

Measuring progress under *Endrew F.*
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Endrew F. v. Douglas County School District RE-1. On March 22, 2017, a unanimous Supreme Court recognized the problem and, with clear and simple logic, put an end to the thirty-five years of aiming too low and missing the point. *Endrew F.* affords an opportunity to return to a commitment to progress for all of our students.

Specifically, what does *Endrew F.* change? In *Endrew F.*, the Supreme Court rejects a limited view of the IDEA and stresses the importance of providing disabled students with educational programs that lead to actual progress. The Court emphasizes that an, “IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Endrew F.*, 137 S. Ct. at 999. The Court reasons that, “a substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.” *Id.*

The Court also cautions that while the decisions of school system officials should be respected, that respect has limits particularly when the experts have not applied their expertise and failed to, “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1000-1002 (emphasis added). In other words, warranting the sort of deference traditionally granted to school system officials requires an explicit showing that they have both applied their expertise and adequately justified their decisions.

These dual emphases on progress and explanation undergird the Court’s observation that its 2017 standard is “markedly more demanding.” It is not so much that *Endrew F.* requires more benefit for each student than suggested by *Rowley*, but that the manner for demonstrating

“appropriateness” requires a showing of progress and the school system must cogently respond to parental requests.

It is impossible to overemphasize the difference. Early on, the Supreme Court was clear in *Rowley*. It said that the purpose of the Act was to ensure that students were getting benefit from their education. The Court stated the obvious – that there would be no purpose in passing such a law if it did not guarantee some level of result. In *Andrew F.* the Supreme Court has returned to its analysis and added the idea of progress. Notably, the word “progress” does not appear at all in *Rowley* to describe the way in which to measure benefit, except for a single footnote: “We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a ‘free appropriate public education.’ In this case, however, we find Amy’s academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.” *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.*, 458 U.S. 176, 203 N.25 (1982).

Rowley was decided only seven years after Congress determined that students had a right to be educated in public school settings regardless of their disability status, Public Law 94-142 (1975), and clarifying regulations were not even finalized until 1977. *Rowley* came on the heels of the de-segregation efforts across the country, see e.g. *Morgan v. Hennigan*, 379 F.Supp. 410 (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 *Miliken v. Bradley*, 418 U.S. 717 (1974) (addressing desegregation plans in Detroit). Given this backdrop, it is unsurprising that the *Rowley* court concluded that "it 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 we 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:

We 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." 458 U.S. at 187-188.

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:

- be provided at public expense and under public supervision;
- meet the State's educational standards;
- approximate the grade levels used in State's regular education; and
- comport with the child's IEP.

Id.

In *Andrew F.*, the Court stresses the need for IEPs to lead to actual progress. As already mentioned, the Court emphasizes that an, "IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Andrew F.*, 137 S. Ct. at 999. The Court specifically emphasizes that, "a substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Id.* And, again, the Court defines appropriateness as progress in both academics and functional skills.

The Court has now clarified the importance of seeing actual, measurable progress under a student's IEP. That means that, in creating IEPs and assessing the progress achieved, we need to

be sure to create IEP goals with clear baseline data so we can establish an accurate starting point. A student's progress must be measurable, so school staff needs to assess the progress in a quantifiable way. By the end of the year, the starting and end point have to be compared, resulting in clear, measurable data.

And this progress is based upon a cumulative process. For example, the Court was clearly not satisfied with *Andrew F.* repeating the same IEP goals from year to year, pointedly emphasizing that, "Andrew's 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." *Id.* at 996. And when discussing his proposed IEP for fifth grade, the Court notes that the parents saw it as, "pretty much the same as his past ones." *Id.* The Court never implies that it is only looking at the prior IEP. Instead, the Court refers to multiple IEPs, one year to the next. In other words, a student repeating the same present levels of performance and goals on his or her IEP cannot be said to be making the progress envisioned by *Andrew F.*

Of course, *Andrew F.* recognizes that the progress we can expect is not the same for all students. In determining what amount of progress one should expect, the Court repeatedly stresses the needs of the actual child, instructing that the IEP must be, "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" and that the, "educational program must be appropriately ambitious in light of his circumstances. *Id.* at 999-1000 (emphasis added). That progress must be measured consistent with "the child's circumstances" is similar to the language in *Rowley*, but that goals must also be "appropriately ambitious" is new. And, the Court also explains that, "[a]n IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Id.* at 999 (emphasis added).

The Court’s language is quite open ended. When considering a student’s unique needs, this can cover a wide range of categories. For example, the progress expected for a student with above-average cognitive ability is very different than the progress expected for a student with very low cognitive ability. And, the Court notably did not limit “unique needs” to strictly academic needs. Therefore, we need to look at all needs that make a child unique. For example, if a student has a medical condition causing him to miss significant portions of school, we need to program differently for that student than a student who regularly attends. Or, if a student has an emotional trauma in the past, certainly school staff may need to account for this in her IEP.

OSEP GUIDANCE ON ENDREW F.

Following *Andrew F.* the Department of Education issued a question and answer styled document to provide guidance on the application of the decision. Several of the DOE responses shed light on the application of *Andrew F.*

“Does the standard in *Andrew F.* apply prospectively to IDEA cases?”

Yes. The Supreme Court decisively rejected the “merely more than de minimis” standard used by the Tenth and other Circuits; therefore, that standard is no longer considered good law. The Court explained, “[a] student offered an educational program providing merely more than de minimis progress from year to year can hardly be said to have been offered an education at all...The IDEA demands more.” Now, as a result of *Andrew F.*, each child’s educational program must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives.”

“Does the standard in *Andrew F.* only apply to situations similar to the facts presented in *Andrew F.*?”

No. The standard that the Court announced in *Andrew F.* clarifies the scope of the FAPE requirements in the IDEA and, as such, applies to the provision of FAPE to any IDEA-eligible child with a disability, as defined by the law. The standard in *Andrew F.* applies regardless of the child’s disability, the age of the child, or the child’s current placement.”

“What does “reasonably calculated” mean?

“The “reasonably calculated” standard recognizes that developing an appropriate IEP requires a prospective judgment by the IEP Team. Generally, this means that school personnel will make decisions that are informed by their own expertise, the progress of the child, the child’s potential for growth, and the views of the child’s parents. IEP Team members should consider how special education and related services, if any, have been provided to the child in the past, including the effectiveness of specific instructional strategies and supports and services with the student. In determining whether an IEP is reasonably calculated to enable a child to make progress, the IEP Team should consider the child’s previous rate of academic growth, whether the child is on track to achieve or exceed grade-level proficiency, any behaviors interfering with the child’s progress, and additional information and input provided by the child’s parents. As stated by the Court, “any review of an IEP must consider whether the IEP is reasonably calculated to ensure such progress, not whether it would be considered ideal.”

“What does “progress appropriate in light of the child’s circumstances” mean?

The essential function of an IEP is to provide meaningful opportunities for appropriate academic and functional advancement, and to enable the child to make progress. The expectations of progress in the IEP must be appropriate in light of the child’s unique circumstances. This reflects the focus on the individualized needs of the particular child that is at the core of the IDEA. It also reflects States’ responsibility to offer instruction “specially designed” to meet a child’s unique

needs through an IEP. While the Court did not specifically define “in light of the child’s circumstances,” the decision emphasized the individualized decision-making required in the IEP process and the need to ensure that every child should have the chance to meet challenging objectives. The IDEA’s focus on the individual needs of each child with a disability is an essential consideration for IEP Teams. Individualized decision-making is particularly important when writing annual goals and other IEP content because “the IEP must aim to enable the child to make progress.” For example, the Court stated that the IEP Team, which must include the child’s parents as Team members, must give “careful consideration to the child’s present levels of achievement, disability, and potential for growth.”¹

“The Department reasserts its long-standing position that all students, including students with disabilities, must be held to high expectations and rigorous standards. Many students with disabilities can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided, and every student should have the chance to meet challenging objectives and achieve academic goals in an educational environment that is safe and respectful of all viewpoints and backgrounds. The language in subpart (a) is consistent with the standard expressed in *Endrew F. v. Douglas County School District Re-1*, 137 S.Ct. 988 (2017) (*Endrew F.*), the unanimous Supreme Court decision holding “that a child’s educational program must be appropriately ambitious in light of his circumstances.” This standard, and requirements expressed elsewhere in law and regulation, are still operable, even if not explicitly restated in these priorities.”

¹ The Secretary of Education specifically targeted special education inadequacies as one of the eleven priority areas for monetary grants, citing the *Endrew* decision and the importance of recognizing the capability of students with disabilities.

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Congress made clear that one of its overriding priorities was giving students with disabilities access to the general education curriculum and education in the regular classroom to the maximum extent possible. This requirement has been strengthened in subsequent reauthorizations of the IDEA. *Id.*; see also 20 U.S.C. §1400(c)(5) (“Congress finds . . . almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the *general education curriculum* in the regular classroom, to the maximum extent possible.”). Moreover, abundant quantitative and qualitative research demonstrates that students with disabilities can achieve considerable educational benefit from access to the general education curriculum and placement in general education classes with supplementary aids and services, such as resource rooms and itinerant instruction.

IDEA’s mandates are not simply empty aspirations; in fact, research demonstrates that children with disabilities can achieve considerably more educational benefit from placement in general education classes with access to the general education curriculum through supplementary aids and services than from placement in special education classrooms or schools with limited access, or no access to their age-appropriate non-disabled peers or general education curriculum. Further, the research also supports the finding that when students with and without disabilities spend time together, all students benefit; thus, there is a positive correlation between academic achievement and inclusion. Additionally, the Supreme Court has recently made clear that the IEPs of children with disabilities must be “appropriately ambitious” to enable them to make progress in the *general education curriculum* 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 progress just as their non-disabled peers are. For most students, this progress happens most effectively when children with disabilities are given access to the general education curriculum and included in the general education classrooms with their peers without disabilities. IEPs that are just deemed to be “more appropriate” without regard to the children’s least restrictive environment do not provide children with the ability to meet their true potential, nor do they satisfy the Congressional mandate under IDEA.

MORE THAN FORTY YEARS OF RESEARCH SUPPORTS THE LEAST RESTRICTIVE ENVIRONMENT MANDATE

Congress Relied on Thirty Years of Research Supporting Inclusive Education in Reauthorizing the IDEA in 2004

Thirteen years ago, in its 2004 reauthorization of IDEA, with its renewed commitment to placement of students with disabilities in general education classroom, Congress relied on “30 years of research and experience.” 20 U.S.C. §1400(c)(5). That research showed that students with disabilities who are educated in general education classes do better academically and socially than comparable students educated in noninclusive settings, regardless of the type of disability or grade level. See e.g., Xuan Bui, et al., *Inclusive Education Research & Practice*, Maryland Coalition for Inclusive Education available at http://www.mcie.org/usermedia/application/6/inclusion_works_final.pdf (compiling 30 years of research on inclusive practices demonstrates included children perform better academically socially and have a positive effect on their non-disabled peers); Michael J. Guralnick et al., *Immediate Effects of Mainstreamed Settings on the Social Interactions and Social Integration of Preschool Children*, 100 Am. J. Mental Retardation 359-77 (1996) available at https://depts.washington.edu/chdd/guralnick/pdfs/immed_effects_AJMR_vol100_94.pdf (finding that the behavior of children with disabilities appears to be positively affected by participation in activities and classrooms with typically developing children); Samuel Odom, *Preschool Inclusion: What We*

Know and Where We Go From Here, 20 Topics in Early Childhood Special Educ. 21, 20-27 (2000) (Appx. 1) (noting that various studies “found that children with severe disabilities who participate in inclusive settings appear to score higher on standardized measures of development than comparable children enrolled in traditional special education settings.”).

Moreover, research supports the conclusion that time spent with non-disabled peers enhances academic achievement for students with disabilities; meaning that inclusion and achievement are positively correlated. For example, a 2002 study compared results on measures of child development and social competence for children in inclusive programs versus children in segregated or “self-contained” programs over a two-year study period. The children enrolled in inclusive programs achieved statistically significant better results than the children in the segregated programs. Mary Fisher & Lauanna H. Meyer, “*Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs*,” 27 Res. & Prac. for Persons with Severe Disabilities 165, 169-73 (2002), available at <https://www.researchgate.net/publication/250169854>

Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs (last visited Oct. 23, 2017). The authors concluded:

The results of this study point to greater gains on psychometrically valid measures for students who were included in general education settings in comparison to matched peers who were segregated. Moving instruction into inclusive environments, rather than providing instruction in isolation from normalized learning opportunities... seems to be beneficial for individual child learning outcomes.

Id. at 172-73.

Recent Research Confirms that Access to the General Education Curriculum and Non-Disabled Peers Benefits Students with Disabilities

Research after the reauthorization of IDEA in 2004 continues to confirm the marked academic and social improvement in children with disabilities who are educated alongside their typical peers in the general education classroom. *E.g.*, Wayne S. Sailor & Amy B. McCart, Stars in Alignment, 39 Res. & Prac. for Persons with Severe Disabilities 55, 57-58 (2014) (collecting studies and noting benefit to *all* students of educational practices that support inclusion); Hehir, Thomas et al., Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report (2014), available at <http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf> (last visited Oct. 23, 2017); see also Lewis B. Jackson et al., *The Dynamic Relationship Between Context, Curriculum and Student Learning: A Case for Inclusive Education as a Research Based Practice*, 34 Res. & Prac. for Persons with Severe Disabilities 175-95 (2008), available at http://www.academia.edu/2567145/The_dynamic_relationship_between_context_curriculum_and_student_learning_A_case_for_inclusive_education_as_a_research-based_practice; Peggy Coyne et al., *Literacy by Design: A Universal Design for Learning Approach for Students with Significant Intellectual Disabilities*, 33 Remedial & Special Educ., 162- 72 (2012), available at https://ccids.umaine.edu/wp-content/uploads/sites/26/2013/08/Remedial-and_Special-Education-2012-Coyne-162-72_web.pdf (students with significant disabilities can learn academic content, build social competence and develop friendships with peers).

In an analysis of self-contained classes, experts observed special education classes that were spacious, well-staffed by educators and paraprofessionals, and supplied with adequate resources. Despite these supports and resources, they found a remarkable lack of time that students spent in instruction, and the instruction that did occur was provided primarily by paraprofessionals. Further, they found there were few opportunities for students to respond to instructional cues, a

high level of distractions in the classroom, a lack of communication supports for students, and a lack of individualization of instruction. Kurth, Jennifer A., Kiara Born, and Hailey Love. “*Ecobehavioral Characteristics of Self-Contained High School Classrooms for Students with Severe Cognitive Disability.*” *Research & Prac. for Persons with Severe Disabilities* 41, 227–43 (2016).

Moreover, and particularly important here, is that research demonstrates the benefits of inclusion in the general education classroom especially for children who have Down syndrome. Sue Buckley et al., *A Comparison of Mainstream and Special School Education for Teenagers with Down Syndrome: Effects on Social and Academic Development*, 9 *Down Syndrome Res. & Prac.* (2006), available at <https://www.down-syndrome.org/reports/295/reports-295.pdf> . This study compared two groups of children with Down syndrome, one group educated with their non-disabled peers in general education classrooms and another group educated in special education classrooms containing only peers with disabilities. *Id.* The study found that by their teenage years, the children with Down syndrome included in general education with non-disabled peers were reading and writing more than 3.4 years ahead of children with Down syndrome educated in special education classrooms with only disabled peers. *Id.* at p. 57. Similarly, the expressive language of the included children was 2.6 years ahead of that of the non-included children. *Id.* at 56-57. And, by being educated alongside typically developing children, 78% of the included children had language intelligible to strangers, as compared to 56% of those educated in separate classrooms. *Id.*; see also *A Summary of the Research Evidence on Inclusive Education* (PDF Download Available), available at https://www.researchgate.net/publication/312084483_A_Summary_of_the_Research_Evidence_on_Inclusive_Education (summarizing extensive benefits, including academic, social and emotion, of including students with disabilities,

particularly those with Down syndrome, in the general education classroom with non-disabled peers).

THE CRITICAL FACTS FOR AN ENDREW ANALYSIS

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’s most recent assessments and evaluations, initial individualized education program planning, and recalculation in light of lack of expected progress has all occurred pursuant to the requirements laid out in 20 United States Code Section 1414. 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 content expected to be mastered, or the focus in the general education at all must be justified by the assessments, data, and planning Congress established for understanding how educational decisions were to be made for each individual student.

a. Facts establishing the student’s capabilities

Firmly establishing a student’s capabilities and potential provides the crucial foundation for an *Endrew F.* challenge. “Like our precedents, *Endrew F.* treated a child’s intellectual abilities and potential as among the most important circumstances to consider.”²

During IEP discussions, it is vital the “team” either agree on the student’s capabilities or agree to disagree. It is vital to get the school on record to commit to its belief regarding the student’s abilities and the facts supporting its determination.

² *K.D. by & through Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018)

“Because an IEP must be tailored to the student's reasonably known needs at the time it is offered, the underlying evaluation of the student is fundamental to creating an appropriate educational program. **“The IEP is the means by which special education and related services are ‘tailored to the unique needs’ of a particular child.”** *Andrew F.*, 137 S.Ct. at 994 (quoting *Rowley*, 458 U.S. at 181, 102 S.Ct. 3034). The evaluation requirement “serves a critical purpose: it allows the child's IEP Team to have a complete picture of the child's functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to the needs of the individual child.” *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016); *see id.* at 1110-11, 1124-25.”³

b. Facts establishing the student’s challenges and limitations

“[W]hat Congress has required is that public schools be “ambitious” for every child, giving each the opportunity to “meet challenging objectives.” *Id.* at 1000. Disabilities can be subtle and complex. They may require expertise to identify accurately. The IDEA requires public schools to be alert to the needs of all students they serve. They must take steps to identify those students with disabilities and, armed with all reasonably available information and expertise, ensure that each IDEA-eligible student receives an education appropriate to her needs.”⁴

c. Facts establishing baselines and present levels

With vague or inaccurate present levels and baselines schools can arbitrarily declare IEP goals have been met. Baselines, and present levels, just like progress should be established by a

³ *Z. B. v. D.C.*, 888 F.3d 515, 523 (D.C. Cir. 2018)

⁴ *Z. B. v. D.C.*, 888 F.3d 515, 528 (D.C. Cir. 2018)

method that documents performance. Formal assessments, standardized testing, collected data, and actual work samples.

d. Facts establishing the degree of progress or regression

If measurable goals with well-established baselines are in place, determining progress should be easy. Unfortunately, schools like to rely on subjective measures and anecdotal “evidence.” To combat this progress on goals should be based on objective measures, such as standardized evaluations, academic assessments, collected data, and work samples.