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Is Our Guaranteed "Free Appropriate Public Education" Meaningful for Students with Disabilities?: A Closer Look at Endrew F. v. Douglas Cty. Sch. Dist. Re-1, Clarifying Public Education Requirements for Students with Disabilities

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IS OUR GUARANTEED "FREE APPROPRIATE PUBLIC EDUCATION" MEANINGFUL FOR STUDENTS WITH DISABILITIES?: A CLOSER LOOK AT *ENDREW F. v. DOUGLAS CTY. SCH. DIST. RE-1,* CLARIFYING PUBLIC EDUCATION REQUIREMENTS FOR STUDENTS WITH DISABILITIES

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I. INTRODUCTION

"Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society."[1] Federal law requires public schools to provide students with disabilities a free and appropriate education.[2] Congress established the Individuals with Disabilities Education Act ("IDEA") to promote

[1] 20 U.S.C.S. § 1400(c)(1) (LexisNexis 2012).
[2] Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1332 (10th Cir. 2015).

equality in the education system where "the educational needs of millions of children with disabilities were not being fully met . . . ."[3] Complimenting IDEA, Congress implemented federal education funding available "on the states' provision of a 'free appropriate public education,'" ("FAPE") to improve the educational results for children with disabilities.[4] Unfortunately, Congress has not established a meaningful way to measure progress under FAPE.[5] In *Endrew*, the "parents of an autistic child withdrew him from the Douglas County School District because they believed his educational progress was inadequate."[6]

II. FACTUAL BACKGROUND

Endrew F., hereafter referred to as Drew, is a child with autism.[7] "Drew's autism affects his cognitive functioning, language and reading skills, and his social and adaptive abilities."[8] Drew's parents placed him in public school where he received special-education services through fourth grade.[9] IDEA requires public schools to create a document called an individualized education program ("IEP") for each student with disabilities.[10] An IEP describes the student's goals and establishes a

[3] 20 U.S.C.S. § 1400(c)(2) (LexisNexis 2012).
[4] *Id.* at § 1400(c)(3).
[5] *Endrew*, 798 F.3d at 1332.
[6] *Id*.
[7] *Id.* at 1333.
[8] *Id*. at 1332.
[9] *Id*.
[10] *Id*. at 1334.

plan for achieving those goals.[11] Unfortunately for Drew the program content is left to the discretion of the local educators and parents.[12]

Unsatisfied with his progress, Drew's parents withdrew him from the Douglas County School District ("District").[13] Drew's parents noticed Drew was not progressing in the District and consequently opposed the fifth grade IEP the District proposed for Drew.[14] After rejecting the IEP, Drew's parents enrolled him at a private school that specializes in educating autistic children.[15] Drew's parents believe they are entitled to reimbursement under law because Drew did not receive a FAPE.[16] Parents of students with intellectual disabilities remove their child at their own financial risk unless they can prove both that the District violated IDEA[17] and that the private school satisfied IDEA. [18] One issue is how to decide if a child has received "some educational benefit"[19] as FAPE requires.[20]

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[11] *Id.* at 1332 (quoting Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B., 702 F.3d 1227, 1230 (10th Cir. 2012)).
[12] *Endrew*, 798 F.3d at 1332 (quoting Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P., 540 F.3d 1143 1151 (10th Cir. 2008)).
[13] *Endrew*, 798 F.3d at 1332.
[14] *Id*. at 1333.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Endrew*, 798 F.3d at 1333 (quoting Florence Cty Sch. Dist. Four v. Carter by & Through Carter, 510 U.S. 7, 15 (1993)).
[19] *Endrew*, 798 F.3d at 1333.
[20] *Id*.

III. TENTH CIRCUIT ANALYSIS

Unfortunately for Drew and other students with disabilities in the area, the Tenth Circuit did not require a FAPE to result in "meaningful benefit"[21] for the students, but required them simply to show "some educational benefit."[22] Drew's parents asserted that Drew did not receive a FAPE.[23] To determine the validity of the allegations, the Tenth Circuit assessed Drew's FAPE by examining progress reporting, behavioral assessment, and substantive challenges.[24]

First, Drew's parents argued they could not participate in Drew's education due to the District's inadequate reporting.[25] The District allowed these allegations and granted that the report was conclusory and lacked detail.[26] Despite some concessions the District asserted it did not hinder the parents' involvement in Drew's education.[27] The District produced evidence of Drew's parents' involvement.[28] The court found progress reporting to be sufficient under FAPE since Drew's parents regularly communicated with Drew's teachers through face-to-face meetings and a back-and-forth notebook.[29] The Tenth Circuit was

[21] *Id.*
[22] *Id.* (quoting *Florence Cty.*, 510 U.S. at 15).
[23] *Endrew*, 798 F.3d at 1333.
[24] *Id.* at 1334–43.
[25] *Id.* at 1335.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 1335.

ultimately convinced that the District abided by the IDEA regulations by the school's active suggestions on modifying Drew's IEP.[30]

Second, Drew's parents alleged that Drew's escalating behavioral problems forced them to place him in the private school.[31] Drew's behaviors included hitting things,[32] removing his clothes,[33] and going to the bathroom on the floor in class.[34] The school implemented behavioral plans to manage and reduce Drew's behaviors.[35] The school maintained regular contact with Drew's parents regarding his behavior.[36] The Tenth Circuit found that while Drew's behavior problems were escalating, the school's efforts were sufficient.[37] The school addressed the issues, attempted to manage Drew's behaviors[38] and scheduled to formulate a new behavioral plan for Drew.[39] The court noted that behavioral intervention plans are typically only necessary for students who require disciplinary action.[40] The Tenth Circuit found the District did not violate IDEA or its regulations.[41] The court emphasized

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[30] *Id*. at 1335–36.
[31] *Id*. at 1337.
[32] *Id*. at 1336.
[33] *Id*.
[34] *Id*. at 1336.
[35] *Id*. at 1336.
[36] *Id*.
[37] *Id*. at 1337.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 1337–38. *See also* Park Hill Sch. Dist. V. Dass, 655 F.3d 762, 766 (8th Cir. 2011); Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 1825 (1st Cir. 2008); Alex R. *ex rel.* Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221, 375 F.3d 603, 614 (7th Cir. 2004).
[41] *Endrew*, 798 F.3d at 1337.

the District fulfilled its low expectation to consider positive behavioral interventions.[42] The Tenth Circuit held the District complied with federal law with regards to the behavioral assessment.[43]

Lastly, Drew's parents claimed Drew's fifth-grade IEP was materially similar to Drew's past unsuccessful IEPs. Drew's parents asserted that Drew's lack of progress proved that the IEP was not "reasonably calculated to provide Drew educational benefit."[44] Drew's parents also alleged that the District should have considered Drew's behaviors in assessing the validity of his IEP.[45]

The cornerstone issue in this case is the standard of educational benefit required in IDEA. In *Rowley*, the Supreme Court attempted to resolve legislative intent for specialized education and determined the statute "cannot be read as imposing any particular substantive educational standard upon the States."[46] The Court highlighted Congress's intent to simply "provide [handicapped children] with access to a free public education."[47] The Court emphasized FAPE's requirement as "some educational benefit upon the handicapped child."[48] The Court continued that a "grading and advancement system

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[42] *Id*. (quoting 20 U.S.C.S. § 1414(d)(3)(B)(i) (LexisNexis 2012)).
[43] *Endrew*, 798 F.3d at 1338; *see* R.P. ex rel. R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 813 (5th Cir. 2012).
[44] *Endrew*, 798 F.3d at 1338.
[45] *Id*.
[46] Board of Education v. Rowley, 458 U.S. 176, 200 (1982).
[47] *Id*.
[48] *Id*.

[] constitutes an important factor in determining educational benefit."[49] The Court did not provide mechanisms for measuring educational benefit.[50] In recent years "several circuits have adopted a higher standard" which requires a "meaningful educational benefit."[51]

The Tenth Circuit held that it did not have the authority to deviate from its "well-established definition of a FAPE."[52] The Tenth Circuit held that Drew was receiving "some educational benefit"[53] and Drew's parents were not entitled to compensation.[54]

IV. WRIT OF CERTIORARI

While the *Rowley* court's standard of "some educational benefit"[55] seemed inadequate, the Tenth Circuit was bound by that standard.[56] The Tenth Circuit had a "well-established definition of a FAPE" because of numerous cases that dealt with this issue. The educational benefit standard is becoming more rigorous in the Third and Fifth Circuits.[57] This growing rigor suggested the Supreme Court would overturn the Tenth Circuit's decision in *Endrew* to harmonize the standard among

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[49] *Id*. at 203.
[50] *Id*.
[51] Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1339 (10th Cir. 2015); *see, e.g.*, Deal v. Hamilton Cty. Bd. Of Educ., 392 F.3d 840, 862 (6th Cir. 2004); Adam J. ex. Rel. Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808–09 (5th Cir. 2003); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988).
[52] *Endrew*, 798 F.3d at 1340.
[53] *Id*. at 1341.
[54] *Id*. at 1342.
[55] *Id.* at 200.
[56] *Id.* at 1340.
[57] *Id*.

the circuits.[58] Thus, the Court granted certiorari[59] and unanimously vacated the Tenth Circuit decision.[60]

V. SUPREME COURT ANALYSIS

Through the *Endrew* decision, the Supreme Court reaffirmed the goals of IDEA.[61] The Court emphasized that for schools to meet the standards for FAPE, the "school must offer an [IEP that is] reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[62] The Court focused on (a) the need for higher standard IEPs and (b) the importance of tailored IEPs.[63]

A. The Court concluded the Tenth Circuit misinterpreted Rowley and erred in applying the de minimus standard.[64]

The Court both stressed that the Tenth Circuit erroneously relied upon isolated statements in *Rowley* and distinguished the circumstances in *Rowley*.[65] The Court explained that in *Rowley*, although the student had impaired hearing, she had progressed from grade to grade.[66] In *Rowley*, the Second Circuit affirmed the district court's ruling that an "education was not 'appropriate' unless it provided . . . an opportunity to achieve full potential commensurate with the opportunity provided to

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[58] *Id*.
[59] Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S.Ct 988, 997 (2017).
[60] *Id*. at 993, 1002.
[61] *Id*. at 991.
[62] *Id*.
[63] *Id*. at 992
[64] *Id*. at 992.
[65] *Id*. at 994.
[66] *Id*. at 995.

other children."[67] However, the Court in *Rowley* found that because the student made excellent progress and excelled in her specialized instruction, her IEP met the requirements under FAPE.[68] The Court in *Endrew* stressed that the Court in *Rowley* did not establish a test for "adequacy of educational benefits conferred upon all children covered by [IDEA]."[69] Also, the Court in *Endrew* agreed the district court gave undue weight to the *Rowley* language "concerning the requirement that States provide instruction calculated to 'confer some educational benefit.'"[70]

Further the *Endrew* Court stated a *de minimus* progress standard would defeat the purpose of offering an education to students with disabilities.[71] Under IDEA, the child's progress must be "appropriate in light of the child's circumstances.[72]

B. The Supreme Court affirmed each IEP should be tailored to the targeted child.[73]

The IEP procedures encourage parents to work with teachers to "consider[] the child's individual circumstances" and best serve the child.[74] The IEP standards require instruction to be "specially designed"

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[67] *Id*. at 995 (quoting Board of Education v. Rowley, 458 U.S. 176, 185–87 (1982)).
[68] *Id*. at 996.
[69] *Id*. at 997 (quoting *Rowley*, 458 U.S. at 202).
[70] *Id*. at 998 (quoting *Rowley*, 458 U.S. at 200).
[71] *Id*. at 1001.
[72] *Id*.
[73] *Id*. at 992.
[74] *Id*. at 994 (quoting 20 U.S.C.S. § 1414 (LexisNexis 2012)).

to meet a child's "unique needs."[75] The *Rowley* Court illustrated the "infinite variations" of IEP possible under the IDEA requirements.[76] In *Endrew,* the Court illustrated that while in the public-school system, Drew would scream, run away, and be fearful of "commonplace things like flies, spills, and public restrooms,"[77] in Firefly Autism House, "a private school that specializes in educating children with autism,"[78] his "behavior improved significantly."[79] Since Drew made meaningful progress at Firefly, the Court concluded due to his stagnancy in the public school system, his IEP was ineffective precluding Drew from receiving his guaranteed FAPE.[80]

Tailoring an IEP to each child's particular circumstances is paramount and foundational under FAPE.[81] Since the *Endrew* decision applies the same FAPE standards, the decision is not "plainly at odds" with any standards adopted in *Rowley,* thus IEPs must be analyzed on a case-by-case basis.[82]

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[75] *Id*. at 999.
[76] *Id*. (quoting Board of Education v. Rowley, 458 U.S. 176, 202 (1982)).
[77] *Id*.
[78] *Id*. at 996.
[79] *Id*. at 997.
[80] *Id*.
[81] *Id*. at 999–1000.
[82] *Id*. at 1001.

VI. CONCLUSION

Endrew was decided March 22, 2017 and has impacted most circuits.[83] Since several jurisdictions, like the Tenth Circuit, had misinterpreted *Rowley* and overemphasized *Rowley's* "some material benefits" language, the *Endrew* decision will affirm the meaningful benefit standard. [84] This updated standard will require educators who establish IEPs to ensure each is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[85] School authorities continue to have deference in the IEP process since the IEP mandates communications between the parents and the educators.[86]

Although this heightened standard may require more time and energy for educators, ensuring meaningful progress will realign the educational system to Congress' goals of "provid[ing] students with disabilities a free and appropriate education"[87] and of "promot[ing] equality in the education system where 'the educational needs of

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[83] United States v. Maldonado-Burgos, 869 F.3d 1 (1st Cir. 2017); R.B. v. N.Y. City Dep't of Educ., 689 Fed. Appx. 48 (2d Cir. 2017); T.M. v. Quakertown Cmty. Sch. Dist., 251 F.Supp.3d 792 (E.D. Pa. 2017); M.L. v. Smith, 867 F.3d 487 (4th Cir. 2017); Dallas Indep. Sch. Dist. v. Woody, 865 F.3d 303 (5th Cir. Tex. 2017); I.L. v. Knox Cty. Bd. of Educ., 257 F.Supp.3d 946 (E.D.Tenn. 2017); I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch., 863 F.3d 966 (8th Cir. 2017); Rachel H. v. Dep't of Educ., 868 F.3d 1085 (9th Cir. 2017); and United States v. Vail-Bailon, 868 F.3d 1293 (11th Cir. 2017).

[84] *Endrew*, 137 S. Ct at 998.

[85] *Id.* at 999 (quoting Board of Education v. Rowley, 458 U.S. 176, 203–204 (1982)).

[86] *Id.* at 1001.

[87] Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1332 (10th Cir. 2015).

millions of children with disabilities were not being fully met . . . .'"[88] Guaranteed free and public education is foundational in our country. Thus, the *Endrew* decision will likely have a positive impact across circuits and within schools.

[88] 20 U.S.C.S. § 1400(c)(2) (2012).