IDEA at 40+ Part One: The Evolution of FAPE

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IDEA at 40+: The Evolution of FAPE

The U.S. Supreme Court last spoke on FAPE’s fundamental requirement in the renowned Rowley decision. As Rowley turns 35, the Court is poised to weigh-in again in Endrew F. The decision in Endrew F. will provide the Supreme Court the opportunity to re-define FAPE after a 35-year-Rowley-standard has provided the framework for FAPE. In Endrew F., the 10th Circuit was forced to address the contention that the Rowley standard had been shifted in its own jurisprudence from “some educational benefit” standard in favor of a heightened “meaningful educational benefit” standard. As special education has evolved from access to inclusion to assertions that the IDEA may require “maximized” programs through litigation, these materials will explore how the Rowley standard has evolved.

HISTORY OF FAPE

PRE-ROWLEY: Access and Appropriateness


A state could receive funding under Title VI by submitting a plan that met eleven general conditions, the first of which was that grant money could only be spent to initiate, expand, or improve programs to meet the special educational and related needs of handicapped children.” Id., § 604, 80 Stat. 1205. The Commissioner could disapprove a state’s plan subject to judicial review under the substantial evidence standard of review. Id., §§ 606 & 607, 80 Stat. 1207.

Thus, like much regulatory legislation, Congress set a goal, but delegated the task of pursuing that goal to administrative expertise, and the expertise of the individual states subject to approval by the federal agency. The judiciary’s role was limited to reviewing federal agency action under the deferential substantial evidence standard.


The fact that the EHA offered funding to initiate programs to educate children with disabilities spoke to the fact that many children with disabilities were excluded from public education. One of the first major court cases addressing the education of children with disabilities was Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279, 282 (E.D. Pa. 1972). Pennsylvania law permitted a child to be excluded from public

school if a school psychologist certified that the child was uneducable. A group of excluded students sued, alleging that the state’s practice denied them the education promised by the state constitution without a hearing a violation of the due process clause. Id. at 283. They also alleged that the state’s conclusion that they could not be educated lacked a rational basis, violating the equal protection clause, and the substantive aspects of the due process clause. Id. Students initiated similar litigation against the District of Columbia. Mills v. Bd. of Educ., 348 F. Supp. 866, 971 (D. D.C. 1972).

The cases confronted two issues – access and appropriateness.

The plaintiff students in PARC were within the age range to whom the state constitution promised an education, and thus were similarly-situated to typically developing students. The question was whether their exclusion was rationally related to a legitimate state interest. PARC, 343 F. Supp. at 297 (“We are satisfied that the evidence raises serious doubts (and hence a colorable claim) as to the existence of a rational basis for such exclusions.”) Before the court ruled on the merits, however, the parties agreed to a consent decree granting the plaintiff students access to public education. PARC, 343 F. Supp. at 284-85, 288 n. 19.

Access, however, raises the issue of appropriateness almost immediately. The plaintiff students were similarly-situated to typically developing peers by age, but not similarly situated in terms of educational needs. As the Supreme Court held in a case in which non-English speaking Chinese students sued San Francisco, arguing that English-only instruction violated Title VI of the Civil Rights Act of 1964: “[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.” Lau v. Nichols, 414 U.S. 563, 566 (1974); see also New Mexico Ass’n for Retarded Citizens v. New Mexico, 678 F.2d 847, 853-54 (10th Cir. 1982) (raising Lau-type claims claim under Section 504).

The difficulty arises in constructing a remedy related to appropriateness. “Education, perhaps even more than welfare assistance, presents a myriad of intractable economic, social, and even philosophical problems.” San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 42 (1973) (quotation and citation omitted). Lau was spared from wading into these waters:

No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners ask only that the

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2 While PARC held that the students presented a colorable claim, the outcome was far from certain. At least one court held:

In the Court’s opinion, such a classification is sufficient to meet the rational basis test. In dealing with a system of mandatory free public education a state which determines that only those children who can derive actual benefit from a broadly based public educational system are to be included therein cannot be said to be acting arbitrarily.

Cuyahoga County for Ass’n of Retarded Children and Adults v. Essex, 411 F. Supp. 46, 52-53 (N.D. Ohio 1976). The court, however, found such students could not be excluded without sufficient protections to satisfy the due process clause. Id at 60-61.
Board of Education be directed to apply its expertise to the problem and rectify the situation.

414 U.S. at 564-65. In short, the issue of appropriateness was left to educators, a course of action taken in both PARC and Mills. The PARC decree required schools to grant a child with disabilities “access to a free public program of education and training appropriate to his capacities.” 343 F. Supp. at 287 (emphasis added). The decree in Mills required schools to provide “a publicly-supported education suited to [the students’] needs.” 348 F. Supp. at 971. Neither decree guaranteed a level of benefit or outcome.

PARC and Mills led to litigation elsewhere; forty-six cases in twenty-eight states. House Report No. 94-332, p. 3. In response to this increase in litigation, Congress began taking action.

The EHA was extended for an additional three years with two new conditions. Publ. L. 93-380, 88 Stat. 484. States had to provide “full educational opportunity” to all children with disabilities as well as provide procedural safeguards, specifically, prior written notice of an agency’s decision to change a child’s educational status, and the opportunity for a hearing to challenge the decision. Education Amendments of 1974, § 613(a)(12) & (13), 88 Stat. 581-82.

The following year Congress adopted the “Education of All Handicapped Children Act of 1975.” Public Law 94-142, 89 Stat. 773. Congress found that the education needs of children with disabilities were not being fully met, and many children with disabilities were not receiving “appropriate educational services which would enable them to have full educational opportunity.” EAHCA, § 601(a), 89 Stat. 774. Therefore, it was “in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.” Id.

In order to receive funding, states had to submit a plan meeting conditions that remained largely unchanged from the prior year’s EHA. EAHCA, § 613, 89 Stat. 782-84. If a school district did not comply with the plan, the state was required to withhold further payments from the district. EAHCA, § 614(b)(2), 89 Stat. 786.

The EAHCA set eligibility criteria, including assuring the state had a goal of ensuring “full educational opportunity to all handicapped children,” and that a “right to a free appropriate public education,” would be available to all handicapped children. EAHCA, § 612(1) & (2), 89 Stat. 780. The fact that the legislation referred to “full educational opportunity” separately from a free appropriate public education and created separate timelines for implementation suggests that “full educational opportunity” was aimed at the problem of exclusion, or access, while a free appropriate public education addressed the issue of appropriateness.

The EAHCA defined a free appropriate public education as

special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are
provided in conformity with the individualized education program required under section 614(a)(5).

EAHCA, § 602(18), 89 Stat. 775. Special education was defined as specially designed instruction to meet the unique needs of the child. EAHCA, § 602(4), 89 Stat. 775. Related services were support services that might be required to assist a child to benefit from special education. EAHCA, § 602(17), 89 Stat. 775. An individualized education program had to include a written statement of the child’s present levels of educational performance, annual goals, short term objectives, the educational services that would be provided to the child, the extent to which the child would be educated with nondisabled peers, and objective criteria for determining whether instructional objectives were being achieved. EAHCA, § 602(19), 89 Stat. 776. In short, the EAHCA set out a process by which the appropriateness and suitability remedies of PARC and Mills could be implemented.

If Congress had defined a free appropriate public education as “specialized instruction based upon the individual child’s unique needs,” there would have been little debate as to the meaning of free appropriate public education. An appropriate education is an individualized education. “The movement toward the individualization of instruction, involving the participation of the child and the parent, as well as all relevant educational professionals is a trend gaining ever wider support in educational, parental, and political groups throughout the Nation.”3 House Report 94-332, p. 13. “[T]he 93rd Congress and, more specifically, this Committee already have expressed their concern about the need for increased individualization.” Id. at 14. Courts, however, assumed that Congress had omitted the lynchpin of the Act – a substantive standard against which the individualized education could be measured.4

**ROWLEY: Self Sufficiency v. Maximization**

The United States Supreme Court considered the appropriate level of education for children with disabilities in *Board of Education of Hendrick Hudson Central School District v. Amy Rowley*, 458 U.S. 176 (1982). Amy Rowley, the student at issue in *Rowley*, suffered from a partial hearing impairment. She had good residual hearing in the frequencies of sound where vowels, which are difficult to lip-read, register. *Rowley*, 483 F. Supp. at 529. Amy’s parents were deaf. They raised her using an array of interventions. Id. at 530. By the time Amy entered kindergarten, she was adept at lip reading. Id. at 530. She had an IQ of 122. Assisted by a hearing aid, Amy

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3 The Report, however, further states that individualization is linked to creating an educational plan for each child “that is tailored to achieve his or her maximum potential.” House Report 94-332, p. 13. Notwithstanding this language, however, the term maximum potential is not included in Public Law 94-142, nor even H.R. 7212.

4 The fact that the Act does not contain a substantive standard should not be surprising. Typically developing students are not guaranteed a substantive level of benefit, much less guaranteed an individual outcome. State content standards are benchmarks as to what student should know, not guarantees as to what students will know. Adequacy law suits which allege that the legislature is not funding education at a level to keep a constitutional promise, hint at a substantive standard, but comparisons between adequacy litigation and IDEA litigation should be carefully drawn. Adequacy litigation raises programmatic complaints about funding. School districts are named plaintiffs in more than eighty percent of these suits. Sonja Ralston Elder, “Enforcing Public Educational Rights Via A Private Right of Action,” 1 Duke Forum for Law and Social Change 137, 143 (2009). IDEA complaints most often focus on methodology. It is worth noting that the initial remedy sought in school funding cases is that the legislature, not a court, fix the problem.
interacted productively with her classmates and teachers, and her academic performance was above average. *Id.* at 531-32. A sign language interpreter was placed in the classroom for a two-week trial and reported that Amy did not need his services.

Amy’s first grade IEP called for sessions with a tutor for the deaf for one class a day, three hours a week of speech language services, the use of the hearing aid and preferential seating. *Id.* at 531. Her parents sued, complaining that Amy should have a sign language interpreter. *Id.*

The district court found Amy’s education to be “adequate,” but not “appropriate,” stating that the district “ignore[d] the importance of comparing her performance to that of non-handicapped students of similar intellectual caliber and comparable energy and initiative.” *Id.* at 534. The court, extrapolating the results of a word recognition test to the classroom, made a specific finding that Amy only was able to identify only fifty-nine percent of the words that were spoken in class with the interventions on her IEP, but that Amy would understand one hundred percent of the words with a sign language interpreter. *Id.* at 532.

Stating that the EAHCA did not define “appropriate education,” the court pointed to a regulation implementing Section 504 of the Rehabilitation Act.° *Id.* at 533.

°An appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

*Id.*, quoting 45 C.F.R. § 84.33(b) (emphasis supplied by court). The court then considered two possible meanings of appropriate education; (1) an adequate education or (2) an education that enables a child “to achieve his or her full potential.” *Id.* at 533. The court settled on an intermediate standard: “This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.” *Id.* at 533. The court acknowledged:

The difficulty with the standard, of course, is that it depends on a number of different measurements which are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or “shortfall” be compared to the shortfall experienced by non-handicapped children.

The court had no evidence regarding the “shortfall” experienced by Amy’s classmates, but it did have its finding that Amy could identify approximately sixty percent of the spoken words with her current IEP, but would understand one hundred percent with an interpreter. Therefore, Amy’s IEP was not giving her the same opportunity to reach her potential as other students.

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° The regulation still is in use. 34 C.F.R. § 104.33(2)(b)(i).

When Amy’s case reached the Supreme Court, the School District argued that Amy’s IEP was appropriate because it was consistent with the state’s plan. In addition, the IEP was individualized, based on observations, evaluations, and experience. And it was working. Amy was getting good grades. She was going to be self-sufficient.

Her parents argued that the Act’s definition of a free appropriate public education was “not a functional definition.” *Bd. of Educ. v. Rowley*, case no. 80-1002, Br. for Respondents, 1982 U.S. S.Ct. Briefs LEXIS 164, p. *21. They argued that the term could only be understood by reference to the Congressional goal of equal protection. *Id.* at *23. Rather than discuss the analytical parameters of equal protection jurisprudence, equality was invoked primarily as a rhetorical tool.

It is worth noting that Amy’s parents emphasized that they were not proposing a results-based test. “The Act envisions no specific end result.” *Id.* at *29. “The home life of the child, his parents and the child’s cultural and sociological environment often determine the child’s academic success and attainment or lack thereof.” *Id.* at *30.

The United States argued for “substantially equal access to the educational process,”*6 Bd. of Educ. v. Rowley*, case no. 80-1002, Br. for the United States, 1982 WL 608583, p. *15. The Solicitor General urged the Court to rely on the Section 504 regulations to give meaning to Congress’s use of the term free appropriate public education. *Id.* at *17-18 n. 11.


According to the definitions contained in the Act, a “free appropriate public education” consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child “to benefit” from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s IEP. 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.

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6 At oral argument, the Solicitor General’s Office conceded: “Congress did not fix into the statute a particular standard.”
He added: “Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children.” *Id.* at 189. Justice Rehnquist, however, asked “whether the legislative history indicates a congressional intent that such education meet some additional substantive standard.” *Id.* at 190.

By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly “recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.” S. Rep., at 11. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

*Id.* at 192.

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education . . . We therefore conclude 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 200-01.

“The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem.” *Id.* at 202. “We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.” *Id.* “[W]e hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 203.

Justice Blackmun concurred, rejecting the majority’s standard, and the test proposed by the parents: “[T]he question is whether Amy’s program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. *Id.* at 211 (Blackmun, J., concurring).

Justice White dissented, joined by Justices Brennan and Marshall. The opinion wanders but appears to land on a standard similar to Justice Blackmun: “According to the Senate Report,
for example, the Act does ‘guarantee that handicapped children are provided equal educational opportunity.’” *Id.* at 213 (White, J. dissenting), quoting S. Rep. No. 94-168, p. 9 (1975).

In the end, the justices – Burger, Powell, Rehnquist, O’Connor, and Stevens – endorsed individualization, but four justices – Blackmun, Brennan, White, and Marshall – plus the Solicitor General endorsed equal educational opportunity, a standard echoed in the Section 504 regulation.

*Rowley* established a two-part test to determine whether a child has received a free appropriate public education:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

*Id.* at 206-07.

The IDEA has been amended five times since *Rowley*, twice in response to Supreme Court decisions, but it has never added a “substantive standard prescribing the level of education to be accorded handicapped children” to the IDEA. 458 U.S. at 189. Indeed, the Department of Education has never proposed a regulation that sets forth a substantive standard for the level of benefit to be accorded children with disabilities. Doing so might well exceed the Department’s regulatory authority. 20 U.S.C. § 1406(a) (Secretary shall issue regulations “only to the extent that such regulations are necessary to insure that there is compliance with the specific requirements of this chapter.”).

Thirty-four years after *Rowley*, the definition of free appropriate public education remains the same. 20 U.S.C. 1401(9). The definition of special education remains the same. 20 U.S.C. § 1401(29). The definition of related services remains the same. 20 U.S.C. § 1401(26). And the process for developing an IEP remains largely the same. 20 U.S.C. § 1414(d)(1).

**POST-ROWLEY: A Circuit Split or Complementary Adjectives?**

The *Rowley* standard – “reasonably calculated to enable the child to receive educational benefits” – is followed by every circuit in the federal system. *Leggett v. District of Columbia*, 739 F.3d 59, 70 (D.D.C. 2015)(“[A]n IEP is generally ‘proper under the Act’ if ‘reasonably calculated to enable the child to receive educational benefits.’”) (quoting *Rowley*, 458 U.S. at 207); *Lessard*, 518 F.3d 18 at 27 (1st Cir. 2008) (“[W]e start with the *Rowley* Court’s mandate that IEP

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components must be ‘reasonably calculated to enable the child to receive educational benefits.’

(quotting Rowley, 458 U.S. at 207; Reyes v. New York Dep’t of Educ., 760 F.3d 211, 221 (2d. Cir. 2014) (School districts must “formulate an IEP that is ‘reasonably calculated to enable the child to receive educational benefits.’”)) (quotting Rowley, 458 U.S. at 207; D.S. v. Bayonne Bd. of Ed., 602 F.3d 553, 564 (3d. Cir. 2010) (“[A] reviewing court must … determine whether the educational program was ‘reasonably calculated to enable the child to receive educational benefits.’”)) (quotting Rowley, 458 U.S. at 207; M.S. v. Fairfax Cnty. Sch. Bd., 553 F.3d 315, 319 (4th Cir. 2009) (“[A]n IEP must ultimately be ‘reasonably calculated to enable the child to receive educational benefits.’”)) (quotting Rowley, 458 U.S. at 207); Houston Indep. Sch. Dist. V. V.P. ex rel. Juan P., 582 F.3d 576, 583-84 (5th Cir. 2009) (“The court must … determine whether the IEP developed through such procedures was ‘reasonably calculated to enable the child to receive educational benefits.’”)) (quotting Rowley, 458 U.S. at 207), cert. denied, 559 U.S. 1007 (2010); Knable v. Bexley City Sch. Dist., 238 F.3d 755, 763 (6th Cir. 2001) (“[T]he court must determine whether the IEP, developed through the IDEA’s procedures, is reasonably calculated to enable the child to receive educational benefits.”) (citing Rowley, 458 U.S. 207), cert. denied, 533 U.S. 950; Alex R. v. Forrestville Valley Cnty. Unit Sch. Dist., 375 F.3d 603, 613 (7th Cir. 2004) (“[A]n IEP is valid when … it is ‘reasonably calculated to enable the child to receive educational benefits.’”)) (quotting Rowley, 458 U.S. at 207), cert. denied, 543 U.S. 1009 (2004); Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett, 440 F.3d 1007, 1011 (8th Cir. 2006) (“To pass substantive muster, the IEP must be ‘reasonably calculated to enable the child to receive educational benefits.’”) (quotting Rowley, 458 U.S. at 206-07); K.D. v. Dep’t of Educ., 665 F.3d 1110, 1122 (9th Cir. 2011) (“The court must determine … whether the state developed an IEP that is ‘reasonably calculated to enable the child to receive educational benefits.’”)) (quotting Rowley, 458 U.S. at 207); Sytsema ex rel. Sytsema v. Academy Sch. Dist. No. 20, 538 F.3d 1306, 1315 (10th Cir. 2008) (“[F]ederal courts must determine whether a school district substantively complied with the Act by focusing on whether ‘the [IEP] developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.’”) (quotting Rowley, 458 U.S. at 207); R.L. v. Miami-Dad Cnty. Sch. Bd., 757 F.3d 1173, 1182 (11th Cir. 2014) (“[T]he IEP must be ‘reasonably calculated to enable the child to receive educational benefits.’”) (quotting Rowley, 458 U.S. at 207).

While some commentators assert that a circuit split has developed regarding the proper interpretation of the Rowley standard, an examination of the relevant case law demonstrates that there is instead a split of adjectives to describe the Rowley’s requirement that a child’s IEP must be “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 207; see Brief of Respondent 12, Endrew F. v. Douglas County School District RE-1, No. 15-827 (Apr. 15, 2016). Indeed, many of the standards allegedly adopted by the relevant courts of appeal are selected by the commentators themselves rather than being referenced by circuits to which they are attributed. Id. For example, while some commentators assert that the Third Circuit has adopted a “substantial benefit” standard, the Third Circuit has never used that label in any decision. Id. Instead, it uses the label “meaningful.” E.g., T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3rd Cir. 2000) (“By failing to inquire into whether the Board’s IEP would confer a meaningful educational benefit ….”) (emphasis in original).
The multiplicity of alleged standards and adjectives is not altogether surprising, as the circuits demonstrate varying degrees of fidelity to its choice of adjectives. Brief of Respondent 16, *Endrew F. v. Douglas County School District RE-1*, No. 15-827 (Apr. 15, 2016). For example, the First Circuit has used at least three adjectives to describe the educational benefits required by *Rowley* that appear conflicting at first blush. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 36 (1st Cir. 2012) (“likelihood that the IEP will confer a meaningful educational benefit”) (emphasis added); *Lessard*, 518 F.3d at 23-24 (1st Cir. 2008) (“IEP need only supply ‘some educational benefit’”) (emphasis added); *Lt. T.B. ex rel. N.B. v. Warwick Sch. Cnty.*, 361 F.3d 80, 82 (1st Cir. 2004) (IEP must be “reasonably calculated to provide an appropriate education”) (emphasis added). The Seventh Circuit “is similarly eclectic,” even conjoining the “conflicting adjectives.” Brief of Respondent 12, *Endrew F. v. Douglas County School District RE-1*, No. 15-827 (Apr. 15, 2016); *Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007) (IEP provided “some meaningful educational benefit”) (emphasis added), cert. denied, 554 U.S. 930 (2008).

This lack of fidelity may be attributed to the fact that courts view the different adjectives as complimentary rather than conflicting. The First Circuit noted:

> The Supreme Court has said that an IEP must offer only “some educational benefit” to a disabled child. Thus, the IDEA sets “modest goals: it emphasizes an appropriate rather than an ideal, education; it requires an adequate, rather than an optimal, IEP.” At the same time, the IDEA calls for more than a trivial educational benefit, in line with the intent of Congress to establish a “federal basic floor of meaningful, beneficial educational opportunity.” Hence, to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit.

*D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012) (emphases added) (internal citations and parentheticals omitted). The First Circuit statement was supported by citations from the allegedly “conflicting” First, Second, Third, and Sixth Circuits.

The circuits define the different adjectives in similar ways. The Second Circuit, for example, has held that “meaningful benefit” “contemplates more than mere trivial advancement.” *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120-21 (2d Cir. 1997). That holding is almost identical to the Tenth Circuit’s description of “some benefit,” which is it “must merely be ‘more than de minimis.’” Pet. App. 16a. Similarly, the Fourth Circuit and the First Circuit define “meaningful” in similar ways, and the Fourth Circuit uses “some” in the same manner as the Tenth Circuit. Brief for the Respondent 20, *Endrew F. v. Douglas County School District RE-1*, No. 15-827 (Apr. 15, 2016).

The *Rowley* standard— as well as the conflicting views regarding the alleged circuit split v. adjective split – will be revisited by the Supreme Court in *Endrew F. v. Douglas County School District Re-1*.

**AMENDMENTS TO THE IDEA**

While every lower court, all nine justices of the Supreme Court, the Solicitor General, and the parties in *Rowley* agreed that the Act did not include a substantive standard, Congress
responded with utter silence. Indeed, it was not until 1997 that Congress undertook to amend the IDEA. However, some have argued that the 1997 amendments undermined *Rowley*.

The argument that the 1997 amendments to the IDEA undermined *Rowley* generally begins and ends with the Congressional findings:

> Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities. 20 U.S.C. § 1400(c)(3)-(4). Congress found that the education of children with disabilities can be made more effective by having high expectations and ensuring access to general education curriculum in the regular classroom. *Id.* at §1400(c)(5)(A).

> However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

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coordinated with the IDEA. This speaks directly to the Congressional finding that the education of children with disabilities can be improved by coordinating the IDEA with the ESEA. 20 U.S.C. § 1400(c)(5)(C). Thus, to properly understand the IDEA, one must also understand the ESEA.

The ESEA requires states to adopt a statewide accountability system. 20 U.S.C. § 6311(d). The accountability system is based on “academic content standards” that specify what students should know and be able to do. Id. at § 6311(b); 34 C.F.R. § 200.1(b)(1)(i). States also must adopt “academic achievement standards” that are aligned with the state’s content standards. Id. at § 6311(b); 34 C.F.R. § 200.1(c)(1)(i). Academic achievement standards define how students will demonstrate knowledge of the content standards. Dep’t. of Educ., “Modified Achievement Standards,” p. 13 (July 20, 2007). In short, Congress directed the states to establish the level of benefit that students should receive -- including students with disabilities. These content standards drive the curriculum.

States assess students’ mastery of the content standards through statewide assessments. 20 U.S.C. § 6311(b)(2). States must report the aggregated results broken down into sub-groups of disadvantaged students. § 6311(c)(2). Closing the achievement gap between these disadvantaged sub-groups and other students is the driving force behind the ESEA. The disadvantaged sub-groups identified by Congress are economically-disadvantaged students, students in racial and ethnic groups, students with disabilities, and students who are learning English. Id. States must establish goals for the subgroups and report the results of progress toward those goals. Id. at § 6311(b)(4) & (h). Correspondingly, the IDEA requires states to establish goals and performance indicators for children with disabilities that are related to the ESEA. 20 U.S.C. §1412(a)(15).

Students with disabilities must be included in state and district-wide assessments. 20 U.S.C. § 1412(a)(16). The rational for including students with disabilities in the accountability system speaks directly to the Congressional findings regarding high expectations:

[W]hen students with disabilities are part of the accountability systems, educators’ expectations for these students are more likely to increase. In such a system, educators realize that students with disabilities count and can learn to high levels, just like students who do not have disabilities. Only by including all students in accountability measures will certain unintended consequences be avoided.

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18 Modified achievement standards are no longer permissible. Therefore, the guidance referenced above has been withdrawn. The Department’s explanation of academic achievement standards, however, remains valid.
19 For example, for the 2012-2013 school year, twenty-one percent of IDEA-eligible fourth graders in Colorado were in the proficient range for reading on the state’s standardized test, thirty percent were partially proficient, and forty-seven percent scored in the unsatisfactory range. http://www.cde.state.co.us/fedprograms/nclbreportcard2012-13.
20 For example, the State of Colorado has adopted a target of graduating eighty percent of the Part B eligible children with a regular education diploma. https://www.cde.state.co.us/cdesped/auprofile_douglas2014-2015. More than seventy percent of Douglas County School District’s IDEA- eligible children graduate with a regular diploma in four years. Id. More than eighty percent earn a regular diploma in six years. Id. The State has a goal of reducing the dropout rate to less than twenty-five percent. Id. Douglas County School District’s dropout rate is less than seventeen percent. Id.
This does not mean, of course, that students with disabilities would be placed in a one size fits all system. “The purpose of the IEP is to tailor the education to the child; not tailor the child to the education.” House Rep. No. 105-95, p. 104. The Senate Committee on Health, Education, Labor, and Pensions reported during the 2003 reauthorization of IDEA:

The committee recognizes that, for some students with significant disabilities, measuring achievement, especially academic achievement, can be challenging. There are some students for whom the curriculum focuses on functional skills that cannot be easily translated into core academic content such as reading or math. However, adapted curricula can be aligned with State standards and the progress of these students still can be measured through assessments. To ensure greater accountability for these students, the bill contains new requirements for the development and administration of alternate assessments that are aligned with the State’s academic content and achievement standards, or for the development of alternate standards for those children with significant cognitive disabilities.


As a result, States may adopt “alternative academic achievement standards” for students with significant cognitive disabilities “provided those standards are aligned with the State’s academic content standards.” 20 U.S.C. § 6311(b)(1)(E) (emphasis added); 34 C.F.R. § 200.1(d). Alignment is vertical, not horizontal. “Alternative achievement standards may include prerequisites or enabling skills that are part of a continuum of skills that culminates in grade level proficiency.” Dep’t. of Educ., “Alternate Achievement Standards,” p. 27 (August 2005).

For example, a Colorado content standard for fourth grade students requires students to: “Demonstrate comprehension of a variety of informational, literary, and persuasive texts.” https://www.cde.state.co.us/sites/default/files/documents/coextendeddeo/documents/rwc_with_eeos.pdf, p. 55. A corresponding academic achievement standard is met if the student can “refer to details and examples in a text when explaining what the text says explicitly and when drawing inferences from the text.” Id. An alternative academic achievement standard for the same content standard is met if a student can “[m]atch a simple sentence that includes an attribute to a picture.” Id. Thus, all students pursue the same grade level content standard – comprehension of various texts – but at different levels of achievement.

There is no indication that any state consulted the Court’s decision in Rowley as a data point in developing its academic content standards, academic achievement standards, or alternative academic achievement standards. Similarly, there is no indication that Congress intended courts to assess the educational merits of each state’s academic standards, that is, decide whether “match[ing] a simple sentence that includes an attribute to a picture” conveys a level of benefit, that is, trivial benefit, some benefit, meaningful benefit, or substantial benefit, especially when Congress expressly stated that states are not “required to submit to its academic standards to the Secretary. 20 U.S.C. § 6311(b)(1)(A).
In the end, the amendments to the IDEA in 1997 and 2004, as well as, the changes to the ESEA, demonstrate that Congress expected that state agency expertise would drive improvements in educational outcomes for disadvantaged children including children with disabilities in a manner that respects the concern of the court in *Mills* that limitations on educational funding not “be permitted to bear more heavily on the ‘exceptional’ or handicapped child than on the normal child,”\(^{21}\) while responding to the concern that the IDEA not further disadvantage students who are disadvantaged by other challenges. Kelman and Lester, *Jumping the Queue*, p. 6.


J.L., a high school student in Mercer Island, Washington with specific learning disabilities, scored poorly on standardized tests despite having above average intelligence. *J.L. v. Mercer Island Sch. Dist.*, 2006 WL 3628033 (W.D. Wa. 2006). J.L.’s parents enrolled her in a residential school in Massachusetts (the same school that M.E. from New Jersey attended in *Ridgewood*), and initiated an action seeking reimbursement *Id*.

Following a twelve-day hearing, an administrative law judge upheld the school district’s IEPs and denied reimbursement. J.L.’s parents initiated an action for judicial review. The district court reversed, holding that the 1997 amendments represented such a “significant shift” in the IDEA that *Rowley* had been superseded. The court held that the emphasis on transition services as “an outcome-oriented process which promotes movement from school to post-school activities,”\(^{22}\) was such a dramatic shift that “any citation to pre-1997 case law on special education is suspect,”\(^{23}\) apparently unaware that the transition services were added to IEPs in 1990. § 602(d), Publ. L. 101-476, 104 Stat. 1103. According to the court, the IDEA now required that schools insure that students’ goals be attained,\(^{24}\) ignoring that special education and related services were


\(^{23}\) *Id*.

\(^{24}\) *Id*. 
required to allow the child “to advance appropriately toward attaining the annual goals, 25 and both the House and Senate Reports endorsed Department of Education regulation stating that accountability should not be based on a failure to attain goals.

These arguments had been rejected by the First Circuit two years earlier, 26 and were rejected by the Ninth Circuit on appeal, 27 by the First Circuit (again), 28 and several district courts. Mansfield, 618 F. Supp. 2d 568, 574-75 (N.D. Tx. 2009); Mr. and Mrs. C. v. Maine School Admin Unit, 538 F. Supp. 2d 298 (D. Maine 2008); San Rafael Elem. Sch. Dist. v. Calif. Special Educ., Hearing Office, 482 F. Supp. 2d 1152, 1156-57 (N.D. Cal. 2007).

ENDREW F.

As noted above, the U.S. Supreme Court recently granted certiorari to a case that revisits the Rowley standard- Endrew F. v. Douglas County School District RE-1. The issue in Endrew F. is the level of educational benefit a child must receive for a school district to have provided an appropriate level of service under the IDEA.

The petitioner in the case, Endrew F (“Drew”), is a child with a diagnosis of autism and attention deficit/hyperactivity disorder. Pet. App. 3a, Endrew F. v. Douglas County School District RE-1, No. 15-827. From preschool through the fourth grade, Drew received special education and related services from the Douglas County School District (“the District”). Id. at 3a-4a.

While Drew made progress in preschool and kindergarten years, his “behavioral problems began increasing” in second grade. Id. at 63a. In response, the District instituted a behavior intervention plan (“BIP”). Id. Drew’s third-grade IEP significantly increased the minutes he spent either in a significant-support-needs classroom or paraprofessional aide, and added the services of a mental-health professional and speech-language therapist. Brief of Respondent at 8, Endrew F. v. Douglas County School District RE-1, No. 15-827. While Drew “ma[de] progress towards some of [his] goals and objectives,” his behaviors “beg[a]n to interfere with [his] educational opportunities.” Pet. App. 65a. Drew’s fourth-grade IEP included a new BIP designed to address these behaviors. Supp. J.A. 117sa-119sa.

The IEP Team met in April 2010 to design an IEP for the fifth-grade year. Pet. App. 67a. The Team made some adjustments to the IEP – increasing the hours in the significant-support-needs classroom or with his aide – and agreed to meet again on May 10 2010 to discuss a new BIP and the inclusion of an autism specialist on the Team. Pet. App. 68a, 109sa, 142sa. However, Drew’s parents notified the District prior to that meeting that they were enrolling Drew at Firefly Autism House, a private school specializing in educating children with autism. Id. at 29a, 68a-69a.

27 J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 949-951 (9th Cir. 2010). An earlier panel of the Ninth Circuit had stated: “Under the 1997 amendments to the IDEA, a school must provide a student with a ‘meaningful benefit’ in order to satisfy the substantive requirements of the IDEA,” citing first to an earlier Ninth Circuit opinion that did not discuss the 1997 amendments, and Deal that also did not discuss the 1997 amendments. N.B. v. Hellgate Elem. Sch., 541 F.3d 1202, 1212 (9th Cir. 2008).
28 Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 28 n. 5 (1st Cir. 2008).
The parents filed a due process complaint in February 2012 with the Colorado Department of Education, seeking reimbursement for the cost of sending Drew to Firefly. J.A. 16-20. They alleged that Drew had “stopped making progress in his first grade year,” and that his fifth-grade IEP “was not substantively different than the IEPs that had failed to provide [him] and appropriate education in the past.” J.A. 18-19.

A state administrative law judge (“ALJ”) denied the parents’ claim for relief, concluding that the fifth-grade IEP discharged the school district’s obligation to provide a FAPE because it was “reasonably calculated for [Drew] to receive educational benefit.” Pet. App. 59-85a. The parents challenged the ALJ’s decision in federal court; however, the District Court upheld the ALJ’s determination. Id. at 38a.

On appeal, the Tenth Circuit affirmed. Id. at 2a. The court noted that it had “long subscribed to the Rowley Court’s ‘some educational benefit’ language,” and analyzed whether the IEP was reasonably calculated to offer a “more than de minimis” educational benefit. Id. at 15a-16a. The Tenth Circuit ultimately concluded that “the IEP rejected by [Drew’s] parents” was “substantively adequate,” as manifested by his “progress towards his academic and functional goals on his IEPs during the time he was enrolled in the District.” Id. at 22a-23a.

Drew’s parents filed a petition for a writ of certiorari on December 22, 2015, and the Supreme Court granted certiorari on September 29, 2016. Oral argument was held on January 11, 2017, and a decision is expected by June 2017.

A PRACTICAL TURN: WAS IT FAPE?

Providing Educational Benefit

When an IEP team, school administrator, or school attorney is reviewing a particular situation to determine whether the school has indeed provided a free, appropriate public education to a student, there are a variety of factors that can assist in informing that decision. While there are multiple factors, any one of which could be the primary factor in a specific case, the checklist below is intended as a guidepost to begin case evaluation and to plot a course of action for an IEP team to respond to parental requests.

Under the guidance of Rowley, this analysis would begin with some threshold questions. These questions are not intended to be exhaustive of the issues which may (and likely will) arise in a specific case, nor are these questions intended to infer that the answer to any one of them turns the FAPE question for or against the school district. Rather, these are the areas where parental questions are likely to arise, and which may prove useful in your initial review of the case.

Procedural Compliance?

- Did the parent attend the IEP meeting? With proper notice?
- Were all other required team members present or properly excused?
- Was the meeting held within required timelines under state regulations?
- Is there evidence of parental input?
- Were parental concerns both noted and addressed?
- Did the IEP team consider other required components?
  - Assistive Technology?
  - Extended School Year?
  - Nonacademic Services?
- Are the IEP goals specific, measurable, attainable, and based on recent and meaningful data?
- Is there evidence of predetermination?

**Substantive Compliance?**
- Was the evaluation preceding the IEP’s development thorough and use appropriate instruments?
- Are the present levels statements based on data reflected in the evaluation information gathered to assemble the IEP?
- Do the present levels statements reflect the extent to which the child’s disability affects his or her ability to be involved and participate in the general education curriculum? Do the statements reflect the difference between benchmark and target in the goals to follow?
- Are there goals in state content standard areas? If so, are those goals aligned with the state content standards?
- Can the Team explain the basis for the projected progress?
- Are the service hours sufficient to allow the child to progress toward those goals?
- Is the least restrictive environment determination based on considerations like service hours and progress toward IEP goals?

**Educational Benefit/Evidence of Progress?**
- Did the student meet each of his or her IEP goals? If not, was there progress?
- What is the evidence supplied for progress on each IEP goal? Data collected?
- Do we have “apples-to-apples” data to compare from year to year?
- Did the student make progress in the general curriculum? Pass classes? Advance to the next grade? Standardized tests?
How about social performance? Behavior? Functional skills?

If there is no progress on a goal, what accounts for it?
- Methodology issues?
- Attendance?
- Wrong goal?

While some of these questions ask you to look back at the progress achieved by the student, FAPE is always a prospective inquiry: “An IEP is a snapshot, not a retrospective, and we must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.” K.E. v. Independent School District No. 15, St. Francis, Minnesota, 647 F.3d 795 (8th Cir. 2011); see also, James and Lee Anne D. v. Board of Education of Aptakisic-Tripp Community Consolidated School District No. 102, 642 F.Supp.2d 804 (N.D. Ill. 2009) (where the court opined that whether an IEP is reasonably calculated to provide educational benefit is determined prospectively) (emphasis added). While evidence of progress is helpful in forming an initial review of a case, it should not be mistaken as dispositive of the FAPE question.

**The Supreme Court’s eventual decision in Endrew F. may require further analysis of the guidance above.**

CONCLUSION

The nationwide focus on FAPE disputes is likely to remain for the foreseeable future. Particularly if there is a new standard articulated in Endrew F., hearing officers, courts and the parties will continue to debate the bounds of an appropriate education. Those districts that act proactively to address the issue once on notice of a potential FAPE claim by way of student data monitoring and careful reviews of student progress are best situated not only to reduce conflict over student performance, but also to respond to and defend against administrative complaints as well as in the courts. Undoubtedly, regardless of the Court’s decision in Endrew F., districts will continue to find themselves in the unfortunate position of having to defend litigation in this area. School districts facing FAPE claims should analyze legal defenses, and consider what measures can be taken to moot, mitigate or defeat claims that hinge upon the level of educational benefit provided to a student with a disability and the record of the district’s response to parent concerns.