

***Endrew* Decision Creates Important New Opportunities for Students with Disabilities**

The Supreme Court’s March 2017 decision in *Endrew F. v. Douglas County School District* announced a new and more demanding standard for educating students with disabilities under the Individuals with Disabilities Education Act (IDEA).¹

The Court’s unanimous decision, authored by Chief Justice Roberts, requires schools to:

- Provide students with disabilities capable of keeping up with (or catching up to) their non-disabled peers with special education that enables them to meet grade-level standards and advance from grade to grade.²
- Provide the small group of students with the most significant cognitive disabilities who are not able to meet grade-level standards with the instruction and services they need to meet ambitious and challenging goals.³

The Bazelon Center is committed to ensuring that students with disabilities receive the high quality of education that *Endrew* demands. We are available to consult with attorneys about potential or ongoing IDEA cases and to provide assistance as co-counsel. We can also organize *amici* support in connection with due process hearings and court proceedings.

** The Bazelon Center thanks for their contributions to this paper: Ron Hager of the National Disability Rights Network, Arlene Mayerson of the Disability Rights Education and Defense Fund, and Brian Wolfman of the Georgetown University Law Center, one of *Endrew F.*’s lawyers.

¹ *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017).

² The IDEA requires public schools to provide a free appropriate public education (FAPE), which includes both special education and related services. “Special education” is “specially designed instruction” that adapts, as appropriate to the child’s needs, “the content, methodology, or delivery of instruction ...to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction . . . that apply to all children.” 34 C.F.R. § 300.39(b)(3). “Related services” are the “developmental, corrective, and other supportive services . . . required to assist a child with a disability to benefit from special education.” 34 C.F.R. § 300.34(a).

³ See *Endrew F.*, 137 S. Ct. at 1000.

The *Endrew* Case

Andrew F. (Drew) was diagnosed with an autism spectrum disorder (ASD) and with attention-deficit/hyperactivity disorder (ADHD).⁴ From preschool through fourth grade, Drew attended public school. Beginning in second grade, Drew’s behavior interfered with his learning. The school provided Drew special education, but he made little or no progress. The school never effectively addressed his behaviors, and as a result Drew regressed. Before he began fifth grade, Drew’s parents enrolled him in a private school. The private school immediately developed a behavior intervention plan that addressed Drew’s specific strengths and needs. Drew flourished and made significant academic progress.

Having exhausted administrative remedies, Drew’s parents sued the school district seeking reimbursement for their tuition payments to the private school. Relying on a decades-old Supreme Court decision, *Board of Education v. Rowley*,⁵ the district court and the Tenth Circuit Court of Appeals held, consistent with decisions by most lower federal courts, that all the school district had to do for Drew was strive to provide him a “merely . . . more than *de minimis*” educational benefit.⁶ The school district had done that, the courts ruled, even though Drew never met most of his educational goals.

In deciding in favor of Drew, the Supreme Court emphasized that schools must be held to a “markedly more demanding” standard for providing education to a child with a disability.⁷ The Court declared that the special education that schools provide to students with disabilities must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”⁸ For students being educated in regular classrooms with their non-disabled peers, the special education provided must be reasonably calculated to allow the child to meet academic standards and advance from grade to grade.⁹ The Court assumed that students

⁴ This summary of Drew’s story is taken from the *Endrew* decision, 137 S. Ct. at 996-98, and from briefs filed in the Supreme Court.

⁵ *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

⁶ 798 F.3d 1329, 1338 (10th Cir. 2015); 2014 WL 4548439, **4, 9 (D. Colo. Sept. 15, 2014).

⁷ *Endrew F.*, 137 S. Ct. at 1001.

⁸ *Id.* at 998-99.

⁹ *Id.*; *see id.* at 1000-01 (IDEA “typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom”). The Court indicated that a child advancing from grade to grade still may have a claim that FAPE is being denied. *Id.* at 1000 & n.2.

would be “fully integrated” in regular classrooms if they were capable of meeting academic standards and advancing from grade to grade.¹⁰ For children whose disabilities prevent them from being “fully integrated” in regular classrooms, the Court said, their special education must be “appropriately ambitious” and enable the child to meet “challenging” objectives.”¹¹

In judging whether the special education provided to a student meets these standards, the Supreme Court said, decisions of school authorities are entitled to some deference. However, “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions.”¹²

A New Paradigm

Endrew rejects the “bigotry of low expectations”¹³ that marked prior interpretations of *Rowley*. It requires that schools provide special education that is designed to help students with disabilities become academically proficient and advance from grade to grade.

At oral argument, Chief Justice Roberts emphasized that when students with a disability have the cognitive ability to learn the subject matter being taught, they should receive a special education that enables them to learn and advance from grade to grade.¹⁴

With needed supports, the Supreme Court observed, most children with disabilities are capable of meeting grade-level academic expectations.¹⁵ As then-Secretary of Education Arne Duncan

¹⁰ *Id.* at 999-1000. The Court emphasized that most children receiving special education should be “fully integrated.” *Id.* at 1000; *see also id.* (“[T]he Act prefers . . . [that] a child is fully integrated in the regular classroom”); *id.* at 999 (“[T]he IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’”)

¹¹ *Id.* at 1000.

¹² *Id.* at 1001-02

¹³ Brief of Former Officials of the U.S. Department of Education as Amici Curiae at 6, *Endrew F.*, 137 S. Ct. 988 (2017) (“[W]e should reject the soft bigotry of low expectations and expect all children, including children with disabilities, to achieve academic success....”), <http://www.bazelon.org/wp-content/uploads/2017/04/Endrew-Bazelon-Former-U.S.-Dept-of-Educ-Officials.pdf>.

¹⁴ Transcript of Oral Argument at 48:22-49:3.

¹⁵ *Endrew F.*, 137 S. Ct. at 1000 (“*Rowley’s* expectation [is] that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.”).

declared in announcing new performance expectations for states, “We know that when students with disabilities are held to high expectations . . . they excel.”¹⁶

The Supreme Court expected that, consistent with the IDEA’s requirements, schools are educating in regular classrooms all students with disabilities who are capable of keeping up with or catching up to their non-disabled peers.¹⁷ Hence, its opinion used the term “fully integrated” as a proxy for “capable of meeting academic standards and advancing from grade to grade.”¹⁸ Thus, *Endrew*’s requirement that schools help students with disabilities become proficient is not limited to just those students the school has chosen to “fully integrate.” It extends to all students who are capable of meeting the academic standards that apply to all children and of advancing from grade to grade.¹⁹

¹⁶ U.S. DEP’T OF EDUC., *New Accountability Framework Raises the Bar for State Special Education Programs* (June 24, 2014) (*quoting* Secretary Duncan); Brief of Former Officials *supra* note 11 at 17 (“Educators now have many highly effective interventions that can help every student meet the state academic standards that apply to all students.”).

¹⁷ *Endrew F.*, 137 S. Ct. at 999-1000. IDEA includes a strong preference for inclusion all students, including those not able to meet grade level academic standards. To advance students’ learning, the IDEA requires education in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5)(A). To the maximum extent appropriate, students with disabilities must be educated with non-disabled students in regular classrooms. *Id.* This requirement is consistent with the obligation of schools under the Americans with Disabilities Act to serve students in the “most integrated setting” appropriate to their needs. 28 C.F.R. § 35.130(d); *see Olmstead v. L.C.*, 527 U.S. 581 (1999).

Research and experience demonstrate the benefits of inclusion. *See, e.g.*, Wayne S. Sailor & Amy B. McCart, *Stars in Alignment*, 39 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 55 (2014) (collecting studies and noting benefit to all students of educational practices that support inclusion), <http://rps.sagepub.com/content/39/1/55.full.pdf>; Thomas Hehir *et al.*, REVIEW OF SPECIAL EDUCATION IN THE COMMONWEALTH OF MASSACHUSETTS: A SYNTHESIS REPORT (2014), <http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf>.

¹⁸ *Endrew F.*, 137 S. Ct. at 999-1000. Neither *Endrew* nor the IDEA requires that students be able to meet grade level standards to be included with non-disabled peers. *See* note 15 *supra*.

¹⁹ Indeed, read otherwise, the Court’s language would create an incentive for districts to avoid the obligation to strive for ambitious academic goals simply by segregating students.

For the many students with disabilities who have fallen far behind their peers academically due to inadequate special education or other reasons, *Endrew* requires that schools help them catch up. For some students, that may be a multi-year project.²⁰

For the small group of students who, due to significant cognitive disabilities, cannot meet generally applicable academic standards, *Endrew* requires schools to provide special education that enables them to meet “challenging” and “appropriately ambitious” goals.²¹ For these students, progress may be measured against “alternate academic achievement standards” designed to promote further education, work, and independence.²²

Additionally, for a student like Drew whose behavior impedes learning, special education must include behavioral services, including positive behavioral interventions and supports (PBIS), functional behavior assessments (FBAs), and behavior intervention plans (BIPs).²³ These and other “related services” must be provided as part of special education when needed to address the behavior that impairs the student’s learning.²⁴

²⁰ See U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SERVS., Dear Colleague Letter on FAPE 5 (Nov. 16, 2015) (“In a situation where a child is performing significantly below the level of the grade in which the child is enrolled, an IEP Team should determine annual goals that are ambitious [T]he annual goals need not necessarily result in the child’s reaching grade-level within the year covered by the IEP, but . . . help close the gap.”), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance_on_fape_11_17_2015.pdf.

²¹ *Endrew F.*, 137 S. Ct. at 1000.

²² See Dear Colleague Letter *supra* note 18 at 5; 20 U.S.C. § 1400 (d)(1)(A) (special education should “emphasize[]” instruction and services designed to prepare students “for further education, employment, and independent living”); see also 20 U.S.C. § 1111(b)(1)(E)(i)(V) (Every Student Succeeds Act) (alternate academic achievement standards for students with most significant cognitive disabilities must be “aligned to ensure” student “is on track to pursue postsecondary education or employment”).

²³ U.S. DEP’T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SERVS., Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities 1, 4 (Aug. 1, 2016), <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>.

²⁴ 34 C.F.R. § 300.34(a) (related services are provided as “required to assist a child . . . to benefit from special education”).

The Road Forward

The *Endrew* decision is a major advance. To realize its promise, parents, students, educators, and advocates must work together to ensure school districts comply with the new standard it sets.

The Bazelon Center is committed to enforcing *Endrew* so that students with disabilities receive the instruction and services they need for success in school. We are committed to working with our partners to advance that goal.

We are interested in hearing about your experiences in securing appropriate special education of students post-*Endrew*. Please contact us if you would like to share your experiences or are interested in collaborating with us to advance implementation of *Endrew*. We can be reached at lewisb@bazelon.org or irab@bazelon.org.