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Education Law into Practice

Perry A. Zirkel, Ph.D., J.D., LL.M.^{aa1}

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WHICH PROGRESS INDICATORS DO COURTS USE IN APPLYING THE *ENDREW F.* SUBSTANTIVE STANDARD FOR FAPE UNDER THE IDEA?^{a1}

The central obligation under the Individuals with Disabilities Education Act (IDEA)¹ is to provide each eligible child with a “free appropriate public education” (FAPE).² In turn, the substantive dimension of FAPE is fundamental.³ In March 2017, the Supreme Court in *Endrew F. v. Douglas County School District RE-1*⁴ refined the substantive standard for FAPE to require the school district to offer an individualized education program (IEP) that is “reasonably calculated to enable a child to *make progress appropriate in light of the child's circumstances.*”⁵ Yet, the Court declined to provide any elaboration or examples of this progress-oriented standard.⁶

As a result, the focus gravitates to the tangible meaning of appropriate progress.⁷ More specifically, which indicators do courts use in applying the *Endrew F.* standard of progress that is appropriate for the child's individual circumstances?⁸ In this context, “indicators” *2 refer to educational measures such as grades and promotion, standardized and other test results, and various other evidence of academic, behavioral, and functional advancement.⁹ Depending on the specific circumstances in the case, including the combination and reliability of these indicators, the direction and degree of these evidentiary measures may or may not establish the requisite progress.¹⁰

Method

To answer the aforementioned question,¹¹ the first step was identifying the lower court decisions that cited the Supreme Court's decision in *Endrew F.* The “Citing References” feature of Westlaw identified 461 cases decided by March 21, 2022.¹² The second step was to use the “History” feature of Westlaw to determine the latest decision in the case that addressed the substantive FAPE issue. In those cases that affirmed the lower court's ruling on this issue without specifically addressing the progress-indicators question, the analysis was based on the earlier decision, but the affirmance was included in the citation for the case.¹³ The third step was for the author to review each decision, focusing on the part(s) of the court opinion that cited *Endrew F.* and the section of the opinion in which the court provided its legal conclusions as applied to the facts of the case.¹⁴ The decision was eliminated from the original pool of 461 cases if this culminating section of the court opinion (a) did not address the substantive standard for FAPE or, if it did address this issue, (b) did not identify “progress indicators”¹⁵ in its determination of this FAPE issue.¹⁶ As a result, fifty-eight (13%) of the original pool of cases qualified for analysis. The final step was tabulating the use of each progress indicator by category and the overall outcome of applying the *Endrew F.* standard, with the supplemental clarification of explanatory notes.¹⁷

Results

The Appendix provides the fifty-eight judicial rulings in rows that are in approximate chronological order. The first pair of columns provide the parties' names and the remainder *3 of the citation for each case.¹⁸ The next four columns, which were numbered for supplemental clarifications in the Comments column, were 1) grades or promotion; 2) standardized tests; 3) other tests, such as non-standardized curriculum-based assessments; and 4) miscellaneous indicators, including progress reports and related testimony.¹⁹ The entries in these columns were Xs, including those in parentheses for indicators that were only implicit in the cited court opinion.²⁰ Next, the "Outcome" column contained the ruling specific to the substantive FAPE claim via the following abbreviations: SD = in favor of the school district and P = in favor of the parents.²¹ Finally, the Comments column contains three categories of abbreviated content: (a) the clarifications of the aforementioned asterisks;²² (b) the explanations for the case entries for the numbered columns;²³ and (c) more general outcome-related observations, such as failure-to-implement (FTE) or other distinguishable FAPE rulings, or the use of the various dicta in the *Andrew F.* decision.²⁴

A review of the entries in the Appendix reveals several significant findings. First, based on the overall tabulation of the outcomes column, the distribution of these fifty-eight FAPE rulings was as follows: fifty-one (88%) for the school district and seven (12%) for the parents. The parents' limited success tended to increase within the most recent years of this post-*Andrew F.* period, which was five years in length.²⁵ However, as the Comments column's final notes reveal,²⁶ the majority of the rulings in favor of parents were attributable in part to evidence of violations beyond the progress indicators.

Second, the most frequent progress indicators identified as decisional factors in these rulings were grades, standardized tests, and progress reports.²⁷ However, in various cases the other measures outweighed standardized test results that were reported as percentiles or other *4 normed scores based on the *Andrew F.* focus on the individual child rather than peers or even grade levels.²⁸

Third, the courts' conception of "objective" indicators is broad and not nuanced as compared with the disciplined standards in the education profession.²⁹ Whether for grades at one end of the range of the identified indicators or progress reporting at the other end, the *subjective* judgment of district professionals, especially in their expert testimony in interpreting the multiple sources of progress data appears to be the preeminent, or most influential, evidence.³⁰

Finally, being so frequent that they do not appear in the Appendix, the most common dicta that these court rulings cite from *Andrew F.* are the fact-intensive nature and reasonable rather than optimal level of its standard.³¹ As noted in the Comments column of the Appendix, other frequent, although not predominant, cited dicta³² include judicial deference to school authorities³³ and, to a lesser extent, the particular circumstances of an integrated setting³⁴ and the child's disability.³⁵

*5 Discussion

Perhaps the most significant finding of this post-*Andrew F.* caselaw analysis was the relatively scant attention given to the indicators of progress. Only 13% of the court decisions that cited *Andrew F.* identified one or more progress indicators in applying its substantive standard for FAPE, and, as the Appendix shows, several of these cases were either marginal in their inclusion or cursory in their treatment of this part of its substantive standard for FAPE.

The reasons for the wide disparity between the profession's specificity interest in assessing "appropriate progress" under *Andrew F.* and the lower courts' scant identification in applying this cryptic standard are several. First, approximately half of the 461 cases that cited *Andrew F.* did so merely in the distant background of the court opinion due to its central stellar status in the limited constellation of Supreme Court decisions under the IDEA.³⁶ Second and more significantly, in the clear majority of

the remaining cases, the courts applied its substantive standard for FAPE without identifying specific progress indicators. Their absence is due in part to the “reasonably calculated” part of its standard, including the express recognition of the “prospective judgment” aspect of this calculation.³⁷

As a result of this “snapshot” approach, which focuses the judicial application on what the IEP team knew or had reason to know upon formulating the IEP for the child,³⁸ evidence showing the extent of actual progress during the course of the subsequent year is of limited significance.³⁹ Instead, in the vast majority of the cases that apply the *Endrew F.* substantive standard, the primary decisional factors are the tangible dimensions of the snapshot--the particular placement of the child, including the nature and extent of the services to the child, in relation to the child's identified needs, including the results of the evaluation/reevaluation and the present educational levels in the IEP.⁴⁰

The scant attention to progress indicators is also attributable in part to the filtering process for judicial decision-making in IDEA cases. In the multi-level adjudicative process *6 for the IDEA, the primary locus of fact-finding is at the due process hearing.⁴¹ At that initial level, districts have a distinct advantage in terms of specialized counsel⁴² and expert witnesses.⁴³ By the time the case reaches the court, after the decision at the hearing officer level and in the relatively few jurisdictions with a second tier, at the review officer level,⁴⁴ many of the factual specifics have been filtered out with overall deference to the hearing officer's findings.⁴⁵ Inasmuch as the judges are generalists, the filtration not only screens out many of the nuances, such as the measurement data about the individual child and the extent of the child's progress, but also results in a skewed selection and interpretation of these indicators based on the imbalance of the specialized information at the initial level.⁴⁶

The next major overall finding in this analysis is the pronounced skew in the outcomes of the fifty-eight relevant rulings. The 88%-12% ratio in favor of school districts is attributable in part to *Endrew F.*'s refined reiteration of the long-standing trend of judicial deference for school authorities,⁴⁷ but also the reasonable-calculation application of its amorphous appropriate progress standard.⁴⁸ Indeed, consonant with the reasonable-calculation component of the applicable standard,⁴⁹ these pro-district rulings included cases where the progress indicators showed only slow and fragmented progress.⁵⁰ Empirical *7 analyses of the *Endrew F.* progeny that were not limited to the identification of progress indicators have revealed a similar district-skewed and relatively relaxed application of its substantive standard.⁵¹

The subsidiary findings about the frequency of the progress indicators merely confirm that beyond *Endrew F.*'s refined reiteration of grades and promotion as a general but not absolute metric,⁵² the importation of standardized and other test scores and progress reports aligns with the prevailing practice in the preparation and implementation of IEPs. Similarly, the court's weighting of these indicators, often as supplementary or subordinate to the applicable tailoring of the IEP placement and services,⁵³ is part and parcel of the overall filtering process of judicial decision-making under the IDEA, with the preeminent position among the indicators often being the testimony of school authorities.⁵⁴

The bottom-line message is to put *Endrew F.*, like other IDEA judicial precedents, in perspective. Avoid the inflated and well-intentioned misconceptions that at times appear in the professional literature⁵⁵ or governmental pronouncements,⁵⁶ and that fuse or confuse professional best-practice norms with minimum judicial requirements for FAPE under the IDEA.⁵⁷ Instead of looking to the Supreme Court to identify with specificity and prioritize the indicators of appropriate progress, special education professionals should, with due differentiation, (a) inform the courts and policymakers in the formulation and application of the substantive standard for FAPE, and (b) promote best-practices in collaboration with parents and other stakeholders in aiming for and achieving improved outcomes for students with disabilities.

***8 Appendix: Use of Progress Indicators in Post-*Endrew F.* Judicial Rulings for Substantive FAPE**

		1	2	3	4		
Case Name	Citation	Grades - Prom.	Stdzd. Tests	Other Tests	Misc.	Outcome	Comments
A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist.	69 IDELR ¶ 210 (S.D.N.Y. 2017)	(X)	(X)		X	SD	1-promotion; 2-grade level exc. reading; 4-progress reports, incl. fulfilling 3 of 11 goals
E.D. v. Colonial Sch. Dist.	69 IDELR ¶ 245 (E.D. Pa. 2017)	X			X	SD	1-passing grades; 4-worksheet (behavior); nature of disability + fully integrated
T.M. v. Quakertown Cmty. Sch. Dist.	251 F. Supp. 3d 792 (E.D. Pa. 2017)		X		X	SD	2-various standardized tests (acad.); 4-progress reports (behavior-socialization) + teachers' testimony > private expert
E.G. v. Great Valley Sch. Dist.	70 IDELR ¶ 3 (E.D. Pa. 2017)		X	X		SD	2,3-WADE, MAP, AIMSweb although "maddingly slow and stagnation" due to Wilson skills > grade level and Wilson time
Parker C. v. W. Chester Area Sch. Dist.	70 IDELR ¶ 94 (E.D. Pa. 2017)	X	X			SD	1-grades - not inflated; 2-WJTJ-IV achievement tests, incl. Flynn effect
Bd. of Educ. of Albuquerque Pub. Schs. v. Maez	70 IDELR ¶ 57 (D.N.M. 2017)				X	SD	4-teacher observations; <i>Endrew F.</i> lens of "present level of achievement, disability, and potential for growth" [marginal case]
J.R. v. Smith	70 IDELR ¶ 178 (D. Md. 2017)				X	SD	4-behavioral records - improvement; distinguished <i>Endrew F.</i> dicta re "pretty much the same" program [marginal case]
Renee J. v. Hous. Indep. Sch. Dist.	333 F. Supp. 3d 674 (S.D. Tex. 2017)*	X			X	SD	* <i>aff'd on other grounds</i> , 913 F.3d 523 (5th Cir. 2019); 1-passing grades; 4-teachers' testimony re academics and behavior
Mr. P v. W. Hartford Bd. of Educ.	885 F.3d 735 (2d Cir. 2018)	X	X			SD	1-grades, promotion; 2-state proficiency exam; judicial deference

Rosaria M. v. Madison City Bd. of Educ.	325 F.R.D. 429 (N.D. Ala. 2018)	X	X	X		SD	1-passing; 2-state proficiency exam; 3-Fry, SPIRE; not fully integrated + limited time
C.S. v. Yorktown Cent. Sch. Dist.	72 IDELR ¶ 7 (S.D.N.Y. 2018)		X	X	X	SD	2-DAZE/DIBELS, Reading A-Z; 4-progress reports, teacher testimony; lower expectation based on disability & history
Jack J. v. Coatesville Area Sch. Dist.	72 IDELR ¶ 54 (E.D. Pa. 2018)	X			(X)	SD	1-grades; 4-secondarily, progress reports [marginal case]
M.L. v. Smith	72 IDELR ¶ 218 (D. Md. 2018)	X			X	SD	1-report card; 4-progress reports + teacher testimony; judicial deference [marginal case]
F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist.	735 F. App'x 38 (2d Cir. 2018)		X			SD	2-despite being slow and mixed (+ private evaluator's regression results); <i>Andrew F.</i> dictate promotion exception when in non-integrated context
S.M. v. Arlotto	73 IDELR ¶ 74 (D. Md. 2018)	X			X	SD	1-report cards + promotion; 4-district witnesses
K.D. v. Downingtown Area Sch. Dist.	904 F.3d 248 (3d Cir. 2018)		(x)	(x)		SD	2,3-slow fragmented progress (cross-referring to lower court specifics); lower potential + majority of day segregated [marginal case]
Carr v. New Glarus Sch. Dist.	73 IDELR ¶ 36 (W.D. Wis. 2018)	X				SD	1-improved grades
Sean C. v. Oxford Area Sch. Dist.	751 F. App'x 220 (3d Cir. 2018)	X			(x)	SD	1-improvement from failing to passing grades (referring to lower court, which also noted progress on IEP goals + improved behavior
Candi M. v. Riesel Indep. Sch. Dist.	379 F. Supp. 3d 570 (W.D. Tex. 2019)	X	X		X	SD	1-passing grades w. accommodations; 2-state proficiency exam; 4-progress reports
Mr. G. v. Canton Bd. of Educ.	74 IDELR ¶ 8 (D. Conn. 2019)	X	X	X	X	SD	1-honor roll; 2-decreased standard scores not necessarily violative; 3,4-Wilson (WADE) + staff testimony

D.F. v. Smith	74 IDELR ¶ 75 (D. Md. 2019)				X	SD	4-progress reports, though only fulfilling one goal in two years; autism may result in inconsistent rather than linear progress + judicial deference
E.P. v. N. Arlington Bd. of Educ.	74 IDELR ¶ 80 (D.N.J. 2019)	X			X	SD	1,4-teacher testimony + "progress reports, report cards, work samples, and other evaluations"; lack of cogency as harmless procedural error
Albright v. Mountain Home Sch. Dist.	926 F.3d 942 (8th Cir. 2019)		X		X	SD	2-mixed but improving; 4-district expert testimony (contracted BCBA)
C.B. v. Smith	74 IDELR ¶ 230 (D. Md. 2019)		X	X	X	SD	2,3-W-J Reading and confirming tutor testing; 4-expert witness testing; same goals but increasing objectives
Morrison v. Perry Sch. Dept	2019 WL 3035283 (D. Me. 7/11/19)*		X	X	X	SD	<i>*adopted</i> , 2019 WL 3502879 (8/1/19); 3,4-various test results + teacher testimony holistically + declining <i>les as only slower progress than peers</i>
Gaston v. District of Columbia	74 IDELR ¶ 248 (D.D.C. 2019)	X			X	P	1,4-downward spiral in grades & disciplinary incidents; insuff. revisions at relevant snapshots (tho' rectified several mos. later) - not cogent explanation.
R.F. v. S. Lehigh Sch. Dist.	74 IDELR ¶ 292 (E.D. Pa. 2019)	X	X			SD	1-passing grades; 3-test scores in average range > private expert's test scores
L.B. v. Kyrene Elem. Sch. Dist.	75 IDELR ¶ 44 (D. Ariz. 2019)				X	SD	4-behavioral data - minor discrepancies but teacher qualitative testimony [marginal case]
Perkiomen Valley Sch. Dist.	405 F. Supp. 3d 620 (E.D. Pa. 2019)			X		SD	3-ATMSweb [marginal case]
AR v. Katonah Lewisboro Union Free Sch. Dist.	75 IDELR ¶ 187 (S.D.N.Y. 2019)	X	X		X	SD	1,2,4-report cards + progress reports > standardized tests (WJTA) due to percentile issue; "objective indications of progress"
A.A. v. Northside Indep. Sch. Dist.	951 F.3d 678 (5th Cir. 2020)				X	SD	4-progress reports + teacher testimony

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T.L. v. Florence Indep. Sch. Dist.	2020 WL 4434928 (W.D. Tex. 7/31/20)	X	X	X	X	SD	1-grades; 2-state proficiency exam; 4-progress reports
Wong v. Bd. of Educ.	478 F. Supp. 3d 229 (D. Conn. 2020)	X			X	SD	1-grades; 4-progress reports + teacher testimony; integrated placement; twice-exceptional student
Richardson v. Omaha Sch. Dist.	77 IDELR ¶ 135 (W.D. Ark. 2020)		X		X	SD	2,4-grade-equivalent gains (incl. low one) + teacher testimony (re student's resistance to test-taking)
A.D. v. Creative Minds Int'l Pub. Charter Sch.	77 IDELR ¶ 163 (D.D.C. 2020)		(X)		(X)	P	2-limited role; 4-lack of meeting any IEP goals for the 3 years [marginal case--other reasons: removal of math goal and writing services]
S.S. v. Harford Cnty. Bd. of Educ.	498 F. Supp. 3d 761 (D. Md. 2020)			(x)	X	P	3,4-"real [behavioral] data" > progress reports + teacher testimony for yrs. 2 & 3; 1 st yr. was for SD but w/o progress indicators [marginal case]
S.M. v. District of Columbia	77 IDELR ¶ 279 (D.D.C. 2020)		X		X	SD	2,4-progress reports + teacher testimony > parents' expert testimony + "standardized tests" (DIBELS, i-Ready math assessment)
P.P. v. Nw. Indep. Sch. Dist.	839 F. App'x 848 (5th Cir. 2020)	X	X		X	SD	1-grades + promotion; 2-state proficiency exam (mixed results) + Developmental Reading Assessment; 4-teacher testimony
D.H. v. Fairfax Cnty. Sch. Bd.	78 IDELR ¶ 39 (E.D. Va. 2021)	X	X		X	SD	1,2,4-grades + progress report + teacher testimony > state proficiency exam
Wade v. District of Columbia	2021 WL 3507866 (D.D.C. 2/11/21)*	X	X		X	SD	*R&R; 1,2,4-grades + teacher testimony > alleged social promotion + standardized testing (absenteeism explanation)
J.B. v. Frisco Indep. Sch. Dist.	528 F. Supp. 3d 614 (E.D. Tex. 2021)	X	(X)		X	SD	1-all As + gifted program; 2-grade level or above; 4-behavioral records + observations + teacher testimony; judicial deference

Preciado v. Bd. of Educ. of Clovis Mun. Schs.	443 F. Supp.3d 1289 (D.N.M. 2021)		X	X		P	2-including Kaufman, WIST, state proficiency exam; 3-hot reads; combined with other FAPE violations, including implementation failure
Alexander G. v. Downingtown Area Sch. Dist.	78 IDELR ¶ 213 (E.D. Pa. 2021)	X	X	X		SD	1-grades; 2-AIMSweb; 3-reading curric. assessments; holistic over time, despite some regression and inconsistency (citing <i>K.D.</i>)
D.C. v. Klein Indep. Sch. Dist.	860 F. App'x 894 (5th Cir. 2021)	X	X			P	1,2-passing grades (which did not improve) + state prof. exams (but with accommodations + well below grade level); <i>Andrew F.</i> n.2 limitation
Maggie J. v. Donegal Sch. Dist.	79 IDELR ¶ 42 (E.D. Pa. 2021)	X		(X)	X	SD	1,3,4-teacher testimony + "report cards and assessments"; including other reasons: IEP revisions that increased services
Thurman G. v. Sweetwater Indep. Sch. Dist.	79 IDELR ¶ 66 (N.D. Tex. 2021)	X	X	X	X	SD	1-passing grades; 2-state proficiency exam; 3,4-progress reports > Istation
N.G. v. E.L. Haynes Pub. Charter Sch.	2021 WL 3507557 (D.D.C. 7/30/21)*		X	X		SD	*R&R; 2,3-KeyMath, i-Ready, F&P (despite repeated goals); cogent explanation
R.S. v. Smith	79 IDELR ¶ 135 (D. Md. 2021)	X			X	SD	1-proficient grades in almost all subjects; 4-reached most goals + teachers' > parents' testimony re social/emotional progress
Jones v. District of Columbia	2021 WL 3927815 (D.D.C. 9/1/21)				X	SD	4-behavior data (counts of aggression incidents) + "great strides" in functional academics and daily living skills [marginal case]
Albuquerque Pub. Schs. v. Armstrong	80 IDELR ¶ 42 (D.N.M. 2021)	X	X	X	X	p	1,2,4-declining grades, i-Ready scores, SPIRE levels > teacher testimony; added implementation/training deficiencies

Lamar Consol. Indep. Sch. Dist. v. J.T.	__ F.Supp. 3d __ (S.D. Tex. 2021)		X		(X)	SD	2-improvement on state proficiency exams; 4-mastered some goals; individual child > peers/percentiles; holistic, incl. entire year
M.W. v. Rankin Cnty. Pub. Sch. Dist.	80 IDELR ¶ 136 (S.D. Miss. 2022)	X	X			P	1,2-failing gr. 2 (non-promotion) > state prof. exam + another standardized test; limited relief (rather than requested tuition reimb.)
Washington v. Katy Indep. Sch. Dist.	80 IDELR ¶ 67 (S.D. Tex. 2022)	X				SD	1-passing grades despite absenteeism
Crofts v. Issaquah Sch. Dist. No. 411	22 F.4th 1048 (9th Cir. 2022)			X		SD	3-reading levels [marginal case]
G.D. v. Swampscott Pub. Schs.	27 F.4th 1 (1st Cir. 2022)		X	X	X	SD	2,3,4-“informal assessments” (incl. progress reports) > state proficiency exams w/ o specified gain for individually effective progress
Downingtown Area Sch. Dist. v. D.S.	80 IDELR ¶ 159 (E.D. Pa. 2022)		X	X		SD*	2,3-AIMSweb + F&P though not fulfilling goals; *5-separate from FTE rulings for P for next two years that did not discuss progress indicators
Zachary J. v. Colonial Sch. Dist.	80 IDELR ¶ 153 (E.D. Pa. 2022)			X	X	SD	3,4-unspecified scores, progress reports, and teacher testimony w/ o clear differentiation; deference to hearing officer [marginal case]
B.B. v. District of Columbia	80 IDELR ¶ 214 (D.D.C. 2022)	X			(X)	SD	1-grades w/o evidence of inflation; 4-largely secondary in this case, with deference to hearing officer and, as sufficiently cogent, school witnesses

Footnotes

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- aa1 Perry A. Zirkel is university professor emeritus of education law at Lehigh University.
- 1 20 U.S.C. §§ 1400-1419 (2018).
- 2 *Id.* §§ 1401(9) and 1412(a)(1).
- 3 *E.g., id.* § 1415(f)(3)(E) (adding the substantive dimension as the second step for procedural denials of FAPE). For an overview of the evolving dimensions of FAPE, *see* Perry A. Zirkel, *An Adjudicative Checklist of Criteria for the Four Dimensions of FAPE under the IDEA*, 346 Educ. L. Rep. 18 (2017).
- 4 137 S. Ct. 988 (2017).
- 5 *Id.* at 999 and 1002 (emphasis added). The italicized language shows the refinement of the preceding substantive standard in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 5 Educ. L. Rep. 34 (1982) of requiring the IEP to be “reasonably calculated to enable the child to receive educational benefits.” As previously pointed out with regard to interpreting the “A” in FAPE, the italicized refinement “added to the imprecision by defining substantive *appropriateness* circularly with what is circumstantially *appropriate*.” 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 Educ. L. Rep. 545, 551 (2017).
- 6 *Id.* at 1001 (“We will not attempt to elaborate on what ‘appropriate’ progress will look like from case to case.”).
- 7 *E.g.,* Josh Cowin, Note, *Is That Appropriate? Clarifying the IDEA's Free Appropriate Public Education Standard Post Endrew F.*, 113 Nw. U. L. Rev. 587, 591 (2018) (A “lingering question” in the wake of *Endrew F.* is “how should district courts interpret appropriate progress going forward?”); *cf. U.S. Dep't of Educ., Questions and Answers on Endrew F. v. Douglas County School District RE-1* (2017), <https://sites.ed.gov/idea/endrew-qa> (“The *Endrew F.* decision is important because it informs our efforts to improve academic outcomes for children with disabilities.”).
- 8 *E.g.,* Maureen MacFarlane, *In Search of the Meaning of an “Appropriate Education,”* 46 J.L. & Educ. 539, 557 (2017) (“Achieving clarity of a standard is crucial ... and court decisions that will actually help to determine what these standards actually mean.”).
- 9 *See, e.g., Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 383, 181 Educ. L. Rep. 370 (2d Cir. 2003) (describing evidentiary indications of progress as grades, test scores, and “similar objective criteria”). Given their intrinsic interrelationship to other progress indicators, the scope of this term included progress reports, per the IDEA's IEP requirement for progress monitoring, including periodic reporting. 20 U.S.C. § 1414(d)(1)(A)(i)(III) (2018).
- 10 *See, e.g., Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576, 590-91, 249 Educ. L. Rep. 585 (5th Cir. 2009) (concluding that based on the circumstances, including persuasive teacher testimony and the relationship with the IEP, the child's passing grades and acceptable test scores did not meet the substantive standard under *Rowley*).
- 11 *Supra* text accompanying note 8.
- 12 This date marked the fifth anniversary of the *Endrew F.* decision. The original date of the data collection was March 22, 2022, when the citation total was 457 cases. Next, to correct for the time lag for electronic publication of the decisions, the author re-checked the Westlaw database on April 4, 2022, finding four more cited cases that were decided before March 22, 2022.

- 13 *Infra* note 18.
- 14 This section typically followed after earlier sections that successively included the factual findings and the applicable review standard, depending on whether the reviewed ruling was a hearing or review officer decision or a lower court decision.
- 15 *Supra* note 9 and accompanying text. Although not in this original conception of “progress indicators,” the ultimate entries extended the boundary to teacher or other expert testimony if supplementing or superseding one or more of the identified examples. *Id.*
- 16 Thus, the exclusions were court opinions in which the citation(s) to *Andrew F.* were limited to the overall background framework of the IDEA or to peripheral footnotes and/or the culminating section of the opinion addressed the substantive standard for FAPE but did not include any of the progress indicators.
- 17 *Infra* notes 19-24 and accompanying text.
- 18 The asterisks were for the relatively few citations that either had an affirmance that did not specifically address progress indicators or were a federal magistrate’s report and recommendations (R&R), as shown in the Comments column. Moreover, unpublished decisions that were available in the Individuals with Disabilities Education Law Reports (IDELR) used that more compact citation, although they can be alternatively found in Westlaw (WL).
- 19 For the overall scope of these indicators, see *supra* notes 9-10, 15 and accompanying text. Within this scope, the difference between standardized and other tests is not generally clear and consistent. Although the categorization is not at all critical within this context, the author relies on a respected colleague, who includes in the standardized category not only broad-based achievement tests, such as Woodcock-Johnson and KeyMath, but also curriculum-based measurement instruments, such as DIBELS and AIM-Sweb as compared with nonstandardized other measures embedded within reading and other curricular programs, such as SPIRE and Fountas & Pinnell benchmark. E-mail from Dr. Mark Shinn, Professor Emeritus of School Psychology, to Perry A. Zirkel (Mar. 15, 2022, 11:15 EST) (on file with author).
- 20 The occasional lower case “x” was for indirect identification via cross-referencing to their identification in the lower court’s opinion.
- 21 Being specific to the application of *Andrew F.* substantive standard for FAPE, this column did not include the outcomes for other issues in the case. However, the Comments column sometimes noted other closely related rulings. Similarly, the Comments column sometimes illustratively identified substantive FAPE rulings that were based in significant part on contributing factors other than progress indicators.
- 22 *Supra* note 18.
- 23 *Supra* text accompanying note 19. These numbered notes including acronyms for identified test names, such as “WJTA” for Woodcock-Johnson Tests of Achievement and “F&P” for Fountas and Pinnell.
- 24 *E.g.*, Zirkel, *supra* note 5, at 549-50 (identifying various dicta including the distinction in the role of passing grades and promotion for fully integrated placements; the identified “circumstances” of the nature and severity of individual child’s disability and the child’s potential; and judicial deference to school authorities along with “cogent” district justification).
- 25 *Supra* note 12.

- 26 *Supra* text accompanying note 24 (referring to category “c”).
- 27 Testimony by teachers and other district personnel was also frequent, but its boundary in relation to the progress indicators was difficult to determine. Without counting testimony, but with the remaining blurriness of progress reports and, to a less extent standardized assessments, all of these indicators were close to each other in their relatively high frequency.
- 28 *E.g.*, *G.D. v. Swampscott Pub. Schs.*, 27 F.4th 1, 13 (1st Cir. 2022) (concluding that parents failed to meet their burden of proof in relying on standardized assessments without showing what specific gains amounted to appropriate progress); *Lamar Consol. Indep. Sch. Dist. v. J.T.*, ___ F. Supp. 3d ___, ___ (S.D. Tex. 2021) (contextualizing standardized test results to the individual child, citing the percentile-scores observation in *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349, 141 Educ. L. Rep. 62 (5th Cir. 2000); *AR v. Katonah Lewisboro Union Free Sch. Dist.*, 75 IDELR ¶ 187, at *13 (S.D.N.Y. 2019) (finding persuasive the review officer's conclusion that a drop in percentile rank does not equate to lack of progress); *Mr. G. v. Canton Bd. of Educ.*, 74 IDELR ¶ 8, at *16 (D. Conn. 2019) (“[T]he fact that some of [the child's] scores on these standardized tests decreased does not necessarily mean [she] was regressing rather than simply experiencing less growth than her peers.”). In contrast, the courts generally did not particularly limit the weight of grades, along with that of the interrelated factor of promotion. *E.g.*, *Wade v. District of Columbia*, 2021 WL 3507866, at *5 (D.D.C. Feb. 11, 2021); *Candi M. v. Riesel Indep. Sch. Dist.*, 379 F. Supp. 3d 570, 599-600, 367 Educ. L. Rep. 282 (W.D. Tex. 2019); *Parker C. v. W. Chester Area Sch. Dist.*, 70 IDELR ¶ 94, at *10 (E.D. Pa. 2017). *But cf.* *D.C. v. Klein Indep. Sch. Dist.*, 860 F. App'x 894, 905, 395 Educ. L. Rep. 499 (5th Cir. 2021) (concluding that the child's grades were passing but not meaningfully improving)
- 29 The “objective” characterization was pronounced in the Second Circuit, per its pre-*Andrew F.* terminology (*supra* note 9). *E.g.*, *AR v. Katonah Lewisboro Union Free Sch. Dist.*, 75 IDELR ¶ 187, at *12 (S.D.N.Y. 2019) (“objective indications of progress”); *C.S. v. Yorktown Cen. Sch. Dist.*, 72 IDELR ¶ 7, at *20 (S.D.N.Y. 2018) (“objective evidence”). For an example of the overbroad use of “standardized” tests, see *S.M. v. District of Columbia*, 77 IDELR ¶ 279, at *6 (D.D.C. 2020) (referring to DIBELS and i-Ready math assessments as standardized).
- 30 *See, e.g.*, *Albright v. Mountain Home Sch. Dist.*, 926 F.3d 942, 948-49, 367 Educ. L. Rep. 13 (8th Cir. 2019); *R.S. v. Smith*, 79 IDELR ¶ 135, at *10 (D. Md. 2021); *S.M. v. District of Columbia*, 77 IDELR ¶ 279, at *7 (D.D.C. 2020); *C.B. v. Smith*, 74 IDELR ¶ 230, at *6 (D. Md. 2019); *T.M. v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 812, 347 Educ. L. Rep. 921 (E.D. Pa. 2017). *But cf.* *Albuquerque Pub. Schs. v. Armstrong*, 80 IDELR ¶ 42, at *5 (D.N.M. 2021) (testimony of uncertified teacher).
- 31 *Andrew F.*, 137 S. Ct. at 999 (“The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents ... Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.”).
- 32 For leading examples of the *Andrew F.* dicta, see *supra* note 24.
- 33 *E.g.*, *Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 754, 351 Educ. L. Rep. 961 (2d Cir. 2018); *J.B. v. Frisco Indep. Sch. Dist.*, 528 F. Supp. 3d 614, 646, 395 Educ. L. Rep. 631 (E.D. Tex. 2021); *D.F. v. Smith*, 74 IDELR ¶ 75, at *8 (D. Md. 2019). An interrelated factor, which was an *Andrew F.* gloss on its repetition of the traditional deference to school authorities in *Rowley*, was whether the school authorities' explanation was cogent. *E.g.*, *N.G. v. E.L. Haynes Pub. Charter Sch.*, 2021 WL 3507557, at *7-8 (D.D.C. July 30, 2021); *Gaston v. District of Columbia*, 74 IDELR ¶ 248, at *9 (D.D.C. 2019); *E.P. v. N. Arlington Bd. of Educ.*, 74 IDELR ¶ 80, at *9 (D.N.J. 2019).
- 34 *E.g.*, *Wong v. Bd. of Educ.*, 478 F. Supp. 3d 229, 249, 385 Educ. L. Rep. 537 (D. Conn. 2020); *E.D. v. Colonial Sch. Dist.*, 69 IDELR ¶ 245, at *14 (E.D. Pa. 2017).

- 35 *E.g., D.F. v. Smith*, 74 IDELR ¶ 75, at *10 (D. Md. 2019); *C.S. v. Yorktown Cent. Sch. Dist.*, 72 IDELR ¶ 7, at *23 (S.D.N.Y. 2018); *E.D. v. Colonial Sch. Dist.*, 69 IDELR ¶ 245, at *13 (E.D. Pa. 2017). The child's potential is a related consideration that occasionally arose, particularly in the Third Circuit based on its longstanding recognition of this particular aspect of the individual child's circumstances. *E.g., K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 254, 358 Educ. L. Rep. 98 (3d Cir. 2018).
- 36 *See, e.g.,* Perry A. Zirkel, *An Updated Primer of Special Education Law*, 52 Teaching Exceptional Child. 261 (2020) (identifying twelve major Supreme Court decisions under the IDEA since 1975, including at least three that address purely adjudicative issues, such as burden of proof).
- 37 *Supra* note 30.
- 38 *See, e.g.,* Perry A. Zirkel, *The "Snapshot" Standard under the IDEA: An Update*, 358 Educ. L. Rep. 767 (2018).
- 39 Although the subsequent period may not be a year, the courts tend to take a holistic approach in not only the multiple sources in but also the duration of the subsequent period. *E.g., Lamar Consol. Indep. Sch. Dist. v. J.T.*, ___ F. Supp. 3d ___, ___ (S.D. Tex. 2021); *Alexander G. v. Downingtown Area Sch. Dist.*, 78 IDELR ¶ 213, at *6-7 (E.D. Pa. 2021).
- 40 The *Andrew F.* Court repeated the IDEA framework for applying the requisite prospective judgement. *Andrew F.*, 137 S. Ct. at 999 ("The instruction offered must be 'specially designed' to meet a child's 'unique needs' through an '[i]ndividualized education program.'" §§ 1401(29), (14) (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth.>").
- 41 The exception for additional evidence at the court level is a narrow one. *See, e.g., I.M. v. Northampton Pub. Schs.*, 858 F. Supp. 2d 132, 134, 284 Educ. L. Rep. 228 (D. Mass. 2012) (citing Andrey Krahal et al., 'Additional Evidence' under the Individuals with Disabilities Education Act: The Need for Rigor, 9 Tex. J. on C.L. & C.R. 201 (2002)).
- 42 *See, e.g.,* Kay Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 Georgetown J. on Poverty L. & Pol'y 193, 218-19 (2002) (reporting survey results for perceived insufficiency of parent attorneys in special education).
- 43 In addition, having various professional employees who have not only specialized knowledge about instruction and assessment in special education but also ongoing experience with the student in the school setting, school districts have more fiscal resources for contracting outside experts. Conversely, if the parents prevail, they are not entitled to recovery of expert witness fees. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006).
- 44 Currently, only eight states have a review officer tier under the IDEA, but this small group includes New York, which by far is the most active state for litigation under the IDEA. *See, e.g.,* Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed ...*, 73 Admin. L. Rev. 833, 834 n.4, 838 n.20 (2021).
- 45 Moreover, for cases that reach the appellate level, the review standard is even more deferential. As a result, the degree of actual deference between the initial and final adjudicative levels under the IDEA is very high. *See, e.g.,* Perry A. Zirkel, *Is Appealing a Hearing Officer's Decision Likely to Result in a Major Outcome Change in the Final Court Decision?* 393 Educ. L. Rep. 1 (2021) (finding that in 81% of the cases the change between the hearing officer decision and final court decision was slight or none).
- 46 *Supra* notes 42-43 and accompanying text.

- 47 *Supra* note 33.
- 48 *Supra* notes 5 and 31. Other contributing factors include (a) the aforementioned district-favored imbalance of attorney representation and expert witnesses at the originating due process hearing level in combination with judicial deference to hearing officer decisions, and (b) the likely but indeterminate skewing effect of the settlement process within the overall multi-level filtration, with the specific extent and nature of settlements of due process hearing decisions not known and some of the reasons for settlement tempering or countering the assumed skew.
- 49 *E.g.*, *Colonial Sch. Dist. v. G.K.*, 763 F. App'x 192, 196, 365 Educ. L. Rep. 192 (3d Cir. 2019); *Jefferson Cnty. Bd. of Educ. v. Amanda S.*, 418 F. Supp. 3d 911, 917-18, 374 Educ. L. Rep. 574 (N.D. Ala. 2019); *see also* *J.B. v. District of Columbia*, 325 F. Supp. 3d 1, 9, 358 Educ. L. Rep. 350 (D.D.C. 2020) (“*Endrew F.* ... did *not* hold that any time a child makes limited, or even zero, progress, that a school system has necessarily failed to provide a FAPE”).
- 50 *E.g.*, *K.D. v. Downingtown Area Sch. Dist.*, 904 F.3d 248, 255, 358 Educ. L. Rep. 98 (3d Cir. 2018); *E.G. v. Great Valley Sch. Dist.*, 70 IDELR ¶ 3, at *5 (E.D. Pa. 2017). Similarly, contrary to professional norms, the repetition of IEP goals in combination with poor performance on standardized tests does not necessarily equate to a violation of the *Endrew F.* standard. *E.g.*, *F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist.*, 735 F. App'x 38, 40 (2d Cir. 2018).
- 51 William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation after Endrew F.*, 22 N.Y.U. J. Legal & Pub. Pol'y 495 (2020); Perry A. Zirkel, *The Aftermath of Endrew F.: An Outcomes Analysis Two Years Later*, 363 Educ. L. Rep. 1 (2019).
- 52 *Endrew F.*, 137 S. Ct. at 1000-01.
- 53 *Supra* note 40 and accompanying text.
- 54 *Supra* notes 41-46 and accompanying text.
- 55 *See, e.g.*, Perry A. Zirkel, *Professional Misconceptions of the Supreme Court's Decision in Endrew F.*, 47 *Communiqué* 12 (June 2019).
- 56 *E.g.*, *U.S. Dep't of Educ., Questions and Answers (Q&A) on U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*, at *1, 7, 9 (Dec. 7, 2017), <https://sites.ed.gov/idea/questions-and-answers-qa-on-u-s-supreme-court-case-decision-endrew-f-v-douglas-county-school-district-re-1/> (identifying the significance of *Endrew F.* as “inform[ing] our efforts to improve academic outcomes for children with disabilities” with “high standards” for “appropriate and challenging level of progress”).
- 57 For other examples of the need for duly differentiating professional norms from legal requirements, see Lauren W. Collins & Perry A. Zirkel, *Functional Behavioral Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 *J. Positive Behav. Interventions* 180, 188 (2017); Perry A. Zirkel, *The “Peer-Reviewed Research” Provision of the IDEA: A Current Comprehensive Snapshot*, 397 Educ. L. Rep. 422, 430-32 (2022); Perry A. Zirkel, *Speech Language Pathology under the Individuals with Disabilities Education Act*, 396 Educ. L. Rep. 377, 391 (2022); Perry A. Zirkel, *Legal Information in Special Education: Accuracy with Transparency*, 28 *Exceptionality* 312, 313-14 (2020); Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?* 83 *Exceptional Child* 219, 230 (2016).