfaced in class, including loud vocalizations, the continuous repetition of words and phrases, climbing over furniture and other students, and even fleeing the classroom at inappropriate times. All of these obstacles made it difficult for Endrew to access education within the traditional public school setting.

[1] *The Condition of Education - Indicators - Children and Youth with Disabilities*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/coe/indicator_cgg.asp (last updated Apr. 2018) [https://perma.cc/7MBH-U4ZR].

Endrew's school attempted to respond to these issues by providing him with additional educational support and formulating goals designed specifically for him. Despite this extra assistance, however, Endrew still struggled to meet his individualized goals and make the appropriate amount of academic and social progress for a student of his age.[2] While Endrew's circumstances unfortunately mirror those of many similarly situated students, his case is particularly notable because it served as the backdrop for the most recent decision in special education law—a decision that will likely have a significant impact on students, teachers, and administrators in the years to come.

Children with disabilities receive special education services in part because of the procedures outlined in the Individuals with Disabilities Education Act of 1990 (IDEA).[3] The IDEA mandates that all students with disabilities receive a free appropriate public education (FAPE),[4] which requires school districts to provide each qualifying child with an individualized education program (IEP) and any accompanying services that the school deems appropriate.[5] However, despite the enactment of federal legislation attempting to address these issues and the development of programs intended to help facilitate student development, children like Endrew continue to be neglected. This raises the question: How can school districts better ensure that students with disabilities receive a proper education?

Although the IDEA establishes strict and uniform procedures for developing an IEP,[6] it does not address how substantively challenging the IEP must be for students with disabilities. As a result, courts have attempted

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[2] Endrew F. v. Douglas Cty. Sch. Dist. RE 1, No. 12-cv-2620-LTB, 2014 WL 4548439 (D. Colo. Sept. 15, 2014), *aff'd*, 798 F.3d 1329 (10th Cir. 2015), *vacated and remanded*, 137 S. Ct. 988 (2017).

[3] 20 U.S.C. § 1400 (2012). Congress passed the IDEA as a reauthorization of the Education for All Handicapped Children Act of 1975. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1103.

[4] 20 U.S.C. § 1412(a)(1). The IDEA defines a free appropriate public education as special education and related services that (1) have been provided at public expense under public supervision and direction without charge, (2) meet the standards of the state educational agency, (3) include an appropriate preschool, elementary school, or secondary school education in the state involved, and (4) are provided in conformity with the statute's IEP requirement. *Id.* § 1401(9).

[5] *Id.* § 1412(a)(4). The IDEA defines a "child with a disability" as a child "(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." *Id.* § 1401(3)(A). Either parents, teachers, or education agency officials may request that a student be evaluated to determine if the child qualifies as a "child with a disability," and states must conduct the evaluation to determine the educational needs of the child within sixty days of a request. *Id.* § 1414(a)(1).

[6] *See infra* Section I.A.

to fill in the gaps regarding how much substantive educational benefit students must achieve through their IEP to satisfy the requirements of a FAPE.[7] Prior to the Court's ruling in *Endrew F.*, the primary Supreme Court case addressing this issue was *Board of Education v. Rowley*[8]—a case that was widely considered to be precedent regarding the educational rights of children with disabilities for over thirty years.[9] According to *Rowley*, if a student's IEP explained an educational program that was "reasonably calculated to enable the child to receive educational benefits," then the FAPE requirement was satisfied.[10]

However, the Court's decision in *Rowley* yielded two divergent interpretations. Expounding on the "reasonably calculated" standard, the Court indicated that Congress meant for an IEP to require schools to confer "some educational benefit,"[11] yet the Court also stated that school districts must confer a "meaningful" benefit to students through their individualized curricula.[12] Circuit courts that followed the "some educational benefit" interpretation acknowledged that an IEP does not need to guarantee the maximization of a child's potential but instead needs only to provide a

[7] The IDEA grants the Secretary of Education the authority to issue regulations that "are necessary to ensure that there is compliance with the specific requirements of [the IDEA]." 20 U.S.C. § 1406(a). However, "[s]ince neither the IDEA nor its regulations [promulgated by the Department of Education] include a precise definition of the term *appropriate*, it is necessary to turn to judicial interpretations for guidance on the meaning of FAPE." ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 31 (3d ed. 2014). Ultimately, the Supreme Court is better suited to address this interpretation because its decisions are more consistent, given that it will not change as presidential administrations change—this allows students and parents to better understand their legal rights. *See* Casey Bayer, *DeVos Rescinds Guidance Documents for Disabled Students: What Does It Mean?*, HARV. GRADUATE SCH. EDUC. (Oct. 24, 2017, 5:02 PM), https://www.gse.harvard.edu/news/17/10/devos-rescinds-guidance-documents-disabled-students-what-does-it-mean [https://perma.cc/DC2Z-A8PT] (interviewing Professor Thomas Hehir, former director of the U.S. Department of Education's Office on Special Education Programs, regarding Secretary of Education Betsy DeVos's decision to rescind seventy-two guidance documents that provide interpretation for policies and regulations under the IDEA). Furthermore, it is more appropriate for courts to address this issue because many of the regulations instituted by the Department of Education have political motivations that may be inconsistent with congressional intent. *See id.* (highlighting that the Department of Education's decision to rescind the guidance documents may be part of the Trump Administration's effort to show that it is "in the business of deregulating").

[8] 458 U.S. 176 (1982).

[9] *See* Julie F. Mead & Mark A. Paige, Board of Education of Hendrick Hudson v. Rowley*: An Examination of Its Precedential Impact*, 37 J.L. & EDUC. 329, 329 (2008) (stating that "*Rowley* stands firm as the primary precedent whenever the educational rights of children with disabilities are considered"); Terry Jean Seligmann, *Sliding Doors: The* Rowley *Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71, 71 (2012) ("As the first decision by the Supreme Court interpreting the IDEA, the case was expected to be a landmark opinion. And in fact, the decision in *Rowley* has remained the standard for interpretation of many aspects of the IDEA.").

[10] *Rowley*, 458 U.S. at 207.

[11] *Id.* at 200.

[12] *Id.* at 192.

benefit that is merely more than *de minimis*.[13] In contrast, the circuits that followed the "meaningful educational benefit" interpretation argued that Congress designed the IDEA to confer more than a trivial benefit to students with disabilities.[14] The resulting circuit split following *Rowley* had significant consequences for students, parents, and school board officials, leaving questions among these individuals regarding their legal rights.

The Supreme Court finally addressed this split in *Endrew F. v. Douglas County School District RE-1*[15] by establishing a standard for determining how substantively challenging an IEP must be to adequately provide a student with a FAPE. In doing so, the Court first noted that judges must evaluate IEPs using a standard that is "markedly more demanding than the 'merely more than *de minimis*' test."[16] The Court further stated that, in order for a child to receive a FAPE, the IEP must be "appropriately ambitious" and "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[17] However, despite raising the minimum benefit requirement above the *de minimis* threshold, the Court declined to establish a bright-line rule for what appropriate progress would look like in each individual case; instead, the Court merely stressed that lower courts should defer to the judgment of school authorities.[18]

Following *Endrew F.*, therefore, there continues to be a wide range of interpretations of this new standard among the lower courts, yielding vastly different outcomes and creating additional confusion.[19] The appropriate progress standard established in *Endrew F.* has left two lingering issues: first, what is the practical impact of this standard on students with disabilities and the schools they attend; and second, how should district courts interpret appropriate progress going forward? One potential benefit of this standard is

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[13] *See, e.g.*, Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1154 (10th Cir. 2008) ("[A] school district is not required to provide every service that would benefit a student if it has found a formula that can reasonably be expected to generate some progress on that student's IEP goals.").

[14] *See, e.g.*, Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988) (holding that an IEP was invalid because it afforded no more than trivial progress, contradicting Congress's intent "to afford children with special needs an education that would confer meaningful benefit").

[15] 137 S. Ct. 988 (2017).

[16] *Id.* at 1000 (quoting Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015)).

[17] *Id.* at 1000–01.

[18] *Id.* at 1001. The *Endrew F.* decision garnered even more mainstream attention because it reversed a standard originally stated by then-Circuit judge Neil Gorsuch and became a point of contention during his Supreme Court confirmation hearing. *See* Holly T. Howell, Note, *Neil Gorsuch, a Unanimous SCOTUS, and a Circuit Split Resolved: What Is the Big "IDEA"?*, 40 AM. J. TRIAL ADVOC. 603, 609–13 (2017) (describing how Senator Dick Durbin and other Democratic Senators questioned Justice Gorsuch about his opinion in *Luke P.*, which was ultimately overturned by the *Endrew F.* decision).

[19] *See infra* Section II.B.

that it could supply students who receive special education services with vital resources that will assist them in further developing their academic, social, and behavioral skills.[20] As a consequence of this new standard, however, school programs may undergo significant changes, and school administrators will likely be forced to make difficult decisions regarding the allocation of their limited resources.[21]

This Note provides the first comprehensive analysis of these issues and their impact on schools and courtrooms and argues that, in spite of its ambiguity, *Endrew F.*'s appropriate progress standard requires much-needed academic and social benefits to students with special needs. However, while *Endrew F.*'s standard has the potential to greatly protect the interests of students with disabilities, the standard could still be clarified so that students, parents, and administrators better understand their legal rights. This Note thus offers a solution to help resolve this ambiguity by proposing that the standard outlined in *Endrew F.* be understood as a two-part test: first, in determining whether an IEP would confer a meaningful benefit, courts should evaluate whether the school district's procedures for developing IEPs are adequate; and second, courts should determine whether a student's IEP substantively addresses the specific needs of the student. This Note further elaborates on this test by providing objective guidelines for courts to use in order to determine whether each part has been satisfied.

In doing so, this Note proceeds as follows. Part I explains the development of IDEA and FAPE jurisprudence, including the Court's holding in *Rowley* and the circuit split that followed. It then describes the changes in education law between *Rowley* and *Endrew F.* and assesses how legislation enacted during this period may have impacted the holding in *Endrew F.* Next, Part II explores the *Endrew F.* case in depth and analyzes the Court's reexamination of the FAPE requirement and how district courts have interpreted the new appropriate progress standard. Part III examines the implications of the appropriate progress standard for school districts and argues that requiring the use of a more demanding standard to evaluate IEPs will lead to greater inclusion of students with disabilities in general education classrooms, force school districts to allocate more resources to special education, and cause decreased enrollment of students with disabilities in charter schools. Finally, Part IV explains how courts should assess whether an IEP would foster appropriate progress by proposing a two-part test that helps clarify this ambiguous standard.

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[20] *See infra* Part III.

[21] *See infra* Part III.

I. THE IDEA, *ROWLEY*, AND U.S. EDUCATION LAW PRE-*ENDREW F.*

For much of American history, the educational needs of children with disabilities were not being fully met—schools were not providing these students with appropriate educational services that addressed their specific needs, certain children were excluded entirely from the public school system, and public schools did not possess adequate resources, which ultimately forced families to find educational services outside the public school system.[22] In response to these issues, Congress enacted the Education for All Handicapped Children Act (EAHCA) in 1975[23] and later reauthorized EAHCA in 1990, changing the language of the law to emphasize the individual student (instead of the condition) and renaming the law the Individuals with Disabilities Education Act.[24]

While the IDEA provides uniform procedural rights for students with disabilities, interpretations of the substantive FAPE standard were highly inconsistent and were further complicated by shifts in the legal landscape of education law between the Court's decisions in *Rowley* and *Endrew F.* This Part provides a brief background of the IDEA's procedural requirements, the establishment of *Rowley*'s substantive FAPE standard, and the disparate interpretations of this standard that subsequently ensued. This Part then examines how the enactment of laws that provided increased protections for students with disabilities may have ultimately influenced the Court's decision in *Endrew F.*

A. Individuals with Disabilities Education Act

In 1990, Congress passed the IDEA as a reauthorization of EAHCA[25] in response to public perception that a majority of children with disabilities "were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[26] Congress acknowledged the necessity of this law because "[i]mproving educational results for children with disabilities is an essential element of [the United States'] national policy of ensuring equality of opportunity . . . for individuals with disabilities."[27] In order to resolve these issues, Congress

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[22] 20 U.S.C. § 1400(c)(2) (2012).

[23] *Id.*

[24] Mitchell L. Yell et al., *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 REMEDIAL & SPECIAL EDUC. 219, 226 (1998).

[25] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773.

[26] H.R. REP. NO. 94-332, at 2 (1975) (citing *Investigation of the Adequacy of Federal and Other Resources for Education and Training of the Handicapped: Hearings Before the Ad Hoc Subcomm. on the Handicapped of the H. Comm. on Educ. & Labor*, 89th Cong. (1966)).

[27] 20 U.S.C. § 1400(c)(1). The purposes of the IDEA include ensuring that children with disabilities possess special education and related services designed both to meet their unique needs and to prepare

enacted the IDEA, which aimed to provide federal monetary assistance to state and local school systems so they would have the resources necessary to address the educational needs of students with disabilities.[28]

A state can qualify for this federal monetary assistance by submitting a plan to the Secretary of Education outlining the policies and procedures it will enact to ensure each of its students receives a FAPE.[29] In order to achieve this, the IDEA specifically requires a state to guarantee that each child with a disability receives a uniquely tailored individualized education program (IEP).[30] To develop an IEP, educators, parents, and specialists evaluate a student's particular strengths and weaknesses and decide which special services will be required for the student to achieve individualized goals. The IEP is then prepared at a meeting with the student's parents, the regular education teacher, at least one special education teacher, and a qualified member of the local educational agency.[31] IEP goals can address several different areas of student development, ranging from achieving specific academic benchmarks to satisfying broader behavioral goals.[32] Among other things, the IEP must include statements about the student's present levels of academic achievement and functional performance, measurable annual academic and functional goals, a description of how the child's progress will be measured, specific special education services that will be provided, and an explanation of the extent to which the child will be educated outside the regular classroom.[33] The IDEA also requires that the IEP be periodically "developed, reviewed, and revised for each child."[34]

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them for further education, employment, and independent living; assisting local and federal agencies in implementing special education plans; helping implement early intervention services for infants and toddlers with disabilities and their families; and ensuring that educators and parents have the necessary tools to improve educational results for children with disabilities. *Id.* § 1400(d)(1)–(3).

[28] *Id.* § 1411(a). In 2013–2014, the federal government provided IDEA grants at a rate of $1743 per student with a disability, which equaled 14.5% of the average expenditure per general education student. U.S. DEP'T OF EDUC., FISCAL YEAR 2016 BUDGET SUMMARY AND BACKGROUND INFORMATION 31 (2015), https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf [https://perma.cc/9TMA-PMOG].

[29] 20 U.S.C. § 1412(a)(1).

[30] *Id.* § 1412(a)(4).

[31] *Id.* § 1414(d)(1)(B).

[32] *See, e.g.*, NAT'L ASS'N OF SPECIAL EDUC. TEACHERS, COMPLETED SAMPLE IEP 2–8 (2017), http://depts.washington.edu/lend/building_skills_files/5%20IEP%20C%20%20Sample_Distance%20Learners%20for%20webposting_2-2017.pdf [https://perma.cc/95WF-9YVB].

[33] 20 U.S.C. § 1414(d)(1)(A)(i).

[34] *Id.* § 1412(a)(4). If parents or guardians of students with disabilities are unsatisfied with their child's education, the IDEA allows them to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* § 1415(b)(6)(A). These complaints must be resolved through an impartial due process hearing, *id.* § 1415(f)(1)(A), and any aggrieved party may appeal the findings of the hearing to the state educational agency to be reviewed by an administrative official, *id.* § 1415(g)(1).

In addition to the FAPE requirement, the IDEA also requires that students with disabilities are educated in the least restrictive environment (LRE).[35] The LRE concept originated from procedural and substantive due process doctrines and equal protection principles.[36] The IDEA's LRE mandate stresses that students with disabilities should be taught as much as possible in general education classrooms and should only be removed from the regular educational environment and placed into a self-contained special education classroom[37] if their disability hinders their ability to achieve a satisfactory education.[38]

While the IDEA outlines rigorous procedural obligations for school districts, it does not contain any substantive standard regarding the level of educational benefit that an IEP must provide to students with disabilities in order for them to adequately receive FAPEs. This omission has thus left the courts in the position of devising an appropriate standard.

Any party aggrieved by the findings of the state administrative hearing possesses "the right to bring a civil action with respect to the complaint . . . in any State court of competent jurisdiction or in a district court of the United States . . . ." *Id.* § 1415(i)(2)(A).

[35] *Id.* § 1412(a)(5).

[36] *See, e.g.*, Theresa M. DeMonte, Comment, *Finding the Least Restrictive Environment for Preschoolers Under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 171 (2010); Sarah E. Farley, Comment, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 840 (2002) ("The placement of children with disabilities in the least restrictive environment is founded on equal protection principles . . . ."); Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 648 (1995) ("[T]he legislative history of the [IDEA] shows that Congress viewed the categorical segregation of children with disabilities as a matter of constitutional dimension. Due process protections were enacted in part to assure that every child with a disability is 'in fact' afforded an education in the 'least restrictive environment.'" (quoting H.R. REP. NO. 94-332, at 15 (1975)).

[37] A self-contained classroom typically consists of five to ten special education students and is led by a special education teacher or paraeducator, who "focuses on the idea of smaller groups, a more close-knit environment, and one-on-one attention, which can help children with special needs feel safe while fostering creativity and learning." Suzie Dalien, *Self-Contained Classroom Defined*, SPECIAL EDUC. RES. (Nov. 11, 2014, 9:08 PM), https://specialedresource.com/resource-center/self-contained-classroom-defined [https://perma.cc/QC5K-CSFL].

[38] 20 U.S.C. § 1412(a)(5)(A) (stating that students with disabilities should be "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"). In 1997, Congress amended the IDEA in part in response to circuit court cases interpreting the LRE provision. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; Farley, *supra* note 36, at 816. The 1997 Amendments strengthened the LRE provision by stressing the importance of including students with disabilities in general education classrooms. Farley, *supra* note 36, at 816. Upon signing the Amendments, President Clinton lauded this approach, emphasizing that the bill helped "put[] an even sharper focus on improving educational results for these children through greater access to the general curriculum." Statement on Signing the Individuals with Disabilities Education Act Amendments of 1997, 1 PUB. PAPERS 701, 701 (June 4, 1997).

B. Rowley *and the Court's Initial Articulation of the FAPE Standard*

The Supreme Court first examined the FAPE standard in *Board of Education v. Rowley*.[39] In *Rowley*, the parents of a deaf student argued that their child's IEP was insufficient because it did not require the presence of a qualified sign language interpreter in each of the student's academic classes.[40] Instead, the IEP included a provision requiring the teacher to speak into a wireless transmitter in order to amplify her words.[41] Though Rowley advanced easily from grade to grade under this program,[42] the district court held that Rowley's IEP was inadequate because it did not provide her with "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[43]

While the Second Circuit affirmed this ruling, the Supreme Court reversed, lambasting the district court's "equal opportunity" standard because it would require judges to make impossible measurements and comparisons.[44] The Court stated that there was "no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'"[45] Using this rationale, it found that Rowley's excellent progress and the specialized instruction offered in her IEP satisfied the IDEA's FAPE requirement.[46] Ultimately, the Court declined to establish a bright-line test for determining the adequacy of educational benefits afforded to children with disabilities[47] and, instead, merely stated that the FAPE requirement is satisfied if the IEP explains an educational program that is "reasonably calculated to enable the child to receive educational benefits."[48]

Expounding on this "reasonably calculated" standard, the Court in its opinion noted that Congress meant for an IEP to require "some educational benefit,"[49] while simultaneously stating that school districts must confer a

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[39] 458 U.S. 176 (1982). Although the Court interpreted the FAPE standard under the EAHCA, the IDEA possesses the same FAPE requirement that was addressed in *Rowley*. *See* 20 U.S.C. § 1412(a)(1)(A) (requiring that states provide each child who has a disability a free appropriate public education).

[40] *Rowley*, 458 U.S. at 184.

[41] *Id.*

[42] *Id.* at 185.

[43] *Id.* at 185–86.

[44] *Id.* at 198.

[45] *Id.* (quoting Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

[46] *Id.* at 202–03.

[47] *Id.* at 202.

[48] *Id.* at 207.

[49] *Id.* at 200.

"meaningful" benefit.[50] This seemingly contradictory language led lower courts to subsequently adopt vastly different interpretations regarding the amount of benefit that must be conferred to students with disabilities through their IEPs. As a result, for more than thirty years, courts reached different decisions for cases with seemingly identical facts, leaving parents and school board officials confused about their legal rights under the IDEA.

C. "Some Educational Benefit" vs. "Meaningful Educational Benefit"

The Court's decision in *Rowley* led to a debate among school attorneys and advocates over whether the FAPE standard required that students with disabilities receive either a "meaningful educational benefit" or "some educational benefit."[51] The fact that certain circuits utilized both standards further added to the confusion,[52] and the ambiguity and inconsistency surrounding the use of the "meaningful educational benefit" and "some educational benefit" standards even led one district judge to question whether there was truly a difference between them at all.[53] This Section attempts to answer that question by examining the distinctions between these two standards. First, this Section outlines the origins of these standards in *Rowley*, and then it concludes by discussing circuit court case law addressing each standard with a focus on how these varying interpretations yielded disparate results.

1. The "Some Educational Benefit" Standard

The "some educational benefit" standard originally derived from the Court's decision in *Rowley*.[54] Prior to the Court's decision in *Endrew F.*, the majority of circuit courts exclusively used a variation of the "some educational benefit" test to evaluate whether an IEP satisfied the FAPE

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[50] *Id.* at 192.

[51] *See* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 WEST'S EDUC. L. REP. 1, 1–2 (2009) (comparing various circuit courts' interpretations of *Rowley* in different contexts).

[52] *Compare, e.g.*, Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 132 (2d Cir. 1998) (holding that the evidence did not support a finding that a child's IEP was inadequate to provide the student with an appropriate education because an IEP must only be designed to confer some educational benefit), *with* Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121 (2d Cir. 1997) (holding that a student was entitled to public funding of his or her attendance at a private school under the IDEA because the IEP must be reasonably calculated to provide some meaningful benefit).

[53] *See* Blake C. v. Dep't of Educ., 593 F. Supp. 2d 1199, 1206 (D. Haw. 2009) ("Various opinions have left it ambiguous as to what the precise difference, if any, is between 'meaningful' benefit and 'some' benefit." (quoting Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1313 n.7 (10th Cir. 2008))).

[54] *Rowley*, 458 U.S. at 200 ("Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child." (emphasis added) (quoting 20 U.S.C. § 1412(1) (1982))).

requirement.[55] The decisions from these circuits demonstrate that the application of this standard afforded only limited protection for students with disabilities. For instance, the Tenth Circuit applied the "some educational benefit" standard in *Thompson R2-J School District v. Luke P.*[56] and stated that an IEP must provide a benefit that "must merely be 'more than *de minimis*.'"[57] In another case, the Tenth Circuit also noted that, while an IEP must be reasonably calculated to provide educational benefits to a child with disabilities, the student's education does not need to be "guaranteed to maximize the child's potential."[58]

The Sixth Circuit applied an infamous interpretation of the "some educational benefit" standard in *Doe v. Board of Education of Tullahoma City Schools*.[59] In *Doe*, a student had qualified for special education services because of a neurological impairment that hindered his ability to process auditory information and engage in normal language and thinking skills.[60] Doe's parents alleged that the IEP provided by their student's public school was inadequate and that their child could only receive a FAPE by enrolling in a private school specifically for children with learning disabilities.[61] The parents sued the school district in order to compel funding for their child's private school education.[62] The Sixth Circuit held that under the "some educational benefit" standard, an IEP must only "provide the educational

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[55] *See, e.g.*, *Sytsema*, 538 F.3d at 1317 (finding that the IEP "provided adequate generalization services for [the child] to receive some educational benefit"); Lt. TB. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004) ("[U]nder the Supreme Court's decision in *Board of Educ. v. Rowley*, . . . IDEA does not require a public school to provide what is best for a special needs child . . . ."); A.B. v. Lawson, 354 F.3d 315, 330 (4th Cir. 2004) ("IDEA's FAPE standards are far more modest than to require that a child excel or thrive. The requirement is satisfied when the state provides the disabled child with 'personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction.'" (quoting *Rowley*, 458 U.S. at 203)); Devine v. Indian River Cty. Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001) ("[A] student is only entitled to some educational benefit; the benefit need not be maximized to be adequate."); Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1035 (8th Cir. 2000) ("The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed."); Kerkam v. Superintendent, D.C. Pub. Sch., 931 F.2d 84, 87 (D.C. Cir. 1991) ("There seems to be little doubt that [the child] would have made less progress under the District of Columbia program, but *Rowley* precludes our taking that factor into account so long as the public-school alternative confers some educational benefit.").

[56] 540 F.3d 1143 (10th Cir. 2008).

[57] *Id.* at 1149 (quoting Urban v. Jefferson Cty. Sch. Dist. R-1, 89 F.3d 720, 727 (10th Cir. 1996)).

[58] *Sytsema*, 538 F.3d at 1313.

[59] 9 F.3d 455 (6th Cir. 1993).

[60] *Id.* at 456.

[61] *Id.* at 456–57.

[62] *Id.* at 457. Under the IDEA, if parents of a child with a disability choose to take their child out of public school and enroll him or her in a private school, a court may require the public school to reimburse the parents for the costs of the private school enrollment if the court finds that the public school had not made a FAPE available to that student. 20 U.S.C. § 1412(a)(10)(C) (2012).

equivalent of a serviceable Chevrolet . . . [and] that the Board [of Education] is not required to provide a Cadillac."[63] Ultimately, the courts' decisions in these cases illustrate that the implementation of the "some educational benefit" standard has provided only limited protection to students with disabilities.

2. The "Meaningful Educational Benefit" Standard

In contrast to the "some educational benefit" standard, prior to the Court's *Endrew F.* decision, the Third Circuit was the only one that exclusively applied the "meaningful educational benefit" standard,[64] although the Second, Fifth, Sixth, and Ninth Circuits all previously utilized the standard in at least some cases.[65] Courts that applied the more demanding "meaningful educational benefit" standard all provided greater protection for students with disabilities.[66]

The Third Circuit explained the difference between the "some educational benefit" and "meaningful educational benefit" standards in *Polk*

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[63] *Doe*, 9 F.3d at 459–60.

[64] *See, e.g.*, Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199 (3d Cir. 2004) ("[T]he school must establish that it complied with the procedures set out in the IDEA and that the IEP was 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the child's 'intellectual potential.'" (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982))); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000) (affirming the district court's holding because the court relied on evidence that satisfied "the somewhat more stringent 'meaningful benefit' test"); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988) (finding an IEP invalid because it afforded no more than trivial progress, while "Congress intended to afford children with special needs an education that would confer meaningful benefit").

[65] *See, e.g.*, N.B. v. Hellgate Elementary Sch. Dist. 541 F.3d 1202, 1212–13 (9th Cir. 2008) (stating that "[u]nder the 1997 amendments to the IDEA, a school district must provide a student with a 'meaningful benefit' in order to satisfy the substantive requirements of the IDEA" (quoting Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir. 1999))); Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 864 (6th Cir. 2004) ("At the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency . . . . Indeed, states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress."); *Adams*, 195 F.3d at 1150 (holding that the IDEA requires that an IEP "be reasonably calculated to confer a meaningful benefit on the child"); Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998) (noting that the IDEA mandated that "the door of public education must be opened for a disabled child in a 'meaningful' way," and IEPs that only afford the opportunity for trivial advancement do not meet the IDEA's requirements (quoting *Rowley*, 458 U.S. at 192)); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997) (holding that the IDEA's reference to educational benefit means that the benefit must be meaningful and "likely to produce progress, not regression or trivial educational advancement").

[66] The courts that utilized the heightened "meaningful educational benefit" standard argued that it was appropriate based on the following language from *Rowley*:

> By passing the [Education for All Handicapped Children Act], Congress sought primarily to make public education available to handicapped children. But in 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*.

458 U.S. at 192 (emphasis added).

v. Central Susquehanna Intermediate Unit 16.[67] There, a student with encephalopathy, a brain disease similar to cerebral palsy, alleged that the school district did not provide him with an adequate IEP because it did not include weekly hands-on physical therapy from licensed physical therapists, hindering his progress and ability to meet his educational goals.[68] The Third Circuit held that there was "evidence in the record that would support a finding that the program prescribed for [Polk] afforded no more than trivial progress."[69] The court justified its use of the "meaningful educational benefit" standard by explaining that it would contravene Congress's intent in passing the IDEA to allow states to receive federal funding for making the "idle gesture" of providing only trivial benefits.[70]

Ultimately, *Rowley* caused deep disagreement among the circuit courts over which of the two standards was most appropriate. This disagreement, and the resulting inconsistent rulings, eventually prompted the Supreme Court to address the issue in *Endrew F. v. Douglas County School District RE-1*.[71] In addition to resolving the two divergent standards, however, the Court also needed to consider whether the drastic changes in the landscape of education law post-*Rowley* would impact its interpretation of the substantive FAPE standard. The next Section addresses these changes.

D. Changes in Education Law Between Rowley *and* Endrew F.

After *Rowley*, Congress passed three education-based laws intended to provide better educational opportunities to students with disabilities: the 1997 Amendments to the IDEA, the 2004 reauthorization of the IDEA following the No Child Left Behind Act, and the Every Student Succeeds Act of 2015. First, the 1997 Amendments to the IDEA strengthened the IDEA's requirement that children with disabilities must be educated in general education classrooms to the maximum extent appropriate.[72] The Amendments further established presumptions that students with disabilities participate in the general curriculum, required general education teachers to

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[67] 853 F.2d at 180–85.

[68] *Id.* at 172.

[69] *Id.*

[70] *Id.* at 184.

[71] 137 S. Ct. 988 (2017).

[72] Paolo Annino, *The 1997 Amendments to the IDEA: Improving the Quality of Special Education for Children with Disabilities*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 125, 125 (1999). This requirement is now codified in 20 U.S.C. § 1412(a)(5)(A) (2012) ("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." (emphasis added)).

participate in the creation of IEPs, and prohibited any funding mechanism that favors placement in a nongeneral curriculum or segregated setting.[73]

Second, Congress reauthorized the IDEA in 2004 in order to make it consistent with the No Child Left Behind Act.[74] Among other things, the reauthorization created a Highly Qualified Teacher requirement[75] for special education teachers, required schools to administer state assessments for all students (including children with disabilities), and mandated that states identify and address preparation and professional development needs for individuals who provide direct services to children with disabilities.[76] Finally, the Obama Administration's Every Student Succeeds Act of 2015[77] further addressed the needs of students with disabilities by requiring school districts to align all IEPs with state academic content standards, include students with disabilities in their administration of statewide assessments, and offer alternate assessments for students with more severe disabilities.[78]

Taken together, Congress's legislative actions after *Rowley* appeared to heighten the substantive and procedural protections for students with disabilities as well as the expectations for their teachers. As school districts began to implement these newly enacted initiatives, courts struggled with whether these changes to the legislative landscape should impact their interpretations of *Rowley*.[79] These questions loomed large as the Supreme Court considered the case of *Endrew F.*

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[73] Annino, *supra* note 72, at 125–26 (citing 20 U.S.C. §§ 1412(a)(5)(B), 1414(d)(1)(A)(ii)(i), (B)(ii)).

[74] *See* U.S. DEP'T. OF EDUC., IDEA – REAUTHORIZED STATUTE: ALIGNMENT WITH THE *NO CHILD LEFT BEHIND ACT*, https://www2.ed.gov/policy/speced/guid/idea/tb-nclb-align.doc [https://perma.cc/72HC-TW33] (outlining that the IDEA altered its provisions regarding definitions, allocations of funds, performance goals, reporting, eligibility, and development plans to be consistent with the Bush Administration's No Child Left Behind Act).

[75] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2686 (codified at 20 U.S.C. § 1412(a)(14)(C)). The Highly Qualified Teacher requirement mandated that teachers possess bachelor's degrees, full state certification or licensure, and knowledge of the subject they taught, which is demonstrated based on a combination of teaching experience, professional development, and knowledge in a subject garnered from the teacher's higher education or over time through their experience in the profession. U.S. DEP'T OF EDUC., FACT SHEET: NEW *NO CHILD LEFT BEHIND* FLEXIBILITY: HIGHLY QUALIFIED TEACHERS (2004), https://www2.ed.gov/nclb/methods/teachers/hqtflexibility.html [https://perma.cc/F2QW-9CB5].

[76] 118 Stat. at 2685–87 (codified at 20 U.S.C. § 1412(a)(14), (16)(C)).

[77] Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

[78] PSEA EDUC. SERVS. DIV., THE EVERY STUDENT SUCCEEDS ACT: SPECIAL EDUCATION REQUIREMENTS 1 (2018), https://www.psea.org/globalassets/for-members/psea-advisories/advisory-essa-specialeducation.pdf [https://perma.cc/P7JJ-CDDT].

[79] *Compare* N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1212–13 (9th Cir. 2008) (finding that "[u]nder the 1997 amendments to the IDEA, a school must provide a student with a 'meaningful benefit' in order to satisfy the substantive requirements of the IDEA" (quoting Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir. 1999))), *with* LT. T.B. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004)

II. REEXAMINING THE FAPE STANDARD IN *ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT RE-1*

The Supreme Court granted certiorari in *Endrew F.* to resolve the circuit split that had developed post-*Rowley* over the FAPE requirement. While the Court's decision in *Endrew F.* ultimately provided a new standard for evaluating whether a student's IEP provided a FAPE, it also raised new questions regarding how lower courts should interpret that new standard. This Part highlights these issues by analyzing *Endrew F.*'s holding and discussing its varying interpretations by district courts.

A. Endrew F. *and the Court's New Articulation of the FAPE Standard*

Endrew, a student who was diagnosed with autism at age two, attended school in the Douglas County School District from preschool through fourth grade.[80] During his fourth-grade year, Endrew's parents complained that his IEP largely carried over the same basic goals and objectives from year to year instead of creating new, individualized yearly goals based on relevant data and that, as a result, Endrew continually failed to make meaningful academic and functional progress.[81] Because of this, Endrew's parents eventually removed him from public school and enrolled him in a private school that specialized in educating children with autism.[82]

Endrew's private school instituted a unique behavior intervention plan[83] that resulted in dramatic improvements to his behavioral and academic progress.[84] Six months later, Endrew's parents again met with Douglas County School District representatives to discuss his IEP in light of his recent progress, and the school district developed a new IEP for Endrew.[85] However, Endrew's parents claimed this new IEP yet again did not meaningfully differ from the one developed the previous year, nor did it incorporate the successful interventions utilized by his private school.[86]

(rejecting parents' argument that the 1997 Amendments to the IDEA changed the *Rowley* standard to require school districts to provide each student with special needs the maximum benefit).

[80] Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 996 (2017).

[81] *Id.*

[82] *Id.*

[83] A behavior intervention plan "is a concrete plan of action for reducing problem behaviors, dictated by the particular needs of the student exhibiting the behaviors." Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 175 (2011) (citing H. Rutherford Turnbull III et al., *Public Policy Foundations for Positive Behavioral Interventions, Strategies, and Supports*, 2 J. POSITIVE BEHAV. INTERVENTIONS 218 (2000)). While behavior intervention plans are not required components of an IEP, they are frequently included by IEP teams as part of the student's individualized program. *See id.* at 188–89.

[84] *Endrew F.*, 137 S. Ct. at 996–97.

[85] *Id.* at 997.

[86] *Id.*

Endrew's parents rejected the school district's proposed IEP, arguing that it denied their son a FAPE because it "was not 'reasonably calculated to enable [Endrew] to receive educational benefits.'"[87] As a result, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for his private school tuition.[88]

After an administrative law hearing and adjudications in federal court, Endrew's case reached the Supreme Court in 2016.[89] During oral argument, both parties advanced vastly different interpretations of how the Court should decide whether an IEP satisfies the FAPE requirement. According to Endrew's attorney, the interpretation of the standard should derive from the IDEA's text stating that a school's services should be "reasonably calculated to provide [students with disabilities] substantially equal educational opportunities [to those offered to other students]."[90] But the Justices were skeptical about how this ambitious standard would be applied in practice.[91] In particular, Justice Kennedy appeared concerned about the cost of this proposed standard,[92] and Justice Breyer expressed his worry that judges lacking expertise in education would interpret this standard inconsistently.[93]

While most of the Justices did not appear persuaded by Endrew's proposed ambitious standard, they unanimously agreed that the "some educational benefit," "merely more than *de minimis*" test introduced by the school district was problematic. Chief Justice Roberts stated that the Court's precedent in *Rowley* specifically required that an IEP provide "enough benefit to keep track with grade progress," and "that's . . . slightly more than de minimis."[94] Justice Breyer also acknowledged that the 1997 Amendments to the IDEA and the 2004 reauthorization stressed that students with disabilities must make progress in general education, which also results in a more stringent standard than *de minimis*.[95]

Writing for the majority, Chief Justice Roberts reevaluated the Court's holding in *Rowley* and ultimately dismissed the school district's argument,

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[87] *Id.* (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982)).

[88] *Id.*

[89] Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 798 F.3d 1329, 1333 (10th Cir. 2015), *cert. granted*, 137 S. Ct. 29 (2016).

[90] Transcript of Oral Argument at 3, *Endrew F.*, 137 S. Ct. 988 (No. 15–827), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-827_gfbh.pdf [https://perma.cc/VN2G-8XD4].

[91] *See id.* at 4–9, 13–18.

[92] *See id.* at 8–9.

[93] *See id.* at 13–14. Chief Justice Roberts and Justice Kagan also noted that the IDEA stresses flexibility and that a proper standard must address those students who may not be able to follow the general education curriculum. *See id.* at 6–7, 18.

[94] *Id.* at 35–36.

[95] *Id.* at 38.

noting that "th[e] standard is markedly more demanding than the 'merely more than *de minimis*' test."[96] However, the opinion also rejected Endrew's parents' argument that the FAPE requirement is only satisfied if it provides a child with a disability opportunities equal to those afforded to children without disabilities.[97] Finding a middle ground, the Court held that the IDEA "requires an educational program reasonably calculated to enable a child to *make progress appropriate in light of the child's circumstances*."[98]

In reaching its decision, the Court further stated that a child's "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*."[99] However, like in *Rowley*, the Court declined to establish a bright-line rule that elaborated on what appropriate progress would actually entail, stressing that courts should instead defer to the judgment of school authorities on that particular question.[100]

B. Endrew F.*'s Initial Interpretation in the Lower Courts*

While the *Endrew F.* decision heightened the requirements for what constituted a FAPE, courts have struggled to articulate a clear expectation of what this new standard means in practice.[101] Given how recently the Court decided *Endrew F.*, there has been limited case law interpreting the decision. However, various courts have already begun applying different criteria in their interpretations of the FAPE standard, creating further inconsistencies and confusion across jurisdictions.[102] This Section examines how courts have

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[96] *Endrew F.*, 137 S. Ct. at 993, 1000–01 (quoting Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015)).

[97] *Id.* at 1001.

[98] *Id.* (emphasis added).

[99] *Id.* at 1000 (emphasis added). During oral argument, the Justices, particularly Justice Breyer, lauded this standard because it came directly from the Department of Education and was regarded as the most consistent with existing law. *See* Amy Howe, *Argument Analysis: Justices Grapple with Proper Standard for Measuring Educational Benefits for Children with Disabilities*, SCOTUSBLOG (Jan. 11, 2017, 6:12 PM), http://www.scotusblog.com/2017/01/argument-analysis-justices-grapple-proper-standard-measuring-educational-benefits-children-disabilities [https://perma.cc/ZG9L-PVQ5].

[100] *See Endrew F.*, 137 S. Ct. at 1001–02.

[101] This is problematic considering that scholars have previously stated that "*Rowley* stands firm as the primary precedent whenever the educational rights of children with disabilities are considered," Mead & Paige, *supra* note 9, at 329, and the Court's decision in *Endrew F.*, which reassessed and reformulated the *Rowley* standard, will likely have a similarly significant impact on these students and their legal rights.

[102] *See* Perry A. Zirkel, *The Supreme Court's Decision in* Endrew F. v. Douglas Country School District RE-1*: A Meaningful Raising of the Bar?*, 341 WEST'S EDUC. L. REP. 545, 551 (2017) ("The immediate effect [of *Endrew F.*] on the lower courts' FAPE cases illustrates the uncertainty [of its impact] at least for the near future.").

dealt with this new standard thus far by reviewing three district court cases from different jurisdictions, decided post-*Endrew F.*, and evaluating how these varying approaches have prompted new questions that courts will have to address going forward.

*1. District Court Decisions Post-*Endrew F.

While current case law interpreting *Endrew F.* is limited, the following three district court opinions reveal important trends, as well as some inconsistencies, in courts' interpretations of the new standard. First, in *Paris School District v. A.H.*,[103] the court considered the IEP of a child with autism and found it did not satisfy the FAPE requirement.[104] In reaching its decision, the court found that the school district failed to respond quickly to developing a behavior management plan[105] and that it ignored the nuances of behaviors that manifest with autism.[106] The court concluded that *Endrew F.* imposed heightened requirements for IEPs and that the district's plans were inadequate "especially in light of the *higher standard* of *Endrew F.* that must now be applied."[107]

Conversely, the court in *Board of Education v. Maez*[108] held that the IEP developed for a student with autism appropriately satisfied the FAPE requirement under the *Endrew F.* standard.[109] The court found that the student's IEP incorporated numerous teaching techniques, "which in total were appropriately ambitious and likely to provide . . . *some* educational benefit in light of his unique circumstances."[110] The court used the term "some" again later in the opinion when it highlighted the student's unique circumstances, stating that the IEP was proper because the student was making "*some* meaningful progress, even if it was not the exact type of progress that [the p]arents would have wanted."[111]

Finally, in *Parker C. v. West Chester Area School District*,[112] the court found that a child with disabilities adequately received a FAPE due to his immense progress and reasonably calculated IEP in light of his

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[103] No. 2:15-CV-02197, 2017 WL 1234151 (W.D. Ark. Apr. 3, 2017).

[104] *Id.* at *8.

[105] *Id.* at *7. Behavior management plans are detailed plans created through the IEP process and included as a part of the student's IEP that are designed to "essentially teach a child proper behavior through specified methods." Robert A. Garda, Jr., *Who Is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 323 (2006).

[106] *A.H.,* 2017 WL 1234151, at *8.

[107] *Id.* (emphasis added).

[108] No. 16-cv-1082, 2017 WL 3278945 (D.N.M. Aug. 1, 2017).

[109] *Id.* at *14.

[110] *Id.* at *8 (emphasis added).

[111] *Id.* at *13 (emphasis added).

[112] No. 16-4836, 2017 WL 2888573 (E.D. Pa. July 6, 2017).

circumstances.[113] During the due process proceedings,[114] a question arose as to whether the hearing officer applied the proper standard when evaluating the circumstances.[115] The court stated that resolution of this dispute was "irrelevant" because the "meaningful educational benefit" standard already employed by the Third Circuit applied in its review in light of the *Endrew F.* holding.[116] While these three decisions acknowledge that *Endrew F.* heightened the standard by requiring that the educational benefit be "more demanding than the 'merely more than de minimis' test,"[117] there are still important differences in how courts evaluated the appropriate progress standard.

2. Emergence of New Questions

Several new questions have presented themselves following the Court's decision in *Endrew F.* First, the three opinions discussed above confirmed *Endrew F.*'s acknowledgement that the creation of an IEP is a "'fact-intensive exercise' and that it 'will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians.'"[118] These district courts highlighted *Endrew F.*'s contention that "the IEP must be evaluated through the lens of the student's 'present level of achievement, disability, and potential for growth.'"[119] But this inquiry will likely differ depending on the court's particular expectations of a child with disabilities based on his or her circumstances—*Endrew F.* even acknowledges that there are infinite variations about what is obtainable for students.[120] Therefore, establishing a fact-based inquiry to determine what reasonably constitutes appropriate progress in these decisions presents possible issues for district courts moving forward.

Furthermore, after *Rowley* and *Endrew F.*, it is still unclear how much deference a court should give school administrators. While *Rowley*

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[113] *Id.* at *13.

[114] For further discussion of the due process proceedings outlined under the IDEA, see *supra* note 34.

[115] *Parker C.*, 2017 WL 2888573, at *7.

[116] *Id.*

[117] Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 992 (2017) (quoting Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015)).

[118] Paris Sch. Dist. v. A.H., No. 2:15-CV-02197, 2017 WL 1234151, at *5 (W.D. Ark. Apr. 3, 2017) (quoting *Endrew F.*, 137 S. Ct. at 999); *see also Parker C.*, 2017 WL 2888573, at *6 ("[S]chool districts must work with parents to design an IEP . . . . The instruction offered must be specially designed to meet a child's unique needs." (internal quotation marks omitted)); Bd. of Educ. v. Maez, No. 16-CV-1082, 2017 WL 3278945, at *14 (D.N.M. Aug. 1, 2017) ("The Supreme Court in *Endrew F.* recently reiterated that the adequacy of an IEP turns on the unique attributes of the child for which it is created.").

[119] *Maez*, 2017 WL 3278945, at *14 (quoting *Endrew F.*, 137 S. Ct. at 999).

[120] *Endrew F.*, 137 S. Ct. at 999.

acknowledged that courts should defer to school administrators on "questions of methodology"—the specific educational tactics being utilized[121]—it did not mandate that courts defer on the question of whether a particular IEP appropriately provides a FAPE.[122] The Court in *Endrew F.* stated that lower courts should defer to school authorities based on their expertise and exercise of judgment yet declined to elaborate on what appropriate progress would look like from case to case.[123] In the same paragraph, however, the Court lauded the procedural nature of the IEP process and the reviewing authority's ability to evaluate "cogent and responsive explanations" for decisions made by a school district.[124] This ambiguity may ultimately cause courts to differ on the level of deference they provide to school administrators, which would produce different outcomes across jurisdictions despite similar facts being presented in any given case.

Finally, the limited district court cases decided so far have interpreted *Endrew F.*'s language differently. There is a possible split emerging among the circuits that previously followed the "some educational benefit" standard, especially in light of the fact that these courts are trying to reconcile the *Endrew F.* standard with its *Rowley* precedent. While some courts have found that *Endrew F.* overruled *Rowley* and requires a heightened standard,[125] others are still using the "some educational benefit" language, indicating that the decision has not altered their fact-specific evaluation.[126] In contrast, other courts have found that *Endrew F.*'s appropriate progress standard does not alter *Rowley*'s "meaningful educational benefit" test.[127]

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[121] *See* Terry Jean Seligmann, Rowley *Comes Home to Roost: Judicial Review of Autism Special Education Disputes*, 9 U.C. DAVIS J. JUV. L. & POL'Y 217, 233 (2005) (stating that courts do not possess specialized knowledge and expertise to resolve educational policy questions and thus must defer to states on preferable educational methods).

[122] Dixie Snow Huefner, *Judicial Review of the Special Education Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483, 504 (1991) ("What *Rowley* commands, however, is deference to the school authorities on questions of methodology and policy, not on questions of whether an IEP constitutes a FAPE." (footnotes and internal quotation marks omitted)).

[123] *Endrew F.*, 137 S. Ct. at 1001.

[124] *Id.* at 1002.

[125] *See* Paris Sch. Dist. v. A.H., No. 2:15-CV-02197, 2017 WL 1234151, at *5 (W.D. Ark. Apr. 3, 2017) ("In comparing [the *Endrew F.* standard] to the 'merely more than de minimis' test—previously the law of the Eighth Circuit—the Court held that 'this standard is markedly more demanding.'" (quoting *Endrew F.*, 137 S. Ct. at 1000)).

[126] *See* Bd. of Educ. v. Maez, No. 16-CV-1082, 2017 WL 3278945, at *8 (D.N.M. Aug. 1, 2017) (noting that the IEP was "appropriately ambitious and likely to provide [the student] with some educational benefit in light of his unique circumstances").

[127] *See, e.g.*, Parker C. v. W. Chester Area Sch. Dist., No. CV 16-4836, 2017 WL 2888573, at *7 (E.D. Pa. July 6, 2017) (declining to address whether the hearing officer applied the incorrect standard

Incorporating the "meaningful educational benefit" standard to evaluate the FAPE standard is questionable, however, given that *Endrew F.* never explicitly mentions "meaningful educational benefit," nor did the opinion choose to adopt either standard utilized by district courts following *Rowley* or offered by either party at oral argument.[128] These cases demonstrate the varying impact of *Endrew F.*'s appropriate progress standard on courts' evaluation of what constitutes a FAPE and may indicate how this divergence will develop in the future.[129]

III. THE PRACTICAL IMPACT OF THE *ENDREW F.* STANDARD

Despite the fact-specific nature of the FAPE standard, district courts all agree that *Endrew F.*'s appropriate progress standard now requires that an IEP's educational benefit be "more demanding than the 'merely more than *de minimis*' test."[130] Additionally, since *Endrew F.*, there has been an emphasis on meeting specific requirements highlighted in the *Endrew F.* opinion—namely, that in order to guarantee that a student receives a FAPE, school districts must provide students with disabilities individualized accommodations, include special education students in general education classrooms, and make decisions about an IEP using cogent analysis.[131] As a result, *Endrew F.*'s heightened standard for a FAPE should lead to significant changes for both special education students and schools—

because he applied the "meaningful educational benefit" standard, which remains valid in light of *Endrew F.*).

[128] Janet R. Decker & Sarah Hurwitz, *Post*-Endrew *Legal Implications for Students with Autism Introduction*, 344 WEST'S EDUC. L. REP. 31, 35 (2017) (acknowledging that "[t]he *Endrew* Court resolved the split in the circuits not by adopting one of these [conflicting] standards, but by creating a new standard").

[129] Maureen MacFarlane, legal counsel for Cambridge Public Schools in Massachusetts, even went so far as to say that "[o]ne might posit that based upon the cases that have been issued to date there is likely to be, over time, another split in the circuits as to how to interpret the standard[] that ha[s] been articulated in . . . *Endrew*." Maureen A. MacFarlane, *In Search of the Meaning of an "Appropriate Education": Ponderings on the* Fry *and* Endrew *Decisions*, 46 J.L. & EDUC. 539, 557 (2017).

[130] Endrew F., 137 S. Ct. at 992 (quoting Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015)); *see also* JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, Endrew *Decision Creates Important New Opportunities for Students with Disabilities*, COUNCIL OF PARENT ATT'YS & ADVOCS. (Sept. 2017), http://c.ymcdn.com/sites/www.copaa.org/resource/resmgr/docs/accessible_2017/Endrew_paper_LH__9-8-17-1.pdf [https://perma.cc/YCQ2-4RR3] ("*Endrew* rejects the bigotry of low expectations that marked prior interpretations of *Rowley.* It requires that schools provide special education that is designed to help students with disabilities become academically proficient . . . .").

[131] *See Endrew F.*, 137 S. Ct. at 1000 ("[A] FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade."); *id.* at 1002 ("A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.").

especially for those residing in circuits that previously followed the "some educational benefit" standard.[132] For one, this new standard provides special education students with much-needed resources that will assist them in further developing their academic, social, and behavioral skills.[133] Many of these children had been neglected by the policies and programs instituted at their schools in jurisdictions that previously utilized the *de minimis* standard. Under the Court's new standard, school districts and administrators will now have to provide these students with enhanced individualized curricula, supplemental aids, and other important resources.[134]

While the new standard does appear to increase the protections for students with disabilities, it also should have a significant impact on school structuring and the resources that are allocated to other students. Because the Court raised the FAPE standard above the *de minimis* threshold, it is probable that certain school districts will now have to significantly alter their existing programming, and school administrators will be forced to make difficult decisions about how to allocate their already-limited resources in order to adequately fund the programming and resources that *Endrew F.* requires.

This Part analyzes these issues further by highlighting the areas of education most likely to be impacted by the *Endrew F.* decision: the integration of students with disabilities into general education classrooms, resource allocation within public schools, and the role of charter schools in providing education to children with special needs.

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[132] *See* Julie Waterstone, Endrew F.*, Symbolism v. Reality*, 46 J.L. & EDUC. 527, 532 (2017) ("For those children with special needs living in the Tenth Circuit, they will unquestionably feel a difference because their quality of program has been elevated through this decision."). While the IDEA already required, and schools already provided, some of the programs and services discussed in this Part to some extent, it is probable that the heightened FAPE standard will force more schools to implement the policies outlined in this Part; otherwise, schools increase the risk of facing lawsuits. *See* Terry Jean Seligmann, *Flags on the Play: The Supreme Court Takes the Field to Enforce the Rights of Students with Disabilities*, 46 J.L. & EDUC. 479, 481 (2017) ("For those school districts and courts, however, that have relied on a narrow reading of *Rowley* to claim that their IDEA obligations are only procedural or that courts should avoid any substantive review of the validity of a school district's proposed individualized education plan (IEP), *Endrew F.* has blown the whistle and offered an invigorated version of *Rowley* to guide future FAPE dispute resolution.").

[133] *See* JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 130 ("For the many students with disabilities who have fallen far behind their peers academically due to inadequate special education or other reasons, *Endrew* requires that schools help them catch up."); Claire Raj & Emily Suski, Endrew F.*'s Unintended Consequences*, 46 J.L. & EDUC. 499, 502 (2017) (noting that the standard the Supreme Court set forth for determining FAPE "undoubtedly marks a victory for students with disabilities and is markedly better than the 'more than *de minimis*' standard it rejected").

[134] *See infra* Sections III.A–C.

A. Integrating Students with Disabilities into General Education Classrooms

One way *Endrew F.*'s appropriate progress standard will significantly affect the development of students with disabilities is by explicitly ensuring that students with disabilities advance while being fully integrated into general education classrooms. This new standard seems to create a high presumption in favor of IEPs that focus on "mainstreaming"[135] the student and ensuring individual progress in the general education curriculum, instead of primarily in special education classrooms.[136] The opinion's emphasis on this point serves as a reaffirmation of the IDEA's mandate that school districts should guarantee that each child with a disability receives his or her educational services in the least restrictive environment (LRE).[137]

This presumption in favor of integrating students with disabilities into general education will presumably carry with it significant costs to schools and school districts, including the costs of administering educational programs specific to each child's circumstances in general education classrooms.[138] For example, schools may have to expand the use of supplemental aids and services in these classrooms in order to provide students with disabilities the opportunity to make appropriate progress.[139]

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[135] "Mainstreaming" is a common term used in education to describe the integration of students with disabilities into a general education classroom. *See Mainstreaming*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/mainstreaming [https://perma.cc/J2SR-XX3D].

[136] *Endrew F.*, 137 S. Ct. at 1000 ("The IEP provisions [of the IDEA] reflect *Rowley*'s expectation that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. . . . When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum."); *see also* Spencer J. Salend & Laurel M. Garrick Duhaney, *The Impact of Inclusion on Students with and Without Disabilities and Their Educators*, 20 REMEDIAL & SPECIAL EDUC. 114, 115 (1999) (citing a study that found that students with disabilities who were integrated into general education classes were more likely, as compared to those children with disabilities who were not enrolled in general education classes, to attend postsecondary academic programs, obtain employment and earn higher salaries, live independently, be socially integrated into their communities, and be married or engaged).

[137] 20 U.S.C. § 1412(a)(5) (2012). For a discussion of the IDEA's LRE mandate, see *supra* Section I.A.

[138] *See* LISSA A. POWER-DEFUR & FRED P. ORELOVE, INCLUSIVE EDUCATION: PRACTICAL IMPLEMENTATION OF THE LEAST RESTRICTIVE ENVIRONMENT 68–71 (1997); Therese Craparo, Note, *Remembering the "Individuals" of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 467, 494 (2003) (noting that school districts often argue that the costs of providing supplemental services necessary to include a child with disabilities in a general education classroom are too high); Kevin D. Stanley, Note, *A Model for Interpretation of Mainstreaming Compliance Under the Individuals with Disabilities Education Act:* Board of Education v. Holland, 65 UMKC L. REV. 303, 317 (1996) (explaining that services for mainstreamed students may result in a reallocation of school funds).

[139] *See* Megan Roberts, Comment, *The Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and Educators*, 55 UCLA L. REV. 1041, 1054 (2008) ("[F]undamentally the LRE is meant to be the environment in which

Additionally, schools may have to hire more support staff that can be incorporated into general education classrooms periodically throughout the school day.[140]

Despite these costs and impacts on school operations, however, the implementation of mainstreaming practices emphasized in the *Endrew F.* opinion are likely to have a positive effect on students with disabilities. The majority of studies on mainstreaming show that the placement of students with disabilities in general education classrooms more positively affects their academic achievement compared to their placement in separate special education classes.[141] These studies show that mainstreaming encourages development by exposing students with disabilities to the mainstream curriculum, which challenges these students in a way that one-on-one instruction does not.[142] Mainstreaming also allows these students to observe how other students learn, which can help boost language and problem-solving skills.[143]

Incorporating children with disabilities into general education classrooms can also have a positive impact on the social development of other students. First, mainstreaming promotes diversity within a classroom that would not be available in different circumstances.[144] Additionally, interactions with other students can improve self-esteem in children with disabilities as well as improve their active listening abilities and general

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a student, with essential supplemental aids and services, can benefit from academic and social opportunities.").

[140] *See* Rebecca Beitsch, *Special Education Case at Supreme Court Could Prove Costly for Schools*, HUFFINGTON POST (Dec. 8, 2016, 11:05 AM), https://www.huffingtonpost.com/entry/special-education-case-at-supreme-court-could-prove_us_584983dae4b07d4bc0fa2561[https://perma.cc/X73S-Y3HR] ("Disability groups that have sided with Endrew . . . say a win for their side could encourage schools to improve their special education programs, perhaps by hiring people and using technology that can provide more therapy . . . .").

[141] *See, e.g.*, Nancy A. Madden & Robert E. Slavin, *Mainstreaming Students with Mild Handicaps: Academic and Social Outcomes*, 53 REV. EDUC. RES. 519, 523–26 (1983) (analyzing various studies that demonstrate more academic growth for students with disabilities who were mainstreamed than those in self-contained classrooms); Salend & Duhaney, *supra* note 136, at 114–16 (same).

[142] *See* Salend & Duhaney, *supra* note 136, at 114–16.

[143] *See* Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1047–48 (5th Cir. 1989) (noting that language and behavior models taught to others may help with the development of children with disabilities); Jeff Grabmeier, *Children with Disabilities Benefit from Classroom Inclusion*, OHIO ST. U. (July 29, 2014, 3:37 PM), https://ehe.osu.edu/news/listing/children-disabilities-benefit-classroom-inclusion [https://perma.cc/Q5V3-XKLE] (citing a study that found that students with disabilities "get a big boost" in their language skills when they interact with other children with good language skills).

[144] *See* Lorna Idol, *Towards Inclusion of Special Education Students in General Education: A Program Evaluation of Eight Schools*, 27 REMEDIAL & SPECIAL EDUC. 77, 91 (2006) (finding that educators had generally favorable impressions of the impact of students with disabilities on other students in their class and vice versa); Stanley, *supra* note 138, at 316 ("Without question, the great weight of evidence points to the positive effects of diversity within the regular classroom.").

social skills.[145] Ultimately, while *Endrew F.*'s appropriate progress standard and emphasis on LREs may significantly impact the structure of certain schools, it should also help foster further academic and social growth among students with disabilities as well as other students in the general education classroom.

B. Impact on Public School Operations and Spending

Endrew F.'s heightened FAPE standard should have a significant impact on public school administrators, teachers, and students. In order to abide by this new standard, schools may have to provide more individualized assistance to students with disabilities, which will, in turn, impact day-to-day school operations, teachers' professional development, and resource allocation schoolwide. While these changes are likely to affect traditional public schools more generally, they will probably have an even greater impact on public charter schools due to their funding issues, unique structures, and alternative teaching methods, as compared to traditional public schools. This Section further examines these impacts by first surveying the most plausible ways the *Endrew F.* holding will alter traditional public schools and then evaluating how the new standard specifically affects public charter schools.

1. General Impact on Public Schools

The appropriate progress standard will likely have a positive effect on students with disabilities enrolled in traditional public schools by facilitating the provision of more supplemental, individualized aid and a curriculum that is more accommodating to their needs. However, in order for students with disabilities to receive these benefits, teachers will likely need additional educational assistance to better understand the best methods to educate them.[146] This Section discusses how the appropriate progress standard, and the Court's requirement that a student's IEP allow for an educational benefit

[145] *See* William R. Henninger, IV & Sarika S. Gupta, *How Do Children Benefit from Inclusion*, *in* FIRST STEPS TO PRESCHOOL INCLUSION: HOW TO JUMPSTART YOUR PROGRAMWIDE PLAN 33, 37–43 (2014) (highlighting the short- and long-term benefits of inclusion); Stanley, *supra* note 138, at 314 (highlighting the nonacademic benefits of mainstreaming).

[146] *See generally* Mitchell L. Yell & David F. Bateman, Endrew F. v. Douglas County School District *(2017): FAPE and the U.S. Supreme Court*, 50 TEACHING EXCEPTIONAL CHILD. 7 (2017) (acknowledging that, under this new standard, teachers must better understand the legal implications of special education, the procedures and strategies for effectively incorporating special education students into the general education curriculum, how to develop measurable annual goals for students with disabilities, and how to monitor those goals using objective data).

that is more demanding than the "merely more than *de minimis*" test, should affect the daily lives of teachers and students.[147]

Meeting the *Endrew F.* FAPE standard ultimately makes general and special education teachers, school support staff, and administrators more accountable by requiring them to develop differentiated curricula to help students with disabilities make appropriate progress.[148] This standard may have the greatest impact on general education teachers, who must now familiarize themselves with the needs of students with disabilities.[149] Some scholars note that *Endrew F.* will probably lead to a higher volume of professional development in evidenced-based teaching practices for both general and special education teachers so that these educators will have the knowledge necessary to create an individualized special education for students with disabilities.[150] This programming may include incorporating new technology, workbooks, and other teaching objects into the classroom to help facilitate learning[151] and will allow teachers to master the tools

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[147] Of course, the potential changes to the daily lives of teachers and students after *Endrew F.* will depend on the quality of special education classrooms across districts, but those who previously followed the "some educational benefit" (*de minimis*) standard are likely to experience the biggest changes. *See Understanding the Supreme Court Decision on Students with Disabilities: An Interview with Natasha Strassfeld*, N.Y.U. STEINHARDT NEWS (June 19, 2017), http://steinhardt.nyu.edu/site/ataglance/2017/06/understanding-the-supreme-court-decision-on-students-with-disabilities-an-interview-with-natasha-strassfeld.html [https://perma.cc/7JRJ-S49U] ("If a school district maintains fidelity to IDEA's objective of providing a free, appropriate public education to a student with a disability, then *Endrew* changes very little for the day-to-day life of the classroom teacher.").

[148] *See* Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000 (2017) (requiring school districts to provide students with disabilities "individualized special education calculated to achieve advancement from grade to grade" in order to satisfy the FAPE standard); *see also* H. Rutherford Turnbull et al., *The Supreme Court,* Endrew*, and the Appropriate Education of Students with Disabilities*, 84 EXCEPTIONAL CHILD. 124, 136 (2018) ("[E]ducators of these students will need to have knowledge of a broad range of academic as well as functional curricula. . . . And they will need to have the depth of understanding of curricula, academic as well as functional, to effectively modify and assess progress in those curricula for students with disabilities."); Linda Diamond, *Decoding the Impact of the Supreme Court Decision on Special Education*, CONSORTIUM ON READING EXCELLENCE IN EDUC. (May 19, 2017), https://www.corelearn.com/special-ed-blog [https://perma.cc/YAN7-FSHL] ("Because of the Supreme Court's ruling, districts will want to equip special education and regular education teachers with the skills and knowledge to be able to teach all students to a higher level. This will require better and deeper professional development in evidence-based teaching practices . . . . It will require selecting and fully implementing the best curricula for all students as well as the most effective materials for teaching students already identified with disabilities.").

[149] *See* Decker & Hurwitz, *supra* note 128, at 40 ("[S]chool leaders must ensure employees receive effective training in autism, both to be prepared for potential legal challenges and to meet the individual needs of the growing number of students with autism.").

[150] *See id.* Through these programs, teachers will learn how to both set up programs to regularly monitor student progress and use new resources and materials to respond to these interventions. *See id.*

[151] Michael L. Wehmeyer at al., *Technology Use by Students with Intellectual Disabilities: An Overview*, 19 J. SPECIAL EDUC. TECH. 7 (2004) (highlighting the importance and different types of technological supplements included into special education curricula in order to assist students).

necessary to create a curriculum that encourages individual growth in an inclusive classroom setting.[152]

It is probable that the *Endrew F.* standard will also impact the administrative demands of educating a student with a disability. Some commentators argue that *Endrew F.*'s appropriate progress standard now mandates that all participants in a child's IEP meeting evaluate the merits of the IEP with increased scrutiny.[153] The burden ultimately falls on both general and special education teachers to fully understand the potential complications of a specific disability and how it impacts an individual student's academic, social, and functional progress.[154] Using this information, educators and parents must work together to configure a proper IEP and then monitor the progress of the student throughout the year to ensure that the interventions are sufficient.[155] To assist in this process, schools may now be more inclined to enlist the services of disability education experts to assess the adequacy of an IEP and help teachers implement proper interventions.[156] Scholars also anticipate that, following the implementation of this new standard, school districts will listen to and coordinate with parents before and during these meetings even more than before.[157]

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[152] Melissa Hecht, *What the* Endrew F. *Supreme Court Case Means for Public Education*, RELIAS (May 22, 2017), https://www.relias.com/blog/what-the-endrew-f-case-means-for-public-education [https://perma.cc/8ARG-7EPG] ("All school staff must have the tools and professional development necessary to create an inclusive classroom where all students, including students with disabilities, can meet their educational goals.").

[153] *See, e.g.*, Decker & Hurwitz, *supra* note 128, at 40 (stating that IEP teams are mandated to "carefully scrutinize segregated placements including self-contained classrooms and alternative educational settings"); Michelle Diament, *Supreme Court FAPE Ruling May Be a Watershed Moment*, DISABILITY SCOOP (April 7, 2017), https://www.disabilityscoop.com/2017/04/07/supreme-court-fape-watershed/23553 [https://perma.cc/6LKE-7F8R] (providing a statement from the School Superintendents Association suggesting that districts must "make sure that they can provide 'a cogent and responsive explanation' for the IEPs they produce, particularly for students who are not expected to perform on grade-level" (quoting *Endrew F.*, 137 S. Ct. at 1002)).

[154] *See* Hecht, *supra* note 152 (explaining how, by setting out a legal precedent that millions of students deserve an "appropriately ambitious" education, the Court is requiring that "[a]ll school staff—administrators, general education teachers, special education teachers, and paraprofessionals—must understand how to create and implement an effective and *ambitious* IEP").

[155] Shawn K. O'Brien, *Did* Endrew F. *Change the "A" in FAPE? Questions and Implications for School Psychologists*, 46 COMMUNIQUÉ 31 (2017).

[156] *See* Beitsch, *supra* note 140 (stating that the *Endrew F.* decision may encourage schools to improve their special education programs by hiring experts, utilizing technology that can provide more therapy, or sending existing staff to more training).

[157] *See* Waterstone, *supra* note 132, at 532–33 (noting that the Court's repeated emphasis on procedures for parents and educators to collaborate together is expected to lead to more parent involvement in the IEP process); Endrew F. v. Douglas County School District*: Academic Achievement & Students with Disabilities*, AM. BAR ASS'N (May 23, 2017), https://www.americanbar.org/content/dam/aba/administrative/cle/materials/2017/05/ce1705asd.authcheckdam.pdf [https://perma.cc/88FD-

Finally, the appropriate progress standard should have a significant impact on the utilization of special education teachers and support staff, including the need for more special education support staff to "push into" the general education classroom or "pull out" students into a self-contained classroom throughout the school day.[158] Raising the FAPE standard above the *de minimis* threshold means that schools residing in these districts must also provide more specialized programs for those who need them. Thus, students who struggle with mental or emotional disabilities are now more likely to receive counseling or a behavior modification program provided by disability specialists.[159] Additionally, children with physical problems ought to gain access to special equipment or physical and occupational therapy sessions during the school day.[160]

While all of these additional resources and programs appear very beneficial for facilitating student growth, critics of the *Endrew F.* standard worry about the costs of these increased inventions,[161] especially given that school districts already do not receive sufficient funding from the federal government to address the needs of students with disabilities.[162] For example,

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LVGX] ("Advocates argue that one major anticipated change will be that when parents are at IEP meetings with the school district, the school will be more willing to listen to parents and give students more of what they need up front.").

[158] In education, a "push in" model refers to a system in which aides or specialists enter the general education classroom to assist a special education student within that environment, while "pull out" services are those where an aide or specialist works with a student outside of the general education classroom. *See* Brain Adom, *Pull Out and Push In Models in Special Education*, MEDIUM (Apr. 22, 2016), https://medium.com/@brainadom895/pull-out-and-push-in-models-in-special-education-d1c8d9ceea13 [https://perma.cc/WH7J-BKGE].

[159] *See* Holly T. Howell, Comment, Endrew F. v. Douglas County School District*: How Much Benefit is Enough When Evaluating the Educational Needs of Disabled Students in Federally-Funded Public Schools?*, 40 AM. J. TRIAL ADVOC. 347, 352 (2016).

[160] *Id.*

[161] During oral argument in *Endrew F.*, Justice Kennedy expressed concerns about the costs associated with a program that is reasonably calculated to provide students with disabilities educational opportunities that are "substantially equal" to those offered to other students. Howe, *supra* note 99; *see also* Howell, *supra* note 159, at 413 (noting the author's expectation that the *Endrew F.* decision will be costly to school districts).

[162] *See* Kathleen Conn, Rowley *and* Endrew F.*: Discerning the Outer Bounds of FAPE?*, 345 WEST'S EDUC. L. REP. 597, 613 (2017) ("The costs of providing a FAPE for . . . severely disabled children are not adequately reimbursed by the federal government under IDEA. The federal government never made good on its promise to provide 40% of special education expenditures to school districts. At the present time, the federal government covers only 16% of the costs of providing special education services under IDEA."). This funding issue is exacerbated in school districts that provide services to children with disabilities through private institutions. For instance, Endrew's private school tuition was $70,000 per year, while Colorado school districts spent an average of $8985 per student. *Id.* (citing *Education Spending Per Student Per State*, GOVERNING: STATES & LOCALITIES, http://www.governing.com/gov-data/education-data/state-education-spending-per-pupil-data.html [https://perma.cc/7RNZ-NS56]). If a school cannot accommodate a student's needs because it lacks the resources necessary to ensure that the

school districts may incur a variety of additional academic costs for differentiated instructional tools and workbooks, professional development for teachers, technology, and new curricula. Additionally, the provision of counseling, behavioral modification programs, and physical and occupation therapy sessions requires the services of costly specialists.[163] Finally, schools are likely to incur various administrative expenses, including the costs associated with hiring disability education experts who can assess an IEP's adequacy or testify about education plans for children if those plans are challenged in court.[164]

2. Impact on Charter Schools

Like traditional public schools, charter schools must also comply with federal special education laws.[165] Thus, it would seem that the *Endrew F.* decision will cause charter schools to experience the same effects experienced by traditional public schools, including the provision of more resources to students with disabilities by their respective schools. However, charter schools differ from traditional public schools in that they experience more funding deficiencies, have unique organizational structures, and utilize alterative teaching methods.[166] All of these factors together possibly make it

child will make appropriate progress, the school may be required to pay for outside private schooling, where tuition could cost above $50,000 per year. *Id.*

[163] Howell, *supra* note 159, at 352.

[164] Beitsch, *supra* note 140 ("Advocates for administrators said schools likely would be forced to boost spending on lawyers and disability education experts to testify about education plans for children, as they try to fight off cases from parents seeking more therapy or private school tuition for their child.").

[165] Robert A. Garda, Jr., *Disabled Students' Rights of Access to Charter Schools Under the IDEA, Section 504 and the ADA*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 516, 519 (2012) ("Charter schools operate free from many of the local and state regulations that apply to traditional public schools. But charter schools must comply with the federal laws governing disabled students—the Individuals with Disabilities Education Act . . ., Section 504 of the Rehabilitation Act . . . and Title II of the Americans with Disabilities Act.").

[166] Some commenters note that charter schools have unfavorably impacted students with disabilities in the past primarily because they are underfunded, *see, e.g.*, Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 691 (2012) ("Lacking such basic services for disabled students precludes charter schools from being a viable school option for most disabled students."), and they cannot provide adequate programming or support for these students, *see, e.g.*, Cheryl M. Lange & Camilla A. Lehr, *Charter Schools and Students with Disabilities: Parent Perceptions of Reasons for Transfer and Satisfaction with Services*, 21 REMEDIAL & SPECIAL EDUC. 141, 146–49 (2000) (providing anecdotes from scholars and parents of students with special needs about the issues with delivery and outcomes for these students who attend charter schools); Michael A. Naclerio, Note, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1174–75 (2017) (providing an example of a parent from New Orleans—whose child had autism, blindness, and a developmental delay—who found that only one of the eight publicly funded charter schools she met with had a program that could accommodate her son). Despite these issues, enrollment by special needs students in charter schools has increased in recent years, *see* Lauren Morando Rhim et al., *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012*, NAT'L CENTER FOR SPECIAL EDUC. IN

even more difficult for charter schools to accommodate students with disabilities. This Section explains these difficulties in more detail and outlines why the *Endrew F.* holding may actually decrease the enrollment of students with disabilities in charter schools.

Charter schools receive their initial charter from their respective local boards of education and depend on their students receiving adequate yearly achievement scores in order to renew their charters.[167] Like public schools, charter schools receive government funding.[168] But charter schools differ from traditional public schools in that they retain significant discretion regarding teaching methods, curricula, and the general school structure, so long as their students achieve satisfactory academic outcomes.[169] Charter schools also differ in the amount of government resources they receive—these schools are only funded at approximately 64% the rate of their public school district counterparts nationwide.[170]

These limited resources ultimately make it difficult for charter schools to adequately accommodate students with disabilities. In the past, certain charter schools have even been found to specifically disregard students with complex cognitive and behavioral disabilities, perhaps due to the high costs of providing these services.[171] As highlighted in the previous Section,

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CHARTER SCHS. (Oct. 2015), https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/567b0a3640667a31534e9152/1450904118101/crdc_full.pdf [https://perma.cc/X5R5-WKSE], and the Trump Administration has promoted and increased funding for school choice and the charter school movement, arguing that it can benefit students with disabilities, Aria Bendix, *Trump's Education Budget Revealed*, ATLANTIC (Mar. 16, 2017), https://www.theatlantic.com/education/archive/2017/03/trumps-education-budget-revealed/519837 [https://perma.cc/V9RJ-JZPS]; Maria Danilova, *Do Charter Schools Serve Special-Needs Kids? The Jury is Out*, SEATTLE TIMES (published May 22, 2017, 12:56 AM; updated May 22, 2017, 6:18 AM), https://www.seattletimes.com/nation-world/nation-politics/do-charter-schools-serve-special-needs-kids-the-jury-is-out [https://perma.cc/A2UB-M4N8].

[167] Naclerio, *supra* note 166, at 1162–63; *see also* Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 372 (2003) (noting that student performance standards are one of the most common measures states take into consideration when deciding whether or not to renew a school's charter). Some states, such as Louisiana, even condition renewal of charter schools based on student improvement on standardized test scores. *Id.*

[168] *See* Jeanette M. Curtis, Note, *A Fighting Chance: Inequities in Charter School Funding and Strategies for Achieving Equal Access to Public School Funds*, 55 HOW. L.J. 1057, 1067–68 (2012) (explaining that, although charter schools may receive private grants and loans, most of their funding comes from federal, state, and local government sources).

[169] *Id.* at 1064.

[170] *Just the FAQs – Charter Schools*, CTR. FOR EDUC. REFORM, https://www.edreform.com/2012/03/just-the-faqs-charter-schools [https://perma.cc/B5UT-ECDU] (reporting that charter schools average $7131 per pupil compared to the per pupil expenditure of $11,184 in traditional public schools).

[171] *See* Garda, Jr., *supra* note 166, at 687–88 (stating that some charter schools are dissuading students with severe disabilities—such as autism, traumatic brain injury, or hearing, visual, or orthopedic impairments—from enrolling in their schools because of "cost and accountability concerns"); Nancy J. Zollers & Arun K. Ramanathan, *For-Profit Charter Schools and Students with Disabilities: The Sordid*

Endrew F.'s appropriate progress standard will likely increase the amount of resources required to provide disabled students with a FAPE. As a result, charter schools may be required to reallocate funds from general education programs in order to support students with disabilities. However, administrators of these schools will probably be hesitant to redistribute their already-limited resources—as mentioned previously, charter schools depend on adequate yearly achievement scores to renew their charters,[172] and charter school administrators are unlikely to remove their already-scarce resources from general education classrooms in fear that doing so may lead to a decline in the schools' overall test scores.[173] Furthermore, if school administrators decide not to reallocate these resources to assist children with disabilities, these students may decide not to enroll in charter schools at all. The heightening of the FAPE standard post-*Endrew F.* is therefore likely to create new tensions for charter schools.

Additionally, it is reasonable to expect that *Endrew F.*'s heightened requirements will exacerbate the underenrollment of students with disabilities in charter schools—especially considering that the additional protections afforded under the appropriate progress standard clash with teaching methods and school operating procedures employed by many charter schools. Commentators note that the charter school movement is motivated by the ideas of deregulation and academic outcome accountability.[174] Over time, in order to achieve the state-mandated academic benchmarks, multiple charter schools have developed a "no excuses" model

Side of the Business of Schooling, 80 PHI DELTA KAPPAN 297, 298 (1998) ("While they have done a decent job of including students with mild disabilities, for-profit charter schools in Massachusetts have engaged in a pattern of disregard and often blatant hostility toward students with more complicated behavioral and cognitive disabilities.").

[172] *See supra* note 167 and accompanying text.

[173] Prior to the *Endrew F.* decision, scholars noted that "the administrators and teachers that serve [charter] schools often prioritize test scores and financial considerations over legal and moral obligations to appropriately accommodate and include students with [disabilities]." Stern et al., *The Normative Limits of Choice: Charter Schools, Disability Studies, and Questions of Inclusion*, 29 EDUC. POL'Y 448, 456 (2015). Given that the *Endrew F.* holding will likely require even more resources to be devoted to students with disabilities, it is reasonable to assume that these issues will only be exacerbated.

[174] *See, e.g.*, Leman Kaniturk Kose, *Challenges of Charter Schools with Special Education: Issues of Concern for Charter School Authorizers and Service Providers*, 1 MID-ATLANTIC EDUC. REV. 36, 38 (2013) (noting that "[c]harter operators who are intentionally avoiding bureaucracy may find it hard to understand that failing to follow procedural rules could amount to failing to provide an appropriate education for students with disabilities"); Garda, Jr., *supra* note 166, at 660–61 ("The charter movement is rooted in the exchange of autonomy and independence for educational results. Regulators judge charter schools by the performance of their students, not adherence to mandatory processes. As famously stated by President Clinton, they are 'schools that have no rules.'" (quoting *October 6, 1996 Debate Transcript: The First Clinton-Dole Presidential Debate*, COMM'N PRESIDENTIAL DEBATES (Oct. 6, 1996), http://www.debates.org/index.php?page=october-6-1996-debate-transcript [https://perma.cc/L65D-22K3])).

that encourages strict discipline policies so that students would focus solely on their schoolwork, in addition to longer school days, heavier workloads, and an extended school year.[175] Moreover, several charter schools have structured their curricula in a way that maximizes the chances of students achieving the highest collective test scores, even if that comes at the expense of addressing individual needs outside of the tests.[176]

Even before *Endrew F.*, the strict, metric-driven philosophy of charter schools was not very conducive to the individual, nuanced needs of students with disabilities capable of functioning in general education classrooms.[177] Moreover, the independence given to these charter schools may conflict with the procedural rights afforded to parents under the IDEA.[178] The Court's ruling in *Endrew F.* may aggravate these same concerns because the more demanding substantive FAPE requirements conflict with typical charter school operations. For instance, the appropriate progress standard's implications for least restrictive environments and more individualized accommodations directly contrast with the strict discipline policies administered by many charter schools. Additionally, charter schools' focus on academic outcome accountability clashes with the appropriate progress standard, which is based on the student's holistic needs—including behavioral and social–emotional objectives—not just academic outcomes.

One example from Philadelphia illustrates this problem. Angelique D. was enrolled in a distressed charter school that did not have the resources to properly evaluate her or provide her with the supplemental aids necessary to

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[175] The debate over the "no excuses" model intensified recently when a video surfaced of a charter school teacher berating a first grader for failing to explain a math problem correctly, ripping up the student's paper, and having the subdued student sit in the "calm down chair." *See* Mark Palko & Andrew Gelman, *How Schools That Obsess About Standardized Tests Ruin Them as Measures of Success*, VOX (Aug. 16, 2016, 7:50 AM), https://www.vox.com/2016/8/16/12482748/success-academy-schools-standardized-tests-metrics-charter [https://perma.cc/H4WW-ESU5]. While advocates argue that this "educational tough love" encourages student growth, *id.*, critics of charter schools argue that these institutions achieve test results by recruiting the highest achieving students and weeding out underperforming students through their rigid disciplinary codes. Naclerio, *supra* note 166, at 1161; *see also* Evan Horowitz, *Do Charter Schools Really Help Children Improve?*, BOS. GLOBE (Aug. 23, 2016), https://www.bostonglobe.com/news/politics/2016/08/23/charter-schools-boost-test-scores-nothing-else/D6F7vTwLTqYnBJyeupoODK/story.html [https://perma.cc/2934-WUPX] (finding that the "no excuses" charter school model does not translate into better job success).

[176] *See* Palko & Gelman, *supra* note 175 (highlighting the case of Success Academy Charter Schools in New York and how the data seems to show that the schools thrive by training the remainder of students to perform well on performance tests and excluding those students who are not likely to perform well).

[177] *See* Naclerio, *supra* note 166, at 1173–74.

[178] *See id.* at 1183–84 ("[T]he absence of direct accountability avenues—like a publicly elected school board—amplifies the problems with the procedures through which students with disabilities can vindicate their rights [in charter schools] because such procedures become the *only* formal mechanism to resolve disputes . . . .").

receive a FAPE under the appropriate progress standard.[179] After achieving unsatisfactory test scores in previous years, the school was in danger of losing its charter and thus forced to funnel all of its limited monetary and curriculum resources into ensuring that students in general education classrooms succeeded on their yearly achievement tests. Lost in the school's desperate attempts to maintain its charter was Angelique, who the court determined should have received 1780.3 more hours of education services from the school.[180]

Now that charter schools will be forced to address disabled students' needs so that they make more than *de minimis* progress, it is plausible that many of these schools will experience more dilemmas like Angelique's. Although these students will still receive a better education than they previously did at their respective public institutions, their choice in schools may be limited even further than before. Ultimately, if these students do not receive proper resources, they are faced with two undesirable choices: switch schools or sue.

Overall, the Court's creation of the appropriate progress standard in *Endrew F.* is likely to have a substantial impact on various aspects of the current education landscape. As a result, special education programs, administrative proceedings, and professional development will significantly change—to the benefit and detriment of different individuals within the school system. This Part analyzed the probable impact the new standard will have on general education integration programs, public school operations and spending, and charter schools. However, the discussion provided here is just the tip of the iceberg, and questions still remain regarding how *Endrew F.* will impact education reform moving forward.

IV. CLARIFYING *ENDREW F.*'S APPROPRIATE PROGRESS STANDARD

While the appropriate progress standard serves as a preliminary step to help protect the needs of special education students, the standard must be clarified so that students, parents, and administrators better understand their legal rights. Part II observed the wide-ranging interpretations of appropriate progress among district courts since *Endrew F.* and how the ambiguous standard has led to vastly different outcomes across jurisdictions. This Part presents a solution to this issue by proposing a two-part test to assist courts

[179] *See* Angelique D. v. Pa. Dep't of Educ., No. 16-1179, 2018 WL 582757, at *3 (E.D. Pa. Jan. 29, 2018).

[180] *Id.* (awarding Angelique $71,212 in compensatory damages). The charter school closed in December 2014, and Angelique subsequently enrolled in a Philadelphia public school. *Id.*

in clarifying the FAPE standard.[181] In doing so, this Part proceeds by first addressing the lingering issues following *Endrew F.*, and then outlining the proposed test and discussing objective criteria courts can use in determining whether the two-part test has been met.

A. Lingering Issues Following Endrew F.

While courts and educators want some uniformity to ensure consistency across jurisdictions, developing a FAPE standard for all students is inherently difficult because no single standard easily applies to all children with disabilities.[182] During *Endrew F.*'s oral argument, Justice Sotomayor stated her belief that the IDEA provided the Court with enough to set a clear standard but noted that the difficulty would be in finding a way to articulate it.[183] The *Endrew F.* Court tried to simplify the existing standard by stating that, in order to satisfy the IDEA's FAPE requirement, an IEP must contemplate more than a "*de minimis* educational benefit."[184] But the opinion did not clarify what it means to provide an "appropriately ambitious" education program or "progress appropriate in light of the child's circumstances."[185]

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[181] For further discussion on why courts should clarify the interpretation of the FAPE standard, as opposed to the Department of Education, see *supra* note 7 and accompanying text.

[182] *See* MacFarlane, *supra* note 129, at 555 (noting that courts have mostly shied away from defining the term "appropriate education" apart from the standard articulated in *Endrew F.* because it is difficult to articulate a nationwide definition when the IDEA is geared toward providing students with "specially designed instruction" to meet their unique needs); Allan G. Osborne, Jr. & Charles J. Russo, *Some Educational Benefit or Meaningful Educational Benefit and* Endrew F.*: Is There a Difference or Is It the Same Old Same Old?*, 340 WEST'S EDUC. L. REP. 1, 18 (2017) ("The bottom line is that no 'one size fits all' standard can be crafted to apply easily to all children with disabilities.").

[183] *See* Transcript of Oral Argument at 24, Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017) (No. 15–827) https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-827_gfbh.pdf [https://perma.cc/VN2G-8XD4].

[184] *Endrew F.*, 137 S. Ct. at 1000.

[185] The United States Department of Education (DOE) provided some guidance on what is considered appropriate progress following the *Endrew F.* decision. *See Questions and Answers (Q&A) on* U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1, U.S. DEPT. OF EDUC. (Dec. 7, 2017), https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf [https://perma.cc/G7K7-5EMF]. The agency's memorandum focuses on the IDEA's procedural mandates and defers the measure of appropriate progress and "challenging objectives" to local IEP teams. *See id.* According to the DOE, IEP teams must now

> implement policies, procedures and practices relating to (1) identifying present levels of academic achievement and functional performance; (2) the setting of measurable annual goals, including academic and functional goals; and (3) how a child's progress toward meeting annual goals will be measured and reported, so that the *Endrew F.* standard is met for each individual child with a disability.

Id. The memorandum further discusses the importance of providing special education students with supplemental aids and services as well as making "appropriate accommodations." *Id.* Ultimately, while the DOE's memorandum provides a broad overview of the impact of *Endrew F.* on school districts, it

Some scholars argue that the Court in *Endrew F.* merely reiterated what was already articulated in *Rowley*—the idea that special education students are not entitled to an equal educational opportunity.[186] Additionally, the Court's contention that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"[187] closely tracks the language in the IDEA, which states that "'[f]ree appropriate public education' means special education and related services that . . . include an appropriate preschool, elementary school, or secondary school education in the State involved."[188] Finally, the Court's establishment of a standard that elaborates on the meaning of the acronym FAPE using the word "appropriate" provides little guidance as to what the term truly means in practice.[189]

B. Two-Part Test

The aforementioned ambiguity has left parents and school board officials questioning how to apply the new standard in their schools. This Section attempts to clarify this standard by addressing how courts should assess whether an IEP would foster appropriate progress. It argues that, in order to assess whether an IEP meets this standard, courts should apply a two-part test. First, the court should examine whether the school district's procedures are adequate and will help institutions develop individualized programs for students with disabilities. Second, the court should determine whether the IEP substantively addresses the specific needs of the individual student. This Section also proposes certain procedural and substantive guideposts that courts may consider in their application of this two-part test.[190] These procedural and substantive subfactors should be balanced and weighed against each other in order to enable courts to consider the unique circumstances associated with individual students while also allowing for some consistency across different jurisdictions.

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does not specify how school districts should best implement this standard, nor does it elaborate on how courts should evaluate it.

186 Decker & Hurwitz, *supra* note 128, at 36.

187 *Endrew F.*, 137 S. Ct. at 1001.

188 20 U.S.C. § 1401(9) (2012).

189 Conn, *supra* note 162, at 614 (further stating that "[e]xplaining a word by repeating the same word is circular reasoning and unhelpful").

190 These criteria largely come from advisory memoranda by the Department of Education offices in Massachusetts and Vermont—the states that have provided the most additional guidance following *Endrew F.*—as well as from education experts and existing case law. *See, e.g.*, Memorandum from Rebecca Holcombe, Sec'y of Educ., Vt. Agency of Educ., to Superintendents et al., FAPE Obligation Under IDEA (July 27, 2017) [hereinafter Holcombe Memo], http://education.vermont.gov/sites/aoe/files/documents/edu-memo-rh-regarding-fape-and-idea.pdf [https://perma.cc/48ZQ-LX7L].

1. Part One: Adequacy of Procedure

In evaluating whether a particular IEP facilitates appropriate progress, courts should first examine the adequacy of the school district's procedures for developing IEPs. In their evaluation, courts should examine the adequacy of the resources the school uses to help formulate a student's IEP goals, the data collection procedures implemented by the school to help monitor student progress, the school's consultation with experts and the professional development it offers both the general education and special education teachers, and the methods the school institutes to provide students who have disabilities with support, both behavioral and social–emotional.

The adequacy-of-procedure analysis should begin with an examination of whether a school district uses proper measures and resources in formulating a student's IEP goals. For instance, courts may analyze whether a school employed educational experts to independently evaluate the sufficiency of the stated IEP goals as well as the proposed methodology to be implemented by the teachers to help the student achieve these goals.[191] Furthermore, courts should ensure that schools have procedures in place that allow for the routine collection of data regarding a student's academic and behavior progress so that the IEP team will be able to make challenging, yet realistic, goals for the student.[192]

In addition to consulting with experts and using data to evaluate IEPs, courts should also look at whether a school provides adequate guidance and professional development to ensure that the teachers and schools administering these interventions are qualified to address a student's individual needs.[193] This professional development should be geared specifically toward teaching educators how to implement different strategies

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[191] *See* Raj & Suski, *supra* note 133, at 524 ("Expert opinions are central to any well-designed IEP. When schools have well-trained and unbiased experts on staff who are able to contribute to IEP development, the FAPE standard is likely met."); Mitchell D. Chester, *Advisory on* Endrew F. v. Douglas County School District RE-1, 2017 U.S. Supreme Court Decision of Special Education, MASS. DEP'T ELEMENTARY & SECONDARY EDUC. (June 16, 2017), http://www.doe.mass.edu/lawsregs/advisory/2017-0616ieps.html [https://perma.cc/9N7V-DKVG] (discussing the Massachusetts Department of Elementary & Secondary Education's emphasis that *Endrew F.* highlights the importance of educational expertise in the process of developing an IEP).

[192] *See* Sharita Forrest, *What Quality of Education Are Schools Required to Provide to Students with Disabilities?*, UNIV. OF ILL. NEWS BUREAU (Jan. 25, 2017, 8:30 AM), https://news.illinois.edu/blog/view/6367/455713 [https://perma.cc/R6Y6-FZ6U] (recording that University of Illinois special education professor James Shriner noted that schools must routinely collect data regarding the academic needs of students with disabilities because "[w]ithout the data, you're just making wild guesses" about what constitutes appropriate progress).

[193] Vermont is an example of a state that has provided exemplary guidance on the expectations of qualified teachers. The state has used professional development training to help educators incorporate unique procedures and practices into their classrooms as well as accommodate the specific academic needs of special education students. *See* Holcombe Memo, *supra* note 190.

throughout the class period; how to administer, interpret, and use periodic assessments; and how to develop meaningful, measurable goals that will help establish the success of certain interventions.[194] General and special education teachers should also be instructed on the basics of education law so that they can maintain proper protocol.[195]

Finally, in determining whether a particular IEP will foster appropriate progress, courts should assess whether the school district has established procedures that provide students with behavioral and social–emotional support, such as administering functional behavior assessments[196] and evaluating the adequacy of behavior intervention plans.[197] Although recent disability education laws, court cases, and professional opinions have focused more on ensuring that students with disabilities achieve academic improvements through their IEPs than achieve socioemotional development,[198] for some special education students, receiving the proper

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[194] *See* Yell & Bateman, *supra* note 146, at 7–10 (outlining recommendations for teachers that would ensure that their school districts are abiding by the *Endrew F.* standard).

[195] *See* Holcombe Memo, *supra* note 190. While the Vermont State Department of Education's guidance would significantly improve special education, the current vast shortage of certified special and general education teachers across the United States may make implementing these procedures difficult. *See* Antonis Katsiyannis et al., *Availability of Special Education Teachers: Trends and Issues*, 24 REMEDIAL & SPECIAL EDUC. 246, 248 (2003). In California, for instance, school administrators describe the need for these educators as "desperate," leading to the creation of short-term programs that do not spend sufficient time training special education teachers. Louis Freedberg & Theresa Harrington, *Special Education in "Deep Trouble" and Still Needs Reform, Says California Ed Board President*, EDSOURCE (Oct. 11, 2017), https://edsource.org/2017/california-education-board-president-says-special-ed-in-deep-trouble-and-needs-reform/588436 [https://perma.cc/5MMW-52CX]. The issue is exacerbated in charter schools, which are not obligated under the IDEA to meet certification requirements, leading to a shortage of appropriately certified staff to deliver special education services. *See* Kose, *supra* note 174, at 41. These training programs are expensive, and the cost will be magnified if educators are already underqualified. Meeting *Endrew F.*'s appropriate progress standard, however, will require states to make the same difficult decisions about resource allocation that Vermont did.

[196] A functional behavioral assessment is "a systematic process of identifying the purpose—and more specifically the function—of problem behaviors by investigating the preexisting environmental factors that have served the purpose of these behaviors." Zirkel, *supra* note 83, at 175 (citing Gregory P. Hanley et al., *Functional Analysis of Problem Behavior: A Review*, 36 J. APPLIED BEHAV. ANALYSIS 147 (2003); Mark W. Steege & T. Steuart Watson, *Best Practices in Functional Behavior Assessment*, *in* 2 BEST PRACTICES IN SCHOOL PSYCHOLOGY V 337 (Alex Thomas & Jeff Grimes eds., 2008)).

[197] *See* Patrick Ober, *Proactive Protection: How the IDEA Can Better Address the Behavioral Problems of Children with Disabilities in Schools*, 1 BELMONT L. REV. 311, 335 (2014) (proposing that functional behavioral assessments and behavior interview plans be required in the IEPs of students with disabilities because they will proactively address the behavior problems of these students). For more information on behavior intervention plans, see *supra* note 83 and accompanying text.

[198] *See* Kevin Golembiewski, *Disparate Treatment and Lost Opportunity: Courts' Approach to Students with Mental Health Disabilities Under the IDEA*, 88 TEMP. L. REV. 473, 485 (2016) ("Courts frequently interpret 'educational' to mean 'academic.' Consequently, as long as a student is able to make progress in traditional academic areas, such as reading, writing, and arithmetic, she will be denied services even if she is not making progress in a number of areas that are critical to self-sufficiency." (citing R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 946 (9th Cir. 2007))); Zirkel, *supra* note 83, at 209–10

behavior management education is imperative to making academic progress.[199] Thus, IEPs should incorporate adequate behavior services in order to foster appropriate progress.[200] Ultimately, for courts to hold school districts to the appropriate progress standard, they necessarily must examine districts' procedures.

2. Part Two: Adequacy of the IEP's Substantive Goals

In addition to the procedural criteria discussed above, courts should also examine the substantive goals of the individual child's IEP in determining whether the IEP will promote appropriate progress. The evaluation of the substantive goals of a student with disabilities should assess whether the school used an objective comparative analysis that scrutinizes a student's IEP compared with that student's past performance, the IEPs of other students, and different state and local educational standards; whether the IEP contemplates the use of data and technology to enhance student learning; and whether the school district implemented vocational assessments when crafting IEPs for students who may not plan on attending college.

In its review, courts should first ensure that the IEP team, in its development of an individual student's IEP, considered past performance as a benchmark in deciding whether the current IEP adequately fosters appropriate progress.[201] Mere repetitions of goals and objectives from the student's previous IEPs should be considered "red flags."[202] The language of a child's IEP must also be scrupulously compared to other students' IEPs to

(highlighting that, since the 1997 IDEA Amendments, there has been a decrease in the professional push for, as well as policymaking receptivity to, proactively ensuring that students with disabilities improve their behavior; experts and lawmakers instead emphasize the importance of academic improvement for special education students).

[199] *See* Kathleen L. Lane et al., *Serving Students with or At-Risk for Emotional and Behavior Disorders: Future Challenges*, 25 EDUC. & TREATMENT CHILD. 507, 511–12 (2002) (citing a study suggesting that behavioral issues may result in academic underachievement); Craig F. Spiel et al., *Evaluating the Content of Individualized Education Programs and 504 Plans of Youth Adolescents with Attention Deficit/Hyperactivity Disorder*, 29 SCH. PSYCHOL. Q. 452, 452 (2014) (describing how students with ADHD experience serious academic impairments because of their behavior).

[200] JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 130. These programs include positive behavioral interventions and supports as well as behavior intervention plans that help special education students cope with the varying problems they experience each day.

[201] Bill Crane, *The Supreme Court's Decision in* Endrew F., MASS. ADVOCS. FOR CHILD.: BILL'S BLOG (June 27, 2017, 1:50 PM), https://massadvocates.org/bills-blog-the-supreme-courts-decision-in-endrew-f [https://perma.cc/N68U-3JRN] (providing commentary from a former hearing officer at the Bureau of Special Education Appeals discussing the Massachusetts State Board of Education's best practices following *Endrew F.*).

[202] Rachel Seelig & Marlyn Mahusky, Endrew F.*: What the Supreme Court Has to Say About Special Education*, VT. LEGAL AID (Sept. 27, 2017), http://www.vermontfamilynetwork.org/wp-content/uploads/VFN-Webinar-Slides-Endrew-F.pdf [https://perma.cc/8NBG-VXE9].

ensure that they are individualized and appropriately ambitious.[203] Additionally, the team should craft a student's IEP goals and objectives using the guidance of the local or state educational standards to ensure that they are sufficiently challenging.[204] Finally, courts should confirm that the school district evaluated the child's IEP goals using objective, peer-reviewed research data collection procedures and teaching methods so that teachers who may not have the appropriate knowledge or experience are not forced to make subjective decisions.[205]

In determining whether the second part of this test is met, courts should also evaluate whether school districts utilize objective, data-driven standards to develop a student's yearly goals.[206] Specifically, courts should look at whether schools districts assess progress based on data collected from periodic evaluations and assessments of a student's academic and behavioral performance.[207] IEP teams can use this data to institute appropriate, research-based remedies that would enhance student learning,[208] and school districts may utilize technology to assist in this endeavor.[209]

While the above-mentioned methods would assist in crafting an appropriately ambitious IEP for students preparing to attend secondary education institutions, the analysis likely differs for a child whose disability

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[203] *Id.*

[204] *See* MacFarlane, *supra* note 129, at 555–56 ("In order to assess the appropriateness of a particular stage of the educational process of a student, the parties need look at the student's progress and individualized education program in the context of his/her overall educational process within state and local standards as well [] as within the context of the current information that the team is reviewing.").

[205] "The Court's signal in *Endrew F.* is . . . to hold school districts to account for their choices and proposals [when educating students with disabilities] with reasons that are 'cogent and responsive.'" Seligmann, *supra* note 132, at 493 (quoting Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 173 S. Ct. 988, 1002 (2017)). School districts can justify their decisions through the use of special education experts, objective data, and by keeping sufficient records of student intervention methods. *See* John W. Borkowski, *The Implications of the Supreme Court's Recent Decision in* Endrew, ILL. ALL. ADM'RS SPECIAL EDUC. (Sept. 28, 2017), https://www.smore.com/app/attachments/download/59d1765b99bb565e90b52ff0 [https://perma.cc/H34J-NRMN] (cautioning schools to use experts and objective data and also to keep sufficient records of student intervention methods, since these schools are required to provide justifications for their decisions).

[206] Crane, *supra* note 201.

[207] Turnbull et al., *supra* note 148, at 135.

[208] *See* Bd. of Educ. v. Maez, No. 16-cv-1082 WJ/WPL, 2017 WL 3278945, at *7 (D.N.M. Aug. 1, 2017) (noting that every IEP must be "based on peer-reviewed research to the extent practicable"); A.G. v. Bd. of Educ., No. 16 CV 1530, 2017 WL 1200906, at *9 (S.D.N.Y. Mar. 29, 2017) (referencing the importance of research-based programs and reading systems).

[209] *See* Dave L. Edyburn, *Critical Issues in Advancing the Special Education Technology Evidence Base*, 80 EXCEPTIONAL CHILD. 7, 17 tbl. 1 (2013) (discussing how digital learning devices, digitalization, and the collection of data through technological means assists in improving special education). One example of such technology is the Illinois IEP Quality Project, which is a web-based tutorial and decision-making support system that helps educators create quality IEPs, plan instruction, and prioritize goals for each student in relation to his or her needs and state learning goals. Forrest, *supra* note 192.

may hinder his or her ability to attend a four-year college or university. Courts should address these cases by stressing the use of "vocational assessments,"[210] tests that help students with disabilities identify their strengths and passions as well as find jobs that correspond to their interests.[211] Courts should examine whether school districts used these assessments, along with other objective criteria, to establish realistic goals for a student to achieve after high school, and then used reverse engineering to create an IEP that addresses the skills the student will need to possess in order to succeed in that vocation.[212] Depending on the individual circumstances, a student's IEP may be targeted toward teaching that child academic skills, daily living skills, personal and social skills, or occupational skills.[213]

In sum, this Section sought to provide further guidance that would help courts evaluate whether the appropriate progress standard was met in a given case. The two-part test and corresponding guidance discussed in this Section would help courts evaluate whether a particular IEP has met the appropriate progress standard and would enable courts to make more consistent decisions regarding whether a student was denied a FAPE. Scrutinizing a school district's procedures and the substantive quality of an IEP should ultimately help courts feel more comfortable in making these determinations, while also allowing school districts and parents to better understand their legal rights.

CONCLUSION

The Supreme Court's decision in *Endrew F.* sought to clarify the more-than-thirty-year circuit split created after *Rowley*. The standard established by *Endrew F.* should be read to provide further protection for special education students, even if it has consequences in other areas of education and requires significant systemic reform in certain school districts. The Court's articulation of the broad appropriate progress standard does create new problems, however, as shown by the divergent interpretations already occurring at the lower court level. To address this confusion, this Note has proposed a two-part test that examines the adequacy of a district's procedures for developing IEPs and the substantive merits of an individual student's IEP. While the adoption of this test should mitigate some of the outstanding confusion following *Endrew F.*, several questions still remain

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[210] *See, e.g.*, F.L. v. Bd. of Educ., 274 F. Supp. 3d 94, 106 (E.D.N.Y. 2017) (highlighting the use of vocational assessments as a mechanism to help determine whether a student's IEP was appropriate).

[211] Edward M. Levinson & Eric J. Palmer, *Preparing Students with Disabilities for School-to-Work Transition and Postschool Life*, COUNSELING 101, Apr. 2005, at 11, 12, https://my.vanderbilt.edu/specialeducationinduction/files/2011/09/Transition-Planning1.pdf [https://perma.cc/6UDE-ETEX].

[212] *See* Seelig & Mahusky, *supra* note 202.

[213] Levinson & Palmer, *supra* note 211, at 12.

regarding which criteria should be used to determine the upper limits of the FAPE requirement. Ideally, district and circuit courts will expound on this standard and provide further guidance so that parents and school officials can better understand their rights and expectations under the new standard. Regardless, the *Endrew F.* holding should be seen as a victory for the special education community that will better protect students and ensure that their rights and opportunities under the IDEA are met.