The Supreme Court's Decision in *Endrew F. v. Douglas County School District RE-1*: A Meaningful Raising of the Bar?*

Perry A. Zirkel

Issued in March 2017, the Supreme Court's decision in *Endrew F. v. Douglas County School District RE-1*[1] addressed the substantive standard for the central obligation under the Individuals with Disabilities Education Act (IDEA)[2] of a "free appropriate public education" (FAPE).[3] The Court had not revisited this issue for 35 years, having originally addressed it in its landmark IDEA decision in *Board of Education of Hendrick Hudson Central School District v. Rowley*.[4] This brief case note consists of three parts. The first part provides successive overviews of (a) the IDEA, including the central role of FAPE; (b) the *Rowley* decision; and (c) the post-*Rowley* FAPE developments prior to *Endrew F*. The second part provides an analysis of the Court's *Endrew F*. decision. The final part discusses the likely effect of *Endrew F.* in subsequent court decisions and IDEA amendments.

I. Pre-*Endrew F.*

The IDEA

Dating back to 1975,[5] the IDEA is federal legislation intended to provide students with disabilities access to schools and, within schools, to special education.[6] Overlapping with the federal civil rights legislation of Section 504 of the Rehabilitation Act of 1973[7] and its

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[1] 137 S. Ct. 988 (2017).

[2] 20 U.S.C. §§ 1400–1419 (2013).

[3] *Id*. §§ 1401(9) and 1412(a)(1).

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

[5] Its original version was the Education of the Handicapped Act, and Congress subsequently amended the act in 1986, 1990 (when its name changed to the IDEA), 1997, and—most recently—2004. See, e.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 211, 212 n.2 (2011).

subsequent sister statute, the Americans with Disabilities Act,[8] the IDEA has a narrower and more detailed focus on education.[9]

The IDEA provides specific requirements from child find[10] and eligibility[11] to dispute resolution[12] and remedies.[13] These requirements are primarily but not at all exclusively procedural.[14]

The "central pillar of the IDEA"[15] is the public schools' obligation to provide each eligible student, via an individualized educational program (IEP),[16] with a FAPE.[17] This core requirement accounts for the bulk of IDEA litigation.[18] The courts have developed four

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[6] E.g., *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 179:

> The Education of the Handicapped Act . . . provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"

[7] 29 U.S.C. § 794 (2013).

[8] 42 U.S.C. §§ 12101 *et seq*. (2013).

[9] For a systematic canvassing of the differences and similarities between the IDEA and these two federal civil rights disability laws, see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 Ed.Law Rep. 767 (2012).

[10] Child find, as interpreted in modern case law, refers to the school district's obligation to conduct an evaluation within a reasonable period of time upon reasonable suspicion that the child may be eligible under the IDEA. E.g., Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 Ed.Law Rep. 574 (2014).

[11] E.g., Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFFALO L. REV. 83 (2009).

[12] E.g., Perry A. Zirkel, *A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings*, 326 Ed.Law Rep. 1 (2016).

[13] E.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 211 (2011).

[14] E.g., *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 205:

> [T]he elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act . . . .

[15] Sytsema v. Acad. Sch. Dist., 538 F.3d 1306, 1312, 236 Ed.Law Rep. 94 (10th Cir. 2008).

[16] 20 U.S.C. § 1414(d)(1)(A) (2013). The IEP is the "cornerstone" of this central pillar and represents the detailed specification of the individual eligible child's FAPE, which the required team

dimensions of FAPE, starting with its procedural and substantive aspects in *Rowley* to the more recent lower courts' formulation of failure to implement[19] and capacity to implement the IEP.[20]

The *Rowley* Decision

In its landmark IDEA decision, the Supreme Court established the initial procedural and substantive standards for FAPE. In the context of a bright primary school child with a hearing impairment who was performing at or above grade level while mainstreamed, or integrated, in regular education classes,[21] the issue was whether her IEP should extend to interpreter services for academic subjects. Concluding that the emphasis of the Act was primarily procedures "to open the

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members, including the parents, have agreed upon. *Murray v. Montrose Cty. Sch. Dist. RE-1J*, 51 F.3d 921, 923 n.3, 99 Ed.Law Rep. 126 (10th Cir. 1995).

[17] 20 U.S.C. § 1412(a)(1) (2013).

[18] *E.g.*, Perry A. Zirkel, *Case Law under the IDEA*, IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS AND INDICATORS 709 (2014) (showing the distribution of published court decisions under the IDEA). This predominance is based on not only the cases specific to the issue of FAPE but also those in the overlapping category of remedies for denials of FAPE, particularly tuition reimbursement and compensatory education. *See, e.g.*, Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013) (analyzing procedural and substantive denials of FAPE in IDEA hearing/review officer and court decisions for the period 2000–2012 in terms of the resulting remedial relief).

[19] E.g., Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409 (2016).

[20] This hybrid of the substantive and implementation dimensions recently arose in a series of New York City cases and has started to emerge elsewhere. E.g., *Y.F. v. N.Y.C. Dep't of Educ*., 659 F. App'x 3, 338 Ed.Law Rep. 52 (2d Cir. 2016); *B.P. v. N.Y.C. Dep't of Educ*., 634 F. App'x 845, 330 Ed.Law Rep. 23 (2d Cir. 2015); *S.T. v. Howard Cty. Pub. Sch. Sys*., 627 F. App'x 255 (4th Cir. 2015); *M.O. v. N.Y.C. Dep't of Educ*., 793 F.3d 236, 320 Ed.Law Rep. 77 (2d Cir. 2015); *Beckwith v. District of Columbia*, __ F. Supp. 3d __ (D.D.C. 2016); *James v. District of Columbia*, 194 F. Supp. 3d 131. 339 Ed.Law Rep. 189 (D.D.C. 2016).

[21] The findings at the district court level included an IQ of 122, standardized test scores in first grade that were at or above the level of her peers and above national grade level standards. *Rowley v. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.*, 483 F. Supp. 528, 532 (S.D.N.Y. 1980). Moreover, with hearing aids and lip reading, she could hear only approximately 59% the words spoken to her. *Id*. Her IEP included (1) an FM wireless hearing aid, (2) services of a tutor for the deaf for one hour per day, and (3) speech therapy for three hours per week. *Id*. at 531.

door"[22] rather than substantive specifications beyond a "'basic floor,'"[23] the Court enunciated the following two-part test for FAPE:

> First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?[24]

Because the procedural side was not at issue in this case, the Court applied this relatively relaxed, benefit-based substantive standard in favor of the district within the context of the case, while disclaiming its more general applicability.[25]

Post-*Rowley* and Pre-*Endrew F*.

Ignoring this disclaimer, the long and wide line of *Rowley* progeny has broadly applied these procedural and substantive formulations with two respective twists. For the procedural part, the lower courts gradually developed a two-step analysis that started with whether the district violated one or more of the IDEA's procedural requirements and, if so, culminating with

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[22] *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 191 (1982) ("[T]he intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside").

[23] *Id*. at 201 (citing the Act's legislative history). The legal commentary concerning *Rowle*y has been extensive. For an example based on these two metaphors, see Perry A. Zirkel, *Building an Appropriate Education from* Board of Education v. Row*ley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983).

[24] *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 206–07.

[25] Apparently focusing on the nonqualified "benefit" element of the substantive standard, the Court warned:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a … child [with a disability] 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.

Id. at 202.

whether the violation(s) resulted in substantive harm to the child.[26] For the substantive side, the lower courts tended to divide into two camps—one that interpreted *Rowley* as requiring only "some," i.e., more than de minimis, educational benefit and the other that interpreted *Rowley* as requiring a "meaningful" educational benefit.[27] However, the lower courts during this period were not divided on a related issue, uniformly rejecting plaintiff-parent arguments for raising *Rowley*'s substantive standard based on the successive IDEA amendments in 1990, 1997, and 2004.[28]

In the 2004 amendments of the IDEA, Congress codified the two-part test for denials of FAPE based on procedural violations, although adding a substantive loss to the parent as a cognizable alternative to the benefit effect on the student.[29] On the substantive side, the Tenth Circuit's decision in *Endrew F. v. Douglas County School District RE-1*[30] presented the issue of whether the standard of "some" or "meaningful" benefit applied, choosing the lower, some

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[26] E.g., Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?*, 83 EXCEPTIONAL CHILD. 219 (2016) (analyzing a broad sample of court decisions addressing procedural FAPE claims in the IEP process).

[27] E.g., Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Ed.Law Rep. 1 (2009) (identifying the circuits that have used the some benefit standard, the meaningful benefit standard, and both of these substantive standards).

[28] E.g., Perry A. Zirkel, *Is It Time for Elevating the Substantive Standard for FAPE under IDEA?* 79 EXCEPTIONAL CHILD. 497 (2013); 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 396 (2008) (canvassing the legal commentary and court decisions specific to.

[29] 20 U.S.C. § 1415(f)(3)(E) (2013):

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: (i) Impeded the child's right to a FAPE; (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) Caused a deprivation of educational benefit.

For a systematic analysis of the court decisions specific to the parental prong, see Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement under the IDEA?* 15 CONN. PUB. INT. L.J. 1 (2016).

[30] 798 F.3d 1329, 1338–40, 321 Ed.Law Rep. 639 (10th Cir. 2015).

benefit standard in light of its own precedent and applying it in favor of the school district.[31] The parents filed a petition for certiorari specific to the substantive FAPE ruling.[32] The Court granted certiorari on September 29, 2016,[33] thus setting the stage for its decision.

II. *Endrew F.*

On March 22, 2017, the Supreme Court issued its decision with a refinement of the *Rowley* standard. Although, as the oral arguments illustrated,[34] the district remained steadfast in advocating the "some" benefit standard, the parents and the Solicitor General (SG) argued for alternatives other than "meaningful" benefit.[35] In a unanimous 8-0 opinion, the Court interpreted *Rowley* not only as expressly eschewing a single test[36] but also specific to the context of a mainstreamed child whose progress with an IEP was obviously more than sufficient.[37] Starting with the *Rowley* language, the Court added a more individualized predicate: "a school must offer an IEP reasonably calculated to enable a child to *make progress appropriate in light of the child's circumstances.*"[38]

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[31] *Id*. at 1340–41 (citing *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008). For the parents' two separate procedural FAPE claims, the Tenth Circuit applied the two-part test in also ruling—for the behavioral assessment at the first step and for the progress reporting claim at the second step—in favor of the district. *Id*. at 1334–38.

[32] The question that the petition identified was "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the [IDEA]?" http://www.scotusblog.com/wp-content/uploads/2016/05/15-827-Petition-for-Certiorari.pdf

[33] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 29 (2016).

[34] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-827_gfbh.pdf

[35] *Id*. at 3 ("substantially equal educational opportunities" - parents); *id*. at 17 ("achiev[ing] in general education curriculum [except for relatively few children entitled to] the alternate achievement standards" - parents); *id*. at 29 ("significant progress or appropriate progress toward grade level standards in light of the child's circumstances" – SG). The SG expressly urged the Court to avoid "meaningful" benefit as the answer. *Id*. at 21.

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

[37] *Id*. at 998 ("The [*Rowley*] Court had no need to say anything more particular, since the case before it involved a child whose progress plainly demonstrated that her IEP was designed to deliver more than adequate educational benefits . . . . The Court was not concerned with precisely articulating a governing standard for closer cases.").

[38] *Id*. at 999 and 1002 (emphasis added).

In accompanying dicta, the Court explained the various elements of this revised and more generalizable standard. First, the retained "reasonably calculated" part of this standard recognizes that the IEP team's judgment is prospective, fact-intensive, collaborative, reasonable rather than ideal,[39] and, like *Rowley*'s original recognition, not guaranteed.[40] Second, the new predicate starts with "progress" rather than merely benefit in light of the purpose of the IDEA.[41] Perhaps most significantly, the ultimate qualifier of "appropriate in light of the child's circumstances" reflects two overriding characteristics of the IDEA—its individualized nature and the wide-spectrum of the children it covers.[42] Moreover, the dicta suggest the reference points for the "circumstances" of this ad hoc qualifier for two respective segments of this spectrum. At the fully integrated end of the least restrictive environment (LRE) continuum,[43] the *Endrew F.* Court recited the *Rowley* referents of passing grades and annual promotion,[44] along with their non-absoluteness.[45]

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[39] *Id*. at 999 ("The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. . . . The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents. . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.").

[40] *Id*. at 998 ("[T]he IDEA cannot and does not promise 'any particular [educational] outcome.' . . . No law could do that—for any child.").

[41] *Id*. at 999 ("The essential function of an IEP is to set out a plan for pursuing academic and functional advancement. . . . A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.").

[42] *Id*. ("A focus on the particular child is at the core of the IDEA. . . . As we observed in *Rowley*, the IDEA 'requires participating States to educate a wide spectrum of handicapped children,' and '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.').

[43] 20 U.S.C. § 1412(a)(5) (2013); 34 C.F.R. §§ 300.114–300.117 (2014).

[44] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 999 ("[F]or a child fully integrated into the regular classroom, an IEP typically should, as *Rowley* put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'").

[45] *Id.* at 1000 n.2 ("This guidance should not be interpreted as an inflexible rule. We declined to hold in *Rowley*, and do not hold today, that 'every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE].'").

For the second, wider segment that includes Endrew,[46] the Court's suggestions are less clear. The first factor, by way of analogy, is an "appropriately ambitious" adjustment of Amy Rowley's advancement guidepost.[47] Other factors are indirect and subject to speculation, starting with the nature and severity of individual child's disability and the child's potential.[48] However, they declined to establish a "bright line rule," including enumeration, much less weighting, of the relevant multiple factors.[49]

However, the concluding dicta returned to refine the *Rowley* reminder of judicial deference to school authorities.[50] Specifically, the *Endrew F.* Court enunciated a qualified standard of judicial review, contingent upon the school district's "cogent and responsive" justification for meeting this new, individualized substantive standard.[51]

The Court remanded the case back to the lower courts to apply this standard to Endrew's IEP. The ultimate outcome for this case, as for other cases, is far from certain.

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[46] At the time of the IEP at issue in this case, Endrew was a fourth grader with autism who exhibited severe behaviors, such as screaming in class, climbing over other students, and occasionally eloping from school. *Id*. at 996. The district court decision further reveals that he also had a diagnosis of ADHD; in the fourth grade his behaviors had escalated to include head banging and, twice in the "calming room," defecating on the floor; and the district had shifted more of his time from the general education class to the special education classroom. His parents rejected the proposed IEP for the fifth grade, unilaterally placing him in a private school and filing for a due process hearing for tuition reimbursement. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 2014 WL 4548439 (Sept. 15, 2014).

[47] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 1000 ("[In the case of a child for whom advancement through the regular curriculum is] not a reasonable prospect … his [IEP] must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ but every child should have the chance to meet challenging objectives.").

[48] *Id*. at 994 ([The IEP] "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth.").

[49] *Id*. at 1001 ("We will not attempt to elaborate on what 'appropriate' progress will look like from case to case.").

[50] *Id*. ("This absence of a bright-line rule, however, should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" (citing *Rowley*, 458 U. S. at 206.)).

[51] *Id*. at 1002 ("A reviewing court may fairly expect those authorities to be able to offer a *cogent and responsive explanation* for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (emphasis added)).

III. Post-*Endrew F.*

The immediate reaction to the Court's decision was rather predictably split within the special education litigation community. Advocates touted the decision as dramatically elevating the substantive standard for FAPE.[52] At the other extreme, some school district lawyers asserted that the new standard is lower than some interpretations of *Rowley*.[53]

However, the *Endrew F.* Court did not make clear the specific height of this new, refined substantive standard, although undeniably placing it somewhere between the district's "some benefit" interpretation[54] and the "substantially equal" interpretation that Endrew's parents ultimately advocated.[55] Sidestepping the original question in terms of benefit,[56] particularly with regard to meaningful benefit,[57] the Court's answer added to the imprecision by defining substantive *appropriate*ness circularly with what is circumstantially *appropriate*.[58] Moreover, anchoring this standard directly and by analogy to academic advancement, as measured by

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[52] E.g., Laura McKenna, *How a New Supreme Court Decision Could Affect Special Education*, THE ATLANTIC (Mar. 23, 2017), https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/ ("Advocates and parents say the case dramatically expands the rights of special-education students in the United States, creates a nationwide standard for special education, and empowers parents as they advocate for their children in schools"); Christina Samuels, *Advocates Hail Supreme Court Ruling on Special Education Rights*, EDUC. WK. (Mar. 22, 2017) ("The Council for Parent Attorneys and Advocates said 'we expect this unanimous decision ... to be transformative in the lives of the students and families for whom the law is intended to benefit'").

[53] E.g., Timothy E. Gilsbach, *Supreme Court Rules on What a FAPE Requires: Has the Court Raised the Bar? or Lowered It in the Third Circuit?* SCH. L. BULLET (Mar. 2017), http://www.kingspry.com/supreme-court-rules-on-what-a-fape-requires/ (asserting that the *Endrew F.* standard is lower than the "meaningful benefit" interpretation of *Rowley*).

[54] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 1000 ("[T]his standard is markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit.").

[55] *Id*. at 15 ("Endrew's parents argue that the Act goes even further . . . . [to the level] substantially equal to the opportunities afforded children without disabilities . . . . Mindful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case."). Instead, the Court's standard appears to be attributable to the Solicitor General's part of the oral arguments. See *supra* note 35.

[56] See *supra* note 32.

[57] See *supra* note 35 and accompanying text.

[58] See *supra* text accompanying note 38.

passing marks and promotion from grade to grades,[59] is—as compared, for example, to federally mandated state accountability assessments—far from rigorous or ambitious in light of school policies that favor social promotion over grade retention[60] and corresponding practices that continue the trend of grade inflation.[61] Indeed, the dicta in the Court's opinion has potentially much more "bite" than the holding.[62]

The immediate effect on the lower courts' FAPE cases illustrates the uncertainty at least for the near future. A cluster of lower court decisions within the first week after *Endrew F*. split into two different outcomes, with none of the cases specifically identifying and applying the aforementioned[63] advancement criteria for full-included children or the less clear-cut factors for other IDEA-eligible children.[64] Reciting the new standard, one group of decisions affirmed the hearing officer's substantive FAPE ruling, which had been based on *Rowley*.[65] The other group vacated the hearing officer's substantive FAPE ruling in favor of the school district, remanding the issue in light of the Supreme Court's new standard.[66] The relatively small number of rulings and the clearly short span of time since the *Endrew F.* decision makes the expectation of definitive guidance and effects premature at this point.

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[59] See *supra* text accompanying notes 43–47.

[60] E.g., Nat'l Ass'n of School Psychologists, *Grade Retention and Social Promotion*, 44 COMMUNIQUÉ 14 (May 2016).

[61] Although the usual focus is higher education, this trend applies as well within the K-12 sector. See, e.g., Perry A. Zirkel, *Grade Inflation: High Schools' Skeleton in the Closet*, EDUC. WK. 39 (Mar. 28, 2007).

[62] For the holding, see *supra* text accompanying note 38. For the dicta, see, e.g., *supra* note 47 and accompanying text. However, even the Court's use of "ambitious" with regard to the standard is modified by the seemingly inescapably pervasive qualifier "appropriate[ly]." *Id*.

[63] See *supra* notes 43–45 and accompanying text.

[64] See *supra* notes 46–48 and accompanying text.

[65] *Davis v. District of Columbia*, __ F. Supp. 3d __ (D.D.C. 2017); *A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist*., 69 IDELR ¶ 210 (S.D.N.Y. 2017); *Brandywine Heights Area Sch. Dist. v. B.M.,* 69 IDELR ¶ 212 (E.D. Pa. 2017).

[66] *M.C. v. Antelope Valley Union High Sch. Dist*., __ F.3d __ (9th Cir. 2017); *C.D. v. Natick Pub. Sch. Dist.,* 69 IDELR ¶ 213 (D. Mass. 2017).

Nevertheless, the Court's ad hoc standard is quite compatible with the individualized, "it depends" nature of the IDEA and special education. Like the tandem obligation of LRE,[67] the new standard is likely to evolve into one or more multi-factor tests.[68] To the extent that "potential" is a factor, its use may be problematic due to not only its measurement problems,[69] but also its directional application.[70] The other factors that are material parts of a "child's circumstances" are similarly subject to resolution. For example, do the child's parents[71] and school setting[72] fit among the factors in the equation?

The Court's opinion also raises other open questions. For example, will the "cogent and responsive" review standard result in a shifting of the burden of persuasion from the filing

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[67] See *supra* note 43.

[68] *See, e.g.*, Patrick Howard, Note, *The Least Restrictive Environment: How to Tell*? 33 J.L. & EDUC. 167, 171–176 (2004) (reciting three overlapping multi-factor tests for LRE).

[69] *See, e.g.*, *Rowley v. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist*., 483 F. Supp. 528, 535 (S.D.N.Y. 1980):

> Amy's IQ does not represent the full measure of her potential. . . . These are significant elements of her potential which are not reflected in her IQ but which are undoubtedly reflected in the results of her achievement and other academic tests. It seems likely that much of Amy's energy and eagerness goes into compensating for her [disability].

[70] For example, the Third Circuit has long used potential as part of its interpretation of *Rowley*. See, e.g., *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247, 133 Ed.Law Rep. 748 (3d Cir. 1999) ("the benefit 'must be gauged in relation to the child's potential" (citing Polk v. Cent. Susquehanna Intermediate Unit, 853 F.2d 171, 185 (3d Cir. 1988)). However, it is not entirely clear whether this factor supports more services and progress for a child with low or high potential.

[71] *See, e.g.*, *Rowley v. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.,* 483 F. Supp. at 530:

> Amy's parents, concerned with helping her accommodate to her handicap, and with her total intellectual and emotional well-being, trained her as a very young child in receptive and communicative techniques. Largely as a result of their work with her, Amy entered school with a much better ability to communicate and receive information and to establish social contact than most deaf children

[72] *Id*.:

> The principal of the school . . . and the other school administrators and teachers involved in Amy's case responded very constructively to the challenge they faced. A number of them took a mini-course in sign language interpretation. A teletype phone was installed in the principal's office to facilitate communication with the Rowleys at home.

party,[73] which in most substantive FAPE claims is the parent,[74] to the district?[75] And even more indirectly, will courts import the new standard to the second step of the two-part test for procedural FAPE[76] or will they instead adhere to the "educational benefit" language of the amended IDEA?[77]

Other effects of *Endrew F*. are more predictable. For example, the new standard will in all likelihood replace the *Rowley* benefit formulation as applicable to the second step for tuition reimbursement analysis,[78] thus even more completely affecting the outcome within this particular remedial context. More directly and generally, the Court's retention of the prospective dimension of the reasonably calculation[79] is likely to reinforce, rather than reverse, the judicial use of the so-called "snapshot" approach for evaluating substantive FAPE.[80] Similarly, the Court's reinforcement of the fact-intensive nature of the standard[81] will yield wide variance for the outcome of future substantive FAPE claims. Moreover, the standard's ad hoc character allows ample latitude for the overall trend of judicial deference, likely resulting in continuation, with limited mitigation, of the pro-district balance of these outcomes.[82]

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[73] *Schaffer v. Weast*, 546 U.S. 49 (2005).

[74] As a limited exception, on occasion a district may file such a claim either to validate its proposed IEP or effectuate its proposed change in placement. See, e.g., Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, CONN. PUB. INT. L.J. (forthcoming 2017).

[75] *Cf. M.C. v. Antelope Valley Union High Sch. Dist.*, __ F.3d __, __ (9th Cir. 2017) (shifting the burden of persuasion to the parents in limited circumstances, here being a procedural violation that deprived the parents of the knowledge of the kind and duration of services at issue).

[76] See *supra* text accompanying note 26.

[77] See *supra* note 29.

[78] E.g., *C.B. v. Garden Grove Unified Sch. Dist*., 635 F.3d 1155, 1159–60, 265 Ed.Law Rep. 917 (9th Cir. 2011); *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364, 212 Ed.Law Rep. 35 (2d Cir. 2006) (using *Rowley*'s substantive standard for determining the appropriateness of the unilateral placement).

[79] See *supra* note 39.

[80] E.g., Perry A. Zirkel, *The "Snapshot" Standard under the IDEA*, 269 Ed.Law Rep. 455 (2011).

[81] See *supra* note 39.

[82] E.g., Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Case Law*, 27 SPECIAL EDUC. LEADERSHIP 55, 58 (2014) (finding a 2:1 ratio, i.e., 61% for districts v. 30% for parents of

Upon its application on remand to Endrew's substantive FAPE claim, the new substantive standard might fit his attorney's characterization as a "game changer,"[83] because the Tenth Circuit considered its substantive FAPE claim to be a close case,[84] and, although the parents must also prove that their unilateral placement was appropriate, the Tenth Circuit also characterized his progress there as impressive.[85] However, the outcome is not at all certain, with the requisite rulings extending to the equities element for tuition reimbursement, including but not limited to whether the parents provided timely notice.[86]

More generally, *Endrew F.*'s revision of the *Rowley* standard is not likely to be a game changer in terms of the overall standings. Perhaps its fluid nature and perceived elevation will facilitate more collaborative preparation of IEPs and, in cases of dispute, resolution short of litigation via alternative mechanisms and settlements. Thus, whether this revision is meaningful depends on the circumstances, including one's perspective.

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outcomes, including inconclusive but not mixed rulings in IDEA cases from 1998 to 2012).

[83] John Aguilar & Mark K. Edwards, *U.S. Supreme Court Ruling on Student Disabilities Case*, DENVER POST (Mar. 23, 2017), http://www.denverpost.com/2017/03/22/supreme-court-ruling-tangled-neil-gorsuch-hearing/ ("Jack Robinson, the attorney who represents Endrew F.'s family, … called the high court's ruling a 'game changer.'").

[84] *Endrew F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329, 1342, 321 Ed.Law Rep. 629 (10th Cir. 2015) ("This is without question a close case. . . .").

[85] *Id*. ("It is clear from the testimony at the due process hearing that Drew is thriving at [the private placement].").

[86] E.g., 20 U.S.C. § 1412(a)(10)(C)(iii)(I).