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A Cadillac, Chevrolet, Pickup Truck, or Convertible: Endrew F. v. Douglas County School District RE-1 and a Not-So-Individualized Education under the Some Educational Benefit Standard

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A CADILLAC, CHEVROLET, PICKUP TRUCK, OR
 CONVERTIBLE: *ENDREW F. v. DOUGLAS COUNTY SCHOOL
 DISTRICT RE-1* AND A NOT-SO-INDIVIDUALIZED
 EDUCATION UNDER THE “SOME EDUCATIONAL BENEFIT”
 STANDARD

ABSTRACT

The Individuals with Disabilities Education Improvement Act guarantees a child with disabilities a free appropriate education tailored to the needs of that child through an individualized education plan. However, as the Tenth Circuit’s decision in *Endrew F. v. Douglas County School District RE-1* demonstrates, courts applying the “some educational benefit” standard fail to properly evaluate the substantive adequacy of an Individualized Education Plan in light of a child’s unique needs, abilities, and circumstances. To ensure that children with disabilities receive the truly individualized education to which they are entitled, courts, state legislatures, and Congress must implement measures that encourage courts to recognize that education comes in all makes and models and varies according to the particular needs of different children.

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INTRODUCTION

The Individuals with Disabilities Education Improvement Act (the IDEIA) seeks to improve the education of children with disabilities within public school systems.¹ The IDEIA requires states to provide a child with disabilities with a free appropriate public education (FAPE), which is tailored to the specific needs of the child through an Individualized Education Program (IEP).²

Although the IDEIA puts forth detailed procedural requirements that an IEP must adhere to, the statute delegates the responsibility for establishing the content of an IEP to parents and educators.³ Consequently, the Supreme Court's decision in *Board of Education v. Rowley*⁴ put forth the standard by which the substantive adequacy of an IEP is measured.⁵ A majority of federal circuits, including the Tenth Circuit, adhere to *Rowley*'s "some educational benefit" standard, which requires that an IEP be "reasonably calculated to enable the child to receive [some] educational benefits."⁶ Under the some educational benefit standard, an IEP is only required to "provide the educational equivalent of a serviceable

1. Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d) (2012) (discussing the purposes of IDEIA, including ensuring that children with disabilities receive a "free appropriate public education," protecting children with disabilities, and assisting states and localities with providing children with disabilities an education).

2. See *Andrew F. v. Douglas Cty. Sch. Dist. RE-1 (Andrew II)*, 798 F.3d 1329, 1332-33 (10th Cir. 2015) (noting that IDEIA makes federal education funding to states conditional "on the states' provision of a [FAPE]" to children with disabilities and that "[IDEIA] ensures a FAPE for each child . . . [through] the development and implementation of an [IEP]"); see also 20 U.S.C. § 1414(d)(1)(A)(i) (describing an IEP as a written statement that is developed particularly "for each child with a disability"); 20 U.S.C. § 1414(d)(3)(A) (discussing how the IEP team, when developing an IEP, considers "the strengths of the [individual] child" and "the academic, developmental, and functional needs of the child").

3. See *Andrew II*, 798 F.3d at 1332-33 ("[IDEIA] put in place detailed procedural requirements by which a child's IEP must be created and maintained. . . . [H]owever, Congress 'left the content of th[e] programs entirely to local educators and parents.'" (third alteration in original) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1151 (10th Cir. 2008))).

4. 458 U.S. 176 (1982).

5. *Andrew II*, 798 F.3d at 1333 (citing *Rowley*, 458 U.S. at 207).

6. *Id.* at 1333-34, 1338 (quoting *Rowley*, 458 U.S. at 207); Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 W. EDUC. L. REP. 1, 1 (2009).

Chevrolet" and need not "provide a Cadillac."⁷ However, under *Rowley*, even courts adhering to the some educational benefit standard must consider the substantive adequacy of an IEP in light of a child's unique needs, abilities, and circumstances.⁸ Therefore, courts assessing the substantive adequacy of an IEP must not focus just on "Chevrolets" versus "Cadillacs." Instead, given that every child with disabilities will require different services to receive an educational benefit,⁹ courts must ask whether the child needs the educational equivalent of a pickup truck, or a minivan, or a convertible.

This Comment argues that, as the Tenth Circuit's decision in *Endrew F. v. Douglas County School District RE-1*¹⁰ demonstrates, courts applying the some educational benefit standard often fail to properly consider a child's unique needs, abilities, and circumstances when assessing the substantive adequacy of an IEP. First, while courts rely on expert witness testimony to evaluate the substantive adequacy of IEPs, parents are disadvantaged in terms of retaining expert witnesses.¹¹ To have better access to expert witness testimony concerning their child's unique needs, abilities, and circumstances, parents could request that a school district perform an independent education evaluation (IEE) before requesting reimbursement under the IDEA. Ultimately, however, states must shift the burden of proof to schools in IDEA actions, or Congress must amend the IDEA to allow parents to recover expert witness fees. Second, courts often hold that an IEP is substantively adequate if it is modeled after a past IEP under which a child made minimal progress even if, considering the child's unique needs, abilities, and circumstances, the progress under the past IEP did not afford the child any educational benefit.¹² Instead, courts applying the some educational benefit standard must evaluate whether a child progressed under the tutelage of the entire IEP in the classroom, rather than considering progress towards one goal or objective in isolation. Third, by refusing to consider functional behavior assessments (FBAs) and the substantive adequacy of behavior intervention plans (BIPs), courts fail to assess all relevant actions taken by schools in response to a child's unique needs, abilities, and circumstances.¹³ To ensure that courts properly account for schools' responses to behavioral problems, the IDEA must be amended to include detailed requirements as to the contents of FBAs and BIPs and should

7. *Doe v. Bd. of Educ.*, 9 F.3d 455, 459–60 (6th Cir. 1993) (holding that while the "Chevrolet" education offered by the child's private school placement is most likely a better education, "the [school] is not required to provide a Cadillac, and . . . the proposed IEP is reasonably calculated to provide educational benefits to [the child], and is therefore in compliance with the requirements of the IDEA").

8. *See infra* Section I.E.

9. *See infra* note 98 and accompanying text.

10. 798 F.3d 1329 (10th Cir. 2015).

11. *See infra* Section III.A.i.

12. *See infra* Section III.B.i.

13. *See infra* Section III.C.i.

require FBAs and BIPs in every instance in which a child's behavior impedes his learning or that of others.

Part I of this Comment summarizes the legislative and procedural history of the IDEIA, describes its relevant provisions, and discusses the *Rowley* decision and how courts, including the Tenth Circuit, have interpreted its requirement for evaluating the substantive adequacy of an IEP. Part II details the factual background, procedural history, and the Tenth Circuit's opinion in *Endrew*. Part III describes how the *Endrew* decision demonstrates how courts applying the some educational benefit standard fail to properly consider a child's unique needs, abilities, and circumstances when evaluating the substantive adequacy of an IEP. Part III specifically focuses on expert participation, past progress as an indicator of the substantive adequacy of a disputed IEP, and the role of FBAs and BIPs in evaluating the substantive adequacy of IEPs. Part III also proposes measures that legislatures and courts could implement that would promote consideration of a child's unique needs, abilities, and circumstances under the some educational benefit standard.

I. BACKGROUND

A. Historic Treatment of Children with Disabilities in Public Schools and Early Legislation

Historically, children with disabilities have been denied access to public education because of their disabilities.¹⁴ For example, in 1970, a significant number of state laws excluded children with mental disabilities from schools, and only one in five children with disabilities were educated in public schools.¹⁵ Children with disabilities were forced to live in state institutions, which provided minimal basic needs, such as food and clothing, but not education.¹⁶ The IDEIA's short title described the educational challenges children with disabilities faced absent federal legislation protecting their right to receive public education:

[T]he educational needs of millions of children with disabilities were not being fully met because—

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

14. Megan McGovern, Note, *Least Restrictive Environment: Fulfilling the Promises of IDEA*, 21 WIDENER L. REV. 117, 118 (2015).

15. OFFICE OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 3 (2010).

16. *See id.* ("In 1967 . . . state institutions were homes to almost 200,000 persons with significant disabilities. Many of these restrictive settings provided only minimal food, clothing, and shelter. Too often, persons with disabilities received care for basic needs rather than education and rehabilitation.")

(C) undiagnosed disabilities prevented the children from having successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.¹⁷

Congress's first response to fostering the education of children with disabilities was in 1966, when it established a grant program under the Elementary and Secondary Education Act.¹⁸ In 1970, the Education of the Handicapped Act (EHA) repealed the 1966 grant program but replaced it with a substantially similar program.¹⁹ The EHA provided states with funds that were required to be used "for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) which are designed to meet the special education needs" of children with disabilities.²⁰ However, the EHA did not offer more specific guidelines on what the grant money should be used for, and its primary purpose was limited to pushing the states to provide "educational resources and to train personnel for educating" children with disabilities.²¹ Consequently, the grant program did not significantly improve the educational prospects of children with disabilities.²²

B. The Education for All Handicapped Children Act, the Individuals with Disabilities Education Act, and the Individuals with Disabilities Education Improvement Act

Recognizing the inadequacy of its preliminary efforts to encourage the education of children with disabilities, Congress passed the Education for All Handicapped Children Act of 1975 (EAHCA).²³ The

17. Individuals with Disabilities Education Act § 601(c), 20 U.S.C. § 1400(c)(2)(A)-(D) (2012).

18. Elementary and Secondary Education Act Amendments of 1966, Pub. L. No. 89-750, § 161, 80 Stat. 1191, 1204 (1966) (repealed 1970); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-80 (1982).

19. Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970); *Rowley*, 458 U.S. at 180.

20. Education of the Handicapped Act § 105.

21. *Rowley*, 458 U.S. at 180.

22. *See id.* Congress was "[d]issatisfied with the progress being made under these earlier enactments . . ." *Id.*

23. McGovern, *supra* note 14, at 119. *Rowley* also notes that the United States District Court for the District of Columbia's decision in *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), and the District Court for the Eastern District of Pennsylvania's decision in *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), have been "identified as the most prominent of the cases contributing to Congress's enactment of [EAHCA]." 458 U.S. at 180 n.2. Both court cases addressed the inadequacy of the education of children with disabilities in public schools under the existing regulatory scheme and recognized that children with disabilities should receive access to an individualized public education that provides educational benefit. *See Mills*, 348 F. Supp. at 874 (holding that "the Board of Education has an obligation to provide whatever specialized instruction that will benefit the child" and by failing to provide the plaintiffs, who were children with disabilities, individualized educations, "the Board of Education violates the [District of Columbia Code] and its own regulations"); *see also Pa. Ass'n for Retarded Children*, 334 F. Supp. at 1266 (ordering Pennsylvania schools to provide all children with disabili-

EAHCA was intended to address the systematic denial of children with disabilities from the public school system and to provide these children with access to public education.²⁴ In 1990, Congress reauthorized the EAHCA under the new name: the Individuals with Disabilities Education Act (IDEA).²⁵

In 2004, Congress reauthorized the IDEA again under another new name: the Individuals with Disabilities Education Improvement Act (IDEIA).²⁶ Under the IDEIA, federal funding for education is conditioned upon a state's provision of a FAPE to children with disabilities.²⁷ The IDEIA ensures a FAPE for a child with disabilities through the development and implementation of an IEP. An IEP tailors a FAPE to the specific and unique needs of an individual child with disabilities.²⁸ An IEP contains, among other requirements, statements of the child's current education level, specific goals, services that will be provided, and objective criteria for determining if the goals of the IEP are being met.²⁹ Schools are required to provide each child with a disability with an IEP

ties between the ages of six and twenty-one access to a free education "and training appropriate to his capacities").

24. Andrea Kayne Kaufman & Evan Blewett, *When Good Enough Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the Rowley Definition of a Free Appropriate Public Education*, 41 J.L. & EDUC. 5, 11 (2012); see also McGovern, *supra* note 14, at 119.

25. Individuals with Disabilities Education Act, Pub. L. No. 101-476, § 901, 104 Stat. 1141, 1141-42 (codified as amended at 20 U.S.C. § 1400(a) (2012)). The IDEA was also reauthorized in 1997. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (codified as amended at 20 U.S.C. §§ 1400-1482 (2012)).

26. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended 20 U.S.C. §§ 1400-1482 (2012)).

27. *Andrew II*, 798 F.3d 1329, 1333-34 (10th Cir. 2015). The IDEIA defines a FAPE as the following:

[S]pecial education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meets the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9)(A)-(D).

28. *Id.*; see also 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VI).

29. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV), (VI)(aa). Section 1414(d) states that an IEP must contain the following items:

· "[A] statement of the child's present levels of academic achievement and functional performance . . ." 20 U.S.C. § 1414(d)(1)(A)(i)(I).

· "[A] statement of measurable annual goals, including academic and functional goals . . . and a description of how the child's progress toward meeting [these] annual goals . . . will be measured," including the frequency of periodic reports. 20 U.S.C. § 1414(d)(1)(A)(i)(II)-(III).

· "[A] statement of the special education and related services . . . based on peer-reviewed research to the extent practicable, to be provided to the child . . ." 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

· "[A] statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments . . ." 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(aa).

that conforms to the IDEIA's requirements at the beginning of each school year.³⁰

C. Cases Challenging the Provision of a FAPE Under the IDEIA

Under the IDEIA, a school district does not have to pay for a child's private school placement if the school district provided the child with a FAPE.³¹ However, if the parents of a child with disabilities believe that the school district has not provided the child with a FAPE because, for example, a proposed IEP for a given school year is allegedly inadequate, the parents could pull the child from public school, enroll the child in private school, and request reimbursement from the school district for the cost of private school enrollment.³² If the school district refuses to issue reimbursement, the parents may request a due process hearing to review the school district's denial of reimbursement in administrative court.³³ For a court to find that the school district has provided a FAPE, the school district and the proposed IEP must comply with the IDEIA's procedural requirements, and the IEP must be "substantively adequate."³⁴ Under the Supreme Court's decision in *Schaffer v. West*,³⁵ the child, who is most often represented by her parents, that brings a challenge under the IDEIA bears the burden of proving that the proposed IEP was procedurally and substantively inadequate, and the child was denied a FAPE.³⁶ If the administrative law judge (ALJ) determines that the proposed IEP is inadequate and the public school did not provide the child with a FAPE, then the school district must reimburse the parents for the cost of the child's private school enrollment.³⁷ Under the IDEIA, prevailing parents may recover attorneys' fees.³⁸ However, pursuant to the Supreme Court's decision in *Arlington Central School District Board of*

30. See 20 U.S.C. § 1414(d)(2)(A).

31. 20 U.S.C. § 1412(a)(10)(C)(i)-(ii).

32. See *Andrew II*, 798 F.3d at 1333 (citing 20 U.S.C. § 1412(a)(10)(C)(ii)) ("IDEA allows parents who believe their children are not receiving a FAPE in state schools [the] option [to] . . . pull their children from public school, [and] enroll them in private school . . .").

33. See *id.* (discussing the proceedings and results at a three-day due process hearing); see also 20 U.S.C. § 1415(f)(1)(A) (stating that if the parents of a child with disabilities file a complaint concerning the child's education, "the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing").

34. See *Andrew II*, 798 F.3d at 1334 (describing the "two-step analysis" courts use to determine whether a FAPE as been provided, which asks "(1) whether the district complied with the Act's procedural requirements, and (2) whether the IEP developed by those procedures is substantively adequate such that it is 'reasonably calculated to enable the child to receive educational benefits'").

35. 546 U.S. 49 (2005).

36. *Id.* at 62 (holding that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief," and because the party seeking relief was the disabled child represented by his parents, the child bore the burden of proof).

37. See 20 U.S.C. § 1412(a)(10)(C)(ii) (requiring schools to reimburse parents for the cost of private school tuition "if the court or hearing officer finds that the [school] had not made a [FAPE] available to the child").

38. 20 U.S.C. § 1415(i)(3)(B).

Education v. Murphy,³⁹ parents are barred from recovering expert witness fees.⁴⁰ If the parents or school district appeal an ALJ's decision regarding the provision of a FAPE, district courts and appellate courts use a "modified de novo standard of review."⁴¹ Reviewing courts must give "'due weight' to the administrative proceedings" and the findings of fact from such proceedings "are considered prima facie correct."⁴²

When assessing the procedural and substantive sufficiency of an IEP, courts consider how school districts address behavioral problems related to a child's disability.⁴³ Under the IDEIA, when a child's behavior interferes with his ability to learn, the IEP team, which includes the child's parents and special education teacher,⁴⁴ must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."⁴⁵ The IDEIA makes reference to two procedures—FBAs and BIPs—that schools could use to address behavioral problems.⁴⁶ An FBA is "a systematic process" that identifies the source and purpose of problem behaviors through an examination of related "environmental factors."⁴⁷ An FBA is the foundation of a BIP, which is a "plan of action for" addressing and eliminating behavioral problems, and is "dictated by the particular needs of the student."⁴⁸

However, the IDEIA only requires schools to "consider the use of" FBAs and BIPs when a child's behavior interferes with his own learning or that of others and does not require these measures to be implemented in every instance in which a child exhibits behavioral problems.⁴⁹ Rather,

39. 548 U.S. 291 (2006).

40. *Id.* at 296–97, 300 (holding that under the IDEIA, "prevailing parents may not recover the costs of experts or consultants" because while the IDEIA provides "clear notice" that prevailing parents may recover "reasonable attorneys fees," the statute does not unambiguously state that prevailing parents may recover expert witness fees).

41. *Endrew II*, 798 F.3d 1329, 1334 (10th Cir. 2015) (emphasis omitted) (citing *Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E.*, 702 F.3d 1227, 1232 (10th Cir. 2012)).

42. *Id.* (quoting *Jefferson Cty. Sch. Dist.*, 702 F.3d at 1232).

43. *See id.* at 1336–38, 1342.

44. 20 U.S.C. § 1414(d)(1)(B)(i)–(vii) (2012) (noting that the IEP team is composed of, in part, "the parents of a child with a disability," the child's special education teacher, and "a representative of the local education agency").

45. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1 (Endrew J)*, No. 12–cv–2620–LTB, 2014 WL 4548439, at *11 (D. Colo. Sept. 15, 2014) (quoting 20 U.S.C. § 1414(d)(3)(B)(i)).

46. Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 175 (2011) (describing behavior intervention plans (BIPs) and functional behavior assessments (FBAs) as "[a]n interrelated pair of procedures that have come into favor in the field of special education for proactively addressing the behavior problems of students with disabilities"); *see also* 20 U.S.C. § 1415(k)(1)(D)(ii) ("A child with a disability who is removed from the child's current placement . . . shall . . . receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.").

47. Zirkel, *supra* note 46, at 175 ("An FBA 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.").

48. *Id.*

49. 20 U.S.C. § 1414(d)(3)(B)(i) ("[I]n the case of a child whose behavior impedes the child's learning or that of others, [the IEP team must] consider the use of positive behavioral interventions

FBA and BIP are only required when there has been “a disciplinary change in placement of the student.”⁵⁰ Further, there are no requirements regarding the contents of FBAs and BIPs, and there is no standard by which courts assess the substantive adequacy of FBAs or BIPs.⁵¹ In *Alex R. v. Forrestville Valley Community Unit School District #221*,⁵² the Seventh Circuit refused to follow the lead of an Iowa hearing officer who developed a test for assessing the appropriateness of a BIP.⁵³ Neither Congress nor the Department of Education had identified the “specific components” of BIPs and, therefore, had not created substantive requirements for FBAs or BIPs.⁵⁴ Considering this, the Seventh Circuit refused to create such requirements.⁵⁵ Consequently, the court declined to assess the substantive sufficiency of the BIP at issue because the BIP “could not have fallen short of substantive criteria that do not exist.”⁵⁶ Other circuits, including the Tenth Circuit, have adopted the Seventh Circuit’s holding that there is no substantive standard by which to measure the contents of FBAs and BIPs.⁵⁷

When evaluating the procedural sufficiency of an IEP, courts look to the IDEA’s specific and detailed procedural requirements that an IEP

and supports, and other strategies, to address that behavior”); see also *Endrew II*, 798 F.3d 1329, 1337 (10th Cir. 2015) (“[N]oting the operant verb [in the IDEA] is ‘to consider,’ and not ‘to develop or implement.’” (quoting Zirkel, *supra* note 46, at 186)).

50. *Endrew II*, 798 F.3d at 1337 (“The statute only requires school districts (and even then, only ‘as appropriate’) to conduct an FBA or to implement a behavioral plan if there is a disciplinary change in placement of the student.” (quoting 20 U.S.C. § 1415(k)(1)(D)(ii))). “A child with a disability who is removed from the child’s current placement . . . shall . . . receive, as appropriate, an [FBA and] behavioral intervention services . . . that are designed to address the behavior violation so that it does not recur.” 20 U.S.C. § 1415(k)(1)(D)(ii).

51. See *Endrew II*, 798 F.3d at 1337 (citing Susan C. Bon & Allan G. Osborne, Jr., *Does the Failure to Conduct an FBA or Develop a BIP Result in a Denial of a FAPE Under the IDEA?*, 307 W. EDUC. L. REP. 581, 581 (2014)) (“And even where an FBA or BIP is required, the IDEA does not impose any substantive requirements as to what they must include.”); see also *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 613 (7th Cir. 2004).

52. 375 F.3d 603 (7th Cir. 2004).

53. See *id.* at 613–14; see also Zirkel, *supra* note 46, at 203–04, 203 n.179 (noting that the *Alex R.* decision rejected the test put forth by the Iowa hearing officer in *Mason City Cmty. Sch. Dist.*, 36 IDELR ¶ 50 (Iowa SEA Dec. 13, 2001)).

54. *Alex R.*, 375 F.3d at 615 (first alteration in original) (quoting *Mason City*, 36 IDELR at 199) (“[N]either Congress nor the agency charged with devising the implementing regulations for the IDEA, the Department of Education, had created any specific substantive requirements for the behavioral intervention plan contemplated by § 1415(k)(1) or § 1414(d)(3)(B)(i).”).

55. *Id.* (“Although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions for the [BIP] contemplated by [the IDEA].”).

56. *Id.* (holding that “as a matter of law” the BIP “was not substantively invalid under the IDEA” because “the [BIP] could not have fallen short of substantive criteria that do not exist”).

57. See Zirkel, *supra* note 46, at 203–04 (noting “the reaffirmation of *Alex R.* in other jurisdictions’s judicial rulings”); see also *Endrew II*, 798 F.3d 1329, 1342 n.12 (10th Cir. 2015) (“Although the parents take issue with the substance of the BIPs put in place by the District in prior years, neither the IDEA nor its implementing regulations prescribe substantive requirements for what should be included in BIPs. [T]he District’s behavioral intervention plan could not have fallen short of substantive criteria that do not exist” (alterations in original) (quoting *Alex R.*, 375 F.3d at 613)).

must adhere to.⁵⁸ Whether a school district has procedurally violated the IDEIA also informs a court's "determination of [the] substantive adequacy" of an IEP.⁵⁹ Compliance with the IDEIA's procedural requirements will generally "assure much if not all of what Congress wished in the way of substantive content in an IEP."⁶⁰

Even in the absence of a procedural violation, a child could still be denied a FAPE if an IEP is substantively inadequate.⁶¹ However, unlike the IDEIA's procedural requirements, because each IEP must be based on the individual needs of the particular student,⁶² the IDEIA does not contain detailed provisions concerning the substantive contents of a FAPE.⁶³ Instead, parents and educators are responsible for establishing the substantive content of an IEP.⁶⁴ Nevertheless, federal courts have interpreted the Supreme Court's decision in *Rowley* as creating the measure by which courts determine the substantive adequacy of an IEP.⁶⁵

D. Board of Education v. Rowley

In *Rowley*, the parents of Amy Rowley, a Deaf first-grade student, sued the school district, claiming that the school's refusal to provide Amy with a sign language interpreter, and its associated failure to incorporate the provision of an interpreter in Amy's IEP, resulted in denying Amy a FAPE.⁶⁶ The district court agreed with Amy's parents, citing evidence that Amy understood less of what was happening in the classroom than she would if she was not Deaf.⁶⁷ By working with an interpreter to understand everything that was said in the classroom, Amy could have reached her full potential.⁶⁸ Considering this, and defining a FAPE as "an

58. *Endrew II*, 798 F.3d at 1332–33 (noting that the IDEIA has "in place detailed procedural requirements").

59. *C.F. v. N.Y.C. Dep't of Educ.*, 746 F.3d 68, 81 (2d Cir. 2014) (holding that the school's procedural violation of "producing an inappropriately vague [BIP] without producing [an FBA]" could not be "separated from" the school's "substantive inadequacy" of placing the child in a classroom with an inappropriate student to teacher ratio); see also *Endrew II*, 798 F.3d at 1332–33 (emphasizing "the importance of the" IDEIA's "procedural safeguards" and noting that "[w]hen the elaborate and highly specific procedural safeguards embodied in [the IDEIA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the [IDEIA] . . . the importance Congress attached to [the] procedural safeguards cannot be gainsaid" (first, second, and fifth alterations in original) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982))).

60. *C.F.*, 746 F.3d at 81 (quoting *A.C. v. Bd. of Educ.*, 553 F.3d 165, 172 (2d Cir. 2009)).

61. See *Endrew II*, 798 F.3d at 1334.

62. See *supra* note 2 and accompanying text.

63. See *Endrew II*, 798 F.3d at 1332–33 (noting that IDEIA "put in place detailed procedural requirements by which a child's IEP must be created and maintained" but the IDEIA "does not prescribe the substantive level of achievement required for an appropriate education").

64. *Id.* ("Congress 'left the content of [IEPs] entirely to local educators and parents.'" (quoting *Thompson R2–J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1151 (10th Cir. 2008))).

65. *Id.* at 1333 (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)) ("[T]he substantive adequacy of an IEP is determined by a standard articulated by the Supreme Court [in *Rowley*] . . .").

66. *Rowley*, 458 U.S. at 185.

67. *Id.*

68. *Id.* (discussing how Amy "understands considerably less of what goes on in class than she could if she were not deaf and thus 'is not learning as much, or performing as well academically, as

opportunity [for the disabled student] to achieve [her] full potential commensurate with the opportunity provided to other children," the district court held that the school district had denied Amy a FAPE.⁶⁹

The Supreme Court⁷⁰ reversed, holding that the school district had not denied Amy a FAPE.⁷¹ Through the passage of EAHCA, which was the statute in effect at the time of the Court's decision, Congress did not intend to "maximize the potential" of children with disabilities.⁷² Rather, the congressional intent behind EAHCA was to provide children with disabilities access to a free public education.⁷³ Therefore, a state complies with its duty to provide a FAPE when it "provid[es] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."⁷⁴ Further, the education provided to the child must "be sufficient to confer some educational benefit upon the . . . child."⁷⁵

Considering these principles, the Court held that the school district had complied with the substantive requirements of the EAHCA.⁷⁶ Amy was "advancing easily from grade to grade" and "perform[ed] better than the average child in her class."⁷⁷ Further, the school provided Amy with "personalized instruction and related services" that were calculated to "meet her educational needs."⁷⁸ Consequently, because the school district had also complied with EAHCA's procedural requirements, the Court held that Amy had been provided a FAPE.⁷⁹

she would without her handicap" (quoting *Rowley v. Bd. of Educ. (Rowley I)*, 483 F. Supp. 528, 532 (S.D.N.Y. 1980), *rev'd*, 458 U.S. 176 (1982)).

69. *Id.* at 185-86 (second alteration in original) (quoting *Rowley I*, 483 F. Supp. at 534) ("[The] disparity between Amy's achievement and her potential led the [district] court to decide that she was not receiving a [FAPE] . . ."). The United States Court of Appeals for the Second District affirmed the district court's holding. *Id.* at 186.

70. The United States Supreme Court granted certiorari to determine "[w]hat is meant by [EAHCA]'s requirement of a 'free appropriate education.'" *Id.* at 186.

71. *Id.* at 209-10 (reversing the decision of the Court of Appeals and holding that "Amy was receiving personalized instruction and related services calculated . . . to meet her educational needs").

72. *Id.* at 189-90 ("[T]he language of [EAHCA] contains no requirement . . . that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'").

73. *Id.* at 200 ("Rather, Congress sought primarily to identify and evaluate [children with disabilities], and to provide them with access to a free public education.").

74. *Id.* at 203.

75. *Id.* 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 . . . child.").

76. *Id.* at 209.

77. *Id.* at 209-10 (quoting *Rowley I*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

78. *Id.* at 210.

79. *See id.* (holding that the "evidence firmly establishes that Amy is receiving an 'adequate' education," and the EAHCA does not "require[] the provision of a sign-language interpreter" (quoting *Rowley I*, 483 F. Supp. at 534)).

E. The Some Educational Benefit Standard v. The Meaningful Benefit Standard

The *Rowley* decision created a two-step analysis for determining whether a school district has provided a child with a FAPE.⁸⁰ First, courts must determine whether school districts have complied with the IDEIA's procedural requirements.⁸¹ Second, courts must determine "whether the IEP developed by those procedures is substantively adequate."⁸²

Rowley also created the standard that courts use to measure the substantive adequacy of an IEP.⁸³ However, courts cite *Rowley* as creating two different substantive standards: the "meaningful benefit" standard and the "some educational benefit" standard.⁸⁴ Some federal circuits adhere to the meaningful benefit standard, holding that, under *Rowley*, to be substantively adequate, an IEP must confer a "meaningful educational benefit."⁸⁵ Circuits adhering to the meaningful benefit standard cite the following language from *Rowley* in support of this heightened standard: "By passing the [EAHCA], 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."⁸⁶ However, a majority of federal circuits adhere to the lower some educational benefit standard,⁸⁷ holding that under *Rowley*, an IEP must merely be "reasonably calculated to enable the child to receive [some] educational benefits."⁸⁸ These circuits cite the following language from *Rowley* in support of the some educational benefit standard:

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

80. *Endrew II*, 798 F.3d 1329, 1334 (10th Cir. 2015) (citing *Rowley*, 458 U.S. at 207).

81. *Id.*

82. *Id.*

83. See *supra* note 65 and accompanying text.

84. See generally Wenkart, *supra* note 6.

85. *Id.* at 1 (quoting *Rowley*, 458 U.S. at 207). Wenkart noted that "[t]he Third Circuit is the only circuit that has utilized exclusively the 'meaningful educational benefit' standard," and four circuits—the Second, Fifth, Sixth, and Ninth—have utilized both standards. *Id.* at 3, 17.

86. Scott F. Johnson, *Rowley Forever More? A Call for Clarity and Change*, 41 J.L. & EDUC. 25, 29–30 (2012) (quoting *Rowley*, 458 U.S. at 192).

87. See generally Wenkart, *supra* note 6 (noting that the Third Circuit exclusively adheres to the meaningful educational benefit standard, four circuits have utilized both standards, and the remaining seven circuits, the D.C., First, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits, have exclusively utilized the some educational benefit standard).

88. *Endrew II*, 798 F.3d 1329, 1338–41 (10th Cir. 2015) (reconfirming the Tenth Circuit's adherence to the some educational benefit standard, which "measure[s] . . . whether the IEP is reasonably calculated to guarantee some educational benefit"); see also Wenkart, *supra* note 6, at 6–17 (discussing application of the some educational benefit standard in circuits that exclusively apply that standard).

benefit upon the handicapped child. . . . [T]he “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.⁸⁹

The Tenth Circuit is among the majority of circuits that adhere to the lower some educational benefit standard.⁹⁰ For example, in *Thompson R2-J School District v. Luke P.*,⁹¹ the Tenth Circuit noted that previous Tenth Circuit cases have held that a child’s educational benefit “must merely be ‘more than de minimis.’”⁹² Similarly, in *Systema v. Academy School District No. 20*,⁹³ the Tenth Circuit held that an IEP must be “‘reasonably calculated’ to provide the child with ‘educational benefits’”⁹⁴ and emphasized that the child’s education need not be “guaranteed to maximize the child’s potential.”⁹⁵ The Tenth Circuit’s decision in *Andrew F.* affirmed the Circuit’s adherence to the some educational benefit standard.⁹⁶

However, the *Rowley* Court did not attempt “to establish any one test for determining” whether an IEP is substantively adequate.⁹⁷ Rather,

89. Johnson, *supra* note 86, at 27–28 (quoting *Rowley*, 458 U.S. at 201). Courts adhering to the some educational benefit standard also point out that Congress did not change the definition of a FAPE in the IDEA or IDEIA, suggesting Congress’s intention to not explicitly raise the standard for measuring the substantive adequacy of an IEP to the meaningful benefit standard with its reauthorizations of the EAHCA and IDEA. See *Andrew II*, 798 F.3d at 1339 (noting that it is “inconsequential that *Rowley* had analyzed the statutory precursor to the IDEA because Congress has maintained the same statutory definition of a FAPE from its initial inception . . . and in each subsequent amendment to the Act”).

90. *Andrew II*, 798 F.3d at 1339 (“This circuit . . . has continued to adhere to the *Rowley* Court’s ‘some educational benefit’ definition of a FAPE.”).

91. 540 F.3d 1143 (10th Cir. 2008).

92. *Id.* at 1149 (emphasis omitted) (quoting *Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). In *Thompson*, the parents of a child with autism argued that the child was denied a FAPE. *Id.* at 1145. The parents specifically took issue with the proposed IEP’s failure “to address adequately [the child’s] inability to generalize functional behavior learned at school to the home.” *Id.* at 1150. While the ALJ and district court agreed with the parents that the child’s IEP was substantively inadequate, the Tenth Circuit reversed. *Id.* at 1145, 1148. The court noted that while a child’s self-sufficiency and generalization skills are important and consistent with the IDEIA’s goals, the some educational benefit standard does not “guarantee . . . self-sufficiency for all disabled persons.” *Id.* at 1151. Further, the child was making some progress towards some of the goals and objectives in his IEPs. *Id.* at 1153. Consequently, regardless of whether this progress could not “be transferred outside of the school environment,” the child did receive some educational benefit. *Id.* at 1154 (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, No. 05-cv-2248-WDM-CBS, 2007 WL 1879981, at *8 (D. Colo. June 28, 2007), *rev’d*, 540 F.3d 1143 (10th Cir. 2008)). Therefore, while the Tenth Circuit “sympathize[d] with [the child’s] family,” the court ultimately held that the IEP was substantively adequate, and the child was not denied a FAPE. *Id.* at 1154–55 (holding that “the school district met its IDEA obligations in this case,” given that the child was making “some educational progress,” and his IEP was “generated in a manner that represented . . . [an] effort to continue such progress”).

93. 538 F.3d 1306 (10th Cir. 2008).

94. *Id.* at 1313 (quoting *Rowley*, 458 U.S. 176, 206–07 (1982)).

95. *Id.* (quoting *Urban*, 89 F.3d at 727).

96. *Andrew II*, 798 F.3d 1329, 1339–41 (10th Cir. 2015) (noting that the ALJ and district court were correct in applying the some educational benefit standard, since that is the standard that the Tenth Circuit “continue[s] to adhere to”).

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

given that the abilities and needs of children with disabilities differ greatly, “determining the adequacy of educational benefits” provided to an individual child must account for the circumstances of the child’s particular situation.⁹⁸ Consequently, the *Rowley* Court sought to confine its analysis to the situation the Court was presented, which involved a child that was receiving specialized instruction and, most notably, was “performing above average in the regular classroom of a public school system” and “advancing easily from grade to grade.”⁹⁹ This is consistent with the IDEIA’s requirement that an IEP be tailored to the specific and unique needs of an individual child.¹⁰⁰ However, the *Endrew F.* decision demonstrates how courts applying the some educational benefit standard fail to take into account a child with disabilities’ unique needs, abilities, and circumstances when assessing the substantive adequacy of an IEP.

II. *ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT RE-1*

A. *Facts*

Endrew (Drew), a student in the Douglas County Public School System, was diagnosed with autism and attention-deficit/hyperactivity disorder as a young child.¹⁰¹ Drew’s school provided him with special education services and IEPs.¹⁰² Drew struggled to communicate his needs and emotions and to engage with others.¹⁰³ Drew also exhibited behavior that interfered with his ability to learn,¹⁰⁴ and during his fourth-grade year his behavioral problems worsened.¹⁰⁵ Drew’s behavioral problems led his parents to conclude that he was not making any educational progress under the tutelage of the public school’s special education teachers.¹⁰⁶ Consequently, Drew’s parents rejected the IEP that the school

98. *Id.*

99. *Id.* at 185, 202 (“[The EAHCA] requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. . . . We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by [EAHCA]. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system; we confine our analysis to that situation.”); see also Perry A. Zirkel et al., *Creeping Judicialization in Special Education Hearings?: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 27, 47 (2007) (“[T]he IDEA is peculiarly individualized in its orientation, thus running counter to the generalizing goal of stare decisis . . .”).

100. See *Endrew II*, 798 F.3d at 1333.

101. *Id.*

102. *Id.*

103. *Endrew I*, No. 12-cv-2620-LTB, 2014 WL 4548439, at *1 (D. Colo. Sept. 15, 2014).

104. *Id.* Drew’s behaviors included using perseverative language, picking and scraping himself, having an intense fear of dogs and flies, “eloping, dropping to the ground, climbing, loud vocalizations . . . and using a new or public bathroom.” *Id.*

105. *Id.* at *2. During his fourth-grade year, Drew often ran out of the classroom and school building, “urinated and defecated on the floor,” hit computer screens, yelled, and kicked people and walls. *Id.*

106. *Id.*

district proposed for his fifth-grade year and enrolled him in a private school for children with autism.¹⁰⁷

B. Procedural History

Drew's parents, contending that the school district failed to provide Drew with a FAPE, requested that the school district reimburse them for the private school's "tuition and related expenses."¹⁰⁸ When the school district refused, Drew's parents exercised their right to a due process hearing reviewing the school district's denial of reimbursement in administrative court.¹⁰⁹ However, an ALJ, applying the some educational benefit standard, found that the school district had provided Drew with a FAPE and denied the parents' request for reimbursement.¹¹⁰

1. District Court Opinion

Drew's parents sought judicial review of the ALJ's decision in federal court.¹¹¹ The district court affirmed the ALJ's conclusion¹¹² and found that, while Drew's IEPs did not demonstrate "immense educational growth," they did show that he was making "minimal progress."¹¹³ The court cited the rule that, under the some educational benefit standard,

[a]lthough the controlling question is whether, going forward, the IEP proposed by the District was reasonably calculated to confer some educational benefit, past progress on the IEP goals "strongly suggests" that when a proposed IEP is modeled on prior IEPs that had succeeded in generating some progress, the proposed IEP "was reasonably calculated to continue that trend."¹¹⁴

After reviewing the testimony of experts at the administrative proceedings¹¹⁵ and thoroughly examining Drew's past IEPs,¹¹⁶ the district

107. *Endrew II*, 798 F.3d at 1333.

108. *Id.*

109. *Id.* (discussing the proceedings and results at a three day due process hearing); *see also* 20 U.S.C. § 1415(f)(1)(A) (2012) (stating that if the parents of a child with disabilities file a complaint concerning the child's education, "the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing").

110. *Endrew II*, 798 F.3d at 1333, 1338.

111. *Id.* at 1333; *see also* 20 U.S.C. § 1415(i)(2)(A) (providing that a party aggrieved by the ALJ's conclusion has the right to bring a civil action for review of that conclusion in a district court of the United States).

112. *Endrew II*, 798 F.3d at 1333.

113. *Endrew I*, No. 12-cv-2620-LTB, 2014 WL 4548439, at *9 (D. Colo. Sept. 15, 2014).

114. *Id.* at *6 (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1153 (10th Cir. 2008)).

115. *Id.* at *8. Drew's parents' retained expert had conducted a neuropsychological evaluation of Drew after he enrolled in the private school. *Id.* The expert testified that after a review of Drew's school records, she could not find any "measurable progress." *Id.* Further, Drew's IEPs' goals were "vague . . . hard to measure, and the progress reports lacked quantifiable data." *Id.* The school district retained two experts, both from within the school system. *Id.* Drew's special education teacher explained that although the IEP goals were similar from year to year, the "objectives were changed to accommodate [Drew's] progress." *Id.* The school district's Director of Special Education testified

court found that, while some of the objectives in the IEPs stayed the same from year to year and others were “only slightly modified, . . . the expectation in the objectives increased over time.”¹¹⁷ For example, Drew’s fourth-grade IEP contained the following math objectives:

- 1) given a variety of coins and dollars, he will accurately count money up to \$5.00 and then hand over the correct amount counted;
- 2) when identifying an object he wishes to purchase, he will be able to answer the question “is that enough?”;
- 3) he will understand time related vocabulary and concepts as it relates to the calendar;
- 4) given an analog clock, he will be able to tell the correct time;
- 5) given a word problem, he will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem;
- 6) he will learn his multiplication facts 6–10; and
- 7) he will learn his division facts 0–5.¹¹⁸

The proposed fifth-grade IEP that was rejected by Drew’s parents contained the following math objectives:

- 1) given a variety of coins and dollars, he will accurately count money up to \$5.00 and then hand over the correct amount counted;
- 2) when identifying an object he wishes to purchase, he will be able to answer the question “is that enough money?”;
- 3) given a word problem, he will be able to identify which operation (addition, subtraction, multiplication or division) to use to solve the problem;
- 4) he will learn his multiplication facts 6–12; and
- 5) he will learn his division facts 0–5.¹¹⁹

While Drew did not make progress on every goal or objective in the IEPs, he made progress towards some goals and objectives.¹²⁰ Therefore,

that ideally, the IEPs would have contained more “entries” and more detailed progress reporting. *Id.* The Director also testified that “the goals and objectives” in the IEP rejected by Drew’s parents “contained only ‘some slight’ changes” from Drew’s last IEP. *Id.* However, considering the IEPs as a whole, “the progress reporting . . . met the required standard.” *Id.*

116. *Id.* at *9.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The District Court stated:

the fifth-grade IEP that was modeled after the fourth-grade IEP under which Drew made some progress "was reasonably calculated to continue that trend" of progress.¹²¹

Next, the court rejected Drew's parents' argument that the IEP did not sufficiently address Drew's behavioral problems because the school district did not conduct an FBA nor did it "implement an adequate BIP."¹²² Drew's parents did not dispute the fact that, under the IDEA, the school district was not required to conduct an FBA or develop a BIP.¹²³ However, Drew's parents felt that the school district's failure to properly implement these measures worsened Drew's behavioral problems and prevented him from making any progress on the goals identified in the IEP.¹²⁴ The court disagreed, holding that, although the school district was unable to "manage [Drew's] escalating behavioral issues at the time" that he was enrolled in the private school, the district was working to address those issues.¹²⁵

The district court ultimately held that Drew's parents failed to meet their burden to prove that the school district violated the IDEA by failing to provide Drew with a FAPE.¹²⁶ Consequently, Drew's parents were not entitled to reimbursement for the cost of Drew's private school tuition.¹²⁷

I disagree with [Drew's] parents' argument that the modifications were insufficient to show any meaningful progress. Rather, I agree with the ALJ that Petitioner made progress towards his academic and functional goals in his IEPs and although this does not mean that he achieved every objective, or that he made progress on every goal, the evidence shows that he received educational benefit while enrolled in the District. As such, Petitioner's parents have failed to show that the District's IEPs—both past and proposed for the future—were not reasonably calculated to provide him with some educational benefit.

Id.

121. *Id.* (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1153 (10th Cir. 2008)).

122. *Id.* at *11.

123. *Id.* at *12 ("Whether or not the District failed to conduct a functional behavioral assessment or implement a BIP in this case, at any particular or specific time, is mainly irrelevant to this decision as [Drew] does not dispute that the IDEA does not require such assessment or plan.").

124. *Id.* at *11. Although Drew's second-grade and fourth-grade IEPs contained BIPs, Drew's parents alleged that the BIPs were inadequate. *Id.*

125. *Id.* at *12. The court supported its holding through evidence that the school district "was in the process of reassessing [Drew's] BIP" when Drew was withdrawn from public school. *Id.* For example, the court cited testimony from the school district's expert, Drew's special education teacher. *Id.* The teacher testified that "[Drew]'s behavioral issues interfered with his ability to learn," and "her interventions with [Drew]'s escalating disruptive behaviors were not effective." *Id.* at *11. However, Drew's teacher was working to address Drew's behavioral problems, including identifying problem behaviors and their triggers and scheduling an autism specialist to come in and work with the IEP team. *Id.*

126. *Id.*

127. *Id.* (first citing 20 U.S.C. § 1412(a)(10)(C)(ii) (2012); then citing 34 C.F.R. § 300.148(c) (2016)).

2. Tenth Circuit Opinion

The Tenth Circuit's unanimous opinion began by discussing the IDEIA's procedural requirements.¹²⁸ The Tenth Circuit affirmed the district court's holding that the school district's failure to conduct an FBA did not result in "a substantive denial of a FAPE" and that the BIP sufficiently addressed Drew's behavioral issues.¹²⁹ "As a matter of procedure," given that Drew was not subject to a disciplinary change in placement, the school district was required to merely "consider the use of positive behavioral interventions and supports."¹³⁰ The school district was under no affirmative statutory duty to conduct an FBA or to develop BIPs, and the record contained examples of the school district's "consideration of Drew's behavioral issues."¹³¹ Consequently, the Tenth Circuit found "no procedural defect that amounted to denial of a FAPE."¹³²

The Tenth Circuit then addressed Drew's parents' argument that the IEP proposed by the school district was "substantively inadequate."¹³³ The panel began by rejecting Drew's parents' argument that the Tenth Circuit had done away with the some educational benefit standard and instead adopted the meaningful educational benefit standard.¹³⁴ The Tenth Circuit stated that language from the *Rowley* decision indicated that the appropriate standard is the some educational benefit standard.¹³⁵

128. *Andrew II*, 798 F.3d 1329, 1338 (10th Cir. 2015) (holding that the court found "no procedural defect that amounted to a denial of a FAPE"). In addition to addressing the school district's failure to conduct an FBA and Drew's BIPs in the context of the IDEIA's procedural requirements, the Tenth Circuit also found that the school district's progress reporting deficiencies did not amount to a "denial of a FAPE." *Id.* at 1335–36. The Tenth Circuit did stress the importance of "diligent progress reporting on IEPs" and noted "that the progress reporting . . . could have been more robust." *Id.* However, considering the ALJ's finding that the reporting deficiencies "did not have an adverse impact on the IEP team's ability to craft and implement Drew's IEPs," the minimal and vague progress reporting did not result in denial of a FAPE. *Id.* (citing *Escambia Cty. Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248, 1273–75 (S.D. Ala. 2005)).

129. *Id.* at 1336. This holding was in response to Drew's parents' "argument . . . that the District's handling of Drew's behavioral needs amounted to a substantive denial of a FAPE." *Id.* "Specifically, [Drew's parents] criticize[d] (1) the District's failure to conduct a functional behavior assessment (FBA) before implementing a behavior plan for Drew, and (2) even absent the FBA, the District's failure to put in place an appropriate behavioral intervention plan (BIP) to address Drew's increasing behavioral issues." *Id.*

130. *Id.* at 1337 (quoting 20 U.S.C. § 1414(d)(3)(B)(i)).

131. *Id.* at 1338 (citing *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012)) ("Finding the school district complied with federal law where the district considered behavioral interventions and the child had not been removed from her placement due to disciplinary infractions.").

132. *Id.*

133. *Id.*

134. *Id.* Drew's parents' specific argument was that the Tenth Circuit Court of Appeals's decision in *Jefferson County School District R-1 v. Elizabeth E.*, 702 F.3d 1227, 1238 (10th Cir. 2012), adopted the meaningful educational benefit standard. *Id.* The only analysis specific to that case that Judge Tymkovich considered in making his determination that the Tenth Circuit continues to abide by the some educational benefit standard was that the *Elizabeth E.* court mentioned the meaningful educational benefit standard simply to outline the different approaches taken by other circuits, not to adopt the heightened standard. *Id.*

135. *Id.* Judge Tymkovich stated that the Supreme Court in *Rowley* "determined that Congress's aim had been to set a 'basic floor of opportunity' for children with disabilities by 'providing

Further, the Tenth Circuit, citing *Rowley*, previously held that Congress's intent behind the IDEA's precursor was "to set a 'basic floor of opportunity'" by providing children with disabilities "some educational benefit."¹³⁶ The Tenth Circuit has interpreted the some educational benefit standard "to mean that 'the educational benefit mandated by [the IDEA] must merely be more than de minimis.'"¹³⁷ The Tenth Circuit was bound by these standards set forth by previous Tenth Circuit decisions, "absent en banc reconsideration or a superseding contrary decision by the Supreme Court."¹³⁸

Applying the some educational benefit standard,¹³⁹ the Tenth Circuit agreed with the ALJ and the district court that the proposed IEP was "reasonably calculated to enable Drew to receive educational benefits."¹⁴⁰ First, the panel found that Drew had made sufficient progress under past IEPs that were materially similar to the disputed IEP to render the disputed IEP "substantively adequate."¹⁴¹ For example, "the objectives and measuring criteria" included in Drew's annual goals became increasingly difficult each year he was in school.¹⁴² Despite the fact that Drew was not reaching his full potential at the public school and was "thriving" at his private school, Drew was making some academic progress, which is all that the some educational benefit standard requires of a public school.¹⁴³ Further, the ALJ found that Drew was making pro-

individualized services sufficient to provide every eligible child with "some educational benefit." *Id.* (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)). "Congress did not 'guarantee educational services sufficient to maximize each child's potential.'" *Id.* (quoting *Thompson*, 540 F.3d at 1149).

136. *Id.* (emphasis omitted) (quoting *Thompson*, 540 F.3d at 1149 (internal quotations omitted)); see also *Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996).

137. *Id.* at 1338-39 (emphasis omitted) (quoting *Thompson*, 540 F.3d at 1149).

138. *Id.* at 1340 (emphasis omitted) (quoting *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000)). The court also discussed how it was "inconsequential that *Rowley* had analyzed [EAHCA] because Congress has maintained the same statutory definition of a FAPE from its initial inception . . . and in each subsequent amendment to the Act." *Id.* at 1339 (citing *Thompson*, 540 F.3d at 1149 n.5). Further, post-*Rowley* Supreme Court decisions favorably cited the *Rowley* Court's definition of a FAPE. *Id.* (citing *Thompson*, 540 F.3d at 1149 n.5). Finally, although Judge Tymkovich acknowledged that other circuits have relied on different language in *Rowley* to adopt the apparently heightened standard of requiring "meaningful educational benefit," commentators suggest that the difference between the two standards is imprecise and negligible. See *id.* at 1339 n.8 (citing *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 n.7 (10th Cir. 2008)). "[H]ow much *more* benefit a student must receive" for the benefit to be meaningful rather than just "some" benefit is unclear. *Id.* Therefore, although the meaningful benefit standard purports to be a heightened standard, the difference between it and the "some benefit" standard is unclear. *Id.* Further, despite the fact that there is a split among the different circuits concerning the applicable standard, "which circuit falls on which side varies depending on which commentator you read." *Id.*

139. *Id.* at 1341. Judge Tymkovich also offered clarification of the standard, noting that under the some educational benefit standard, "the measure is whether the IEP is reasonably calculated to guarantee some educational benefit, not whether it *will* do so." *Id.*

140. *Id.* at 1343.

141. *Id.* at 1342.

142. *Id.* at 1341.

143. *Id.* at 1342 ("The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the stu-

gress towards the goals on his IEPs, and the ALJ's "finding of progress" was a "factual finding" that the court "owed a presumption of correctness."¹⁴⁴

Second, the Tenth Circuit found that the school district and the ALJ adequately addressed Drew's behavioral issues.¹⁴⁵ However, citing *Alex R.*, the panel declined to assess the "substance of the BIPs" developed for Drew throughout his education, as there is no "substantive requirements for what should be included in BIPs."¹⁴⁶ Consequently, the Tenth Circuit focused on how the school district addressed Drew's behavioral problems outside of the provisions included in his BIPs.¹⁴⁷ The panel cited the ALJ's finding that the school district collaborated "with [Drew's] parents and other service providers to address [his] behaviors as they arose."¹⁴⁸ For example, when Drew's behavioral issues began to detrimentally affect his prospects of advancing to the fifth-grade, the school district brought in a specialist to evaluate Drew's existing BIP.¹⁴⁹

Consequently, because Drew made some academic progress and the school district worked to address his behavioral problems, Drew's parents did not meet their burden of proving that the IEP was not reasonably calculated to enable Drew to receive educational benefits.¹⁵⁰

Given that the school district and the proposed IEP met the IDEA's procedural requirements and that the IEP was substantively adequate, the Tenth Circuit affirmed the district court's holding that Drew was not denied a FAPE.¹⁵¹ Considering this, the school district was not required to reimburse Drew's parents for his private school tuition.¹⁵²

III. ANALYSIS

By seeking to confine its holding to the facts presented by Amy Rowley's education, and stressing the wide array of disabilities students

dent to make *some* progress towards the goals within that program." (quoting *Thompson*, 540 F.3d at 1155)).

144. *Id.* at 1341.

145. *See id.* at 1342-43.

146. *Id.* at 1342 n.12 (citing *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 615 (7th Cir. 2004)) ("Although the parents take issue with the substance of the BIPs put in place by the District in prior years, neither the IDEA nor its implementing regulations prescribe substantive requirements for what should be included in BIPs.").

147. *See id.* at 1342, 1342 n.12 (declining to assess the substantive adequacy of Drew's BIPs and instead evaluating how the school district "work[ed] to address" Drew's behavior problems outside of the contents of the BIPs).

148. *Id.* at 1342 (second alteration in original) (quoting Record on Appeal at 13, Vol. I, *Andrew I.*, No. 12-cv-2620-LTB, 2014 WL 4548439, at *11 (D. Colo. Sept. 15, 2014)).

149. *Id.*

150. *Id.* at 1342-43.

151. *See id.* ("For the foregoing reasons, we find the District provided Drew a free appropriate public education.").

152. *Id.* at 1343 ("Because the IDEA provides that reimbursement is due only where the school district has not made a FAPE available to the child, we find the parents are not entitled to the compensation they seek.").

may have, the *Rowley* decision made it clear that an evaluation of the substantive adequacy of an IEP should take into account a child's unique needs, abilities, and circumstances.¹⁵³ This suggests that, even under the some educational benefit standard, courts must determine whether the IEP was reasonably calculated to benefit the child, given the child's unique needs, abilities, and circumstances.¹⁵⁴ However, despite the Tenth Circuit's purported reliance on *Rowley*,¹⁵⁵ its evaluation of the substantive adequacy of the proposed IEP failed to properly consider Drew's unique needs, abilities, and circumstances. The Tenth Circuit's failure is indicative of how courts—especially those utilizing the some educational benefit standard—handle cases in which parents have challenged a school district's provision of a FAPE.¹⁵⁶

There are three notable ways in which the Tenth Circuit and the district court failed to take into account Drew's unique needs, abilities, and circumstances in its assessment of the substantive adequacy of the fifth-grade IEP. First, Drew's parents were disadvantaged in terms of retaining important expert witnesses.¹⁵⁷ Second, the Tenth Circuit based its decision in part on the finding that Drew made minimal progress towards some goals in his IEP¹⁵⁸ despite that, considering Drew's unique needs, abilities, and circumstances, his progress really afforded him no benefit. Third, by refusing to consider the school district's failure to conduct an FBA¹⁵⁹ and assess the substantive adequacy of the BIPs,¹⁶⁰ the Tenth Circuit failed to assess all relevant actions taken or not taken by the

153. See *supra* notes 97–100 and accompanying text.

154. See *supra* notes 87–88, 97–100 and accompanying text (discussing the educational benefit standard and suggesting adherence to the principles set forth in *Rowley*).

155. See *Andrew II*, 798 F.3d at 1339–40 (applying the some educational benefit standard because it is the standard adopted by the *Rowley* Court to assess the substantive adequacy of an IEP and is also the definition of a FAPE that the *Rowley* Court adopted).

156. See *Thompson R2–J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1154–55 (10th Cir. 2008) (holding that the child had exhibited academic progress and the IEP was substantively adequate under the some educational benefit standard, despite that the child could not apply the skills he learned in school to other environments, rendering the academic progress meaningless outside of the classroom); see also *M.S. v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 320, 327–28 (4th Cir. 2009) (holding that the school district's provision of "12.75 hours per week of individual instruction" was sufficient to render the IEP substantively adequate because "the IDEA does not require a perfect education," despite that the child "made little progress while enrolled" in the public school, and his abilities to speak and write were severely impaired); *A.B. v. Lawson*, 354 F.3d 315, 318, 325–26 (4th Cir. 2004) (holding that the IEP was reasonably calculated to provide the child with some benefit because the IEP "focused on the child's difficulties in reading and writing," the school officials' "professional judgment" were consistent with state law, and the school district was not required to consider extensive expert reports concerning the child's intellectual ability).

157. See *infra* Section III.A.i.

158. See *supra* notes 139–44 and accompanying text.

159. See *Andrew II*, 798 F.3d at 1342. The Tenth Circuit failed to discuss the school district's choice not to conduct an FBA during its analysis of whether the school district's responses to Drew's behavioral problems rendered the fifth-grade IEP substantively inadequate. See *id.* Instead, the school district was under no statutory duty to conduct an FBA and, therefore, its failure to do so did not result in a substantive denial of a FAPE. See *supra* notes 127–31 and accompanying text.

160. See *Andrew II*, 798 F.3d at 1342 n.12 ("Although the parents take issue with the substance of the BIPs put in place by the District in prior years, neither the IDEA nor its implementing regulations prescribe substantive requirements for what should be included in BIPs.").

school district in response to Drew's behavioral problems. However, the courts, state legislatures, and Congress could implement solutions that would ensure that courts properly consider a child's unique needs, abilities, and circumstances when assessing the substantive adequacy of an IEP.¹⁶¹

A. Expert Participation

Both the Tenth Circuit's and the district court's decisions reflect the need for expert participation in cases assessing the substantive adequacy of an IEP, as well as the advantage school districts have in terms of retaining experts. To correct this inequality, parents could request that school districts perform an IEE. Ultimately, however, states must pass legislation shifting the burden of proof to schools, or Congress must amend the IDEIA to allow parents to recover expert witness fees.

1. The Importance of Experts and Parents' Disadvantages in Cases Challenging the Substantive Adequacy of an IEP

As the Tenth Circuit's decision demonstrates, experts play a significant role in cases assessing the substantive adequacy of an IEP and assist courts in evaluating a child's unique needs, abilities, and circumstances. Full-time administrative law, district court, and appellate judges are usually inexperienced in the field of special education and ill-equipped to unilaterally make decisions regarding the appropriate education for a child with disabilities.¹⁶² Consequently, courts often rely on expert testimony when making their decisions regarding the substantive adequacy of IEPs.¹⁶³ For example, the district court in *Endrew F.* extensively cited testimony given at the due process hearing from Drew's parents' and the school district's retained experts during its evaluation of Drew's progress under the goals and objectives listed in the IEPs.¹⁶⁴ While the Tenth Cir-

161. See *infra* Section III.B.ii.

162. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-08 (1982) ("[C]autio[n]g that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973))); see also Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education?"*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 397, 416-17 (2008) (comparing hearing officers that are trained in special education "best practice" with "hearing officers with a strictly legal training" in the context of enforcement of the IDEIA's requirement that IEPs be based on peer-reviewed research).

163. See Kelly D. Thomason, Note, *The Costs of a "Free" Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation under the IDEA*, 57 DUKE L.J. 457, 470, 474 n.101 (2007) (noting that "the presentation of expert evidence is an indispensable part of" parents carrying their burden of proof (quoting Brief The Council of Parent Attorneys and Advocates as Amicus Curiae Supporting Respondents at 3, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (No. 05-18))); see also Kathryn H. Cray, Comment, *Necessary Expertise: Allowing Parents to Recover Expert Witness Fees Under the Individuals with Disabilities Education Act*, 77 TEMP. L. REV. 967, 968 (2004) (noting that using "expert witnesses" in IDEA actions is "necessary").

164. See *supra* note 115 and accompanying text.

cuit's reliance on expert testimony was less explicit and extensive than in the district court's decision, the Tenth Circuit decision did reference testimony from Drew's special education teacher, who was one of the school district's experts.¹⁶⁵

Despite the importance of expert testimony, in *The Costs of a "Free" Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation Under the IDEA*, Kelly D. Thomason discusses how the Supreme Court's decisions in *Schaffer v. Weast* and *Arlington v. Murphy* disadvantage parents in terms of retaining expert witnesses that are necessary for parents to carry their burden of proving that an IEP is substantively inadequate.¹⁶⁶ Thomason explains that the *Schaffer* decision places the burden of proof in an IDEIA action on the party seeking relief, which is a child with disabilities, represented by his parents.¹⁶⁷ Parents thus bear the burden of countering the strong presumption in favor of the IEP's appropriateness.¹⁶⁸ Considering the importance of expert testimony, it is critical that parents retain expert witnesses to carry their burden of proof.¹⁶⁹ However, in *Arlington*, the Supreme Court held that prevailing parents are barred from recovering expert witness fees.¹⁷⁰ Thomason notes that, while school districts have special education experts on staff that can easily and cheaply be retained to testify on their behalf, parents must seek out and hire an independent expert witness.¹⁷¹ Further, even if parents successfully find a compelling expert advocate, they must pay exorbitant expert witness fees that, under *Arlington*, cannot be recovered.¹⁷² Consequently, Thomason concludes that the combined effect of the *Schaffer* and *Arlington* decisions indicates that parents may not have the resources necessary to carry their burden of proof.¹⁷³

165. See *Endrew II*, 798 F.3d at 1335, 1341–42.

166. See generally Thomason, *supra* note 163.

167. *Id.* at 470; see also *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (holding that “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief,” and since the child, who was being represented by his parents, was the one seeking relief, the child bore the burden of proof).

168. Thomason, *supra* note 163, at 472.

169. See *id.* at 483 (noting that parents bearing the burden of proving that an IEP is substantively deficient “increase[es] parents’ need for expert witnesses”).

170. *Id.* at 475–76; see also *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297, 300 (2006) (holding that under the IDEIA, “prevailing parents may not recover the costs of experts or consultants” because while the IDEIA provides clear notice that prevailing parents may recover “reasonable attorneys’ fees,” the statute does not unambiguously state that prevailing parents may recover expert witness fees (quoting 20 U.S.C. § 1415(i)(3)(B) (2012))).

171. Thomason, *supra* note 163, at 472–73 (“As school districts typically have experts on staff in the form of special education teachers, child psychologists, and educational specialists, they have ready access to experts who will support the IEP provided for the child” (footnote omitted)).

172. *Id.* at 472, 483–84 (discussing how, while the school district’s experts are employed by the school district and would testify on the school district’s behalf for free, parents must incur “exorbitant fees for the retention of expert witnesses”); see also *Arlington*, 548 U.S. at 297–300 (discussing how parents are precluded from recovering expert witness fees).

173. Thomason, *supra* note 163, at 483–84 (discussing how parents of children with disabilities “tend to earn less” than other parents, which “illustrates that the majority of parents with children in

Data out of Colorado corroborates Thomason's conclusion. For example, of the fifteen due process hearings brought under the IDEIA in Colorado in 2013, eleven were dismissed or resulted in a finding of no violation, and only one resulted in a violation.¹⁷⁴ This is consistent with Thomason's argument that parents seeking to prove the inadequacy of an IEP are unable to match the power of the school district's experts and cannot bear their burden of proof.¹⁷⁵

The difficulty parents face in overcoming the power of school districts' experts and proving the substantive inadequacy of an IEP is evident in the *Andrew F.* decision. Although Drew's parents retained an expert to testify at the due process hearing, the school district had two experts testify on its behalf.¹⁷⁶ The school district's experts—Drew's special education teacher and the school district's director of special education—were both employed by the school system.¹⁷⁷ Further, the ALJ agreed with the school district's experts' testimony. For example, the school district's experts testified that, while the progress reporting in Drew's IEPs could have been more detailed, the progress reflected in the IEPs was still adequate.¹⁷⁸ Similarly, the ALJ held that, although the school's progress reporting "could have been more robust . . . the absence of more detailed reports [did] not amount to a substantive denial of a FAPE," and Drew had made some progress towards some of the IEPs' goals.¹⁷⁹ Pursuant to the standard of review in an IDEIA action, the Tenth Circuit was required to accept the ALJ's finding that Drew had made progress towards the goals in his IEPs as *prima facie* correct.¹⁸⁰ It is probable that the school-district-favorable rule relating any minimal past progress to the substantive adequacy of a proposed IEP undoubtedly contributed to the ALJ's decision.¹⁸¹ However, experts play significant roles in IDEIA actions¹⁸² and the school district had two experts who were intimately familiar with the provisions in Drew's IEPs, while Drew's parents had only one expert that merely reviewed Drew's academic rec-

special education do not have sufficient income to hire expert witnesses necessary to carry their burden of proof at IDEA hearings").

174. EXCEPTIONAL STUDENT SERVS. UNIT, COLO. DEP'T OF EDUC., 2013 DUE PROCESS (2014), <http://www.cde.state.co.us/spedlaw/2013dueprocess> (noting that two due process claims were still active at the time of the survey).

175. Thomason, *supra* note 163, at 483–84.

176. *See supra* note 115 and accompanying text.

177. *See supra* note 115 and accompanying text.

178. *See Andrew I*, No. 12–cv–2620–LTB, 2014 WL 4548439, at *3 (D. Colo. Sept. 15, 2014). *See supra* note 115 and accompanying text, for a discussion regarding how the school district's experts conceded that the progress reporting could have been more adequate, but concluded that Drew still made progress and the IEPs "met the required standard."

179. *See Andrew I*, 2014 WL 4548439, at *3.

180. *See Andrew II*, 798 F.3d 1329, 1341–42 (10th Cir. 2015).

181. *See Andrew I*, 2014 WL 4548439, at *6; *see also infra* notes 206–14 and accompanying text (discussing how courts applying the some educational benefit standard consider even minimal progress under a past IEP sufficient to indicate that a disputed IEP modeled after that past IEP is substantively sufficient).

182. *See supra* note 163 and accompanying text.

ords.¹⁸³ Therefore, it is likely that the ALJ was also persuaded by, and relied on, testimony from the school district's experts.

Finally, data suggests that parents' inability to recover expert-witness fees not only inhibits them from carrying their burden of proof¹⁸⁴ but also discourages parents from challenging a school district's provision of a FAPE in the first place. "Only five out of every ten thousand [parents of] children . . . receiv[ing] special education services under the IDEA request due process hearings."¹⁸⁵ Further, the vast majority of school districts do not experience due process hearings or IDEIA litigation in a given year,¹⁸⁶ and ninety-four percent of school districts have never had an IDEIA hearing.¹⁸⁷ For example, in 2013 only fifteen due process hearings in Colorado involved disputes under the IDEIA.¹⁸⁸ This number is negligible considering that there are over ninety-thousand students with disabilities receiving services pursuant to the IDEIA in Colorado.¹⁸⁹ The significant discrepancy between the number of children receiving disability-related services under the IDEIA and the small number of due process hearings suggests that parents might be discouraged from incurring the costs necessary to prevail in a challenge to a school's provision of a FAPE.

Therefore, although experts are an important way in which courts assess a child's unique needs, abilities, and circumstances, parents cannot recover expert witness fees in an IDEIA action and often lack the resources necessary to retain expert witnesses. Consequently, parents are discouraged from bringing actions challenging a school district's provision of a FAPE. When such actions are brought, expert testimony tends to favor school districts and parents are often unable to carry their burden of proof.

183. See *Andrew I*, 2014 WL 4548439, at *8 (discussing how Drew's special education teacher helped develop Drew's IEPs, while Drew's parents' expert merely reviewed Drew's academic records).

184. Thomason, *supra* note 163, at 483–84.

185. *Id.* at 484–85 (citing U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 13 (2003)).

186. Brief for the National Disability Rights Network and the New York Lawyers Interest for the Public Interest as Amici Curiae in Support of Respondents at 10, *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007) (No. 06-637), 2007 WL 2088644 ("90% of school districts had no due process hearings at all in 2004–2005, and only 4% of school districts were involved in IDEA litigation of any kind."). There also is not a trend towards more due process hearings. *Id.* ("From 1999 to 2005, the 10% of school districts that had any ongoing formal dispute resolution procedures had a median of only one dispute per year, a rate that did not change over time.")

187. Thomason, *supra* note 163, at 485.

188. EXCEPTIONAL STUDENT SERVS. UNIT, *supra* note 174.

189. COLO. DEP'T OF EDUC., STUDENTS WITH DISABILITIES BIRTH: TOTAL STUDENTS SERVED ON DECEMBER COUNT (2013), http://www.cde.state.co.us/cdespedfin/sped_datareports-1 (reporting on the number of students with disabilities receiving special educational services from school districts in Colorado in 2013).

2. Shifting the Burden of Proof to Schools and Allowing Parents to Recover Expert Witness Fees

To lessen the disadvantage parents face in terms of presenting convincing expert witness testimony to prove the substantive inadequacy of an IEP, parents could request that school districts perform IEEs before bringing an action seeking tuition reimbursement under the IDEA.¹⁹⁰ Under the IDEA, if the parents of a child with disabilities disagree with the results of a school's evaluation of the child's education, such as an IEP¹⁹¹ or an FBA,¹⁹² the parents have the right to request an IEE at public expense.¹⁹³ An IEE is "an evaluation conducted by a qualified examiner who is not employed" by the school district.¹⁹⁴ In *Schaffer*, the Supreme Court cited IEEs as procedural safeguards that would prevent its decision to allocate the burden of proof to parents from favoring school districts.¹⁹⁵ The Court reasoned that IEEs provide parents with access to an expert that can evaluate the school's performance and "give an independent opinion."¹⁹⁶ Therefore, parents have the "firepower" to match the school district's experts¹⁹⁷ and can submit the IEE as evidence in a due process hearing.¹⁹⁸

However, in practice, IEEs fall short of providing parents with the type of expert involvement necessary to carry their burden of proof. If a parent requests that an IEE be performed, school districts have the option to file a due process hearing defending the adequacy of the evaluation instead of conducting an IEE.¹⁹⁹ Further, even if a school consents to

190. See Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 435 (2012) (describing IEEs as "outside evaluation[s] [that] can be an important way for parents to challenge the expertise of school districts with independent experts of their own").

191. See *Edie F. ex rel. Casey F. v. River Falls Sch. Dist.*, 243 F.3d 329, 333–36 (7th Cir. 2001) (discussing attorneys' fees in the context of a case in which parents had requested an IEE in response to disagreement with some of the provisions and services provided to their child under an IEP).

192. See *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 67–68 (D.D.C. 2008) (holding that an FBA is an "educational evaluation" for purposes of 34 C.F.R. § 300.502, given that an FBA "plays an integral role in the development of an IEP" and is "fundamental . . . to the quality of a disabled child's education" (quoting 34 C.F.R. § 300.502(b)(1) (2016))).

193. Chopp, *supra* note 190, at 435; see also 34 C.F.R. § 300.502(b)(1).

194. 34 C.F.R. § 300.502(a)(3)(i).

195. Thomason, *supra* note 163, at 479–80 (discussing how the *Schaffer* Court "cited the many procedural safeguards of the IDEA," such as IEEs, that would prevent "carrying the burden of proof [from] harm[ing] parents"); see also *Schaffer v. Weast*, 546 U.S. 49, 60–61 (2005).

196. *Schaffer*, 546 U.S. at 60–61.

197. *Id.* (discussing how parents' ability to request an IEE at public expense means that parents "are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition").

198. Lewis M. Wasserman, *Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004*, 21 ST. JOHN'S J. LEGAL COMMENT. 171, 210 (2006); see also 34 C.F.R. § 300.502(c)(2) (permitting the results of an IEE to be "presented by any party as evidence at a hearing on a due process complaint").

199. Chopp, *supra* note 190, at 435–36; see also 34 C.F.R. § 300.502(b)(2)–(b)(3) ("(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—(i) File a due process complaint to request a hearing to show that

conducting an IEE, the school often chooses the independent evaluator.²⁰⁰ School districts also have no affirmative duty to implement any changes based on the IEE and are only obligated to consider the results of an IEE.²⁰¹ Consequently, IEEs do not afford parents the expert involvement necessary to allow courts to objectively evaluate a child's unique needs, abilities, and circumstances.

Instead, states must pass legislation shifting the burden of proof to school districts, or Congress must amend the IDEIA to allow parents to recover expert witness fees.²⁰² The Supreme Court in *Schaffer* noted that states could pass legislation placing the burden of proof on schools in an IDEIA action.²⁰³ Similarly, Ginsburg's concurrence in *Arlington* suggested that Congress could amend the IDEIA to allow parents to recover expert witness fees.²⁰⁴ Such legislation would lessen the prejudice imposed on parents by the combined effects of the *Schaffer* and *Arlington* decisions. For example, if Colorado had legislation shifting the burden of proof, Drew's parents would not have had the burden of overcoming the testimony of the school district's two expert witnesses. Instead, the school district would have had to prove that the fifth-grade IEP was substantively adequate. If the IDEIA allowed parents to recover expert witness fees, Drew's parents might have felt more inclined to hire two expert witnesses instead of one, providing them with equal "firepower" with which to counter the school district's experts. In either scenario, Drew's parents would have had a better chance to retain experts that could match the force of the school district's experts, and present convincing testimony concerning Drew's unique needs, abilities, and circumstances.

In sum, while experts play important roles in IDEIA actions assessing the substantive adequacy of an IEP, parents have less resources with which to retain expert witnesses than schools do. Parents requesting that school districts perform IEEs are not sufficient to correct the disad-

its evaluation is appropriate; or (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 the evaluation obtained by the parent did not meet agency criteria. (3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.").

200. Chopp, *supra* note 190, at 436 (discussing how school districts "often move to choose the evaluator themselves or to limit the scope of the evaluation").

201. *Id.* at 436; *see also* 34 C.F.R. § 300.502(c)(1) (stating that the results of an IEE "[m]ust be considered by [the school district] . . . in any decision made with respect to the provision of FAPE to the child").

202. *See* Thomason, *supra* note 163, at 485-86.

203. *Schaffer v. Weast*, 546 U.S. 49, 61 (2005) (declining to definitively condone states legislatively placing the burden of proof on school districts, but noting that "[s]everal States have laws or regulations" already in place that do just that, leaving open the possibility that states could place the burden of proof on school districts).

204. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 307 (2006) (Ginsburg, J., concurring) ("The ball . . . is . . . in Congress'[s] court to provide, if it so elects, for consultant fees . . . beyond those IDEA and . . . regulations already authorize . . .").

vantage parents face in terms of hiring experts. Instead, states must pass legislation shifting the burden of proof to schools, or Congress must amend the IDEA to allow parents to recover expert witness fees.

B. Past Progress as an Indicator of the Substantive Adequacy of an IEP

The Tenth Circuit based its decision that Drew's fifth-grade IEP was substantively adequate in part on the ALJ and district court's finding that Drew made progress under past IEPs with similar goals and objectives as the fifth-grade IEP.²⁰⁵ However, neither the district court nor the Tenth Circuit addressed whether the progress indicated in past IEPs resulted in actual progress in the classroom, considering Drew's unique needs, abilities, and circumstances. Consequently, when assessing whether past progress indicates that a proposed IEP is substantially adequate under the some educational benefit standard, courts must evaluate whether a child progressed under the tutelage of the entire IEP instead of considering one goal or objective in isolation.

1. Courts' Evaluations of Past Progress

As the Tenth Circuit stated in its opinion, under the some educational benefit standard, past progress on the IEP goals "strongly suggest[s]" that when a proposed IEP is modeled on prior IEPs that had succeeded in generating some progress, the proposed IEP "was reasonably calculated to continue that trend."²⁰⁶ However, courts are willing to consider very negligible progress, even progress that does not necessarily benefit a child, as sufficient to constitute "past progress" for purposes of this rule. In the article titled *Rowley Forever More? A Call for Clarity and Change*, Scott F. Johnson explains that courts using past progress as an indicator that a proposed IEP is substantively adequate focus on "whether any progress was made" in any area in which "services were provided."²⁰⁷ Considering this, if a court finds, for example, that a child made minimal progress on just one goal contained in a past IEP, then the entire proposed IEP modeled after that past IEP is considered to be "reasonably calculated to" provide the child with "some benefit."²⁰⁸ Courts make this holding despite that—considering the child's unique needs, abilities, and circumstances and his progress under the past IEP as a

205. See *supra* notes 139–44 and accompanying text.

206. *Endrew II*, 798 F.3d 1329, 1341 (10th Cir. 2015) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1153 (10th Cir. 2008)).

207. Johnson, *supra* note 86, at 32 (discussing how under the some educational benefit standard, "the court's focus is usually on whether any progress was made in the areas where services were provided").

208. *Endrew II*, 798 F.3d at 1341–42 (rejecting Drew's parents' argument that because "any progress made" under the tutelage of Drew's past IEPs "was de minimis," the fifth-grade IEP was substantively inadequate because an IEP simply needs to be "reasonably calculated to enable the student to make some progress towards the goals within [a] program," and Drew did make some progress (quoting *Thompson*, 540 F.3d at 1155)); Johnson, *supra* note 86, at 39 (discussing how, as long as there is "[s]ome progress towards meeting some IEP goals," an IEP could be deemed substantively adequate even if other IEP goals are not met).

whole—the minimal progress in one area may not have afforded the child any benefit.

This is reflected in *Andrew F.*. The district court found that the math objectives in Drew’s fourth- and fifth-grade IEPs demonstrated the progress he was making, despite that all of the math objectives in his fifth-grade IEP were the same or only slightly changed from the objectives in his fourth-grade IEP.²⁰⁹ For example, the word “money” was added to an objective, and another objective was slightly changed from learning “multiplication facts 6-10” to learning “multiplication facts 6-12.”²¹⁰ The fifth-grade IEP also contained two fewer objectives than the fourth-grade IEP²¹¹ suggesting that, while Drew may have achieved some goals and objectives in his fourth-grade IEP, he would not be progressing in any new areas under his fifth-grade IEP. Despite these obvious deficiencies, which the school district conceded to,²¹² and which the Tenth Circuit noted,²¹³ the fifth-grade IEP that was modeled after the fourth-grade IEP under which Drew made negligible progress was found to be “reasonably calculated to continue that trend” of progress.²¹⁴

Considering Drew’s unique needs, abilities, and circumstances, it is clear that very minimal progress on objectives, such as multiplication facts, may not have afforded him any benefit at all. Drew’s behavioral issues were the most significant impediment to his education.²¹⁵ In this context, past progress on any IEP objective would not necessarily lead to more progress under a similarly drafted IEP. For example, Drew had an “especially rocky fourth-grade year” due to the increased severity of his behavioral problems, suggesting that he received little to no educational benefit that year.²¹⁶ Considering this, it is unclear how the fifth-grade IEP

209. See *supra* notes 116–21 and accompanying text.

210. See *supra* notes 118–19 and accompanying text.

211. See *supra* notes 118–19 and accompanying text.

212. *Andrew I*, No. 12-cv-2620-LTB, 2014 WL 4548439, at *10 (D. Colo. Sept. 15, 2014) (noting that the school district “concedes that the progress reporting on the IEPs in this case . . . was lacking in details”).

213. *Andrew II*, 798 F.3d at 1335 (noting that the school district conceded that progress reporting in Drew’s IEPs “could have been more robust”); see also *id.* at 1342 (describing the question of whether Drew progressed under his past IEPs as “a close case”).

214. *Andrew I*, 2014 WL 4548439, at *9 (quoting *Thompson R2–J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1153 (10th Cir. 2008)); see also *Andrew II*, 798 F.3d at 1341–42 (affirming the district court’s holding concerning past progress and finding “sufficient indications of Drew’s past progress to find the IEP rejected by the parents substantively adequate under our prevailing standard”).

215. See *Andrew II*, 798 F.3d at 1342 (“Drew’s behavioral problems had escalated to such a degree that they were creating a barrier to his academic progress during his fourth-grade year . . .”); *Andrew I*, 2014 WL 4548439, at *2 (discussing Drew’s escalating behavioral problems that inhibited “his ability to function at school and access the educational environment”).

216. *Andrew II*, 798 F.3d at 1333, 1337–38 (describing how Drew struggled during his fourth-grade year and, “[d]espite the school’s prior attempts to manage his behavior, during Drew’s fourth-grade year his behaviors increased,” which left Drew’s parents “with what they felt was one choice—to place Drew in a different learning environment”). There is also evidence that Drew’s behavioral problems increased during his second- and third-grade years, despite the Tenth Circuit’s affirmation of the ALJ’s finding that Drew progressed academically during those years. *Id.* at 1341 (indicating that the record supports the ALJ’s finding that Drew made educational progress during his second-

would be “reasonably calculated to continue” Drew’s educational progress when it was modeled after the fourth-grade IEP under which Drew struggled to progress educationally.²¹⁷ Consequently, the Tenth Circuit failed to consider whether, given Drew’s unique needs, abilities, and circumstances, the negligible progress indicated in Drew’s past IEPs resulted in actual progress in the classroom.

2. Considering Progress Under the Entire Past IEP

When assessing whether past progress indicates that a proposed IEP is substantively adequate, courts applying the some educational benefit standard must consider a child’s progress under the tutelage of the entire past IEP, instead of considering progress towards one goal or objective in isolation. An analysis of whether, considering a child’s unique needs, abilities, and circumstances, a child has progressed educationally necessarily requires an analysis of an entire IEP, not just part of it. For example, as demonstrated by Drew’s behavioral problems, which impeded his educational progress,²¹⁸ simply focusing on one IEP goal or objective can lead courts to hold that the child progressed under the tutelage of a past IEP, when in reality the child was struggling to gain any educational benefit and may have even regressed.

Further, a consideration of progress under the entire IEP, rather than progress on just one goal or objective, does not require courts applying the some educational benefit standard to consider criteria that only courts applying the meaningful benefit standard take into account. Courts applying the some educational benefit standard refuse to consider any progress the child made at a private school placement.²¹⁹ This would entail focusing on providing a benefit that “maximiz[es] . . . student potential,” which is relevant to the substantive adequacy of an IEP under the meaningful benefit standard but not the some educational benefit standard.²²⁰ For example, in holding that Drew made progress under the past IEPs, the Tenth Circuit found evidence that Drew was “thriving” at the private school irrelevant to the determination of whether the fifth-grade IEP was substantively adequate.²²¹ The Tenth Circuit reasoned that, under the

and third-grade years); *Endrew I*, 2014 WL 4548439, at *2 (discussing how Drew’s behavioral problems increased during his second- and third-grade years).

217. See *supra* notes 104–05 and accompanying text (describing how Drew’s behavioral problems impeded his academic progress during his fourth-grade year); see also *Endrew I*, 2014 WL 4548439, at *9 (describing the fifth-grade IEP modeled after the fourth-grade IEP and how the IEPs were materially similar).

218. See *supra* notes 104–06 and accompanying text.

219. See *supra* note 143 and accompanying text; see also Johnson, *supra* note 86, at 36 (describing how “under the ‘some benefit’ test, the progress the student made at a private special education school, as compared to the progress made at the public school, would not matter”).

220. Johnson, *supra* note 86, at 36 (“As long as the public school provided some benefit, the fact that the student made better progress at the unilateral placement . . . would be irrelevant and characterized as the kind of maximizing of student potential that the school is not required to provide.”).

221. *Endrew II*, 798 F.3d at 1342.

some educational benefit standard, the IDEIA does not require schools to "do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge."²²² However, had the Tenth Circuit considered Drew's progress under the IEPs as a whole, it would have been clear that Drew was struggling to learn and progress in school, given his worsening behavioral problems that impeded his education,²²³ even without considering evidence that he was thriving at another school.

Lastly, Johnson notes that, under the meaningful benefit standard, an evaluation of past progress requires that the child meet all or most IEP goals and make significant progress overall.²²⁴ Conversely, under the some educational benefit standard, courts currently focus on "whether any progress was made" in any area in which "services were provided."²²⁵ However, considering progress under the entire IEP, in light of a child's unique needs, abilities, and circumstances, does not require courts to find that the child made significant progress on all or even most of the IEP's goals and objectives. It simply prohibits courts from focusing on one goal or objective, such as math objectives, when assessing whether the child progressed. It also requires courts to not just pay attention to the written words in the IEP but also to what actually transpired during the course of the child's education.²²⁶ For example, had the Tenth Circuit declined to confine its analysis to progress towards only a few select goals and objectives, the panel would have recognized that any minimal progress made under Drew's past IEPs was likely negated by Drew's behavioral problems, rendering him devoid of any educational progress whatsoever.²²⁷ Under these circumstances, a finding that Drew made no progress under the tutelage of the past IEPs would hardly be implementation of a standard requiring substantial progress on all IEP goals and objectives.

In sum, in affirming the district court's decision, the Tenth Circuit failed to consider whether the progress indicated in Drew's past IEPs resulted in actual progress in the classroom in light of Drew's unique needs, abilities, and circumstances. Therefore, courts applying the some educational benefit standard must evaluate whether a child progressed

222. *Id.* (describing how the IDEIA "much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program" (emphasis omitted) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1155 (10th Cir. 2008))).

223. *See supra* notes 104–06 and accompanying text.

224. Johnson, *supra* note 86, at 39.

225. *Id.* at 32.

226. The district court focused on how the words in the IEPs changed as evidence that Drew progressed. *See, e.g., Andrew I*, No. 12-cv-2620-LTB, 2014 WL 4548439, at *9 (D. Colo. Sept. 15, 2014) (discussing how the objectives in Drew's IEPs had changed). However, had the district court considered progress under the tutelage of the entire IEP and how Drew actually progressed in the classroom, it would have been clear that he received little to no educational benefit.

227. *See supra* notes 105–07 and accompanying text (describing how Drew's behavioral issues worsened during his fourth-grade year and inhibited his ability to learn).

under the tutelage of the entire past IEP, instead of focusing on progress towards one goal or objective in isolation, when assessing whether past progress indicates that a disputed IEP is substantively adequate.

C. Assessing School Districts' Responses to Behavioral Problems

The rule cited in the Tenth Circuit's decision that there are no substantive requirements for the contents of BIPs,²²⁸ as well as the Tenth Circuit's failure to consider the school district's choice to not conduct an FBA,²²⁹ conflicts with the Tenth Circuit's discussion of how the school district addressed Drew's behavioral problems in the context of the substantive adequacy of the IEP.²³⁰ By failing to assess all of the school district's actions undertaken in response to Drew's behavioral problems, the Tenth Circuit did not properly consider the substantive adequacy of the fifth-grade IEP in light of Drew's unique needs, abilities, and circumstances.²³¹ Considering this, the IDEIA must be amended to include detailed requirements as to the contents of FBAs and BIPs, and should require FBAs and BIPs in every instance in which a child's behavior impedes his learning or that of others.²³²

1. Consideration of FBAs and BIPs in *Andrew F.*

In its decision, the Tenth Circuit cited the rule that, in order for an IEP to be substantively adequate, "an IEP must respond to all significant facets of the student's disability, both academic and behavioral."²³³ Pursuant to this rule, the Tenth Circuit evaluated how the school district addressed Drew's behavioral problems in the context of determining whether the IEP was substantively adequate.²³⁴ However, the Tenth Circuit failed to evaluate the substantive adequacy of Drew's BIPs and did not consider the school district's choice to not conduct an FBA.²³⁵ The Tenth Circuit chose to adhere to the rule that there is no standard by which courts evaluate the substantive adequacy of a BIP. The Tenth Circuit also refused to take into account the school district's failure to conduct an FBA because the IDEIA required the school district to merely

228. See *supra* note 147 and accompanying text.

229. See *supra* notes 129–33, 159 and accompanying text.

230. See *supra* notes 148–50 and accompanying text.

231. The Tenth Circuit failed to address the substantive adequacy of Drew's BIPs and the school district's choice not to conduct an FBA, which are relevant to addressing Drew's behavioral problems and his unique needs, abilities, and circumstances.

232. See Patrick Ober, Note, *Proactive Protection: How the IDEA Can Better Address the Behavioral Problems of Children with Disabilities in Schools*, 1 BELMONT L. REV. 311, 333 (2014). Currently, the IDEIA requires schools to perform FBAs and develop BIPs when the child has had a disciplinary change of placement but only requires schools to consider these measures when a child's behavior interferes with his or other students' learning. See *supra* notes 50–51 and accompanying text.

233. See *Andrew II*, 798 F.3d 1329, 1342 (10th Cir. 2015) (quoting *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 613 (7th Cir. 2004)).

234. See *supra* notes 148–50 and accompanying text.

235. See *supra* notes 129–33, 147, 159, 231 and accompanying text.

"consider" conducting an FBA. Therefore, the Tenth Circuit refused to assess two important measures taken, and failed to be taken, by the school district in response to Drew's behavioral problems that were relevant to the questions of whether Drew's "IEP . . . respond[ed] to all significant facets of [Drew's] disability" and whether the school district "failed to address" Drew's behavioral issues.²³⁶ Given that Drew's behavioral problems were a significant impediment to his educational progress, the Tenth Circuit should not have held that the school district adequately addressed Drew's behavioral problems without considering the substantive adequacy of Drew's BIPs and the school district's decision not to conduct an FBA. Consequently, the Tenth Circuit failed to assess all relevant actions taken by the school district in response to Drew's unique needs, abilities, and circumstances.

2. Amending the IDEIA's Provisions Relating to FBAs and BIPs

To ensure that courts properly take into account the entirety of school districts' responses to behavioral problems when assessing the substantive adequacy of an IEP, the IDEIA must be amended to include detailed requirements as to the contents of FBAs and BIPs.²³⁷ Additionally, the IDEIA must be amended to require FBAs and BIPs in every instance in which a child's behavior impedes his learning or that of others.²³⁸

In *Proactive Protection: How the IDEA Can Better Address the Behavioral Problems of Children with Disabilities in Schools*, Patrick Ober discusses how the absence of detailed criteria concerning the contents of FBAs and BIPs influenced the Seventh Circuit's holding in *Alex R.* that there is no standard by which courts assess the substantive adequacy of BIPs.²³⁹ Ober pointed out that the Seventh Circuit declined to assess the substantive adequacy of the BIP because neither the IDEIA nor other federal regulations put forth requirements concerning the contents of

236. *Endrew II*, 798 F.3d at 1342. The Tenth Circuit cited the rule that "an IEP must respond to all significant facets of the student's disability, both academic and behavioral." *Id.* (quoting *Alex R.*, 375 F.3d at 613).

237. See Ober, *supra* note 232, at 331–32. Ober notes that in *Alex R.*, the Seventh Circuit relied in part on the absence of detailed requirements for BIPs in the IDEIA to justify its holding that there is no standard by which courts assess the substantive adequacy of BIPs. *Id.* Ober observes how this suggests that "if . . . Congress . . . were to implement [specific] requirements for a BIP and FBA, those standards, if not followed by the school district, could then constitute a violation of the [IDEIA]". See also *Alex R.*, 375 F.3d at 615 ("[N]either Congress nor the agency charged with devising the implementing regulations for the IDEA, the Department of Education, had created any specific substantive requirements for the [BIP] . . .").

238. See Ober, *supra* note 232, at 336 (proposing amending the IDEIA to require school districts to, "in the case of a child whose behavior impedes the child's learning or that of others," conduct an FBA and develop a BIP (quoting 20 U.S.C. § 1414(d)(3)(B) (2012))); see also *supra* notes 50–51, 233 (discussing how the IDEIA currently only requires schools to consider using FBAs or BIPs when a child's behavior interferes with his or other students' learning).

239. See Ober, *supra* note 232, at 331–33; see also *Alex R.*, 375 F.3d at 615.

BIPs.²⁴⁰ Consequently, Ober noted that, under *Alex R.*, “as long as [a] school produce[s] an FBA or BIP” when it is obligated to do so, the school has not violated the IDEIA.²⁴¹ However, by basing its decision on how “Congress . . . had [not] created any specific substantive requirements for . . . [BIPs],” the Seventh Circuit suggested that the implementation of requirements concerning the contents of FBAs and BIPs could lead courts to assess the substantive adequacy of these particular behavioral interventions.²⁴²

Further, a violation of the IDEIA’s detailed procedural requirements informs a court’s analysis of whether an IEP is substantively inadequate.²⁴³ Therefore, if the IDEIA was amended to include detailed requirements as to the contents of FBAs or BIPs, and required FBAs and BIPs in every instance in which a child’s behavior interferes with learning, courts would not only be more likely to find a denial of a FAPE based on violations of these additional procedural requirements but the substantive adequacy of BIPs and FBAs would be called in to question more often as well.

Had these amendments been in place, the Tenth Circuit might have been prompted to assess the substantive adequacy of Drew’s BIPs.²⁴⁴ Further, because Drew’s behavior impeded his learning and that of others, the school district would have been required to conduct an FBA and to develop BIPs. Not only would Drew have received the benefit of an FBA but any procedural violation of the more detailed requirements concerning the contents of the FBA and BIPs also would have informed the analysis of the substantive adequacy of these behavioral interventions and the fifth-grade IEP in general.²⁴⁵ Consequently, the Tenth Circuit would have more thoroughly examined the school district’s response to Drew’s behavioral problems in the substantive provisions of the BIPs during its analysis of the substantive adequacy of the fifth-grade IEP, instead of focusing only on actions the school district took outside of the contents of the BIPs. For example, in holding that the school district’s efforts to address Drew’s behavioral problems did not render the fifth-grade IEP substantively inadequate, the Tenth Circuit relied heavily on

240. Ober, *supra* note 232, at 332; *see also Alex R.*, 375 F.3d at 615 (“[T]he specific components of the [BIP] are not identified either in the federal statute or the regulations.” (quoting Mason City Cmty. Sch. Dist., 36 IDELR 193, 199 (Iowa SEA Dec. 13, 2001))).

241. Ober, *supra* note 232, at 332; *see also Andrew II*, 798 F.3d at 1337–38 (holding that the school district did not violate the IDEIA because there are no “substantive requirements as to what [BIPs] must include,” and the school developed a BIP when Drew’s behavior impeded his education).

242. Ober, *supra* note 232, at 322 (quoting *Alex R.*, 375 F.3d at 615).

243. *See supra* notes 59–61 and accompanying text.

244. Ober discusses how the *Alex R.* court’s reasoning indicates that had detailed requirements been in place, the Seventh Circuit may have been prompted to evaluate the substantive adequacy of the BIP in question. *See supra* notes 240–42 and accompanying text. Given the Tenth Circuit’s reliance on *Alex R.*’s rule that there is no standard by which courts assess the substantive adequacy of a BIP, the Tenth Circuit may also have been inclined to evaluate the contents of Drew’s BIPs.

245. *See supra* notes 59–61 and accompanying text.

evidence of the school district's efforts to bring in a behavioral specialist.²⁴⁶ However, had the panel also considered the school district's failure to conduct an FBA and the substantive contents of the BIPs as relevant evidence, the school district's efforts to bring in a specialist may have been overcome by, for example, insufficiencies in the content of the BIPs or the harm the school's failure to conduct an FBA inflicted upon Drew's educational progress. The Tenth Circuit would have considered all relevant actions taken or not taken by the school district in response to Drew's unique needs, abilities, and circumstances, instead of focusing only on a few of the school district's actions in response to his behavioral problems.

In sum, the Tenth Circuit's failure to consider the substantive contents of Drew's BIPs and the school district's choice not to conduct an FBA conflicted with its discussion of how the school district addressed Drew's behavioral problems and resulted in an inadequate assessment of the fifth-grade IEP in light of Drew's unique needs, abilities, and circumstances. In order to properly consider all relevant actions school districts take in response to a child's behavioral problems, the IDEIA must be amended to include detailed requirements as to the contents of FBAs and BIPs, and should require FBAs and BIPs when a child's behavior impedes his learning or that of others.

CONCLUSION

The IDEIA's requirement that a public school system tailor a FAPE to the specific needs of a child with disabilities through an IEP²⁴⁷ is essential to ensuring that children with disabilities have access to an adequate education. However, the Tenth Circuit in *Andrew F.* demonstrates how courts applying the some educational benefit standard fail to properly consider a child's unique needs, abilities, and circumstances when evaluating the substantive adequacy of an IEP. The Tenth Circuit thought that educations for children with disabilities were offered in only two makes and models: either a Chevrolet or a Cadillac. In order to give children with disabilities the education they are entitled to under the IDEIA and *Rowley*, courts, state legislatures, and Congress must implement solutions encouraging courts to recognize that appropriate education comes in all different kinds of makes and models.

To ensure that courts consider a child's unique needs, abilities, and circumstances when evaluating the substantive adequacy of an IEP, states should enact legislation that shifts the burden of proof to school districts. Further, courts applying the some educational benefits standard must evaluate whether a child progressed under the tutelage of the entire past IEP, instead of considering progress towards one goal or objective in

246. See *Andrew II*, 798 F.3d at 1341–42.

247. See *supra* note 2 and accompanying text.

isolation. Lastly, to encourage courts' consideration of FBAs and BIPs, the IDEIA must be amended to include detailed requirements as to the contents of FBAs and BIPs and require these measures when a child's behavior interferes with learning in the classroom.

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