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Endrew F. Ex Rel. Joseph F. v. Douglas County School Dist. Re-1: A Missed Opportunity

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ENDREW F. EX REL. JOSEPH F. V. DOUGLAS COUNTY SCHOOL DIST. RE-1: A MISSED OPPORTUNITY

INTRODUCTION

> Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.[1]

The above quote is the "national policy with respect to equal educational opportunity" Congress enacted in 1974 as part of the General Education Provisions Act.[2] The highly aspirational statement suggests Congress wanted the states to take decisive and comprehensive action in educating the citizens of the United States. The statement further suggests the federal government was willing, if not entirely prepared, to provide the financial backing for such an undertaking.

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1. 20 U.S.C. § 1221-1 (2012).
2. *Id.*

However, this aspiration ended up being nothing more than that for many United States' citizens with disabilities.[3] Rather than seeking to meet the full potential of students with disabilities, individual states have largely provided students with disabilities an education that meets only the minimum legal requirements.[4] Following Congress's enactment of the Education of the Handicapped Act (EHA), the Supreme Court interpreted a key provision of this act, which requires states to provide a free appropriate public education (FAPE) to students with disabilities, to require nothing more than a showing that the student received some "educational benefits" from their public education.[5]

In the decades since that decision, the circuit courts have split as to what standard they should use to evaluate whether a student has received a FAPE, with several circuits applying a higher standard which requires "meaningful educational benefits."[6] Nevertheless, the Tenth Circuit has faithfully applied the educational benefit standard the Supreme Court established and continued to do in its recent decision in *Endrew F. ex rel. Joseph F. v. Douglas County School District Re-1*.[7] When the Tenth Circuit panel decided to adhere to precedent, it missed the opportunity to call for a new legal standard with which courts could evaluate the quality of the education students with disabilities receive.

Fortunately, on September 29, 2016, the Supreme Court accepted certiorari, giving it the opportunity to establish a new legal standard. This Comment will explain how the legal standard applied by the Tenth Circuit gives rise to serious problems, necessitating the development of a new standard. Further, as this comment discusses, recent federal legislation concerning both special and general education policy demonstrates that the "some educational benefit" standard is no longer sufficient. Finally, this Comment will put forward a proposed new legal standard that more closely reflects Congress's inspirational goal of educating all U.S. citizens to reach their full potential.

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3. This comment will use the terminology "person with disability" rather than "disabled person" as this is the language preferred by persons with disabilities. *Disability Etiquette: Tips on Interacting with People with Disabilities*, UNITED SPINAL ASS'N., (last visited May 29, 2016). Similarly, this term will replace the word "handicapped" in any quote.

4. *See* Robert Caperton Hannon, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 733 (1997).

5. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 206–07 (1982).

6. Scott Goldschmidt, *A New Idea for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities*, 60 CATHOLIC U. L. REV. 749, 751 (2011).

7. Endrew F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1341 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016).

I. BACKGROUND

A. Statutory Foundation

In 1966, Congress passed the Education for All Handicapped Children Act, appropriating funds dedicated to the provision of special education services for the first time.[8] Nearly a decade later, Congress found that out of the 8 million children with disabilities in the United States, more than half were not receiving an appropriate education that would provide them with "full equality of opportunity." Moreover, Congress found the public school system had completely excluded 1 million of these children.[9] Furthermore, many students in the public school system were failing academically because educators had not yet identified their disabilities.[10] However, Congress found the states were otherwise able to provide effective education to students with disabilities, and had a responsibility to do so, but did not have the funds to accomplish the task.[11] Therefore, federally funded assistance to the states in meeting the needs of students with disabilities was of national interest, resulting in the EHA.[12]

The stated purpose of the EHA was "to assure that all . . . children [with disabilities] have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs . . . ."[13] Under the EHA, states receiving federal assistance must provide a student with a disability with a FAPE regardless of the severity of the student's disability.[14] Additionally, Congress required states to develop training to teach educators how to identify possible disabilities in students and to lay out what steps educators should take if they suspect a student has a disability.[15] However, the FAPE requirement was the key provision of the EHA. Federal law defines a FAPE as "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, [and] (C) include an appropriate preschool, elementary, or secondary school education in the State involved . . . ."[16]

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8. Education for All Handicapped Children Act, Pub. L. No. 89-750, sec. F, § 601, 604, 608–09, 80 Stat. 1191, 1204–08 (1966) (codified at 20 U.S.C. §§ 241(a)–(l), 881–85).

9. Education of the Handicapped Act, Pub. L. No. 94-142, sec. 3(a), § 601, 89 Stat. 773, 774 (1975) (codified at 20 U.S.C. § 1401(b)).

10. *Id*.

11. *Id*. at 775.

12. *Id*.

13. *Id*. (codified at 20 U.S.C. 1401(c)).

14. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 172–173 (3d Cir. 1988).

15. Andrea Valentino, *The Individuals with Disabilities Education Improvement Act: Changing What Constitutes an "Appropriate" Education*, 20 J.L. & Health 139, 144 (2007).

16. Education of the Handicapped Act, Pub. L. No. 94-142, sec. 4(a), § 602, 89 Stat. 773, 775 (1975) (codified at 20 U.S.C. § 1402(18)).

Under the EHA, special education consists of "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a . . . child [with a disability], including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."[17] Instruction is "specially designed" by "adapting the content, methodology or delivery of instruction to meet a student's needs."[18] Related services include "developmental, corrective, and other supportive services . . . as may be required to assist a . . . child [with a disability] to benefit from special education . . . ."[19]

As the EHA defined these terms, schools were required to provide students with disabilities access to the same curriculum as their nondisabled peers.[20] Congress specified the means by which states would provide this access. Once a school has identified a student with a disability, the school would be required to develop an individualized education program (IEP) to meet the unique needs of that student.[21] The IEP is a written statement that includes "present levels of educational performance," annual goals, "the specific educational services to be provided . . . [,] the extent to which [the] child will be able to participate in regular educational programs," and criteria and procedures for evaluating "whether instructional objectives are being achieved."[22] Although the EHA was the most comprehensive special education legislation of its time, it lacked details, leaving the Supreme Court with less information to interpret how to evaluate whether the school has provided the student with a FAPE.[23]

B. Rowley Standard

The landmark case on the issue of how to determine whether a child has received a FAPE is *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*.[24] In *Rowley*, the Supreme Court considered the situation of Amy, a deaf child whose teachers considered able to perform better than average academically, despite the fact that her disability prevented her from understanding everything happening in the classroom. [25] The Court overturned the decision of the lower court, which defined a FAPE as "an opportunity [for students with disa-

17. *Id.* (codified at 20 U.S.C. § 1402(16)).

18. Mitchell L. Yell et al., *Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools*, 41 FORDHAM URB. L.J. 669, 689 (2013).

19. Education of the Handicapped Act § 602 (codified at 20 U.S.C. § 1402(17)).

20. Amy J. Goetz et al., *The Devolution of the* Rowley *Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLINE L.R. 503, 508 (2011).

21. Education of the Handicapped Act § 602 (codified at 20 U.S.C. § 1402(18)).

22. *Id.* (codified at 20 U.S.C. § 1402(19)).

23. *See* Hannon, *supra* note 4, at 726.

24. *See* Goetz et al., *supra* note 20, at 505.

25. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 185 (1982).

bilities] to achieve [their] full potential commensurate with the opportunity provided to other children."[26] The Court held that in enacting the EHA, Congress did not intend to guarantee students with disabilities either any particular level of education or opportunity equal to that of nondisabled students.[27] Instead, the Court concluded, Congress sought to provide a "basic floor of opportunity" to students with disabilities.[28] The Court provided lower courts with a two-part test to determine whether a student has been provided with a FAPE: 1) did the state comply with EHA procedural requirements and 2) was the resulting IEP "reasonably calculated to enable the child to receive educational benefits?"[29] The result of this test was a standard that equated some educational benefit to an appropriate education.[30]

In concluding Congress sought only to establish a floor of educational opportunity for students with disabilities, the Court strictly interpreted the definition of FAPE in the EHA.[31] In defining a FAPE, Congress used the words "to benefit," rather than including language modifying the word "benefit." Therefore, the Court reasoned Congress must have meant that any educational benefit would be sufficient to satisfy the requirements of the EHA.[32]

The Court additionally relied on other language in the statute, which required states to prioritize extending educational services to children with disabilities who were not receiving any education over those whose education was merely inadequate.[33] This priority, combined with the FAPE definition, showed the Court that Congress's intent was only to provide students with disabilities access to public education, nothing more.[34] Thus, the Court rejected the idea that Congress went so far as to require schools to maximize the potential of students with disabilities.[35]

To date, the Court has chosen not to revisit the some educational benefit standard it established in *Rowley*. It has made this choice in spite of the fact that the circuits have split as to how courts should evaluate the sufficiency of an IEP.[36]

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26. *Id*. at 186.
27. *Id*. at 192, 198, 200.
28. *Id*. at 201.
29. *Id*. at 206–07.
30. *See* Goldschmidt, *supra* note 6, at 751.
31. *See Rowley*, 458 U.S. at 188–89.
32. *Id*. at 189.
33. *Id*.
34. *Id*.
35. *Id*. at 199.
36. *See* Goldschmidt, *supra* note 6, at 762; Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 ED. L. REP. 1, 6 (2009).

C. Circuit Split

Confusing language in *Rowley* has led to a split among the circuits as to what standard courts should apply to evaluate IEPs.[37] In asserting that Congress's goal was primarily to give students with disabilities access to public education, the Court made this statement: "But in seeking to [make public education available to children with disabilities], Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful."[38]

The Third Circuit used this precise language to justify adoption of an arguably higher standard than the one established in *Rowley*.[39] A number of other circuits have adopted this standard, commonly known as the "meaningful benefit" standard. However, the Supreme Court's language in *Rowley* is so confusing and imprecise that the circuit courts have struggled to articulate precisely which standard they are applying. As a result, scholars commenting on the split differ as to the number of circuits that adhere to one standard or the other.[40]

Despite the disagreement as to which standard a given circuit applies, scholars generally agree the Third Circuit has consistently applied a higher standard than the one announced in *Rowley*.[41] The Third Circuit initially developed the meaningful benefit standard in *Polk v. Central Susquehanna Intermediate Unit 16*,[42] where it required schools to consider a student's potential when developing an IEP.[43] Although the Third Circuit requires consideration of potential, it is important to note it does not require schools to maximize potential.[44] Further, although commentators often consider this a single standard, the Third Circuit has explicitly rejected the idea that what constitutes an appropriate education for students with such diverse needs "could be reduced to a single standard."[45] However, the Third Circuit did set something of a universal standard by

37. Goldschmidt, *supra* note 6, at 751; Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Denied a Free Appropriate Public Education After* Rowley*?*, 39 SUFFOLK U.L. REV. 1, 6 (2005).

38. *Rowley*, 458 U.S. at 192.

39. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 179–80 (3d Cir. 1988).

40. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1339 n.8 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016); *compare* Goldschmidt, *supra* note 6, at 758–59 (asserting that six circuit courts have adopted the heightened standard, while five use the *Rowley* standard, with the last circuit applying a mixed standard), *and* Aron, *supra* note 37, at 7 (tallying up a total of six federal appeals courts that apply the "meaningful benefit" standard), *with* Wenkart, *supra* note 36, at 1 (stating that seven circuit courts have applied the "some educational benefit" standard), *and* Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & EDUC. 25, 27 (2012) (stating that the majority of the circuit courts apply the "some educational benefit" standard).

41. *E.g.*, Wenkart, *supra* note 36, at 2; Goldschmidt, *supra* note 6, at 760; Aron, *supra* note 37, at 7; Goetz et al., *supra* note 20, at 513.

42. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 184 (3d Cir. 1988).

43. Goetz et al., *supra* note 20, at 513.

44. Wenkart, *supra* note 36, at 3 (". . . all courts have held that a school district is not required to maximize each child's potential commensurate with the opportunity provided other children.").

45. Goetz et al., *supra* note 20, at 514.

establishing in *Polk* that, for a student's specialized education to constitute a FAPE, there must be evidence of more than a mere trivial or *de minimus* benefit to the student.[46]

D. Individuals with Disabilities Education Act

In the late 1990s, Congress recognized it had set low expectations for students with disabilities in enacting the EHA. [47] Thus, it significantly amended the EHA, and renamed the law the Individuals with Disabilities Education Act (IDEA).[48] These amendments added detailed procedures for schools to follow during IEP development, providing some guidance as to what courts could consider an "appropriate" education.[49]

A second round of significant amendments came in 2004.[50] These amendments specified three major components required for all IEPs.[51] First, the IEP must include a statement of current academic achievement and functional performance levels.[52] This statement is the "starting point from which [IEP] teams develop the IEP and measure its success."[53] The statement must specifically include how the student's disability affects access to the general education curriculum, which allows the IEP team to develop appropriate goals, interventions, and objectives to allow the student with a disability to be educated with his or her peers as much as possible.[54]

Second, schools must include in the IEP annual goals capable of measurement as well as how the school will measure progress towards those goals.[55] Schools base these goals on the statement of current academic achievement and functional performance levels with the objective of mediating the academic or functional deficits the student's disability causes.[56] This mediation should allow the student to participate and grow under the general education curriculum.[57] The measurable character of the standards is important because without measurable standards, IEP team would not be able to determine if the current accommodations and interventions were effective for the student's educational goals or if they needed modification.[58]

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46. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 181–82 (3d Cir. 1988).
47. Andrea Kayne Kaufman & Evan Blewett, *When Good Enough Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the* Rowley *Definition of a Free Appropriate Public Education*, 41 J.L. & EDUC. 5, 14 (2012).
48. 20 U.S.C. § 1400(a) (2012).
49. Valentino, *supra* note 15, at 144.
50. *Id*. at 155.
51. Yell et al., *supra* note 18, at 686.
52. *Id*.
53. *Id*.
54. *Id*. at 687.
55. *Id*. at 686.
56. *Id*.
57. *Id*. at 687.
58. *Id*. at 687–88.

Lastly, all IEPs must include a statement of the special education, related, or supplementary services the student will receive.[59] When developing this statement, schools must consider the actual needs of the child rather than whether those services are currently available.[60] Further, the amount of time spent in the general education setting versus time spent outside of that setting must be included, as well as an explanation of where the student will be when not included in the general education classroom.[61] This delineation of time forces the IEP team to consider whether more or less time with nondisabled peers is appropriate based on that student's needs.[62]

For students whose disabilities create behavior issues that inhibit that student's or other students' ability to learn, the IEP must additionally include a behavioral intervention plan (BIP).[63] The term intervention is key, as the plan is required to create and implement positive strategies for managing or correcting the problematic behaviors rather than punishing the student.[64] In *Endrew*, one of the petitioner's main arguments was the school's failure to address Endrew's behavior issues to such an extent it had failed to provide him with a FAPE.

II. ENDREW F. EX REL. JOSEPH F. V. DOUGLAS COUNTY SCHOOL DIST. RE-1

A. Facts

At the age of two, Endrew F. (Drew) was diagnosed with autism spectrum disorder (ASD).[65] As a further complication, doctors diagnosed Drew with attention deficit hyperactivity disorder a year later.[66] ASD is a developmental disability affecting several major areas of an autistic person's life, including social interaction, cognitive functioning, verbal and nonverbal communication abilities, and general educational performance.[67]

Unlike other developmental disorders, ASD is a spectrum, wherein those diagnosed with it can exhibit a range of numerous symptoms common to the disorder but no one symptom need always be present.[68]

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59. *Id*. at 686.
60. *Id*. at 690.
61. *Id*. at 691.
62. *Id*.
63. *Id*. at 692.
64. *Id*.
65. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1333 (10th Cir. 2015) ("*Endrew")*, *cert. granted*, 137 S.Ct. 29 (2016).
66. *Id*.
67. Endrew F. v. Douglas Cty. Sch. Dist. RE 1, No. 12-CV-2620-LTB, 2014 WL 4548439, at *1, *1 (D. Colo. Sep. 15, 2014) ("*Endrew F.*"); *Endrew* at 1333.
68. Elizabeth Hervey Osborn, Comment, *What Happened to "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. COLO. L. REV. 333, 339–40 (2008).

Drew specifically has difficulty communicating his personal needs and emotions, and he is unable to engage in normal social interactions with others.[69] Although all of Drew's symptoms make daily life a struggle for him, several symptoms interfere with his ability to learn and participate in a traditional school setting.[70] Specifically, Drew exhibits maladaptive behaviors including fleeing the classroom and school building, dropping his body to the ground, climbing on things, vocalizing very loudly with perseverative language, and picking or scraping at his skin.[71] Additionally, Drew fears dogs, flies, and using a new or public restroom so severely it significantly inhibits his ability to function at school.[72]

Drew's parents, Joseph and Jennifer, initially placed Drew into the Douglas County School District (Douglas County), which he attended until May of 2010, his fourth grade year of school.[73] Although Douglas County developed an IEP designed to meet Drew's particular educational needs, Drew's parents felt he was not meaningfully progressing in his education or development of functional skills.[74] Drew's parents further felt Douglas County had failed to address adequately Drew's increasingly serious disruptive behaviors.[75] These behaviors, in addition to those stated above, included urinating and defecating on the floor of the school's "calming room"; hitting or kicking computers, TV screens, and walls; kicking others; and banging his head against walls.[76] Although previous IEPs contained a BIP, the plans only addressed one or two of Drew's disruptive behaviors and were never based on functional behavioral assessments (FBAs).[77] Consequently, Joseph and Jennifer removed Drew from his public elementary school, rejected the IEP Douglas County developed, and enrolled him at Firefly Autism House, which specializes in educating autistic children.[78]

After enrolling Drew at Firefly, his parents sought reimbursement from Douglas County, arguing that because the public school had failed to provide Drew with a FAPE it was required under the IDEA to provide reimbursement for the private school tuition as well as reasonable transportation costs.[79] After Douglas County refused, Drew's parents went to

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69. *Endrew F.*, 2014 WL 4548439, at *1.
70. *See id*.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*.; Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1341 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016).
75. *Endrew F.*, 2014 WL 4548439, at *2.
76. *Endrew F.*, 2014 WL 4548439, at *2.
77. *Id*.
78. *Id*. at *1; *Endrew*, 798 F.3d at 1333.
79. *Endrew*, 798 F.3d at 1333.

the Colorado Department of Education and filed a due process complaint.[80]

B. Procedural Facts

Over the course of three days in June 2012, an administrative law judge (ALJ) with the Colorado Office of Administrative Courts conducted the due process hearing.[81] The ALJ concluded that, although the IEP had minimal progress monitoring and lacked support for conclusory statements about Drew's progress, those deficiencies did not amount to denial of a FAPE.[82] The ALJ also rejected the parents' contention that Douglas County's failure to conduct FBAs or implement a BIP designed to address Drew's increasingly disruptive behaviors resulted in denial of a FAPE.[83] Thus, the ALJ found for Douglas County and denied the reimbursement claim. [84]

The parents filed for review of the ALJ decision in the U.S. District Court of Colorado, which, in affirming the ALJ decision, reasoned that Drew's IEPs did reveal minimal progress in his education and functional skills.[85] Specifically, the district court noted that even though Douglas County carried over the objectives listed on Drew's IEP each year because they had not been met, it was "clear that the expectation in the objectives are increased over time."[86] Regarding the behavioral issues, the district court reasoned the school had addressed the problems and a new BIP was in progress when Drew's parents withdrew him from Douglas County.[87] Thus, Douglas County had met the minimum requirements of the IDEA.[88] After the district court's affirmation of the ALJ decision, Drew's parents appealed to the Tenth Circuit Court of Appeals, which accepted the case for panel review.[89]

C. Panel Opinion

Judges Hartz, Tymkovich, and Phillips heard the case, with Judge Tymkovich authoring the unanimous opinion.[90] The appellate panel of the court affirmed the district court decision, finding Douglas County did not violate the IDEA and was therefore not required to reimburse Drew's parents for the cost of the private school tuition.[91]

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80. *Endrew F.*, 2014 WL 4548439, at *3.
81. *Id*.
82. *Id*.
83. *Id*.
84. *Id*.
85. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1333 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016); *Endrew F.*, 2014 WL 4548439, at *9.
86. *Endrew F.*, 2014 WL 4548439, at *9.
87. *Id*. at *12.
88. *See id*.
89. *Endrew*, 798 F.3d at 1332.
90. *Id*.
91. *Id*.

To begin, the court outlined its analysis and noted it could order Douglas County to reimburse Drew's parents only if it found both that Douglas County had denied Drew a FAPE and that the IDEA authorized Drew's placement at Firefly.[92] To determine whether Douglas County provided Drew with a FAPE, the court explained it must analyze two issues, whether IDEA's procedural requirements had been complied with and whether the IEP resulting from those procedures was "'substantively adequate' such that it [was] 'reasonably calculated to enable the child to receive educational benefits.'"[93]

The court considered both the parents' procedural and substantive challenges.[94] Drew's parents specifically argued that the IEPs Douglas County developed were procedurally deficient in two ways.[95] The first procedural challenge contended that Douglas County had deprived the parents of the opportunity to participate in Drew's education by failing to provide adequate progress monitoring to them.[96] In their second procedural challenge, Drew's parents offered two alternative positions.[97] First, they asserted that Douglas County's failure to conduct FBAs of Drew, despite the severity of his behavioral issues, resulted in the denial of a FAPE.[98] Alternatively, regardless of the failure to conduct FBAs, Drew's parents argued that Drew did not receive a FAPE because the school never implemented an appropriate BIP that would adequately address his serious behavior issues.[99]

As to the first procedural challenge, the court found that the gaps in progress monitoring on Drew's IEPs did not prevent the parents from participating in his education. In so finding, the court reasoned the evidence regarding frequent informal monitoring and communication between Drew's special education teacher and his parents showed adequate parental participation in Drew's education.[100] Furthermore, the court noted the parents reviewed Drew's IEPs each year prior to implementation, and made suggestions as to what they felt would be appropriate for their son.[101] In rejecting the parents' argument that Drew's case was factually similar to a case out of an Alabama federal district court, the court stated the critical difference was that in that case, the administrative hearing officer had found that the reporting deficiencies clearly caused adverse impacts to the child's education.[102] Because the ALJ in Drew's case con-

92. *Id*. at 1334.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*.
97. *Id*. at 1336.
98. *Id*.
99. *Id*.
100. *Id*. at 1335.
101. *Id*.
102. *Id*. at 1336.

cluded there were no such adverse impacts on Drew's education, the limited formal progress monitoring did not deny his parents an opportunity to participate in his education.[103]

The court next addressed the procedural challenge based on Drew's continuing and increasingly serious maladaptive behaviors.[104] Here the court relied directly on statutory interpretation, reasoning that this challenge could not truly be applied to Drew's situation, as the statute only requires implementation of a BIP if the student's school placement has changed as a result of a disciplinary decision; Drew had experienced no such change.[105] Absent any disciplinary change, the school must only consider behavioral intervention, which Douglas County clearly did during Drew's fourth grade year.[106] In particular, the court mentioned the steps Drew's special education teacher took, including logging anecdotal data of behavior incidents to determine Drew's triggers and requesting that a behavior specialist meet with the IEP team to develop a new behavior plan.[107] Thus, the court found for Douglas County on both procedural challenges.[108]

As with the procedural challenges, Drew's parents made two substantive arguments, the second of which has two subparts.[109] The first argument, which the court spent the most time addressing, asserted that Tenth Circuit precedent called for application of the meaningful benefit standard when evaluating whether Drew's IEP was sufficient to meet IDEA requirements.[110] As to the second substantive argument, Drew's parents contended the IEPs were inadequate on the one hand because they were not reasonably calculated to provide Drew with educational benefit since Drew continually failed to meet his stated goals.[111] On the other hand, the parents argued the school neglected to consider the significance of the impact Drew's behaviors had on his education when developing the IEP the school believed was reasonably calculated to provide an educational benefit.[112]

As to the substantive challenges, the court first discussed the proper standard for courts to use when determining whether an IEP met the requirements of the IDEA and then addressed whether Drew's IEP actually met that standard.[113] As to what standard the IDEA does require, the court discussed the history of the case law interpreting the IDEA and its

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103. *Id*. at 1335.
104. *Id*. at 1336.
105. *Id*. at 1337.
106. *Id*.
107. *Id*.
108. *Id*. at 1338.
109. *Id*. at 1338, 1341–42.
110. *Id*. at 1338.
111. *Id*. at 1341.
112. *Id*. at 1342.
113. *Id*. at 1338, 1341.

predecessor. the EHA,[114] much of which has been discussed above. The court first addressed the circuit split wherein some circuits apply the meaningful benefit standard.[115] However, the court offered no substantive reasons for declining to apply the heightened standard, other than stating in a footnote that "how much *more* benefit a student must receive for it to be meaningful" is unclear.[116] Instead, the court relied on the idea that, being only a panel of the Tenth Circuit rather than the court sitting en banc, Tenth Circuit precedent bound the panel to adhere to the some educational benefit standard.[117] Thus, the panel faithfully applied the *Rowley* standard, allowing it to find no substantive violations of the IDEA and to conclude that Douglas County had provided Drew with a FAPE.[118]

In considering whether Drew's IEP was sufficient, the court determined whether the evidence supported the ALJ's finding that the IEP was reasonably calculated to provide Drew with some educational benefit.[119] Specifically, the court looked at Drew's past progress and found that, despite the ALJ's finding that the IEPs had little to no progress monitoring or measurement data, the record supported the ALJ's conclusion that Drew had made some academic progress.[120] The court stated that, despite the parents' contention that Drew's fifth grade IEP was functionally the same as his previous IEPs, the "objectives and measuring criteria listed under the annual goals . . . typically increased with difficulty from year to year."[121] Additionally, the court noted that both Drew's mother and special education teacher testified that Drew made at least some progress while enrolled in Douglas County.[122]

As to whether Douglas County's handling of Drew's behavioral problems caused Drew's IEP to be substantively inadequate, the court found the county's efforts, discussed above, in consulting with a behavioral specialist sufficient to show that Douglas County had adequately addressed Drew's behavioral problems.[123] Furthermore, the court found it important that, despite the severity of the behavioral problems, Drew was still able to make some progress in his education.[124] Thus, the court found sufficient evidence to support the ALJ's presumptively correct decision, commenting that the IDEA does not require schools to maxim-

114. *Id*. at 1338–40.
115. *Id*. at 1339.
116. *Id*. at 1339 n.8.
117. *Id*. at 1340.
118. *Id*. at 1343.
119. *Id*. at 1341–42.
120. *Id*.
121. *Id*. at 1341.
122. *Id*. at 1341–42.
123. *Id*. at 1342.
124. *Id*. at 1342–43.

ize student achievement or to ensure students reach any particular level of knowledge at all beyond some progress.[125]

III. ANALYSIS

The circuit courts have split as to how they should evaluate whether an IEP is sufficient to provide a student with a disability with a FAPE. This has resulted in dramatically different educational services for students with disabilities depending upon which circuit they live in.[126] If Drew lived in a state within the Third Circuit, it is likely the Douglas County IEP would have been found to violate the IDEA. This discrepancy in outcomes makes it clear; the Court must reconsider the standard established in *Rowley*. However, this Comment will argue that, although the some educational benefit standard is certainly inadequate, the meaningful education benefit standard the Third Circuit developed is similarly insufficient to meet the needs of students with disabilities and honor Congressional intent. Thus, the courts must develop a new standard, one based upon concrete measurements.

A. The Source of the Problem

The discrepancy in required educational standards comes from the less than clear language in *Rowley* discussed above. However, even if every circuit applied the some educational benefit standard, a significant problem would still exist. Specifically, the *Rowley* standard sets the bar too low, essentially raising the requirement schools must meet only slightly above a trivial educational benefit.[127] In almost every other legal context, the legal system requires courts to consider what is best for a child, or at the very least, what situation is better for that child.[128] However, when a child's special education needs are at issue, *Rowley* creates a potentially adversarial situation where parents want the best for their child but the school does not have to reach that high. In other words, schools can provide minimal services to students as long as the child receives something more than a trivial educational benefit.[129] There is a further adversarial element to this situation. Special education providers do not have total control over what services they provide to the student, and school administrators often find it hard to justify the costs of additional services when they are not legally required.[130] Thus, special education providers may be caught in the middle, with the desire to advocate

125. *Id*.
126. Johnson, *supra* note 40, at 27.
127. *See* Goetz et al., *supra* note 20, at 511–512 (arguing that despite courts' assertions that the benefit provided must be more than *de minimus*, circuit courts have repeatedly found that school districts have provided a FAPE, no matter the trivial nature of the benefit received).
128. Johnson, *supra* note 40, at 25–26.
129. *Id*. at 26.
130. *Id*.

for the student along with the parents but lacking the authorization from the school district to do so.[131]

In addition to creating tension between parents, special education providers, and school administrators, the *Rowley* standard results in courts taking a minimalistic approach to these cases. This approach focuses on whether the student has passing grades or advances to the next grade level each year.[132] Although these goals are undoubtedly important in the general education context, they can be less indicative of true academic or functional progress for some students with disabilities.[133] For example, many elementary schools no longer assess students with traditional grades.[134] Additionally, even when traditional grades are used, accommodations provided to the student result in grades higher than those commensurate with the student's skill level.[135] The consequence is a skewed picture of the educational benefit, which appears to be significant but in fact may only be trivial.

One commenter has suggested a solution to this problem in concert with raising the substantive standard.[136] Courts would consider grades as to the question of progress measurement on a sliding scale that gives more or less weight to the grades only if the student spends most of his or her school time in the general education classroom.[137] The weight of the grades would be based on whether the graded courses use the same curriculum as nondisabled students, whether that student's assignments are the same as nondisabled students, and whether the student with a disability completed the work with accommodations that do not require the student to complete the same academic tasks as nondisabled students.[138] The commenter argues this solution is in line with the meaningful benefit standard, which requires courts to look beyond grades and annual advancement to determine if a school has provided the student with a FAPE.[139]

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131. *See* Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 864–65 (6th Cir. 2005).

132. Johnson, *supra* note 40, at 28.

133. Dixie Snow Huefner, *Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?*, 14 HARV. J.L. & PUB. POL'Y 483, 496–97 (1991).

134. Emanuella Grinberg, *Ditching Letter Grades for a 'Window' Into the Classroom*, CABLE NEWS NETWORK (Apr. 7, 2014, 2:48 PM), http://www.cnn.com/2014/04/07/living/report-card-changes-standards-based-grading-schools/.

135. *See* J.L. v. Mercer Island Sch. Dist., No. C06-494P, 2006 WL 6328033, at *1, *6 (W.D. Wash. Dec. 8, 2006); Johnson, *supra* note 40, at 39 ("Under the 'some benefit' approach, the focus was on accommodating the student and escorting her through the educational system with grades that were achieved with modified special education courses, the help of others doing tasks for the student, and moderate expectations. Under the 'meaningful benefit' approach, these same results would not be acceptable, and courts would enforce a higher standard.")

136. Johnson, *supra* note 40, at 42–43.

137. *Id*. at 42.

138. *Id*.

139. *Id*. at 41.

Nevertheless, only addressing one aspect of the problem the *Rowley* standard has created does not go far enough. This is particularly true when, as the United States District Court of Colorado stated, " . . . an IEP may have been reasonably calculated to achieve some benefit, yet fail to do so in the end."[140] This statement is no less true when the standard is elevated to meaningful. Furthermore, in asserting this as a defense of the some educational benefit standard, the court did not address whether a student would be provided with a FAPE when a court found the IEP to be reasonably calculated to provide educational benefits yet failed to accomplish that for several years. The result of this situation could be a student reaching secondary education levels without having achieved many of the skills required to be successful in that setting.

B. Congressional Intent Has Expanded Beyond Simply Providing Access

In setting the standard for courts to evaluate IEPs, the *Rowley* court relied heavily on the EHA's provisions and legislative history to glean from them that Congress only intended to provide students with disabilities access to public education and not any substantive level of educational benefit.[141] In the time since *Rowley*, Congress has substantially amended the EHA, suggesting its intent has shifted to something more than simply providing students with disabilities access to public education.[142]

To address the problem of insufficient education for students with disabilities, the first step was providing access. Thus, the EHA focused on that first step, driving the Court's interpretation in *Rowley*.[143] However, Congress was motivated to amend the EHA because it recognized and explicitly stated in the IDEA that the expectations it had set in the EHA were low, impeding the original idea behind the law.[144] This suggests Congressional intent has shifted such that the goal is to assess the "actual academic performance" of students with disabilities by demanding substantive guidelines for IEP evaluation.[145] Further, a clear overarching purpose of the IDEA is to provide students with disabilities with an education that would make college a reachable goal for as many students with disabilities as possible.[146] If the reasoning behind the *Rowley* standard was the intent of the EHA was only to provide access and if the

140. Tyler V., *ex rel.* Desiree V. v. St. Vrain Valley Sch. Dist. No. RE-1J, No. 07-CV-01094-PAB-KLM, 2011 WL 1045434, at *3 (D. Colo. Mar. 21, 2011).

141. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 200–01 (1982).

142. Kaufman & Blewett, *supra* note 47, at 5.

143. *Id*. at 6.

144. *See* Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 864 (6th Cir. 2004); *see* Kaufman, *supra* note 47, at 14; *see* Valentino, *supra* note 15, at 145.

145. Kaufman & Blewett, *supra* note 47, at 5; Valentino, *supra* note 15, at 141–42.

146. Goldschmidt, *supra* note 6, at 772–73.

IDEA amendments show this intent has substantially changed, courts need to alter the standard they apply to these cases.[147]

Several provisions of the IDEA support the argument that it is time for a new standard based on concrete, measurable criteria. Congress even amended the stated purpose of the IDEA to focus on "educational *results* for children with disabilities."[148] Specifically, all services provided to a student with a disability must be supported by peer-reviewed research, which is necessarily results-based.[149] Instead of schools determining unilaterally what services they find acceptable, they must be able to show that other people, using the school's desired method, have achieved substantive positive results.[150] This requirement goes beyond simply providing students with disabilities a basic opportunity for education.[151]

An additional provision that supports implementation of a new standard includes the new requirement to administer the standardized tests that nondisabled students take to students with disabilities.[152] This focus on results is not only on student performance while in the public education system, but after graduation as well. One amendment created a new requirement for high schools, which must add post-secondary transition goals to IEPs once the student reaches the age of sixteen.[153]

The fact that schools are required to consider post-secondary goals and functional life skills indicates Congress has shifted its intention away from simple access to education and toward some level of self-sufficiency and independent living.[154] To be in line with that intent, schools must provide more than just some educational benefit, and courts must change the standard they use to evaluate whether a school has provided a student with a FAPE.[155] As the Sixth Circuit stated in *Deal v. Hamilton County Board of Education*, "states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress [in the IDEA]."[156]

Finally, the enactment of No Child Left Behind (NCLB) suggests courts should revisit *Rowley*.[157] The stated purpose of NCLB is "to ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education . . . ."[158] This groundbreaking act implemented massive reforms for federal education funding that focused on

147. *Id.* at 773.
148. *Id*. (emphasis added).
149. *See* Valentino, *supra* note 15, at 158.
150. *See id*.
151. *See id*. at 158–59.
152. Kaufman & Blewett, *supra* note 47, at 6, 21; Valentino, *supra* note 15, at 155–157.
153. Goldschmidt, *supra* note 6, at 773.
154. *See* Valentino, *supra* note 15, at 157.
155. *See id*. at 158.
156. Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 864 (6th Cir. 2004).
157. Johnson, *supra* note 40, at 29; Kaufman & Blewett, *supra* note 47, at 17.
158. 20 U.S.C. § 6301 (2012) (emphasis added).

demanding standards-based assessments.[159] Under NCLB, states must develop grade level standards, which schools use to administer the assessments and develop curricula.[160] These standards tell administrators and teachers "what students should know and be able to do at various points and grade levels."[161] While *Rowley* "eschews student outcomes" and considers only what an IEP is reasonably calculated to provide, NCLB focuses primarily on student results.[162]

Under NCLB, standards-based assessment scores of most students with disabilities must be included with the data in mandated progress reports.[163] This makes the goals behind NCLB informative as to how courts should approach developing a new standard for evaluating whether a school has provided a student with a FAPE. In fact, Congress enacted the most recent IDEA amendments with the goal of aligning special education law with the requirements of NCLB.[164] This is further evidence that Congressional goals regarding special education have changed significantly since *Rowley* was decided, necessitating a new legal standard.

In December 2015, Congress made significant changes to NCLB, renaming it the Every Student Succeeds Act (ESSA).[165] Despite these changes, which include reducing federal control over state standards, most students with disabilities are still required to take the standards-based assessments as often as nondisabled children are.[166] Thus, while the ESSA may change what is required of the general education curriculum, it does not change the fact that Congress amended the IDEA specifically to bring special education law into line with that of general education law.

C. Alternative Standards

Although it is clear that a new legal standard is necessary, what that standard should be is less clear. Several circuit courts, following the lead of the Third Circuit, have concluded that the meaningful benefit standard adequately ensures schools will provide students with disabilities a FAPE.[167] However, "meaningful" is a term without definite boundaries. Two different courts could look at the same IEP, examine the services

159. Kaufman & Blewett, *supra* note 47, at 7.
160. *See id*. at 16.
161. Johnson, *supra* note 40, at 41.
162. Kaufman & Blewett, *supra* note 47, at 8.
163. *Id*. at 5–6.
164. *Id*. at 18.
165. *The Every Student Succeeds Act: Explained*, EDUCATION WEEK (updated Jan. 4, 2016), http://www.edweek.org/ew/articles/2015/12/07/the-every-student-succeeds-act-explained.html.
166. Michelle Diament, *Education Law Tightens Testing Cap for Students With Disabilities*, DISABILITY SCOOP (Dec. 10, 2015), https://www.disabilityscoop.com/2015/12/10/education-tightens-testing-cap/21667/.
167. Goldschmidt, *supra* note 6, at 758–59; Aron, *supra* note 37, at 7; Wenkart, *supra* note 36, at 1; Johnson, *supra* note 40, at 27.

provided to the student, and differ as to whether the school has provided the student with meaningful benefits. Even the Tenth Circuit has indicated it finds it difficult to distinguish what more the meaningful benefit standard requires of schools beyond the *Rowley* standard.[168] The struggle to find precisely where educational benefits reach the point of being meaningful suggests the meaningful benefit standard will eventually prove to be unworkable. Little exists in the way of jurisprudence that would definitively affirm there is a substantive difference between the *Rowley* standard and the meaningful benefits standard.[169]

The new legal standard could find a basis in NCLB. Using the standards-based assessments to evaluate whether a school has provided a student with a FAPE would have a number of benefits. First, national education policy would focus on student outcomes and satisfy Congressional intent[170] Second, the results of the standards-based tests would provide courts with a concrete tool for evaluating whether a school has provided a student with a FAPE.[171] Third, the struggle between parents and special education providers would be reduced if not eliminated because both groups would be seeking the same goal: getting the student to perform well on the tests.

Nevertheless, parents and special educators alike are hesitant to use standards-based testing as a tool for measuring whether the student is making educational progress because of the perception that test results do not equate to substantive learning, particularly for students with disabilities.[172] More importantly, the numerous difficulties of assessing the abilities of students with disabilities via standardized tests are well documented.[173] Additionally, focusing solely on test results could produce jurisprudence not substantively different from the *Rowley* standard. Given such a concrete measuring tool, courts might take a minimalistic approach to IEP evaluation similar to *Rowley*'s focus on passing courses and advancing to the next grade each year.[174]

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168. Wenkart, *supra* note 36, at 13.

169. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1339 n.8 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016).

170. 20 U.S.C. § 6301(1) (2012).

171. Kaufman & Blewett, *supra* note 47, at 17.

172. *Id*. at 19. *See also* Matthew R. Plain, *Results Above Rights? The No Child Left Behind Act's Insidious Effect on Students with Disabilities*, 10 Roger Williams U.L. Rev. 249, 267–68 (arguing that NCLB's testing requirements could result in a loss of educational benefits and consequently an IDEA violation).

173. Kaufman & Blewett, *supra* note 47, at 19. *See also* Rachel Loftin, *Standardized Tests and Students with an Autism Spectrum Disorder*, INDIANA UNIVERSITY BLOOMINGTON, http://www.iidc.indiana.edu/pages/Standardized-Tests-and-Students-with-an-Autism-Spectrum-Disorder (last visited Feb. 2, 2016); Joshua Bleiberg and Darrell M. West, *Special Education: The Forgotten Issue in No Child Left Behind Reform*, BROOKINGS (June 18, 2013, 5:00 PM), http://www.brookings.edu/blogs/up-front/posts/2013/06/18-special-education-no-child-left-behind-bleiberg-west ("The assessment of students with disabilities will remain difficult until researchers gain a better understanding of all cognitive disorders.").

174. *See* Johnson, *supra* note 40, at 28.

It is apparent any new standard must be more definite than the current standards, which are based on loosely defined terms like some and meaningful, but not so defined as to be limited strictly to test results.

D. Reasonable Progress Standard

One of the Court's concerns in *Rowley* involved the large burden that would be placed on schools if they were required to maximize a student's potential when developing an IEP.[175] The facts of the *Rowley* case were such that the Court could brush off consideration of a child's potential as unnecessary. Amy Rowley, the child whose education was at question in *Rowley*, performed better than many of her peers did.[176] Despite the fact that the Court asserted it decided the case only on the facts before it and did not seek to set a singular standard for IEP evaluation,[177] *Rowley* did set a standard that has since allowed schools to discount the potential of thousands of children with disabilities.

In the wake of this, many scholars have argued an appropriate standard should be based on the child's potential and the ways in which the child is capable of learning.[178] Failing to consider a child's potential seems counterintuitive to the idea of developing an *individualized* education program.[179] Although the individualized nature of special education suggests schools must consider potential, that alone is not enough. Like meaningfulness, potential is hard to measure. Thus, any new legal standard, which hopes for better results than the current standards, must include something measureable.

An appropriate standard for evaluating whether a student has been provided with a FAPE should be results-based. Rather than relying on standardized test results, this Comment proposes a reasonable progress standard. This standard measures whether the student makes reasonable progress on annual goals. To develop these goals, the IEP team must analyze and discuss the student's capacity and potential. Rather than focusing on maximizing potential, the reasonable progress standard focuses on tailoring IEP goals towards what the student is capable of achieving with the proper special education services. Appropriate tailoring will of course require the IEP team to conduct appropriate evaluations to determine the child's capability.[180] Additionally, this standard

175. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 192, 198–99 (1982).

176. *Id*. at 185.

177. *Id*. at 202.

178. Johnson, *supra* note 40, at 42.

179. *See Rowley*, 458 U.S. at 202 ("It is clear that the benefits obtainable by children at one end of the [disability] spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."); J.P. *ex rel.* Peterson v. Cty. Sch. Bd., 447 F. Supp. 2d 553, 584 (E.D. Va. 2006) ("[E]ducational benefit must be assessed based on the educational capacity of each individual student.").

180. Johnson, *supra* note 40, at 42.

would require schools to document the *results* rather than documenting goals only and allowing the IEP team to base progress towards those goals on conclusory assertions.[181]

Courts commonly use the term reasonable in different areas of law, with each usage having a slightly different meaning. However, unlike some or meaningful, courts have found ways to put definite limits on what is and is not reasonable.[182] Similarly, in the context of IDEA, clear boundaries exist to guide courts as to what constitutes reasonable progress. Specifically, under the standard this Comment proposes, a student would make reasonable progress when the student is on pace, based on the previous year's progress, to meet the state's grade-level standards for the next level of education. Thus, throughout elementary school, the gauge would be the state standards for the first level of middle school. Similarly, while the student is in middle school, the grade-level standards for high school would determine whether the student was making reasonable progress. However, to prepare high school students with disabilities for post-secondary life adequately, the measure of reasonable would have to be more complex.

Unlike elementary and middle school, where the next step is generally the same for almost all students, what comes after high school is uncertain, variable, and dependent on a number of extraneous factors. The possibility of more than one post-secondary path necessarily creates an additional step in the process. That is, schools must undertake to evaluate the student's progress through middle school to determine which path seems most appropriate.[183] Three possible paths include preparation for college, preparation for technical or vocational school, or preparation for the workforce.[184]

At least at the high school level, this model of IEP development would not be substantially different from what is currently required under the IDEA. Once a student with a disability reaches the age of sixteen, the IEP must include transition services.[185] As a coordinated set of activities for a student with a disability, transition services are designed to be

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181. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1335 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016).

182. *See, e.g.*, IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:11(B) (2015) (discussing what makes a search reasonable); BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 3:22 (2nd ed. 2015) (discussing reasonable person standard); RICHARD B. TROXEL & WILLIAM O. KERR, KERR AND TROXEL, CALCULATING IP DAMAGES § 5:2 (2015); EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 23:35 (2015).

183. These evaluations would set the initial path plan for the student. However, the appropriate path for a child may change over the course of high school. Preparation for post-secondary life is so crucial and high school is the public school system's last opportunity to prepare the student. Thus, how schools specifically handle adequately preparing the student for adult life is beyond the scope of this Comment.

184. *See* 34 C.F.R. § 300.320(b) (2014).

185. *Id*.

results oriented and focused on improving academic and functional achievement of the student to facilitate movement from high school to post-secondary activities.[186] These services include preparation for college, vocational school, or appropriate employment and living independently as an adult.[187] The student's individual needs must form the basis of the transition services.[188] Further, the services must take the student's strengths, preferences, and interests into consideration.[189] Thus, the IDEA requires that schools actually consider a student's potential once they reach a certain age. The standard this Comment proposes simply extends this requirement to all ages while the child is in public school.

Under this legal standard, a school provides a FAPE to a student with a disability when that student makes reasonable progress toward his or her annual goals. If at any level of schooling the student is not able to make reasonable progress utilizing the services the school is capable of providing, the school has failed to provide the student with a FAPE. As allowed under the IDEA, the student's parents could then elect to transfer the child to a specialized school that is capable of providing services that will not amount to the denial of a FAPE.[190] Most importantly, because the public school will have failed to provide the student with a FAPE, the parents can more often successfully request reimbursement from the public school district for the cost of the specialized school's tuition, provided the evidence shows the student is making reasonable progress at the specialized school.[191]

E. Benefits of Reasonable Progress Standard

The *Rowley* Court decided on the some educational benefit standard because that standard best served Congressional intent as evidenced by the language and legislative history of the EHA.[192] The IDEA amendments as well as NCLB clearly show Congressional intent has changed.[193] Congress is no longer only concerned with providing students with disabilities access to education.[194] The goals of special education have expanded to providing students with disabilities an education

186. 20 U.S.C. § 1401(34)(A) (2012).
187. Goldschmidt, *supra* note 6, at 773.
188. *Id*.
189. 20 U.S.C. § 1401(34)(B) (2012).
190. 34 C.F.R. § 300.148(c) (2014).
191. *See id*.; Johnson, *supra* note 40, at 43. However, at present, reimbursement is a rare outcome of these cases. For example, in Colorado, where Drew lives, of the 23 cases requesting reimbursement between 2003 and 2013, only two were successful at the due process hearing level. *See* Colorado Department of Education, *Case Outcomes - Due Process Hearings*, COLORADO DEPARTMENT OF EDUCATION, http://www.cde.state.co.us/spedlaw/caseoutcomes (last visited Feb. 15, 2016).
192. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 192–97, 200–01 (1982).
193. *See* Goldschmidt, *supra* note 6, at 773; Kaufman & Blewett, *supra* note 47, at 18.
194. Goldschmidt, *supra* note 6, at 773.

that will prepare them for life after school.[195] The reasonable progress standard serves this goal. The focus of this standard is always on the student's future. When educators aim towards preparing the student for the next level of education, they will be less likely to set goals for the student that are based on the low standard of only giving the student some benefit. Further, the reasonable progress standard honors Congressional intent to better prepare students with disabilities for some degree of independent living rather than dependence on the community.[196]

In addition to honoring Congressional intent, the reasonable progress standard addresses the Supreme Court's concern that, were it to espouse a standard requiring schools to consider students' potential, schools would be overburdened in the pursuit of maximizing the potential of each child that has a disability.[197] The reasonable progress standard does not require schools to maximize students' potential. Instead, it simply brings the requirements schools must meet up to the same level as general education students. When an IEP is based on results, such as reasonable progress, it becomes a comprehensive plan as to how to help the student reach the standards the state applies to the nondisabled students in public schools.[198]

Finally, by shifting to the reasonable progress standard, courts could help reduce the amount of public resources devoted to caring for adults with disabilities who never received an education that would adequately prepare them for adulthood. Adoption of this standard will require elementary and middle schools to make substantial changes to IEP development as well as the provision of services to students with disabilities to ensure each student receives a FAPE, resulting in increased expenses for public schools.[199] Nevertheless, the reduced public expenditures formerly dedicated to caring for adults with disabilities who are unable to provide for themselves will offset these increased costs.[200] Given a proper education, children with disabilities are more likely to grow into adults that possess the skills that will give them the chance at independent living, including self-care and higher education or vocational training.[201]

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195. *Id*.

196. 20 U.S.C. § 1400(d)(1)(A) (2012); Kaufman & Blewett, *supra* note 47, at 15; Valentino, *supra* note 15, at 165.

197. *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 199 (1982).

198. *See* Goetz et al., *supra* note 20, at 527.

199. *See* Goldschmidt, *supra* note 6, at 776.

200. *See* CAROL V. O'SHAUGHNESSY, NATIONAL SPENDING FOR LONG-TERM SERVICES AND SUPPORT (LTSS), 2012 3 (Mar. 27, 2014) (discussing billions of dollars spent on long-term care services for disabled individuals in 2012); Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America*, *Planet Money*, NATIONAL PUBLIC RADIO (last visited Nov. 9, 2015) http://apps.npr.org/unfit-for-work/ (indicating that 19.2% of newly disabled workers in 2011 had a mental illness or developmental disability).

201. *See* Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 864–65 (6th Cir. 2004); Valentino, *supra* note 15, at 166.

F. Endrew Could Have Been the Opportunity to Set a New Standard

Aside from being an excellent example of why the *Rowley* standard must be set aside, other aspects of *Endrew* gave rise to an opportunity for the Tenth Circuit to lay the foundation for a new legal standard to evaluate IEP adequacy. First, *Endrew* relied heavily on the precedent set in *Thompson R2-J School District v. Luke P ex rel. Jeff P.*, the reasoning of which is in conflict with current Congressional intent.[202] Second, in *Endrew*, the lack of progress monitoring provided an opening to require a results-based standard like the reasonable progress standard.[203]

Endrew follows Tenth Circuit precedent that conflicts with national education policy created through the IDEA and NCLB. *Endrew* relied in part on *Thompson*, which reasoned that "Congress did not provide . . . a guarantee of self-sufficiency for all [persons with disabilities], and the most authoritative arbiter of congressional intent has already reached this conclusion [in *Rowley*]."[204] The *Thompson* court further reasoned that although the ability to generalize skills is crucial to self-sufficiency, the IDEA did not make self-sufficiency the standard.[205] However, the IDEA now requires schools to implement transition services that prepare the student for post-secondary life.[206] The transition services requirement is directly in line with one of the IDEA's stated purposes: to prepare children with disabilities for independent adult life.[207] This requirement, along with the fact that *Rowley* interpreted legislation Congress has substantially updated, suggests that *Thompson* conflicts with Congressional intent, making it less than authoritative precedent.

As for the child in *Thompson*, if he never acquires the ability to generalize his educational skills outside of the classroom, the transition services his high school must provide will be difficult, if not impossible, to accomplish. Although *Thompson* finds support in the intent of the EHA, it now fails to keep up with the capabilities of individual with disabilities as well as special educational goals and policy. Even accepting as true that the panel that decided *Endrew* lacked the authority to subvert established precedent, the panel could have acknowledged the reasoning that supported *Rowley* and *Thompson* is no longer true.

Although the panel failed to recognize that the present national special education policy is not the same as it was when *Rowley* was decided, it did acknowledge "Drew's IEPs contain[ed] little or no progress reporting or measurement data and where progress was reported, it was 'lack-

202. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1340 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016). *See* 20 U.S.C. § 6301 (2012); 20 U.S.C. § 1400(c)(1) (2012); Wenkart, *supra* note 36, at 15.

203. *Endrew*, 798 F.3d at 1335.

204. Wenkart, *supra* note 36, at 15.

205. Thompson R2-J Sch. Dist. v. Luke P. *ex rel.* Jeff P., 540 F.3d 1143, 1150 (10th Cir. 2008).

206. 34 C.F.R. § 300.320(b) (2014).

207. 20 U.S.C. § 1400(d)(1)(A) (2012).

ing in detail' or limited to 'conclusory statements.'"[208] However, Drew's parents classified the progress monitoring differently, asserting the school *never* reported the results of Drew's progress.[209] Despite acknowledging the lack in progress monitoring, the *Endrew* court reasoned that because the goals listed on each year's IEP increased in difficulty, the IEP was reasonably calculated to provide Drew with some educational benefit.[210] However, other courts have found when the student has ASD, as Drew does, without "meaningful, measureable goals and objectives, there can be no 'appropriate and meaningful education and developmental interventions . . . .'"[211] Therefore, in the absence of evidence in the form of documented, measurable results that Drew met the goals of lesser difficulty before the school increased the difficulty of those goals, the reasoning in *Endrew* lies in an unfounded assumption based on meaningless, generalized opinions of progress.[212] Requiring results, as would be necessary under the reasonable progress standard, would provide a foundation on which a court could rest its assertion that schools are providing children with disabilities a FAPE.

IV. CONCLUSION

Our judicial system should strive to put into action the values Congress stated in 1974: that education of United States citizens is of primary importance and that one's resources should not limit one's educational opportunities.[213] This goal cannot be realized as long as courts continue to adhere to the *Rowley* standard. *Rowley* sets expectations for students with disabilities too low, pitting parents, special educators, and school administrators against one another.[214] Further, it encourages courts to be narrowly focused and minimalistic in their approach to IEP and FAPE evaluation.[215]

Most significantly, *Rowley* couched its reasoning in honoring Congressional intent.[216] Both the amendments to the EHA, now known as the IDEA, and the enactment of NCLB demonstrate Congress intends to provide students with disabilities with more than mere access to public education.[217] Congress now seeks to raise the expectations schools have of students with disabilities and adequately prepare them for adulthood

208. *Endrew*, 798 F.3d at 1335.
209. Reply Brief at 1–4, Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015) (No. 14-1417).
210. *Endrew*, 798 F.3d at 1341.
211. Escambia Cty. Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248, 1274 (S.D. Ala. 2005).
212. Goetz et al., *supra* note 20, at 516 (quoting Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1029 (8th Cir. 2003)).
213. 20 U.S.C. § 1221-1 (2012).
214. Johnson, *supra* note 40, at 26.
215. *Id*. at 28.
216. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 192 (1982).
217. Kaufman & Blewett, *supra* note 47, at 5, 17.

and independent living.[218] Applying *Rowley* only frustrates these pursuits, requiring development of a new legal standard.

The reasonable progress standard would support not only national education values but also the purposes of the IDEA by focusing on the student's future and requiring reporting of progress results. In addition to supporting Congressional intent, implementation of the reasonable progress standard could reduce public expenditures that fund the care and support of adults with disabilities.

Endrew failed to consider any of the deficiencies *Rowley* presents, or that it is time to develop a new standard. The Tenth Circuit ignored the fact that the Douglas County could not have known whether Drew was making progress, as the school had not recorded any of the supposed progress in his IEPs.[219] Moreover, the Tenth Circuit unquestioningly followed precedent that conflicts with Congressional intent.[220] The values behind providing public education mandate more than blind obedience to precedent and refusal to see the real-life consequences of not demanding to know public schools are providing an appropriate education to students with disabilities. Congress has taken action to effect those values; it is time the courts follow suit by disavowing *Rowley* and developing a new legal standard to determine whether a child with a disability is receiving the free appropriate public education that he or she deserves.

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218. 34 C.F.R. § 300.320(b) (2014).

219. Reply Brief at 1–4, Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015) (No. 14-1417).

220. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1340 (10th Cir. 2015), *cert. granted*, 137 S.Ct. 29 (2016).

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