

2018

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### Recommended Citation

Grant Simon, “*Hardly Be Said to Offer An Education at All*”: *Endrew and its Impact on Special Education Mediation*, 2018 J. Disp. Resol. (2018)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2018/iss2/17>

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# “Hardly Be Said to Offer An Education at All”: *Endrew* and its Impact on Special Education Mediation

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## I. INTRODUCTION

As the standards for special education students in America rise, the need to handle the resulting disputes arises as well. Special education disputes are a common yet emotional process for all parties involved. Such disputes can result in a split between the family and the school district- a split that can potentially leave negative consequences on the student. In 1975, Congress, realizing the personal nature and prevalence of special education issues, passed what would become the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> The IDEA offers states federal funds to assist in educating children with disabilities.<sup>2</sup> This Act also authorizes the child’s parents the right to make use of mediation for resolving these disputes.<sup>3</sup> This alternative dispute resolution process for special education claims solves thousands of claims each year without having to pursue further litigation.<sup>4</sup> However, in light of the recent Supreme Court decision *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, the Court’s new and more demanding standard of what a child’s educational goals must be could potentially change the role of mediation in special education disputes.

This Case Note discusses the recent Supreme Court decision in *Endrew*.<sup>5</sup> The Case Note then will address the potential impact the Court’s ruling could have on the future role of mediation in special education. Finally, this Case Note will also address the potential procedural changes school districts may have to make when considering the new *Endrew* standard.

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\* B.A. Truman State University 2015, J.D. University of Missouri 2019. I am incredibly grateful to Professor James Levin for his feedback and guidance with this Comment. I would also like to thank the editorial staff of the *Journal of Dispute Resolution* for the time spent editing this Comment. Finally, I would like to thank my mother, Kathy McCarthy, for being my most influential guidance and sparking my interest in special education topics.

1. 20 U.S.C. § 1400 (2010).

2. See 20 U. S. C. §1400 (2010); see also *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U. S. 291, 295 (2006).

3. 20 U.S.C. § 1415(e) (2004).

4. Carolyn Thompson, *Following Supreme Court ruling, more special education fights seen coming*, Chicago Daily Law Bulletin (May 17, 2010), <http://www.chicagolawbulletin.com/Archives/2017/05/10/Special-ed-funding-5-10-17>.

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

## II. FACTS AND HOLDING

Petitioner Andrew F. (“Andrew”) was a child with autism enrolled in respondent Douglas County Colorado School District (“School District”) from preschool through fourth grade.<sup>6</sup> During this time, Andrew was enrolled in special education courses with an Individual Educational Plan (“IEP”)<sup>7</sup> created by School District employees.<sup>8</sup> By the time Andrew reached the fourth grade, his parents believed that his academic progress had stalled.<sup>9</sup> For evidence of this fear, Andrew’s parents noted that Andrew still exhibited behaviors that negatively impacted his ability to learn in the classroom.<sup>10</sup> For example, Andrew would scream in class, climb over furniture and other students, and occasionally run away from school.<sup>11</sup> He was also afflicted by severe fears of common everyday occurrences such as flies, spills, and public restrooms.<sup>12</sup> However, despite Andrew’s parents concern about his progress stalling, Andrew’s IEP remained largely unchanged by carrying over the same basic goals and objectives from one year to the next.<sup>13</sup> School District staff indicated that these goals were being carried over because Andrew was failing to make meaningful progress toward these goals.<sup>14</sup>

When the School District proposed a fifth grade IEP that still failed to adjust Andrew’s goals, Andrew’s parents removed him from public school and enrolled him in a specialized private school for children with autism.<sup>15</sup> At this school, Andrew made significant educational progress rapidly.<sup>16</sup> Concurrently, while Andrew was enrolled at his new private school, School District representatives approached Andrew’s parents with a new fifth grade IEP.<sup>17</sup> Andrew’s parents considered this plan as inadequate as the original IEP, and, pursuant to statute, sought reimbursement for his private school tuition by filing an IDEA complaint with the Colorado Department of Education.<sup>18</sup>

To succeed on their complaint, Andrew’s parents had to show that the School District did not provide their son a Free and Appropriate Public Education

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6. *Id.* at 991.

7. The IEP is “the centerpiece of the statute’s education delivery system for disabled children” that identifies the unique needs a particular child needs to receive an adequate education. *See Honig v. Doe*, 484 U. S. 305, 311, (1988); *see also Andrew*, 137 S. Ct. 988 (noting that the IEP “is the means by which special education and related services are tailored to the unique needs of a particular child”).

8. *Andrew*, 137 S. Ct. at 991.

9. *Id.*

10. *Id.* at 996.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Andrew*, 137 S. Ct. at 996.

15. *Id.*

16. *Id.* at 997.

17. *Id.*

18. *Id.*

(“FAPE”)<sup>19</sup> as required by IDEA prior to his enrollment at the private school.<sup>20</sup> Endrew’s parents alleged that the final IEP proposed by the School District did not meet the required legal standard of being “reasonably calculated” to enable Endrew to receive his required educational benefits.<sup>21</sup> Therefore, Endrew’s parents argued that Endrew had been denied a FAPE.<sup>22</sup> The Administrative Law Judge (“ALJ”) denied relief, and Endrew’s parents appealed to the federal district court.<sup>23</sup>

The district court, giving due weight to the ALJ’s decision, agreed with the ALJ that Endrew had not been denied a FAPE.<sup>24</sup> However, while affirming the decision, the district court acknowledged that Endrew’s performance under past IEPs “did not reveal immense educational growth” but that, regardless, the School District still met its legal burden of providing FAPE for Endrew because the IEP objectives at least showed “minimal progress.”<sup>25</sup> Because Endrew’s previous IEPs had enabled him to make at least minimal progress, the court reasoned that Endrew’s latest IEP was reasonably calculated to do the same thing.<sup>26</sup> In the federal district court’s view, that was all what the United States Supreme Court precedent and FAPE required.<sup>27</sup>

Following the District Court’s decision to affirm the ALJ’s ruling, Endrew’s parents appealed to the Court of Appeals for the Tenth Circuit.<sup>28</sup> On review, the court affirmed the lower court, reciting language from Supreme Court precedent stating that all the School District only had to offer Endrew was “some educational benefit.”<sup>29</sup> The appellate court noted that it had long interpreted this language to mean that a child’s IEP is adequate and provides FAPE if the IEP is calculated to confer an “educational benefit [that is] merely . . . more than *de minimis*.”<sup>30</sup> Applying this low standard, the Tenth Circuit held that Endrew’s IEP had been “reasonably calculated to enable [him] to make some progress” and therefore he had not been denied FAPE.<sup>31</sup> The Tenth Circuit also noted that it would not change this “*de minimis*” standard absent a superseding decision by the Supreme Court.”<sup>32</sup>

Following the Tenth Circuit’s decision, the Supreme Court granted certiorari and overturned the lower courts. The Court held that a “*de minimis*” educational benefit is not enough to provide a child with FAPE; rather, school districts must

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19. FAPE is a requirement under the Individuals with Disabilities Education Act (IDEA) in order for the state government to receive federal funds to assist in educating children with disabilities. See 20 U.S.C. 1401 (2015); see also 20 U.S.C. 1412 (2015). It is a guarantee of “a substantively adequate program of education to all eligible children, and that this requirement is satisfied if the child’s IEP sets out an educational program that is reasonably calculated to enable the child to receive educational benefits.” See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester City v. Rowley, 458 U. S. 176, 207 (1982).

20. *Endrew*, 137 S. Ct. at 997.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Endrew*, 137 S. Ct. at 997

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1340 (10th Cir. 2015).

offer children an IEP that is “reasonably calculated to enable each child to make progress appropriate for that child’s circumstances.”<sup>33</sup>

### III. LEGAL BACKGROUND

#### A. *The Individuals with Disabilities Education Act and History of Student with Disabilities*

Requiring public education for children with serious disabilities is a recent historical development.<sup>34</sup> For much of American history, students with physical and mental disabilities were often excluded from public education solely because of their disabilities.<sup>35</sup>

For example, in the late 19<sup>th</sup> century case *Watson v. City of Cambridge*, a student was excluded from a public school in Cambridge, Massachusetts, by school officials “because he was too weak-minded to derive profit from instruction.”<sup>36</sup> This exclusion was eventually affirmed by the Supreme Judicial Court of Massachusetts (“SJC”).<sup>37</sup> In affirming this student’s exclusion, the SJC noted that “by reason of imbecility, [the student] should not be permitted to continue in the school.”<sup>38</sup>

In the 1950’s, children with disabilities were still excluded from public schools. For example, in *Department of Welfare v. Haas*<sup>39</sup>, Haas’ son was “described as mentally deficient, or feeble minded” and, because of his disability, had to be committed to a hospital for the “mentally deficient” outside of the public school system.<sup>40</sup> The trial court granted summary judgment in favor of the state, and that decision was affirmed by the Supreme Court of Illinois.<sup>41</sup> In doing so, the court explicitly approved the exclusion of children with cognitive disabilities from public education, noting that right to a public school education implies that one must have capacity to receive such an education.<sup>42</sup>

Prior to congressional action, more than one million American children had no access to the public school system.<sup>43</sup> Recognizing the problem of excluding children with disabilities from receiving an education, Congress passed the Education for All Handicapped Children Act in 1975.<sup>44</sup> In 1990, the act was re-codified as the Individuals with Disabilities Act.<sup>45</sup> As the Supreme Court has recognized, the “focus on the particular child is at the core of the IDEA.”<sup>46</sup> Today, the IDEA offers

33. *Id.* at 1341.

34. Gary L. Monserud, *Article: The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN’S J. LEGAL COMMENT. 675, 683 (2004).

35. *Id.*

36. *Id.*

37. *Id.* at 684.

38. *Watson v. Cambridge*, 32 N.E. 864, 865 (Mass. 1893).

39. *Dep’t of Pub. Welfare v. Haas*, 154 N.E.2d 265 (Ill. 1958).

40. *Id.* at 268.

41. *Id.* at 274.

42. *Id.* at 270.

43. Jane West, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind*, NATIONAL COUNCIL ON DISABILITY 6 (Jan. 25, 2000).

44. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 (1982).

45. 20 U.S.C. § 1400 (2010).

46. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

states federal funds to assist in educating children with disabilities.<sup>47</sup> In exchange, a state must comply with a large number of statutory conditions.<sup>48</sup> One of these conditions is that the state must provide a free and appropriate public education to all eligible children.<sup>49</sup> Additionally, to satisfy the FAPE requirement, the state must have an Individualized Education Plan for all eligible children.<sup>50</sup>

### B. Free and Appropriate Education

To ensure the FAPE requirement is met, the IDEA imposes a variety of procedural and substantive obligations on the state.<sup>51</sup> While the procedural obligations that Congress intended are clearly and explicitly defined within IDEA, the substantive rights and requirements are not.<sup>52</sup> For the last forty years, the issue of what exactly a school must provide to meet the mandate of FAPE is an issue that has been litigated.<sup>53</sup>

The procedural steps required by the IDEA focus on protecting the rights for children with disabilities and the children's parents.<sup>54</sup> These obligations include detailed procedures that school districts must follow when identifying, evaluating, and making educational decisions for a student suspected of being, or having been found to be, eligible for special education services.<sup>55</sup> A school cannot label a student for special education services as it pleases.<sup>56</sup>

Key to protecting a student from improper labeling is IDEA's exclusionary clause.<sup>57</sup> The IDEA specifies, in part, that a learning problem which primarily results in an environmental, cultural, or economic disadvantage cannot be the sole basis for placing a student in special education.<sup>58</sup> The purpose of this exclusionary clause is to help specifically prevent the improper labeling of children, especially "those from distinct cultures who have acquired learning styles, language, or behaviors that are not compatible with academic requirements of schools in the dominant culture."<sup>59</sup> However, this does not mean that individuals who met this criteria cannot also have other disabilities or be from different cultural backgrounds; it simply cannot be the primary cause behind a learning discretion.<sup>60</sup> The exclusionary clause today serves as one of the main procedural safeguards for the child.<sup>61</sup>

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47. See 20 U.S.C. §1400 (2010); see also *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006).

48. 20 U.S.C. § 1400 (2010).

49. 20 U.S.C. §1412(a)(1) (2015).

50. 20 U.S.C. §1401(9)(D) (2015).

51. James Schwellenbach, *Mixed Messages: An Analysis of the Conflicting Standards Used by the United States Circuit Courts of Appeals when Awarding Compensatory Education for a Violation of the Individuals with Disabilities Education Act*, 53 ME. L. REV. 245, 251 (2001).

52. *Id.*

53. See *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

54. Schwellenbach, *supra* note 51, at 252.

55. *Id.*; see also 20 U.S.C. §1412 (2015); 20 U.S.C. §1414 (2015).

56. 20 U.S.C. § 1414(a)(1)(C) (2015).

57. National Association of Special Education Teachers, *Introduction to Learning Disabilities*, NASET.org, <http://www.naset.org/2522.0.html> (last visited Oct. 20, 2017).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

These procedural safeguards extend to the child's parents as well.<sup>62</sup> Parental protections include, but are not limited to, the parents' right to participate in the educational programming and decision making for their child, the requirement of parental consent before any evaluation or placement, and the right to an impartial hearing in front of a third party if the parent is not satisfied with the school's decisions for their child.<sup>63</sup> Also, as seen in *Andrew*, the IDEA also gives parents the right to file suit in state or federal court once administrative remedies have been exhausted.<sup>64</sup>

However, despite how clearly defined IDEA's FAPE procedural safeguards are, the only mention of substantive FAPE requirements from the IDEA are that:

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

While dictating the requirement of certain key special education features (such as the requirement of an individualized education plan in order to provide a FAPE), the vagueness of the substantive standard supplied by the language of the IDEA has left the meaning and details of FAPE subject to administrative and judicial interpretation.<sup>66</sup>

Prior to *Andrew*, the Supreme Court first considered the substantive requirement of FAPE in the case in *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*.<sup>67</sup> In *Rowley*, the Court held the Act guarantees an adequate educational program to all special education children, and that this requirement is satisfied if the child's IEP sets out an educational program that is "reasonably calculated to enable the child to receive educational benefits."<sup>68</sup> The Court noted, for example, that, for children fully integrated in the regular classroom, this would typically require an IEP "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."<sup>69</sup> Because the IEP challenged in *Rowley* met this standard, the Court declined to establish a single concrete test for determining what the adequacy of the educational benefits must be.<sup>70</sup> This lack of concrete test paved the way for the Tenth Circuit to decide educational benefits must merely be more than *de minimis*.<sup>71</sup>

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62. See 20 U.S.C. § 1415(b)(3).

63. Schwellenbach, *supra* note 51, at 252.

64. 20 U.S.C. § 1415(j) (2004).

65. 20 U.S.C. § 1401(8) (2015).

66. See Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 366 (1990).

67. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

68. *Id.* at 206.

69. *Id.* at 204.

70. *Id.* at 202.

71. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 997 (2017).

*C. The Individual Education Plan*

As one of the few substantive requirements laid out by the IDEA, a state must provide a child an individualized education plan (IEP).<sup>72</sup> The IEP is "the centerpiece of the statute's education delivery system for disabled children."<sup>73</sup> A comprehensive plan prepared by a child's "IEP Team" (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures.<sup>74</sup> These procedures emphasize "collaboration among parents and educators and require careful consideration of the child's individual circumstances."<sup>75</sup> The IEP is how special education and related services are made to serve the unique needs of a particular child.<sup>76</sup>

The IDEA mandates "that every IEP include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals".<sup>77</sup> Addition, the IDEA requires that the IEP contains a "description of how the child's progress toward meeting" those goals will be gauged.<sup>78</sup> The IEP must also describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum."<sup>79</sup>

Above all, the IEP must aim to enable the child to make progress in areas where the child is behind their peers.<sup>80</sup> The instruction offered must be "specially designed" to meet a child's "unique needs" through an individualized education program.<sup>81</sup> An IEP is not a document to be created haphazardly; it requires careful consideration of the child's present levels of achievement, disability, and potential for growth.<sup>82</sup>

*D. The Role of Mediation Within the IDEA*

Mediation is defined as a "form of alternative dispute resolution (ADR) in which the parties to a lawsuit meet with a neutral third-party in an effort to settle the case."<sup>83</sup> Mediation differs from other forms of ADR such as arbitration because the third-party mediator plays a facilitative role that does not have the power to force a particular outcome.<sup>84</sup> Because IDEA does not specify a mediation process,

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72. 20 U.S.C. § 1401(9)(D) (2015).

73. *Honig v. Doe*, 484 U. S. 305, 311 (1988).

74. 20 U.S.C. §1414(d)(1)(B) (2015).

75. *See Endrew*, 137 S. Ct. at 994; *see also* 20 U.S.C. §1414 (2015).

76. *Bd. of Educ. v. Rowley*, 458 U.S. 176,191 (1982).

77. *Endrew*, 137 S. Ct. at 994; *see also* 20 U.S.C. §§1414(d)(1)(A)(i)(I)-(III) (2015).

78. *Endrew*, 137 S. Ct. at 994.

79. *Id.*

80. *Id.*; *see also* 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV) (2015).

81. *Endrew*, 137 S. Ct. at 994.

82. 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) (2015).

83. *Mediation Law*, HG.org, <https://www.hg.org/mediation-definition.html> (last visited Oct. 19, 2017).

84. *See Mediation*, legal-dictionary.com, <https://legal-dictionary.thefreedictionary.com/mediation> (last visited Nov. 15, 2017).



a mediator has discretion about the exact steps of a mediation.<sup>85</sup> However, an often-recognized model of mediation includes main six steps: introductory remarks, statement of the problem by the parties, information gathering time, identification of the problems, bargaining and generating options, and reaching an agreement.<sup>86</sup>

During the introductory remarks, the mediator will give an opening statement that outlines the role of the participants and demonstrates the mediator's neutrality.<sup>87</sup> The mediator will then define the protocol and set the time frame for the process.<sup>88</sup> Finally, the mediator will review the mediation guidelines and briefly recap the issues of the party.<sup>89</sup>

After the opening statement, a mediator will often give each side the opportunity to tell their story uninterrupted.<sup>90</sup> The party's statement is not necessarily a recital of the facts, but it is meant to give the parties an opportunity to frame the issue as the parties' view it.<sup>91</sup> The rationale behind the statement of the problem "is not a search for the truth; it is just a way to help solve the problem" by helping each side better understand the perspective of the other.<sup>92</sup>

The next step of a typical mediation process is informal information gathering.<sup>93</sup> During this step, the mediator will ask the parties open-ended questions to get as much information as possible.<sup>94</sup> Dependent on the model of mediation used, the mediator may repeat the key points back to the parties while summarizing the dispute when possible.<sup>95</sup> This helps the mediator build chemistry between the parties.<sup>96</sup>

Often, identifying the problem occurs during the information gathering stage.<sup>97</sup> Throughout the entire process, an effective mediator works with the party to find common goals.<sup>98</sup> These goals help the mediator figure out which issues are going to be able to settle or which ones focused on by the parties.<sup>99</sup>

A most commonly used method to settle disputes during mediation is the caucus.<sup>100</sup> This caucus session is often a confidential session for each party to communicate transparently with the mediator without the other side being present.<sup>101</sup> Once common ground between the parties is located through the caucus, a potential settlement can occur.<sup>102</sup>

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85. Grace E. D'Alo, *Accountability In Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 205 (2001).

86. Jessica Stepp, *How Does the Mediation Process Work?*, MEDIATE.COM (Feb. 2003), <http://www.mediate.com/articles/steppj.cfm>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Stepp, *supra* note 86.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Stepp, *supra* note 86.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

When Congress reauthorized the IDEA in 1997, it required that mediation be available as a choice whenever a due process hearing from a third party is requested.<sup>103</sup> There are several reasons why Congress began this mediation requirement.<sup>104</sup> First, studies showed that mediation could resolve IDEA disputes more quickly and more cheaply than due process hearings.<sup>105</sup> Second, due to its informal nature, mediation appeared to offer greater opportunity for participation by parents, guardians, and school officials.<sup>106</sup> This continues IDEA's emphasis on collaboration for the betterment of the child's education.<sup>107</sup> Third, research showed that parties were more likely to accept and implement agreements reached in mediation.<sup>108</sup> Finally, and perhaps most importantly, mediation appeared to allow all parties to openly discuss their concerns and interests, potentially laying the groundwork for more effective future relationships.<sup>109</sup>

As noted by Professor Grace E. D'Alo of Pennsylvania State University of Law, mediation literature commonly refers to three potential mediation models: facilitative-broad, evaluative-narrow and transformative.<sup>110</sup> The IDEA does not specify what model special education mediation should follow.<sup>111</sup> IDEA only states that mediation process must be voluntary and conducted by a "qualified and impartial mediator who is trained in effective mediation techniques."<sup>112</sup>

One of the models is known as "facilitative-broad" mediation.<sup>113</sup> In this model, mediators "focus primarily on aiding the parties in self-understanding and communicating their underlying interests."<sup>114</sup> Mediators under this model act to help facilitate both parties' dialogue but do not evaluate or judge the merits of each argument.<sup>115</sup>

Another model is the "evaluative-narrow" mediation model.<sup>116</sup> This model sees mediators focusing on the likely outcome if the dispute did not get resolved (which, in special education disputes, is often a due process hearing).<sup>117</sup> In this model, the mediator's role is to "provide the parties with an evaluation of the strengths and weaknesses of each side's case, the likely legal outcomes if the case proceeds to a hearing, and a determination of reasonable settlement terms."<sup>118</sup>

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103. D'Alo, *supra* note 85, at 204 (citing 20 U.S.C. § 1415(e) (2004)).

104. *Id.*

105. *Id.* (citing Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 45-46 (1999)).

106. D'Alo, *supra* note 85, at 204 (citing Jonathan A. Beyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 47 (1999)).

107. D'Alo, *supra* note 85, at 204.

108. *Id.* (citing Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 239 (1981)).

109. D'Alo, *supra* note 85, at 204 (citing Steven S. Goldberg & Dixie Snow Huefner, *Dispute Resolution in Special Education: An Introduction to Litigation Alternatives*, 99 EDUC. L. REP. 703, 705-06 (1995)).

110. D'Alo, *supra* note 85, at 205.

111. *Id.*

112. *Id.* (quoting 20 U.S.C. § 1415(e)(2)(A) (2004)).

113. D'Alo, *supra* note 85, at 205; *see also* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, CTR. FOR PUB. RESOURCES (Sept. 1994), [https://www.starkmediator.com/wpcontent/uploads/sites/4/2013/10/Old\\_Riskin\\_Grid1994.pdf](https://www.starkmediator.com/wpcontent/uploads/sites/4/2013/10/Old_Riskin_Grid1994.pdf).

114. D'Alo, *supra* note 85, at 205.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

A third model recognized by mediation literature is the “transformative” mediation model.<sup>119</sup> In this model, mediators “focus their interventions on empowering the parties by helping them reach self-understanding and encouraging mutual recognition of each other’s humanity and concerns.”<sup>120</sup> Compared to the “evaluation-marrow” model, a mediator is much less likely to provide an explicit evaluation of each side’s arguments and more likely to help each side understand the other’s point of view.<sup>121</sup>

Special education mediation is a process in which both parties can be satisfied with the result. For example, in 1997, Minnesota saw a high satisfaction rate among mediation participants, with 94% saying they would use the process again and 96% saying they would recommend mediation to others.<sup>122</sup> Even as the actual success rate of the mediation process dropped over 10% in subsequent years, the satisfaction rates among participants have remained consistent.<sup>123</sup> Mediation allows both parties to be satisfied with a result while avoiding costly litigation.<sup>124</sup>

The prevalence of special education mediation itself has been declining prior to the *Andrew* decision. For example, the rate of special education mediation has decreased from 2004 to 2012 as due process hearings dropped from under 7,000 to slightly above 2,000 nationwide.<sup>125</sup> When such mediations do take place, they often successfully resolve the parties’ concerns. For example, mediations between 2004 to 2012, almost 70% of mediations resulted in agreements.<sup>126</sup> These signed, written mediation agreements are legally enforceable in any state or federal court.<sup>127</sup>

#### IV. INSTANT DECISION

With Chief Justice Roberts writing for a unanimous court, the Supreme Court held that for a school to meet its substantive FAPE obligation under the IDEA, it must offer an IEP “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>128</sup>

The Court’s “reasonably calculated” qualification reflects a recognition that crafting an appropriate educational program for a child requires a variety of viewpoints (from school official’s expertise to the view of a child’s parents) and is consistent with the function of an IEP’s goal of a child’s advancements.<sup>129</sup> The Court noted that the potential progress contemplated by the IEP “must be appropriate in light of the child’s circumstances” and therefore a concrete guidance is not appropriate in this case.<sup>130</sup>

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119. *Id.*

120. D’Alo, *supra* note 85, at 205.

121. *Id.*

122. James Mortenson, *Why Should We Mediate Special Education Claims*, LDonline (1998), <http://www.ldonline.org/article/6302/>.

123. *Id.*

124. *Id.*

125. Katherine McMurtrey, *The IDEA and the Use of Mediation and Collaborative Dispute Resolution in Due Process Disputes*, 2016 J. DISP. RESOL. 1, 3 (2016).

126. *Id.* at 5.

127. *Id.*

128. *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

129. *Id.*

130. *Id.*

The Court noted that *Rowley* shed a light on what appropriate progress will look like in many cases.<sup>131</sup> As seen in *Rowley*, a child fully integrated in the regular classroom should have an IEP that is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”<sup>132</sup> However, a child’s IEP does not need to aim for grade-level advancement if that is not a reasonable expectation.<sup>133</sup> Still, while a child’s goals may differ, the Court noted that “every child should have the chance to meet challenging objectives.”<sup>134</sup> In addition, the Court noted that an absence of a concrete bright-line rule 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 which they review.”<sup>135</sup>

However, this decision was not a complete victim for Endrew’s parents. In coming to this decision, the Court rejected Endrew’s parents’ argument that the IDEA requires States to provide children with disabilities educational opportunities that are “substantially equal to the opportunities afforded children without disabilities.”<sup>136</sup> However, because the Court rejected this view in *Rowley* and Congress had not changed this standard after the decision, the Court did not accept this view now.<sup>137</sup>

## V. COMMENT

### A. *Endrew Was Correctly Decided*

In rejecting the Tenth Circuit’s “*de minimis*” standard, the Supreme Court correctly decided that the IDEA required more from FAPE. As discussed during oral arguments, the Supreme Court justices and the School District’s counsel could not pinpoint the origins of the “*de minimis*” standard.<sup>138</sup> The standard was not consistent with any previous Supreme Court ruling yet somehow was applied by the majority of federal courts.<sup>139</sup> As noted by Jeffrey Fisher, who was Endrew’s parents counsel, these courts needed “a kick” as the application of the “*de minimis*” standard lead to inconsistent outcomes throughout the country.<sup>140</sup> The Supreme Court correctly gave these courts the kick they deserved, recognizing that such a standard had no basis in special education law.

Furthermore, this low standard was recently condemned by multiple federal legislators from both major political parties.<sup>141</sup> For example, during Justice Neil

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131. *Id.* at 1000.

132. *Id.* at 999.

133. *Endrew*, 137 S. Ct. at 1000.

134. *Id.*

135. *Id.* at 1001.

136. *Id.*

137. *Id.*

138. Transcript of Oral Argument at 60, *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 999 (2017) (No. 15-827).

139. *Id.* at 62.

140. *Id.*

141. See, e.g., Andrew Chung, *U.S. Justices Reject Gorsuch in Win for Disabled Student*, U.S. NEWS (Mar. 22, 2017), <https://www.usnews.com/news/us/articles/2017-03-22/us-high-court-hands-disabled-students-win-on-education-standards>.

Gorsuch's Supreme Court confirmation hearings, the *Endrew* decision was announced.<sup>142</sup> Justice Gorsuch was a member of the Tenth Circuit Court of Appeals who, while not directly involved with the *Endrew* decision, had previously used the “*de minimis*” standard to rule against similar special education claims.<sup>143</sup> In response to *Endrew*, multiple senators such as Democrats Chuck Schumer and Dick Durbin and Republican John Cornyn questioned Justice Gorsuch for applying the now-rejected standard.<sup>144</sup> In response to this questioning, Justice Gorsuch admitted that the decision to apply the low standard was wrong, and he apologized.<sup>145</sup>

Additionally, the use of the “*de minimis*” standard cannot logically be consistent with multiple landmark educational acts. For example, the No Child Left Behind Act in 2004 was a revolutionary and bipartisan policy change for American public-school education.<sup>146</sup> No Child Left Behind intended to increase the measurable educational standards that students and educators were evaluated by while simultaneously aiming for academic growth throughout America.<sup>147</sup> Allowing the courts to apply a “*de minimis*” standard for special education student growth clearly conflicts with this bipartisan legislative action.

In addition, as the Supreme Court noted, it cannot be consistent with the IDEA to allow a normal functioning student to aim for grade level improvement year after year but hold a special education student to a much lower standard.<sup>148</sup> Therefore, because of the lack of judicial support and legislative intent behind the “*de minimis*” standard, the Court was correct to overturn the standard's usage.

The Court was also correct in rejecting *Endrew*'s parent's suggestion of “substantially equal” standard. A standard of aiming for grade to grade level improvement for all special education children's IEP would be unworkable for schools and courts. In addition, it would ignore the student's individuality that drives IDEA's purpose. For example, today special education requirements and services apply to a wide range of disabilities (i.e. Down Syndrome, Attention Deficit Disorder, and countless more).<sup>149</sup> To say that a child with Down Syndrome is entitled to a “substantially equal” goal as a general education student's grade-to-grade progress or as an ADHD student is unrealistic and not fair to the student.<sup>150</sup> Such a goal is not only unattainable for the student with Down Syndrome, but potentially detrimental to the child since, by ignoring the student's individual disability, it is likely that the child would not be getting the best tailored individual services he needs. Since *Rowley*, the Supreme Court has correctly recognized that a concrete standard for

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142. *Id.*

143. *Id.*

144. *Id.*; see also Anya Kamenetz, *The Supreme Court Rules in Favor of a Special Education Student*, NPR (Mar. 22, 2017), <http://www.npr.org/sections/ed/2017/03/22/521094752/the-supreme-court-rules-in-favor-of-a-special-education-student>.

145. Kamenetz, *supra* note 144, at 1.

146. Transcript of Oral Argument at 63, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827).

147. *Id.*

148. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-01 (2017).

149. See *The Most Common Disabilities in School*, TEACH-NOLOGY, [http://www.teach-nology.com/teachers/special\\_ed/disabilities/](http://www.teach-nology.com/teachers/special_ed/disabilities/) (last visited Oct. 20, 2017).

150. It is important to note that academic achievement varies based even within one disability such as Down Syndrome. However, students with Down Syndrome generally do not achieve grade to grade improvement. See Thomas L. Layton, *Developmental Scale for Children with Down Syndrome*, DSACC.ORG, <http://www.dsacc.org/downloads/parents/downsyndromedevelopmentalscale.pdf> (last visited Nov. 15, 2017).

FAPE is not possible due to the individualized nature of special education.<sup>151</sup> Therefore, *Endrew* was correct in not only rejecting the Tenth Circuit's "*de minimis*" standard but also rejecting *Endrew*'s parents proposed "substantially equal" standard as well.

*B. Endrew Could Lead To An Increase and Change to Special Education Mediation.*

As noted during oral arguments, the *Endrew* decision has the potential to impact over 8 million special education IEPs.<sup>152</sup> While special education disputes rarely find their way to courts, the Supreme Court recognized that this ruling had the potential to massively increase special education litigation.<sup>153</sup> With this increase of litigation looming, it is possible *Endrew* could drastically change the process and role of special education mediation going forward.

Traditionally, one of the concerns of special education mediation is that it can significantly advantage the school over the parents or the child.<sup>154</sup> Mediations are private matters often meant to protect school reputation.<sup>155</sup> Furthermore, ethical concerns can arise since the state pays for the mediator to settle the dispute for state funded schools.<sup>156</sup> Also, schools can be "repeat players", therefore school administrators are more likely than parents to be knowledgeable about the mediation and IDEA processes.<sup>157</sup> These advantages could result in the parents or the child having less power or control over the course of the mediation process than they should.

However, in light of *Endrew*, parents and students potentially could see an increase in mediation advantages. For example, in an evaluative mediation model where the mediator provides the parties with an evaluation of the strengths and weaknesses of each side's case and the likely legal outcomes, *Endrew* ensures that the child is guaranteed by law a higher standard than "*de minimis*." Therefore, an evaluative mediator would recognize that *Endrew* weakened a school's case or potential legal outcome if a school really was only providing a child a minimal benefit. This recognition could serve to mitigate the traditional advantage schools receive in the mediation process. As Daniel Unumb, executive director of the Autism Speaks Legal Resource Center, noted "[o]nce there's an appropriate standard in place and it's understood that that is the standard that needs to be met, I think that goes a long way to improving mediation and to improving attempts to avoid litigation."<sup>158</sup>

In addition to the changes to the mediation process, the sheer number of special education mediation may increase directly as a result of *Endrew*. While declining in recent years, with as many as 8 million IEPs facing a potentially higher standard, mediation could be the most efficient and effective method to solve this potentially

151. *Endrew*, 137 S. Ct. at 1001.

152. Transcript of Oral Argument at 60, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827).

153. *Id.*

154. McMurtrey, *supra* note 125, at 6.

155. *Id.*

156. *Id.*

157. *Id.*

158. Mark Keierleber, *Why Advocates Hope the Supreme Court Will Save Special Education*, THE74MILLION (Oct. 5, 2016), <https://www.the74million.org/article/why-advocates-hope-the-supreme-court-will-save-special-education/>.

massive increase in disputes. If special education mediation is unsuccessful, the cost to continue pursuing the special education claim is expensive. Further hearings after mediation can cost both sides tens of thousands of dollars in legal fees.<sup>159</sup> Furthermore, if a court finds a special education claim frivolous, all attorney's fees can be redirected back to the parents.<sup>160</sup>

For example, Jackie Pioli settled her dispute with her son's Connecticut school district just because further hearings would have costed the family as much as \$75,000 in legal fees, on top of the \$25,000 already spent on representation.<sup>161</sup> If she knew the process would be so expensive, Pioli said she would have paid the \$45,000 tuition herself for the private school she wanted for her son to attend.<sup>162</sup> In addition to these costs, special education claims can be time consuming. For example, in *Andrew*, Andrew was in fourth grade when the issue of the case occurred and was seventeen years old by the time his case reached the Supreme Court.<sup>163</sup> With almost 60% of children in special education throughout the United States living at or below the federal poverty level, continuing a claim past mediation is often not feasible.<sup>164</sup>

Therefore, because of the new standard adopted by *Andrew*, the process and amount of special education mediation could drastically change in the future.

## VI. CONCLUSION

Faced with its most significant special education case in decades, the Supreme Court held that that a “*de minimis*” educational benefit is not enough to provide a child with FAPE; rather, school districts must offer children IEP that is “reasonably calculated to enable each child to make progress appropriate for that child’s circumstances.” In recognizing this higher standard, the Court rejected the test used by the Tenth Circuit and the majority of federal courts to assess special education claims. This higher standard was correctly decided in light of past Supreme Court decisions and recent landmark educational act legislative intention. However, as a direct result of *Andrew*, the special education mediation process might change as it becomes the most efficient matter to deal with the potential massive amount of change this higher standard brings. As Supreme Court Chief Justice John Roberts noted, if the *de minimis* standard could continue, special education students would “hardly be said to have been offered an education at all.”<sup>165</sup>

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159. Carolyn Thompson, *Following Supreme Court ruling, more special education fights seen coming*, CHICAGO LAW BULLETIN (May 10, 2017), <http://www.chicagolawbulletin.com/Archives/2017/05/10/Special-ed-funding-5-10-17>.

160. Andrew Lee, *Due Process Rights: What You Need to Know*, UNDERSTOOD.ORG, <https://www.understood.org/en/school-learning/your-childs-rights/dispute-resolution/due-process-rights-what-you-need-to-know> (last visited Oct. 20, 2017).

161. Thompson, *supra* note 159, at 1.

162. *Id.*

163. Laura McKenna, *Is the Bar Too Low for Special Education*, THE ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/education/archive/2017/01/is-the-bar-too-low-for-special-education/514241/>.

164. *Prevalence of Special Health Care Needs Among Children, by Income Level (Regions of 70,000 Residents or More)*, KIDSDATA.ORG, <http://www.kidsdata.org/topic/14/characteristics-of-children-with-special-needs/summary> (last visited Oct. 20, 2017).

165. *Andrew*, 137 S. Ct. at 1001.