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ENDREW F. AFTER SIX MONTHS: A GAME CHANGER?*

by

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The Supreme Court's decision in *Endrew F. v. Douglas County School District RE-1*,¹ issued on March 22, 2017, was potentially momentous in terms of special education practice for two reasons. First, the line of Supreme Court decisions under the Individuals with Disabilities Education Act (IDEA),² which started in 1982 with the landmark decision in *Board of Education of Hendrick Hudson Central School District v. Rowley*,³ moved back to the core special education issue of "free appropriate public education" (FAPE).⁴ In the second phase of the

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¹ 137 S. Ct. 988 (2017).

² 20 U.S.C. §§ 1400–1419 (2013).

³ 458 U.S. 176 (1982).

⁴ *Id.* §§ 1401(9) and 1412(a)(1). During the earlier phase, the two decisions concerning tuition reimbursement elaborated upon FAPE for not only the school district but also the private placement. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 86 Ed.Law Rep. 41 (1993); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985). Similarly, the two decisions concerning the medical services exclusion were within the related services component of FAPE. *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 132 Ed.Law Rep. 40 (1999); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 18 Ed.Law Rep. 138 (1984). The decision concerning disciplinary changes in placement was a mix,

interim period, the focus had shifted various litigation issues under the IDEA, such as burden of proof,⁵ expert witness fees,⁶ and the right to proceed *pro se*.⁷ Second and more specifically, *Andrew F.* represents a return to the substantive and, thus, central, dimension of FAPE under *Rowley*.⁸

During the interim, the lower courts had split with regard to the extent of benefit that *Rowley* had intended in its formulation of substantive FAPE—that the IEP be “reasonably calculated to enable the child to receive educational benefits.”⁹ Various circuits were of the view that the applicable standard was “some” benefit; the Third Circuit instead definitively adopted instead “meaningful” benefit; and the remaining jurisdictions either were inconsistent or

with FAPE being balanced against stay-put. *Honig v. Doe*, 484 U.S. 305 (1988) (ruling that the disciplinary placement of an eligible child for a disciplinary infraction that was a manifestation of his or her disabilities required judicial action).

⁵ *Schaffer v. Weast*, 546 U.S. 49, 241 Ed.Law Rep. 30 (2005) (ruling that the filing party has the burden of persuasion at due process hearings under the IDEA).

⁶ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (ruling that prevailing parents are not entitled to expert witness fees under the IDEA).

⁷ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 219 Ed.Law Rep. 39 (2007) (ruling that parents are entitled to proceed without legal representation to vindicate their own, not their child’s, rights under the IDEA). Nevertheless, this shifting focus is not at all pure or exclusive. In addition to the mixed case of *Honig v. Doe* during the earlier phase (*supra* note 4), the most recent cases included a FAPE-related decision and a mixed decision. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 340 Ed.Law Rep. 19 (2017) (ruling that the IDEA’s exhaustion provision applies if the gravamen of the claim is FAPE); *Forest Grove School District v. T.A.*, 557 U.S. 230, 245 Ed.Law Rep. 551 (2009) (ruling that a child not previously enrolled in special education may be eligible for tuition reimbursement).

⁸ For the other dimension of FAPE under *Rowley* and its aftermath, see, e.g., Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?*, 83 EXCEPTIONAL CHILD. 219 (2016) (finding a pro-district skew in the outcomes of court decisions addressing procedural FAPE claims based on the two-part test that developed in the wake of *Rowley*).

⁹ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. at 206–07. In its preview of this formulation in the context of Amy Rowley, who was a deaf child in an integrated setting, the Court added that “if the child is being educated in the regular classrooms of the public education system, [the IEP] should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” *Id.* at 204.

indefinite.¹⁰ In the case chosen to re-visit *Rowley* and clarify the substantive standard, the Tenth Circuit had rejected tuition reimbursement for a child with autism who had been in a self-contained special education classroom until his parents unilaterally placed him in a specialized private school, using in relevant part the “some” benefit standard.¹¹

In a previous article analyzing the Supreme Court’s decision in *Endrew F.*,¹² I identified not only its holding, which was that “a school must offer an IEP reasonably calculated to enable a child to *make progress appropriate in light of the child’s circumstances*,”¹³ but also its analytical framework and potentially significant dicta. The framework appeared to be (1) retaining the *Rowley* primary but not absolute indicators of annual promotion and passing marks for children with disabilities in integrated settings, which Amy Rowley exemplified, and (2) adjusting the indicators for children with disabilities in segregated settings, which *Endrew F.* represented.¹⁴ The dicta appeared to fit in the following two categories, with the abbreviated

¹⁰ E.g., Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 Ed.Law Rep. 1 (2009) (identifying the First, Fourth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia circuits as adopting some benefit; the Third Circuit as meaningful benefit; and the remaining circuits as inconsistent or indefinite). However, a limited number of jurisdictions had changed their position more recently prior to *Endrew F.* E.g., compare *D.B. v. Esposito*, 675 F.3d 26, 34, 278 Ed.Law Rep. 716 (1st Cir. 2012) (meaningful benefit), with *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23–24, 230 Ed.Law Rep. 485 (1st Cir. 2008) (some benefit).

¹¹ *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1340–42, 321 Ed.Law Rep. 639 (10th Cir. 2015).

¹² Perry A. Zirkel, *The Supreme Court’s Decision in Endrew F. v. Douglas County School District RE-1: A Meaningful Raising of the Bar?*, 341 Ed.Law Rep. 545 (2017).

¹³ *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 999 and 1002 (emphasis added).

¹⁴ *Id.* at 1000:

When a child fully integrated into the regular classroom, what [FAPE] means is providing a level of instruction reasonably calculated to permit advancement in the regular curriculum.... If [a fully integrated classroom] is not a reasonable prospect for a child, ... his educational program must be appropriately ambitious in light of his circumstances,

designations added merely for quick subsequent reference:

1. General across both settings:

- no guarantee¹⁵
- not ideal¹⁶
- demanding¹⁷
- stagnation¹⁸
- judicial deference¹⁹
- cogent justification²⁰

2. Specific to segregated settings:

- appropriately ambitious²¹

just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.

¹⁵ *Id.* at 998 (“[T]he IDEA cannot and does not promise ‘any particular [educational] outcome.’ ... No law could do that—for any child.”).

¹⁶ *Id.* at 999 (“Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.”).

¹⁷ *Id.* at 1000 (“This [new] standard is markedly more demanding than [the some benefit test].”).

¹⁸ *Id.* at 1001 (“For children with disabilities, receiving instruction that aims so low [i.e., under the some benefit test] would be tantamount to ‘sitting idly ... awaiting the time when they were old enough to drop out’” [citing *Rowley*’s reference to the legislative history of the original Act]. A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.”).

¹⁹ *Id.* at 1001 (“The absence of a bright-line rule [for “appropriate progress”] should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities for which they review.’” [quoting *Rowley*]).

²⁰ *Id.* at 1002 (“A reviewing court may fairly expect those authorities to be able to offer a *cogent and responsive explanation* for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (emphasis added)).

²¹ *Id.* at 1000 (“[In the case of a child for whom advancement through the regular curriculum] is not a reasonable prospect ... his [IEP] must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ but every child should have the chance to meet challenging objectives.”).

- challenging objectives²²

The purpose of this follow-up article is to trace the lower court applications of the new *Andrew F.* standard, after an initial immediate period of six months since its March 22 issuance, to determine its effect on the outcome of cases where the hearing officer used the *Rowley* standard, with or without the “some” or “meaningful” qualifier, and the reviewing court used the *Andrew F.* standard. The primary question, within this period and context, was whether *Andrew F.* has indeed been what one of the child’s attorneys characterized “game changer.”²³ The secondary questions were (1) whether the “some” v. “meaningful” benefit variations of the previous, benefit standard²⁴ appeared to make a difference in the outcome upon judicial review, and (2) which of the *Andrew F.* dicta emerged as influential decisional factors.²⁵

Method for the Analysis

The first step was a continuing Boolean search for “Andrew F.” of two largely overlapping databases—Westlaw and LRP’s SpecialEdConnection®—so as to identify those lower court decisions where both the hearing officer pre-*Andrew F.* and the reviewing court post-*Andrew F.* ruled on substantive FAPE and the reviewing court’s decision was within the period from March 23 to September 22.²⁶ Consequently, the exclusions were (1) decisions where

²² *Id.*

²³ John Aguilar & Mark K. Edwards, *U.S. Supreme Court Ruling on Student Disabilities Case*, DENVER POST (Mar. 23, 2017), <http://www.denverpost.com/2017/03/22/supreme-court-ruling-tangled-neil-gorsuch-hearing/> (“Jack Robinson, the attorney who represents Andrew F.’s family, ... called the high court’s ruling a ‘game changer.’”).

²⁴ *See supra* note 10 and accompanying text.

²⁵ *See supra* notes 14–22 and accompanying text. “Dicta” here extends to the intermediate area referred to herein as the analytical, or organizing, framework of *Andrew F.*

²⁶ Given the limited lag time between the date of the decision and the appearance in these electronic databases, the search ended in mid-October.

substantive FAPE was not at issue,²⁷ (2) substantive FAPE decisions where the court limited its use of *Andrew F.* to the background,²⁸ and (3) decisions after September 22.²⁹ In a few cases, the selection was a close call, with the identification of marginal cases where the balance seemed to favor inclusion.³⁰

The second step was tabulating the information to address the aforementioned³¹ questions. For the qualifying decisions, the scope was limited to the substantive FAPE ruling,

²⁷ *Rachel H. v. Dep't of Educ., State of Haw.*, 868 F.3d 1085 (9th Cir. 2017); *R.B. v. N.Y.C. Dep't of Educ.*, 603 F. App'x 36, 318 Ed.Law Rep. 662 (2d Cir. 2017); *I.L. v. Knox Cty. Bd. of Educ.*, ___ F. Supp. 3d ___, ___ Ed.Law Rep. ___ (E.D. Tenn. 2017) (procedural FAPE); *Special Sch. Dist. No. 1 v. R.M.M.*, 861 F.3d 769, 344 Ed.Law Rep. 766 (8th Cir. 2017) (parentally placed student under state law); *DL v. District of Columbia*, 860 F.3d 713, 344 Ed. Law Rep. 685 (D.C. Cir. 2017) (child find class action); *G.D. v. W. Chester Area Sch. Dist.*, 70 IDELR ¶ 180 (E.D. Pa. 2017) (eligibility); *E.P. v. Howard Cty. Pub. Sch.*, 70 IDELR ¶ 176 (D. Md. 2017) (IEE reimbursement); *Bey v. E. Penn Sch. Dist.*, 70 IDELR ¶ 124 (E.D. Pa. 2017) (exhaustion); *Jackson v. Pine Bluff Sch. Dist.*, 2017 WL 2296957 (E.D. Ark. May 25, 2017) (SEA liability); *Braden O. v. W. Chester Area Sch. Dist.*, 70 IDELR ¶ 97 (E.D. Pa. 2017) (interstate transfer); *Santino v. Pa. Dep't of Educ.*, 70 IDELR ¶ 72 (M.D. Pa. 2017) (attorney's fees); *Harrington v. Jamesville Dewitt Cent. Sch. Dist.*, 69 IDELR ¶ 235 (N.D.N.Y. 2017) (§ 504); *K.P. v. District of Columbia*, 69 IDELR ¶ 233 (D.D.C. 2017) (stay-put); *N.W. v. District of Columbia*, 253 F. Supp. 3d 5, 347 Ed.Law Rep. 1026 (D.D.C. 2017); *Smith v. Cheyenne Mountain Sch. Dist.*, 2017 WL 2778556 (D. Colo. June 26, 2017) (various other issues).

²⁸ *J.C. v. Katonah-Lewisboro Sch. Dist.*, 690 F. App'x 53, 346 Ed.Law Rep. 89 (2d Cir. 2017) (determined unnecessary); *M.M. v. N.Y.C. Dep't of Educ.*, 69 IDELR ¶ 208 (S.D.N.Y. 2017); *L.M. v. Willingboro Twp. Sch. Dist.*, 70 IDELR ¶ 34 (D.N.J. 2017) (not expressly applied).

²⁹ *E.g.*, *E.F. v. Newport Mesa Unified Sch. Dist.*, ___ S. Ct. ___ (Oct. 2, 2017) (remanding the ruling in favor of the district); *N.B. v. N.Y.C. Dep't of Educ.*, ___ F. App'x ___ (2d Cir. Oct. 10, 2017) (affirming the ruling in favor of the district); *Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N.*, 2017 WL 4641219 (S.D.N.Y. Oct. 13, 2017); *Montgomery Cty. Intermediate Unit No. 23 v. C.M.*, 2017 WL 4548022 (E.D. Pa. Oct. 12, 2017); *Methacton Sch. Dist. v. D.W.*, 70 IDELR ¶ 247 (Oct. 6, 2017) (affirming the ruling in favor of the parents); *S.M. v. Hendry Cty. Sch. Bd.*, 2017 WL 4417070 (M.D. Fla. Oct. 5, 2017); *Denny v. Bertha-Hewit Pub. Sch.*, 70 IDELR ¶ 220 (D. Minn. Sept. 29, 2017) (affirming the ruling in favor of the district); *S.B. v. N.Y.C. Dep't of Educ.*, 70 IDELR ¶ 221 (S.D.N.Y. Sept. 28, 2017) (reversing the ruling that had been in favor of the district).

³⁰ These cases are designated as marginal in the Comments column of Table 1.

³¹ See *supra* text accompanying notes 23–25.

thus not extending rulings on other issues.³² Within this limited scope, the tabulation consisted of not only the judicial outcome in relation to the hearing officer's ruling³³ but also the *Rowley* benefit variation in the hearing officer's jurisdiction and the decisional factors that the reviewing court applied in its ruling.³⁴

Results of the Analysis

Table 1 consists of the following columns: (1) the citation for the court's decision, (2) the date of the court's decision, (3) the prior benefit variation in the jurisdiction,³⁵ (4) the outcome effect based on the specified options,³⁶ and (4) the decisional factors and other abbreviated comments.³⁷ For the outcome-effect column, "D" refers to the district, and "P" refers to the

³² *E.g.*, *C.D. v. Natick Pub. Sch. Dist.*, 70 IDELR ¶ 120 (D. Mass. 2017) (remanding the LRE ruling); *Davis v. District of Columbia*, 244 F. Supp. 3d 27, 346 Ed.Law Rep. 859 (D.D.C. 2017) (reversing evaluation ruling and remanding eligibility ruling).

³³ At the hearing officer level, the substantive FAPE ruling was either in favor of the school district or, in a few cases, in favor of the parent. At the reviewing court level, the outcome was one of three options: affirmance, remand, or reversal.

³⁴ Although not a bright line, this part of the tabulation was limited to factors from *Andrew F.*, other than its holding, that the reviewing court cited in the relevant conclusions, not merely in the background section, of its opinion.

³⁵ *See supra* note 10 and accompanying text. The entry in Table 1 is parenthetical if the court decision did not provide this information specifically for the hearing officer's decision but it was either inferable based on the established precedent or otherwise expressly identified in the opinion.

³⁶ *See supra* note 33.

³⁷ The decisional factors consisted of the aforementioned analytical framework and dicta. *See supra* notes 14–22 and accompanying text. For the analytical framework, the entry was "LRE distinction" in light of its basis in the least restrictive environment (LRE) continuum of the IDEA. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.115. The *Andrew F.* Court more specifically drew the line between "fully integrated" placements and those that are not fully integrated. *See supra* note 14. However, this term is not particularly precise. For example, *Andrew F.* based its reference to "fully integrated" on the factual context of *Rowley*. Yet, Amy Rowley's IEP provided for separate instruction from a tutor for the deaf for one hour per day in addition to three hours per week with a speech therapist. *Bd. of Educ. v. Rowley*, 458 U.S. at 184. Thus, the foregoing description of the analytical framework uses the more approximate categories of integrated and segregated, subject to more refined line drawing if indeed the LRE distinction emerges as a significant factor in post-*Andrew F.* rulings.

parent. Moreover, for the two-tier jurisdictions,³⁸ the pre-*Andrew F.* baseline ruling was that of the review officer.

[INSERT TABLE 1 APPROXIMATELY HERE]

In relation to the primary question,³⁹ Table 1 reveals that in only two (6%) of the relevant⁴⁰ thirty-three cases and thirty-four rulings⁴¹ during the ensuing six-month period did *Andrew F.* have a game-changing effect. Moreover, this effect was limited to a remand⁴² of a ruling previously in the district’s favor,⁴³ and a reversal—oddly enough—of a ruling previously in the parent’s favor.⁴⁴ The other thirty-two rulings included, beyond those where the court upheld the ruling in favor of the district, five rulings where the court upheld the ruling in favor of the parent. Finally, in three of the cases, the court expressly concluded that the *Andrew F.* standard was not substantively different from the previous standard in the “meaningful” benefit

³⁸ The IDEA provides states with the option of a one- or two-tier system, starting with an impartial hearing officer. 20 U.S.C. § 1415(g) (2013). A small and dwindling number of states, including the active jurisdiction of New York, retain a review officer tier. See, e.g., Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL’Y STUD. 3, 5 (2010).

³⁹ See *supra* text accompanying note 23.

⁴⁰ For the identification and application of the criteria for relevance, see *supra* notes 26–30 and accompanying text.

⁴¹ As identified in the Table, one case, *G.S. v. Fairfield Bd. of Educ.*, 70 IDELR ¶ 93 (D. Conn. 2017), contained two relevant rulings, thus bringing the overall total to thirty-four.

⁴² Indeed, as recognized in the previous article, Zirkel *supra* note 12, *Andrew F.* also fit within this category, which could ultimately result in a relevant ruling for either party or in a settlement.

⁴³ This Ninth Circuit decision, *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 343 Ed.Law Rep. 694 (9th Cir. 2017), was questionable—as the entry in the Comments column in the Table shows—in its translation of the *Andrew F.* standard, because the Court appeared to reject using the performance of nondisabled peers as the reference point for appropriate progress. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. at 1001.

⁴⁴ This unpublished district court decision, *Bd. of Educ. of Albuquerque Pub. Sch. v. Maez*, 70 IDELR ¶ 157 (D.N.M. 2017), was questionable—as the entry in the Comments column in the Table shows—in its use of “meaningful” as the applicable standard under *Andrew F.*

jurisdictions.⁴⁵

In relation to the secondary questions,⁴⁶ Table 1 reveals that (1) the jurisdiction’s previous variation of *Rowley*’s substantive standard did not appear to make a notable difference, although this conclusion has various limitations,⁴⁷ and (2) as shown in the Comments column, the use of the analytical framework and various dicta in *Andrew F.* was rather limited in these thirty-three cases, with the LRE distinction and/or the “appropriately ambitious” language being the most frequent of the identified options.⁴⁸ An option not extracted from the previous article, although afforded secondary attention therein,⁴⁹ was the use of the child’s “potential” as one of the circumstances that the *Andrew F.* Court intended.⁵⁰ Other entries noted in the Comments column beyond the lower courts’ universal use of the holding and their variable use of the features identified in this exploratory study’s design⁵¹ include (1) the questionable translations of

⁴⁵ *Sean C. v. Oxford Area Sch. Dist.*, 70 IDELR ¶ 146 (E.D. Pa. 2017); *C.D. v. Natick Pub. Sch. Dist.*, 70 IDELR ¶ 120 (D. Mass. 2017); *E.D. v. Colonial Sch. Dist.*, 69 IDELR ¶ 245 (E.D. Pa. 2017). As the entries for these cases makes clear, the first and last cases were in the same jurisdiction, with the more recent citing the earlier one for this conclusion.

⁴⁶ See *supra* text accompanying notes 24–25.

⁴⁷ First, the pre-existing variation was not clear in a substantial minority of the case opinions. Second, the variance in the outcome change was so restricted as to make any such significant difference undetectable. Third, the characterizations of “meaningful” may have masked any such difference in the remaining jurisdictions. See *supra* notes 46–47.

⁴⁸ However, the courts’ treatment of these features of *Andrew F.* was notably devoid of depth and nuance. At the next level of frequency were references to the deference and stagnation dicta.

⁴⁹ See Zirkel, *supra* note 12, at 550 (speculating that the relevant factors may include the child’s potential) and 552 (observing that the application of this factor may be problematic).

⁵⁰ See the Comments column entries for the following cases in order of their appearance in the Table: *M.C. v. Antelope Valley Union High Sch. Dist.*, *K.D. v. Downingtown Area Sch. Dist.*, and *Barney v. Akron Bd. of Educ.*

⁵¹ See *supra* text accompanying notes 33–34.

Andrew F. (designated in the Table by a question mark in brackets)⁵² and (2) the initial and limited recognition of the applicability of its new substantive standard to the second appropriateness step of tuition reimbursement analysis.⁵³

Discussion of the Findings

The objectively clear but duly cautious conclusion is that *Andrew F.* has thus far proven to be far from a “game-changer” at least in its common meaning making a significant outcome difference. Such attributions, including that of the current head of the U.S. Department of Education, Betsy DeVos, characterizing *Andrew F.* as “a major victory for students with disabilities and their parents,”⁵⁴ at this point amount to mere hyperbole. Indeed, the net effect on outcomes in the several cases in the period after *Andrew F.* that provide both a pre- and post-outcome, has been either neutral or very slightly in the district’s favor.⁵⁵ The period that provides such baseline adjudications has not ended but it is limited, extending only to the point of time lag between the final administrative adjudication⁵⁶ and the subsequent judicial review.⁵⁷

⁵² See the Comments column entries for the following cases in order of their appearance in the Table: *Quakertown Cmty. Sch. Dist. v. T.M., M.C. v. Antelope Valley Union High Sch. Dist., E.R. v. Spring Branch Indep. Sch. Dist., Bd. of Educ. of Albuquerque Pub. Sch. v. Maez, and Barney v. Akron Bd. of Educ.*

⁵³ This step, as originally set forth in *Burlington and Carter*. See *supra* note 4. The full analysis, in light of the 2004 amendments of the IDEA, includes equitable factors as threshold and final steps. See, e.g., Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785 (2012).

⁵⁴ Valerie Straus, *The Deep Irony in Betsy DeVos’s First Speech on Special Education*, WASH. POST, July 18, 2017, https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/18/the-deep-irony-in-betsy-devoss-first-speech-on-special-education/?utm_term=.ffd15a9d27a2

⁵⁵ See *supra* notes 44–47 and accompanying text.

⁵⁶ In this context, such adjudication refers to the hearing officer’s or, in the limited number of to –tier jurisdictions, the review officer’s decision.

⁵⁷ Of course, the longer, but limited period, may include outcomes change for any of the thirty-three cases that are subjected to appeal.

Contributing to this lack of outcomes change is the general trend, at least partially attributable to the judicial deference emphasized in *Rowley* and repeated in *Andrew F.*, of limited and district-skewed decisional change from the hearing officer to the final judicial stage.⁵⁸

The lack of a notable difference between the “some” and meaningful” benefit pre-existing standards is attributable not only to the aforementioned⁵⁹ limitations but also their effectively undifferentiated application in the first place.⁶⁰ Similarly, the lack of in-depth disciplined use of the various identified potential decisional factors in the *Andrew F.* opinion⁶¹ fits with not only individualized of its context and content but also the non-specialized and congested nature of our courts.

The future effect of *Andrew F.* remains predictably unpredictable. It is not likely to point in a markedly parent-favorable or, in the obverse, direction. Its various dicta are largely Rorschach-like cryptic and ambiguous indicators that courts may interpret in different directions. The frequent references to “appropriately ambitious,” like the holding’s use of “appropriate,” will depend on the adjudicator’s perception of the individual circumstances.

This initial empirical research both warrants and invites follow-up analyses both of a quantitative and qualitative nature. The suggested studies should extend to (1) a longer period,

⁵⁸ See, e.g., Cathy Skidmore & Perry A. Zirkel, *Judicial Appeal of Hearing Officer Rulings: The Extent and Direction of Decisional Change*, __ J. DISABILITY POL’Y STUD. (forthcoming 2018).

⁵⁹ See *supra* note 49.

⁶⁰ E.g., Wenkart, *supra* note 10, at 3 (“[The use of these two terms] does not appear to create different substantive standards or lead to different results”) and 29 (“There appears to be little substantive difference between the use of these two terms”).

⁶¹ This trend extends to the imprecise treatment of the holding of *Andrew F.* See *supra* note 52 and accompanying text.

and (3) hearing and review officer decisions, and (3) additional questions.⁶² Suggested additional questions, for example, are: (a) What are the specific circumstances that will become significant in the application of this individualized, ad hoc standard?;⁶³ (b) Will the LRE distinction become a more precise factor?⁶⁴; (c) Will *Endrew F.* extend the use of the so-called “snapshot standard” to more jurisdictions?⁶⁵; and (d) How will the lower courts in the longer run square *Endrew F.*’s progress standard with the benefit basis of the IDEA definition of related services⁶⁶ and its second, substantive step of procedural denials of FAPE?⁶⁷ In any event, the Supreme Court’s *Endrew F.* decision merits more careful analysis than the initial rhetoric.⁶⁸

⁶² For example, for filings for impartial hearings after March 22, 2017, the parties will be starting with a blank slate in terms of preparing the factual record. Although these lower court decisions may have an otherwise restraining effect on their arguments, the parties’ attorneys may shape the record to focus on factors not present in the already established records of the cases in the foregoing analysis. E-mail from Thomas Mayes, Special Education Attorney, Iowa Department of Education, to Professor Zirkel (Oct. 23, 2017, 10:45 EST) (on file with author).

⁶³ The aforementioned thus far cursory use of the child’s potential is an initial example. See *supra* notes 49–50 and accompanying text.

⁶⁴ For example, how will it be applied to the many students with disabilities who are in placements that are neither fully integrated nor fully segregated? See *supra* note 38.

⁶⁵ See, e.g., Perry A. Zirkel, *The “Snapshot” Standard under the IDEA*, 269 Ed.Law Rep. 455 (2011).

⁶⁶ 20 U.S.C. § 1401(26)(A) (2013).

⁶⁷ *Id.* § 1415(f)(3)(E)(iii).

⁶⁸ Even the scholarship during the initial six-month aftermath of *Endrew F.* is limited in amount and objectivity. For example, in one of the very few legal analyses to date, the authors diagnose the effect of *Endrew F.* as an increase in ABA lawsuits for children with autism and prescribe behavior intervention plans (BIPs) as the solution. Janet Decker & Sarah Hurwitz, *Post-Endrew Legal Implications for Students with Autism*, 344 Ed.Law Rep. 31, 38, 40 (2017). Yet, the Supreme Court’s ruling was in no way limited or specific to students with autism, much less ABA methodology, and the unappealed Tenth Circuit ruling was the lack of a BIP, in the absence of a disciplinary change in placement, “did not violate any provision of the IDEA or its implementing regulations.” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1337, 321 Ed.Law Rep. 629 (10th Cir. 2015). The unpublished federal district court decision in *Paris Sch. Dist. v. A.H.*, 69 IDELR ¶ 243 (W.D. Ark. 2017), which is in the Table, does not change this conclusion for several reasons, including that (a) it was specific to appropriateness, not entitlement to an BIP, (b) the hearing officer already concluded that it failed the less demanding “some” benefit test, and (c) other post-*Endrew F.* cases (*N.G. v. Tehachapi Unified Sch. Dist.*, *C.M. v. Warren Indep. Sch. Dist.*, and *Sean C. v. Oxford Area Sch. Dist.*) and continued the overall entitlement trend of

Table 1. Relevant Judicial Rulings in the Six Months after *Endrew F.*

Case Citation	Decision Date	Benefit Jurisdiction	Outcome Effect	Comments
1. <i>Davis v. District of Columbia</i> 244 F. Supp. 3d 27 (D.D.C. 2017)	3/23	("some")	D - upheld	appropriately ambitious/challenging objectives (w/o LRE distinction)
2. <i>Brandywine Heights Area Sch. Dist. v. B.M.</i> , 248 F. Supp. 3d 618 (E.D. Pa. 2017)	3/28	"meaningful"	D - upheld	LRE distinction: appropriately ambitious, challenging objectives
3. <i>C.D. v. Natick Pub. Sch. Dist.</i> , 69 IDELR ¶ 213 (D. Mass. 2017) 70 IDELR ¶ 120 (D. Mass. 2017)	[3/28] 7/21	unclear "meaningful"	[D - remanded] D - upheld	not materially different at least for this ca
4. <i>A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist.</i> , 69 IDELR ¶ 210 (S.D.N.Y. 2017)	3/29	unclear	D - upheld	
5. <i>E.D. v. Colonial Sch. Dist.</i> , 69 IDELR ¶ 245 (E.D. Pa. 2017)	3/31	"meaningful"	D - upheld	not substantively different; LRE distinction annual promotion/passing marks
6. <i>Paris Sch. Dist. v. A.H.</i> , 69 IDELR ¶ 243 (W.D. Ark. 2017)	4/3	unclear	P - upheld	limited to behavior plans (possible higher entitlement); stagnation
7. <i>K.M. v. Tehachapi Unified Sch. Dist.</i> , 69 IDELR ¶ 241 (E.D. Cal. 2017)	4/5	unclear	D - upheld	
8. <i>N.G. v. Tehachapi Unified Sch. Dist.</i> , 69 IDELR ¶ 279 (E.D. Cal. 2017)	4/12	unclear	D - upheld	marginal case (largely focused on FBA-entitlement issue)
9. <i>C.M. v. Warren Indep. Sch. Dist.</i> , 69 IDELR ¶ 282 (E.D. Tex. 2017)	4/18	("meaningful")	D - upheld	LRE distinction
10. <i>T.M. v. Quakertown Cmty. Sch. Dist.</i> , 69 IDELR ¶ 276 (E.D. Pa. 2017)	4/19	("meaningful")	D - upheld	"the benefit must be substantial, not minimal"[?]; judicial deference
11. <i>D.B. v. Ithaca Sch. Dist.</i> , 690 F. App'x 778 (2d Cir. 2017)	5/23	unclear	D - upheld	marginal case (peripheral mention in short opinion)
12. <i>E.G. v. Great Valley Sch. Dist.</i> , 70 IDELR ¶ 3 (E.D. Pa. 2017)	5/23	("meaningful")	D - upheld	cogent justification
13. <i>M.C. v. Antelope Valley Union High Sch. Dist.</i> , 858 F 3d 1189 (9th Cir. 2017)	5/30	"meaningful"	D - remanded	"taking into account the progress of his disabled peers[?] and the child's potentia

14. <i>E.R. v. Spring Branch Indep. Sch. Dist.</i> , 2017 WL 3017282 (S.D. Tex. 2017) ⁶⁹	6/15	unclear	D - upheld	“meaningful”[?]; appropriately ambitious LRE distinction); applied to § 504[?]
15. <i>C.G. v. Waller Indep. Sch. Dist.</i> , 697 F. App’x 816 (5th Cir. 2017)	6/22	unclear	D - upheld	appropriately ambitious (w/o LRE distinc
16. <i>Albright v. Mountain Home Sch. Dist.</i> , 70 IDELR ¶ 95 (W.D. Ark. 2017)	7/5	(“some”)	D - upheld	
17. <i>Parker v. W. Chester Area Sch. Dist.</i> , 70 IDELR ¶ 94 (E.D. Pa. 2017)	7/6	(“meaningful”)	D - upheld	judicial deference; LRE distinction (grad promotion)
18. <i>G.S. v. Fairfield Bd. of Educ.</i> , 70 IDELR ¶ 93 (D. Conn. 2017)	7/7	unclear	P-upheld (yr.1) D-upheld (yr.2)	applicable to Step 2 of tuition reimburse
19. <i>I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Sch.</i> , 863 F.3d 966 (8th Cir. 2017)	7/14	(“some”)	D - upheld	marginal case (largely focused on state la no guarantee
20. <i>Avaras v. Clarkstown Cent. Sch. Dist.</i> , 70 IDELR ¶ 129 (S.D.N.Y. 2017)	7/17	unclear	P – upheld (review officer)	not applied at Step 2 of tuition reimburse
21. <i>Dallas Indep. Sch. Dist. v. Woody</i> , 865 F.3d 303 (5th Cir. 2017)	7/27	unclear	P - upheld	marginal case (largely focused on timing IEP offer)
22. <i>Unknown Party v. Gilbert Unified Sch. Dist.</i> , 70 IDELR ¶ 131 (D. Ariz. 2017)	7/31	(“meaningful”)	D - upheld	odd posture (parents sought easier progra district using <i>Andrew F</i> ’s higher std.); sta
23. <i>Bd. of Educ. of Albuquerque Pub. Sch. v. Maez</i> , 70 IDELR ¶ 157 (D.N.M. 2017)	8/1	(“some”)	D - rev’d P	no guarantee; cogent justification; approp ambitious (LRE distinction); “meaningfu
24. <i>J.R. v. N.Y.C. Dep’t of Educ.</i> , 70 IDELR ¶ 151 (S.D.N.Y. 2017)	8/9	“meaningful”	D - upheld (review officer)	appropriately ambitious (LRE distinction
25. <i>Benjamin A. v. Unionville-Chadds Ford Sch. Dist.</i> , 70 IDELR ¶ 150 (E.D. Pa. 2017)	8/14	“meaningful”	D - upheld	
26. <i>Sean C. v. Oxford Area Sch. Dist.</i> , 70 IDELR ¶ 146 (E.D. Pa. 2017)	8/14	“meaningful”	D - upheld	not ideal; LRE distinction (grades/promo not substantively different (citing <i>Coloni</i>
27. <i>M.L. v. Smith</i> , 867 F.3d 487 (4th Cir. 2017)	8/15	(“some”)	D - upheld	declines to address effect except “circum does not include child’s religion
28. <i>F.L. v. Bd. of Educ. of Great Neck U.F.S.D.</i> , F. Supp. 3d (S.D.N.Y. 2017)	8/15	“meaningful”	D - upheld (review officer)	

⁶⁹ The court subsequently summarily adopted this magistrate’s recommended decision. 2017 WL 3016952 (S.D. Tex. July 15, 2017).

29. <i>J.R. v. Smith</i> , 70 IDELR ¶ 178 (D. Md. 2017)	8/21	unclear	D - upheld	
30. <i>K.D. v. Downingtown Area Sch. Dist.</i> , 70 IDELR ¶ 203 (E.D. Pa. 2017)	9/1	“meaningful”	D - upheld	LRE distinction; “potential” factor; defer not substantive different from meaningfu
31. <i>Pocono Mountain Sch. Dist. v. J.W.</i> , 70 IDELR ¶ 200 (E.D. Pa. 2017)	9/8	(“meaningful”)	P - upheld	stagnation – passing grades here not the c in light of circumstances, including child
32. <i>Tamalpais Union High Sch. Dist. v. D.W.</i> , F. Supp. 3d (N.D. Cal. 2017)	9/21	unclear	D - upheld ⁷⁰	appropriately ambitious (w/o LRE distinc
33. <i>Barney v. Akron Bd. of Educ.</i> , 70 IDELR ¶ 227 (N.D. Ohio 2017)	9/22	unclear	D - upheld (review officer)	appropriately ambitious (w/o LRE distinc “appropriate based on the ... child’s pote

⁷⁰ The hearing officer addressed three IEPs, ruling for the parent for one of them. However, the court only used *Andrew F.* in its rejection of the parent’s challenge to one of the other two, not for its rejection of the district’s challenge to the third.