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## IDEAs that Provide a Solution When the Courts Have Disabled the System

Kelsey A. Manweiler

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## IDEAs that Provide a Solution When the Courts Have Disabled the System

*Kelsey A. Manweiler\**

Children's education is vital to the longevity of a nation. Of equal importance is how a nation provides educational resources to its disabled citizens. Currently, almost six million of our nation's publicly-enrolled schoolchildren have a recognized disability under federal law. Each of these students have an individualized education program (IEP) to help teachers and school administrators provide them with a "free appropriate public education" (FAPE).

While there is great support to help disabled students learn alongside their peers, a lack of resources often leaves these students without the necessary tools to be successful in the classroom. When this happens, parents may resort to suing the school district for not furnishing an IEP that provides their child with a FAPE. The courts will look to see if the school followed the procedure laid out in the Individuals with Disabilities Education Act (IDEA) as well as try to determine if the IEP has provided the child with an educational benefit.

This article will give a detailed background of the legislative and judicial history of special education. In addition, a detailed explanation of the circuit split that was before the Supreme Court during the October 2016 term will be examined. Currently, lower courts differ as to what level of educational benefit an IEP must provide a disabled student to comply with the IDEA. Historically, the lower courts have used four different ways to describe how much of an educational benefit must be provided: (1) some; (2) meaningful; (3) more than *de minimus*; and (4) courts that use some and meaningful interchangeably.

In the spring of 2017, the Supreme Court of the United States ruled on how much of an educational benefit a child must receive under the IDEA. The Court essentially reaffirmed their previous ruling and held that the benefit must be more than *de minimus*. Unfortunately, this did little in the way of creating a clear standard, leaving the lower courts to continue applying different standards. Thus, the level of educational benefit a disabled child receives depends entirely on which circuit court has jurisdiction over the child's school.

This problem is simply not one that can be solved in the court system. Rather, it is the legislative branch that must provide a solution. Specifically, the problem is due to a lack of funding. While this paper will offer possible solutions for the courts as they wait for Congress to act, Congressional action is ultimately needed to solve the disparity in the level of educational benefits afforded to disabled children across this nation.

\* Kelsey Manweiler, University of Idaho College of Law, J.D. Candidate, 2018. I would like to thank my grandmother, mother, and sister for showing me the importance in advocating for better education standards for children; Brianna Espeland for adding a personal element to my understanding of special needs education; and Sinan Nadarevic for his continuous support throughout this article's development.

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## I. INTRODUCTION

*“If a child can’t learn the way we teach, maybe we should teach the way they learn.”*  
-Ignacio Estrada

Ella,<sup>1</sup> a sixth grader, began middle school with an individualized education program (IEP) for modifications to be made to her exams, but not the material taught to her. A few months into her sixth-grade year, her mother discovered she was failing her classes due to missing assignments. Ella’s mother called a meeting with her daughter’s teacher and school administrators. Her mother was upset that her assignments were not being modified. The administration produced the IEP and noted that Ella’s mother had previously agreed to modifications being made to her daughter’s tests, but not to the daily assignments and lesson plans. Further, the teacher explained that this may not be a modification problem. Rather, most sixth graders in middle school struggle in the first months with having several classes and homework. Thus, keeping organized is a challenge, unlike in elementary school, where the students have only a single teacher and little to no homework. Ella’s teacher went on to discuss what she is doing with all of her classes to help the sixth graders adjust to this new environment. Upon discovering that the IEP did not do what her mother wanted for Ella, Ella’s mother became very upset and threatened to sue the school if they did not start modifying her daughter’s lesson plans in addition to her exams. To avoid a lawsuit, the administration then told the teacher to modify all of her lesson plans when it came to this particular student. Consequently, the teacher would now have to simultaneously teach two lesson plans: one for Ella and one for the rest of her class. Ironically, the school administrators found that this particular teacher was one of only two teachers at the school that modified lesson plans according to the IEPs. The rest of the teachers merely inflated grades after the fact as an accommodation.

Based on legal precedent, was it proper for the school administration to require the teacher to make additional modifications for Ella, despite what her current IEP mandated? According to the current circuit split and recent Supreme Court decision, it is unclear how the school should have instructed the teacher to respond. This paper will illustrate that the “educational benefit” standard established in *Board of Education v. Rowley*<sup>2</sup> fails to address the problems facing implementation of effective IEPs under the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> This paper compares accommodations for disabled students to that of workplace accommodations made under the Americans with Disabilities Act (ADA),<sup>4</sup> and discusses how Congress should remedy the current problem. The goal of this paper is to show that the problems facing compliance with the IDEA can and should be solved through the legislative process and not through the judicial process.

“Education is...one of the [most] contested areas in our society,”<sup>5</sup> and special education receives no additional support from our nation. In Part I, a hypothetical scenario is introduced to

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<sup>1</sup> Name has been changed to protect the student’s identity. Parts of this story have also been fabricated to develop a hypothetical example.

<sup>2</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07 (1982).

<sup>3</sup> Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1491 (2012), *amended by* Every Student Succeeds Act, 114 Pub. L. 95, 129 Stat. 1802 (2015).

<sup>4</sup> Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, Pub. L. 101-336 (2012).

<sup>5</sup> Transcript of Oral Argument at 51, *Endrew F. ex. rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 798 F.3d 1329 (10<sup>th</sup> Cir. 2015), *sub nom.* *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 29, No. 15-827 (argued Jan. 11, 2017) (quoting Mr. Katyal for the respondents) [hereinafter Transcript].

show the reader how the current circuit split has caused problems at the IEP implementation stage. Part II of this paper will give an overview of the types of disabilities that are covered under the IDEA as well as the legislative and judicial history of the IDEA. Part III of this paper will discuss the circuit split and the recent Supreme Court decision in *Endrew F. v. Douglas County School District*.<sup>6</sup> Then, reasons why solving the circuit split through the judicial process does not solve the application problem will be addressed in Part IV. Finally, Part V will discuss possible solutions for solving this problem, and Part VI will conclude.

## II. BACKGROUND

In *San Antonio v. Rodriguez*, the United States Supreme Court held that there is no Constitutional right to education.<sup>7</sup> While *Rodriguez* was a case about the state's use of property tax to fund public schools, it is one of the seminal cases cited as the reason there is no fundamental right to a public education. Interestingly, just a year prior to *Rodriguez*, the Court recognized in *Wisconsin v. Yoder* that states have a legitimate interest in the education of their children.<sup>8</sup> Thus, any right to education would come from legislatures, and the responsibility of educating our youth rested in the states' hands.<sup>9</sup> Education tailored to the individual needs of the child was traditionally only for the upper echelons of society.<sup>10</sup> It was not until the Civil Rights movement of the 1960s that Americans started to push for education for all students.<sup>11</sup> In *Brown v. Board of Education*, Chief Justice Warren said, "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>12</sup> Finally, we had a nation that cared about the education of our society, at least in the abstract.

### A. Disabilities and Special Education

As of 2017, there were over six million students with disabilities recognized under the IDEA.<sup>13</sup> The classification of "individuals with disabilities" is an umbrella phrase encompassing disabilities that range from severe physical impairments to behavioral and developmental

<sup>6</sup> See generally *Endrew F.*, 137 S. Ct. 988.

<sup>7</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that "[p]ublic education is not a 'right' granted to individuals by the Constitution").

<sup>8</sup> Margaret Condit, *Remember the IDEA: A Call for Courts to Apply a Piecemeal Approach to Transition Litigation*, 38 T. JEFFERSON L. REV. 6, 13 (2016) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); see also *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). While invalidating an anti-evolution teaching statute on First Amendment grounds, the Court notes that "by and large, public education in our Nation is committed to the control of state and local authorities." *Id.*

<sup>9</sup> Condit, *supra* note 8, at 13; see generally U.S. Const. amend. X (granting states sovereign powers in certain areas).

<sup>10</sup> See Dep't of Educ., *From There to Here: The Road to Reform of American High Schools* at 1, <https://www2.ed.gov/about/offices/list/ovae/pi/hsinit/papers/history.pdf> (last visited Mar. 8, 2017) ("Until the 20th century, secondary education was a small-scale experience, largely reserved for the privileged, rather than the nearly universal democratic institution of today"); see also generally *American Public Education: An Origin Story*, EDUC. NEWS (Apr. 16, 2013), <http://www.educationnews.org/education-policy-and-politics/american-public-education-an-origin-story>.

<sup>11</sup> Condit, *supra* note 8, at 14–15.

<sup>12</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>13</sup> Idaho State Dep't of Educ., *Identification of Children with Disabilities* (2017), <http://www.sde.idaho.gov/sped/public-reporting/files/state-determination/StateStateid-datadisplay-2017bState-Data-Display.pdf>.

afflictions.<sup>14</sup> Under the IDEA, recognized disabilities include: intellectual impairment; learning disability; physical, cognitive, or emotional developmental delays; physical disabilities (blindness, deafness, etc.); “serious emotional disturbance;” disabilities falling within the autism spectrum; and other health impairments.<sup>15</sup> Educators use instruction and intervention methods “to meet the individual needs of each child with a disability,”<sup>16</sup> also known as special education.<sup>17</sup> Additionally, educators and parents create an individualized education program, also known as an IEP. An IEP is a “written statement for each child with a disability that is developed, reviewed, and revised in accordance with [parental consent].”<sup>18</sup> IEPs are creatures of statutory instruction, created in 1975 by Congress.<sup>19</sup> Courts analyze the school’s use of the IEP’s process to create and implement an IEP, as well as the results achieved, to determine if a child with a disability has been provided a free appropriate public education (FAPE) in compliance with the IDEA.<sup>20</sup>

## B. Legislative History

In the United States, disabled students have historically been denied access to public education.<sup>21</sup> In the mid-twentieth century, the federal government partnered with various family organizations to develop education “practices for children with disabilities and their families.”<sup>22</sup> This effort paved the way for special education programs at the state and local levels.<sup>23</sup> Unfortunately, the 1960’s brought only miniscule changes to special education.<sup>24</sup> It was far more common for individuals with disabilities to be placed in institutions or asylums during this time.<sup>25</sup> Unfortunately, these institutions provided no educational or rehabilitative services.<sup>26</sup> Only the basic needs of food and shelter were provided.<sup>27</sup> Additionally, public schools only educated one

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<sup>14</sup> See *supra* Part II.A.

<sup>15</sup> 20 U.S.C. § 1401(3)(a)–(b) (2012); see also Christy Marlett, *The Effects of the IDEA Reauthorization of 2004 and the No Child Left Behind Act on Families with Autistic Children: Allocation of Burden of Proof, Recovery of Witness Fees, and Attainment of Proven Educational Methods for Autism*, 18 KAN. J.L. & PUB. POL’Y 53, 53 (2008) (describing the autism spectrum to include, “autistic disorder . . . , pervasive development disorder . . . [A]sperger’s syndrome, Rett’s syndrome, and childhood disintegrative disorder”); see generally Andrew M.I. Lee, *The 13 Conditions Covered Under IDEA*, UNDERSTOOD (2017), <https://www.understood.org/en/school-learning/special-services/special-education-basics/conditions-covered-under-idea>.

<sup>16</sup> Off. of Special Educ. & Rehab Services, U.S. Dep’t of Educ., *Thirty-five Years of Progress in Educating Children with Disabilities through IDEA* at 1 (2010), <http://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> 20 U.S.C. § 1401(14) (2012).

<sup>19</sup> Education for all Handicapped Children Act of 1975, 94 Pub. L. 142, 89 Stat. 773 (1975) (definition of an IEP, sec. 4, (18)).

<sup>20</sup> See generally Rowley, 458 U.S. 176.

<sup>21</sup> Megan McGovern, *Least Restrictive Environment: Fulfilling the Promises of IDEA*, 21 WIDENER L. REV. 117, 118 (2015); see also Off. of Special Educ. & Rehab Services, *supra* note 16, at 3.

<sup>22</sup> Off. of Special Educ. & Rehab Services, *supra* note 16, at 4.

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

<sup>24</sup> Elementary and Secondary Education Act of 1966, Pub. L. 89–750, § 161, 80 Stat. 1191, 1204 (1966) (amendment to the Elementary and Secondary Education Act of 1965 which established a federal grant to help states provide education to disabled children).

<sup>25</sup> Off. of Special Educ. & Rehab Services, *supra* note 16, at 3 (noting that state institutions in 1967 were home to nearly 200,000 individuals with disabilities).

<sup>26</sup> *Id.*

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

in five students with disabilities.<sup>28</sup> By the mid-seventies, many states had laws excluding children with disabilities from receiving education alongside their non-disabled peers.<sup>29</sup> Some children were undiagnosed, which prevented them from receiving the services they needed to be successful in school.<sup>30</sup> Moreover, the lack of resources available within the public schools forced parents of children with disabilities to seek educational services outside of the public system.<sup>31</sup>

This changed in 1975, when Congress passed the Education for All Handicapped Children Act (EHA).<sup>32</sup> This Act required, “that all children [ages three to twenty-one] with disabilities have available to them ... a free appropriate public education” by establishing procedures to protect the rights of children with disabilities and to assist states and localities in providing services for these children.<sup>33</sup> The law aimed to make four improvements: (1) properly identifying children with disabilities, (2) improving how the success of these efforts is measured, (3) managing due process protections for claims made by families with children with disabilities, and (4) authorizing additional federal funds to provide states with needed resources for compliance.<sup>34</sup> This landmark legislation helped support the education of over one million children with disabilities who had previously been excluded, in part or in whole, from receiving an appropriate public education.<sup>35</sup>

Sue’s story is a great illustration of the positive impact this legislation has had on the lives of children with disabilities.<sup>36</sup> She was born in 1950 with no sight as well as with cognitive disabilities.<sup>37</sup> By the time the EHA was passed in 1975, Sue was twenty-five years old.<sup>38</sup> This legislation enabled Sue to attend school for the first time.<sup>39</sup> After just one year of receiving educational services through public school, Sue learned how to eat with utensils, walk with a cane, and carry on social conversations.<sup>40</sup> The public education she received through EHA allowed her to live independently as an adult.<sup>41</sup>

Since the EHA’s enactment forty-one years ago, the evolution of special needs education has been reflected in its various amendments.<sup>42</sup> The amendments of 1986 mandated that state services be provided for children with disabilities from birth, whereas previously it had been from three years to age twenty-one.<sup>43</sup> Various amendments passed between 1983 and 1997 focused on high school to adult living transitional services.<sup>44</sup> These amendments required that every IEP

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

<sup>29</sup> 20 U.S.C. § 1400(c)(2)(b) (2012).

<sup>30</sup> 20 U.S.C. § 1400(c)(2)(c).

<sup>31</sup> 20 U.S.C. § 1400(c)(2)(d).

<sup>32</sup> EHA, *supra* note 19.

<sup>33</sup> Office of Special Educ. & Rehab Services, *supra* note 16, at 5 (quoting EHA).

<sup>34</sup> Office of Special Educ. & Rehab Services, *supra* note 16, at 5 (discussing the changes P.L. 94-142 made to the status quo).

<sup>35</sup> *Id.* at 5–6.

<sup>36</sup> *Id.* at 3.

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

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

<sup>39</sup> *Id.*

<sup>40</sup> Office of Special Educ. & Rehab Services, *supra* note 16, at 3.

<sup>41</sup> *Id.*

<sup>42</sup> *See generally* Education of the Handicapped Act Amendments of 1986, 99 Pub. L. 457, 100 Stat. 1145 (1986).

<sup>43</sup> Office of Special Educ. & Rehab Services, *supra* note 16, at 6 (citing the EHA Amendments of 1986, 99 Pub. L. 457, 100 Stat. 1145 (1986)).

<sup>44</sup> *Id.* at 6 (citing EHA Amendments of 1983, 98 Pub. L. 199, 97 Stat. 1357 (1983); EHA Amendments of 1990, 101 Pub. L. 476, 104 Stat. 1103 (1990); IDEA Improvement Act of 1997, 105 Pub. L. 17, 111 Stat. 37 (1997)).

include post-school objectives and procedures for finding employment and living.<sup>45</sup> In accommodating these services, the IEP names specific individuals to help with the transition to adulthood and also connects the child with the state agencies and community services available to the child as an adult.<sup>46</sup> The 1990 amendments also renamed the EHA, changing it to the Individuals with Disabilities in Education Act (IDEA).<sup>47</sup>

The IDEA was reauthorized in 2004 as the Individuals with Disabilities in Education Improvement Act (IDEIA).<sup>48</sup> This reauthorization was meant to align the goals of the IDEA with the goals of the No Child Left Behind Act (NCLB).<sup>49</sup> The goal of NCLB was to measure student achievement through standardized assessments.<sup>50</sup> Through NCLB, Congress mandated that schools set educational goals for students based on testing results.<sup>51</sup> If students did not annually improve on standardized tests, the state lost federal funding for education.<sup>52</sup> In order to align the goals of the IDEA and NCLB, Congress required that children with disabilities be included in the statewide NCLB assessments, and that performance goals be altered under the IDEA to mimic the goals under NCLB for all students be implemented.<sup>53</sup> Because of this goal alignment, schools across the nation feared losing federal funds if they did not meet the new standards.<sup>54</sup> The schools' response was to "dumb down" their performance goals so they would appear to be making progress.<sup>55</sup> This decrease in the performance goals ran counter to the IDEA's objective of having high expectations for children with disabilities.<sup>56</sup> Additionally, the move to standardized testing ran counter to the goal of an IEP being an individualized program catered to the students' unique needs.<sup>57</sup>

Thirteen years later, Congress dealt a swift blow to NCLB when it passed the Every Student Succeeds Act (ESSA), which reauthorized the fifty-year-old Elementary and Secondary Education Act (ESEA).<sup>58</sup> The ESSA represents a move away from heavily regulated federal education policy towards a more flexible, federally funded, but state controlled, education initiatives.<sup>59</sup> Schools still have to report to the federal government through accountability plans,<sup>60</sup> but the ESSA allows states more flexibility in how they implement their accountability systems, and moves away from the federal mandate of tying teacher evaluations to test scores.<sup>61</sup> Waivers of compliance with the

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 6 (citing EHA Amendments of 1983, 98 Pub. L. 199, 97 Stat. 1357 (1983); EHA Amendments of 1990, 101 Pub. L. 476, 104 Stat. 1103 (1990); IDEA Improvement Act of 1997, 105 Pub. L. 17, 111 Stat. 37 (1997)).

<sup>48</sup> *See generally* Individuals with Disabilities Education Improvement Act of 2004, 108 Pub. L. 446, 118 Stat. 2647 (2004) (from here on, the author will refer to the Act that currently governs special education as the IDEA instead of the IDEIA).

<sup>49</sup> Marlett, *supra* note 15, at 65.

<sup>50</sup> *Id.* at 63.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 65.

<sup>54</sup> *Id.* at 63.

<sup>55</sup> Marlett, *supra* note 15, at 63.

<sup>56</sup> 20 U.S.C. § 1400(c)(5)(A) (2012).

<sup>57</sup> Marlett, *supra* note 15, at 64.

<sup>58</sup> U.S. DEPT. OF EDUC., *Every Student Succeeds Act (ESSA)*, <https://www.ed.gov/essa> (last visited Mar. 1, 2017).

<sup>59</sup> Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUC. WEEK, (Mar. 31, 2016), <http://www.edweek.org/ew/issues/every-student-succeeds-act/>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



requirements of NCLB were void as of August 1, 2016, and the new ESSA accountability plans had to be in full effect by the 2017-2018 academic year.<sup>62</sup> While these changes have been praised on both sides of the political aisle, at first glance, ESSA has not made any noticeable improvements for students with disabilities.<sup>63</sup> This is yet another example where the legislative branch had the opportunity to clarify the IDEA, but did nothing.

Today, the IDEA is a federal spending program designed to assist school districts in providing a free appropriate public education (FAPE) to children with disabilities.<sup>64</sup> Under the IDEA, a FAPE is defined as:

special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program . . .<sup>65</sup>

Unfortunately, the IDEA is plagued with ambiguities and a lack of Congressional oversight.<sup>66</sup> This leads parents, as well as school districts, “to look to the courts for guidance.”<sup>67</sup>

### C. Supreme Court Precedent

In addition to Congressional efforts, in 1982 the Supreme Court established the current standard used to determine whether a school has complied with the IDEA in furnishing an IEP that provides a free appropriate public education (FAPE).<sup>68</sup> When faced with a claim that a FAPE has not been provided under the IDEA, the court will ask: (1) whether the school district complies with the mandated procedures in the IDEA when implementing an IEP; and (2) whether the IEP allows the child to receive an educational benefit.<sup>69</sup>

In *Board of Education of Hendrick Hudson Central School District v. Rowley*, the Court held that the IDEA guarantees a “basic floor of opportunity,” specifically designed to meet the child's unique needs, supported by services that will permit him [or her] to benefit from the instruction.<sup>70</sup> This case involved a deaf student who was denied a sign language interpreter in her first grade class because it was determined that she was so adept at reading lips that she did not need an interpreter.<sup>71</sup> Her parents disagreed with the school's decision and sued the school district.<sup>72</sup> The district court found that she was not receiving a FAPE under what would become

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

<sup>63</sup> *Id.*

<sup>64</sup> Sarah Prager, *An “IDEA” to Consider: Adopting a Uniform Test to Evaluate Compliance with the IDEA’s Least Restrictive Environment Mandate*, 59 N.Y.L. SCH. L. REV. 653, 654 (2015) (citing 20 U.S.C. §§ 1400-1401 (2012)).

<sup>65</sup> 20 U.S.C. § 1401(9).

<sup>66</sup> Mark F. Kowal, *Current Issues in Public Policy: A Call to the Courts to Narrow the Scope of the Definition of Learning Disability Within the Americans with Disabilities in Education Act*, 6 RUTGERS J.L. & PUB. POL’Y 819, 819 (2009).

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

<sup>68</sup> *Rowley*, 458 U.S. 176, at 206–07.

<sup>69</sup> *Id.* at 206–08.

<sup>70</sup> *Id.* at 201.

<sup>71</sup> *Id.* at 184–85.

<sup>72</sup> *Id.* at 185.

titled the IDEA, because she understood significantly less than her non-deaf peers and, therefore, she was “not learning as much or performing as well academically, as she would without her [disability].”<sup>73</sup>

The Supreme Court granted review to answer the statutory interpretation question of what Congress meant by the requirement of a “free appropriate public education.”<sup>74</sup> To answer this question, the Court created a two-prong test.<sup>75</sup> The first prong is a procedural one, asking: “has the state complied with the procedures set out in the Act?”<sup>76</sup> The second prong is substantive, asking: “is the IEP . . . reasonably calculated to enable the child to receive educational benefits?”<sup>77</sup> The first prong is a threshold element. If there is a procedural violation, the court will not consider the substantive prong. Unfortunately, due to disagreement in the lower courts on how much benefit an IEP must provide, it is the substantive prong that has created the circuit split.<sup>78</sup>

While the Court recognized that Congress did not offer much assistance in defining what was “appropriate,” Congress provided a definition for the phrase “free appropriate public education.”<sup>79</sup> The Court noted that FAPE was defined 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 preschool, elementary school, or secondary school education in the State involved; and (4) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.<sup>80</sup>

Ironically, the definition uses the term “appropriate” to define a “free *appropriate* public education.” Due to this ambiguity, the Court looked at Congressional records to determine the intent of Congress.<sup>81</sup>

The Court summarized the extensive history of education for children with disabilities that led to the Act.<sup>82</sup> It interpreted the legislative history to show that the intent of Congress, through this Act, was to provide *access* for children with handicaps to public education, not to guarantee any substantive educational outcome.<sup>83</sup> The Court further noted that both the Senate and House Reports on the Act made clear that an “appropriate education is provided when personalized educational services are provided.”<sup>84</sup> The reports are silent, however, as to any required *outcomes*

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<sup>73</sup> *Id.* at 185-86.

<sup>74</sup> *Rowley*, 458 U.S. at 186.

<sup>75</sup> *See id.* at 458 U.S. at 206–07.

<sup>76</sup> *Id.* at 207 (referring to the IDEA).

<sup>77</sup> *Id.* at 208.

<sup>78</sup> *See infra* Part III.

<sup>79</sup> *Rowley*, 458 U.S. at 187.

<sup>80</sup> *Id.* at 188 (quoting the definition of FAPE as defined through 94 Pub. L. 142).

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

<sup>82</sup> *Id.* at 191 (referencing 121 Cong. Rec. 19486 and 121 Cong. Rec. 19494, remarks by Sen. Williams and Sen. Javits respectively).

<sup>83</sup> *Id.* at 192 (quoting S. Rep., No. 94-168 at 11, (1975) stating that the Act did not “guarantee to produce any particular outcome”). *See also id.* at 201 (“[the] ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”).

<sup>84</sup> *Rowley*, 458 U.S. at 197.

of these personalized educational services.<sup>85</sup> In addition, the Court also rejected the argument that the Act required these individualized services to maximize the child's potential.<sup>86</sup> Additionally, if there were insufficient funds to provide for the services needed by the child with a disability, then the available funds should have been apportioned so that no child's right to a FAPE was disproportionately infringed upon.<sup>87</sup> This further illustrates the Court's belief that the Act was about *access* to public education and not educational *results*.

The *Rowley* Court, however, believed that it would be pointless for Congress to appropriate money for access to public education if a child received no benefit from that education.<sup>88</sup> The Court held that the Act was a combination of access to individualized instructions and services that provide an educational benefit.<sup>89</sup> The problem lies in determining when enough educational benefits had been provided to satisfy the Act's requirements.<sup>90</sup> Thus, the *Rowley* Court developed the two-prong test mentioned previously to help answer this question.<sup>91</sup>

In developing the two-prong test, the Court makes clear that it is not attempting "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."<sup>92</sup> Instead, the Court confined its test to situations similar to the specific facts of this case: a student with disabilities who was receiving "substantial specialized...services," and performing above grade average.<sup>93</sup> This test was not meant for students that were able to receive services that allowed them to meet the "mainstreaming preference of the Act," i.e. allowed them to be educated in classrooms with children who did not have a disability. Incidentally, this test would subsequently be applied by circuit courts to all claims of violations of the IDEA for years to come. This led to a circuit split and the recent Supreme Court case, *Endrew F. v. Douglas County School*.<sup>94</sup>

### III. CIRCUIT SPLIT

The circuit split involves the interpretation of how much of an educational benefit is required under the IDEA. Some circuits have held that only "some educational benefit" is required,<sup>95</sup> while other circuits require a "meaningful educational benefit."<sup>96</sup> The most problematic language in *Rowley* combines both standards, noting, "[the] 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide *educational benefit* to the [disabled] child."<sup>97</sup>

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<sup>85</sup> See generally S. Rep., No. 94-168 (1975); see also H.R. Rep., No. 94-332 (1975).

<sup>86</sup> *Rowley*, 458 U.S. at 198.

<sup>87</sup> *Id.* at 199 (citing *Mills v. Bd. of Educ.*, 384 F. Supp. 866, 876 (D.C. 1972)).

<sup>88</sup> *Id.* at 201-02.

<sup>89</sup> *Id.* at 200-01.

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

<sup>91</sup> *Id.* at 206-07.

<sup>92</sup> *Id.* at 202.

<sup>93</sup> *Rowley*, 458 U.S. at 202.

<sup>94</sup> See generally *Endrew F.*, 798 F.3d at 1338.

<sup>95</sup> See *id.*; see also *Cerra v. Pawling*, 427 F.3d 186, 195 (2d. Cir. 2005).

<sup>96</sup> See *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F. 3d 840, 862 (6th Cir. 2004).

<sup>97</sup> *Rowley*, 458 U.S. at 201 (emphasis added).

### A. Some Educational Benefit

Courts in the “some educational benefit” school of thought use language from *Rowley* that states, “education to which access is provided [must] be sufficient to confer some educational benefit.”<sup>98</sup> The Second Circuit has held that a school district must only provide an IEP that is “likely to produce progress, not regression,” and “afford the student with an opportunity greater than mere ‘trivial advancement.’”<sup>99</sup> Taking language from *Rowley*, the Ninth Circuit held that Congress did not apply a standard implying meaningful access, clarifying that states must “confer some educational benefit upon the [disabled] child.”<sup>100</sup> Finally, the Tenth Circuit also notes that Congress had the ability to increase the standard every time it reauthorized the Act, but instead it chose to maintain the same statutory definition of a FAPE since its initial conception in the EHA.<sup>101</sup>

Circuits in the “some educational benefit” school of thought seem to view the Act as requiring more benefit than the minimum the Supreme Court required in *Rowley*. These courts focus on the language in *Rowley*, which noted that IEPs represent only a “basic floor of opportunity” under the IDEA; the Act does not require school districts to provide a level of services “that would confer additional benefit.”<sup>102</sup> To illustrate this school of thought, the Second Circuit seems to be concerned with “impermissibly meddling in state educational methodology.”<sup>103</sup> Another court believes that when it comes to determining if an IEP is reasonably calculated to proffer a benefit, “courts should not substitute their judgement for that of state and local educators.”<sup>104</sup> Justice Breyer reiterated this statement during oral arguments of *Andrew*, when he noted that the Court was being asked to create a definition in an area where it lacked expertise.<sup>105</sup>

### B. Meaningful Educational Benefit

Courts using the “meaningful educational benefit” standard reason that *Rowley* was a narrow decision and nothing in it precludes setting the standard of an educational benefit higher than “some” or “any.”<sup>106</sup> Fearing that a difference in the level of education provided could be the difference in a life of dependency or one of self-sufficiency,<sup>107</sup> the Sixth Circuit held that “the IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue.”<sup>108</sup> But, as the attorney for the respondents pointed out in *Andrew*,

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<sup>98</sup> *Id.* at 200–01.

<sup>99</sup> *Cerra*, 427 F.3d at 195 (quoting *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)).

<sup>100</sup> *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 947 (9th Cir. 2010) (quoting *Rowley*, 458 U.S. at 200).

<sup>101</sup> *Andrew F.*, 798 F.3d at 1339.

<sup>102</sup> *Cerra*, 427 F.3d at 195 (citing *Rowley*, 458 U.S. at 201).

<sup>103</sup> *Id.*

<sup>104</sup> *J.K. & J.C. v. Missoula Cnty. Pub. Sch.*, 2016 WL 4082633, at \*11 (D. Mont. July 29, 2016).

<sup>105</sup> Transcript, *supra* note 5, at 14.

<sup>106</sup> *Deal*, 392 F.3d at 863.

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

<sup>108</sup> *Id.* at 862.

the court only mentioned the term “meaningful” one time to note that the standard in *Rowley* “can’t be more than meaningful.”<sup>109</sup>

Courts that require an IEP to confer a meaningful educational benefit reason that it could make all the difference in the independence of the child once they become an adult.<sup>110</sup> Since the case before the *Rowley* Court involved a plaintiff who was receiving passing grades and progressing successfully to each grade level, the *Rowley* Court did not have an opportunity to address how much educational benefit the IEP should confer.<sup>111</sup> Therefore, lower courts have the opportunity to set a higher standard of educational benefit than “some” or “any.”<sup>112</sup>

Courts in the meaningful benefit camp also look to Congressional intent of the IDEA, reasoning that applying a “some” educational benefit standard cannot achieve the goals of the IDEA.<sup>113</sup> Therefore, Congress must have intended the educational benefit to be “meaningful.”<sup>114</sup>

### C. Flip-flopers

Some circuits have remained inconsistent as to which standard to apply.<sup>115</sup> This is due, in large part, to the language in *Rowley* mentioned above.<sup>116</sup> For example, the Third Circuit has stated that the school district must provide an education “sufficient to confer some educational benefit,” but is not required to “maximize the potential of [disabled] children.”<sup>117</sup> Historically, the Third Circuit required “more than a trivial or *de minimis* educational benefit.”<sup>118</sup> But more recently, the Third Circuit has held that “more than a trivial educational benefit” fails to meet *Polk v. Central Susquehanna Intermediate Unit*’s standard that an IEP confer a meaningful benefit on the child’s education.<sup>119</sup> The Third Circuit argues that it is now conventional wisdom that the IDEA “require[s] that a disabled child be placed in the least restrictive environment that will provide him with a meaningful educational benefit.”<sup>120</sup>

In *Polk*, the court observed that one cannot avoid answering the question of “how much benefit is sufficient to be meaningful” in these types of cases.<sup>121</sup> The court examined what the Act meant by “benefit” and sought to apply a standard that was consistent with Congressional intent and the *Rowley* decision.<sup>122</sup> The court noted that Congress defined the EHA’s purpose as providing “full educational opportunity to all [disabled] children.”<sup>123</sup> *Polk* also referenced a Senate Report

<sup>109</sup> Transcript, *supra* note 5, at 44–45.

<sup>110</sup> *See Deal*, 392 F. 3d at 863.

<sup>111</sup> *Deal*, 392 F. 3d at 863.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 864.

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

<sup>115</sup> Compare *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1213 (3d Cir. 1993) (requiring a more than *de minimis* standard), and *L.E. v. Ramsey Bd. of Educ.* 435 F.3d 384, 390 (3d Cir. 2006) (requiring some educational benefit to maximize the potential).

<sup>116</sup> *Rowley*, 458 U.S. at 201.

<sup>117</sup> *Ramsey*, 435 F.3d at 390 (quoting *T.R. ex rel. N.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000)).

<sup>118</sup> *Oberti*, 995 F.2d at 1213.

<sup>119</sup> *Ramsey*, 435 F.3d at 390 (discussing a standard laid out in *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir.1988)).

<sup>120</sup> *Id.* at 390 (quoting *Kingwood Township*, 205 F.3d at 578).

<sup>121</sup> *Polk*, 853 F.2d at 180.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 180-81 (quoting 20 U.S.C. § 1412(2)(A)).

on the amendments from 1975, defining “related services...[as those] necessary for a [disabled] child to fully benefit from special education.”<sup>124</sup> The court in *Polk* recognized that the Supreme Court had determined that “Congress did not intend to provide optimal benefit,”<sup>125</sup> but the court countered this by finding that the use of the phrase “full educational opportunity” in the Act itself, as well as the Act’s legislative history, proved an “intent to afford more than a trivial amount of educational benefit.”<sup>126</sup>

#### D. Patently Unclear

Some circuits are so patently unclear as to how much benefit is required under the IDEA that attorneys have resorted to using the terms “some” and “meaningful” interchangeably.<sup>127</sup> In *Lessard v. Wilton*, the First Circuit rejected that an IEP was needed to provide the “maximum benefit available.”<sup>128</sup> The court’s reasoning was based on its finding that the standard “had no support in the text of the amendments . . . [or] other court of appeals, post–1997.”<sup>129</sup> Then, in 2012, the court used the term “meaningful” to describe the standard it was applying throughout its opinion. To dispose of the issue, though, the court cited to a Tenth Circuit case, which concluded that the IEP need only provide “some” educational benefit,<sup>130</sup> momentarily leaving attorneys unsure of whether the First Circuit was adopting the Tenth Circuit’s “some” educational benefit standard. Most recently, the First Circuit has stated that it “review[s] an IEP’s compliance with the IDEA based on whether the IEP is reasonably calculated to confer a meaningful educational benefit.”<sup>131</sup>

The Fifth Circuit was especially confusing, as it used the term “meaningful” but then discussed that the benefit does not have to meet a maximum standard.<sup>132</sup> In 1997, the Fifth Circuit held that a child with disabilities was not entitled to a program that “maximize[d] the child’s educational potential.”<sup>133</sup> It quoted *Rowley*, stating that the “IDEA guarantees a ‘basic floor of opportunity’ specifically designed to meet the child’s unique needs, supported by services that will permit him to benefit from the instruction.”<sup>134</sup> It also held, however, that the educational benefit “cannot be a mere modicum or de minimis.”<sup>135</sup> Instead, the IEP must be “likely to produce progress.”<sup>136</sup>

<sup>124</sup> *Id.* at 181 (quoting Sen. R. No. 168, 94th Cong., 1st Sess. at 42); see also 121 CONG. REC. 19482 (remarks of Senator Randolph discussing the goals of the EHA as “[a]chieving a goal of full educational opportunities”).

<sup>125</sup> *Polk*, 853 F.2d at 180–81.

<sup>126</sup> *Id.*

<sup>127</sup> See *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 28 (1st Cir. 2008); *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 35 (1st Cir. 2012); *Ms. S. v. Reg’l Sch. Unit 72*, 829 F.3d 95, 114 (1st Cir. 2016) (quoting *Esposito*, 675 F.3d at 34); see also *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009).

<sup>128</sup> *Lessard*, 518 F.3d at 28.

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

<sup>130</sup> *Esposito*, 675 F.3d at 37 (citing *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)).

<sup>131</sup> *Ms. S.*, 829 F.3d at 114 (quoting *Esposito*, 675 F.3d at 34).

<sup>132</sup> *Richardson*, 580 F.3d at 292; See *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997).

<sup>133</sup> See *Cypress–Fairbanks*, 118 F.3d at 247.

<sup>134</sup> *Richardson*, 580 F.3d at 292 (quoting *Cypress–Fairbanks*, 118 F.3d at 247–48); see also *Rowley*, 458 U.S. at 206–07.

<sup>135</sup> *Richardson*, 580 F.3d at 292 (quoting *Cypress–Fairbanks*, 118 F.3d at 247–48).

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

Reconsider our hypothetical of Ella from page three. What would happen if her mother pursued a cause of action against the school district concerning Ella's IEP? Based on current precedent, it would entirely depend on which circuit court had jurisdiction over Ella's case. This is devastating because it means that children with disabilities are receiving different levels of education across our nation. This also means that teachers and school administrations are left in limbo, spending their time trying to get a grasp of their circuit's current interpretations, instead of spending their time doing what they were trained to do: educating our nation's children.

### *E. Andrew F. v. Douglas County School District RE-1*

All of this ambiguity finally made its way to the Supreme Court through *Andrew F. v. Douglas County School*.<sup>137</sup> The Tenth Circuit called the difference between "some" and "meaningful" "fleeting."<sup>138</sup> However, the Tenth Circuit explicitly rejected the "meaningful benefit" standard because the standard the court had always applied was the "some benefit" standard, which the Tenth Circuit believed the Supreme Court adopted in *Rowley*.<sup>139</sup> Because the circuits were in complete shambles as to which standard should be applied, the Supreme Court agreed to hear oral arguments on this case.<sup>140</sup>

On January 11, 2017, the Supreme Court heard oral arguments on *Andrew*.<sup>141</sup> The Solicitor General argued that an IEP should aim for "significant educational progress."<sup>142</sup> He went further to argue that "significant" and "meaningful" are synonymous, as well as the word "progress."<sup>143</sup> Ultimately, he urged the courts to use the word "appropriate," and to stay away from the term "meaningful," because it had a lot of baggage in various courts of appeals.<sup>144</sup> The Solicitor General argued for the standard to be worded as "reasonably calculated to make progress that is appropriate in light of the child's circumstances."<sup>145</sup> In response to his arguments, Justice Kagan made a joke about the Solicitor General asking the Court to come up with their own word to be applied by lower courts in different ways, essentially the exact problem we are facing now.<sup>146</sup>

Petitioners argued for an "equal educational opportunity" standard;<sup>147</sup> however, this standard was previously rejected by the *Rowley* Court as being an "unworkable standard requiring impossible measurements and comparisons."<sup>148</sup> The *Rowley* Court went further to explain that the term "equal" does not appropriately capture the complex phrase, "free appropriate public

<sup>137</sup> See generally *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 29, No. 15-827 (argued Jan. 11, 2017).

<sup>138</sup> *Id.* at 1340.

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

<sup>140</sup> Christina Samuels, *U.S. Supreme Court to Decide Level of 'Benefit' Special Education Must Provide*, EDUC. WEEK (Sept. 29, 2016), [http://blogs.edweek.org/edweek/speced/2016/09/court\\_special\\_education\\_benefit\\_case.html](http://blogs.edweek.org/edweek/speced/2016/09/court_special_education_benefit_case.html).

<sup>141</sup> See Transcript, *supra* note 5.

<sup>142</sup> *Id.* at 20; see also Amy Howe, *Argument Analysis: Justices Grapple with Proper Standard for Measuring Educational Benefits for Children with Disabilities*, SCOTUS BLOG (Jan. 11, 2017), <http://www.scotusblog.com/2017/01/argument-analysis-justices-grapple-proper-standard-measuring-educational-benefits-children-disabilities/>.

<sup>143</sup> Transcript, *supra* note 5, at 20.

<sup>144</sup> *Id.* at 21.

<sup>145</sup> *Id.* at 24.

<sup>146</sup> *Id.* at 21.

<sup>147</sup> *Id.* at 4; see also Howe, *supra* note 142 (Petitioner argued for the program to be "reasonably calculated" to provide [the child] with educational opportunities that are substantially related equal to those offered to other students").

<sup>148</sup> *Rowley*, 458 U.S. at 198.

education.”<sup>149</sup> Petitioners contended that the IDEA’s purpose as amended in 1997 and 2004 provides for this “equal educational opportunity standard.”<sup>150</sup>

The *Rowley* Court’s sentiments were reiterated by the Justices. As several Justices pointed out, the goal of special needs education is about equality of opportunity and not outcomes. Petitioners’ argument for their standard left the Justices confused about how Petitioners thought this standard helped argue for a higher standard than *Rowley* suggested.<sup>151</sup> Justice Ginsburg noted that the Court rejected such a standard in the *Rowley* decision.<sup>152</sup> Justice Breyer pointed out that if one standard were to be applied for all students, it would not accurately encompass the wide range of disabilities.<sup>153</sup> He was concerned that this would lead to taking funds intended for providing services for these children and instead spending them on lawsuits litigating a too rigid standard.<sup>154</sup> Justices Alito, Kagan and Ginsburg specifically seemed to struggle with how the term “equal” could be applied as the measurement when schools were mandated to create individualized plans for individual students, with individual needs.<sup>155</sup>

Respondents noted that, when there are concerns about interpreting a Congressional standard, it is for Congress to clarify.<sup>156</sup> They argued that in each IDEA amendment, Congress continued to focus on procedural protections without touching the substantive standard in the statute.<sup>157</sup> Respondents argued that, having recognized the ambiguities in the substantive prong, Congress’ 1997 and 2004 amendments to the IDEA placed more emphasis on procedural protections.<sup>158</sup> Throughout their argument, Respondents attempted to illustrate the point that an IEP is essentially a contract, which is enforceable through procedural mechanisms.<sup>159</sup> Respondents focused on the “systematic requirements” that are in place through enforcement by the Department of Education.<sup>160</sup> This was meant to reiterate that Congress believed procedural requirements would avoid the problems created by ambiguous language.<sup>161</sup> Justice Kagan pointed out that this issue could not rest on the procedural safeguards, stating that “[while] the IDEA has lots of procedures in it...they’re all geared towards a particular substantive result.”<sup>162</sup>

Throughout oral arguments, Justice Breyer continued to discuss his confusion as to what the Court was supposed to do about all the ambiguous terms.<sup>163</sup> He believed this was really a question of whether the requirements in the IDEA had been met and whether there was already a system to enforce these requirements.<sup>164</sup> He also noted that the Justices were hoping to rely on the

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<sup>149</sup> *Id.* at 199.

<sup>150</sup> Transcript, *supra* note 5, at 4.

<sup>151</sup> *Id.* at 3–4.

<sup>152</sup> *Id.* at 4.

<sup>153</sup> *Id.* at 15.

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

<sup>155</sup> Transcript, *supra* note 5, at 18–19.

<sup>156</sup> *Id.* at 40, 52.

<sup>157</sup> *Id.* at 30.

<sup>158</sup> *Id.* at 42–43.

<sup>159</sup> *Id.* at 43–44.

<sup>160</sup> Transcript, *supra* note 5, at 46 (systematic requirements include “cut off funds; redirect funds; and require annual reports...”).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 50.

<sup>163</sup> *Id.* at 15.

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



Department of Education's expertise in articulating a standard.<sup>165</sup> Instead, the Department left the issue of interpretation to be decided by the Court.<sup>166</sup> Chief Justice Roberts discussed that presenting numerous adjectives to the Court when asking the Court to undertake judicial review does not make it clear to the Court as to what it should adopt.<sup>167</sup> Justice Alito reiterated that the frustration of this case was the "blizzard of words" that had been thrown at the Court.<sup>168</sup> The Court continuously focused on facts specific to the *Endrew* case, possibly eluding to the notion that the test courts use in IDEA cases should be fact-specific and narrowly tailored.<sup>169</sup> The only thing that was clear was that the Justices all seemed to be unhappy with the "more than merely de minimis" standard.<sup>170</sup> If the Court's preference is to case-specific holdings in IDEA cases, then resolving the circuit split will not fix the problem.

On March 22, 2017, the Supreme Court released their decision in *Endrew*.<sup>171</sup> Unfortunately, the Supreme Court gave little clarity to the question of what level of educational benefit a child must receive under his or her IEP to satisfy the requirements of the Individuals with Disabilities in Education Act.<sup>172</sup> In a unanimous decision, the Court held that, to meet its substantive obligation under the IDEA, a school must "offer an [individualized education program] reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>173</sup> The Court simply reaffirmed the holding in *Rowley*.<sup>174</sup> There was a slight silver-lining, though, because the Court unanimously rejected the *de minimis* standard,<sup>175</sup> and instead held that schools need to provide more than a trivial benefit.<sup>176</sup> Parents saw this decision as expanding the reach of special needs education, while critics say it does little to change the status quo because the vast majority of schools are already in compliance with the "more than de minimis" standard.<sup>177</sup> The rejection of the *de minimis* standard did make a difference in this specific case.<sup>178</sup> On remand, the district court ruled that the school district has to pay for the private schooling of special needs children in Colorado.<sup>179</sup> Also, of note, our

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<sup>165</sup> *Id.* at 22.

<sup>166</sup> Transcript, *supra* note 5, at 22.

<sup>167</sup> *Id.* at 26; *see also* Howe, *supra* note 137.

<sup>168</sup> *Id.* at 47 (discussing that significant and meaningful are synonyms).

<sup>169</sup> *Id.* at 6–7 (Chief Justice Roberts illustrating how one standard doesn't work for every type of disabled child); *see also id.* at 10 (Justice Ginsburg discussing the \$70,000 the district has already spent on this one child).

<sup>170</sup> Howe, *supra* note 137; *see also* Kimberly Robinson, *SCOTUS Struggles with Duty Owed to Disabled Students*, BLOOMBERG L. (Jan. 12, 2017), <https://www.bna.com/scotus-struggles-duty-n73014449718/>.

<sup>171</sup> *Endrew F.*, 798 F.3d at 988.

<sup>172</sup> *See id.*

<sup>173</sup> Amy Howe, *Opinion Analysis: Court's Decision Rejecting Low Bar for Students with Disabilities, Under the Spotlight*, SCOTUS BLOG (Mar. 23, 2017), <http://www.scotusblog.com/case-files/cases/endrew-f-v-douglas-county-school-district/>.

<sup>174</sup> *Rowley*, 458 U.S. at 206–07.

<sup>175</sup> Howe, *supra* note 142.

<sup>176</sup> *Id.*

<sup>177</sup> Laura Mckenna, *How Supreme Court Ruling Will Affect Special Education*, THE ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/>.

<sup>178</sup> T. Thomas Metier, *The District Court Says a School District Must Pay for the Private Schooling of a Special Needs Child in Colorado After US Supreme Court Ruling*, LEGAL EXAM'R (Feb. 28, 2018), <http://fortcollins.legalexaminer.com/miscellaneous/the-district-court-says-a-school-district-must-pay-for-the-private-schooling-of-a-special-needs-child-in-colorado-after-us-supreme-court-ruling/>.

<sup>179</sup> *Id.*

newest Supreme Court Justice, Neil Gorsuch, while presiding for the Tenth Circuit, ruled in 2008 that the IDEA only required educational benefits to “merely be ‘more than de minimus.’”<sup>180</sup>

#### IV. THE DIFFERENCE IN THE SPLIT IS FLEETING

Justice Sotomayor said it best during oral arguments of *Endrew*: “I do think the [IDEA] provides enough to set a clear standard... [but the problem] is trying to come up with the right words, which will be less confusing to everyone.”<sup>181</sup> Even the attorney for Respondents offered nine different standards during oral argument.<sup>182</sup>

One may be inclined to turn to the differences in the definition of the two words. “Some” means “of a fairly large amount or number.”<sup>183</sup> “Some” is also defined as “being of an unspecified amount or number.”<sup>184</sup> “Meaningful” is defined as “having real importance or value.”<sup>185</sup> It also means “having a meaning or purpose.”<sup>186</sup> Regardless, whether one uses “some” or “meaningful,” these words are not categorical, and thus not easily measured or defined. This is precisely why the Tenth Circuit calls the difference between the two standards “fleeting.”<sup>187</sup>

Even within the circuits that have preferred the word “meaningful,” there are great inconsistencies.<sup>188</sup> One circuit discusses that the legislative history suggests that Congress intended for the child to “fully benefit from special education.”<sup>189</sup> The same circuit court then counters by noting that the Supreme Court has made it clear that Congress did not mean optimal benefit.<sup>190</sup> Other circuits define “meaningful” as being “sufficient.”<sup>191</sup> Yet others define “meaningful” as providing “some” educational benefits.<sup>192</sup> All in all, the courts have made circular arguments and have avoided offering any clear examples as to what is required to be considered an educational benefit. Clearly, this ambiguity cannot be settled by simply referring to our dictionaries.

If we look at the statute itself, in addition to defining FAPE, the Act outlines in great detail what an IEP entails.<sup>193</sup> The statute states that an essential part of our national policy is to improve

<sup>180</sup> Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P., 540 F.3d 1143, 1150 (10th Cir. 2008).

<sup>181</sup> Howe, *supra* note 142.

<sup>182</sup> Robinson, *supra* note 170.

<sup>183</sup> *Some*, MERRIAM-WEBSTER ONLINE DICTIONARY, merriam-webster.com (last visited Mar. 8, 2017).

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

<sup>185</sup> *Meaningful*, MERRIAM-WEBSTER ONLINE DICTIONARY, merriam-webster.com (last visited Mar. 8, 2017)

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

<sup>187</sup> *Endrew F.*, 798 F.3d at 1340.

<sup>188</sup> *See Lessard*, 518 F.3d at 22; *Esposito*, 675 F.3d at 34; *Ms. S.*, 829 F.3d at 114 (quoting *Esposito*, 675 F.3d at 34); *see also Richardson*, 580 F.3d at 292.

<sup>189</sup> *Polk*, 853 F.2d at 181.

<sup>190</sup> *Id.*

<sup>191</sup> *Ramsey*, 435 F.3d at 390 (quoting *Kingswood Township*, 205 F.3d 572, 577 (3d Cir. 2000)).

<sup>192</sup> *See Lessard*, 518 F.3d at 22; *see Esposito*, 675 F.3d at 34; *see Ms. S.*, 829 F.3d at 114 (quoting *Esposito*, 675 F.3d at 34).

<sup>193</sup> 20 U.S.C. § 1414(d)(19) (2012) ((1) “a statement of the present levels of educational performance of such child, (2) a statement of annual goals, including short-term instructional objectives, (3) a description of how the child’s progress toward meeting the annual goals described in subclause (II) will be measured (4) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (5) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class (6) a statement of any individual appropriate accommodations that are

educational results for children with disabilities so they have an “equality of opportunity,” “independent living,” and “economic self-sufficiency.”<sup>194</sup> The statute further discusses that, while state and local governments are responsible for providing these educational services, it is the Federal Government that should have a supporting role in assisting the states in their efforts.<sup>195</sup>

While the statute outlines several worthy efforts, it uses ambiguous words to define what standards are necessary to comply with the Act. Yet, the Act does make one thing clear: while state and local governments are vested with providing services to children with disabilities, the Federal Government should have an active and continuous role in the education of children with disabilities. Congress recognizes that it has a valuable role to play in the education of all children in this nation, including those with disabilities. However, the Act does not set parameters for the achievement of the goals laid out within the Act. It is the classic “throw money at the problem,” but do not actually ensure the problem is fixed. Instead, Congress, in what is most likely an effort to appease stakeholders with differing views, has emphasized the procedural safeguards in the Act and left any ambiguity to be duked out in court proceedings. The problem here is that courts exist to make sure someone’s rights have not been violated, and to provide recourse when they are. The purpose of the court system is not to rewrite legislation when Congress is unclear.

In addition, Congress has had years to clarify these ambiguities, and every time it has amended the IDEA, it chose to keep the ambiguities as they are. This leads one to wonder if Congress never intended there to be a substantive portion to this legislation, and instead only that the legislation be enforced and measured upon procedural requirements. Maybe what the courts are supposed to do is decide cases on procedural grounds only.

The biggest problem with this is best illustrated by recalling our hypothetical student, Ella. Ella’s teacher is making accommodations according to Ella’s IEP, but Ella is still unable to keep up with the rest of her class. One would assume that the school should go back and modify the accommodations, but that would require costly testing and pages of paperwork. Additionally, since IEPs are only issued on an annual basis, it could take until the next academic year for Ella’s new accommodations to be approved.

In the meantime, what is her mother to do? Initiate a lawsuit? Let’s assume she does. If the court only looks to the procedural requirements of the Act, the school has met them. It has developed an IEP for the current school year, it is following that IEP, and it has included Ella’s mother in that process. Aside from violating the process of creating the IEP (let us assume here that there was none), the school has not violated any procedural requirement. Therefore, the school has not violated the Act, and the court should rule in favor of the school. If this were the outcome, Ella would continue failing her classes. This begs the question that maybe what Congress needs to do is make the process more efficient. Yet, any lawyer will tell you not to hold your breath waiting for Congress and the Administration to “act.”<sup>196</sup>

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necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments (7) and the projected date for initiation and anticipated duration of such services”).

<sup>194</sup> 20 U.S.C. § 1400(c).

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

<sup>196</sup> See Condit, *supra* note 8, at 19 (“Many argue that in today’s political climate, Congress will not likely be able to pass legislation that expressly heightens schools’ responsibilities to special education students”); see also Terry Jean Selignann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71, 93–94 (Jan. 2012) (“Despite the sympathetic proposition that children with disabilities should receive an appropriate education, given the current landscape one wonders whether it would be possible to pass an entitlement statute like the IDEA today”).

To add more confusion and frustration to the lives of families with children with disabilities,<sup>197</sup> the new Secretary of Education was unaware that special education services are mandated by federal law.<sup>198</sup> During Secretary DeVos' confirmation hearing before the Senate HELP<sup>199</sup> Committee, it became clear that DeVos was unaware that the IDEA was a federal law that she would be obligated to enforce if confirmed.<sup>200</sup> When questioned by Senator Hassan about enforcing the requirements of the IDEA, DeVos said that, "states should have the right to decide whether to enforce IDEA."<sup>201</sup> Senator Hassan went on to proclaim that the IDEA was a "federal civil rights law."<sup>202</sup> DeVos tried to assure the Senator that she would "be very sensitive to the needs of special needs students and the policies surrounding that,"<sup>203</sup> to which Hassan replied, "it's not about sensitivity, although that helps,...[it's about] enforcing the federal law to ensure that all children have access to public education."<sup>204</sup> This may signal that Congress still feels the issue is about access to education rather than providing a benefit, or it could just be the opinion of one Senator. Either way, for Americans to know how much of an educational benefit is required under the IDEA, Congress will have to address the issue.

## V. POSSIBLE SOLUTIONS

There is great public backlash against using public school resources to provide expensive treatments to children with disabilities.<sup>205</sup> In the long run though, the expense to society of providing lifetime care to adults with disabilities who do not receive early intervention and education is far greater.<sup>206</sup> While I strongly believe this is a problem for legislatures to fix, in the interim, the courts can use standards similar to the ones they apply in the Americans with Disabilities Act accommodation cases. Additionally, the Secretary of Education made it clear that she has a lot of catching up to do before she understands how to enforce the IDEA. That leaves us

<sup>197</sup> See *On Betsy DeVos—Because I Can't Be Silent*, A DIARY OF A MOM (Jan. 18, 2017), <https://adiaryofamom.com/2017/01/18/on-betsy-devos-because-i-cant-be-silent>; see also Kimberlee Rutan McCafferty, *A Call to Action Part Two*, AUTISM MOMMY-THERAPIST (Jan. 23, 2017), <https://autismmommytherapist.wordpress.com/2017/01/23/a-call-to-action-part-two/>.

<sup>198</sup> See Douglas N. Harris, *Betsy DeVos and the Wrong Way to Fix Schools*, N.Y. TIMES (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/opinion/betsy-devos-and-the-wrong-way-to-fix-schools.html>; see also Charles P. Pierce, *The Betsy DeVos Hearing was an Insult to Democracy*, ESQUIRE (Jan. 18, 2017), <http://www.esquire.com/news-politics/politics/news/a52357/betsy-devos-hearing>; see also Aimee Ortiz, *Hassan Questions Betsy DeVos's Knowledge of Civil Rights Disabilities Law for Students*, BOSTON GLOBE (Jan. 18, 2017), <https://www.bostonglobe.com/news/politics/2017/01/18/devos-unfamiliarity-with-civil-rights-law-for-students-with-disabilities-concerns-hassan/eaRGm1bAzUy9PG2RC15Q8M/story.html>.

<sup>199</sup> HELP is a commonly used shorthand for the Health, Education, Labor and Pension. See *U.S. Senate Committee on Health, Education, Labor, and Pensions*, SENATE.GOV, <https://www.help.senate.gov>, (last visited March 11, 2018).

<sup>200</sup> See Valerie Strauss, *Six Astonishing Things Betsy DeVos Said—and Refused to Say—At Her Confirmation Hearing*, WASH. POST (Jan. 18, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/18/six-astonishing-things-betsy-devos-said-and-refused-to-say-at-her-confirmation-hearing>; see also Emmarie Huetteman & Yamiche Alcindor, *Betsy DeVos Confirmed as Education Secretary; Pence Breaks Tie*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/betsy-devos-education-secretary-confirmed.html> (noting that Betty DeVos was confirmed by a vote of 51-50 on Feb. 7, 2017).

<sup>201</sup> Strauss, *supra* note 200.

<sup>202</sup> *Id.*

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

<sup>204</sup> *Id.*

<sup>205</sup> Marlett, *supra* note 15, at 55, 72.

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

with the branch of government that created this problem—Congress. After discussing remedies for the courts to apply, this section will describe how Congress can fix the ambiguities in the language of the Act to ensure clearer interpretation and implementation under the IDEA. Lastly, parental resources will be discussed to emphasize that no solution is successful without the involvement of the parents of the child with disabilities.

### A. Comparison to How Courts Handle Americans with Disabilities Act Claims

One possible solution for courts to use as they wait on Congress is to apply the standards used in workplace accommodations to cases involving the IDEA. Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits the states and other employers from “discriminating against a qualified individual with a disability because of that disability . . . in regard to . . . terms, conditions, and privileges of employment.”<sup>207</sup> Employers violate the statute when they do not make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”<sup>208</sup> Through litigation, what qualifies as a “reasonable accommodation” has been somewhat defined.

In *Board of Trustees of the University of Alabama v. Garrett*, for example, the Court held that the Fourteenth Amendment does not require the states “to make special accommodations for the disabled, so long as their actions towards such individuals are rational.”<sup>209</sup> Likewise, in *Tennessee v. Lane*, a case involving two people in wheelchairs who needed access to a courthouse with no wheelchair ramp, the Court held that Title II of the ADA prevented discrimination against a disabled person by public entities.<sup>210</sup> This holding required the government to ensure that an individual be able to participate in or take part in the benefits of any service, program or activity conducted by a public body without discrimination because of their disability.<sup>211</sup>

Applying these standards to the accommodations under the IDEA, a school is a public entity and would thus be prohibited from discriminating against a disabled student. The school would need to ensure that the disabled student be able to participate in or take part in the benefits of any service, program or activity conducted by the school without discrimination because of their disability. However, it would not be required to make special accommodations so long as the school’s actions toward the individual were rational. More accurately, the school is not required to make accommodations that would place an undue hardship on the other students’ ability to receive a free appropriate education.

A judge could then apply a balancing test to the substantive prong of *Rowley*. Instead of trying to deal with the ambiguity of the terms “some” and “meaningful” in defining whether an educational benefit was provided, the focus would be on reasonableness—a standard the courts are much more familiar with. Reasonableness appeals to both our heart and our head. Instead of the IEP needing to provide a child with a benefit, the question could be, “has the school made reasonable accommodations to provide the child with a FAPE under the IDEA?” What is

<sup>207</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2012).

<sup>208</sup> 42 U.S.C. § 12112(5)(a)-(b)(5)(A).

<sup>209</sup> *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

<sup>210</sup> *Tennessee v. Lane*, 541 U.S. 509, 513 (2004).

<sup>211</sup> *Id.* at 529.

reasonable could be decided on a case by case basis, determined by specific facts and needs of the individual child, and balanced with the resources of the school district. This balancing test would also be in line with *Rowley*, where the Court noted that, if there were insufficient funds to provide for the desirable programs needed by the child with disabilities, then the funds that are available should be apportioned so that no child is entirely excluded from a public education.<sup>212</sup>

Public education is a public benefit to which everyone should have equal access. Special education is not about equal outcomes, but rather about making accommodations that are reasonable, so the child has the ability to learn alongside his or her peers. However, “an ineffective ‘modification’ or ‘adjustment’ will not accommodate a disabled individual’s limitations.”<sup>213</sup> For students with disabilities, that means providing accommodations to give the child an opportunity to learn alongside his or her peers.

If IDEA is about access to education and not about results, then why not have Ella’s mom file a discrimination claim against the school? The Supreme Court answered this question in a recent case, *Fry v. Napoleon Community Schools*.<sup>214</sup> While the IDEA makes clear that it does not prohibit the rights and remedies afforded under other federal laws, it limits relief under those other laws for lawsuits where relief can be granted under the IDEA.<sup>215</sup> The Supreme Court held in *Fry* that if the essence of the plaintiff’s suit is the denial of the IDEA’s core guarantees of a FAPE, then a parent must exhaust the IDEA’s administrative procedures under the Act.<sup>216</sup> Exhaustion of the IDEA’s procedures is necessary when the plaintiff seeks relief that is available under the IDEA.<sup>217</sup> Courts are to look at the substance of the claims to set aside any attempt at artful pleading.<sup>218</sup>

Additionally, the education of children with disabilities is also about post-secondary skills. One of the overall goals of the IDEA and its predecessors is to keep children with disabilities in the regular classroom as much as possible. While for some children with disabilities self-sufficiency in their adult life is out of reach, that does not mean that the school and parents should not aim to teach the student skills that the child can use in their adult life. Sometimes, this is simply the skill of interacting and getting along with peers. This is why being integrated into the classroom as much as possible, without impairing the other students from the education owed to them, is crucial in any analysis and implementation of IEPs.

To ensure that the term “reasonable” does not create more ambiguity, “reasonable” should be judged by looking at what the school district can financially afford to provide, as well as using grant funding to cover disparities. Once fiscal limitations were reached, further accommodations would not be available. The legislature should put a clause into the IDEA barring the taking of dollars spent per child without IEPs and reallocating them to children with IEPs. Instead, each state should use a formula to set forth how much money each school would have to make these accommodations (taking into account how many children with IEPs there were in the previous year in each district). Once that amount is reached, the school should apply for a supplemental budget and grants to cover additional costs. Once the school has shown that it has made all efforts and exhausted their resources, no further accommodations could be made for that year. This method makes it easier to hold schools accountable. In order to prevent a school from having to

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<sup>212</sup> *Rowley*, 458 U.S. at 199 (citing *Mills v. Bd. of Educ.*, 384 F. Supp. 866, 876 (D.C. 1972)).

<sup>213</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002).

<sup>214</sup> *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 754–55.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 755.

make further accommodations, it must show all of the steps it has gone through before being relieved of its duty. This also ensures more predictability in IDEA lawsuits for both the parents and the school district. Instead of ambiguous, non-categorical words used to measure academic achievement, the reasonableness standard is based on balancing what has already been done with what resources are still available. This emphasis on resources will also thrust constituents to put pressure on Congress to actually fund schools to a level that allows them to provide an appropriate education to all students. After all, a well-educated society is always a better society.

### B. Role of the Federal Government

As discussed above, courts have noted over the years that Congress has repeatedly left the level of educational benefit required ambiguous.<sup>219</sup> It is the role of Congress to clearly define a statute so that the appropriate executive branch may enforce it.<sup>220</sup> Yet, time and time again, it has failed to do so with the IDEA,<sup>221</sup> putting the courts in a quasi-legislative role and left to guess what Congress intended.<sup>222</sup> The Court in *Rowley* actually cautioned that courts “lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.”<sup>223</sup> During oral argument for *Endrew*, Justice Breyer further reiterated the cautionary advice given by the Court in *Rowley* when he discussed the lack of expertise the justices had regarding education policy.<sup>224</sup> Therefore, because the courts lack the expertise to devise a new legal standard on the education of individuals with disabilities, this problem should be fixed by Congress.

When it comes to the education of our children, problems often arise due to a lack of resources, not ambiguities in interpretation. Even if Congress were to solve the ambiguities in the language it uses in the IDEA, courts would still not be able to provide an actual remedy if the school district lacked the resources needed to make an accommodation. As discussed above, the Federal Government has a major role to play in helping state and local governments implement regulations concerning the education of our nation's children.

Besides fixing the ambiguities discussed above, the Federal Government can help by creating grants that allow state and local governments the flexibility in funding that is needed from year to year. These grants could be used to fill shortfalls in local and state education budgets on a yearly basis. Making the grants renewable on a yearly basis allows the Federal Government to move its resources quickly to accommodate yearly changes in the number of students with disabilities in specific locations. It should be noted that grant funding does exist for special needs education. However, the reauthorization of ESSA did not make changes to the flexibility of how grants for special education were allocated like it did for grants that go to schools which serve low income students; schools near Native American reservations or near military bases; and schools

<sup>219</sup> See *Rowley*, 458 U.S. at 176; See also *Endrew F.*, 798 F.3d at 1339.

<sup>220</sup> See generally U.S. CONST. art. 1, § 1, art. 2, § 2.

<sup>221</sup> Kowal, *supra* note 66, at 825.

<sup>222</sup> See *id.* at 839.

<sup>223</sup> *Rowley*, 458 U.S. at 208.

<sup>224</sup> Transcript, *supra* note 5, at 14 (Bryer, J. stating, “besides having nine people who don't know . . . that much about it, creating a new standard out of legal materials which are at a distance from the people, the children and the parents who need help.”).

that serve higher populations of English learners.<sup>225</sup> In addition, the IDEA has never been fully funded.<sup>226</sup> It is impossible for Congress to expect children with disabilities to receive the educational benefits they are entitled to if Congress does not choose to fully fund that entitlement.

Congress recently reauthorized the Elementary and Secondary Education Act through the Every Student Succeeds Act of 2015.<sup>227</sup> In doing so, it restructured how grant funding was calculated, and it also restructured grant programs for schools.<sup>228</sup> An additional resource of federal money to local schools can be found in Title I, Title III, Title V, Title VI, Title VII, and Title IX funding.<sup>229</sup> This funding is used for schools in areas that serve an overwhelming majority of children below the poverty line; children from reservations; public schools located close to military bases; schools serving homeless populations; and schools that need resources for English learners.<sup>230</sup> The Federal Government provides this additional grant funding to schools because it has recognized these categories as having additional resource needs, such as food over the weekend, snacks after school, after school care programs, and higher demands for counseling and health services.<sup>231</sup>

Using these grant structures as an outline, Congress should create an additional category of federal funding eligibility for schools who serve a particular percentage of children with disabilities. While IDEA sub-b grants already provide funding for States to implement special education services, this program has never been fully funded. Instead, Congress should include funding mechanisms for states to serve students with disabilities in the ESSA, the legislation that encompasses all of their other school grants. Including grants for special education in the nation's overarching legislation that governs how federal money goes to public schools will further promote our societal values of educating all children.

In contrast, is the real problem that courts have refused to listen to the blueprint Congress gave them regarding how much educational benefit was required under the IDEA? The IDEA states that:

[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—  
(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children...<sup>232</sup>

Based on these Congressional findings, it sounds like the IEPs need to be tailored so that they set the highest possible standards for the child and meet developmental goals.

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<sup>225</sup> See Klein, *supra* note 59 (ESSA made changes to testing requirements for children with disabilities, but there is no mention of grant funding); see also Every Student Succeeds Act (ESSA), 114 Pub. L. 95, 129 Stat. 1802 (2015).

<sup>226</sup> Kowal, *supra* note 66, at 837 (arguing that while Congress has increased the number of categories of disabilities under the IDEA, they have not increased its funding).

<sup>227</sup> Every Student Succeeds Act (ESSA), 114 Pub. L. No. 95, 129 Stat. 1802 (2015).

<sup>228</sup> This is the author's own knowledge from working with various stakeholders in Congress prior to the ESSA's enactment.

<sup>229</sup> ESSA, 114 P.L. 95, 129 Stat. 1802.

<sup>230</sup> *Id.*

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

<sup>232</sup> Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(c)(5) (2012), *amended by* Every Student Succeeds Act, 114 Pub. L. 95, 129 Stat. 1802 (2015).



The courts could use this language to say that the level of benefit an IEP must provide the student is one in which the student actually meets developmental goals. This is problematic though, because as we saw with NCLB, schools respond by setting abysmally low standards for children, to ensure that their numbers show progress. If the standard is whether the child has met developmental goals each year, schools would be incentivized to set low goals for children with disabilities. Even though Congressional findings suggest that having high expectations leads to better results, if the school does not have enough available resources to help the child reach maximum goals, requiring them to do so only takes what little funding they have for special education and redirects it to paying for lawsuits when maximum goals are not achieved.

As discussed earlier in this section, however, the problem is less about ambiguous wording than it is about a lack of resources. Until we as a nation decide that the investment in special education from an early age provides society with a greater benefit than choosing to not educate children with disabilities, Congress will never provide the money necessary to avoid IDEA lawsuits. As a society, we can choose to pay for complete dependence on the public coffers once the child becomes an adult, or we can choose to fund education for children with disabilities now—knowing that proven early intervention techniques lead to more independent adults. Ultimately, the way to solve this problem is through Congress fully funding the program it created.

### C. Parental Resources

One thing that Congress cannot legislate is the need for parental involvement in their child's education. As one mother put it, "I am overwhelmed."<sup>233</sup> For parents with a child with disabilities, one of their biggest hurdles to overcome is the paperwork.<sup>234</sup> To even get to the process of creating an IEP with the school district can take months. The process involves both independent and school evaluations, requires countless documents, and must be met with active parent involvement.<sup>235</sup> It also involves an emotional toll that comes with adjusting your lifestyle around accommodations for your child. While most parents would do anything for their kids, this can be a stressful time. Further, as the child grows, there is need for constant adjustment. In addition to the accommodations in a family's lifestyle, there are also financial needs that develop.

To help alleviate some of the stress and possibly mitigate future disagreements down the line, local school districts could offer educational programs to help with the miles of paperwork that a family with a child with disabilities is faced with completing each year. Similar to the "Back to School" and "How to Help Your Child Apply for College" informational nights, these evenings or weekend seminars would provide parents with (1) face-to-face time with their child's educators; (2) provide the ability to create a support group with parents similarly situated; and (3) start the channels of communication with the school district on a positive note. At a minimum, schools could provide a list of online resources for parents, as well as a list of resources, available in the local community, i.e. therapists, aftercare providers specializing in children with disabilities, and pertinent contact information for local and state departments.

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<sup>233</sup> McCafferty, *supra* note 197.

<sup>234</sup> See generally Kristin Stanberry, *The Process of Getting Your Child an IEP*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/ieps/the-process-of-getting-your-child-an-iep> (last visited Mar. 8, 2017).

<sup>235</sup> *Id.*

Additionally, the sessions should be taught by the teachers who work in the special education field. A school could also have experts from the community come in and discuss the resource area they work in. Although there are always concerns regarding the cost of having an expert speak, as well as liability for what is said, most professions have people that deeply care about the work they do and are willing to volunteer on occasion to help provide education in the community. Furthermore, grants could be obtained to fund the cost of having expert speakers, and local support groups are also great at raising money for causes. Per the liability concerns, this can be taken care of with a simple waiver discussing that these informational events are meant to simply expose the parents to all the resources available to them and are not meant as legal or medical advice, etc. By creating a solution that lessens the probability of litigation, the dollars that are spent on costly lawsuits could be put toward resources that ultimately help the child.

## VI. CONCLUSION

The education of our nation's children, including children with disabilities, is the responsibility of every citizen. While most stakeholders blame the courts for not providing clear guidelines to determine an educational benefit, it has historically been the legislature that has acted and changed the status quo regarding education for Americans with disabilities. As discussed previously, the Supreme Court's decision in *Endrew* did not solve the problem for several reasons. First, special education is all about individualized standards for individual needs; therefore, applying one standard to all IDEA cases is contrary to the goals of special education. Second, choosing a non-categorical word as a measurement of a benefit opens the door to even more litigation to try and define the parameters of the chosen word. Lastly, a court ruling that an IEP does not provide the correct level of benefit to a child with disabilities does little in the way of a remedy for the claimant if the school does not have the resources to provide more. The only possible solution the courts could provide is to do away with the substantive prong of *Rowley* and replace it with a balancing test, applying reasonableness. The confusion over how much educational benefit Congress sought to provide under the IDEA was created by Congress when it chose to place additional requirements on states without increasing the funding provided to the states to fulfill these requirements. It is the legislature that has the power of the purse. It is the legislature that can provide more or less money to an initiative. Thus, resources should be put toward lobbying Congress to provide more funding so that appropriate and effective accommodations can be made.