How to Measure Progress at the IEP table, Making *Endrew F.* a Reality for Students

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In 1975, gross disparities in access to educational programming and school campuses for students with disabilities prompted Congress to enact Pub. L. No. 94-142, 89 Stat. 773, the Education for All Handicapped Children Act ("EHA"), to guarantee that children with disabilities obtain a "free appropriate public education." Just seven years later, in 1982, this Court considered, *inter alia*: "What is meant by the Act's requirement of a 'free appropriate public education'?" *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176, 186 (1982). Against the historical backdrop of an educational policy that focused on children with disabilities obtaining access to public school campuses and receiving any education, whatsoever, this Court "conclude[d] that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201.

However, since the United States Supreme Court issued its decision in *Rowley*, educational policy has steadily shifted away from framing educational benefits for children with disabilities (and otherwise) in terms of access to education and focusing, instead, on standardized academic achievement to progress. Thus, any effort to quantify the amount of educational benefits required by the Act, in light of *Rowley*'s "basic floor of opportunity" approach is analogous to forcing an access-driven peg into, what is now, an achievement-based hole. The result of which is that courts have attempted to craft convoluted and often meaningless standards to determine whether a school district has conferred an educational benefit upon a child with disabilities. This has caused entirely inconsistent outcomes across the United States.

Once a parent challenging his or her child's individualized education program has demonstrated the child has failed to progress commensurately with nondisabled peers in the general education curriculum, the court's inquiry then shifts to determining whether the school district most recent assessments and evaluations, initial individualized education program planning, and constant recalculation in light of lack of expected progress has all occurred pursuant to the requirements laid out in section 1414 of 20 USC. Because Congress intended this country's education policy to further the ultimate goals of learning and close achievement gaps between all students in that high-expectations general education curriculum, departures from either the rate of learning on a particular campus, from the overall list of content expected to be mastered, or the focus in the general education at all must be justified by the assessments, data, and planning congress set up for understanding how educational decisions were made for each individual student.

The United States Supreme Court decided *Rowley* only seven years after Congress determined that students had a right to be educated in public school settings regardless of their disability status, Pub. L. No. 94-142, 89 Stat. 773 (1975), and only five years after Congress finalized clarifying regulations in 1977, Education of Handicapped Children: Implementation of Part B of

the Education of the Handicapped Act, 42 Fed. Reg. 42474 (1977). The *Rowley* decision also came on the heels of the racial desegregation efforts across the country, *see e.g.*, *Morgan v. Hennigan*, 379 F. Supp. 410, 482–83 (D. Mass. 1974) (ordering desegregation of the Boston Public School Systems) *supplemented in Morgan v. Kerrigani*, 388 F. Supp. 581 (D. Mass. 1975); *see also Milliken v. Bradley,* 418 U.S. 717 (1974) (addressing desegregation plans in Detroit). Given this backdrop and the focus on access to schools for all children across the country, it is unsurprising that this Court concluded in *Rowley* that "[w]e would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." 458 U.S. at 190, n.11.

Rowley emphasized that courts must look to federal policy, as well as the explicit definition in the IDEA, to ascertain the substantive rights conferred by the Act. Specifically, this Court stated, "[w]e are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define 'free appropriate public education' . . . ." *Id.* at 187.

Rowley goes on to state: "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189. The "other items from the definitional checklist" require that instruction and services: (i) "be provided at public expense and under public supervision"; (ii) "meet the State's educational standards"; (iii) "approximate the grade levels used in State's regular education"; and (iv) "comport with the child's IEP." *Id*.

Thirty years later, the Court looked at FAPE and made clear that the IEPs of children with disabilities must be "appropriately ambitious" to enable them to make progress in in light of their unique abilities. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). The Court explained that children with disabilities are to be challenged to reach their potential for progress just as their non-disabled peers are, regardless of the severity of their disabilities. IDEA, the Court held, "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001.

IDEA, in other words, protects children from the "soft bigotry of low expectations." *See* President George W. Bush, Address to the Latin Business Association (Sep. 3, 1999) ("Now some say it is unfair to hold disadvantaged children to rigorous standards. I say it is discrimination to require anything less—the soft bigotry of low expectations."); *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004)("[C]ourts should heed the congressional admonishment not to set unduly low expectations for disabled children.").
In 2001 Congress and President George W. Bush built on the IASA's focus on a core of challenging state standards and expanded on Massachusetts's efforts, resulting in the No Child Left Behind Act ("NCLB") being signed into law on January 8, 2002. *See* Pub. L. No. 107-110, 115

Stat. 1425 (2002) (current version at 20 U.S.C. § 6301 *et seq.* (2015)). The NCLB had the overarching purpose of ensuring "that all children [receive] a fair, equal, and significant opportunity to obtain a high-quality education" and to close educational achievement gaps. Pub. L. No. 107-110, 115 Stat. 1425, 1439–40 (2002). Academic accountability was the cornerstone of NCLB, which asked schools to develop educational programming so as to ensure that each student reached at a minimum, proficiency, on challenging State academic achievement standards and state academic assessments. *Id.* Moreover, NCLB specifically called for our educational system to:

> (1) ensur[e] that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;
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> (2) meet[] the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, ***children with disabilities,*** Indian children, neglected or delinquent children, and young children in need of reading assistance; . . .
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> (4) holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education.

Id. (emphasis added).

In 2004, after aligning the basic floor of educational expectations with the "high-quality education" standards in NCLB, Congress reauthorized the IDEA again, strengthening the systems for developing student programs and evaluating progress. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (current version at 20 U.S.C. § 1400 *et seq.* (2015)).

> Borrowing on the ideas and maxims in NCLB, Congress wrote that:
>
> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmental goals and, ***to the maximum extent possible, the challenging expectations that have been established for all children***; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible . . .

Pub. L. No. 108-446, 118 Stat. 2647, 2649 (2004) (current version at 20 U.S.C. § 1400(c)(5)(A) (2015)) (emphasis added).

The Senate Report accompanying the 2004 reauthorization of the IDEA also provided that "[f]or most students with disabilities, many of their IEP goals would likely conform to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB." S. Rep. No. 108-185, at 29 (2003); s*ee also* Pub. L. No. 108-446, 118 Stat. 2647, 2708 (current version at 20 U.S.C. § 1414(d)(1)(A)(IV) (2015)) (explaining that to achieve the IDEA's goals, the statute requires that an IEP provide such special education, related services, and supports necessary to: "advance appropriately toward attaining the annual goals . . . [and] ***to be involved in and make progress in the general education curriculum*** . . . .") (emphasis added).

The Analysis of Comments and Changes accompanying the 2006 IDEA Part B regulations also explained that "§ 300.320(a)(1)(i) clarifies that the general education curriculum means the same curriculum as all other children. Therefore, an IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, Final Rule, 71 Fed. Reg. 46540, 46662 (Aug. 14, 2006).[1] Indeed, researchers have documented the success of an approach that provides access to general education standards for students with disabilities. *See* Ginevra Courtade, et al., *Seven Reasons to Promote Standards-Based Instruction for Students with Severe Disabilities: A Reply to Ayres, Lowrey, Douglas, & Sievers (2011)*, 47(1) Educ. and Training in Autism and Developmental Disabilities 3, 3–5 (2012).[2]

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[1] *See also* U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., *OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, at 1 (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf ("To help make certain that children with disabilities are held to high expectations and have ***meaningful*** access to a State's academic content standards . . . [and] to clarify that an [IEP] for an eligible child with a disability under the [IDEA] must be aligned with the State's academic content standards for the grade in which the child is enrolled.") (emphasis added); *Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities,* Final Rule, 80 Fed. Reg. 50773, 50773–74 (Aug. 21, 2015) (describing how States are "no longer authorize[d] . . . to define modified academic achievement standards . . . for eligible students with disabilities" because "[s]ince these regulations went into effect, additional research has demonstrated that students with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.") *Id.* (footnote omitted).

[2] "Through [the IDEA] policies, the expectation for students with significant cognitive disabilities has evolved from simply participating in assessment; to the documented achievement of adequate yearly progress in reading, math, and science; to the expectation that

The most recent iterations of the IDEA continued Congress's policy of shifting from an access-driven to an achievement-based educational agenda and were ***absolutely intended*** to align with the shifting educational agenda, set forth in NCLB, of "high-quality education" based on "academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials . . . aligned with challenging State academic standards." Pub. L. No. 107-110, 115 Stat. 1425, 1439 (current version at 20 U.S.C. § 6301(1) (2015)).

In fact, the most recent iteration of our education policy, Every Student Succeeds Act ("ESSA"), specifically contemplates coordination with the IDEA, 20 U.S.C. § 6311(a)(1)(B) (2015), and contemplates students with disabilities would meet the same standards as their non-disabled peers except for in cases of "students with the most significant cognitive disabilities." 20 U.S.C. § 6311(b)(2)(D) (intending to ensure that no more than 1% of the total number of students in a State may be assessed using alternate assessments in any subject).

The Supreme Court's recent decision in *Endrew F.* solidified this protection. In rejecting the Tenth Circuit's low standard of receiving "merely more than *de minimis*" educational benefit to determine whether a child with disabilities has been provided FAPE, the Supreme Court clarified that, "The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 1001.

The *Endrew F.* Court not only proclaimed that all children with disabilities are entitled to an "appropriately ambitious" and "challenging" educational program but also set forth a fact-intensive FAPE analysis that shields children from low expectations. *See id.* at 1000. General assumptions about a category of disability have no place in the analysis; IDEA's expectation of grade-level advancement and a child's individual circumstances are paramount.

Under *Endrew F.*, a court considering a FAPE claim must first identify the child's individual "circumstances": her present levels of educational achievement, the characteristics of her disability, and her potential for growth. *See id.* at 999. Then it must determine whether the child's program is "appropriately ambitious" in light of those circumstances. *See id.* at 999–1000. This standard requires the court to consider whether the program aims for grade-level advancement in the general education curriculum. *See id.* If the program does not, the court must assess whether the child's circumstances justify that departure from the curriculum, and if a departure is justified, the court must consider whether the program is nevertheless challenging given the child's unique potential for growth. *See id.*

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these assessments document achievement with clear links to state grade-level content standards, even when applying alternate achievement standards for this population." Diane M. Browder, et al., *Creating Access to the General Curriculum with Links to Grade-Level Content for Students with Significant Cognitive Disabilities: An Explication of the Concept*, 41 J. of Special Educ. 2, 2 (2007).

Strict adherence to *Endrew F.*—and strict compliance with IDEA's ban on low expectations—is critical to securing educational opportunity for the millions of children. The *Endrew F.* Court noted that Congress had acted to adopt IDEA because of the "pervasive and tragic academic stagnation," with the majority of students with disabilities either entirely excluded from public education or "sitting idly in regular classrooms awaiting the time they were old enough to 'drop out.'" *Id.* at 999 (internal quotation marks omitted).

Significantly, on remand, the district court in *Endrew F.* held that the Supreme Court established a new FAPE standard, and applying that standard, the court found that Endrew had been denied FAPE. *Endrew F. v. Douglas Cty. Sch. Dist.*, No. 12-cv-2620-LTB, 2018 U.S. Dist. LEXIS 22111, at *3, *26 (D. Colo. Feb. 12, 2018). The court concluded that:

> [Endrew's] IEP was not appropriately ambitious because it did not give [him] the chance to meet challenging objectives under his particular circumstances. Specifically, the IEP proposed by the District was not reasonably calculated for [him] to achieve academic success, attain self-sufficiency, and [receive opportunities to] contribute to society that are substantially equal to the opportunities afforded children without disabilities.

Id. at *26 (citing *Endrew F.*, 137 S. Ct. at 1001).

The clearest indication of how procedural compliance with the requirements of the IDEA does not, alone, demonstrate a student has received educational benefit can be found in the obligation that school districts continually update assessment and data collection, and then update the IEP to ensure that a student's progress and goals adhere as closely as possible to the high-quality general education academic standards. Congress realized, at various points of reauthorization, that the planning and initial offering of a particular educational program and course of study would not always lead to a program that would enable the student to make adequate educational progress. As such, the IDEA requires that the school district make changes in the goals or the services in the IEP to enable the student to make progress. 20 U.S.C. § 1414(c)(1)(B)(i), (d)(4)–(5)(A); 34 C.F.R. § 300.324. Thus, IDEA mandates that the IEP Team address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate . . . ." 20 U.S.C. § 1414(d)(4)(ii)(I).[3]

[3] As part of their obligation to monitor local school districts, several states have adopted a formal Educational Benefit Review ("EBR") protocol that carefully examines whether students have made expected annual progress, and, if not, whether sufficient educational services were provided. *See* Kimberly A. Mearman, *Educational Benefit Review Process*: *A Reflective Process to Examine the Quality of IEPs*, State Educ. Res. Ctr. of Conn., at 3, http://www.ctserc.org/assets/documents/news/2013/serc-edbenefit.pdf (last visited Nov. 18, 2016); Penn. Dep't of Educ., *Educational Benefit Review (EBR)*, 2 Special Education Leader 1, 2-3

●DEVELOPING IEP CONTENT

Present levels of Performance

❖ **ACADEMIC** Skills

✓ Multiple sources

✓ Data on current, practical applications

✓ Focus on strengths

✓ Identify specific skills leading to grade level standards

✓ ***Progress made over the last year***

●DEVELOPING IEP CONTENT

(August 1, 2014), http://pattan.net-website.s3.amazonaws.com/images/2014/09/26/LDR_2_1_EBR0814.pdf; California Dep't of Educ., Special Educ. Div., *Special Education Self-Review: Instructions and Forms Manual*, at 21-24 (revised October 14, 2013), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwilrK3ClbbQAhUrj1QKHfTDCagQFgggMAA&url=ftp%3A%2F%2Fftp.cde.ca.gov%2Fsp%2Fse%2Fds%2F2013-14%2520SESR%2F2013-14%2520SESR%2520Instruction%2520Manual.doc&usg=AFQjCNEQ9QmUiayeedclTWITerbWdGmhmA. Indeed, EBR protocols are designed to determine whether students' IEPs offered educational benefits by evaluating whether the IEPs complied with the explicit substantive requirements of IDEA cited herein. This EBR protocol thus recognizes the relationship between good educational programs and expected student progress; students are more likely to make good progress in good educational programs than in bad ones. Focusing on whether the student made any progress at all on any goal, as the Tenth Circuit did here, ignores the school district's responsibility to assist students with disabilities in making appropriate annual yearly progress on all educational goals, and instead results in lowering expectations and providing lesser services for students who do not make adequate progress, rather than improving their educational program so that the students can make good progress.

Present levels of Performance

❖ **FUNCTIONAL** Skills

✓ Communication

✓ Social Interaction

✓ Self-Advocacy

✓ Self-Determination

✓ Self-Regulation

✓ ***Progress over the last year***

● DEVELOPING IEP CONTENT

Goals and Objectives

✓ The **date** by which the skill or behavior is expected to be mastered.

✓ The **condition** or context provided to enable the skill or behavior to be demonstrated. This may be materials, teacher cues, activities, or adjustments to the environment. The conditions are part of the "specialized instruction" provided because the child has a disability.

✓ The **skill or behavior** that will be demonstrated.

✓ The **criteria** for success

✓ The **assessment method** for evaluating performance of the skill or behavior.

- Modifications, Supports and Services
  - Equipment
  - Materials
  - Environmental changes
  - Scheduling changes
  - Adapted delivery of instruction
  - Adapted assignments
  - Adapted content for learning
  - Social supports/instruction
  - Behavioral support plans
- "Specially Designed Instruction"

…**adapting**, as appropriate to the needs of an eligible child under this part, **the content, methodology, or delivery of instruction**—

- *To **address the unique needs of the child** that result from the child's disability; and*
- *To ensure **access of the child to the general curriculum**, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.*

- Instruction to be Adapted
- Core Curriculum (UDL)

Effective **proactive** instruction aligned to grade level standards and designed for:

- *Multiple ways for students to engage in the lesson*
- *Multiple means of presenting content*
- *Multiple methods for students to express their learning*
- Differentiated Instruction

Strategic **reactive** instruction designed to respond to the different learning strengths, interests, abilities, and characteristics of students in a particular class.

- *Content of instruction*
- *Process of learning (engagement)*
- *Product (means of expression)*
- "Specially Designed Instruction"

Goals and Objectives

✓ The **date** by which the skill or behavior is expected to be mastered.

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✓ The **skill or behavior** that will be demonstrated.

✓ The **criteria** for success

✓ The **assessment method** for evaluating performance of the skill or behavior.

- Roles and Responsibilities

➢ ***Consultation Only:***

✓ Data review

✓ Implementation review

✓ Recommendations discussion

➢ ***Collaborative Planning and Assessment:***

Collaboration between the general and special education teachers that is informed directly by interaction with the student

➢ ***Co Teaching:***

Two teachers with joint and equal responsibility for classroom instruction who are physically present in a heterogeneous classroom on a regular/daily basis

Suggestions for looking at the IEP:

1. Are the present educational levels clear?
    a. If this is not the original IEP, are updates on goals included.
    b. If this is an original IEP, is the ER information provided?
2. Are the strengths listed comprehensive and appropriate?
    a. Have they been updated from previous IEP?
3. Are the needs listed comprehensive and appropriate?
    a. Are the needs from the present educational level?
4. Is there a goal for each need?
    a. If there is not, is it clear why not?
5. Goals
    a. Are they clear and measurable?

b. Are they ambitious for progress in a year?

c. Are they aligned with the curriculum?

d. Are they challenging (see c.)?

6. Baselines

    a. Does each goal have a baseline?

    b. Does the baseline match the goal?

7. Parental Concerns – are they listed and addressed?

8. Progress: If the student did not make progress, were the goals and objectives changed in the IEP to assist the student to make progress?

9. If the student did not make progress, were the services changed in the IEP to assist the student to make progress?

10. If the student did not make progress, were sufficient services provided to ensure the student would make progress?

11. How the student's disability affects involvement and progress in the general ed curriculum

    a. Is the student's disability stated?

    b. Does the statement reflect and communicate an understanding of how the disability affects student's ability to be involved with and make progress in the general ed curriculum?

12. Specially designed instruction – Are they comprehensive and appropriate?

13. Other

    a. Behavior box

        i. If checked, is there an FBA and a BIP?

ii. If not checked, was it considered if there are behavioral issues?

Post *Endrew F.* case law:

Endrew F. v. Douglas County Sch Dist. RE-1, 696 Fed. Appx. 654 (10th Cir. August 2, 2017).

The Court of Appeals vacated its prior opinion and remanded the case to the district court for proceedings consistent with the Supreme Court's decision.

Significantly, on remand, the district court in *Endrew F*. held that the Supreme Court established a new FAPE standard, and applying that standard, the court found that Endrew had been denied FAPE. *Endrew F. v. Douglas Cty. Sch. Dist*., No. 12-cv-2620-LTB, 2018 U.S. Dist. LEXIS 22111, at *3, *26 (D. Colo. Feb. 12, 2018). The court concluded that:

[Endrew's] IEP was not appropriately ambitious because it did not give [him] the chance to meet challenging objectives under his particular circumstances. Specifically, the IEP proposed by the District was not reasonably calculated for [him] to achieve academic success, attain self- sufficiency, and [receive opportunities to] contribute to society that are substantially equal to the opportunities afforded children without disabilities.

Id. at *26 (citing *Endrew F*., 137 S. Ct. at 1001).

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189 (9th Cir. March 27, 2017; Amended, May 30, 2017)

The Ninth Circuit, in the first decision after *Endrew F.*, held that the school district violated the parent's right to participate in the IEP process by revising the IEP without informing the parent when it discovered a drafting error. The IEP offered to the parent stated that the student would receive 240 minutes of services by a teacher of the visually impaired. A week later, the district realized that this was a mistake and amended the IEP to state that the student would receive 240 minutes a week. It did not share the amended IEP with the parent. Not knowing of the amended IEP, the parent challenged the IEP in a due process hearing, and both parties incurred attorney fees. The Court of Appeals held that the district's actions violated IDEA by changing the IEP unilaterally. Even if the student did not experience substantive harm as a result of the district's unilateral action, the parent experienced procedural harm by not being apprised of the actual status of her child's services, which in turn caused her to incur attorney fees.

The Court held that the district's failure to specify in the student's IEP the assistive technology devices it would provide to the student violated the parent's right to participate in the IEP process. Because the parent did not know which devices were required by the IEP, she had no way of confirming whether they were actually being used. The Court held that in such a

circumstance, the burden shifts to the school district to show that the services it actually provided were substantively reasonable.

The Court held that the district violated IDEA by failing to respond to the parent's due process complaint. The Court held that in such a case, the ALJ should not go forward with the hearing, but must order the school district to file a response and shift the cost of the delay to the school district, regardless of who is the prevailing party. The Court remanded to the district court to determine the substantive harm experienced by the parent because of the district's failure to respond and an award of appropriate compensation.

The Court held that the district court erred in deferring to the ALJ's decision because that decision was not thorough and careful. The fact that the ALJ held a three-day hearing, questioned witnesses and wrote a 21-page opinion did not mean that his opinion was thorough and careful, where he failed to address all issues and disregarded some of the evidence presented at the hearing. The Court remanded the case to the district court for further consideration in light of *Endrew F.*

D.B. v. Ithaca City Sch. Dist., 690 Fed. Appx. 778 (2d Cir. May 23, 2017).

The Second Circuit affirmed the decisions of the district court and the SRO that the IEP proposed by the district for a student whose parent sought a residential placement was sufficiently tailored to her individual needs for her to make progress. The Court rejected the parent's contention that the school district could not provide the student with FAPE because its employees lacked training and experience in teaching students with nonverbal learning disabilities. The Court found that the district's recommendations in the IEP aligned "comfortably" with the recommendations proffered by the student's own experts, and that the student's expert had "vacillated" on the question whether the district's special education teachers could implement the student's IEP.

C.G. v. Waller Indep. Sch. Dist., 697 Fed. Appx. 816 (5th Cir. June 22, 2017).

The Fifth Circuit held that although the district court did not expressly apply the *Endrew F.* standards and instead focused on the four factors in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) its analysis was consistent with *Endrew F*., The four factors from Michael F. are (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key stakeholders; and (4) positive academic and non-academic benefits are demonstrated. The opinion showed that the court considered that the student's IEP was appropriately ambitious in light of her circumstances. In support of its holding, the Court noted that "[t]he record is replete with evaluations, observations and information regarding C.G., her needs and her

performance level," the teachers worked with many professionals, public and private, to align goals and strategies and the district adjusted its strategies many times. The Court of Appeals affirmed dismissal of the parents' 504 claim because it was not independent of their IDEA claim. It was premised on the "highly restrictive" nature of the zoned classroom setting, an assertion that repeated the language of IDEA's "least restrictive environment" concept.

Special Sch. Dist. No. 1 v. R.M.M.., 861 F.3d 769 (8th Cir. June 29, 2017).

Minnesota state statute, Minn. Stat. § 125A.091, subd. 12, confers a right to a free, appropriate public education on students attending private school, thus creating more rights than IDEA creates for those students. The Eighth Circuit held that IDEA makes available a due process hearing to private school students with disabilities and their parents. The fact that state law, and not federal law, conferred a right to a FAPE was "immaterial."

I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch., 863 F. 3d 966 (8th Cir. July 14, 2017).

The Minnesota Blind Persons' Literacy Rights and Education Act provides in relevant part: "Instruction in Braille reading, and writing must be sufficient to enable each blind student to communicate effectively and efficiently with the same level of proficiency expected of the student's peers of comparable ability and grade level." Minn. Stat. § 125A.06(d). The evidence showed that the student did not always have access to materials in Braille. However, the ALJ found that even when materials in Braille were not provided, the student had access to materials in some accessible format most of the time, and he chose to read some short assignments in a format other than Braille. The student made progress in the general education curriculum and, if the evidence showed lack of progress on the student's Braille reading speech goal, it was "more than likely" due to his "persistence" in reading visually. In a post-*Endrew F.* decision, the Court held that IDEA regulation 34 C.F.R. § 300. 172(b), which requires state educational agencies to "provide instructional materials to blind persons or other persons with print disabilities in a timely manner," did not impose an "absolute" obligation to provide materials in Braille.

The Court held that the student's claims of discrimination under Section 504 and the ADA, that the school district failed to provide I.Z.M.'s with equal opportunity to achieve the same proficiency in reading and communication as non-disabled students, failed because even if they were not entirely precluded by his IDEA claims, they grew out of the allegations that the district had failed properly to implement his IEP. Those claims also failed as a matter if law because the school district did not demonstrate bad faith or gross misjudgment.

S.H. v. Tustin Unified Sch. Dist., 682 Fed. Appx. 559 (9th Cir. March 15, 2017).

The parents challenged the school district's proposal to change their child's placement from a county-run program to a program operated by the district. The parents alleged that the district had failed to involve them in the placement decision and that the district had predetermined the placement. The Court of Appeals held that the district had afford the parents "extraordinary" opportunities to participate. The parents visited the proposed placement multiple times, and at least one of the parents attended every IEP meeting, at which many changes to the plan were affected. Just because the parents and other team members did not actually voice their concerns at the meetings does not mean that they lacked an opportunity to participate.

Melanie B. v. Georgetown Indep. Sch. Dist., 2018 U.S. Dist. LEXIS 72977 (May 1, 2018)

The IDEA was enacted to ensure that "[a] free appropriate public education is available to all children with disabilities." 20 U.S.C. § 1412(a)(1)(A). A child's free appropriate public education "must be tailored to his particular needs by means of an 'individual educational program'" and "assure that such education is offered, to the greatest extent possible, in the educational 'mainstream,' that is, side by side with non-disabled children, in the least restrictive environment consistent with the disabled student's needs." Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247 (5th Cir. 1997). The FAPE "need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." Id. It "guarantees only a 'basic floor of opportunity.'" Id. However, "the educational benefit 'cannot be a mere modicum or de minimus; rather, an IEP must be likely to produce progress, not regression or trivial educational placement.'" *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009) (quoting id. at 248). In Texas, an Admission, Review, and Dismissal committee prepares a student's IEP. *S.H. ex rel. A.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x 850 (5th Cir. 2012).

Z. B. v. D.C., 2018 U.S. App. LEXIS 11365 (May 1, 2018)

In an IDEA suit for a student with ADHD, remand was required as to the development of an initial IEP to determine if the school district met its duty to evaluate the student and offer an IEP that adequately responded to her needs because without the requisite assessment of the student's needs when the initial IEP was drafted, it could not be determined what services were needed to provide a FAPE, and as the district court did not question whether the school district needed additional or different metrics of the student's skills to develop the IEP, it failed to establish a reliable baseline of the student's needs against which to evaluate the IEP's adequacy; The second IEP provided a FAPE because it was based on an adequate evaluation and it was reasonably calculated to afford the student an opportunity to make progress in light of her particular circumstances.

N.P. v. Maxwell, No. 16-1164, 2017 U.S. App. LEXIS 24803 (4th Cir. December 8, 2017).

The ALJ held that the student was not entitled to attend a private school at school district expense because the district did not deny a free appropriate public education. The district court reversed. The Court of Appeals held that the district court erred when it did not give due weight to the administrative findings because the ALJ used "appropriate fact-finding procedures" (holding a three-day hearing and receiving many exhibits), made thoughtful credibility determinations, and issued a thoroughly reasoned and lengthy opinion. The Court of Appeals also erred in failing to explain its deviation from the ALJ's factual findings and its rejection of the ALJ's credibility determinations. The case was placed in abeyance pending the Supreme Court's decision in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 197 L. Ed. 2d 335 (2017). After the Supreme Court released its opinion, the parties submitted supplemental briefing, and the case was re-calendared for oral argument. The Court of Appeals vacated the district court's opinion and remanded the case so that the ALJ and the district court could reconsider the evidence under the new standard. Both had issued their decisions prior to *Endrew F.* and in fact, the ALJ cited the "more than de minimis" standard. The Court held that the ALJ, as the only person to see the witnesses testify in person, should have the opportunity to decide in the first instance whether the outcome of the case is different under the standard articulated by the Supreme Court in *Endrew F.* **On May 10, 2018 the ALJ reversed her earlier decision and, after application of the *Endrew F.* standard, determined that the placement provided by the school district did NOT provide FAPE.**