APPLYING *ENDREW F.*: *PRACTICAL CONSIDERATIONS*

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I. INTRODUCTION

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 553 IDELR 656 (1982), the United States Supreme Court established a two-part test to determine whether FAPE had been offered/provided to the student. First, the court/hearing officer must determine whether the State, inclusive of the IEP team and school district, complies with the procedures outlined in the IDEA relating to the development of the IEP. Second, the court/hearing officer must determine whether the resulting IEP is reasonably calculated to enable the student to receive educational benefits. *Id.* at 206 – 207.

The *Rowley* standard had not been intended to be *the* test for determining the adequacy of educational benefits conferred upon all children. In fact, it was quite the opposite. The Court cautioned against it, saying:

> 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. Because in this case we are presented with a child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

Id. at 202. Yet, despite this warning, courts since *Rowley* have broadly applied *Rowley's* standard to all children covered under the IDEA and expanded the standard and its application. Procedurally, as we know, courts sought to establish substantive harm resulting from the procedural violations.[1] (In 2004,

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[1] *See* Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?*, 83 EXCEPTIONAL CHILD. 219 (2016) (providing analysis of court decisions specific to IEP-related procedural violations after the 2004 amendments).

Congress codified this practice in 34 C.F.R. § 300.513.) On the substantive side, the courts were split on how much benefit *Rowley* had intended, with a number of circuits – First, Fourth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia – deciding that *Rowley* only required "some" benefit and other circuits either applying a "meaningful" benefit standard (primarily the Third) or interchangeably using both.[2]

Endrew F. v. Douglas County School District RE-1, 137 S. Ct. 988, 69 IDELR 174 (U.S. Mar. 22, 2017) is the Court's attempt to define what qualifies as an educational benefit with an emphasis on progress.

II. DECISION SUMMARY

In *Endrew F.*, a unanimous Supreme Court overturned a decision of the Tenth Circuit Court of Appeals that had applied a "merely more than *de minimis*" standard for the duty under the IDEA to provide a free, appropriate public education to children with disabilities served by public school districts. The opinion by Chief Justice Roberts interpreted *Rowley*'s reading of appropriate education as taking a middle position between no enforceable standard at all and affording the child an opportunity to achieve her full potential commensurate with the opportunity provided to children without disabilities.

The Court emphasized *Rowley*'s language requiring a substantively adequate education as well its statement that it was not establishing a single test for the adequacy of educational benefits children should receive. *Id.* at 996. The Court read *Rowley* as pointing to "a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. The approach focuses on the reasonable, not the ideal, but it emphasizes progress for the individual child given his or her unique needs. *Id.* The Court reaffirmed *Rowley*'s statement that if a child is fully integrated in the regular classroom, passing marks and advancement from grade to grade through the general curriculum will ordinarily satisfy the IDEA standard, though a footnote to the opinion warns that, "This guidance should not be interpreted as an inflexible rule," and is not a holding that every child advancing from one grade to the next "is automatically receiving an appropriate education." *Id.* at 1000, fn. 2. The Court said that a child not fully integrated in the regular classroom may not have the ability to achieve at grade level, but the IEP for that child should be "appropriately ambitious in light of his circumstances," a standard "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id.* "The goals may differ, but every child should have the chance to meet challenging objectives." *Id.*

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[2] Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 Ed. Law Rep. 1 (2009).

The Court rejected the parents' argument that children with disabilities must be offered an education that provides the opportunities to attain self-sufficiency and contribute to society substantially equal to the opportunities provided to children without disabilities. *Id.* at 1001. The Court noted that a similar standard was rejected in *Rowley*, and Congress, though it revised the IDEA several times since 1982, did not materially alter the statute's definition of free, appropriate public education. *Id.* The Court said it was not creating "a bright-line rule," but said the absence of the rule should not be taken as an invitation to courts to supplant the role of school authorities, to whose expertise and professional judgment deference should be paid. *Id.* A reviewing court, "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1002.

III. OBSERVATIONS

There is much that the Court does not define and will require further discussion.[3] Clarity will come first from hearing officers and, ultimately, from reviewing courts. We are just beginning to see courts delve into the nuances resulting from *Endrew F.*,[4] but appreciable discussion as to some of its pronouncements and how it all fits together is still in its infancy.

Nonetheless, we can definitively glean from *Endrew F.*, the following:

- There continues to be a two-step test to determining whether FAPE is offered/provided. *Endrew F.* did not eliminate the first prong of the

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[3] For example, it is unclear what "appropriately ambitious," "challenging objectives," and "markedly more demanding" than *de minimis* mean in operation, what responses must be made to children's unique needs, and in what situations will children who are fully integrated in the regular classroom and are achieving at grade level be considered not to be receiving an appropriate education in light of their individual circumstances.

[4] *See*, *e.g.*, *Z.B. v. District of Columbia*, 118 LRP 18827 (D.C. Cir. 2018) (*Endrew F.* "raised the bar on what counts as an adequate education"); *M.N. v. School Bd. of the City of Virginia Beach*, 71 IDELR 170 (E.D. Va. 2018) (appropriately ambitious does not equate to placing student in program that is beyond her abilities); *Rosaria M. v. Madison City Bd. of Educ.*, 72 IDELR 9 (N.D. Ala. 2018) (IEP appropriately ambitious as demonstrated by metrics demonstrating progress); *M.C. v. Antelope Valley Union Sch. Dist.,* 852 F.3d 840, 69 IDELR 203 (9th Cir. 2017) (raising the possibility that *Endrew F.* has a more demanding standard than *Rowley*); *Bd. of Educ. of Albuquerque Public Schools v. Maez*, 70 IDELR 157 (D. N.M. 2017) (school district offered a "cogent and responsive explanation" as to why the IEP is appropriately ambitious); *Saucon Valley Sch. Dist.,* 71 IDELR 225 (SEA PA 2017) (*Endrew F.* does not require a school district to close the gap).

Rowley standard.

- The IEP must continue to be reasonably calculated, which is to say that school officials are tasked with prospectively judging through a fact-intensive, collaborative process what is reasonably appropriate for the student.[5]

- Like in *Rowley*, the Court reaffirms that the IDEA "cannot and does not promise 'any particular [educational] outcome.'"[6]

- *Endrew F.* better refocuses the inquiry on the individualized needs of the student – the IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[7] "[E]ducational benefit [that is] merely … more than *de minimus"* or enable the student "to make *some* progress," is inadequate.[8]

- The Court recognizes that there is a wide spectrum of disabled students and makes a distinction between students fully integrated in the regular classroom and those who are not fully integrated and cannot achieve on grade level. Despite this distinction, the Court clarifies that for all students, whether performing at or below grade level, a school district must offer an IEP that takes into consideration the student's circumstances.

    - With respect to the first group, the Court says, "progress appropriate in light of" the student's circumstances is "progress in the general education curriculum," as measured, generally, by performance in regular examinations, passing marks/grades, and advancement from grade to grade. The Court warns that advancing from grade to grade does not automatically mean the student is receiving FAPE.[9]

    - As to the second group (i.e., those not fully integrated), the Court offers even more subjective guidance. For this group, the "IEP need not aim for grade-level advancement," but "must be appropriately ambitious in light of [the student's] circumstances

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[5] *Endrew F.*, 137 S. Ct. at 999.
[6] *Id.* at 998.
[7] *Id.* at 999.
[8] *Id.* at 1000 – 1001.
[9] *Id.* As the Court noted, this guidance is not "an inflexible rule." *Id.*, fn 2. Not every child advancing from grade to grade is automatically receiving a FAPE. *Id.* For example, a student's goals and objectives may not be related to the general education curriculum and, therefore, the student's progress, or lack thereof, should not be measured by the general education "system" but rather by criteria set forth in the student's IEP. *Id.* at 1000.

> … just as advancement from grade to grade is appropriately ambitious for most [students] in the regular classroom." This would include "the chance to meet challenging objectives" just like any other student.[10]

That is what we do "know." What we do not know is what it all means. And, although the Court expressly stated that FAPE is not "[a]n education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities,"[11] the Court curiously says that the IEP is constructed only after careful consideration of the student's "potential for growth."[12]

IV. IMPORTANCE OF PLAAFP – A RENEWED EMPHASIS

As mentioned above, the new language – "progress appropriate in light of the child's circumstances" – better refocuses the inquiry on the individualized needs of the student and recognizes that there is a wide spectrum of disabled children whose circumstances are ever changing, e.g., new needs, needs that have been met, needs that require different interventions / supports, and life experiences that impact learning. And, without a well-defined understanding of the student's unique circumstances, an IEP team cannot determine what an ambitious program would be for the student that would provide for an appropriate measure of progress. Each student's IEP must, therefore, include, among other information, an accurate statement of the student's present levels of academic achievement and functional performance (PLAAFP).

The PLAAFP is the starting point for determining annual goals.[13] Without a baseline of current performance, it is difficult to draft measurable and relevant annual goals,[14] and to measure future progress. Age, behavior, other learning difficulties other than the primary disability, history, and current performance help to define the student's unique circumstances. How the IEP team evaluates and assess this information "contribute[s] to ensuring the [student] has access to challenging objectives."[15]

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[10] *Id.*

[11] *Id.* at 1001.

[12] *Id.* at 999.

[13] *Bend-Lapine Sch. Dist. v. K.H.*, 43 IDELR 191, 2005 WL 1587241 (D. Or. 2005), *aff'd*, *Bend-Lapine Sch. Dist. v. K.H.*, 234 F. App'x 508 (9th Cir. 2007) (unpublished). *See also Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46662 (August 14, 2006).

[14] *Id.*

[15] *Questions and Answers on Endrew F. v. Douglas County School District RE-1*, 71 IDELR 68 (OSEP 2017).

V. PRACTICAL CONSIDERATIONS

A. Though more time (and, likely, litigation) is needed to fully appreciate the clarified, substantive standard articulated by the Court in *Endrew F.*, following are practical questions the hearing officer should consider when completing the record or discussing evidentiary matters with the parties and their representatives.

1. To determine whether a student's particular need / annual goal / objective is "challenging," seek to establish in the record –

- Whether the student's need(s) are identified in the present level of performance statement.
- Whether the statement includes a baseline of current performance for each need that is identified.
- Whether there is a corresponding annual goal for each identified need.
- The student's previous rate of academic / functional progress in learning / mastering needed skill(s).
- The student's potential for growth.[16]
- Whether the student is on track to achieve or exceed grade-level proficiency.
- Whether the goals are reasonably calculated to afford the student a reasonable opportunity to achieve them within one school year given the student's rate of progress.
- Whether the goals are measurable.

2. Whether there are any behaviors that are interfering with the student's progress.

3. Whether the IEP team considered additional information and input provided by the student's parents and independent evaluators.

4. Whether an increase in the intensity of instruction (e.g., amount, 1:1 versus small group, direct versus consultative) is necessary to allow the student a reasonable opportunity to achieve challenging goals / objectives.

[16] *Id.* (Question 9).

5. Whether specialized instruction / supplementary aides and services / related services in the regular / special education classroom is necessary to allow the student a reasonable opportunity to advance from grade to grade / achieve challenging goals / objectives.

6. Whether the appropriateness of the IEP hinges on the IEP goals as a whole or each goal independently.

    - If the appropriateness of the IEP hinges on the IEP goals as a whole, how is progress on the various goals collectively weighed to determine overall "benefit / progress?"

        - By the amount of time during the school day allocated to working on the goal?

        - By the relative importance of the goal to the student's overall needs?

        - By the student's progress in meeting the general education curriculum?

B. *Endrew F.* warns that a school district is expected to "offer a *cogent and responsive explanation*" for their decisions that shows the IEP is appropriately ambitious. Naturally, said explanation would be offered during the course of witness testimony but the documentary evidence, when viewed collectively, may shed light on the IEP team's deliberative process in composing an ambitious, yet appropriate, program for the student. Specifically, the hearing officer should examine –

1. whether the prior written notice documents the reasoning behind / basis for the IEP team's decisions.

2. whether the IEP includes baselines for the student's present levels and documents any circumstances that would limit progress.

3. whether there are appreciable changes in academic achievement and functional performance within the school year or between school years and why.

4. whether the IEP includes corresponding measurable and reasonable annual goals for each need identified in the PLAAFP statement.

5. whether the IEP team met during the course of the year to revise the student's IEP, as appropriate, to address any change circumstances, including lack of expected progress towards the annual goals and in the general education curriculum.[17]

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[17] 34 C.F.R. § 300.324(b)(1)(ii)(A).