Rowley and Endrew F.: Discerning the Outer Bounds of FAPE?
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Introduction

The late Justice Rehnquist announced the Supreme Court’s ruling in Board of Education of the Hendrick Hudson Central School District v. Rowley1 on June 28, 1982. Thirty-five years later, on March 22, 2017, Chief Justice Roberts announced the High Court’s decision in Endrew F. v. Douglas County School District RE-1.2 Both decisions hinged on the High Court’s interpretation of what constitutes a “free appropriate public education” (FAPE) under its definition, first in the Education of All Handicapped Children Act (EAHCA)3 and secondly in the Individuals with Disabilities Act (IDEA).4 Justice Rehnquist had characterized the definition as “cryptic,”5 and Roberts reiterated that characterization.6 During the thirty-five years between the two decisions, many lower courts had interpreted the definition in different ways, until the various Courts of Appeals had arrived at distinctly different conclusions, establishing the need for a grant of certiorari.

This commentary analyzes both decisions by exploring the factual differences between the plaintiffs and, ultimately, how those differences affected the outcome in Endrew F. Part I explains the legislative and judicial history of both EAHCA and IDEA, as described in both Rowley and Endrew F., as well as the most recent changes to IDEA. Part II explains the factual similarities and differences between the plaintiffs, Amy and Endrew, as described in court records. Part III analyzes the two decisions and how the factual differences between Amy and

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4 20 U.S.C.A. § 1414. IDEA was amended and renamed the Individuals with Disabilities Improvement Act (IDEIA) in 2004. However, the Supreme Court in Endrew F. cited the relevant statute as IDEA.

5 Rowley, 458 U.S. at 188.

6 Endrew F., 137 S. Ct. at 995.
Endrew affected the High Court’s decisions, first in *Rowley* and secondly in *Endrew F*. Finally, Part IV critiques the *Endrew F*. decision.

**Part I: The Legislative History and Evolution of IDEA**

The *Rowley* majority presented a comprehensive review of the legislative history of the Education of All Handicapped Children Act (EAHCA) up to the 1982 date of the announcement of the High Court’s decision. According to the *Rowley* majority, the EAHCA was passed in 1975, when Congress took notice of the statistics showing that a majority of handicapped children in the United States were being either totally excluded from public schools or sitting idly in classrooms, receiving inadequate education and waiting to “drop out.”

The *Rowley* Court credited two court decisions as being influential in Congressional action to improve the educational access for handicapped children. The first was the *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth* and the second was *Mills v. Board of Education of District of Columbia*. The PARC parents successfully argued that a change in a student’s placement required notice and an opportunity for comment, and that the Commonwealth had violated the Equal Protection clause of the Fourteenth Amendment by its assuming without factual basis that certain mentally retarded children were uneducable. Similarly, the *Mills* court ruled for the plaintiffs who had argued that the Board of Education of the District of Columbia had violated the due process clause of the Fourteenth Amendment by denying admission to children with disabilities and by expelling children without a review process.

The EAHCA was not the first Congressional attempt to improve the lack of educational access for handicapped children. Approximately a decade earlier, Congress had passed the Elementary and Secondary Act Amendments of 1966 (ESEAA), offering grant programs to the states to provide resources for handicapped children. In 1970 the ESEAA programs were...

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7 *Rowley*, 458 U.S. at 179.

8 *Rowley*, 458 U.S. at 180, fn. 2.


10 348 F. Supp. 866 (D.C. 1972)


12 *Id.*

replaced by the Education of the Handicapped Act (EHA), a substantially similar program but under this Act, states could use the funding for equipment and even for new building facilities to meet the needs of handicapped children. EHA became EAHCA in 1975.

The EAHCA was the first statute to require that states meet specific conditions before receipt of federal funding to meet the needs of handicapped children. States were required to report to the U.S. Secretary of Education their state plans and policies to assure educational access for all handicapped children. In addition, EAHCA required states to describe in detail their goals, programs, and timetables for providing educational access: first, for those handicapped children previously not receiving an education, and secondly, for those children with the most severe handicaps currently receiving an inadequate education. Extensive procedural requirements were part of EAHCA, including impartial due process hearings for parents who were dissatisfied and the provision that federal funding could be reduced or cut off for states not compliant.

In 1990 Congress reauthorized EAHCA under a new name, the Individuals with Disabilities Education Act (IDEA), putting the “individual” ahead of his or her disability. IDEA retained all the important definitions and procedural safeguards present in the EAHCA. IDEA was amended in 2004 to the Individuals with Disabilities in Education Improvement Act (IDEIA), with regulations promulgated the following year. IDEIA left the basics of IDEA intact, but aligned the law more closely with the No Child Left Behind Act (NCLBA) of the Bush administration and its emphasis on standards-based learning. IDEIA changed eligibility determinations by eliminating the discrepancy model, that is, determining eligibility for special education and related services by the discrepancy between ability and achievement, and required that states use new methodologies based on progress monitoring and assessments to determine eligibility. The definitions of FAPE, Individualized Educational Program (IEP), and least restrictive environment (LRE) remained the same in IDEIA as in both IDEA and EAHCA.

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15 Stevenson, supra note 13.
16 Id. at 180.
17 Id. at 181.
18 Id. at 182-83.
20 Stevenson, supra note 13.
22 Id. at 8.
23 Id. at 26-27.
Part II: Factual Similarities and Differences Between the Plaintiffs

Both Amy and Endrew were identified as students needing special education and related services in elementary school, and both had IEPs. Both students’ parents became dissatisfied with their proposed IEPs, Amy’s parents with their daughter’s proposed IEP for first grade and Endrew’s parents with their son’s proposed fifth grade IEP.

Court records show that both Amy and Endrew were described by their teachers in positive terms, although Amy more so. District court records show that Amy’s teachers described her as a “remarkably well-adjusted child” who “interacts with her classmates fairly well, and can communicate with them.” In addition, the record described Amy as having an “extraordinary rapport” with her teachers, and as a “bright and eager child” to whom they assigned “special responsibilities.”

The High Court noted that Endrew’s teachers described him as a “humorous child with a ‘sweet disposition’ who show[ed] concern for friends.” However, teachers also noted that he displayed behaviors that interfered with his learning. Specifically, teachers reported that he “would scream in class, climb over furniture and other students, and occasionally run away from school.” Endrew also was inordinately afraid of “commonplace things like flies, spills, and public restrooms.”

Despite the positive comments about the dispositions of the two youngsters, their disabilities were very different. Amy was severely hearing impaired, such that the court record described her as “a deaf student.” She had minimal residual hearing but was an excellent lipreader. Amy’s parents were also deaf, but the public school she attended for Kindergarten had prepared for her arrival by sending several administrators to sign-language classes and installing a teletype machine in the Main Office to communicate with her parents. Amy was provided with an FM hearing aid to amplify words spoken into a wireless receiver by her teachers and other students.

Amy was initially placed in a regular Kindergarten classroom for a trial period. Because she fared well there, she remained in the regular classroom. The school also provided her with a sign-language interpreter in her Kindergarten classroom for a trial period of two weeks, but the

24 Although IDEA technically changed to IDEIA, most commentators, including the Endrew F. majority, continued to refer to the statute as IDEA.
26 Endrew F., 137 S. Ct. at 998.
27 Rowley, 458 U.S. at 184.
28 Id.
29 Id.
interpreter reported that Amy did not need his services at that time. School administrators also later decided that Amy would not need a sign-language interpreter in first grade, but she would continue placement in a regular classroom.\(^{30}\)

Endrew, on the other hand, was diagnosed with autism at the age of two. The district court reported that he also suffered from Attention Deficit Hyperactivity Disorder (AD/HD). The district court also noted even more problem areas than the High Court reported:

Petitioner struggles with the ability to communicate personal needs, emotions and initiations, and does not engage or interact with others in social routines or play. He has compulsive and perseverative behaviors that he has difficulty overcoming throughout the day which, in turn, interferes with the learning environment. He also has many maladaptive behaviors that interfere with his ability to participate, including: eloping [leaving the school grounds], dropping to the ground, climbing, loud vocalizations, perseverative language, and picking/scraping. In addition, Petitioner presents with many severe fears—such as dogs, flies, and using a new or public bathroom—which severely limits his ability to function in school or in the community. It is undisputed that his diagnosis affects his ability to access education, and he is eligible for services under the IDEA.\(^{31}\)

Despite these impairments, Endrew was initially placed in a regular classroom. However, as his disruptive behaviors escalated over the years from first to fourth grade, the school district began limiting his time in the regular education classroom and increasing his time spent in the special education classroom.\(^{32}\) The percentages of the school day Endrew spent in each classroom are not provided in the court record.

**Part III: The Rowley and Endrew F. Decisions**

Both High Court decisions reversed the decisions of the lower courts and the sending Courts of Appeals, and remanded the cases to the respective Courts of Appeals for further deliberations consistent with the High Court ruling. The Court in *Rowley*, a six-to-three decision, ruled that the school district had complied with all procedural requirements of the EAHCA and denied the relief requested by Amy’s parents. The Court in *Endrew F.*, a unanimous decision by the eight sitting Justices, was less clear in stating the basis of its ultimate conclusion, but it did vacate the decision of the sending Court of Appeals, the Tenth Circuit Court of Appeals, and remanded the case.\(^{33}\)

\(^{30}\) Id. at 184-85.


\(^{32}\) Id. at *2.

\(^{33}\) Recently appointed Justice Neil Gorsuch did not take part in the *Endrew F.* decision. However, the three-judge panel of the Tenth Circuit, in ruling against Endrew and his parents, relied on a 2008 decision authored by Gorsuch, Thompson R2-J Sch. Dist. v. Luke P. (540 F.3d 1143 (10th Cir. 2008), cert. denied, 129 S. Ct. 1356 (2009)), where he affirmed the “merely more than de minimis” benefit standard. Gorsuch has consistently stated that he was legally bound in his deliberations by existing Tenth Circuit
As explained above, the provisions of the EAHCA and IDEA are equivalent in terms of their major procedural and substantive requirements. Both provide that the child with a disability is entitled to receive the special education and related services, the FAPE, as described in his or her IEP. Even if decided on the basis of two different statutes, the EAHCA of 1975 and the IDEA as amended in 2004 (IDEIA), both decisions required deliberations based on the same procedural and substantive standards.

A. The Rowley Decision

1. The Background

Justice Rehnquist began the majority opinion in Rowley by noting that the question to be decided was one of statutory interpretation. After reviewing the evolution of the EAHCA and its procedural requirements, the majority described the preparations made by the administration and teachers at the Furnace Woods School in Peekskill, New York for Amy Rowley’s entrance into Kindergarten there. Several administrators attended a sign-language course and a teletype machine was installed in the Main Office to better communicate with Amy’s parents, who were also deaf. Amy’s Kindergarten year apparently was unremarkable.

However, when the time came to develop Amy’s IEP for the first grade, the school proposed that Amy should continue the use of her FM hearing aid and should receive daily one-hour instruction from a tutor for the deaf, as well as three hours of speech therapy each week. Amy’s parents agreed with parts of the proposed IEP, but insisted that a sign-language interpreter be provided for Amy in each of her academic classes. Based on the report of the sign-language interpreter after the trial period in Amy’s Kindergarten class, that Amy did not require the interpreter’s services at that time, the school denied the parents’ request.


34 Rowley, 458 U.S. at 179.

35 Id. at 184.

36 Id.

37 Id.

38 Id.

39 Id. at 185.
Amy’s parents unsuccessfully pursued two levels of administrative hearings by impartial examiners, and ultimately sued in federal district court in 1980.40 The district court noted Amy’s satisfactory performance in her Kindergarten class, and that she was “advancing easily from grade to grade.”41 However, the court also found that her hearing handicap prevented her from learning as much as she would have otherwise. The court stated that the disparity between Amy’s achievement and her potential meant that Amy was not receiving a FAPE, which the majority defined as “an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.”42 This definition, the High Court later decided, was based on the district court’s assumption that the definition of “appropriate education” was left entirely to the courts and hearing officers.43 The United States Court of Appeals for the Second Circuit affirmed the district court decision, finding the district court’s factual decision “not clearly erroneous.”44

2. The Questions Presented

Upon grant of certiorari, the Supreme Court framed the two questions the Court would decide: first, what is meant by the EAHCA’s requirement of FAPE, and second, what is the role of the courts in exercising their review of school district decisions.45 In their argument, Amy’s parents asserted that the definition of FAPE in the EAHCA was not “functional,” and therefore, gives no guidance to judges in determining what constitutes an appropriate public education.46

3. The High Court’s Rationale

The majority responded to the first question by providing the definition in the EAHCA statute:

The term ‘free appropriate public education’ means special education and related services which (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, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required . . . .47

40 Id.
41 Id.
42 Id. at 185-86.
43 Id. at 186.
44 Id.
45 Id.
46 Id. at 187.
47 Id. at 188.
The majority then elaborated on the definition, reiterating the four parts of the definition in the Act as what they called a “checklist for adequacy,” and concluded that “if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction,” the child is receiving a FAPE.\textsuperscript{48} Since the Court had characterized their task as one of statutory interpretation, the majority reviewed the record of Congressional intent in passing the EAHCA, that is, to bring handicapped children into public education and to require that states “adopt procedures [italics in original] which would result in individualized consideration of and instruction for each child.”\textsuperscript{49} The majority continued,

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded to handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts – that States maximize the potential of handicapped children “commensurate with the opportunity provided to other children.”\textsuperscript{50}

The majority emphasized that Congress was only interested in opening the door of public education to handicapped children, and then making that access “meaningful.”\textsuperscript{51} By “meaningful,” as explained by the \textit{Rowley} majority, Congress was simply requiring “the receipt of some specialized educational services.”\textsuperscript{52} The majority stressed that maximizing a handicapped child’s potential was not Congressional intent; Congress was merely helping states to provide equal protection of the laws in accord with the Constitution, not “achieve strict equality of opportunity or services.”\textsuperscript{53} Equality of services may even disadvantage handicapped children and deprive them of a FAPE, according to the majority, but maximizing their potential would be going too far.\textsuperscript{54}

The majority acknowledged the problem of determining when access to education is sufficient to confer “some educational benefit” on the handicapped child.\textsuperscript{55} However, they expressly declined to even attempt to establish a test for that kind of adequacy. Stating that they were confronted in this case by a handicapped child receiving substantial services and performing above average in a regular education classroom, they stressed that they opted to

\textsuperscript{48} Id. at 189.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 189-90.

\textsuperscript{51} Id. at 192.

\textsuperscript{52} Id. at 195.

\textsuperscript{53} Id. at 198.

\textsuperscript{54} Id. at 198-99.

\textsuperscript{55} Id. at 201-02.
confine their analysis to that particular situation. And in a situation like the one before them, Amy’s situation, the majority asserted that the “system” monitors the child’s educational progress, providing regular examinations, grades, and yearly advancement from grade to grade. That, according to the majority, is the standard for sufficient educational benefit for a handicapped child in a regular classroom in a public school: achieving passing marks and advancing from grade to grade.

As to the question of the role of the courts, the Rowley majority turned to the procedural requirements in the EAHCA. The requirements of participation of all concerned parties in development of the handicapped child’s IEP and the state reporting requirements, the majority stated, should guarantee that the IEP would be substantively adequate. A provision that a reviewing court base its determination on the preponderance of evidence, the majority continued, is not an invitation to the court to substitute its judgment for the decisions of school authorities. Courts must give due weight to the results of administrative proceedings, and follow the procedural requirements established in the statute. Courts, according to the majority, lack the specialized knowledge and experience to decide questions of educational methodology.

Justice Blackmun concurred in the final decision of the majority, writing separately to emphasize that the equality guaranteed by the EAHCA was equality of access. As he stated, looking at Amy Rowley’s program as a whole, her opportunity to understand and participate in the classroom was substantially equal to that of her non-handicapped classmates. The standard, according to Blackmun, is predicated on equal access to the educational process, not to achievement of any particular educational outcome.

Justices White, Brennan, and Marshall, however, dissented, arguing that the majority had misinterpreted Congressional intent. Quoting parts of the EAHCA, the dissenting Justices stressed the language in the legislative history of the Act guaranteeing “full educational opportunity” and “equal educational opportunity.” They also contended that the majority was incorrect in limiting the power of the courts to reviewing procedural requirements; they would have given the courts more latitude to conduct de novo review of all aspects of the child’s educational program.

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56 Id. at 203.
57 Id. at 203-04.
58 Id. at 206.
59 Id. at 208.
60 Id. at 211.
61 Id.
62 Id. at 213.
63 Id. at 217-18.
4. The Reach of Rowley

Although the Court in Rowley made clear that they were limiting their decision to the case of a student like Amy Rowley, placed in a regular education class and receiving substantial supportive services, that part of the decision seems to have been ignored over the years. Courts in controversies involving students with a wide diversity and severity of handicaps have parsed the language of the Rowley court, arriving at a wide diversity of interpretations of the EAHCA (and later, the IDEA) description of FAPE as an “appropriate” public education. Rowley’s phrase “meaningful” access to education, and Rowley’s phrase “some educational benefit” also received much attention over the years after the announcement of the decision.

According to Westlaw, Rowley has been cited in over 2000 trial court documents and over 2000 appellate court documents since its publication. A commentary published just two weeks after the Endrew F. decision, but actually written before the decision of the High Court was announced, reviewed the diversity of court rationales that emerged, based on the Rowley decision, allegedly all relying on the Rowley majority’s interpretation of what constitutes FAPE.\textsuperscript{64} Decisions in the Third Circuit and Sixth Circuit Courts of Appeals were notable in interpreting Rowley as providing that FAPE for the handicapped child must provide the child with “meaningful benefits,” that is, the child must make progress, not simply trivial advances.\textsuperscript{65}

The High Court finally recognized and acted on the need to clarify what level of special education and services constitutes FAPE following the Tenth Circuit’s decision in Endrew F. A discussion and analysis of the Endrew F. decision follows.

B. The Endrew F. Decision

1. The Question Presented

The majority in Endrew F. did not directly state the Question Presented. However, the Briefs for both Petitioner and Respondent stated that the Question Presented was, “What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate education guaranteed by the Individuals with Disabilities Act 20 U.S.C. § 1400 et seq.?"

2. The High Court’s Rationale

The Endrew F. majority, after ignoring that Rowley was decided under the statutory authority of the EAHCA, maintained that the Rowley majority declined to endorse any one

\textsuperscript{64} Allan G. Osborne, Jr. & Charles J. Russo, Some Educational Benefit or Meaningful Educational Benefit and Endrew F.: Is There a Difference Or Is It the Same Old Same Old?, 340 Ed.Law Rep 1 (April 6, 2017).

\textsuperscript{65} Id. at 7 – 10.
standard for determining when children with disabilities were receiving a FAPE.\footnote{The High Court decision failed to note that \textit{Rowley} was decided under the EAHCA, not under IDEA.} Calling that task, as \textit{Rowley} had, a “more difficult problem,” the majority asserted that was the task before the Court now.\footnote{\textit{Id.}}

Defining FAPE in the terms of the IDEA, the \textit{Endrew F.} majority then quoted \textit{Honig v. Doe}\footnote{\textit{Id.}} as identifying the IEP as the “centerpiece of the statute’s education delivery system for disabled children.”\footnote{\textit{Honig v. Doe}, 484 U.S. 305, 43 Ed.Law Rep. 857 (1988).} The majority succinctly explained the essential requirements of an IEP, and the rights of the parents to resolve disputed IEPs through the dispute resolution processes specified in IDEA, including lawsuits in federal courts.\footnote{\textit{Endrew F.}, 137 U.S. at 994.}

The \textit{Endrew F.} majority reviewed \textit{Rowley} extensively before turning to describe Endrew’s disabilities that qualified him for placement in the special education program of the Douglas County School District in Castle Rock, Colorado.\footnote{\textit{Id.}} Endrew had attended Douglas County schools since preschool.\footnote{\textit{Id. at 996}.}

When Endrew was in fourth grade in the district, his parents expressed their dissatisfaction with what they characterized as Endrew’s “stalled academic and functional progress.”\footnote{\textit{Id. at 994-96}.} The parents pointed to the same basic goals repeated year after year for several years in their son’s IEPs.\footnote{\textit{Id.}} When the school district presented them with Endrew’s proposed IEP for fifth grade, they saw the document as more of the same.\footnote{\textit{Id. at 996}.} They removed Endrew from public school and unilaterally placed him at Firefly Autism House, a private school for children with autism, where, according to the Court, Endrew improved academically and behaviorally.\footnote{\textit{Id. at 996-97}.}
Six months after Endrew entered Firefly, the school district offered the parents a new IEP, but they rejected it. The parents subsequently filed a complaint with the state Department of Education, alleging that Endrew had been denied a FAPE, and seeking reimbursement for their son’s tuition at Firefly. The Administrative Law Judge (ALJ) denied relief and the parents sued in district court.

Giving due weight to the ALJ’s decision, the Colorado district court affirmed the ALJ’s decision. The court noted that annual modifications to the objectives in Endrew’s IEPs were “sufficient to show a pattern of, at the least, minimal progress.” His most recent IEP, the district court noted, was reasonably calculated to do the same, and, in the district court’s view, that was all Rowley demanded.

The Tenth Circuit Court of Appeals affirmed the decision of the district court. Quoting from Rowley, the Tenth Circuit asserted that instruction and services afforded children with disabilities must be calculated to “confer some [italics in the original] educational benefit,” and that the Tenth Circuit had long interpreted that language in Rowley to mean that a child’s IEP delivers a FAPE as long as the IEP is designed to confer “educational benefit [that is] merely “more than de minimis.” The Tenth Circuit, therefore, concluded that Endrew’s IEP had been “reasonably calculated to enable [him] to make some progress,” and based on that conclusion, Endrew had not been denied a FAPE.

In its appeal to the High Court, the Douglas County School District argued that Rowley requires only that an IEP should be reasonably calculated to provide “some benefit, as opposed to none.” The district asserted the Congressional goal to merely to open the door to education, as elaborated in Rowley. Stating that the school district “makes too much” of their reliance on the language of Rowley, the High Court majority pointed to the fact that the Rowley court had “no need to say anything more” about the level of education statutorily required because Amy’s IEP was obviously “designed to deliver more than adequate benefits.”

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77 Id. at 997.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id. at 998.
86 Id.
Moreover, the Endrew F. majority asserted that the “principal concern” of the Rowley court was simply to correct the view that federal judges were empowered to set the standards for public education, and to disabuse the notion that a child performing better than most of her peers had been denied a FAPE.\textsuperscript{87} The majority alleged that Rowley was not applicable to the “closer cases,” while emphatically arguing that IDEA does not promise any particular educational outcome, and nor could any law for any child.\textsuperscript{88}

The High Court majority continued its interpretation of Rowley, reiterating Rowley’s conclusion that determining when a handicapped child is receiving sufficient educational benefits is a “difficult problem.” That conclusion in Rowley led the Court majority to state that, “It would not have been ‘difficult’ for us to say when educational benefits are sufficient if we had just said that any [italics in the original] educational benefit was enough. And it would have been strange to refuse to set out a test for the adequacy of educational benefits if we had just done exactly that.”\textsuperscript{89} The majority then continued, pointing out that despite’s Rowley’s absence of an overarching standard by which to judge the adequacy of the educational benefit to a child, Rowley points to a “general approach.”\textsuperscript{90}

In the Endrew F. majority’s interpretation, according to Rowley, a school must prospectively offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”\textsuperscript{91} However, any review of an IEP, the Endrew F. majority asserted, must merely see if it is “reasonable,” not ideal.\textsuperscript{92}

The Endrew F. majority mentioned briefly the Congressional purpose elaborated in Rowley, to provide access to education to handicapped children excluded from public schools or receiving inadequate educational services while waiting to drop out.\textsuperscript{93} This intent, the majority opined, implied that the substantive standard must be that the student admitted make progress appropriate to the child’s circumstances.\textsuperscript{94} For the child fully integrated in the regular education classroom, the Court stated, “the system” would monitor the student’s progress, and adequacy of

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 998-99.
\textsuperscript{91} Id. at 999.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
the student’s IEP would mean the student received passing marks and progressed from grade to grade.\footnote{Id.}

The Endrew F. majority next reviewed the structure of a child’s IEP under IDEA, the present levels of achievement, the nature of the child’s disability and how that disability affects the child’s performance, and annual goals. They also reviewed how instruction and services would contribute to “progress in the general education curriculum.”\footnote{Id. at 1000, citing § 1414(d)(1)(A)(i)(IV)(bb).} The majority insisted again that the Rowley Court had no need to provide guidance for a child unlike Amy Rowley. Rather, the majority stated, if a child’s disability is such that he cannot be integrated into the regular classroom, that child’s IEP “need not aim for grade-level advancement,” but must be “appropriately ambitious in light of his circumstances.”\footnote{Id.} The Endrew F. majority admitted that their proferred standard is “a general standard, not a formula,” but emphatically stated that their standard is “markedly more demanding than the ‘merely more than de minimis’ test applied by the Tenth Circuit.”\footnote{Id.} However, in accord with the Rowley decision, the majority rejected the parents’ more expansive interpretation of the FAPE standard, an education equal to that afforded to children without disabilities.\footnote{Id. at 1001.}

The majority acknowledged that they could not elaborate on what would constitute “appropriate progress” for different cases; they could not establish a “bright-line rule.” They did state that, “It is in the nature of the Act and the standard we adopt to resist such an effort.”\footnote{Id. at 1001} However, the majority then cautioned that courts should not second-guess school authorities who have worked with parents to formulate a child’s IEP, and who have brought their expertise and judgment to bear on any disagreements between them and the child’s parents.\footnote{Id. at 1002.}

3. The Reach of Endrew F.

The final outcome was that the majority vacated the judgment of the Tenth Circuit Court of Appeals and remanded the case for further consideration consistent with their opinion. The ultimate outcome of the High Court’s remand of Endrew F. is unknown. All that can be inferred before the Tenth Circuit’s reconsideration is that the standard the Circuit Court is required to apply must be somewhat more than de minimis, but not as much as equality with non-disabled peers.
Part IV: Critique of *Endrew F.*

A. Points of Concern in the Decision

1. Conflation of Statutes

The *Endrew F.* majority delivered their ruling as if both *Rowley* and *Endrew F.* were decided under IDEA, never clarifying that *Rowley* was a controversy decided under the EAHCA.\(^\text{102}\) The change of name of the EAHCA to IDEA in 1990 was motivated by the recognition that the *individual*, not his or her handicap, should come first; the individual was not defined by his or her disability. Although the definitions of FAPE and IEP remained the same in both EAHCA and IDEA, the two statutes differed in several other provisions. The new IDEA incorporated new initiatives, such as transition programs to help students succeed after high school, emphasis on research and technology, and emphasis on the needs of ethnically and culturally diverse children, as well as “crack babies.”\(^\text{103}\) IDEA itself was changed in 2004 to IDEIA, although the acronym IDEA is generally used to denote either statute.

2. Missing Information in the Decision

In addition, critical information is missing from the Supreme Court’s *Endrew F.* decision. For example, as noted above, the percentages of time Endrew spent in the special education classroom versus the regular education classroom are not specified, neither in the district court opinion nor in the Supreme Court opinion. The district court, as noted above, merely stated that as Endrew’s disruptive behaviors escalated, Endrew spent progressively less time in the regular classroom, without specific information about how his time was divided. The Tenth Circuit Court of Appeals decision also provided no information about the relative percentages of Endrew’s time spent in the special education as opposed to the regular education classroom. The Court of Appeals merely noted that Endrew had never been subject to a disciplinary change of placement.\(^\text{104}\) If Endrew had been a child placed in a regular classroom, he would have been akin to Amy Rowley. The “system” would have marked his progress as it did Amy’s, by his performance on regular examinations, grades, and successful passage from grade to grade.

Absent also from the factual data provided by the *Endrew F.* court is information about the notification Endrew’s parents provided to the school district about their intent to remove Endrew from the district and place him in private school. As a minimum condition for tuition

\(^{102}\) The *Endrew F.* majority began their decision by noting that, “Thirty-five years ago, this Court held that the Individuals with Disabilities Education Act establishes a substantive right to a ‘free appropriate public education’ for certain children with disabilities.”


reimbursement after parents unilaterally remove a child from his public school placement, IDEA and the Colorado Department of Education require that the parents give written notice stating their intent to remove the child, at the most recent IEP meeting or at least ten business days before removal, unless providing such notice would harm the child.¹⁰⁵ No information is provided in the Endrew F. decision about Endrew’s parents’ notification of intent to privately place Endrew, a procedural requirement that may have had legal consequences.

3. “Possible” vs. “Appropriate” Confusion

The Endrew F. majority also contributes to the false impression that the requirement of LRE means that “when possible” the child with disabilities must be included in the regular classroom. The majority quoted Rowley as stating the word “possible,”¹⁰⁶ and referenced the citation provided in Rowley, § 1412(a)(5). However, it is also curious why the Rowley majority used the word “possible” in the text of its opinion, because § 1412(a)(5) actually states, “To the maximum extent appropriate [italics added], children with disabilities . . . are educated with children who are not disabled . . . .”¹⁰⁷ The Rowley decision includes a footnote, Footnote 24, which quotes the provision of EAHCA explaining that the handicapped child must be included in the regular classroom when “appropriate.”¹⁰⁸ IDEA in its current form also states that the child with a


¹⁰⁶ Endrew, 137 S. Ct. at 999.

¹⁰⁷ 20 U.S.C. § 1412(a)(5) states:

Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, available at https://www.law.cornell.edu/uscode/text/20/1412.

¹⁰⁸ Rowley’s Footnote 24 states that, “Title 20 U.S.C. 1412(5) requires that participating States establish ‘procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the [458 U.S. 176, 203] nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.’”
disability must be included in the regular classroom when “appropriate,” not when “possible.”109 The Endrew F. majority had previously noted that wording, with correct IDEA citation, earlier in their decision.110

B. Salient Points in the Decision

1. The Diversity of Disabilities

Despite the points of concern, the Endrew F. decision did establish significant clarifications. The Endrew F. majority limited the applicability of the Rowley benefit standard to special education students functioning in the context of a regular education classroom with specialized instruction and related services. The Rowley decision, the Endrew F. majority emphasized, established the FAPE sufficiency parameters for children with disabilities like Amy, children who are achieving passing grades and advancing from grade to grade within the “system.” The Endrew F. decision expands on Rowley in the sense that Endrew F. explicitly draws attention to the wide diversity of the disabilities to which IDEA must apply. According to the Endrew F. majority, all children with disabilities, not just the Amys, must make progress in school that is more than merely de minimis.

Amy and Endrew are children on opposite ends of the disabilities spectrum. The “bright-line rule” that Endrew F. eschews is an impossibility given the extensive variety of disabling conditions and different degrees of severity of disabilities that present in public school children. The Endrew F. majority’s emphasis on progress appropriate to the child’s individual circumstances does not eclipse the Rowley standard; rather, the Endrew F. majority calls attention to the special education students who cannot achieve progress in the context of the regular education classroom.

2. The Limited Import of Procedural Safeguards

The Rowley decision stated its two-part test for determining the sufficiency of a FAPE, directing courts to look first at whether the procedural requirements of, in Amy Rowley’s case EAHCA, have been met. Only secondly are courts to examine whether the IEP “is reasonably calculated to enable the child to receive educational benefits.”111 The Rowley majority stressed the paramount importance of the procedural safeguards by stating, “If these requirements are met, the State has complied with the obligation imposed by Congress and the courts can require no more.”112 The Endrew F. majority noted that the Douglas County School District had argued that the procedural requirements presented a checklist for what constituted a FAPE, but the majority disagreed, stating that the child’s “educational program must be appropriately ambitious

110 Endrew F., 137 U.S. at 994.
111 Rowley, 458 U.S. at 206-07.
112 Id. at 207.
in light of his circumstances.”113 This is a clearly articulated point in the *Endrew F.* decision. Compliance with procedural requirements is not in itself determinative of an IEP’s adequacy.

3. Collaboration with Parents

The *Endrew F.* decision is also instructive in relating what courts require of special educators when they craft a child’s IEP in collaboration with the child’s parents. The majority noted that, “A reviewing court may fairly expect those [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.”114 “Cogent” is not a word that has appeared often in the context of special education. Synonyms for “cogent” include convincing, pertinent, having power to compel or constrain, and appealing forcibly to the mind or reason.115 Black’s Law Dictionary online also gives the meaning of cogent as “something that is convincing, compelling, and appeals to reason.”116 “Responsive” is a word that in the special education context conveys several obligations for special educators and administrators, not only to the child’s individual circumstances, but also to the parents’ concerns and input. These are strong adjectives.

A “cogent and responsive explanation” has always been required of the IEP team, even if not stated exactly in those terms. The legally justifiable IEP must begin with an assessment of the child’s current academic and functional performance, that is, the child’s individual circumstances. The team must then address with specificity the unique needs of the child. The IEP must clearly indicate what progress the child will be expected to make, and how, when, and where that progress will be achieved. Successive IEPs must demonstrate increasing progress, by monitoring and recording the student’s achievement of advancing levels of annual goals and objectives. The progress, the *Endrew F.* majority stressed, must be appropriate to the child’s individual circumstances. If a child’s progress is allowed to stall, the IEP is not appropriate for the child.

4. Notice of the Non-level Playing Field

Several commentators who were disappointed with the Tenth Circuit’s decision in *Endrew F.* summarized the disadvantages faced by Endrew’s parents during the litigation, and argued the need to level the playing field for parents of severely disabled children such as Endrew. One commentator asserted that Endrew’s parents were disadvantaged because IDEA does not allow parents to recover attorneys’ fees for expert witnesses who could testify in court

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113 *Endrew F.*, 137 S. Ct. at 1000.

114 *Id.* at 1002.


about their child’s disability and needs. She contended that courts often rely on the testimony of expert witnesses in special education litigation, and in some cases their decisions may be based on issues of credibility rather than on the witness’s credentials and expertise. In addition, school districts often rely on the testimony of experts in their own employ, spending less money than the parents would have to spend to hire external, impartial expert witnesses. School districts also have the advantage of complete knowledge of the case gathered over years of IEPs, and this may disadvantage the parents who bring the lawsuit and are required by High Court precedent to carry the burden of proof. However, the probability of the current High Court reversing two of the Court’s prior decisions to give parents more advantages in special education litigation seems unlikely.

5. Immediate Reaction to the Decision

When the Supreme Court announced its *Endrew F.* decision, commentators immediately took to public media. One blogger commented that the decision expands the rights of special education students and tells schools that they must do more than provide a “merely more than *de minimis*” education program. Some reports were more balanced, noting that special education advocates and parents lauded the “stunning” decision, but that critics predicted the decision will have no impact. Critics contended that schools are already meeting the needs of special education students. One reported critic is quoted as remarking that if the decision did have an impact, it would be a budgetary “disaster” for school districts.

Some commentators also appeared to read more into the decision than the majority opinion actually indicated. A duo of NPR commentators characterized the decision as setting a standard requiring a “meaningful, ‘appropriately ambitious’” education for children with disabilities, stating the decision will have “far-reaching implications.” Another asserted that


118 Stevenson, supra note 13, at 817-818.

119 Id.

120 Id. The party seeking relief in special education litigation is required to bear the burden of proof, as in other cases. See Schaeffer v. Weast, 546 U.S. 49, 62, 203 Ed.Law Rep. 29 (2005).


the decision means that schools must provide special education students “a chance to make meaningful progress.”

A word search of the Endrew F. decision indicates that the term “progress” appears forty-five times. In none of those appearances is the word “progress” preceded by the word “meaningful.” On the contrary, the word “meaningful” appears only once in the opinion, and the word “meaningfully” also appears once. In both cases, the majority are describing the feelings expressed by Endrew’s parents, that their son was not making “meaningful progress” or “progressing meaningfully” under his current IEP in his home school. The Endrew F. majority, therefore, has not ruled that a special education student must make meaningful progress in order to have received a FAPE. Throughout the decision what the majority actually required was that the student’s progress must be “appropriate in light of the child’s circumstances.”

6. The Issue of Funding

The Endrew F. decision has the potential to negatively impact school budgets if misinterpreted as requiring school districts to provide more services to special education students than appropriate for the individual circumstances of each child. At the present time, schools are being asked to provide FAPE for increasing numbers of children with severe autistic impediments to academic and functional learning, as well as other students with severe disabilities not even identified when Rowley was decided. The costs of providing FAPE for these severely disabled children are not adequately reimbursed by the federal government under IDEA. The federal government never made good on its promise to provide 40% of special education expenditures to school districts. At the present time the federal government covers only 16% of the costs of providing special education services under IDEA. Conflict resolution costs for districts have reached $90 million dollars per year, much of that expenditure occasioned by special education disagreements. These costs come at a time when school budgets are already tight. Between 2008 and 2014, thirty-five states decreased per pupil funding. This negatively impacts all children, special education and regular education students.

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125 *Endrew F.*, 137 S. Ct. at 996.

126 *Id.* at 997.

127 *Id.* at 999, 1002.


129 *Id.*

130 *Id.*
The *Endrew F.* decision does not mention costs to school districts when providing services to children with disabilities. Endrew’s tuition at Firefly was $70,000 a year. The average cost of education for a student in a K-12 classroom in the state of Colorado in Fiscal Year 2014 was $8,985, compared with the U.S. average figure of $11,009. That same year, Douglas County School District RE-1 spent even less than the state average, $8,182 per pupil. Reimbursement of tuition for parents’ unilateral private placement of children with disabilities, and possible litigation involved, is taxing school budgets, not only in Colorado, but in all the states accepting IDEA funding.

In this author’s opinion, what special education in America’s public schools and what IDEA and IDEA-like statutes need is a kind of “tort reform” provision, a limit on reimbursement for tuition and other services for any child with any disabling condition. For example, for a child on the autism spectrum who is privately placed in a special school for autistic students, perhaps a school that provides Applied Behavior Analysis (ABA) therapy, costs for tuition could rise above $50,000 per year. When parents assert that unilateral private placement was necessary because their child’s public school IEP was inadequate or inappropriate, they sue the school district to reimburse them for tuition. A “disabilities reimbursement reform” could statutorily cap reimbursement due to the parents at a given percentage of the tuition at any unilateral private placement the court finds necessary and appropriate. For different disabilities, the cap could be a different percentage of the tuition cost. A disability reimbursement scheme might also be based on parent income, as is the school lunch program.

Such a reimbursement cap may even discourage parents from bringing suits for tuition reimbursement, and may encourage parents to cooperate more fully with the school district’s special education team. A disabilities reimbursement cap would enable a school district to control its budget more effectively. Each state could establish different percentage caps, each depending on the average cost of per pupil regular education placement. Parents of any child with a disability would have to pay their share of the cost of unilateral private placement.

7. Concluding Remarks

All things considered, whether *Endrew F.* will have any meaning for subsequent controversies in lower courts is doubtful. The *Rowley* majority decision attempted to guide

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131 *Id.*


134 ABA is a therapy for children on the autism spectrum. See https://www.autismspeaks.org/what-autism/treatment/applied-behavior-analysis-aban.
school districts in developing a child’s FAPE, as well as to guide courts responsible for adjudicating parent/school disagreements about the content of a student’s IEP. But, as the Endrew F. majority notes, the Rowley court was dealing with the simplest case of a student with a disability, a cooperative and bright child with an objectively identifiable and quantifiable disability, that of a hearing deficit. Those kinds of controversies are in the minority now.

The Rowley majority made it clear that they knew Amy Rowley’s IEP was designed to confer educational benefits, but the majority was still tasked to explain what was meant by the EAHCA’s requirement of FAPE. They turned to the text of the statute and the definition of FAPE. That the Rowley majority could not explain how to decide what constituted a sufficient FAPE for what the Endrew F. majority called “the closer cases” is understandable; neither could the Endrew F. majority.

Endrew F. did little more than Rowley in the sense of establishing a functional guideline for school districts facing the IDEA obligation of educating students with severe academic and behavioral disabilities. Endrew F. requires that schools provide a FAPE when providing a student with an IEP reasonably calculated to enable a child to make appropriate progress in light of his or her circumstances. Defining “appropriate” in the acronym FAPE with the word “appropriate” does not provide any guidance as to what appropriate means. Explaining a word by repeating the same word is circular reasoning and unhelpful.

What the Endrew F. majority did make clear was that an IEP that provides only “merely more than de minimis” benefit did not amount to a FAPE. However, neither does FAPE require an IEP that provides an educational program equal to that of non-disabled peers. The two limits encompass a significant spectrum of individual circumstances, disabilities, and possibilities for appropriately ambitious goals for students. The statutory language and guarantees of the EAHCA were unclear after the Rowley decision, and the statutory language and guarantees of the IDEA are still unclear after the Endrew F. decision.

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135 Endrew, 137 S. Ct. at 998.

136 Id. at 1002.