

# Post-*Endrew* Legal Implications for Students with Autism\*

Janet R. Decker, J.D., Ph.D. and Sarah Hurwitz, Ph.D.\*\*

## EDUCATION LAW INTO PRACTICE

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## Introduction

The recent U.S. Supreme Court case, *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, has significant implications for students with autism, their parents, educators, and attorneys.<sup>1</sup> The prevalence of children being diagnosed with autism has skyrocketed in recent years. In 2002, only 1 in 150 children received the diagnosis, but current estimates are that as many as 1 out of every 68 children has autism.<sup>2</sup> These children struggle with language delays that can impact their social and communication abilities, along with behavioral problems that can interfere with their learning.

Fortunately, interventions have expanded greatly,<sup>3</sup> and many children with autism now make significant intellectual, social, and behavioral gains.<sup>4</sup> There is even a small subgroup of individuals who achieve optimal outcomes in which their intellectual and adaptive functioning reach typical levels and they no longer qualify for a diagnosis of autism.<sup>5</sup> This type of progress only occurs with excellent psycho-educational services, which typically include early intervention and teaching approaches that are based on the principles of Applied Behavior Analysis (ABA).<sup>6</sup> Although ABA is considered the "gold-standard treatment for autism,"<sup>7</sup> the associated costs can be incredibly high. It can cost \$30,000-\$100,000 per year to provide intensive ABA therapies.<sup>8</sup> While some medical insurance companies have begun to fund ABA, parents often consider ABA an educational, not medical, intervention and expect school districts to provide it.<sup>9</sup>

As school districts struggle to allocate resources for this growing population, they often disagree with families about whether schools are legally required to provide ABA.<sup>10</sup> To understand schools' legal responsibilities toward educating students with

autism, one must navigate a complex maze of federal and state legislation, regulations, and case law.<sup>11</sup> Although the Individuals with Disabilities Education Act (IDEA) explicitly states that schools must provide eligible students with autism a free appropriate public education (FAPE), families and school districts have disagreed on how to define "appropriate" for over forty years, culminating in the 2017 U.S. Supreme Court ruling in *Endrew*.<sup>12</sup>

## Endrew

Endrew was a fifth-grade boy with autism who was not making progress after several years in public schools. "Endrew's [Individualized Education Programs (IEPs)] largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims."<sup>13</sup> Endrew's parents were also concerned with the school's failure to effectively address his severe behaviors and fears that interfered with his learning. Therefore, his parents enrolled him in a private school that provided ABA intervention.<sup>14</sup> Within months of attending the private ABA school, "Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school."<sup>15</sup> His parents filed a lawsuit against Endrew's former school, seeking reimbursement for the \$78,000 per year private school tuition.<sup>16</sup>

Affirming the lower court's decisions in favor of the school district, the Tenth Circuit explained that a legally compliant IEP must be designed so that it confers an "educational benefit [that is] merely... more than *de minimis*."<sup>17</sup> Because Endrew's IEP enabled him to make "*some* progress," the Tenth Circuit determined it was sufficient.<sup>18</sup> However, a unanimous Supreme Court disagreed, instead explaining that even children who are unable to achieve on grade level should still "have the chance to meet challenging objectives."<sup>19</sup> The Court clarified that IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>20</sup> Accordingly, the Supreme Court vacated the Tenth Circuit's decision, and remanded only the issue

of tuition reimbursement to the lower court for reconsideration. This remand is currently pending review by the Tenth Circuit. In doing so, the Court clarified legal standards that have previously been inconsistently applied across the federal courts.

## Split in the Circuits

Prior to *Endrew*, the federal circuit courts of appeal were "in disarray over the level of educational benefit that school districts must confer on children with disabilities to provide them with a free appropriate public education under the IDEA."<sup>21</sup> The first and last time the Supreme Court broached the question of what constitutes an "appropriate" education was in *Board of Education of Hendrick Hudson Central School District v. Rowley*.<sup>22</sup>

*Rowley* involved a first-grade girl who had made excellent academic progress and was advancing to second grade through the regular curriculum. Her parents believed that IDEA entitled her to receive a sign-language interpreter.<sup>23</sup> The Court disagreed, reasoning that IDEA only required an educational program that was "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."<sup>24</sup> As such, the *Rowley* Court intentionally declined to provide a bright-line test to define "appropriate," because schools "educate a wide spectrum" of students with disabilities, and therefore "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end."<sup>25</sup> The *Rowley* Court did, however, clarify that IDEA required schools to confer "some educational benefit" on children with disabilities,<sup>26</sup> and that access to education was to be "meaningful."<sup>27</sup> In the years following *Rowley*, lower courts have grappled to apply these vague terms to subsequent cases. The confusion resulted in a split among the federal circuit courts of appeal, and thus the courts' standards of educational benefit conflicted with one another.

Prior to *Endrew*, the definition of "educational benefit" varied, based on jurisdiction, and was predominantly split into the two standards of "just-above-trivial" and "meaningful" educational benefit. More

specifically, in eight circuits—including the Tenth Circuit, which was under scrutiny in *Endrew*—the federal courts determined that schools must only provide a “just-above-trivial” educational benefit.<sup>28</sup> Conversely, in two other circuits—the Third and Sixth—federal courts had expressly rejected this lower standard, explaining that providing “merely more than a trivial educational benefit” violated IDEA.<sup>29</sup> These two circuits determined that schools must create IEPs that confer a higher level of educational benefit, which they termed “meaningful educational benefit.”<sup>30</sup> Furthermore, in a case involving a student with autism seeking ABA intervention, the Sixth Circuit reasoned that “[n]othing in *Rowley* precludes the setting of a higher standard than the provision of ‘some’ or ‘any’ educational benefit,” as long as the standard did not force schools to provide the best education.<sup>31</sup> In that case, the court determined the school had violated its FAPE obligation, awarding the parents reimbursement for ABA intervention and attorney fees.

Additionally, prior to *Endrew*, the Ninth Circuit’s standard was unclear because some panels of judges had adopted the “just-above-trivial” standard, while others had aligned with the “meaningful educational benefits” standard, thereby failing to adopt one consistent standard for the Circuit.<sup>32</sup> The D.C. Circuit had simply identified the level of educational benefit that mirrored the language of *Rowley* to provide “educational benefits.”<sup>33</sup> Unsurprisingly, these ambiguities and inconsistencies among the circuits resulted in lower court judges questioning whether a difference even existed between the standards.<sup>34</sup> In 2009, Wenkart analyzed the existing precedent and concluded that only one substantive standard existed.<sup>35</sup> He explained that the circuits’ application of different terminology, such as “meaningful” and “some” benefit, did not ultimately cause the courts to produce differing results.<sup>36</sup> The school district in *Endrew* applied this same argument, claiming that no real split existed in the circuits and instead it was a “debate over adjectives.”<sup>37</sup>

However, education law research has long recognized the circuit split, with many experts urging the Supreme Court to provide clarity. Osborne and Russo explained the disagreement over the correct standard was “more than an argument over semantics.”<sup>38</sup> They asserted, “The word *some* can be understood to mean more than nothing whereas *meaningful* connotes something

additional.”<sup>39</sup> The Third and Sixth Circuits have required schools to provide “significant learning” which is more than “just-above-trivial.”<sup>40</sup> While all of the circuits are in agreement that *Rowley* does not require schools to provide the best education, Osborne and Russo explained that the Supreme Court needed to clarify because “[s]chool boards, parents, hearing officers, and courts alike should have a more definitive answer as to precisely what is required.”<sup>41</sup>

If the Supreme Court adopted the higher “meaningful benefit” standard, it might result in increased costs to schools because they would be required to expand special education programming.<sup>42</sup> Even so, Osborne and Russo concluded that it was “inconceivable that Congress would allocate millions of dollars, and expect states and local education agencies to spend even more, to achieve only minimal progress for the country’s children with disabilities.”<sup>43</sup>

Other scholars also declared that recent federal legislative changes provided an impetus for the Court to revisit the educational benefit standard.<sup>44</sup> Since *Rowley*, Congress has reauthorized IDEA three times, as well as increased school accountability through the No Child Left Behind Act and subsequently, the Every Student Succeeds Act. Through these legislative changes, Congress had established heightened curricular standards and increased accountability for all students, including those with disabilities.<sup>45</sup> These mandates required schools to report the standards-based assessment scores of most students with disabilities and design IEPs that ensure students are “involved in and make progress in the general education curriculum.”<sup>46</sup> Thus, the time was ripe for the Court to clarify whether students were entitled to a “meaningful” or “just-above-trivial” educational benefit.

## **Endrew’s Impact**

The *Endrew* Court resolved the split in the circuits not by adopting one of these standards, but by creating a new standard. It clarified that IDEA required schools to provide an education that is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>47</sup> The Court’s new standard is “markedly more demanding than the ‘merely more than *de minimis*’ test applied by the Tenth Circuit,” and offers guidance that *Rowley* neglected to provide.<sup>48</sup>

Specifically, the Court’s new standard was developed for students like Endrew,

who, unlike the student in *Rowley*, was not fully integrated into the general education classroom and whose “academic and functional progress had essentially stalled.”<sup>49</sup> The Court was not satisfied with the more than *de minimis* standard because it would offer an education that was so deficient that it “would be tantamount to ‘sitting idly... awaiting the time when [students with disabilities] were old enough to drop out.’”<sup>50</sup>

For the first time, the Court defined what would be appropriate for students who were *not* achieving on grade level and were educated in self-contained or special education classrooms. Whereas *Rowley* stated that students were only entitled to a “basic floor of opportunity,”<sup>51</sup> and that the purpose of IDEA was “more to open the door of public education to [students with disabilities rather] than to guarantee any particular level of education once inside,”<sup>52</sup> *Endrew* elevated the expectations by stating that *all* students must be afforded an opportunity “to meet challenging objectives.”<sup>53</sup> In dicta, the Court noted, “A child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child’s educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.”<sup>54</sup>

Despite this guidance, the *Endrew* Court neglected to clear up confusion about the upper limits of what is legally required under IDEA. The Court simply reiterated what it had decided in *Rowley*—that students with disabilities are not entitled to an equal educational opportunity. It rejected *Endrew*’s parents’ argument that IDEA entitled their son to educational opportunities that are “substantially equal to the opportunities afforded to children without disabilities.”<sup>55</sup> Thus, schools are still not required to maximize the education of students with disabilities. The FAPE metaphor used to explain that schools do not owe students a “Cadillac” and instead, only a “serviceable Chevrolet,” remains applicable, even after *Endrew*.<sup>56</sup>

Additionally, the *Endrew* Court cautioned future courts to defer to the expertise and judgment of school authorities and to measure the appropriateness of each IEP on a case-by-case basis.<sup>57</sup> Yet, the Court refined the expectation of school personnel,<sup>58</sup> stating that they should provide a “cogent and responsive explanation” to justify how “the student’s IEP is reasonably calculated to

enable the child to make progress appropriate in light of his circumstances.”<sup>59</sup> Similar to *Rowley*, *Endrew* intentionally fails to provide “a bright-line rule” to measure educational benefit.<sup>60</sup>

## Potential Increase in Autism and ABA Litigation

Despite these unanswered, lingering questions, *Endrew* does mark the potential for a new era in autism and ABA litigation. Prior to *Endrew*, a disproportionately high rate of litigation involving students with autism already existed,<sup>61</sup> and many of these cases were focused on ABA methodology.<sup>62</sup> *Endrew* questions the quality of education that students with autism are entitled to receive, which, in turn, shines a spotlight on schools’ “content, methodology, [and] delivery of instruction.”<sup>63</sup> It is possible that the decision could “open the floodgates,” increasing the number of lawsuits filed against schools—an issue raised by Justice Breyer in *Endrew*’s oral arguments.<sup>64</sup>

For schools, winning an ABA case could mean avoiding major modifications and costs. For parents, prevailing in court may signify a brighter future for their child. Unsurprisingly, these competing interests have led to disputes over who must provide and/or pay for ABA,<sup>65</sup> causing researchers to classify ABA lawsuits as the most controversial and expensive subset of autism-related litigation.<sup>66</sup> In an examination of over twenty-five years of ABA litigation trends, Decker identified that courts initially took a hands-off approach when deciding whether schools were legally required to provide ABA.<sup>67</sup> These early courts usually deferred to the districts’ decision to not provide ABA, explaining that they must heed *Rowley*’s guidance that courts should “avoid imposing their view of preferable educational methods.”<sup>68</sup>

However, in recent years, parents have prevailed more often than they had in the past.<sup>69</sup> In *A.M. v. New York City Department of Education*, parents successfully claimed that the district’s proposed IEP was substantively inadequate because it was silent on whether their son would receive ABA.<sup>70</sup> They sought tuition reimbursement after unilaterally placing their 6-year-old son with autism in a private ABA school. Although the impartial hearing officer, the state review officer, and the district court all held for the district, the Second Circuit vacated and remanded the case. The *A.M.*

court recognized *Rowley*’s directive to leave questions of methodology to education professionals; however, the court explained that this guidance had limits.<sup>71</sup> The court compared the facts to its previous ABA decision, *R.E. v. New York City Department of Education*, in which the district’s IEP failed to guarantee the child would receive “daily 1:1 ABA sessions.”<sup>72</sup> Ultimately, the *A.M.* court reasoned that multiple reports and witnesses recommended that the child needed ABA and 1:1 support in order to continue to progress; yet, the district failed to counter these recommendations.<sup>73</sup> Thus, the district had “to require some level of ABA support in a 1:1 classroom setting in order to establish the adequacy of the IEP.”<sup>74</sup>

Regardless of whether parents or districts ultimately prevail in ABA litigation, this type of lawsuit remains pervasive across all jurisdictions and continues to be very expensive.<sup>75</sup> Thus, because *Endrew* involved a boy with autism seeking reimbursement for his private ABA school tuition, parents may feel more empowered to file ABA lawsuits against schools. Non-ABA claims involving students with autism could also increase.

## Post-Endrew Autism Litigation

In the first few months following the Supreme Court’s *Endrew* decision, several cases involving students with autism have discussed the *Endrew* holding.<sup>76</sup> Although it is too early to identify clear trends,<sup>77</sup> three recent cases illustrate how lower courts have applied *Endrew* to cases involving students with autism. All three courts cited *Endrew*’s new standard; nonetheless, the courts ultimately affirmed their pre-*Endrew* decisions. These post-*Endrew* cases have been decided in jurisdictions where both the “just-above-trivial” and “meaningful” benefit standards were previously applied.

In *C.G. v. Waller Independent School District*, the Fifth Circuit disputed the parents’ claim that they were now entitled to private school tuition reimbursement for their daughter with autism because the district court decision occurred before *Endrew* was decided.<sup>78</sup> The Fifth Circuit explained, “Although the district court did not articulate the standard set forth in *Endrew F.* verbatim, its analysis of [the student’s] IEP is fully consistent with that standard and leaves no doubt that the court was convinced that [the student’s] IEP was ‘appropriately ambitious in light of [her] circumstances.’”<sup>79</sup>

The district also prevailed in a second post-*Endrew* autism case, but unlike *C.G.*, this case arose in the “meaningful” benefit jurisdiction of the Third Circuit and was an ABA case. In *T.M. v. Quakertown School District*, the dispute was between the parents’ “strict ABA program” versus the district’s program “based on ABA principles.”<sup>80</sup> The Pennsylvania district court explained that a “district is not required to provide a specific program or employ a specific methodology requested by the parent.”<sup>81</sup> In affirming the administrative court decision, the court reasoned that the district had developed an appropriate IEP, as well as that the student’s “incremental progress was meaningful,” and thus aligned with *Endrew*’s standard.<sup>82</sup> Importantly, the district was able to demonstrate that it had an experienced, board-certified behavioral analyst and other highly trained special education staff.<sup>83</sup> In addition to implementing a behavior plan for the 11-year-old student, the district modified the plan after increases in problematic behavior and considered recommendations from the parents and their independent behavioral analyst.<sup>84</sup>

In a third post-*Endrew* autism case, *Paris School District v. A.H.*, the parents prevailed.<sup>85</sup> Although the Arkansas district court was careful to note that its jurisdiction’s previous standard of “‘slight’ or ‘de minimis’ progress” was no longer good law, it ultimately affirmed the administrative court’s pre-*Endrew* decision.<sup>86</sup> Therefore, the court’s application of *Endrew*’s new standard did not appear to alter the ultimate decision in the case.

The *Paris* court did, however, highlight the unique needs of students with autism. The court reasoned that a fourth-grade student with autism had not received an appropriate education because the district’s “behavior plans were inadequate, especially in light of the higher standard of *Endrew*.”<sup>87</sup> The school had lumped the student’s inappropriate behaviors together as “noncompliance,” which the court stated “completely ignor[ed] the nuances of behaviors that manifest with autism.”<sup>88</sup> As a result of the school’s failure to address the student’s behaviors, the student was charged on nine separate occasions with crimes while at school. The court was “skeptical that [the school] was left with no other reasonable options than to rely on the criminal justice system.”<sup>89</sup>

The court also was seriously troubled that the school had placed the student at a

segregated alternative setting for an unspecified period of time. The court applied the *Andrew* Court’s language by explaining that “sending a fifth grader indefinitely to [an alternative, segregated program] could possibly be ‘sitting idly...awaiting the time when they were old enough to drop out.’”<sup>90</sup> Likewise, the court critiqued the staff’s lack of autism training. The student’s only alternative school teacher was a coach who was not highly qualified in any of the core academic subjects. When that coach was asked about his training related to autism, he replied that he “got some notes on it.”<sup>91</sup> He later admitted “I’ll get in trouble for saying this, but I just didn’t think [the student] needed some of these accommodations, because she was doing so well on her stuff and so I really didn’t make a whole lot of accommodations for her.”<sup>92</sup> Accordingly, applying *Andrew* to justify why the school failed to provide a FAPE, the *Paris* court awarded to the student’s parents attorney fees, compensatory education, a qualified behavioral consultant, and additional relief.<sup>93</sup>

## Conclusion

In conclusion, it is difficult to predict whether autism litigation will increase as a result of *Andrew*,<sup>94</sup> but the post-*Andrew* cases provide some important implications. First, as the *Paris* case highlights, lower courts have applied *Andrew* to critique how schools are educating students with autism. Thus, it may become even more relevant for school leaders and educators to attend to the unique needs of these students.

Specifically, schools should create and implement effective behavior plans. In determining whether a student’s IEP is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,”<sup>95</sup> courts will likely analyze whether a school is effectively addressing behavior that impedes a student’s ability to learn. The *Paris* court noted that “while the IDEA does not explicitly mandate a behavior plan, any given child’s circumstances might implicitly require one” based on *Andrew*.<sup>96</sup> Additionally, IEP teams must carefully scrutinize segregated placements, including self-contained classrooms and alternative educational settings. They should ensure these placements allow students with disabilities a “chance to meet challenging objectives” and a program that is “appropriately ambitious.”<sup>97</sup> Finally, school leaders must ensure employees receive effective

training in autism, both to be prepared for potential legal challenges and to meet the individual needs of the growing number of students with autism. This training should include guidance about behavioral principles and ABA instructional strategies.

*Andrew* may have also sent a symbolic message to parents. They may feel more emboldened to request interventions like ABA and ensure that measurable progress is achieved. They could also be more inclined to seek private school tuition reimbursement, especially if the Tenth Circuit ultimately awards *Andrew*’s parents reimbursement for their son’s \$78,000 per year private ABA school tuition on remand. In this post-*Andrew* era, school leaders and attorneys should, therefore, make concentrated efforts to prevent autism-related lawsuits by ensuring that students with autism are making progress in their learning and behavioral goals. After all, legal disputes drain resources, from families and school districts alike, that could be better devoted to educating students with autism.

## ENDNOTES

<sup>1</sup> 137 S.Ct. 988 (2017). In this article, the term “autism” will be used to describe “Autism Spectrum Disorder.”

<sup>2</sup> JON BAIJO, CTRS. FOR DISEASE CONTROL & PREVENTION, *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years—Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010*, MORBIDITY & MORTALITY WKLY. REP., at 1 (Mar. 28, 2014), <https://www.cdc.gov/mmwr/pdf/ss/ss6302.pdf>.

<sup>3</sup> Connie Kasari et al., *Psychosocial Treatments for Individuals with Autism Spectrum Disorder Across the Lifespan: New Developments and Underlying Mechanisms*. 16 CURRENT PSYCHIATRY REPS. 1 (2014).

<sup>4</sup> Deborah K. Anderson et al., *Predicting Young Adult Outcome Among More and Less Cognitively Able Individuals with Autism Spectrum Disorders*. 55 J. CHILD PSYCHOL. & PSYCHIATRY 485 (2014).

<sup>5</sup> Alyssa J. Orinstein et al., *Intervention History of Children and Adolescents with High-Functioning Autism and Optimal Outcomes*. 35 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 247 (2014).

<sup>6</sup> *Id.*

<sup>7</sup> Lea Winerman, *Autism Diagnoses Bring Slew of Costs for Families*, PBS (Apr. 13, 2011, 6:11 PM), [http://www.pbs.org/newshour/updates/health-jan-june11-autismcosts\\_04-13/](http://www.pbs.org/newshour/updates/health-jan-june11-autismcosts_04-13/).

<sup>8</sup> Laura C. Hoffman, Comment, *Ensuring Access to Health Care for the Autistic Child: More is Needed than Federal Health Care Reform*, 41 SW. L. REV. 435, 437 (2012).

<sup>9</sup> *Id.*

<sup>10</sup> Janet R. Decker, *A Comprehensive Analysis of Applied Behavior Analysis (ABA) Litigation Trends for Students with Autism*, 274 EDUC. L. REP. 1 (2012).

<sup>11</sup> See generally Perry A. Zirkel, *Legal Issues Related to Autism: Eligibility and Methodology*, 322 EDUC.

L. REP. 10 (2015).

<sup>12</sup> 137 S.Ct. 988 (2017).

<sup>13</sup> *Id.* at 996.

<sup>14</sup> The Supplemental Joint Appendix filed with the Supreme Court states that *Andrew*’s private school “utilizes the principles of Applied Behavior Analysis (ABA).” 2016 WL 6803669 at 215. See also Autism and Applied Behavior Analysis (ABA), FIREFLY AUTISM, <http://www.fireflyautism.org/ffaservices> (last visited 5/30/17) (describing ABA services).

<sup>15</sup> 137 U.S. at 997.

<sup>16</sup> Personal Communication with Allison Moffett, Firefly Autism Clinical Liaison (March 29, 2017).

<sup>17</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338, 321 EDUC. L. REP. 639 (10th Cir. 2015) (internal quotation marks omitted).

<sup>18</sup> *Id.* at 1342.

<sup>19</sup> 137 S. Ct. at 992.

<sup>20</sup> *Id.* at 1001.

<sup>21</sup> Petitioner for Writ of Certiorari at 9, *Andrew F.*, 137 S. Ct. 988, (No. 15-827) [hereinafter “Petition for Writ”].

<sup>22</sup> Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 5 EDUC. L. REP. 34 (1982).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 204.

<sup>25</sup> *Id.* at 202.

<sup>26</sup> *Id.* at 200.

<sup>27</sup> *Id.* at 192.

<sup>28</sup> Petitioner for Writ, *supra* note 19, at 10. These eight circuits include the 1st, 2nd, 4th, 5th, 7th, 8th, 10th, and 11th. See also Ronald D. Wenkart, Commentary, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 EDUC. L. REP. 1 (2009).

<sup>29</sup> *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006) (internal quotation marks omitted).

<sup>30</sup> *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862, 194 EDUC. L. REP. 88 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005).

<sup>31</sup> *Id.* at 863.

<sup>32</sup> Petitioner for Writ, *supra* note 19, at 14.

<sup>33</sup> *Id.*

<sup>34</sup> Wenkart, *supra* note 27, at 3. See Blake C. ex rel. Tina F. v. Dept. of Educ., 593 F.Supp.2d 1199, 241 EDUC. L. REP. 662 (D. Haw. 2009).

<sup>35</sup> Wenkart, *supra* note 27, at 4.

<sup>36</sup> *Id.* Wenkart noted that *Rowley* used the term “meaningful” to describe access, not educational benefit. *Id.* at 29, n. 178.

<sup>37</sup> Allan G. Osborne & Charles J. Russo, *Some Educational Benefit or Meaningful Educational Benefit and Andrew F.: Is There a Difference or Is It The Same Old Same Old?* 340 EDUC. L. REP. 1, 12 (2017).

<sup>38</sup> *Id.* at 16. Osborne and Russo discussed the U.S. Department of Education’s amicus brief that supported the parents’ position in *Andrew* and identified that the circuit split was not merely a disagreement about semantics. *Id.* at 14-15.

<sup>39</sup> *Id.* at 16.

<sup>40</sup> *Id.* at 17-18.

<sup>41</sup> *Id.* at 18.

<sup>42</sup> *Id.* at 2.

<sup>43</sup> *Id.* at 17.

<sup>44</sup> See Lauren Davison, *Andrew F. ex rel. Joseph F. v. Douglas County School Distr. RE-1: A Missed Opportunity*, 94 DENV. L. REV. ONLINE 1, 16-19

- (2016) (describing the Congressional intent has expanded beyond simply providing access and ensures students with disabilities are subject to demanding standards-based assessments).
- <sup>45</sup> Osborne & Russo, *supra* note 37, at 16.
- <sup>46</sup> 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV)(bb) (West 2016).
- <sup>47</sup> *Endrew*, 137 S. Ct. 988, 991 (2017).
- <sup>48</sup> *Id.* at 1000.
- <sup>49</sup> *Id.* at 996.
- <sup>50</sup> *Id.* at 1001 (quoting *Rowley*, 458 U.S. at 179 (internal quotation marks omitted)).
- <sup>51</sup> *Rowley*, 458 U.S. at 200.
- <sup>52</sup> *Id.* at 192.
- <sup>53</sup> *Endrew*, 137 S. Ct. at 992.
- <sup>54</sup> *Id.*
- <sup>55</sup> *Id.* (quoting the Brief for Petitioner 40).
- <sup>56</sup> *Doe v. Bd. of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 459, 87 EDUC. L. REP. 354 (6th Cir. 1993).
- <sup>57</sup> *Endrew*, 137 S. Ct. at 1001.
- <sup>58</sup> Perry A. Zirkel, *The Supreme Court's Decision in Endrew F. v. Douglas County School District RE-1: A Meaningful Raising of the Bar*, 341 EDUC. L. REP. 545 (2017).
- <sup>59</sup> *Endrew*, 137 S. Ct. at 1002.
- <sup>60</sup> *Id.* at 1001.
- <sup>61</sup> Perry A. Zirkel, *Legal Currency in Special Education Law: Top Ten for School Leaders*, 262 EDUC. L. REP. 1 (2011).
- <sup>62</sup> Perry A. Zirkel, *The Case Law on Eligibility and Methodology for Students with Autism: An Update*, 262 EDUC. L. REP. 23 (2011).
- <sup>63</sup> 34 C.F.R. § 300.39(b)(3)(i) (defining “specially designed instruction”).
- <sup>64</sup> Transcript of Oral Argument at 13–15, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827).
- <sup>65</sup> Decker, *supra* note 10.
- <sup>66</sup> See generally Claire Maher Choutka et al., *The “Discrete Trials” of Applied Behavior Analysis for Children with Autism: Outcome-Related Factors in the Case Law*, 38 J. SPECIAL EDUC. 95 (2004).
- <sup>67</sup> Janet R. Decker, 25 Years of Litigation Trends: Applied Behavior Analysis (ABA) Lawsuits Involving Students with Autism. (April 30, 2017) (paper presented at the annual meeting of American Educational Research Association, San Antonio, TX).
- <sup>68</sup> *Rowley*, 458 U.S. at 207.
- <sup>69</sup> *Id.* Decker found parents/child(ren) prevailed in six cases from 1993-2004; however, parents/child(ren) won fifteen cases from 2005-2016.
- <sup>70</sup> A.M. ex rel. v. New York City Department of Education, 845 F.3d 523, 541, 339 EDUC. 22, (2d Cir. 2017).
- <sup>71</sup> *Id.* at 542 (explaining that it must determine whether “the content, methodology, or delivery of instruction” have been narrowly tailored to “address the unique needs of the child that result from the child’s disability” 34 C.F.R. § 300.39(b)(3)(i)).
- <sup>72</sup> R.E. ex rel. v. New York City Department of Education, 694 F.3d 167, 194, 284 EDUC.L. REP. 629 (2d Cir. 2012).
- <sup>73</sup> A.M. v. New York City Department of Education, 845 F.3d 523, 545 (2d Cir. 2017).
- <sup>74</sup> *Id.*
- <sup>75</sup> Decker, *supra* note 10. For example, in one ABA case, the court awarded parents \$307,150 in attorneys’ fees alone. *J. P. ex rel. Peterson v. Cty. Sch Bd.*, 641 F. Supp. 2d 499, 501, 250 EDUC. L. REP. 122 (E.D. Va. 2009).
- <sup>76</sup> See, e.g., *R.B. v. New York City Dep’t of Educ.*, No. 16-1952-CV, 2017 WL 1507784 (2d Cir. Apr. 27, 2017); *C.G. v. Waller Indep. Sch. Dist.*, No. 16-20439, \_\_\_ Fed. Appx. \_\_\_, 2017 WL 2713431 (5th Cir. June 22, 2017); *Paris Sch. Dist. v. A.H. ex rel. Harter*, No. 2:15-CV-02197, 2017 WL 1234151 (W.D. Ark. Apr. 3, 2017); *K.M. ex rel. Markham v. Tehachapi Unified Sch. Dist.*, No. 115CV001835LJOJLT, 2017 WL 1348807 (E.D. Cal. Apr. 5, 2017); *N.G. v. Tehachapi Unified Sch. Dist.*, No. 115CV01740LJOJLT, 2017 WL 1354687 (E.D. Cal. Apr. 13, 2017); *N.W. v. District of Columbia*, No. CV 16-0573, 2017 WL 2080250 (D.D.C. May 15, 2017); *M.M. v. New York City Dep’t of Educ.*, No. 15 CIV.5846 (PKC), 2017 WL 1194685 (S.D.N.Y. Mar. 30, 2017); *T.M. v. Quakertown Cmty. Sch. Dist.*, No. CV 16-3915, 2017 WL 1406581 (E.D. Pa. Apr. 19, 2017); and *Brandywine Heights Area Sch. Dist. v. B.M.*, No. 5:14-CV-06624, 2017 WL 1173836 (E.D. Pa. Mar. 29, 2017).
- <sup>77</sup> See also Zirkel, *supra* note 64, at 552.
- <sup>78</sup> \_\_\_ Fed. Appx. \_\_\_, 2017 WL 2713431 (5th Cir. 2017).
- <sup>79</sup> *Id.*
- <sup>80</sup> 2017 WL 1406581 (E.D. Pa. 2017) at \*6.
- <sup>81</sup> *Id.* at \*4.
- <sup>82</sup> *Id.* at \*13.
- <sup>83</sup> *Id.* at \*7.
- <sup>84</sup> *Id.* at \*9-10.
- <sup>85</sup> 2017 WL 1234151 (W.D. Ark. 2017).
- <sup>86</sup> *Id.* at \*4.
- <sup>87</sup> *Id.* at \*8.
- <sup>88</sup> *Id.*
- <sup>89</sup> *Id.* at \*9, n.11.
- <sup>90</sup> *Id.* at \*9 (quoting *Endrew*, 137 S.Ct. 988, 999 (2017)).
- <sup>91</sup> *Id.* at \*6.
- <sup>92</sup> *Id.* at \*7.
- <sup>93</sup> *Id.* at \*12.
- <sup>94</sup> Nonetheless, autism litigation will likely increase considering past trends. Perry A. Zirkel & Tessie R. Bailey, *Special Education Law Update XIII*, 334 EDUC. L. REP. 1 (2016).
- <sup>95</sup> *Endrew*, 137 S.Ct. 988, 1001 (2017).
- <sup>96</sup> 2017 WL 1234151 (W.D. Ark. 2017) at \*8 n. 10.
- <sup>97</sup> *Endrew*, 137 S. Ct. 988, 992 (2017).

## Schools and the Legalization of Marijuana: An Emerging Issue\*

Charles J. Russo, Ed.D., Suzanne E. Eckes, J.D., Ph.D., and Allan G. Osborne, Jr., EdD.\*\*

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### Introduction

Attorney General Jeff Sessions recently expressed his desire to undo federal medical-marijuana protections available under the Rohrabacher-Farr Amendment that have been in place since 2014<sup>1</sup> in jurisdictions where its use is legal. Sessions’ comments have helped to keep this controversial issue in the headlines even as jurisdictions have increasingly legalized its use for both medi-

cal and recreational purposes. According to the Rohrabacher-Farr Amendment, “[n] one of the funds made available in this Act to the Department of Justice may be used, with respect to [thirty-two States plus the District of Columbia] to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>2</sup>

In light of a flurry of legislative activity legalizing the circumstances under which marijuana may be smoked or ingested, concerns associated with its use in and around schools are likely on the minds of educational leaders, their boards, and attorneys. As evidence of the growth of such laws to date, eight jurisdictions plus the District of Columbia<sup>3</sup> legalized the recreational use of marijuana either under the state

constitution<sup>4</sup> or by statute.<sup>5</sup> Another two states enacted constitutional amendments<sup>6</sup> and twenty-eight others<sup>7</sup> plus the District of Columbia<sup>8</sup> legalized marijuana use for medical purposes.

Supporters calling for the legalization of marijuana typically argue that decriminalization will help to keep many young people and minorities out of trouble with the law, that state oversight would help to ensure public safety while creating new revenue sources from regulated sales.<sup>9</sup> On the other hand, opponents of marijuana legalization fear its legalization may have potentially harmful effects for adolescents because it can slow down learning by impeding development and interfering with schooling,<sup>10</sup> along with concerns that it is a gateway drug leading not only to its