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Endrew F. v. Douglas County School District: A "Meaningful" Opportunity to Alleviate the School-to-Prison Pipeline for Students with Disabilities

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ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT: A "MEANINGFUL" OPPORTUNITY TO ALLEVIATE THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES

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I. INTRODUCTION

Brandon and Tyler are both sixth grade students with individualized education programs (IEPs) for their serious emotional disabilities. Pursuant to his IEP, Brandon is in a behavioral support class that focuses on social and emotional learning for 60 minutes every day. He also receives psychological services twice a week and his parents receive counseling, twice a month, on how to work with Brandon. A behavioral intervention plan (BIP) that focuses on teaching replacement behaviors and reinforcing positive behaviors is part of Brandon's IEP. Finally, his IEP includes specific, measurable, and attainable behavioral goals. Tyler's IEP, on the other hand, mirrors the boilerplate IEP given to most middle school students with emotional disabilities in the district. It provides for 30 minutes of generic special education twice a month and no related services. Tyler has a BIP, but it focuses on punitive consequences.

Brandon graduated from high school and earned a scholarship to college. Tyler spent the next few years frequently suspended, referred to law enforcement, and failing classes. He eventually dropped out of school and became ensnared in the prison industrial complex.

The primary cause of the disparate outcomes for Brandon and Tyler was where they went to school. Under the current state of special education law, as eligible students with disabilities (SWD), both were entitled to a free appropriate public education (FAPE). However, Brandon was entitled to "meaningful" services in his state, whereas Tyler was entitled to services that were only "just above trivial" in his state.

The U.S. Supreme Court takes up this incongruity in its upcoming term, with implications well beyond the mere formulation of a consistent legal standard. Its decision in *Endrew F. v. Douglas County School District*[1] will ultimately either worsen or alleviate the "school-to-prison pipeline" for SWD.

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1. 137 S. Ct. 29 (2016) (granting certiorari).

II. DEFINING "FREE APPROPRIATE PUBLIC EDUCATION"

More than 90,000 students in Colorado, and more than 6.5 million students nationally (13% of the total public school enrollment),[2] have one or more disabilities that entitle them to special rights under the Individuals with Disabilities Education Act (IDEA).[3] Among their entitlements, and at the core of special education, is the right to FAPE.[4]

The right to FAPE for SWD was first articulated in the Education for All Handicapped Children Act, passed by Congress in 1975 and reauthorized as the IDEA in 1990.[5] FAPE is defined in IDEA as:

> special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet 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 . . . .[6]

Over the more than 40 years since the statute was adopted, the meaning of "appropriate" has been widely debated, misunderstood, and applied inconsistently.

In 1982, in *Board of Education v. Rowley*,[7] the U.S. Supreme Court issued its first and only ruling on the meaning of FAPE.[8] The Court held that to be "appropriate," an education must be reasonably calculated to confer "some educational benefit" upon the student.[9] In so doing, the Court rejected the propositions that IDEA requires schools to "maximize the potential of" or "provide 'equal' educational opportunities" to SWD.[10] *Rowley* set only a "basic floor of opportunity," but not "any one test for determining the adequacy of educational benefits conferred upon" SWD entitled to FAPE.[11] Ultimately, then, *Rowley* accomplished little in the way of clarifying the meaning of FAPE.

Consequently, lower courts labored to define this "basic floor of opportunity." As the briefs currently before the Supreme Court in *Endrew F.* summarize:

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2. *Children and Youth with Disabilities*, NAT'L CTR. FOR EDUC. STAT., http://nces.ed.gov/programs/coe/indicator_cgg.asp (last updated May 2016); COLO. DEP'T OF EDUC., FUNDED PUPIL COUNT (2015), https://www.cde.state.co.us/cdesped/dec2015_fundedpupilcount.

3. 20 U.S.C. §§ 1400–82 (2012).

4. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101 (2016).

5. U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH *IDEA* 1, 6 (2010), https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf (providing a summary history of IDEA).

6. 20 U.S.C. § 1401(9).

7. 458 U.S. 176 (1982).

8. *Id.* at 187.

9. *Id.* at 200, 203–04.

10. *Id.* at 189, 198.

11. *Id.* at 201–02.

> Two circuits [the Third and Sixth] hold that IEPs must be calculated to confer on students with disabilities a substantial educational benefit, which they refer to as a "meaningful educational benefit." Five other circuits [the Tenth, Fourth, First, Seventh, and Eleventh] expressly acknowledge their disagreement with this higher standard and hold that Rowley requires only a just-above-trivial educational benefit. Three circuits [the Second, Fifth, and Eighth] appear to apply the just-above-trivial standard but have not expressly rejected the higher standard. The Ninth Circuit is internally conflicted, with different panels aligning themselves with opposite sides of the circuit split. The D.C. Circuit has not described the required level of benefit.[12]

The chasm in the educational outcomes permissible under the "meaningful" versus the "just-above-trivial" standards is illustrated in a comparison of two cases.

In *Ridgewood Board of Education v. N.E. ex rel. M.E.*,[13] the Third Circuit Court of Appeals was presented with a student who tested in third grade in the ninety-fifth percentile for intelligence but tested only in the second percentile for reading, and had consistently failed to make academic progress, and had grown increasingly anxious and depressed.[14] That student finally received an IEP in eighth grade, but that IEP proved ineffective, with the student making minimal improvements and the school board changing his grades to pass–fail, purportedly to minimize the impact of failing on his self-esteem.[15] Both the school board and the district court determined that, despite these results, the student had received FAPE.[16] In reviewing this issue, the Third Circuit reiterated its previous holding "that IDEA 'calls for more than a trivial educational benefit' and requires a satisfactory IEP to provide 'significant learning' and confer 'meaningful benefit,'" as determined using a careful, individualized "student-by-student analysis."[17] Using this framework, the Third Circuit remanded the student's case, finding that the district court failed to review for "significant learning" and "meaningful benefit" or perform a sufficiently individualized analysis.[18]

By contrast, in *E.S. v. Independent School District, No. 196*,[19] the Eighth Circuit Court of Appeals required no such showing of significant or meaningful benefits.[20] The case involved a seventh grader with dyslexia seeking an order adding one-to-one tutoring using a specific in-

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12. Petition for Writ of Certiorari at *10, Endrew F. v. Douglas Cty. Sch. Dist. Re-1, No. 15-827 (U.S. Dec. 22, 2015), 2015 WL 9412874.
13. 172 F.3d 238 (3d Cir. 1999).
14. *Id.* at 243–45.
15. *Id.* at 243–44.
16. *Id.* at 244.
17. *Id.* at 247–48.
18. *Id.* at 248.
19. 135 F.3d 566 (8th Cir. 1998).
20. *See id.* at 569.

structional method to her IEP.[21] The Eighth Circuit affirmed the district court's denial of such an order, finding that the student received sufficient academic benefit based on the following standardized test results over three years: her broad reading skills rose from a 3.0 to a 3.8 grade-level equivalent; her reading comprehension rose from a 3.2 to a 5.1 grade level; her broad written language rose from a 2.7 to a 3.1 grade level; and her writing skills rose from a 2.1 to a 3.8 grade level.[22] Thus, the Eighth Circuit found that a seventh grader, testing at, on average, a third-grade level, who had made only the slightest amount of progress in three years, had received FAPE.[23]

As these courts and others labored and reached inconsistent results, SWD continued experiencing marginalization, low expectations, under-resourced schools, and unmet needs.[24] Additionally, a relatively new barrier confronts SWD: the "school-to-prison pipeline."[25]

III. STUDENTS WITH DISABILITIES AND THE SCHOOL-TO-PRISON PIPELINE

The school-to-prison pipeline is a system of laws, policies, and practices—such as exclusionary disciplinary and school policing—that pushes students out of school and onto a path toward the juvenile and criminal systems.[26] Nationally and in Colorado, SWD are disproportionately trapped in this pipeline; they are suspended, expelled, referred to law enforcement, and subjected to school-related arrests with greater

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21. *Id.* at 568.

22. *Id.* at 569.

23. *See also* K.E. *ex rel.* K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 810 (8th Cir. 2011) (finding FAPE provided even where student "fail[ed] to meet some of her IEP goals" and her "test results d[id] not demonstrate the level of growth that is typical for children of her grade level"); Amy J. Goetz, Tammy L. Pust & Atlee Reilly, *The Devolution of the* Rowley *Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLINE L. REV. 503, 519–24 (2011) (collecting Eighth Circuit cases that "reflect an apparent judicial satisfaction with almost any level of progress, no matter how negligible or inferential").

24. NAT'L COUNCIL ON DISABILITY, ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATUS OF EVIDENCE-BASED RESEARCH 26–28 (2013), http://www.ncd.gov/rawmedia_repository/381fe89a_6565_446b_ba18_bad024a59476.pdf.

25. *See, e.g.*, Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 60–71 (2016); Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, HECHINGER REP. (Oct. 26, 2014), http://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/; Julianne Hing, *Race, Disability and the School-to-Prison Pipeline*, COLORLINES (May 13, 2014, 7:00 AM), http://www.colorlines.com/articles/race-disability-and-school-prison-pipeline.

26. *See, e.g.*, Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court's "Age Matters" Jurisprudence*, 46 LOY. L.A. L. REV. 933, 950–68 (2013); Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & EDUC. 653, 653–62 (2013); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 929–57 (2016).

frequency than their peers without disabilities.[27] Such disparities run afoul of one of Congress' primary purposes in passing IDEA—preventing schools from excluding SWD.[28]

According to data from the Office for Civil Rights of the U.S. Department of Education, SWD in public schools across the nation are more than twice as likely to receive one or more out-of-school suspensions than students without disabilities.[29] Moreover, they represent approximately a quarter of students subjected to school-related arrests, even though they are only about 13% of the total student population.[30] In Colorado, during the 2011–2012 school year, SWD were 10.8% of the total student population but 17.9% of students suspended out-of-school, 17.8% of students expelled, 18.0% of students referred to law enforcement, and 24.4% of students with school-related arrests.[31]

Discipline disparities are even more pronounced when examining intersections of disability, race, and gender. For example, nationwide, more than one quarter of black, male SWD receive one or more out-of-school suspensions, compared to just two percent of white, female students without disabilities.[32] Not coincidentally, black males with disabilities are typically the most overrepresented group in juvenile justice systems.[33]

IV. *ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT*

In January 2017, the U.S. Supreme Court will hear a case, *Endrew F. v. Douglas County School District*, which will impact the representation of SWD in the pipeline. The specific question before the Court will be: "What is the level of educational benefit that school districts must

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27. Office for Civil Rights, *Civil Rights Data Collection*, U.S. DEP'T EDUC., http://ocrdata.ed.gov/ (last visited Jan. 11, 2017).

28. Joseph B. Tulman & Kylie A. Schofield, *Reversing the School-to-Prison Pipeline: Initial Findings from the District of Columbia on the Efficacy of Training and Mobilizing Court-Appointed Lawyers to Use Special Education Advocacy on Behalf of at-Risk Youth*, 18 U.D.C. L. REV. 215, 216 (2015) (citing Honig v. Doe, 484 U.S. 305, 327 (1988)); *see also Honig*, 484 U.S. at 327 ("[O]ne of the evils Congress sought to remedy [via IDEA] was the unilateral exclusion of disabled children by *schools*")). One of the cases that led to the passage of IDEA, *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), struck down the District of Columbia's refusal to educate "exceptional" children and its practice of excluding them without due process. Bd. Of Educ. v. Rowley, 458 U.S. 176, 180 n.2 (1982) ("Two cases, . . . [including *Mills*], were later identified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it." (citations omitted)); *Mills*, 348 F. Supp. at 876.

29. Office for Civil Rights, *Civil Rights Data Collection*, U.S. DEP'T EDUC., http://ocrdata.ed.gov/ (last visited Jan. 11, 2017).

30. *Id.*

31. *Id.*

32. *Id.*

33. *See, e.g.*, Amanda Merkwae, Note, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 151–57 (2015); Andrea J. Sedlak & Carol Bruce, *Youth's Characteristics and Backgrounds*, JUVENILE JUSTICE BULLETIN, Dec. 2010, at 1, 2–7, https://www.ncjrs.gov/pdffiles1/ojjdp/227730.pdf.

confer on [SWD] to provide them with the [FAPE] guaranteed by the [IDEA]?"[34]

Endrew F., the plaintiff in the case, is a student with autism.[35] He attended public school in Douglas County, Colorado from preschool through fourth grade, with an IEP each year.[36] He began experiencing behavioral problems in second and third grade, which grew more severe and included self-harming behaviors by fourth grade.[37] The family and the school district agree that these behaviors interfered with Endrew's ability to learn, as evidenced, for example, by his regular removals from the classroom and by the minimal progress he made toward the goals in his IEP.[38] His proposed fifth-grade IEP included roughly the same goals and objectives as those in his previous years' IEPs.[39] Citing his lack of behavioral and academic progress, his parents rejected the proposed IEP for fifth grade, withdrew him from public school, placed him in a private school specializing in autism, and sought tuition reimbursement from the school district under IDEA.[40]

The case began with Endrew's parents seeking tuition reimbursement before an administrative law judge and then federal district and circuit courts.[41] They argued that the fifth-grade IEP denied him FAPE because it was not reasonably calculated to provide educational benefit.[42] Each forum found against the family, finding that reimbursement was not required because "some educational benefit" had been provided.[43] At the Tenth Circuit Court of Appeals, Endrew argued that, in a recent opinion, the Tenth Circuit had adopted the higher standard used by other circuits.[44] The Court rejected this reading of the prior opinion, acknowledging, but declining to adopt, the other circuits' higher standard and hewing to its own interpretation of *Rowley* as requiring only any educational benefit that is "more than *de minimis*."[45]

The case has united special education and disability rights advocates, scores of which have filed amicus briefs in support of a higher FAPE standard. The United States (i.e., the federal government), 118

34. Brief for Petitioner at *i, Endrew F. v. Douglas Cty. Sch. Dist. Re-1, No. 15-827 (U.S. Nov. 14, 2016), 2016 WL 6769009.

35. Petition for Writ of Certiorari at *6, *Endrew F.*, No. 15-827, 2015 WL 9412874.

36. *Id.*

37. *Id.*

38. *Id.* at *6–7.

39. *Id.* at *7.

40. *Id.*; Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1333 (10th Cir. 2015); *see* 20 U.S.C. § 1412(a)(10); 34 C.F.R. § 300.148.

41. Petition for Writ of Certiorari at *7–8, Endrew F. v. Douglas Cty. Sch. Dist. Re-1, No. 15-827 (Dec. 22 2015), 2015 WL 9412874; *Endrew F.*, 798 F.3d 1329; Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 2014 WL 4548439 (D. Colo. Sept. 15, 2014).

42. Petition for Writ of Certiorari at *7–8, *Endrew F.*, No. 15-827, 2015 WL 9412874.

43. *Id.* at *7–9.

44. *Endrew F.*, 798 F.3d at 1338–40 (citing Jefferson Cty. Sch. Dist. R–1 v. Elizabeth E. *ex rel.* Roxanne B., 702 F.3d 1227 (10th Cir. 2012)).

45. *Id.*

members of Congress, three states, and the National Education Association, among others, also filed amicus briefs in support of a higher standard.[46] Those who oppose a higher FAPE standard, including the National School Boards Association, the School Superintendents Association, and the Colorado Department of Education, argue that revisiting a standard that has been working well for 30 years will cause disruption, including, they predict, higher costs resulting from the provision of greater benefits to SWD and an opening of the floodgates to litigation to further define any new standard.[47]

V. POTENTIAL IMPACT

The Court's decision will likely impact SWD's representation in the pipeline in four primary ways.

First, there is a close nexus between behavior and academic engagement, rigor, and performance.[48] The more "appropriate" the education of a student with a disability, the more likely she is to abide by rules.[49] On the flip side, SWD who do not receive adequate supports and services are more likely to engage in misconduct and, in turn, "are more likely to end up suspended, to be referred to alternative schools, or to become court-involved."[50] Thus, it stands to reason that a higher standard

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46. *See* Endrew F. v. Douglas County School District, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/endrew-f-v-douglas-county-school-district/ (last visited Jan. 11, 2017) (listing amici briefs filed by these and other amici).

47. *See, e.g.*, Brief in Opposition to Petition for a Writ of Certiorari at 10–25, 27, Endrew F. v. Douglas Cty. Sch. Dist. Re-1, No. 15-827 (U.S. Apr. 15, 2016) (contending that the circuit split "is one of adjectives, not outcomes" and suggesting that delineation of a new standard would inject uncertainty into the 6.5 million IEPs created each year); John Aguilar, *U.S. Supreme Court Will Hear Douglas County Student With Disabilities Case*, DENV. POST (Dec. 28, 2016), http://www.denverpost.com/2016/09/29/supreme-court-douglas-county-student-disabilities-case/ (comments of Colorado Association of School Boards); Mark Keierleber, *Why Advocates Hope the Supreme Court Will Save Special Education*, 74 MILLION (Oct. 5, 2016), https://www.the74million.org/article/why-advocates-hope-the-supreme-court-will-save-special-education (same); *cf.* Brief for National Association of State Directors of Special Education as Amicus Curiae Supporting Neither Party at 6–12, Endrew F. v. Douglas Cty. Sch. Dist. Re-1, No. 15-827 (U.S. Nov. 17, 2016) (arguing that *Rowley* works in practice, because the practice is to provide a more meaningful than trivial FAPE).

48. Ivory A. Toldson, Tyne McGee & Brianna P. Lemmons, *Reducing Suspensions by Improving Academic Engagement Among School-Age Black Males*, *in* CLOSING THE SCHOOL DISCIPLINE GAP 107–17, (Daniel J. Losen, ed., 2015); CTR. FOR EFFECTIVE COLLABORATION & PRACTICE, PREVENTION STRATEGIES THAT WORK: WHAT ADMINISTRATORS CAN DO TO PROMOTE POSITIVE STUDENT BEHAVIOR 8–9, http://cecp.air.org/preventionstrategies/prevent.pdf; Robert F. Putnam, Robert H. Horner & Robert Algozzine, *Academic Achievement and the Implementation of School-wide Behavior Support*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS, https://www.pbis.org/common/cms/files/Newsletter/Volume3%20Issue1.pdf (last visited Jan. 11, 2017).

49. Yael Cannon, Michael Gregory & Julie Waterstone, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional, and Behavioral Challenges*, 41 FORDHAM URB. L.J. 403, 412 (2013); Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 878 (2009/2010).

50. CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 55 (2012); Cannon, Gregory & Waterstone, *supra* note 49, at 412–25; Tulman & Schofield, *supra* note 28, at 220; Tulman & Weck, *supra* note 49, at 878.

for FAPE, and the resulting benefits, will help stem the flow of SWD into the pipeline.

Effective behavior management tools already in IDEA that may be more seriously considered essential to an "appropriate" education under heightened FAPE scrutiny, and thus utilized with greater frequency, include:[51] special education, such as affective needs classrooms with social skills programming;[52] related services, such as counseling and psychological services;[53] supplementary aids and services, such as one-on-one paraprofessionals;[54] nonacademic services, such as referrals to mental health agencies;[55] and functional behavioral assessments and behavioral intervention plans.[56]

Second, SWD who experience "a change of placement" because of disciplinary removals have an ongoing entitlement to FAPE after the change.[57] A change in placement occurs if the student is subjected to: (a) removal for more than ten consecutive school days (e.g., expulsion) or (b) a series of removals (e.g., multiple short-term suspensions) that constitute a pattern and total more than ten school days in a single school year.[58] Typically, school districts deliver, or at least purport to deliver, FAPE to removed SWD through placements in alternative schools, in-school centers, private programs (e.g., day treatment centers), online classes, or home-based services.[59]

These alternatives, however, tend to further feed the school-to-prison pipeline.[60] A higher standard for what is considered "appropriate"

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51. *See generally* Office of Special Educ. & Rehab. Servs., U.S. Dep't of Educ., Dear Colleague Letter on Supporting Behavior of Students with Disabilities (Aug. 1, 2016), https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf; THE S. DISABILITY LAW CTR., KEEPING STUDENTS WITH DISABILITIES IN SCHOOL: LEGAL STRATEGIES AND EFFECTIVE EDUCATIONAL PRACTICES FOR PREVENTING THE SUSPENSION OF STUDENTS WITH DISABILITIES (2014); Tulman & Weck, *supra* note 49, at 902–05.

52. 34 C.F.R. § 300.39.

53. *Id.* § 300.34; *see* Cannon, Gregory & Waterstone, *supra* note 49, at 458–62.

54. 34 C.F.R. § 300.42.

55. *Id.* § 300.107(b).

56. *Id.* § 300.530(d)(1)(ii); *see* Cannon, Gregory & Waterstone, *supra* note 49, at 466–74; Stephanie M. Poucher, Comment, *The Road to Prison is Paved with Bad Evaluations: The Case for Functional Behavioral Assessments and Behavior Intervention Plans*, 65 AM. U. L. REV. 471, 517–21 (2015) (arguing for more specific standards as to when BIPs and FBAs are required).

57. 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i). SWD may be treated like other students up until the eleventh day of removal. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

58. 34 C.F.R. § 300.536.

59. *See* LAUDAN Y. ARON, THE URBAN INST., AN OVERVIEW OF ALTERNATIVE EDUCATION 3–11 (2006), http://ncee.org/wp-content/uploads/2010/04/OverviewAltEd.pdf; PRISCILLA ROUSE CARVER, LAURIE LEWIS & PETER TICE, NAT'L CTR. FOR EDUC. STATISTICS, ALTERNATIVE SCHOOLS AND PROGRAMS FOR PUBLIC SCHOOL STUDENTS AT RISK OF EDUCATIONAL FAILURE: 2007–08, at 1–2, A-6 (2010), https://nces.ed.gov/pubs2010/2010026.pdf; *Alternative Education*, COLO. DEP'T EDUC., https://www.cde.state.co.us/dropoutprevention/alternativeeducation (last visited Jan. 11, 2016).

60. *See* LAURA MCCARGAR, INVISIBLE STUDENTS: THE ROLE OF ALTERNATIVE AND ADULT EDUCATION IN THE CONNECTICUT SCHOOL-TO-PRISON PIPELINE 29–32 (2011), http://www.kidscounsel.org/ABWF_PROP_InvisibleStudentsFinal.pdf; AUGUSTINA H. REYES,

will inch disciplinary alternative schools and programs closer toward fulfilling one of their primary goals—reengaging and rehabilitating students with behavioral issues. Additionally, the more that alternative schools and programs fulfill this intended purpose, the more likely that SWD they serve will be able to successfully reenter traditional schools and graduate, rather than falling deeper into the pipeline.[61] The same can be said for the provision of FAPE in correctional facilities.[62]

Third, the nebulousness of FAPE to date has resulted in confusion and misunderstanding about the entitlement and lack of implementation, particularly with regard to what constitutes a disability and how SWD should be identified, served, and disciplined.[63] Because educators struggle to implement legal standards that Congress and courts have left ill-defined, the default for IEPs often becomes merely what is available, affordable, or easiest.[64] Clarity and specificity from the Court ought to begin to allow IEP teams to better understand and focus on providing an "appropriate" education for SWD.

DISCIPLINE, ACHIEVEMENT, & RACE: IS ZERO TOLERANCE THE ANSWER? 47–69 (2006); Judi Vanderhaar, Marco Munoz & Joseph Petrosko, *Reconsidering the Alternatives: The Relationship Between Suspension, Disciplinary Alternative School Placement, Subsequent Juvenile Detention, and the Salience of Race*, 5 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. RISK, no. 2, 2014, at 1.

61. *See, e.g.*, Michele L. Beatty, Note, *Not a Bad Idea: The Increasing Need to Clarify Free Appropriate Public Education Provisions Under the Individuals with Disabilities Education Act*, 46 SUFFOLK U. L. REV. 529, 548 (2013) ("Without a clear definition of FAPE, states are free to follow the minimal standards set forth in *Rowley*, and have no solid guidelines requiring them to ensure students receive the same level of 'appropriate' education while excluded from their regular setting.").

62. Office of Special Educ. & Rehab. Servs., U.S. Dep't of Educ., Dear Colleague Letter (Dec. 5, 2014), https://www2.ed.gov/policy/gen/guid/correctional-education/idea-letter.pdf; *Access to Quality Education*, JUV. L. CTR., http://jlc.org/current-initiatives/protecting-incarcerated-youth/access-quality-education (last updated Nov. 16, 2015).

63. *See* Cannon, Gregory & Waterstone, *supra* note 49, at 409; Anna P. Goettl, *Emptying Classrooms to Fill Detention Centers: The Disappointing Discipline Standards Under IDEA*, 9 FED. CTS. L. REV. 41, 44–48, 51–54 (2016).

64. Case law and literature shows how this has played out in several contexts relevant to the pipeline. Use and implementation of FBAs and BIPs is one. *See, e.g.*, Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. # 221, 375 F.3d 603, 615 (7th Cir. 2004) (finding that neither the IDEA nor regulations set substantive standards for BIPs and, thus, the plaintiff's BIP "could not have fallen short of substantive criteria that do not exist"); NAT'L COUNCIL ON DISABILITY, BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES 8 (2015), http://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf ("The confusing disciplinary provisions added and refined in the last two IDEA reauthorizations have allowed schools to ignore their overarching obligation to provide a . . .FAPE[], particularly the requirement to consider behavioral supports in the IEP."); Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 Seattle U. L.R. 175, 202–03, 209 (2011), http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2060&context=sulr (surveying FBA and BIP case law and decisions and finding that lack of specificity in legal standards led to *ad hoc* results, based on the individual evidence in the case or reliance on expert witness testimony). Discipline, and FAPE requirements as to process and substance in the context of discipline is another. *See* Beatty, *supra* note 61, at 548; Goettl, *supra* note 63, at 52 (explaining that misunderstanding of the IDEA's disciplinary provisions results in "school officials . . . tend[ing] to err on the side of caution and defer behavior-related issues in [SWD] directly to the police").

Fourth, the Court may shift the culture of special education and treatment of SWD, for better or worse, by the signals sent to educators, parents, and SWD in its decision. As explained in Section II, *supra*, the right to FAPE currently rests at a "basic floor."[65] If the Court elects to mandate more "meaningful" educational benefits for every SWD in the country, its decision may prove to be a landmark in a strengthening of the entitlement to FAPE over time.[66]

VI. LIMITATIONS AND POTENTIAL UNINTENDED CONSEQUENCES

Realistically, a decision in Endrew F.'s favor will not be a panacea for SWD. Most broadly, a decision endorsing a "meaningful" right to FAPE nevertheless endorses the system of which it is a part, the same system that produces and tolerates the disparate outcomes discussed *supra* in Section III.[67] Even if the Court adopts the higher standard in *En-*

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65. *See, e.g.*, *supra* note 23. The language used by some of these courts to describe the right to FAPE shows the minimal regard for its requirements. Perhaps most egregiously, the Eleventh Circuit has suggested that, because before the IDEA, SWD might not have received any education *at all*, they ought to be, and FAPE was, satisfied with the scraps from *Rowley*'s "floor." JSK *ex rel.* JK v. Hendry Cty. Sch. Bd., 941 F.2d 1563, 1573 (11th Cir. 1991) (finding that even "the basic floor of opportunity . . . provides significant value to the handicapped child who, before [IDEA], might otherwise have been excluded from *any* educational opportunity"); *see also, e.g.*, D.B. *ex rel.* Elizabeth B. v. Esposito, 675 F.3d 26, 37 (1st Cir. 2012) (finding no need for "a determination as to a child's potential for learning and self-sufficiency" before proceeding to determine whether his "IEP complies with the IDEA"); Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008) (explaining *Rowley*'s standard as "not an onerous one"); A.B. *ex rel.* D.B. v. Lawson, 354 F.3d 315, 330 (4th Cir. 2004) (observing that "IDEA's FAPE standards are far more modest than to require that a child excel or thrive" and endorsing a result that provided much less). Even cases with less problematic language observe that *Rowley* does not provide them with the tools to require better results. The Tenth Circuit illustrated this in *Endrew F.*, finding that even though it was a "close case," there was sufficient evidence of some progress to meet *Rowley*'s "modest[]," standard. Endrew F. v. Douglas Cty. Sch. Dist. Re–1, 798 F.3d 1329, 1342 (10th Cir. 2015).

66. Under this theory, FAPE could follow in the footsteps of, for example, the right to effective assistance of counsel for criminal defendants. *See generally* Stephen F. Smith, *The Right to Effective Assistance of Counsel: Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515 (2009) (analyzing how Strickland v. Washington, 466 U.S. 668 (1984), established that right, but it languished until strengthened by a trilogy of cases years later); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 815–16 (2010) (same). The *Strickland* line of cases is a particularly apt example, as *Strickland*, like *Rowley*, provided lower courts little to go on in enforcing the right, leading to judicial deferral to professional norms and endorsement of unimpressive outcomes. *See* Smith, *supra*, at 521–26. As occurred with *Strickland*, *see id.* at 543, *Endrew F.* could be the first in a series to move toward a higher standard, and thus an increase in successful IDEA claims—or, better yet, educational outcomes for SWD without the need for legal representation.

67. *See generally* Tamar R. Birckhead, *Juvenile Justice Reform 2.0*, 20 J.L. & POL'Y 15, 33, 39–45 (2011) (summarizing critiques of *Brown v. Board of Education*'s transformative power and analyzing how *In re* Gault, 387 U.S. 1 (1967), which extended due process rights to juveniles in delinquency proceedings, serves "as an example of what happens when courts serve an ideological function of luring a movement for social reform to an institution that is structurally constrained from serving its needs, providing only an illusion of change" (internal quotation marks and citation omitted)); Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (examining how the procedural right to counsel, in part, legitimizes and hinders solutions to systemic issues in the criminal justice system); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (dissecting how systems "can adjust to [court-ordered] rules in ways other than obeying them. And the rules can in turn respond to the systemin a variety of ways, not all of them pleasant").

drew F., systems still will not be obligated to "maximize the potential of" or "provide equal educational opportunities" to SWD.[68] Additionally, regardless of the outcome in *Endrew F.*, public schools will almost certainly continue to lack the resources necessary to deliver the individualized educational services to SWD envisioned by IDEA[69] and parents will still struggle to enforce the rights of SWD.[70]

If the Court does adopt a higher standard, more "meaningful" outcomes may nevertheless not result because there may be an unintended, negative recalibration of schools' approach to IDEA. For instance, schools may attempt to reduce the number of students deemed eligible for services so as to avoid FAPE obligations altogether.[71] Consequently, the likelihood of unidentified SWD becoming ensnared in the pipeline, for now, will not change; in fact, the odds will rise as the numbers of these unidentified students rise.

Conversely, if the Court adopts the "just-above-trivial" standard, it will further reinforce the "low expectations" that drove Congress to adopt the IDEA in the first place.[72] Furthermore, a "just-above-trivial" standard would maintain or exacerbate socioeconomic achievement gaps (or opportunity gaps) among SWD. That is because more affluent families can afford to live in districts with greater resources for special education, to pay advocates when their SWD are not academically progressing, to enroll in private schools that specialize in SWD, and to supplement school with extra services, such as afterschool tutoring and summer programs. They can also pay attorneys to litigate FAPE issues. Low-wealth families, on the other hand, are more likely to attend under-resourced schools and to be unable to afford skilled advocates to enhance FAPE.[73] Moreover, some of the mechanisms for remedies in IDEA, such as private school tuition reimbursement,[74] have limited efficacy for families without substantial resources.[75] In short, the minimum FAPE requirement, however it is defined, acts as a safety net for economically disad-

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68. Bd. of Educ. v. Rowley, 458 U.S. 176, 198–99 (1982).

69. *See, e.g.*, Erin Phillips, Note, *When Parents Aren't Enough: External Advocacy in Special Education*, 117 YALE L.J. 1802, 1824–26 (2008).

70. *See, e.g.*, *id.* at 1827–37.

71. *See* Cannon, Gregory & Waterstone, *supra* note 49, at 415–16, 436–47 (discussing myriad ways in which SWD are not identified, or are incompletely or improperly identified); Goettl, *supra* note 63, at 51 n.72, 55 n.110 (discussing consequences of failure to properly identify SWD).

72. 20 U.S.C. § 1400(c)(4) ("[I]implementation of [the IDEA] has been impeded by low expectations.").

73. *See, e.g.*, Goettl, *supra* note 63, at 51 ("[M]any families cannot afford a lawyer to interpret IDEA for them or to help them through the complaint process"); Margaret M. Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263, 278, 281 (2008).

74. *See* 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148.

75. *See* Cannon, Gregory & Waterstone, *supra* note 49, at 411 (quoting RUTH COLKER, DISABLED EDUCATION: A CRITICAL ANALYSIS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 239 (2013)); Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 121–30 (2011).

vantaged SWD; defining it as "just-above-trivial" further entrenches those students at the bottom of the food chain.

VII. CONCLUSION

Ideally, the Supreme Court will choose the higher standard for FAPE in *Endrew F.* and, in turn, reduce the number of SWD in the school-to-prison pipeline. Regardless of the Court's decision, however, Congress, states, districts, and schools could voluntarily raise standards for educating SWD. Doing so would not only be in the best interests of students, but also would help improve school climate and safety and student achievement and graduation rates. After all, school officials often justify their actions under the *in loco parentis* ("in place of the parent") doctrine,[76] and what parent wants anything but the highest quality education for her child?

Realistically though, a more radical and holistic approach to eliminating disproportionality and dismantling the pipeline for SWD—one that involves adequate and equitable funding, robust oversight and enforcement of SWD's rights,[77] reforms related to school policing, and developmentally appropriately school discipline—will be needed. This approach will only come from zealous advocacy on the local, state, and national levels by students, parents, educators, and disability rights and education justice activists.

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76. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 413–14 (2007); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986); New Jersey v. T.L.O., 469 U.S. 325, 336 (1985); *see also* Susan Stuart, In Loco Parentis *in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 974–83 (2010).

77. Not limited to rights under the IDEA, but including such rights as those under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Titles II and/or III of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, 12181; and applicable state civil rights or other laws.