

## PAVED WITH GOOD INTENTIONS: HOW *ENDREW F.* COULD AFFECT STRUGGLING SCHOOL DISTRICTS

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*“The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the [Individuals with Disabilities Education Act] presents a more difficult problem.”*<sup>1</sup>

– Justice Rehnquist, June 28, 1982

*“That ‘more difficult problem’ is before us today.”*<sup>2</sup>

– Chief Justice Roberts, March 22, 2017

### I. INTRODUCTION

Speaking at his granddaughter’s high school graduation in Virginia, the late Justice Scalia offered the class of 2010 simple, yet thoughtful advice.<sup>3</sup> “Movement is not necessarily progress,” the Justice explained.<sup>4</sup> “More important than your obligation to follow your conscience, or at least prior to it, is your obligation to form your conscience correctly.”<sup>5</sup> Justice Scalia concluded his speech by offering his audience some candid guidance: “Good intentions are not enough.”<sup>6</sup>

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<sup>1</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 202 (1982).

<sup>2</sup> Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 993 (2017).

<sup>3</sup> Kat Miller, *Scalia Schools Other Commencement Addresses in His*, WASH. TIMES (June 18, 2010), <https://www.washingtontimes.com/blog/watercooler/2010/jun/18/scalia-schools-other-commencement-addresses-his/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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

Less than one year after Justice Scalia passed away,<sup>7</sup> on January 17, 2017 the surviving eight Justices heard oral argument<sup>8</sup> for the case of *Endrew F. v. Douglas County School District RE-1*.<sup>9</sup> The issue seemed relatively straightforward: how much educational “benefit” should public schools be required to provide to disabled students covered by the Individuals with Disabilities Education Act (IDEA)?<sup>10</sup> Finding an acceptable answer, however, proved to be more difficult. Indeed, Justice Alito—the son of two public school teachers<sup>11</sup>—captured this difficulty with a simple remark: “What is frustrating about this case and about [the IDEA] is that we have a blizzard of words,” Justice Alito said.<sup>12</sup> “[W]hat everybody seems to be looking for is the word that has just the right nuance to express this thought.”<sup>13</sup> The “thought” to which Justice Alito alluded concerned *just how much* the federal government should demand of its public schools.<sup>14</sup>

Throughout oral argument, the Court as a whole seemed bothered by the standard predominately used by the circuit courts—bothered that a modest “some benefit” standard was sufficient to satisfy the substantive requirement of the IDEA.<sup>15</sup> But several Justices—both liberal and conservative—also showed an uneasiness about the possible financial burden that a change to the standard might impose on public schools.<sup>16</sup> “[I]s there any place to discuss the cost that . . . would be incurred for, say, severely disabled students?” Justice Kennedy asked.<sup>17</sup> Justice Breyer shared this concern. “[T]he problem that’s working in my mind is if we suddenly adopt a new standard, all over the country we’ll have judges and lawyers . . . interpreting it differently,” Justice Breyer worried.<sup>18</sup> “I foresee taking the money that ought to go to the children,” he cautioned, “and spending it on lawsuits and lawyers and all kinds of things that are extraneous.”<sup>19</sup> It was

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<sup>7</sup> Justice Scalia passed away on February 13, 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

<sup>8</sup> See generally Transcript of Oral Argument, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827) [hereinafter Transcript of Oral Argument].

<sup>9</sup> 137 S. Ct. 988 (2017).

<sup>10</sup> *Id.* at 997–98.

<sup>11</sup> THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012, at 499 (Clare Cushman ed., 3d ed. 2013).

<sup>12</sup> Transcript of Oral Argument, *supra* note 8, at 47.

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

<sup>14</sup> See *id.* at 47–48.

<sup>15</sup> See generally *id.*; see also Adam Liptak, *Justices Face “Blizzard of Words” in Special Education Case*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/supreme-court-special-education.html>.

<sup>16</sup> See Liptak, *supra* note 15.

<sup>17</sup> Transcript of Oral Argument, *supra* note 8, at 9.

<sup>18</sup> *Id.* at 14.

<sup>19</sup> *Id.* at 15.

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again Justice Alito, however, who neatly summarized the Court’s hesitancy with one question: “No matter how expensive it would be and no matter what the impact in . . . a poor school district would be on the general student population, cost can’t be considered?”<sup>20</sup>

That is undoubtedly a loaded question, as this Comment will demonstrate. It must first be noted, though, that the purpose of this Comment is not to criticize the (unquestionably) good intentions underlying *Endrew F.* Rather, this Comment aims to highlight the potential consequences of that decision, which may be overshadowed by those good intentions. More specifically, this Comment will examine how struggling school districts may suffer under *Endrew F.*’s heightened educational standard. Part II will discuss the historical development of special education law in the United States, culminating with the enactment of the Education for All Handicapped Children Act (EAHCA), and its successor, the IDEA. Students covered by the IDEA are entitled to a free appropriate public education (“FAPE”), but what exactly constitutes a FAPE has been a matter of controversy for quite some time.<sup>21</sup> While school districts must provide disabled students with an individualized education program (“IEP”) that details the students’ required special education and related services, disputes arise when parents disagree with schools as to *what* those IEPs should require.<sup>22</sup> Part III will discuss the circuit split that emerged in the wake of *Board of Education of Hendrick Hudson Central School District v. Rowley*,<sup>23</sup> the landmark special education case preceding *Endrew F.* Part IV will provide an analysis of *Endrew F.*, examining the Supreme Court’s decision to reject the “some benefit” standard and replace it with one “markedly more demanding.”<sup>24</sup> Part V will evaluate how *Endrew F.*’s new standard, although crafted with the best intentions, may nonetheless overburden struggling school districts. Part VI will briefly conclude.

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<sup>20</sup> *Id.* at 27.

<sup>21</sup> DEREK BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 504 (2016).

<sup>22</sup> *Id.*

<sup>23</sup> 458 U.S. 176 (1982).

<sup>24</sup> See *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017).

## II. THE DEVELOPMENT OF SPECIAL EDUCATION LAW IN THE UNITED STATES

### A. *Mental Health Reform's "Bold New Approach"*

On January 20, 1961, nearly one million spectators gathered before the Capitol Building to watch a youthful, charismatic "Catholic boy" sworn in as the thirty-fifth President of the United States.<sup>25</sup> The inauguration of forty-three-year-old President John F. Kennedy signaled a breath of fresh air for a generation exhausted by war. And while the Cold War necessitated that foreign policy remained the core priority of his administration, President Kennedy's familial connection to mental disability suggested that mental health reform would be an important part of the New Frontier.<sup>26</sup> Indeed, less than nine months after his inauguration, on October 17, 1961, President Kennedy appointed the President's Panel on Mental Retardation, a twenty-seven-member panel comprised of "outstanding scientists, doctors, and others."<sup>27</sup> The panel's task was straightforward, yet daunting: develop a national plan to combat deficiencies in mental health treatment.<sup>28</sup>

Only one year later, on October 16, 1962, the panel presented its report to the President, providing over one hundred recommendations regarding methods of research, treatment, and education.<sup>29</sup> In light of the panel's report, on February 5, 1963, President Kennedy issued a "Special Message to the Congress on Mental Illness and Mental Retardation," urging Congress to take "a bold new approach" toward mental health reform.<sup>30</sup> His particular plea for special education was clear:

I am asking the Office of Education to place a new emphasis on research in the learning process, expedite the application of research findings to teaching methods for the mentally retarded,

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<sup>25</sup> *The Inauguration of John F. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/Exhibits/Permanent-Exhibits/The-Inauguration-of-President-Kennedy.aspx> (last visited Jan. 3, 2018).

<sup>26</sup> See *John F. Kennedy and People with Intellectual Disabilities*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/JFK/JFK-in-History/JFK-and-People-with-Intellectual-Disabilities.aspx> (last visited Jan. 3, 2018) [hereinafter *John F. Kennedy and People with Intellectual Disabilities*]. President Kennedy's younger sister, Rosemary, was born in 1918 with a mental disability. *Id.* In 1946, President Kennedy's father, Joseph, along with his mother, Rose, established the Joseph P. Kennedy Jr. Foundation, "in memory of their eldest son" who had been killed in action during World War II. *Id.* The Foundation sought to improve awareness and treatment of those with mental disabilities, and was overseen by President Kennedy's other sister, Eunice Kennedy Shriver. *Id.* Eunice was instrumental in pushing mental health reform as a priority of President Kennedy's administration. *Id.*

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

support studies on improvement of curricula, develop teaching aids, and stimulate the training of special [education] teachers.<sup>31</sup>

Eight months later, on October 24, 1963, Congress passed the Maternal and Child Health and Mental Retardation Planning Amendment to the Social Security Act.<sup>32</sup> It was considered the first major piece of legislation aimed towards mental health reform.<sup>33</sup> Only one week after, on October 31, 1963, President Kennedy signed into law the Community Mental Health Act, which provided funding for the establishment of mental health facilities focused on the treatment and care of people with mental disabilities.<sup>34</sup> This bill, however, would be the last piece of legislation President Kennedy signed into law—he was assassinated just three weeks later.<sup>35</sup> But the assassination of President Kennedy would not curb the progress he had started toward mental health reform. Befittingly, the President's brother, Robert Kennedy, would rejuvenate the effort toward improved awareness of those with mental disabilities.<sup>36</sup>

In the autumn of 1965, two years after his brother's death, Senator Robert Kennedy made an unexpected visit to the infamous Willowbrook State School, touring the children's psychiatric institution and publicly equating it to a "snake pit."<sup>37</sup> While testifying before the Joint Legislative Committee on Mental Health Retardation and Physical Handicap in September 1965, Senator Kennedy endeavored to steer public attention toward the decrepit conditions that had for decades plagued psychiatric institutions.<sup>38</sup> On the heels of Senator Kennedy's commentary, then-Boston University Professor Burton Blatt, along with photographer Fred Kaplan, visited several psychiatric institutions in December 1965.<sup>39</sup> The environments they encountered at these various institutions motivated the duo to document their experiences in *Christmas in Purgatory: A*

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<sup>31</sup> CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, 1933-1973, at 1548 (Robert H. Bremner et al. eds., 1974).

<sup>32</sup> *John F. Kennedy and People with Intellectual Disabilities*, *supra* note 26.

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

<sup>34</sup> *Id.*

<sup>35</sup> President Kennedy, just forty-six years old, was assassinated in Dallas, Texas on November 22, 1963. DeeNeen Brown, *The Day John F. Kennedy Was Killed: How America Mourned a Fallen President*, WASH. POST (Nov. 22, 2017), [https://www.washingtonpost.com/news/retropolis/wp/2017/10/26/how-america-mourned-john-f-kennedy-images-of-grief-for-a-fallen-president/?utm\\_term=.878e24e821ec](https://www.washingtonpost.com/news/retropolis/wp/2017/10/26/how-america-mourned-john-f-kennedy-images-of-grief-for-a-fallen-president/?utm_term=.878e24e821ec).

<sup>36</sup> See PAUL J. CASTELLANI, FROM SNAKE PITS TO CASH COWS: POLITICS AND PUBLIC INSTITUTIONS IN NEW YORK 117 (2005).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 118.

<sup>39</sup> Steven J. Taylor, *Christmas in Purgatory: A Retrospective Look*, 44 AM. ASS'N ON MENTAL RETARDATION 145, 145 (2006).

*Photographic Essay on Mental Retardation*,<sup>40</sup> which brought photographic recognition to the ignored world of mental disability. Indeed, the latter half of the 1960s ushered in a new era of collective mindfulness regarding mental disability and soon spurred advancement in special education at the turn of the decade.<sup>41</sup>

Prior to the 1970s, public schools routinely closed their doors to students with disabilities, depriving them of a proper education by segregating them from the general student population.<sup>42</sup> But this notion of segregation-in-education came under fire in 1954, after a unanimous Supreme Court “conclude[d] that in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>43</sup> The Court in *Brown v. Board of Education* established the right to equal educational opportunity and set a precedent against racial segregation in public education.<sup>44</sup> The landmark decision, however, would improve more than just the educational opportunities of students from racial minorities. Indeed, proponents of students with disabilities used *Brown*’s reasoning in advocating that disabled students should have the same access to education as nondisabled students.<sup>45</sup>

Change in special education law came shortly thereafter, driven by two seminal decisions: *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*,<sup>46</sup> and *Mills v. Board of Education of District of Columbia*.<sup>47</sup> In 1971, the Pennsylvania Association for Retarded Children challenged the constitutionality of Pennsylvania’s statutory-exclusion of mentally disabled students from public schools.<sup>48</sup> The Court in *PARC* held that mentally disabled students could not be denied access to a free and adequate public education, establishing the precedent that would be used to dismantle exclusionary education laws in other states.<sup>49</sup> Only one year later, in 1972, *Mills* took that precedent one step further. The Court in *Mills* extended *PARC*’s doctrine to not just *mentally* disabled students, but to *all* disabled students.<sup>50</sup> These two cases put Washington on notice, and shortly thereafter

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<sup>40</sup> BURTON BLATT & FRED KAPLAN, CHRISTMAS IN PURGATORY: A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION (1974).

<sup>41</sup> See Pa. Ass’n for Retarded Children (*PARC*) v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); see also *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

<sup>42</sup> BLACK, *supra* note 21, at 469.

<sup>43</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>44</sup> See *id.* at 495–96.

<sup>45</sup> BLACK, *supra* note 21, at 469.

<sup>46</sup> 343 F. Supp. 279 (E.D. Pa. 1972).

<sup>47</sup> 348 F. Supp. 866 (D.D.C. 1972).

<sup>48</sup> BLACK, *supra* note 21, at 469.

<sup>49</sup> *Id.*

<sup>50</sup> *Mills*, 348 F. Supp. at 878; see also BLACK, *supra* note 21, at 469.

Congress opened an investigation into the state of special education.<sup>51</sup>

The findings were sobering. Congress discovered that millions of disabled children were being poorly educated, if at all.<sup>52</sup> Indeed, as revealed by the Senate Report that later accompanied the EAHCA, it was estimated that

of the more than 8 million children (between birth and twenty-one years of age) with handicapping conditions requiring special education and related services, only 3.9 million such children [were] receiving an appropriate education. 1.75 million handicapped children [were] receiving no educational services at all, and 2.5 million handicapped children [were] receiving an inappropriate education.<sup>53</sup>

In light of these findings, Congress shifted its attention toward statutory reform for students with disabilities.<sup>54</sup> Accordingly, in 1975 Congress passed—and President Ford reluctantly signed into law<sup>55</sup>—the 142nd piece of legislation of the 94th Congress: the Education for All Handicapped Children Act.<sup>56</sup> “Incorporat[ing] the major principles of the right to

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<sup>51</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 194 (1982).

<sup>52</sup> S. REP. NO. 94-168, at 8 (1975).

<sup>53</sup> *Id.*

<sup>54</sup> BLACK, *supra* note 21, at 470.

<sup>55</sup> *Statement on Signing the Education for All Handicapped Children Act of 1975*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=5413> (last visited Mar. 29, 2018). The following is an excerpt from President Ford’s official statement on signing the EAHCA on December 2, 1975:

Unfortunately, this bill promises more than the Federal Government can deliver, and its good intentions could be thwarted by the many unwise provisions it contains. Everyone can agree with the objective stated in the title of this bill—educating all handicapped children in our Nation. The key question is whether the bill will really accomplish that objective. Even the strongest supporters of this measure know as well as I that they are falsely raising the expectations of the groups affected by claiming authorization levels which are excessive and unrealistic. Despite my strong support for full educational opportunities for our handicapped children, the funding levels proposed in this bill will simply not be possible if Federal expenditures are to be brought under control and a balanced budget achieved over the next few years. There are other features in the bill which I believe to be objectionable and which should be changed. It contains a vast array of detailed, complex, and costly administrative requirements which would unnecessarily assert Federal control over traditional State and local government functions. It establishes complex requirements under which tax dollars would be used to support administrative paperwork and not educational programs. Unfortunately, these requirements will remain in effect even though the Congress appropriates far less than the amounts contemplated in [the EAHCA].

*Id.*

<sup>56</sup> Timothy Ilg & Charles Russo, *Funding Special Education and the IDEA: Promises, Promises*, in MONEY, POLITICS, AND LAW: INTERSECTIONS AND CONFLICTS IN THE PROVISION

education cases,”<sup>57</sup> the EAHCA required all schools receiving federal funding to provide a FAPE to all disabled children covered by the Act.<sup>58</sup> In 1990, the EAHCA was retitled as the IDEA, but its substantive and procedural protections remained practically the same.<sup>59</sup>

#### B. *The IDEA: How Does it Work?*

Under the IDEA, states must adhere to certain procedural and substantive requirements in exchange for federal funding toward the excess costs of special education.<sup>60</sup> First, school districts must determine whether a student is eligible under the IDEA.<sup>61</sup> Despite references to “all children with disabilities” in common law rhetoric and legislative history, not all disabled children are, in fact, eligible under the IDEA.<sup>62</sup> Instead, the IDEA defines an eligible child as one “(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”<sup>63</sup> In other words, eligibility under the IDEA requires that a child: (1) have a type of disability enumerated in the IDEA that “adversely affects [the] child’s educational performance,” and (2) need “special education” and “related services” as a result of that disability.<sup>64</sup>

The IDEA defines “special education” as “specially designed instruction . . . to meet the unique needs of a child with a disability, including . . . instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and . . . instruction in physical education.”<sup>65</sup> Furthermore, “related services” are defined as “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit

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OF EDUCATIONAL OPPORTUNITY 101 (Karen DeMoss & Kenneth Wong eds., 2004).

<sup>57</sup> S. REP. NO. 94-168, at 8; *see also* Bd. of Educ. v. Rowley, 458 U.S. 176, 180 n.2 (1982).

<sup>58</sup> 20 U.S.C. § 1412(a)(1) (2012).

<sup>59</sup> *See Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. DEP’T EDUC., <https://www2.ed.gov/policy/speced/leg/idea/history.html> (last visited Oct. 17, 2018).

<sup>60</sup> BLACK, *supra* note 21, at 471.

<sup>61</sup> *Id.* at 501–02.

<sup>62</sup> *Id.*

<sup>63</sup> 20 U.S.C. § 1401(3)(A).

<sup>64</sup> BLACK, *supra* note 21, at 471; *see also* 34 C.F.R. § 300.8(c) (2017).

<sup>65</sup> 20 U.S.C. § 1401(29); *see also* BLACK, *supra* note 21, at 471 (“The IDEA defines ‘special education’ as the adaptation of the content, methodology, or delivery of instruction to address a child’s unique needs and to ensure access to the general curriculum.”) (citing 34 C.F.R. § 300.39(b)(3)).



from special education . . . .”<sup>66</sup> Such services may include “speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, . . . therapeutic recreation, social work services, . . . rehabilitation counseling, orientation and mobility services, and medical services . . . .”<sup>67</sup> Not all children with an enumerated disability, however, qualify under this two-prong prerequisite. For example, a child with spina bifida may require catheterization services, or a child with cystic fibrosis may require respiratory therapy, but such services would not qualify as “special education” unless the disability adversely affected the child’s educational performance.<sup>68</sup> Put simply, if a child needs “related services” but not “special education,” then that child is not eligible under the IDEA.<sup>69</sup>

Once a child is deemed eligible under the IDEA, the school district has an affirmative obligation to create an IEP for the child, which must be specifically tailored to provide the child with a FAPE.<sup>70</sup> The IEP is the linchpin of the child’s educational curriculum; it is the mechanism through which the majority of IDEA-services operate.<sup>71</sup> As Professor Derek Black<sup>72</sup> explains, the IEP “is the basic plan of education for the child,” and must incorporate the child’s “current educational performance, annual goals and short-term objectives, the extent to which the child can take part in general education, the date services are to begin and how long they will be offered, and the criteria to evaluate whether the student is achieving his or her goals.”<sup>73</sup> Arguably the most important—and most contentious—issue involving the creation of an IEP is whether it provides the child with a FAPE.

The child’s IEP must be uniquely constructed to provide the child with a FAPE.<sup>74</sup> The IDEA defines FAPE as “special education” and “related services” which: “[1] have been provided at public expense, under public supervision and direction, and without charge; [2] meet the standards of the State educational agency; [3] include an *appropriate* . . . education in the State involved; and [4] are provided in conformity with the [child’s

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<sup>66</sup> 20 U.S.C. § 1401(26)(A).

<sup>67</sup> *Id.*

<sup>68</sup> BLACK, *supra* note 21, at 472.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 501.

<sup>71</sup> *Id.* at 503.

<sup>72</sup> Derek Black is a Professor of Law at the University of South Carolina School of Law. David Hopper, *Derek Black, South Carolina University—Federal Education Right*, ACAD. MINUTE (Feb. 13, 2018), <https://academicminute.org/2018/02/derek-black-south-carolina-university-federal-education-right/> (explaining that “[t]he focus of [Professor Black’s] current scholarship is the intersection of constitutional law and public education, particularly as it pertains to educational equality and fairness for disadvantaged students”).

<sup>73</sup> BLACK, *supra* note 21, at 503; *see generally* 20 U.S.C. § 1414(d)(1)(A) (2012).

<sup>74</sup> 20 U.S.C. § 1412(a)(1).

IEP].”<sup>75</sup> A federal circuit split emerged, however, as to what constituted an *appropriate* education; indeed, the term was as ambiguous as it was ambitious. This statutory language created a hotbed of inconsistent jurisprudence and eventually grabbed the Supreme Court’s attention in the autumn of 1981.<sup>76</sup> One year later, the Supreme Court attempted to resolve the issue in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.<sup>77</sup>

C. *The Stakes of Special Education: All Roads Lead to Rowley*

In 1982, the Court in *Rowley* addressed the issue as to when an education is sufficiently “appropriate” to satisfy the FAPE requirement under the IDEA.<sup>78</sup> Plaintiff Amy Rowley was a first-grade student at Furnace Woods School in the Hendrick Hudson Central School District of New York.<sup>79</sup> Rowley had a hearing impairment, and as a result, she was offered an IEP that required she be educated in a regular classroom and receive additional instruction from both a special tutor for the deaf and a speech therapist.<sup>80</sup> The school district proposed that Rowley’s regular classroom instructor speak through a wireless transmitter, which would amplify the instructor’s voice by means of a hearing aid worn by Rowley.<sup>81</sup> Rowley’s parents, however, insisted that the school district instead provide an interpreter in all of Rowley’s classes.<sup>82</sup> The school district refused, and Rowley’s parents subsequently sought administrative review before an independent examiner.<sup>83</sup> The examiner found an interpreter to be unnecessary because Rowley “was achieving educationally, academically, and socially without such assistance.”<sup>84</sup> In response, Rowley’s parents filed a lawsuit in the Southern District of New York, claiming that the school’s refusal to provide an interpreter had denied Rowley a FAPE under the IDEA.<sup>85</sup>

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<sup>75</sup> *Id.* § 1401(9) (emphasis added).

<sup>76</sup> *See generally* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* *Rowley* involved an analysis of the IDEA’s statutory precursor, the EAHCA. *Id.* Still, the same textual language has predominately carried over to today’s version of the IDEA. *Compare id.* at 187–89 (quoting EAHCA definitions), with 20 U.S.C. § 1401(9), (26), (29) (current IDEA definitions).

<sup>79</sup> *Rowley*, 458 U.S. at 184.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 185.

<sup>84</sup> *Id.*

<sup>85</sup> *Rowley*, 458 U.S. at 185–86.

The District Court agreed with Rowley's parents, finding that Rowley had, in fact, been denied a FAPE.<sup>86</sup> The District Court held that Rowley's education was not "appropriate" unless it afforded her "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."<sup>87</sup> A divided Second Circuit affirmed, and the Supreme Court granted certiorari to address the pressing question of what constituted a FAPE under the IDEA.<sup>88</sup> In a 6-3 decision delivered by Justice Rehnquist, the Court established a twofold assessment to determine whether a school had provided a FAPE: (1) the school must "compl[y] with the procedures set forth in the [IDEA]"; and (2) the IEP must be "reasonably calculated to enable the child to receive educational benefits."<sup>89</sup> If these two requirements were met, the Court reasoned, then the school district had fulfilled its obligation under the IDEA—"courts [could] require no more."<sup>90</sup> Finding that Rowley's IEP *was* reasonably calculated to provide her with an educational benefit, the Court reversed the judgment of the Second Circuit.<sup>91</sup> In doing so, however, the Court inadvertently<sup>92</sup> set the standard for what constituted "appropriate education" under the IDEA: an IEP must be reasonably calculated to enable the child to receive an educational benefit.<sup>93</sup> Yet, "[t]he determination of when handicapped children are receiving *sufficient* educational benefits," the Court acknowledged, "present[ed] a more difficult problem."<sup>94</sup>

Indeed, inconsistencies emerged among the federal circuits regarding interpretation of the phrase "educational benefit."<sup>95</sup> Some courts interpreted *Rowley* as requiring no more than "some educational benefit,"<sup>96</sup> whereas other courts interpreted the decision as demanding a heightened "meaningful educational benefit."<sup>97</sup> The distinction was significant because schools were

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 186.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 206–07.

<sup>90</sup> *Id.*

<sup>91</sup> *Rowley*, 458 U.S. at 210.

<sup>92</sup> *Id.* at 202 ("The [IDEA] requires participating States to educate a wide spectrum of handicapped children . . . . It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. . . . We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the [IDEA].").

<sup>93</sup> *Id.* at 206–07.

<sup>94</sup> *Id.* at 202 (emphasis added).

<sup>95</sup> See Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 EDUC. L. REP. 1, 1–4 (2009) (discussing the differences among the federal circuits in applying the *Rowley* standard).

<sup>96</sup> BLACK, *supra* note 21, at 511.

<sup>97</sup> *Id.*

frequently involved in litigation regarding their obligations under the IDEA.<sup>98</sup> One of the most contested issues concerned whether parents were entitled to tuition reimbursement for private schooling when the reason for withdrawing their child from public school was the public school's alleged failure to provide the child with a FAPE.<sup>99</sup> In 1993, the Supreme Court addressed this issue in *Florence County School District Four v. Carter*.<sup>100</sup> The Court's decision in *Carter* established a parental right to tuition reimbursement, even when parents "unilaterally withdraw their child from a public school that provides an inappropriate public education under [the] IDEA and put the child in a private school that provides an education that is otherwise proper under [the] IDEA."<sup>101</sup>

While the IDEA made noteworthy progress in terms of educating children with disabilities, Congress realized that it needed to do more to "improv[e] the quality of services . . . and transitional results . . . obtained by [disabled] students."<sup>102</sup> Accordingly, Congress twice reauthorized and amended the IDEA, first in 1997 and again in 2004.<sup>103</sup> Ironically, however, these amendments all but confirmed that Congress knew the IDEA was drastically underfunded, yet intended to wash its hands of the responsibility regardless. When Congress originally passed the EAHCA, it agreed to fund forty percent of the national average per-pupil expenditure by 1982.<sup>104</sup> That is, Congress promised to pay forty percent of the "excess costs" associated with educating students with disabilities.<sup>105</sup> But once Congress realized that it could never satisfy that threshold, it later amended the IDEA, changing the forty percent figure to a "maximum funding goal, rather than a requirement."<sup>106</sup> As such, Congress openly acknowledged its inability to pull its own weight, shifting the burden onto states and their local school districts. Indeed, aside from a "multiyear boost" linked to the federal stimulus package in 2009, for the past forty-two years Congress has repeatedly failed to even come close to its forty percent benchmark.<sup>107</sup> As of 2017, the federal government covered only sixteen percent of the costs

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<sup>98</sup> *Id.* at 545.

<sup>99</sup> *Id.*

<sup>100</sup> 510 U.S. 7 (1993).

<sup>101</sup> *Id.* at 9.

<sup>102</sup> S. REP. NO. 104-275, at 14 (1996); *see also* S. REP. NO. 108-185, at 6 (2003).

<sup>103</sup> *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; *see also* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

<sup>104</sup> Christina A. Samuels, *Decades of Progress, Challenges Under Federal Special Education Law*, EDUC. WEEK (Nov. 10, 2015), <https://www.edweek.org/ew/articles/2015/11/11/decades-of-progress-challenges-under-federal-special.html>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> *Id.*

associated with the IDEA.<sup>108</sup>

Nonetheless, five years after the IDEA's latest amendment, the Supreme Court further stretched the IDEA's scope in *Forest Grove School District v. T. A.*<sup>109</sup> There, the Court determined whether the amended-IDEA prohibited tuition reimbursement where a child did not first receive "special education and related services" from the public school.<sup>110</sup> Writing for the 6-3 majority, Justice Stevens concluded that the "IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school."<sup>111</sup>

The dissent, joined by Justices Souter, Scalia, and Thomas, emphasized that the IDEA was envisioned to promote collaboration between parents and school districts toward a mutual goal: an appropriate education for the disabled child.<sup>112</sup> Writing for the dissent, Justice Souter sympathized with the concerns of school districts, because "special education can be immensely expensive, amounting to tens of billions of dollars annually and as much as [twenty percent] of public schools' general operating budgets."<sup>113</sup> "Given the burden of private school placement," Justice Souter reasoned, "it makes good sense to require parents to try to devise a satisfactory alternative within the public schools."<sup>114</sup> This fiscal controversy has generated a clash between parents of students with disabilities and struggling school districts—one that federal circuits have grappled with differently in the thirty-five years following *Rowley*.

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<sup>108</sup> U.S. DEP'T OF EDUC., FISCAL YEAR 2017 BUDGET SUMMARY AND BACKGROUND INFORMATION 4 (2017), <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf> [hereinafter FISCAL YEAR 2017 BUDGET SUMMARY].

<sup>109</sup> 557 U.S. 230 (2009).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 247.

<sup>112</sup> *Id.* at 249–60.

<sup>113</sup> *Id.* at 258.

<sup>114</sup> *Id.* at 260.

III. THE FEDERAL CIRCUIT SPLIT IN THE WAKE OF *ROWLEY*A. *Tale of Two Standards: “Some Benefit” or “Meaningful Benefit”*

Ever since *Rowley*, the requirement for providing a FAPE has been interpreted differently among the federal circuits.<sup>115</sup> Some circuit courts have applied a “some educational benefit” standard,<sup>116</sup> while others have applied a “meaningful educational benefit” standard.<sup>117</sup> While some scholars have disagreed as to which standard has been the majority approach,<sup>118</sup> both interpretations were borne out of *Rowley*’s majority opinion.<sup>119</sup> The circuit courts that used the “some benefit” standard drew their understanding from the passage in *Rowley* which states: “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.”<sup>120</sup> Conversely, those circuit courts that used the “meaningful benefit” standard derived their interpretation from the following passage: “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*.”<sup>121</sup> This subtle difference in interpretation, however, sharply divided the federal circuits.

B. *The Best of Times (Allegedly): The “Meaningful Benefit” Standard*

The Second, Third, Fifth, Sixth, and Ninth Circuits utilized the “meaningful benefit” standard, interpreting *Rowley* as requiring schools to provide an IEP reasonably calculated to provide the student with a “meaningful” educational benefit. In *Mrs. B. v. Milford Board of Education*,<sup>122</sup> the Second Circuit explicitly held that “[w]hile the [IDEA]

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<sup>115</sup> See Wenkart, *supra* note 95, at 1–4.

<sup>116</sup> See, e.g., *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18 (1st Cir. 2008).

<sup>117</sup> See, e.g., *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008).

<sup>118</sup> Compare Andrea Kayne Kaufman & Evan Blewett, *When Good Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the Rowley Definition of a Free Appropriate Public Education*, 41 J. L. & EDUC. 5, 20–21 (2012) (finding that case law indicates that the majority of circuit courts adhere to the “some educational benefit” standard), with Scott Goldschmidt, *A New Idea for Special-Education Law: Resolving the “Appropriate” Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATH. U. L. REV. 749, 751 (2011) (stating “a slight majority” of circuits require “a heightened-educational-benefit standard,” also known as the “meaningful educational benefit” standard).

<sup>119</sup> See generally *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

<sup>120</sup> *Id.* at 200 (emphasis added).

<sup>121</sup> *Id.* at 192 (emphasis added).

<sup>122</sup> 103 F.3d 1114 (2d Cir. 1997).

does not authorize a court to impose a particular substantive educational standard on the state or to require equality of opportunity for the handicapped in education . . . a state IEP must be reasonably calculated to provide some ‘meaningful’ benefit.”<sup>123</sup> The Second Circuit reaffirmed this stance in *Cerra v. Pawling Central School District*,<sup>124</sup> finding that public schools satisfied their FAPE requirements when they offered an IEP that was “likely to produce progress, not regression,” and afforded disabled students “with an opportunity greater than mere ‘trivial advancement.’”<sup>125</sup>

In *Polk v. Central Susquehanna Intermediate*, the Third Circuit found that the IDEA was “inten[ded] to afford more than a trivial amount of educational benefit” to students with disabilities.<sup>126</sup> Cautioning against the interpretation of *Rowley* where “the conferral of any benefit, no matter how small, [would] qualify as ‘appropriate education’ under the [IDEA],” the Third Circuit instead found that the IDEA required “an education that would confer meaningful benefit” upon students with disabilities.<sup>127</sup> The Fifth Circuit in *Cypress-Fairbanks Independent School District v. Michael F.* echoed this rationale.<sup>128</sup> While recognizing that “the IDEA guarantees only a ‘basic floor of opportunity’ for every disabled child,” the Fifth Circuit found that the IDEA required an educational benefit more than “mere modicum or *de minimis*.”<sup>129</sup> Citing with approval the Third Circuit’s decision in *Polk*, the Fifth Circuit held that “the educational benefit [ ] an IEP is designed to achieve must be ‘meaningful.’”<sup>130</sup> In *Deal v. Hamilton County Board of Education*, the Sixth Circuit held that “the IDEA require[d] an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue.”<sup>131</sup> And the Ninth Circuit, in *N.B. v. Hellgate Elementary School District*,<sup>132</sup> interpreted the amendments to the IDEA as requiring schools to “provide a student with a ‘meaningful benefit’ in order to satisfy the substantive requirements of the IDEA.”<sup>133</sup> These federal circuits plainly interpreted *Rowley* as requiring schools to provide a “meaningful” educational benefit to disabled students covered by the IDEA.

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<sup>123</sup> *Id.* at 1120.

<sup>124</sup> 427 F.3d 186 (2d Cir. 2005).

<sup>125</sup> *Id.* at 195.

<sup>126</sup> 853 F.2d 171, 181 (3d Cir. 1988).

<sup>127</sup> *Id.* at 184.

<sup>128</sup> 118 F.3d 245 (5th Cir. 1997).

<sup>129</sup> *Id.* at 248.

<sup>130</sup> *Id.*

<sup>131</sup> 392 F.3d 840, 862 (6th Cir. 2004).

<sup>132</sup> 541 F.3d 1202 (9th Cir. 2008).

<sup>133</sup> *Id.* at 1213.

C. *The Worst of Times (Allegedly): The “Some Benefit” Standard*

The First, Fourth, Eighth, Tenth, Eleventh, and D.C. Circuits utilized the “some benefit” standard, interpreting *Rowley* as requiring schools to provide an IEP reasonably calculated to provide the student with “some” educational benefit. In *Lessard v. Wilton-Lyndeborough Cooperative School District*,<sup>134</sup> the First Circuit diverged from the Ninth Circuit’s decision in *Hellgate*, finding that the amendments to the IDEA did *not* supplant the “some benefit” standard adopted in *Rowley*.<sup>135</sup> Plaintiff Stephanie Lessard had been “diagnosed with moderate mental retardation . . . cognitive delays, speech impairments, a seizure disorder . . . and partial paralysis of her left side.”<sup>136</sup> Lessard’s IEP included, among other things, a customary reading program designed to increase her literary proficiency.<sup>137</sup> Lessard’s parents, however, advocated for a more specialized program,<sup>138</sup> one that had been recommended by their daughter’s personal psycholinguist.<sup>139</sup> The school declined to adopt the parent’s proposal because its employees were not qualified under the suggested educational methodology.<sup>140</sup>

While Lessard’s parents “[did] not contest that [Lessard] was the beneficiary of a standard, multisensory reading methodology,” they nonetheless claimed that their daughter’s reading program “produced a level of progress . . . beneath what [she] was capable of attaining.”<sup>141</sup> The First Circuit ruled in favor of the school district, finding that “an inquiring court ought not to condemn [a chosen] methodology *ex post* merely because the disabled child’s progress [did] not meet the parents’ . . . expectations.”<sup>142</sup> Finding that the 1997 amendment to the IDEA did not supplant *Rowley*, the First Circuit held that in order to satisfy the IDEA’s substantive requirement, “[a]n IEP need only supply ‘some educational benefit,’ not an optimal or an ideal level of educational benefit.”<sup>143</sup>

Similarly, in *O.S. v. Fairfax County School Board*,<sup>144</sup> the Fourth Circuit declined to find that Congress annulled *Rowley* by means of the IDEA’s 2004 amendment.<sup>145</sup> “Without any express acknowledgment of [Congressional] intent to . . . abrogate[] Supreme Court precedent[,]” the Fourth Circuit

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<sup>134</sup> 518 F.3d 18 (1st Cir. 2008).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 21.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Lessard*, 518 F.3d at 21.

<sup>141</sup> *Id.* at 28.

<sup>142</sup> *Id.* at 29.

<sup>143</sup> *Id.* at 23.

<sup>144</sup> 804 F.3d 354 (4th Cir. 2015).

<sup>145</sup> *Id.* at 360.



rejected the contention that a “meaningful benefit” standard had replaced the “some benefit” standard originally set forth in *Rowley*.<sup>146</sup> As such, the Fourth Circuit reiterated the unmistakable standard within its jurisdiction: “a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial.”<sup>147</sup>

The Tenth Circuit’s decision in *Thompson R2-J School District v. Luke P.*<sup>148</sup> endorsed the “some benefit” standard used by its sister circuits. The decision, however, ultimately drew strong criticism in the wake of its author’s future Supreme Court confirmation hearing.<sup>149</sup> Plaintiff Luke’s parents sought tuition reimbursement after they withdrew their autistic child from a Colorado public school and placed him in a Massachusetts private residential program that specialized in educating children with autism.<sup>150</sup> Although Luke had made recognizable progress in public school from kindergarten through second grade, at home he developed severe behavioral problems that soon carried over into the public setting.<sup>151</sup> Understandably concerned, Luke’s parents explored residential options for their son, and settled on the Boston Higashi School (“BHS”).<sup>152</sup> Under BHS’s program, Luke lived on the BHS campus for forty-four weeks of the year, and was supervised by BHS educators and staff for twenty-four hours a day.<sup>153</sup> In response to a request for tuition reimbursement by Luke’s parents, the public school offered Luke a final, revised IEP that “incorporated virtually all of

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> 540 F.3d 1143 (10th Cir. 2008).

<sup>149</sup> Senator Dick Durbin questioned Justice Gorsuch, the author of the *Thompson* decision, about why he had “rejected not only the judgment of the federal district court, but also the judgment of a hearing officer and the Colorado State administrative law judge.” Valerie Strauss, *Why the Word ‘Merely’ Turned Many Advocates For Students With Disabilities Against Gorsuch*, WASH. POST (Apr. 7, 2017), [https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/07/why-the-word-merely-turned-many-advocates-for-students-with-disabilities-against-gorsuch/?utm\\_term=.a1d73fec8545](https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/07/why-the-word-merely-turned-many-advocates-for-students-with-disabilities-against-gorsuch/?utm_term=.a1d73fec8545). After quoting language from *Endrew F.*’s superseding decision, which ironically was handed down on the third day of Justice Gorsuch’s confirmation hearing, Senator Durbin pushed Justice Gorsuch with the following question: “why in your early decision did you want to lower the bar so low to merely more than *de minimis* as a standard for public education to meet [the] federal requirement under the [IDEA]?” *Id.* A somber Justice Gorsuch replied, “[i]f anyone is suggesting that I like a result where an autistic child happens to lose, that’s a heartbreaking accusation to me. Heartbreaking. But the fact of the matter is I was bound by circuit precedent and so was the panel of my court.” Nikita Vladimirov, *Gorsuch: I’m ‘Sorry’ For Ruling Against Autistic Student*, HILL (Mar. 22, 2017), <http://thehill.com/homenews/senate/325318-gorsuch-i-was-wrong-to-rule-against-autistic-student>. The Justice concluded apologetically, “[i]f I was wrong . . . I was wrong because I was bound by circuit precedent and I’m sorry.” *Id.*

<sup>150</sup> *Thompson*, 540 F.3d at 1146.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

the goals requested by [Luke's] parents," except that it proposed placement in the public school rather than at BHS.<sup>154</sup> Luke's parents rejected the IEP.<sup>155</sup>

Then-Tenth Circuit Judge Neil Gorsuch<sup>156</sup> wrote for a unanimous panel, reversing the District Court's finding that Luke had been denied a FAPE.<sup>157</sup> While it was "sympathetic to Luke's parents' desire to see their child thrive," the Tenth Circuit nonetheless was "constrained to reverse" because, in the Court's view, *Rowley* required only that an IEP be reasonably calculated to confer "some educational benefit," which must simply be "more than *de minimis*."<sup>158</sup> Accordingly, "[b]ecause every factfinder to have assessed [the] case ha[d] found that Luke was making progress in the public school," the Tenth Circuit held that the school district had satisfied its obligation under the IDEA.<sup>159</sup> In doing so, the Tenth Circuit fell squarely in line with the "some benefit" standard.<sup>160</sup> This line of reasoning, however, soon attracted the Supreme Court's attention.

#### IV. THE *ENDREW F.* DECISION: RAISING THE BAR, BUT HOW HIGH?

##### A. *The Beginning of the End: Andrew F. Goes to Washington*

While *Rowley* interpreted the IDEA as establishing a substantive right to a "free appropriate public education" for students with disabilities, it did not endorse any one test for determining "when handicapped children [were] receiving sufficient educational benefits to satisfy the requirements of the [IDEA]."<sup>161</sup> But on March 22, 2017—thirty-five years after *Rowley*—the Supreme Court squarely addressed this issue in *Andrew F. v. Douglas County School District RE-1*.<sup>162</sup>

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<sup>154</sup> *Id.* at 1147.

<sup>155</sup> *Id.*

<sup>156</sup> In 2008, when *Thompson* was decided, Justice Gorsuch was a judge on the Tenth Circuit Court of Appeals. Carrie Severino, *Setting the Record Straight on Gorsuch and Disabilities*, NAT'L REV. (Mar. 4, 2017), <https://www.nationalreview.com/bench-memos/setting-record-straight-gorsuch-and-disabilities>. On April 10, 2017, Justice Gorsuch was sworn in as the 113th Justice of the Supreme Court. Robert Barnes & Ashley Parker, *Neil M. Gorsuch Sworn In as 113th Supreme Court Justice*, WASH. POST (Apr. 10, 2017), [https://www.washingtonpost.com/politics/courts\\_law/gorsuch-to-be-sworn-in-to-supreme-court-today-in-two-ceremonies/2017/04/10/9ac361fe-1ddb-11e7-ad74-3a742a6e93a7\\_story.html?utm\\_term=.e95ce162cf4c](https://www.washingtonpost.com/politics/courts_law/gorsuch-to-be-sworn-in-to-supreme-court-today-in-two-ceremonies/2017/04/10/9ac361fe-1ddb-11e7-ad74-3a742a6e93a7_story.html?utm_term=.e95ce162cf4c).

<sup>157</sup> *Thompson*, 540 F.3d at 1155.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1145.

<sup>160</sup> *See, e.g., O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (holding that under the "some benefit" standard, "a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial").

<sup>161</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982).

<sup>162</sup> 137 S. Ct. 988 (2017).

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Petitioner Andrew was diagnosed with autism at the age of two.<sup>163</sup> As a result, Andrew experienced impaired cognitive functioning, reduced social and communicative skills, and behavioral issues.<sup>164</sup> His teachers fondly described him as having a “sweet disposition,” a child with a sense of humor who “showed concern for friends.”<sup>165</sup> Andrew attended public school in the Douglas County School District (“Douglas County”) from preschool through fourth grade, receiving an IEP each year designed to address both his functional and educational needs.<sup>166</sup> Andrew made satisfactory progress throughout his preschool and kindergarten years, but by second grade his behavioral issues began to interfere with his educational development.<sup>167</sup> In response, Douglas County incorporated a behavioral intervention plan (“BIP”) into Andrew’s third-grade IEP, which approximately tripled the amount of time Andrew spent with a “significant-support-needs” instructor or paraprofessional aide to thirty-three-and-a-half hours a week.<sup>168</sup> Andrew’s third-grade IEP also incorporated assistance from a mental-health professional and speech-language therapist.<sup>169</sup> Despite these implementations, however, Andrew’s behavioral issues continued to affect his educational development, carrying over into the fourth grade.<sup>170</sup>

As such, Andrew’s parents understandably became dissatisfied with their son’s progress during his fourth-grade year.<sup>171</sup> Although Andrew had demonstrated progress towards some of his goals and objectives, he still “exhibited multiple behaviors that inhibited his ability to access learning in the classroom.”<sup>172</sup> These behaviors included screaming in class, climbing over classroom furniture and other children, and occasionally running away from school; he also developed fears of ordinary things such as flies and public restrooms.<sup>173</sup> This behavioral regression ultimately stalled Andrew’s academic progress.<sup>174</sup>

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<sup>163</sup> *Id.* at 996.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Brief for Respondent at 8, *Andrew F.*, 137 S. Ct. 988 (No. 15-827) [hereinafter Brief for Respondent].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Andrew F.*, 137 S. Ct. at 996.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

Andrew's subsequent IEPs, from his parents' view, seemed to simply carry over the same learning objectives from one year to the next, "indicating that [Andrew] was failing to make meaningful progress toward his aims."<sup>175</sup> Despite Andrew's proposed fifth-grade IEP calling for an increase in hours with a "significant-support-needs" instructor and paraprofessional aide, a new BIP, and potential guidance from an autism specialist,<sup>176</sup> Andrew's parents still viewed the proposed IEP as "pretty much the same as his past ones."<sup>177</sup> Andrew's parents believed that "only a thorough overhaul" of the school district's methodology toward Andrew's behavioral issues could break his academic stagnation.<sup>178</sup> But because Douglas County allegedly could not provide this for Andrew, his parents withdrew him from the public school and enrolled him at Firefly Autism House ("Firefly") in May 2010.<sup>179</sup>

During his time at Firefly, Andrew fared much better than in public school.<sup>180</sup> The private autism center developed a BIP that identified and addressed Andrew's behavioral problems, and consequently, within months Andrew had made significant strides in his educational progression.<sup>181</sup> Despite their child's evident success at Firefly, Andrew's parents agreed—in good faith—to meet again with Douglas County representatives in November 2010.<sup>182</sup> Douglas County presented Andrew with a new IEP, but Andrew's parents deemed it no different than the one they had rejected months earlier.<sup>183</sup> Accordingly, Andrew remained enrolled at Firefly.<sup>184</sup> Less than two years later, in February 2012, Andrew's parents filed a complaint with the Colorado Department of Education requesting tuition reimbursement for Andrew's placement at Firefly.<sup>185</sup> Andrew's parents argued that the IEP proposed by Douglas County was not reasonably calculated to provide Andrew with an educational benefit, that Andrew in turn had been denied a FAPE, and that Andrew was therefore entitled to

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<sup>175</sup> *Id.*

<sup>176</sup> See Brief for Respondent, *supra* note 166, at 8.

<sup>177</sup> *Andrew F.*, 137 S. Ct. at 996.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; see also Nic Garcia, *Minimum Progress for Students with Disabilities "Preposterous," Betsy DeVos Says in Denver*, CHALKBEAT (Sept. 13, 2017), <https://www.chalkbeat.org/posts/co/2017/09/13/minimum-progress-for-students-with-disabilities-preposterous-betsy-devos-says-in-denver>. Firefly is a private Denver-based autism center that specializes in educating children with autism. *Id.* Tuition at Firefly costs over seventy-thousand dollars a year, where funding comes primarily from public school districts, but Medicaid and private insurance carriers also contribute. *Id.* Only one percent of Firefly's funding comes out-of-pocket from families who enroll their children there. *Id.*

<sup>180</sup> *Andrew F.*, 137 S. Ct. at 996.

<sup>181</sup> *Id.* at 997.

<sup>182</sup> See *id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

tuition reimbursement under the IDEA.<sup>186</sup> The Administrative Law Judge disagreed, however, and denied the request for tuition reimbursement.<sup>187</sup>

Andrew's parents subsequently filed suit in the United States District Court for the District of Colorado.<sup>188</sup> While acknowledging that Andrew's progress under his previous IEPs "did not reveal immense educational growth," the District Court nonetheless concluded that Andrew's "past IEPs revealed a pattern of *some* progress on his education and functional goals, and that [his] proposed IEP for the fifth grade continue[d] that pattern."<sup>189</sup> "[A]lthough this [did] not mean that [Andrew] achieved *every* objective, or that he made progress on *every* goal," the District Court found, "the evidence show[ed] that [Andrew] received educational benefit while enrolled in [public school]."<sup>190</sup> In other words, because Andrew's past IEPs had been reasonably calculated to enable him to make some progress, the IEP at issue was therefore reasonably calculated to do the same.<sup>191</sup> And this progress, albeit less than what Andrew's parents had desired, nonetheless satisfied the "some benefit" standard adopted from *Rowley*.

On appeal, the Tenth Circuit affirmed.<sup>192</sup> Predicated on Justice Gorsuch's opinion in *Thompson*,<sup>193</sup> the Tenth Circuit reinforced the notion that it "ha[d] long subscribed to the *Rowley* Court's 'some educational benefit'" definition of a FAPE.<sup>194</sup> In conformity with its sister circuits, the Tenth Circuit interpreted the "some benefit" standard to mean that a child has received a FAPE when the child's IEP has been "reasonably calculated to confer *some* educational benefit," and that benefit is "more than *de minimis*."<sup>195</sup> Applying the customary "some benefit" standard, the Tenth Circuit ruled that Andrew had not been denied a FAPE, because his IEP had been "reasonably calculated to enable [him] to make *some* progress" toward

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<sup>186</sup> *Andrew F.*, 137 S. Ct. at 997.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, No. 12-2620, 2014 U.S. Dist. LEXIS 128659, at \*30–32 (D. Colo. Sept. 15, 2014) (emphasis added).

<sup>190</sup> *Id.* (emphasis added).

<sup>191</sup> *Id.*

<sup>192</sup> *Andrew F.*, 137 S. Ct. at 997.

<sup>193</sup> *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1340 (10th Cir. 2015) ("[Andrew's parents] ask that we now expressly overturn *Thompson* . . . the case relied on by the [Administrative Law Judge] and the district court for the 'some educational benefit' standard. That we cannot do. We are bound by *Thompson*.").

<sup>194</sup> *Id.* at 1338.

<sup>195</sup> *Id.* (emphasis added).

his academic objectives.<sup>196</sup> Noting that it was bound by *Thompson*,<sup>197</sup> the Tenth Circuit explicitly acknowledged that it could not abandon the “some benefit” standard “absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court.”<sup>198</sup> In almost prophetic fashion, one year later the Supreme Court took its first step toward the latter. Indeed, in the autumn of 2016, the Supreme Court granted certiorari.<sup>199</sup>

#### B. *Rowley No More: Andrew F. Sets a New Standard*

On March 22, 2017, the Supreme Court handed down perhaps the most impactful special education decision since *Rowley*. Writing for the unanimous Court,<sup>200</sup> Chief Justice Roberts opened the opinion in observance of the “more difficult problem” that *Rowley* had declined to address thirty-five years prior: determining at which point students with disabilities have been provided with sufficient educational benefits to satisfy the IDEA.<sup>201</sup> In confronting that problem, the Court explicitly overturned the decision of the Tenth Circuit—and sunset the “some benefit” standard in the process.<sup>202</sup>

Addressing Douglas County’s argument that, under *Rowley*, “an IEP need not promise any particular level of benefit, so long as it is reasonably calculated to provide *some* benefit,” the Court found the school district’s interpretation of *Rowley* mistaken.<sup>203</sup> First, the Court saw “little significance” in the language of *Rowley* requiring states to provide instruction “reasonably calculated to confer *some* educational benefit,” because, as the Court noted, *Rowley* had no reason to articulate anything more specific.<sup>204</sup> Second, the Court observed how *Rowley* acknowledged the

<sup>196</sup> *Id.* at 1342 (“It is clear . . . that [Andrew was] thriving at Firefly. But it is not [Douglas County]’s burden to pay for his placement there when [Andrew] was making some progress under its tutelage. That is all that is required. . . . [The IDEA] calls for the creation of [an IEP] reasonably calculated to enable the student to make *some* progress towards the goals within that program.”).

<sup>197</sup> *Id.* at 1340.

<sup>198</sup> *Id.*

<sup>199</sup> *Andrew F.*, 798 F.3d 1329, *cert. granted*, 137 S. Ct. 29 (U.S. Sept. 29, 2016) (No. 15-827).

<sup>200</sup> The decision was technically only 8-0 because Justice Scalia had passed away the previous year, and Justice Gorsuch had not yet been confirmed at the time of the Court’s decision. Laura McKenna, *How A New Supreme Court Ruling Could Affect Special Education*, ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662>.

<sup>201</sup> See *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017); see also *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982) (“The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the [IDEA] presents a more difficult problem.”).

<sup>202</sup> *Andrew F.*, 137 S. Ct. at 1000.

<sup>203</sup> *Id.* at 998.

<sup>204</sup> *Id.* (noting that *Rowley* involved a child whose academic success clearly demonstrated

“difficult problem” in determining “when handicapped children [were] receiving *sufficient* educational benefits,” but still refused “to establish any one test for determining the *adequacy*” of such benefits.<sup>205</sup> Combining these two premises, the Court put the final nail in the coffin:

It would not have been “difficult” for us to say when educational benefits are sufficient if we had just said that [*some*] educational benefit was enough. And it would have been strange to refuse to set out a test for the adequacy of educational benefits if we had just done exactly that. We cannot accept [Douglas County’s] reading of *Rowley*.<sup>206</sup>

Accordingly, the Court put to rest the “some benefit” standard, replacing it with a new, heightened standard.<sup>207</sup> Today, a school satisfies its obligation under the IDEA when it provides an IEP that is “reasonably calculated to enable [the] child to make progress *appropriate* in light of the child’s circumstances.”<sup>208</sup> And as ambiguous as this new standard may sound, the Court described it as “markedly more demanding” than the “some benefit” standard applied by the Tenth Circuit.<sup>209</sup> “The IDEA,” the Court held, “demands more.”<sup>210</sup> Just *how much* more, however, remains subject to interpretation.

### C. *Deciphering Endrew F.: What it Means, and What it Does Not*

Justice Alito foreshadowed the difficulty of crafting an opinion “that ha[d] just the right nuance to express” how much should be demanded of public schools.<sup>211</sup> To be clear, however, *Endrew F.*’s reasoning was sound. Indeed, it *would have* made little sense for *Rowley* to explicitly refuse to say when educational benefits were sufficient if it had intended for any benefit—“some benefit”—to satisfy the IDEA’s substantive requirement. But as is oftentimes the issue, the problem hinges on interpretation of the text—and Nietzsche famously cautioned against letting text disappear under interpretation.<sup>212</sup>

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that her IEP was reasonably calculated to provide sufficient educational benefits, and therefore, *Rowley* was not concerned with establishing a workable standard for closer cases).

<sup>205</sup> *Id.* (emphasis in original).

<sup>206</sup> *Id.*

<sup>207</sup> *See generally id.*

<sup>208</sup> *Endrew F.*, 137 S. Ct. at 999 (emphasis added).

<sup>209</sup> *Id.* at 1000.

<sup>210</sup> *Id.* at 1001.

<sup>211</sup> Transcript of Oral Argument, *supra* note 8, at 47.

<sup>212</sup> FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* 37 (Rolf-Peter Horstmann & Judith Norman eds., Cambridge Univ. Press 2002).

### 1. What *Andrew F.* Said

By describing the new standard as “markedly more demanding” than the “some benefit” standard, the Supreme Court evidently raised the bar for the level of educational benefit that public schools must provide to students with disabilities.<sup>213</sup> Moreover, because *Andrew F.*’s standard is “markedly” more demanding than the “some-benefit” standard,<sup>214</sup> there are questions as to whether *Andrew F.* also raised the “meaningful benefit” standard previously used by federal circuits. Indeed, courts and scholars alike have questioned whether there was even a difference between the “meaningful benefit” and “some benefit” standards to begin with.<sup>215</sup>

Furthermore, the Court’s opinion did not once mention the “meaningful benefit” standard, nor did it use the modifier “meaningful” to describe any part of the new standard.<sup>216</sup> This may suggest that the Court did not choose between the “some benefit” and “meaningful benefit” standards, but rather charted a new, heightened standard. And to be sure, this problem of interpretation has already posed issues for lower courts. For example, in light of the Tenth Circuit being overruled, the Fourth Circuit acknowledged that it too would have to raise its standard to align with *Andrew F.*<sup>217</sup> On the other hand, some courts that used the “meaningful benefit” standard have interpreted *Andrew F.* as simply confirming that standard.<sup>218</sup> And other courts have simply been unsure of the decision’s impact.<sup>219</sup>

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<sup>213</sup> *Andrew F.*, 137 S. Ct. at 1000.

<sup>214</sup> *Id.*

<sup>215</sup> Compare Kaufman & Blewett, *supra* note 118, at 20–21 (noting that it is impossible to be sure whether these two different standards result in drastically different outcomes for cases in circuits using different standards), with Scott F. Johnson, *Rowley Forever More? A Call for Clarity and Change*, 41 J. L. & EDUC. 25, 27 (2012) (“Using one standard or the other can dramatically affect the outcome of a case and the services provided to a student.”); see also *Systema v. Acad. Sch. Dist.*, 538 F.3d 1306, 1313 n.7 (10th Cir. 2008) (“Admittedly, it is difficult to distinguish between the requirements of the ‘some benefit’ and the ‘meaningful benefit’ standards.”).

<sup>216</sup> See generally *Andrew F.*, 137 S. Ct. 988.

<sup>217</sup> *M.L. v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017) (“Our prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Andrew F.* We have cited to the Tenth Circuit’s standard in the past, including that court’s decision in *Andrew F.* itself.”).

<sup>218</sup> *K.D. v. Downingtown Area Sch. Dist.*, No. 16-0165, 2017 U.S. Dist. LEXIS 141428, at \*19 n.7 (E.D. Pa. Aug. 31, 2017) (“According to the School District, *Andrew F.* simply confirms the standard that has been used in the Third Circuit for years. . . . I agree with the School District. . . . The [Supreme] Court rejected an interpretation that *Rowley*’s ‘some educational benefit’ means only ‘some’ benefit or a benefit that is ‘merely . . . more than *de minimis*.’”); see also *Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018) (“The Supreme Court rejected the Tenth Circuit’s standard, not ours. On the contrary, *Andrew F.*’s language parallels that of our precedents.”).

<sup>219</sup> *J.C. v. Katonah-Lewisboro Sch. Dist.*, 690 F. App’x 53, 55 n.2 (2d Cir. 2017) (“Because we conclude that the School District failed to provide [plaintiff] with a free and appropriate public education under the existing precedent in this circuit, we need not decide



## 2. What *Andrew F.* Did Not Say

In analyzing what *Andrew F.* actually said, it may also be helpful to explain what it did not. Perhaps most significantly, the Court explicitly declined to adopt the view held by *Andrew's* parents.<sup>220</sup> *Andrew's* parents argued that the IDEA required “an education that aims to provide a child with a disability opportunit[ies] . . . that are *substantially equal* to the opportunities afforded [to] children without disabilities.”<sup>221</sup> In response, the Court explained that this standard was “strikingly similar” to the one plainly rejected in *Rowley* as “entirely unworkable.”<sup>222</sup> Accordingly, the Court refused “to interpret the FAPE provision in a manner so plainly at odds with [*Rowley*].”<sup>223</sup>

More instructive was the Court’s meet-me-halfway approach to the Department of Justice, which appeared as *amicus curiae* in support of *Andrew's* parents.<sup>224</sup> During oral argument, Irving “Irv” Gornstein, Counselor to the Solicitor General of the Department of Justice, argued on behalf of *Andrew's* parents that a FAPE should require “a program that is aimed at *significant* educational progress in light of the child’s circumstances.”<sup>225</sup> When asked by Justice Sotomayor if “meaningful” could replace “significant,” Mr. Gornstein responded that he interpreted “‘significant’ [as] synonymous with ‘meaningful.’”<sup>226</sup> But Mr. Gornstein also cautioned that the word “meaningful” carried what he described as “baggage”—interpretational ambiguity—in various federal circuits.<sup>227</sup> Accordingly, he tried to steer the Court away from “meaningful” and more toward “appropriate.”<sup>228</sup> As such, Mr. Gornstein proposed the following language: “reasonably calculated to make progress that is appropriate in light

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whether *Andrew F.* raised the bar for a free and appropriate public education or left Second Circuit precedent intact (the Supreme Court’s decision certainly did not reduce the force of the requirement).”).

<sup>220</sup> See *Andrew F.*, 137 S. Ct. at 1001.

<sup>221</sup> *Id.* (quoting Brief for Petitioner at 40, *Andrew F.*, 137 S. Ct. 988 (No. 15-827) (emphasis added)).

<sup>222</sup> *Id.* (“This standard is strikingly similar to the one the lower courts adopted in *Rowley*, and it is virtually identical to the formulation advanced by Justice Blackmun in his [concurrency] in that case. . . . But the majority rejected any such standard in clear terms.”).

<sup>223</sup> *Id.* (“The requirement that States provide ‘equal’ educational opportunities would . . . seem to present an entirely unworkable standard requiring impossible measurements and comparisons.”).

<sup>224</sup> Transcript of Oral Argument, *supra* note 8, at 19.

<sup>225</sup> *Id.* at 20 (emphasis added).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 21.

<sup>228</sup> *Id.* (“The only [word] I would urge you away from actually is ‘meaningful.’ And the reason is that it has baggage in various courts of appeals. It means different things to different courts, and it has been applied in different ways by different courts.”).

of the child's circumstances."<sup>229</sup> The Court clearly took solace in that formulation, seemingly as a midpoint between Douglas County's "some benefit" standard and Andrew's parents' "substantially equal" standard. Indeed, the standard articulated in *Andrew F.* is almost verbatim the one proposed by Mr. Gornstein: "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>230</sup>

In choosing this particular language, the Court understood that "appropriate" progress would differ depending on the child at issue.<sup>231</sup> The Court even refused to "elaborate on what 'appropriate' would look like from case to case," because as it correctly foresaw, "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."<sup>232</sup> Indeed, the creation of an IEP requires forward-thinking decisions by both school officials and parents—oftentimes a heavily fact-intensive task. And this might be why the Court replaced a bright-line "some benefit" rule with a fact-intensive "appropriateness" one.

But therein may lie the problem. By crafting a highly fact-intensive solution to a problem that is, in itself, highly fact-intensive, the Court perhaps generated too much room for interpretation among parents, school districts, hearing officers, lawyers, and ultimately, judges. These uncertainties will likely impose real costs for struggling school districts, both in pre-planning and risk management, as well as defending against litigation. Indeed, Justice Breyer's fear may very well prove true, in that "the money that ought to go to the children [will be spent] on lawsuits and lawyers and all kinds of things that are extraneous."<sup>233</sup>

Of course, there are two sides to every story. While the "some benefit" bright-line standard may have offered greater predictability for parents and school districts, it was much more susceptible to abuse by the latter. This was one concern of *Andrew F.*<sup>234</sup> But even so, it might be unfair to broadly accuse school districts of not fulfilling their IDEA obligations because they *want* to cut costs. In a perfect world, public schools would be generously funded and never have to implement cost-saving measures. Needless to say, however, this world is far from perfect. Public school funding, unfortunately, is a zero-sum game. The more funding consumed by one curriculum, the less funding remains for the others. In practice, then, if more

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<sup>229</sup> *Id.* at 24.

<sup>230</sup> *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

<sup>231</sup> *Id.* at 1001.

<sup>232</sup> *Id.*

<sup>233</sup> Transcript of Oral Argument, *supra* note 8, at 15.

<sup>234</sup> See *Andrew F.*, 137 S. Ct. at 1001 ("For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly . . . awaiting the time when they were old enough to 'drop out.'") (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982)).

money must be set aside for special education services—particularly to defend against accompanying litigation—then less money is available for the general curriculum. And that is precisely the issue facing many struggling school districts.

#### V. HOW *ENDREW F.* COULD AFFECT STRUGGLING SCHOOL DISTRICTS

##### A. *The Good, the Bad, and the Ugly—Minus the Good*

The IDEA has grown into the second largest federal program in education, providing states with roughly twelve billion dollars a year to help alleviate the costs of the six-and-a-half million students with disabilities in the United States.<sup>235</sup> Recognizing the financial strain the IDEA would pose to school districts, Congress agreed when enacting the statute to cover forty percent of the additional costs of educating students with disabilities.<sup>236</sup> But as this Comment has previously highlighted,<sup>237</sup> Congress has all but abandoned that agreement. In fact, Congress has never fully funded the program, routinely covering less than twenty percent of the costs.<sup>238</sup> For the fiscal year of 2017, for example, federal funding covered only sixteen percent of the excess costs of educating students with disabilities.<sup>239</sup> That is less than the seventeen percent covered in 2008, and much less than the thirty-three percent covered in 2009, which was inflated by the additional funding provided by the American Recovery and Reinvestment Act.<sup>240</sup> In turn, this deficiency has been assumed by states, and more directly, by local school districts—many of which struggle to offset the deficit because their local funding pool is simply impoverished.

And that is precisely the burden *Endrew F.* may inadvertently pose for struggling school districts. Because *Endrew F.* seemingly raised the standard by a substantial degree, and federal funding is consistently inadequate, then more money will likely have to be expended on special education for school districts to avoid liability under *Endrew F.* This may create serious difficulties for school districts where an impoverished local property tax base supports most of the educational funding. Generally speaking, local governments collect local taxes from residential and commercial properties, and then funnel that revenue into school districts as

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<sup>235</sup> BLACK, *supra* note 21, at 472.

<sup>236</sup> *Id.*

<sup>237</sup> *See supra* Part II.C.

<sup>238</sup> *Id.*

<sup>239</sup> *See* FISCAL YEAR 2017 BUDGET SUMMARY, *supra* note 108, at 4.

<sup>240</sup> “Full Funding” Debate, NEW AM.: EDUC. POL’Y, <https://www.newamerica.org/education-policy/topics/school-funding-and-resources/students-disabilities/federal-funding/full-funding-debate/> (last visited Feb. 21, 2019).

their main source of funding.<sup>241</sup> In this system, wealthier localities have the ability to raise more money through higher property taxes, creating an abundance in resources that allows those wealthier localities to provide sufficient funding for their public schools. Poorer localities, however, do not fare as well. Impoverished school districts usually have reduced tax bases, which generate less funding to support their public schools.<sup>242</sup> This means that disabled students who live in impoverished localities often attend schools with fewer resources, fewer qualified teachers, substandard school facilities, and diminished funding to rectify these issues.<sup>243</sup> If and when these schools struggle to satisfy their obligations under *Endrew F.*, financial liability attaches, which in turn exacerbates the overarching problem. A cycle develops that proliferates to its own detriment.

Furthermore, any time the federal education budget is reduced, the IDEA nonetheless prohibits cuts to special education programs due to its “maintenance of effort” clause.<sup>244</sup> Scholars have criticized the IDEA’s “maintenance of effort” clause as benefiting neither taxpayers nor students.<sup>245</sup> The clause effectively prevents states from reducing special education funding below the preceding fiscal year.<sup>246</sup> In practice, then, if schools must reduce their education budgets (as is sometimes necessary), the IDEA prohibits cuts to the special education program.<sup>247</sup> Accordingly, school districts may be forced to increase class sizes, lay off teachers, counselors, and nurses, or reduce enrichment programs in order to satisfy their obligations under *Endrew F.*<sup>248</sup>

In addition, cuts to Medicaid could create a similar problem. Medicaid reimbursements constitute the third-largest federal source of funding to public schools.<sup>249</sup> Special education in particular relies heavily on Medicaid,

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<sup>241</sup> See Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/>.

<sup>242</sup> See *id.*

<sup>243</sup> *Id.*

<sup>244</sup> 20 U.S.C. § 1412(a)(18)(A) (2012).

<sup>245</sup> See, e.g., Nathan Levenson, *Boosting the Equality and Efficiency of Special Education*, THOMAS B. FORDHAM INST. 32 (Sept. 2012), [http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20120905BoostingtheQualityandEfficiencyofSpecialEducation20120905BoostingtheQualityandEfficiencyofSpecialEducationFinal\\_.pdf](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20120905BoostingtheQualityandEfficiencyofSpecialEducation20120905BoostingtheQualityandEfficiencyofSpecialEducationFinal_.pdf) (“[The ‘maintenance of effort’] provision says, in essence, that considerations of cost effectiveness have no place in special education. It serves neither the needs of students nor the interests of taxpayers very well.”).

<sup>246</sup> BLACK, *supra* note 21, at 472.

<sup>247</sup> *Id.*

<sup>248</sup> See Jonah Edelman, *Trump’s Budget Fails to Put America’s Children First*, HILL (Mar. 15, 2017), <http://thehill.com/blogs/pundits-blog/education/324128-trumps-budget-fails-to-put-americas-children-first>.

<sup>249</sup> Emma Brown, *GOP Health-Care Bill Could Cut Funds Schools Use to Help Special-Ed Students*, WASH. POST (June 28, 2017), <https://www.washingtonpost.com/local/education>

but congressional proposals could trigger major cuts to the federal assistance program.<sup>250</sup> The federal government subsidizes via Medicaid some of the expensive, but important therapies provided to students with disabilities, such as mental health therapy, speech therapy, and physical therapy, as well as equipment ranging from hearing aids to breathing and mobility apparatuses, and even specialized transportation.<sup>251</sup> If that money disappears, the burden again falls on the states and, more specifically, local school districts. This would impact not only the special education curriculum, but the general education curriculum too, because the general education budget will likely have to offset any loss of subsidies to the special education budget.<sup>252</sup> When the average per capita spending on special education students is *twice* the average per capita spending on general education students,<sup>253</sup> this counterbalance becomes particularly difficult to achieve for school districts already struggling to keep their heads above water.

B. *Two Birds, One Stone: How to Protect Both the Children and School Districts*

All methods of problem-solving can be broken down into a simple, two-step process. The first step is to recognize there is a problem. The second step is to try to solve it. While this Comment has highlighted the problem *Endrew F.* may pose for struggling school districts, there may also be some solutions to help alleviate these concerns. For one, Congress could limit the amount of tuition reimbursement that parents may recover from public schools after unilaterally placing their children in private programs.<sup>254</sup> Described by some legal professionals as a “disabilities reimbursement reform,” such a cap on tuition reimbursement could be based

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/gop-health-care-bill-could-strip-public-schools-of-billions-for-special-education/2017/06/27/05650ad4-5aa5-11e7-a9f6-7c3296387341\_story.html?utm\_term=.a295626855a!

<sup>250</sup> Damian Paletta & Eric Werner, *White House Budget Proposes Increase to Defense Spending and Cuts to Safety Net, but Federal Deficit Would Remain*, WASH. POST (Feb. 12, 2018), [https://www.washingtonpost.com/business/economy/white-house-budget-proposes-increase-to-defense-spending-and-cuts-to-safety-net-but-federal-deficit-would-remain/2018/02/12/f2eb00e6-100e-11e8-8ea1-c1d91fcec3fe\\_story.html?utm\\_term=.dd60904c9c85](https://www.washingtonpost.com/business/economy/white-house-budget-proposes-increase-to-defense-spending-and-cuts-to-safety-net-but-federal-deficit-would-remain/2018/02/12/f2eb00e6-100e-11e8-8ea1-c1d91fcec3fe_story.html?utm_term=.dd60904c9c85); see also Jennifer Steinhauer, *Republicans Look to Safety Net Programs as Deficit Balloons*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/us/politics/medicare-medicaid-social-security-republicans-elections.html>.

<sup>251</sup> See *Why Schools Are Worried About Medicaid Cuts Hurting Special Education*, PBS: NEWS HOUR (May 22, 2017), <https://www.pbs.org/newshour/show/schools-worried-medicaid-cuts-hurting-special-education#transcript>.

<sup>252</sup> BLACK, *supra* note 21, at 471.

<sup>253</sup> *Id.*

<sup>254</sup> Kathleen Conn, *Solving the Funding Problem After Endrew F. Decision*, KING, SPRY, HERMAN, FREUND & FAUL (Sept. 28, 2017), <https://www.kingspry.com/solving-the-funding-problem-after-endrew-f-decision/>.

on a percentage of the costs of the particular private placement.<sup>255</sup> Alternatively, reimbursement for private tuition could be subsidized as a percentage of parental income, similar to how public schools implement free-and-reduced lunch programs.<sup>256</sup> In any event, a statutory limit on tuition reimbursement may encourage parents to better cooperate with school districts, while at the very least discourage hastily-brought lawsuits.<sup>257</sup> Finally, such a cap would allow schools to fashion their budgets more effectively, as they would be on notice as to the amount of tuition reimbursement for which they may be liable, based on the number of IDEA-eligible students within the district.<sup>258</sup>

Most importantly, however, these solutions would help protect *both* students with disabilities *and* school districts. On the one hand, students with disabilities would benefit from *Andrew F.*'s heightened educational standard, and their parents would still be able to seek tuition reimbursement if that standard is not met. On the other hand, school districts would benefit from a statutory cap on tuition reimbursement that both limits their liability and allows them to better incorporate these liabilities into their budgets. Two birds, one stone.

## VI. CONCLUSION

*Andrew F.* has become the newest champion of students with disabilities, rightfully assuming its place atop the mantle of special education law. As such, some may find it unjustified to question *Andrew F.*'s good intentions—and understandably so. Some may think the finger should instead be pointed at Capitol Hill, since it is Congress that has openly abandoned its financial obligation under the IDEA. And those criticisms might be valid, in a vacuum. But the public education system does not exist in a vacuum. Insufficient funding has plagued struggling school districts long before *Andrew F.*, and will continue to do so long afterward. Perhaps, then, the decision just becomes the straw that breaks the camel's back. Indeed, only time will tell whether *Andrew F.* creates more problems than it solves. For the sake of students with disabilities, we should hope not.

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *See id.*