

# SOLVING THE IDEA PUZZLE: BUILDING A BETTER SPECIAL EDUCATION DEVELOPMENT PROCESS THROUGH *ENDREW F.*

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*When it was first enacted, the Individuals with Disabilities Education Act (IDEA) had the potential to function both as a progressive statement on the rights and needs of children with disabilities and as a concrete mechanism for promoting the educational progress of students with special needs—a population that had previously been all but denied access to the classroom. Yet despite the Act’s potential, over forty years of court precedents interpreting the Act have resulted in a diluted, unimaginative reality. The result is a system of inadequate education for students who most need educational revitalization: (1) a “continuum of alternative placements” provision that allows schools to provide students with only a bare outline of one-size-fits-most, group-based programming; (2) a “least restrictive environment” provision that does little to require that schools place students in public, integrated settings; and (3) an “educational benefit” standard that is far too comfortable with the status quo.*

*This Note begins by tracing the failures of the IDEA in the delivery of special education today, characterized by the low academic achievement of students with disabilities, high rates of incarceration and exclusionary discipline, and a lack of imagination on the parts of districts and teachers. The Note then proceeds to explain how educational inaction has been allowed to persist through a policy of judicial deference to districts, with courts failing to demand bold action or creative generation of new and innovative special education programs. Despite these failures, this Note argues that the Supreme Court’s recent decision in *Endrew F. v. Douglas County School District RE-1* can be used to help advocates move courts and districts out of the largely stagnant provision of special education services, where schools continue to rely on the same ineffective and dated programs rather than developing new methods to reach children with disabilities who continue to struggle in school. This Note argues that the language of *Endrew F.* can be read to promote a more rigorous, guided process of program development, helping advocates evaluate a district’s process and communicate failures to courts in a way that authorizes courts to act to correct these failures. In moving beyond the status quo and requiring that schools engage in constant growth, *Endrew F.* has the potential to solve the “puzzle” of the IDEA’s three primary provisions which, through court*

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*interpretations and decades of neglect, has led to a stalemate that incentivizes inaction rather than solutions. This Note’s novel interpretation of Endrew F. encourages a more robust reading of the Act, which will in turn support the growth and development of children with disabilities across the nation’s public schools.*

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INTRODUCTION

When De’Vantee Alexis, a student with a severe intellectual disability, first enrolled at Sci Academy, a public charter school in New Orleans, Louisiana,<sup>1</sup> he exhibited violent tendencies, was easily distracted, and struggled to stay focused.<sup>2</sup> In response, the school placed him in Essential Skills, a specialized classroom recently developed to meet the needs of a growing population of students who, despite significant impairments, had the potential to make progress on individually-set goals—from basics like motor skills to more rigorous communication milestones. Soon after, he grew to love school, finding academic and social growth in a demanding and rigorous setting.<sup>3</sup>

<sup>1</sup> The Author was employed at Collegiate Academies, the charter management organization that operates Sci Academy, from 2012 to 2015. Collegiate Academies has earned a reputation for developing strong and effective programs for students with disabilities: In 2014, 72% of the school’s special education students graduated from high school; double the dismal Louisiana state graduation rate for students with disabilities. See Beth Hawkins, *Once Largely Ignored, New Orleans Special Ed Students Find Meaning and Skills After High School*, THE 74 (Dec. 6, 2016), <http://www.the74million.org/article/once-largely-ignored-new-orleans-special-ed-students-find-meaning-and-skills-after-high-school/>.

<sup>2</sup> Danielle Dreilinger, *New Class Makes One N.O. Special Education Student Love School*, NOLA.COM (May 26, 2015), [http://www.nola.com/education/index.ssf/2015/05/new\\_orleans\\_special\\_education\\_4.html](http://www.nola.com/education/index.ssf/2015/05/new_orleans_special_education_4.html) (“When [Alexis’s teacher] met him five years ago, he was unpredictable, active and sometimes violent. He ran up and down the hallways. He’d kick a classmate out of nowhere.”).

<sup>3</sup> *Id.* (“After he got to Sci, ‘school made me feel happy,’ he said. He enjoyed ‘doing all my work and my math and my reading.’”).

After his eighteenth birthday, De’Vantee enrolled in Sci Academy’s newly-created Opportunities Academy, a publicly funded transition program designed to provide students with severe disabilities with an environment that feels “as much like college as possible.”<sup>4</sup> This creative innovation, inspired by the limited external opportunities for students like De’Vantee, represents just one of several special education programs at the school.

Compare De’Vantee’s experience to that of Andrew F., a student with autism who was enrolled in Colorado’s Douglas County public schools from preschool through fourth grade. Year after year, Andrew had essentially stalled in his academic growth; he exhibited behavioral challenges, like screaming in class and running away from school, that prevented him from making progress academically.<sup>5</sup> Despite ample evidence that his existing classroom setting, curricula, and goals were failing, Andrew’s school resisted making even moderate changes, let alone the “thorough overhaul of the school district’s approach” that his parents desired.<sup>6</sup> Andrew’s failure to make progress was not an inevitability of his disability; when his parents removed him from public school and placed him in the private Firefly Autism House, his “behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.”<sup>7</sup> When his parents argued that the district’s failure to provide the individualized, robust programming that he eventually received at Firefly was a deprivation of a free and appropriate public education under the Individuals with Disabilities Education Act (IDEA, or “the Act”), the federal statute that mandates special education in public schools, the District Court disagreed, finding that the school’s inactivity was nonetheless calculated to provide, “at the least, minimal progress.”<sup>8</sup>

The contrast between De’Vantee’s and Andrew’s experiences is just one representation of the IDEA’s failure to generate or incentivize publicly provided and effective special education. In the forty years since its enactment, the IDEA has been interpreted nearly out of existence, requiring that school districts comply with a set of empty obligations without demanding rigor in the process of program development or in the substantive program that results. Though schools

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<sup>4</sup> Hawkins, *supra* note 1.

<sup>5</sup> Andrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 996 (2017).

<sup>6</sup> *See id.* at 996–97.

<sup>7</sup> *Id.* at 997.

<sup>8</sup> *Id.* (internal quotation marks omitted) (quoting and describing the lower court’s holding in Andrew F. v. Douglas Cty. Sch. Dist. RE-1, No. 12–cv–2620–LTB, 2014 WL 4548439 (D. Colo. Sept. 15, 2014), before explaining how the standard will change under the new Supreme Court holding).

like Sci Academy may occasionally exceed their statutory responsibility, this Note argues that the web of court decisions that have given texture to the IDEA's provisions has established an exceedingly low bar for school action, creating a set of contradicting priorities that many schools struggle to interpret. Today, public schools like Sci Academy that self-consciously evaluate student needs and program gaps are a rarity, while those like Andrew F.'s public school district—which recycles old goals, utilizing the same failing approaches each year—are far more common and are often granted a free pass by courts. When schools venture to act within this tangled set of precedents, they do so timidly, without the imagination our children require. Yet while stagnancy and confusion pervade our current special education environment, the Supreme Court's recent decision in *Andrew F. v. Douglas County School District RE-1*,<sup>9</sup> which repudiated the District Court's hands-off approach towards Andrew's school's inaction, is an important step in adding definition and clarity to a district's essential task of special education program development.

This Note argues that *Andrew F.* provides a powerful tool for advocates to push school districts to engage in a more rigorous and guided process of inquiry and development when designing programs for students with disabilities. In contrast to the unimaginative, careless approach initially utilized by Andrew's school district in Colorado, the Supreme Court in *Andrew F.* envisions a more “muscular” process of design in which schools must engage before arriving at a conclusion about the best program for a student<sup>10</sup>—and before justifying that position to a judge. In particular, this Note argues that *Andrew F.* has the potential to promote a special education development process that can correct the three largest failures of the current state of IDEA interpretations: (1) the removal of the individual from program creation;<sup>11</sup> (2) the failure to evaluate the needs and potential of students with disabilities alongside their non-disabled peers;<sup>12</sup> and (3) the troubling comfort with stagnancy.<sup>13</sup> When read in this light, *Andrew F.* can help practitioners solve the IDEA puzzle—a maze of precedents that incentivizes inaction—by promoting a more generative vision of special education program creation, providing advocates with the nec-

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<sup>9</sup> *Id.* at 988.

<sup>10</sup> See James S. Liebman, *Perpetual Evolution: A Schools-Focused Public Law Litigation Model for Our Day*, 117 COLUM. L. REV. 2005, 2029 (2017) (describing the process of development in *Andrew F.* as a “muscular process of local experimentation and shared learning”).

<sup>11</sup> See *infra* Section II.A.

<sup>12</sup> See *infra* Section II.B.

<sup>13</sup> See *infra* Section II.C.

essary tools for evaluating district action and for encouraging courts to correct process failures.

Though courts routinely express concerns about intervening in the *substantive* area of educational policy,<sup>14</sup> advocates can play a watchdog role in evaluating the *process* that schools use to make decisions about individual students' educational needs. By adding more heft to the individualization and creativity<sup>15</sup> that districts must utilize when serving the special education needs of their students, *Endrew F.* allows advocates to communicate more clearly to courts the failings of districts and provides advocates with a vocabulary to demand more from districts without asking that courts interfere with the education policy expertise of districts.<sup>16</sup> Though other scholars have begun to recognize that *Endrew F.* places an increased burden on schools to justify their decisions,<sup>17</sup> this Note is the first to situate *Endrew F.* within the IDEA's three bedrock provisions—the “continuum of alternative placements,” the “least restrictive environment,” and the “educational benefit standard”—and to argue that the case supports advocates in holding schools accountable to meet the robust requirements of each of these provisions.

As a threshold consideration, the availability of resources<sup>18</sup> may guide the ability of districts to comply with this Note's more ambitious

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<sup>14</sup> See, e.g., *E.L. v. Chapel Hill-Carrboro Bd. of Educ.*, 773 F.3d 509, 514–15 (4th Cir. 2014) (citing *Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982) for the principle that “courts lack the expertise to resolve questions of educational policy”); see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330, 338 (2006) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 448 U.S. 1, 41 (1973)) (noting that Courts frequently feel “encumbered by considerations of judicial restraint” in the context of educational equity cases); *id.* at 338 & n.28 (quoting *San Antonio Indep. Sch. Dist.*, 448 U.S. at 42, and noting that the Supreme Court uses a stated “lack of specialized knowledge and experience” to justify abdication in these cases (internal quotation marks omitted)).

<sup>15</sup> This Note uses the term “individualization” to denote a district's imperative to provide particular students with customized goals and services. “Creativity” is a manner in which individualization can take place at the district level, including both developing *new* programs and resources to respond to individual student needs and incorporating existing programs from other schools into a given district's offerings. Together, a focus on the individual student can help spur the creative development necessary for reaching unique student needs and filling gaps.

<sup>16</sup> Cf. Liebman, *infra* note 10, at 2029 (noting that courts before *Endrew F.* rejected the “old-style public law litigation” requirement that courts must identify “simple *substantive* solutions for complex problems” (emphasis added)).

<sup>17</sup> See *id.* at 2029–31 (referring to *Endrew F.* as an example of “evolutionary learning”: an approach that balances the need for schools to engage in increased process with a court's limited expertise in the mechanics of educational decisionmaking).

<sup>18</sup> Though the IDEA provides funding to states, federal funding has never reached the target of covering 40% of the cost associated with educating students with disabilities. See *Cordero v. Pa. Dep't of Educ.*, 795 F. Supp. 1352, 1355 (M.D. Pa. 1992) (noting that the IDEA “provides federal funding” in order for states to “provide a range of educational

demands, and, perhaps indirectly, with the willingness of courts to hold them accountable. While a more nuanced discussion of resources is outside the scope of this Note, special education is expensive regardless of its quality; it costs just as much to run a bad individualized education plan (IEP) meeting as it costs to run a good one.<sup>19</sup> Moreover, by focusing on procedural enhancements rather than specific curricular requirements, *Endrew F.* does not demand that funding be directed to any *particular* program—instead, by defining a new standard of “educational benefit,” it demands that schools utilize *procedures* that are calculated to produce programming that benefits children.

This Note proceeds in three parts. Part I describes the current state of special education delivery in the country, exposing the inequities and inefficiencies that plague the provision of special education today. Part II steps back to answer how we got to this point, arguing that courts have collectively produced a legal puzzle, which districts are forced—and often fail—to navigate. In particular, Part II provides a unique analysis of the intersection between three of the IDEA’s main provisions: (1) the mandate to develop a “continuum of alternative placements” to serve students with a range of needs, (2) the pref-

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services to disabled children”); see also Carolyn Thompson, *Expensive, Grueling Fights in Store for U.S. Special Education*, ASSOCIATED PRESS (May 6, 2017, 10:15 AM), <https://www.usnews.com/news/best-states/colorado/articles/2017-05-06/expensive-grueling-fights-in-store-for-us-special-education> (“In 2014, federal funding covered about 16 percent.”). Furthermore, inequitable and inadequate public school funding almost certainly imposes limits on districts’ ability to serve all students. Increased support for education is crucial for improving districts’ abilities to meet ambitious student achievement goals. See Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/> (describing the inequalities in education funding across counties); MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1–2 (2016), <https://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf> (finding that, over time, most states have cut their funding for schools); Kevin Carey & Elizabeth A. Harris, *It Turns Out Spending More Probably Does Improve Education*, N.Y. TIMES: THE UPSHOT (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/nyregion/it-turns-out-spending-more-probably-does-improve-education.html> (arguing that increased spending improves student outcomes).

<sup>19</sup> See, e.g., Chester E. Finn, Jr., *Forward and Summary* of MATTHEW RICHMOND & DANIELA FAIRCHILD, THOMAS B. FORDHAM INST., FINANCING THE EDUCATION OF HIGH-NEED STUDENTS 1 (2013), <http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Financing-the-Education-of-High-Need-Students-FINAL.pdf> (describing how the “ineffectual system” of special education “is also very, very expensive”). Others argue that spending more on special education will decrease spending on services necessary to support students in the future—particularly if they are given the skills to develop “greater independence and greater self-sufficiency.” Rebecca Beitsch, *Special Education Case at Supreme Court Could Prove Costly for Schools*, PEW CHARITABLE TRS.: STATELINE (Dec. 8, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/08/special-education-case-at-supreme-court-could-prove-costly-for-schools>.

erence for placing children in the “least restrictive environment,” and (3) the need to confer an “educational benefit” to children with disabilities. Finally, Part III presents a solution—utilizing the Court’s language in *Endrew F.*—for advocates to solve the puzzle of inaction caused by the intersection of these three provisions, demanding increased rigor from districts in the process of special education design and encouraging courts to intervene when a district has failed to meet its responsibilities under the Act.

## I

### TRACING THE OUTCOMES OF DISTRICT IDLENESS

The Individuals with Disabilities Education Act, enacted in 1975 as the Education for All Handicapped Children Act (EAHCA),<sup>20</sup> can trace its history at least as far back as the Supreme Court’s decision in *Brown v. Board of Education*.<sup>21</sup> The Court’s pronouncement in *Brown* that an education “must be made available to all on equal terms”<sup>22</sup> inspired disability rights advocates to challenge the persistent denial of education for students with disabilities.<sup>23</sup> At the time, children with disabilities were either completely shut out of public schools, were provided with inadequate programming, or were continually underperforming because of their schools’ inability to detect or identify their disabilities.<sup>24</sup>

Today, forty-three years after the passage of the EAHCA, renamed the IDEA in 1990,<sup>25</sup> the experience of students with disabili-

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<sup>20</sup> *The Right to Education*, DISABILITY JUST., <http://disabilityjustice.org/right-to-education/> (last visited Aug. 30, 2018).

<sup>21</sup> See *id.* (noting that the *Brown* decision provided the “constitutional foundation for parents of children with disabilities and disability rights activists to press for equal educational opportunities for all children, including those with developmental and other disabilities”).

<sup>22</sup> 347 U.S. 483, 493 (1954).

<sup>23</sup> See Robert Caperton Hannon, Note, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 717 (1997) (describing the advocacy in the aftermath of *Brown* among children’s advocates in the 1960s and early 1970s). Following *Brown*, advocates brought a series of federal court cases to challenge the exclusion of children with developmental disabilities from public schools. See Pa. Ass’n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 302 (E.D. Pa. 1972) [hereinafter *P.A.R.C.*] (enjoining the state from excluding children with developmental disabilities from schools in Pennsylvania); Mills v. Bd. of Educ., 348 F. Supp. 866, 877 (D.D.C. 1972) (expanding the holding of *P.A.R.C.* beyond children with developmental disabilities to include all “exceptional” children).

<sup>24</sup> See, e.g., 20 U.S.C. § 1400(c)(2) (2012) (noting in the Findings section to the IDEA that, prior to the enactment of the EAHCA, “the educational needs of millions of children with disabilities were not being fully met” for a variety of reasons).

<sup>25</sup> See *Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/speced/leg/idea/history.html> (last visited Sept. 9, 2018).



ties in public schools has undoubtedly improved,<sup>26</sup> but the original promise of the statute has not been kept. Despite the IDEA's demand that schools develop IEPs that set out a strategy for providing students with disabilities with a "free appropriate public education" (FAPE),<sup>27</sup> schools have struggled to develop effective and evolving special education programming.<sup>28</sup> This Part illustrates the ways in which school districts across the country are failing to provide students with disabilities the necessary tools for academic achievement.

### A. Academic Gaps and Poor Outcomes

Though students with disabilities are now routinely *provided* with an IEP—the bare minimum procedural requirement under the Act—the IEPs themselves too often fail to spur academic growth.<sup>29</sup> According to the U.S. Department of Education, less than half of states across the country meet "federal performance targets for special education."<sup>30</sup> In 2015, just 16% of fourth grade students with disabilities nationwide achieved proficiency on the mathematics portion of the National Assessment of Educational Progress, compared with 43% of their peers without disabilities,<sup>31</sup> and the disparity increased as

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<sup>26</sup> See, e.g., Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 795 (2005) (describing a "sharp increase in the number of children with disabilities who are educated in the regular classroom").

<sup>27</sup> 20 U.S.C. § 1412(a)(1) (2012).

<sup>28</sup> E.g., LAUREN MORANDO RHIM ET AL., CTR. FOR AM. PROGRESS, IMPROVING OUTCOMES FOR STUDENTS WITH DISABILITIES 4 (2016), <https://cdn.americanprogress.org/content/uploads/2017/01/31104711/CharterSpecialEdCollab-report.pdf> ("Public schools—both traditional and charter—are struggling to consistently provide a high-quality education to students with disabilities.").

<sup>29</sup> After a student with a disability is referred for special education services (either by parents or teachers), schools conduct psychoeducational evaluations to determine a child's specific educational needs and classification, including Learning Disability, Emotional Disturbance, and Intellectual Disability, among others. See, e.g., ADVOCATES FOR CHILDREN OF N.Y., AFC'S GUIDE TO SPECIAL EDUCATION 6, 8, 12 (2016) [hereinafter AFC'S GUIDE TO SPECIAL EDUCATION], [http://www.advocatesforchildren.org/sites/default/files/library/special\\_ed\\_guide.pdf](http://www.advocatesforchildren.org/sites/default/files/library/special_ed_guide.pdf). If the evaluation determines that the child could benefit from special education, the school must develop an IEP for the student, which describes the classroom services, student-teacher ratio, and related services (including speech therapy and counseling) that the student must receive each year. See *id.* at 12. Schools must hold an IEP meeting at least once a year to review a student's current placement and progress towards written goals, and to hear the feedback and concerns of teachers and the child's parents. At a minimum, the IEP meeting must include the parent, a special education teacher, a general education teacher (if the child is in a general education class), a school psychologist, and a district representative or supervisor. See *id.* at 13. If the child is old enough to benefit from participation, the child may also take part in the meeting. See *id.*

<sup>30</sup> RHIM ET AL., *supra* note 28.

<sup>31</sup> *Id.* at 5.



students grew older.<sup>32</sup> Poor academic results and low graduation rates<sup>33</sup> lead to negative life outcomes, including high arrest and unemployment rates.<sup>34</sup> The National Council on Disability estimates that “up to 85 percent of youth in juvenile detention facilities have disabilities that make them eligible for special education services,” though very few actually receive services while incarcerated.<sup>35</sup> The criminalization of students with disabilities through long-term suspensions and other exclusionary disciplinary policies leads to missed classroom time, high drop-out rates, and, far too frequently, arrest and incarceration.<sup>36</sup>

Though these results have emerged from a theoretically “carefully drafted and visionary piece of legislation,”<sup>37</sup> they may in part be attributable to the lack of clear guidance governing much of the special education placement and negotiation process. The process of developing an IEP can be rife with conflict, and IEP team members

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<sup>32</sup> See *id.* (finding that 8% of students with disabilities were proficient on the math portion of the NAEP in eighth grade, compared to 36% of students without disabilities). These disparities are particularly stark in individual districts. In New York City, for example, schools report triple-digit disparities in the performance of students with disabilities compared to their peers. N.Y.C. DEP’T OF EDUC., 2017 NEW YORK STATE TEST RESULTS: NEW YORK CITY GRADES 3–8, at 8 (2017), <https://perma.cc/PWG2-HJUN> (reporting that, in 2017, just 11.8% of New York City students with disabilities in grades three to eight were proficient in Math, compared to 44.6% of students in the general education population; for English Language Arts, the difference was 10.7% to 48.6%). Furthermore, academic disparities in early grades translate to low graduation rates. In New York State, the graduation rate for students with disabilities in the 2013 cohort (the graduating class of 2017) was 54.2%, compared to an overall graduation rate of 80.2% (including both students with disabilities and those without). *State Education Department Releases 2013 Cohort High School Graduation Rates*, N.Y. STATE EDUC. DEP’T (Feb. 7, 2018), <http://www.nysed.gov/news/2018/state-education-department-releases-2013-cohort-high-school-graduation-rates>.

<sup>33</sup> For national graduation rate disparity data, see RHIM ET AL., *supra* note 28, at 5, which reports a national 2015 high school graduation rate of 64.3% for students with disabilities, compared to 83.2% for all students.

<sup>34</sup> Rebecca Weber Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 245 (1994) (stating that half of the students with disabilities between the ages of fifteen and twenty who drop out of school are unemployed two years after high school, and that arrest rates are “fifty percent higher for youths with disabilities than for those in the general population”).

<sup>35</sup> NAT’L COUNCIL ON DISABILITY, *BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES* 5 (2015), <https://www.ncd.gov/publications/2015/06182015>.

<sup>36</sup> See generally Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special Education Too Often Leads to Jail for Thousands of American Children*, HECHINGER REP. (Oct. 26, 2014), <http://hechingerreport.org/pipeline-prison-special-education-often-leads-jail-thousands-american-children/>.

<sup>37</sup> Goldman, *supra* note 34.

“struggle[ ] to operate as equal decision-making partners.”<sup>38</sup> The “variety of social and political characteristics of the team, school, and district may impact the decisions that are made on behalf of individual students.”<sup>39</sup> Without a stable definition of what districts are required to provide students, conflicts are allowed to fester.

The IEP process requires that schools provide students with a “classification”—which can include intellectual disability, language disorder, or emotional disturbance—before developing a placement and program for the child that is reflected on the student’s IEP.<sup>40</sup> A student’s classification plays a large role in the resulting program and goals developed for the child, but there are limited guidelines or standards determining how schools should be selecting a classification.<sup>41</sup> Furthermore, there is evidence that confusion regarding appropriate classifications and the resulting school placements disproportionately impacts minority students. Though students with disabilities are more likely to be educated alongside their non-disabled peers today than they were at the time that the Act was drafted, “African-American students and poor students identified as having a disability [are] more likely than their counterparts to be placed *outside* of the general education classroom.”<sup>42</sup> As a result, these students frequently receive an inferior, segregated education. Though there is evidence that public settings frequently lead to better outcomes than placement in a private, specialized, and segregated school,<sup>43</sup> courts have provided lim-

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<sup>38</sup> Shelley L. Spessard, *An Exploration of the Dynamics and Collaboration Within Individualized Educational Program Teams 7* (May 2014) (unpublished Ed.D. dissertation, California State University, Stanislaus), <https://scholarworks.csustan.edu/bitstream/handle/011235813/773/SpessardSL.Spring2014.pdf>.

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., AFC’s GUIDE TO SPECIAL EDUCATION, *supra* note 29, at 12 (listing the thirteen classifications of disability available from which IEP teams can choose).

<sup>41</sup> See, e.g., Laura Klein, *The Special Education Problems We Aren’t Solving*, WNYC (July 23, 2012), <https://www.wnyc.org/story/301679-the-special-education-problems-we-arent-solving/> (recounting cases of students who have been misclassified).

<sup>42</sup> David Edward DeMatthews & Hanne Mawhinney, *Addressing the Inclusion Imperative: An Urban School District’s Responses*, 21 EDUC. POL’Y ANALYSIS ARCHIVES 1, 7 (2013) (emphasis added), [https://www.researchgate.net/publication/277953758\\_Addressing\\_the\\_Inclusion\\_Imperative\\_An\\_Urban\\_School\\_District%27s\\_Responses](https://www.researchgate.net/publication/277953758_Addressing_the_Inclusion_Imperative_An_Urban_School_District%27s_Responses).

<sup>43</sup> See, e.g., ARISE COAL., EDUCATE! INCLUDE! RESPECT! 3 (2009), [http://www.arisecoalition.org/uploads/1/3/4/8/13489995/educate\\_include\\_respect\\_report.pdf](http://www.arisecoalition.org/uploads/1/3/4/8/13489995/educate_include_respect_report.pdf) (advocating for a task force to research “opportunities for inclusion and access to the mainstream curriculum” as a form of fixing the low graduation rates and test scores of students with disabilities in segregated settings); see also Goldman, *supra* note 34, at 262 (“Beyond improving educational outcomes, educational placement in the least restrictive environment was intended to give children the highest possible level of individual liberty.”). While this Note argues that, in aggregate, a system of removal of children with disabilities from the public school system leads to problematic district-wide impacts, individual students may benefit more from private placements, and the IDEA—and this

ited guidance for districts in determining when students with disabilities should be educated alongside their peers and when they should be separated.<sup>44</sup> This leads to the unnecessary push-out of many students into inferior private or segregated placements. African American students are also far more likely to be classified as “emotionally disturbed” than their white classmates, even when such a classification is not warranted.<sup>45</sup> Furthermore, the lack of clear guidelines from courts regarding how schools should meet their obligations under the IDEA allows cultural misunderstandings, implicit biases, and inappropriate assessments to shape children’s placements and, as a result, their outcomes.<sup>46</sup>

### B. Limited True Individualization

Though the IDEA requires “specially designed instruction”<sup>47</sup> for individual students, districts increasingly turn to group-based decision making and administratively convenient groupings of students in order to meet the IDEA’s requirements. Part of this outcome might stem from the reality that the IDEA imposes no requirements on individual *schools*, but rather requires districts and states *as a whole* to provide students with a public education.<sup>48</sup> The reality of district and state-based obligations, rather than a mandate on an individual school to design a new service for a specific student, means that the IDEA

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Note’s reading of *Endrew F.*—still provides opportunities to make nuanced, sensitive decisions about individual students and their needs.

<sup>44</sup> The IDEA defines the preference for integration as the “least restrictive environment” provision. *See infra* Part II.B (discussing courts’ guidance of the least restrictive requirement).

<sup>45</sup> DeMatthews & Mawhinney, *supra* note 42. Though a more thorough analysis of the ineffective and frequently inappropriate special education programs provided to students of color is outside the scope of this Note, there is extensive research that suggests that minority and low-income students are disproportionately harmed by special education failures—either because they are over-identified or because they are not provided with the services they need. *See, e.g.*, Nora Gordon, *Race, Poverty, and Interpreting Overrepresentation in Special Education*, BROOKINGS INST. (Sept. 20, 2017), <https://www.brookings.edu/research/race-poverty-and-interpreting-overrepresentation-in-special-education/>.

<sup>46</sup> *See, e.g.*, Nicole M. Oelrich, *A New “IDEA”: Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S.D. L. REV. 9, 24–32 (2012) (outlining a variety of reasons for the over-identification of black and poor students as “emotionally disturbed”); *see also infra* Part II (arguing that the Court’s failure to define strict guidelines for compliance with the IDEA has resulted in poor academic outcomes for impacted individuals).

<sup>47</sup> 20 U.S.C.A. § 1401(29) (West 2016) (defining “special education” in the statute).

<sup>48</sup> *See, e.g.*, Mei-lan E. Wong, Note, *The Implications of School Choice for Children with Disabilities*, 103 YALE L.J. 827, 853 (1993) (“Unless each individual school is required to provide the special services needed to educate children with disabilities, individual schools will have a disincentive to provide such programs.”).

sometimes functions at the level of generalities, providing a bird's eye view of a district's program offerings rather than a granular look at individual student needs. As a result, districts seeking to establish the programs they need for students with disabilities tend to do so by thinking about students as members of generalizable groups, categorizing them based on their disability classification and administrative resources, rather than by first looking at the student and then designing appropriate programs.<sup>49</sup> The priority placed on group-based thinking encourages districts to think about all students with emotional disturbance, for example, in the aggregate—providing a one-size-fits-all program rather than thinking more boldly about the shared needs of students *across* classifications. In contrast, by recognizing that many students with emotional disorders also have speech and language disorders “that impact their ability to understand and communicate with peers and adults,”<sup>50</sup> schools would provide shared services *across* classifications and think more critically about the shared needs of groups of students, rather than simply lumping students together based on classification or label.

Teachers at public schools describe an environment in which they are at a loss when faced with a student whose needs have not yet been addressed in the existing range of placements. They may identify a potentially beneficial program for a student, but then they struggle to figure out a way that it can feasibly be offered.<sup>51</sup> They are forced to tailor an IEP to the existing resources of the school rather than to the unique needs of the student, which frequently results in less individualization and more group-based thinking.<sup>52</sup> When schools are espe-

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<sup>49</sup> The “Continuum of Alternative Placements” regulation, on its own and without additional rigor from the courts, seems to also encourage group-based thinking by providing examples of the *types* of programs that might constitute a true continuum (e.g., “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions”). 34 C.F.R. § 300.115 (2017). Yet a true continuum of services in a school would be constantly adjusted and developed for individual children—not used as a rigid structure into which individual children would be forced to fit.

<sup>50</sup> *Emotional Disturbance*, PROJECT IDEAL, <http://www.projectidealonline.org/v/emotional-disturbance/> (last visited Aug. 13, 2018); see also Klein, *supra* note 41 (describing one teacher's experience working with students with emotional disorders).

<sup>51</sup> See, e.g., GEORGE S. PERRY, JR., CAROL A. WRIGHT & NANCY A. BAEZ, PERRY & ASSOCS., INC., GETTING IT RIGHT: SCHOOL-LEVEL IMPLEMENTATION OF NEW YORK CITY DEPARTMENT OF EDUCATION SPECIAL EDUCATION REFORM 28 (2013), [http://www.perryandassociatesinc.com/NYC-SpecEd-12-3-13\\_FINAL.pdf](http://www.perryandassociatesinc.com/NYC-SpecEd-12-3-13_FINAL.pdf) (“[T]he purpose of [the IEP process] was to help . . . children who need help and now—it doesn't matter what the test results show. You can't recommend that because you don't have that. So what's the purpose?”) (internal quotation marks omitted) (quoting a high school teacher).

<sup>52</sup> See, e.g., *id.* (sharing the feelings of one teacher, who expressed concern about the school's frequent practice of “see[ing] the IEP and see[ing] how you can change that to

cially egregious in their reliance on group-based attitudes—such as in *P.J. v. Connecticut Board of Education*, where a student classified with mild to moderate retardation<sup>53</sup> was placed in a program without any consideration of why that program would benefit the individual student—they are admonished.<sup>54</sup> However, the remedy in *P.J.* lacked any guidance for the school. The district was instructed to go through the motions of the bare process outlined in the IDEA: conducting an evaluation, then writing an IEP, and finally providing a placement based on the evaluation and accompanying IEP.<sup>55</sup> The resulting outcome, then, could easily have resulted in the identical placement that was challenged in the case from the beginning.<sup>56</sup> Without more fleshed-out procedural guidance,<sup>57</sup> group-based thinking goes unchecked.

## II

### INTERPRETING THE IDEA

The previous Part described many of the primary failures of our nation's inadequate system of special education today: triple-digit disparities in the academic results of students with disabilities compared to their peers, extremely high rates of arrest and imprisonment, and a system of special education delivery at the school level that relies heavily upon group-based abstraction and one-size-fits-all approaches.<sup>58</sup> This Part explains how judicial interpretations of three bedrock provisions of the IDEA have created our current state of stagnancy by failing to require a robust “continuum of alternative placements,” providing insufficient guidance to districts in defining the “least restrictive environment,” and tolerating a weak and easily-met “educational benefit” standard. In particular, this Part argues that by declining to give content to each of these three provisions and

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accommodate . . . what supports [we as a school] have in place,” rather than first looking at the child's needs).

<sup>53</sup> *P.J.* was decided in 1992, when the IDEA used different classifications. Today, the classification of “mental retardation” is no longer used.

<sup>54</sup> 788 F. Supp. 673, 682 (D. Conn. 1992) (“The overwhelming evidence . . . establishes that the Board's decision to place Lauren in its preschool program was based on the fact that Lauren is handicapped, rather than on the professional review of available alternatives and the recommendations of experts familiar with [Lauren's] particular special education needs . . .”).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 683. This judicial response reflects Professor Liebman's critique that many lower courts before *Andrew F.* “limited judicial intervention in IDEA cases to bright-line situations.” Liebman, *supra* note 10, at 2029.

<sup>57</sup> See *infra* Part III, which frames *Andrew F.* in terms of the procedural guidance it offers districts.

<sup>58</sup> See *supra* Part I.

instead placing responsibility for action on intersecting provisions of the Act,<sup>59</sup> courts have created a snowball effect of missed opportunities and shrugged responsibilities—balancing the Act’s requirements against each other to produce no coherent standard at all.<sup>60</sup>

Collectively, these failures have contributed to the unproductive processes and poor academic and life outcomes described in Part I. In connecting these three provisions of the IDEA and explaining how interpretations of each in turn impacts and deprives the others of their force, this Part presents a novel view of their intersection and of the logical “puzzle” that courts have produced through their decisions.

### A. *Continuum of Alternative Placements*

The IDEA does not require that school districts affirmatively establish any specific programs. Instead, the Act requires that districts provide—whether through programs housed within the public schools or through partnerships with private placements—*some* form of education to children with disabilities.<sup>61</sup> Though the statute requires a public education, its regulations acknowledge that a student’s disability might be so severe that placement in a “special class[ ], separate school[ ], or other removal” will be necessary.<sup>62</sup> The statute affords protection to students by guaranteeing that the program, regardless of location, will be publicly funded. To ensure that districts do not simply rely on segregated private schools to satisfy their statutory requirements, the statute requires that districts establish a “continuum of alternative placements” for students with disabilities, representing a range of special education environments dependent on student need.<sup>63</sup>

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<sup>59</sup> *Hartmann by Hartmann v. Loudoun Cty. Bd. of Educ.*, 118 F.3d 996, 1002 (4th Cir. 1997); *see also* *Briggs v. Bd. of Educ.*, 882 F.2d 688, 692 (2d Cir. 1989) (weighing the mainstreaming requirement against the FAPE requirement).

<sup>60</sup> *See, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1st Cir. 1990) (arguing that the continuum of possibilities is established through the educational benefit and least restrictive environment provisions, not on its own); *cf. Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989) (arguing that the court must balance two “competing requirements” in the Act: the FAPE requirement and the least restrictive environment requirement).

<sup>61</sup> *See, e.g.,* 20 U.S.C. § 1400(d)(1)(A) (2012) (describing the purpose of the IDEA as ensuring “that all children with disabilities have available to them a free appropriate public education”).

<sup>62</sup> 34 C.F.R. § 300.114(a)(2)(ii) (2017).

<sup>63</sup> 34 C.F.R. § 300.115. Though this Note advocates for a more engaged consideration and integration of new programs, it recognizes that there is a real danger in turning the most vulnerable group of students into guinea pigs for experimentation. Children need stability and should only be provided with new programs if there is real research and evidence to suggest that those programs will work. At the same time, however, districts should be utilizing their resources for program generation, and a system of new

The regulations require that district-provided placements include “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.”<sup>64</sup> Yet as currently interpreted by courts, this provision is essentially hollow—easily met by districts in all but the most egregious of circumstances and failing to spur new activity or program development for the students who need it most. In *J.S. v. New York City Department of Education*, a fifteen-year-old student with Tourette’s syndrome and generalized anxiety disorder was offered a placement in a twenty-five-student, two-teacher Integrated Co-Teaching (ICT) classroom.<sup>65</sup> His parents objected, arguing that such a large class would be distracting and inappropriate given their son’s anxiety, and that he instead needed a smaller program where students with academic ability and behavioral needs similar to J.S. could be paired together.<sup>66</sup> The court rejected the plaintiff’s argument, finding that the already available twenty-five-student classroom was good enough, and the state had no obligation “to ensure that there be a placement option specifically suited for [a student’s] *particular* needs and goals.”<sup>67</sup>

While it may be true that school districts are not obligated to provide a unique setting for each individual student, a reliance on programs that are already available and merely “good enough” fails to encourage the systemic thinking necessary for true reform. While the court correctly found that establishing a new program suited *only* for an individual student is not required by the regulations,<sup>68</sup> J.S.’s requested program could have had a positive impact on *numerous* students who are currently trapped in inappropriate classrooms—not just J.S. himself. The court in *Roncker v. Walter* nearly admitted as much, suggesting that a district cannot use a defense of cost when explaining why it has not established a specific, less restrictive program if it “has failed to use its funds to provide a *proper* continuum of alternative

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programs—grounded in data and proof—should be provided to all students as knowledge develops.

<sup>64</sup> *Id.*

<sup>65</sup> 104 F. Supp. 3d 392, 397 (S.D.N.Y. 2015).

<sup>66</sup> *Id.* at 411.

<sup>67</sup> *Id.* at 412 (internal quotation marks omitted) (quoting *Straube v. Fla. Union Free Sch. Dist.*, 801 F. Supp. 1164, 1176 (S.D.N.Y. 1992)). Similar interpretations of the regulations have been made by other circuits, including the Seventh Circuit Court of Appeals. *See, e.g., Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) (“[P]arents, no matter how well-motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.” (collecting citations)).

<sup>68</sup> *J.S.*, 104 F. Supp. 3d at 413–14.



placements for handicapped children.”<sup>69</sup> Yet, this response does little but lead us back to the ineffectual “continuum” standard, as interpreted in *J.S.*<sup>70</sup>

Even when it is determined that schools must consider establishing new placements, courts—including the Ninth Circuit in *Poolaw v. Bishop*<sup>71</sup>—have found that districts must only give “serious consideration” to a proposed new program before swiftly rejecting it. In *Poolaw*, parents of a deaf child wanted the school to provide him with a program in a mainstreamed classroom environment rather than in a specialized, segregated setting.<sup>72</sup> The school district relied upon reports from another school and on a “serious consideration” of the steps and program changes that would be necessary to integrate the student into a general education environment before concluding that he needed a private placement. The court found that the school’s steps were sufficient, even though the school neglected to utilize “a number of alternative programs that could be implemented at [the public school]” to educate the student.<sup>73</sup>

Though the *Poolaw* Court was satisfied with the district’s limited efforts,<sup>74</sup> thinking about how a new program might impact a student’s progress is a fairly loose standard. Without checks on the proper thought process or guidance regarding how to determine whether a district’s consideration is sufficiently “serious,” the *Poolaw* standard fails to define its terms or to impose increased rigor on the procedure that a district must use to make crucial decisions about the educational future of a student with a disability. In contrast, a system of actual trial and error might result in the type of creativity employed at Sci Academy: a recognition that there is a need for a new, previously unexplored program, followed by guided implementation. Even without a system of trial and error, a school should be required to

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<sup>69</sup> *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (emphasis added).

<sup>70</sup> Because the *J.S.* court does not require that a school design its continuum of placements by taking into account the positive impacts that a new program can have on *other* students in its building, not just the specific student in need of a new placement, using the sufficiency of a school’s continuum as a benchmark will rarely lead to increased action from the district. See also *infra* Sections III.B–D for more on the circular nature of IDEA interpretations.

<sup>71</sup> 67 F.3d 830, 835 (9th Cir. 1995) (holding that it was not a violation of the IDEA for the district to rely on reports from another district, in which the student was formerly a student, about the suitability of a particular placement). In *Poolaw*, the district’s consideration of the results of that placement, even without the district taking affirmative steps to establish a version of that placement within its own system, satisfied the court’s stated “serious consideration” standard. *Id.*

<sup>72</sup> *Id.* at 833.

<sup>73</sup> *Id.* at 835.

<sup>74</sup> *Id.*

provide a “cogent and responsive explanation for [its] decisions,” describing in detail the system of consideration that was used and the reason for the rejection.<sup>75</sup> Without increased action and the obligation of justification and explanation<sup>76</sup>—as opposed to mere thought—schools are granted permission to “think” without actually doing anything, and thus to sit idly as their students are placed in the same recycled programs each year.

Where something resembling a true continuum is established, it is frequently the result of a district’s voluntary, not mandated, attempt to diversify placements.<sup>77</sup> For example, the system of special education programming established at Sci Academy, as described in the Introduction, presents a continuum that provides students with a rich set of publicly provided educational options—not a hollow outline.<sup>78</sup> Though Sci Academy’s approach may seem closer to the continuum envisioned by the drafters of the IDEA,<sup>79</sup> courts are moving away

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<sup>75</sup> *Endrew F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 1001–02 (2017).

<sup>76</sup> As will be described in detail in Part III, *Endrew F.* imposes a stronger justification obligation on districts, mandating that they explain what they “learned in each [individual student’s] case from the documented process of analysis and information sharing among educators, experts, and parents in developing the IEP in question.” Liebman, *supra* note 10, at 2029–30.

<sup>77</sup> See, e.g., N.Y.C. DEP’T OF EDUC., SPECIAL EDUCATION SERVICES, <https://perma.cc/YRM8-CJVT> (last visited Aug. 5, 2018) [hereinafter SPECIAL EDUCATION SERVICES] (describing its system of special education as establishing a “‘whole school’ . . . approach[ ], which create[s] a single, unified and efficient delivery system for *all* students, disabled and non-disabled, living in a single community” (emphasis added)).

<sup>78</sup> The legislative history of the IDEA points strongly to the conclusion that the Act was designed to provide an impetus for districts to establish programs that would reduce the placement of children in “needlessly restrictive environments.” Daniel H. Melvin II, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 616 (1995). The House Committee on Education and Labor issued a report at the time that claimed that the due process procedures embedded into the Act were designed to “assure that every child with a disability is ‘in fact’ accorded an education in the ‘least restrictive environment.’” *Id.* at 617. Senator Robert Stafford, a sponsor of the EAHCA, further demonstrated a desire for the Act to result in increased services within public districts in an article published after the passage of the Act. Senator Stafford described the plight of children with disabilities, who were largely “invisible” in that they were separated from their classmates, and when they were visible, they were seen not as individuals, but as manifestations of their condition. Robert T. Stafford, *Education for the Handicapped: A Senator’s Perspective*, 3 VT. L. REV. 71, 71–72 (1978). This Note argues that Stafford’s assurance that the mainstreaming of children with disabilities into public schools would “advanc[e] the integration of individuals with disabilities . . . into the ‘mainstream’ of society,” Melvin, *supra*, at 617–18, can only be achieved through a generative process of new program development, including a complete and constantly adjusted continuum of new placements and services.

<sup>79</sup> Compare Melvin, *supra* note 78, at 616 (describing the legislative history of the IDEA and the hope that it would produce more integrated public school settings), with *Poolaw*, 67 F.3d at 835 (holding that “serious consideration” of an alternate placement is sufficient to meet the “continuum of alternative placements” regulation).

from this history and intent. In contrast to the ambition of the drafters, the precedents interpreting the continuum regulation make clear that a robust approach of program generation and development—changing and adapting programs to provide new settings as new student needs are identified—is *not* demanded. The few situations in which the continuum regulation has actually been used to require district action have been especially egregious—responses to a complete failure to establish even a half-hearted range of services.<sup>80</sup> Courts’ failure to require a robust “continuum of alternative services” necessitates derivative group-based assignment of students to classroom settings and curricular programming. Because courts have not interpreted the continuum provision to require that districts develop programs in response to granular, individual needs, districts assign students to already existing programs—frequently, as seen in *J.S.*, placing students in inferior programs based on classifications and other labels instead of a nuanced analysis of a student’s individual strengths and areas of growth.<sup>81</sup>

### B. Least Restrictive Environment

In providing a FAPE, districts are required to ensure, “to the maximum extent appropriate,” that children with disabilities are placed in an environment that allows them to interact with non-disabled children—otherwise known as the “least restrictive environment.”<sup>82</sup>

No discussion of the “continuum of alternative placements” requirement is complete without a discussion of the “least restrictive

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<sup>80</sup> See, e.g., *Corpus Christi Indep. Sch. Dist. v. Christopher N.*, No. C.A. C-04-318, 2006 WL 870739, at \*6 (S.D. Tex. Mar. 31, 2006) (holding that the school district failed to provide Christopher with a continuum of services when it changed his placement “from mainstream education to the opposite end of the continuum in one fell swoop”); *Cordero v. Pa. Dep’t of Educ.*, 795 F. Supp. 1352, 1362 (M.D. Pa. 1992) (holding that the Pennsylvania Department of Education failed to provide a continuum of services to students when the state placed students in residential facilities—the most restrictive school option—even if they did not require such a placement); see also *V. Dion Haynes, Special Education to Boost Services*, WASH. POST (Dec. 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121202489.html> (describing how Washington, D.C., “would introduce more than \$6 million worth of programs, including additional mental health services, more nationally recognized models for helping students with disabilities in the classroom and more support for parents” in order to satisfy a consent decree following *Blackman v. District of Columbia*, a case which held that the D.C. “backlog of more than 1,000 decisions from hearing officers regarding placement of students in special education programs” violated the IDEA).

<sup>81</sup> See also *supra* Part I.B (discussing the limited individualization that occurs for children, despite the IDEA’s mandate that schools create unique instruction plans for those students).

<sup>82</sup> 20 U.S.C.S. § 1412(a)(5)(A) (2012).

environment” regulation. Indeed, as described by courts across the country, the two provisions are often discussed in the same breath; the continuum of alternative placements requires that schools produce an array of environments and services for children in order to ensure that students with disabilities are educated alongside students without disabilities.<sup>83</sup> Still, there is some confusion and debate about which provision should be prioritized, adding to the stagnancy that has kept the IDEA from achieving its goals.<sup>84</sup>

When cases are litigated under the least restrictive environment regulation, courts are tasked with giving content to the maximum extent appropriate provision—when is it appropriate for a child to be mainstreamed,<sup>85</sup> and when will mainstreaming or inclusion provide the child with fewer benefits than a segregated placement? A number of discrete tests for interpreting the regulation have emerged. The less popular *Roncker* test holds that a court, when weighing whether the district’s proposed segregated educational facility meets the least restrictive environment requirement, should first determine whether the segregated facility is superior to the existing available public programs.<sup>86</sup> If it is, the court must determine if those superior features could “feasibly” be provided in a public, integrated setting and if so, the school must add them.<sup>87</sup> In effect, by requiring schools to more concretely consider the programmatic and curricular elements that actually make a private placement beneficial, this test would add accountability to the *Poolaw* “serious consideration” test.

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<sup>83</sup> See, e.g., *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (considering both the continuum of alternative placements and the least restrictive environment to determine whether or not a child ought to be segregated).

<sup>84</sup> See, e.g., *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993 (1st Cir. 1990) (“[T]he correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities.” (emphasis added) (collecting citations)); see also Colker, *supra* note 26, at 857 (“The continuum of services regulation should play a bigger role in the IEP process, with a school district failing to meet its procedural requirements if it does not offer a continuum of services within the public school building.”).

<sup>85</sup> “Mainstreaming” refers to the practice of placing a special education student in a part-time general education program (either during activities like lunch and extracurriculars, or during part of the academic day). Sharon Vaughn, Jeanne Shay Schumm & James W. Forgan, *Instructing Students with High-Incidence Disabilities in the General Education Classroom*, ACSD, [http://www.ascd.org/publications/curriculum\\_handbook/413/chapters/Instructing\\_Students\\_With\\_High-Incidence\\_Disabilities\\_in\\_the\\_General\\_Education\\_Classroom.aspx](http://www.ascd.org/publications/curriculum_handbook/413/chapters/Instructing_Students_With_High-Incidence_Disabilities_in_the_General_Education_Classroom.aspx) (last visited Aug. 15, 2018). “Inclusion,” on the other hand, is the practice of keeping students with disabilities in a general education classroom for the full day, but bringing in additional support as needed for special instruction. *Id.*

<sup>86</sup> *Roncker*, 700 F.2d at 1063 (assuming, before articulating a test, that the proposed placement was “superior” in the case of Neil Roncker).

<sup>87</sup> *Id.*

While the Sixth Circuit's *Roncker* test could have added rigor to the continuum of alternative placements requirement, other interpretations of the least restrictive environment regulation have veered away from such a strict mandate, opening additional opportunities for districts to avoid establishing new programs that would benefit children without forcing them out of an inclusive environment. In *Daniel R.R.*, the Fifth Circuit declined to follow the *Roncker* test, crafting a new test that requires a court to consider multiple factors when determining the appropriateness of a segregated placement: (1) whether the school has taken steps to accommodate the student in the regular education setting; (2) whether the child could receive academic benefits from a non-segregated setting; (3) whether the child will receive non-academic benefits from the placement; and (4) the impact that inclusion in a regular education setting would have on other students.<sup>88</sup>

Subsequent courts have adopted similar approaches,<sup>89</sup> expressing a concern that the *Roncker* test requires them to intrude too deeply into education policy decisions.<sup>90</sup> In practice, courts' deference to school districts in analyzing these multi-factor tests provides districts with a considerable degree of leeway, allowing them to remove children from general education settings after expending little effort to mainstream or integrate them.<sup>91</sup> By failing to mandate that districts take *any* affirmative steps to avoid placement in a private program, courts utilizing the *Daniel R.R.* test have made it easy to justify segregation. In particular, the first factor in the test, which requires that a court consider whether the district took steps to accommodate the child in a regular education setting, has limited impact without a more robust continuum of services requirement.<sup>92</sup> If districts are not

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<sup>88</sup> *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048–49 (5th Cir. 1989).

<sup>89</sup> See, e.g., *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Holland ex rel. Rachel H.*, 14 F.3d 1398, 1402 (9th Cir. 1994) (using a multi-factor test inspired by *Daniel R.R.* that also includes a cost consideration, inspired by *Roncker*); *Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3d Cir. 1993) (choosing the *Daniel R.R.* test over the *Roncker* test because *Roncker* does not include a mandate to include the child in other classes, like music and art, even if general education mainstreaming is inappropriate).

<sup>90</sup> See, e.g., *Daniel R.R.*, 874 F.2d at 1046 (“[T]he [*Roncker*] test necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials.”); see also *supra* Introduction.

<sup>91</sup> See, e.g., DeMatthews & Mawhinney, *supra* note 42, at 4 (arguing that the court's clarification of the mandate has “created additional leeway for districts in the area of inclusion rather than pushing districts to establish more inclusive schools”).

<sup>92</sup> *Daniel R.R.*, 874 F.2d at 1050 (noting that the district, by experimenting with the amount of time that Daniel spent in regular or special education settings, “took steps to modify the Pre-kindergarten program and to provide supplementary aids and services for Daniel”). Additional teacher support and shifting ratios of time do not, on their own,

required to provide new offerings in response to student needs, an unsuccessful attempt to provide a few extra hours of tutoring will meet the low bar.<sup>93</sup> This standard fails to incentivize the creativity of schools like Sci Academy in the development of new transition programming and the integration of curricula that have proven successful in other schools. Though “[a] district cannot use lack of appropriate placements as an excuse for denying students their right to an education in the least restrictive environment,”<sup>94</sup> courts have implicitly provided districts with a range of excuses for segregation. By deferring to districts without rigorously questioning their choices,<sup>95</sup> courts have abandoned the Act’s spirit.<sup>96</sup>

A byproduct of the hands-off, sometimes neglectful approach taken by courts is that districts have limited incentives to pay careful attention to the needs of their students—and how those needs change over time. Because of the limited heft of both the continuum of alternative placements and least restrictive environment provisions, districts can easily avoid responsibility by placing students in private placements or in segregated schools or programs exclusively for stu-

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constitute a “genuine and creative effort[ ] to reach Daniel,” despite the court’s contention to the contrary. *Id.*

<sup>93</sup> See *id.* (finding that Daniel’s school had succeeded in providing novel and individually-guided programming, despite the fact that the district’s efforts were limited to basic hourly adjustments in staff time and classroom setting). Though the court states that the teacher “modif[ied] the class curriculum to meet [Daniel’s] abilities,” there are no examples of actions like this, beyond the teacher simply spending more time with Daniel. *Id.* Taking actions to attempt to reach the student in *some* new ways is fundamentally different in scope and approach than an affirmative obligation, on the part of the district and its system, to establish new comprehensive programs to redefine a student’s classroom setting.

<sup>94</sup> DISABILITY RIGHTS CA, *Information on Least Restrictive Environment, in SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES* 7-i, 7-20, <http://www.disabilityrightsca.org/pubs/504001Ch07.pdf> (last visited Aug. 27, 2018).

<sup>95</sup> See, e.g., *Daniel R.R.*, 874 F.2d at 1049 (noting that there are additional benefits, such as “the language models that . . . nonhandicapped peers provide” that a child can receive from a general education environment, even if the benefits are not exclusively academic). Recognizing the often unique and non-quantifiable ways in which children learn, many education experts promote the concept of “responsible inclusion,” rather than inclusion at all costs. See, e.g., Vaughn et al., *supra* note 85 (defining “responsible inclusion” as “an orientation to the provision of educational services for students with high-incidence disabilities in the general education classroom that is based on the academic and social progress of the student”). In addition to benefitting students with disabilities, responsible inclusion can benefit students without disabilities. See, e.g., Debbie Staub & Charles A. Peck, *What Are the Outcomes for Nondisabled Students?*, 52 EDUC. LEADERSHIP 36 (1995), <http://www.ascd.org/publications/educational-leadership/dec94/vol52/num04/What-Are-the-Outcomes-for-Nondisabled-Students%C2%A2.aspx> (noting that the proven benefits of an inclusive setting include reduced fear of human differences, social cognition growth, improvements in self-concept, and warm and caring friendships).

<sup>96</sup> See, e.g., Melvin, *supra* note 78, at 617–18 (describing Senator Stafford’s intention that the IDEA would spur integration).

dents with disabilities.<sup>97</sup> While at the individual level there may be strong arguments for why a student will benefit more from a specialized, segregated placement,<sup>98</sup> this Note is focused on the systemic, aggregate impact of increased public-based program development<sup>99</sup>: If a school district is required to respond to individual student needs and trends, many of the students who are placed in costly private or segregated programs could otherwise be served in an integrated program within the public environment—a result which would more naturally meet the Act’s preference for mainstreaming.<sup>100</sup> By making it easy for schools to shirk their duties by pushing students with disabilities out of an integrated environment, courts create a harmful situation in which districts may feel less responsible for students with disabilities; after

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<sup>97</sup> In addition to some of the issues of segregating students in private specialized schools—through voucher programs or otherwise—advocates are increasingly focused on the problems caused by segregated public schools that push vulnerable students with disabilities—increasingly and primarily students of color with disabilities—into *public* yet entirely segregated special education programs. *See, e.g.*, Timothy Pratt, *The Separate, Unequal Education of Students with Special Needs*, HECHINGER REP. (Mar. 21, 2017), <http://hechingerreport.org/georgia-program-children-disabilities-separate-unequal-education/> (describing a lawsuit filed by the Department of Justice in August 2016, alleging that the State of Georgia discriminates against students with disabilities by segregating them in an inadequate public special education school for students with behavioral needs).

<sup>98</sup> *See* Amy June Rowley, *Rowley Revisited: A Personal Narrative*, 37 J.L. & EDUC. 311, 327 (2008) (describing Rowley’s transition to a private deaf school in New Jersey as “the first time [she] truly didn’t feel alone”). Rowley, the plaintiff in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, acknowledged that despite her parents’ well-meaning desires to educate her in a public school, she was happiest in a private school. *Id.*

<sup>99</sup> Special education impacts a large percentage of students in schools in the country: according to the National Center for Education Statistics, 6.7 million students, or 13% of all public school students, received special education in the United States. NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T. OF EDUC., *THE CONDITION OF EDUCATION 2018*, at 74 (2018), <https://nces.ed.gov/pubs2018/2018144.pdf>. IDEA failures do not simply impact individual students on the margins, but instead create a set of sub-standard programs for a large swath of students in the country.

<sup>100</sup> While the use of private schools to fulfill special education responsibilities—through public school tuition reimbursement, as authorized by the Supreme Court in *Sch. Comm. of Burlington v. Dep’t of Educ.*, 371 U.S. 359 (1985)—is most utilized in New York, New Jersey, and California, *see* Jay P. Greene & Marcus A. Winters, *Debunking a Special Education Myth: Don’t Blame Private Options for Rising Costs*, 7 EDUC. NEXT 67, 67 (2007), [http://educationnext.org/files/ednext\\_20072\\_65.pdf](http://educationnext.org/files/ednext_20072_65.pdf), the education of students with disabilities in private schools on public dollars occurs nationwide and is increasing in popularity. *See, e.g.*, Elaine S. Povich, *Tax Dollars for Private School Tuition Gain in States*, PEW CHARITABLE TRS.: STATELINE (Aug. 6, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/08/06/tax-dollars-for-private-school-tuition-gain-in-states> (describing voucher and tax credit scholarships in states across the country to provide publicly-footed tuition for special education students in private schools).



footing the bill, districts are off the hook and spend much of their time focusing only on innovation in the general education classroom.<sup>101</sup>

### C. Educational Benefit

Courts looking to further limit the force of the least restrictive environment provision have turned to the educational benefit mandate: the requirement that districts provide a “free appropriate public education”<sup>102</sup> that confers “some educational benefit upon the handicapped child.”<sup>103</sup> Though the term “educational benefit” does not appear in the Act itself, the Supreme Court has found it “[i]mplicit in the congressional purpose” of the Act; “[i]t would do little good,” the Court said, “for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.”<sup>104</sup> Where courts have abdicated the responsibility to forcefully ensure that schools are providing children with the least restrictive educational environment, they have used the educational benefit requirement as their excuse, finding that the mainstreaming “presumption . . . is ultimately a goal subordinate to the requirement that disabled children receive educational benefit.”<sup>105</sup>

But how *much* of an educational benefit does the Act require districts to provide to students with disabilities? This has been an ongoing question since the passage of the Act, and though ostensibly settled in 1982 by the Supreme Court in *Board of Education v. Rowley*, it had been reinterpreted by lower courts several times<sup>106</sup>—up until the Supreme Court’s recent revisiting of the standard in *Andrew F.*<sup>107</sup>

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<sup>101</sup> See, e.g., Stephen Frank & Karen Hawley Miles, *Improving Special Education in Tough Times*, EDUC. WEEK (July 17, 2012), <http://www.edweek.org/ew/articles/2012/07/18/36frank.h31.html> (arguing that even as general education programs are being revamped across the country, “district leaders often treat special education programs as the mythical Pandora’s box, best left unopened and unexamined”).

<sup>102</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982) (internal quotation marks omitted) (quoting 20 U.S.C. § 1400(c)(3) (2012)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 200–01.

<sup>105</sup> Hartmann by Hartmann v. Loudoun Cty. Bd. of Educ., 118 F.3d 996, 1002 (4th Cir. 1997); see also Briggs v. Bd. of Educ., 882 F.2d 688, 692 (2d Cir. 1989) (“While mainstreaming is an important objective, we are mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing handicapped students an appropriate education.”).

<sup>106</sup> See *infra* notes 113–20 and accompanying text (describing the circuit split surrounding the interpretation of the *Rowley* standard); see also *infra* Part III (describing the new educational benefit standard districts must provide for children under the IDEA).

<sup>107</sup> See *infra* Part III (providing a detailed analysis of the new standard provided by the Court in *Andrew F.*).

In *Rowley*, the parents of Amy Rowley, a deaf student in the Hendrick Hudson Central School District, argued that their daughter should be provided with a sign language interpreter in all of her academic classes.<sup>108</sup> At the time, Amy was performing “better than the average child in her class and [was] advancing easily from grade to grade.”<sup>109</sup> Still, her parents argued that she would be able to achieve at an even higher level with the support of a sign language interpreter, and that the Act required that she be provided with an “equal educational opportunity” to achieve her full potential.<sup>110</sup> The Court rejected their argument, finding that the Act requires the district only to provide a child with a “basic floor of opportunity.”<sup>111</sup> The Court declined to provide a test for assessing the “basic floor;” in Amy’s case, the Court was presented with a child who performed above average with existing resources, so a specific rule could wait.<sup>112</sup>

Spurred in part by the inadequacy of the *Rowley* standard,<sup>113</sup> and also by a demand from litigants for courts to get more concrete regarding what “some” educational benefit means,<sup>114</sup> many lower courts developed their own variations of the *Rowley* standard. Though none went quite as far as Justice White’s dissent in *Rowley*, which advocated for *equal* opportunity for students with disabilities and those without,<sup>115</sup> the variety of interpretations about what an adequate educational benefit looks like ranged from “merely . . . ‘more than de minimis,’”<sup>116</sup> to “whether the child makes progress toward the goals set forth in her IEP,”<sup>117</sup> to a “meaningful education—more than

<sup>108</sup> *Rowley*, 458 U.S. at 184.

<sup>109</sup> *Id.* at 185.

<sup>110</sup> *Id.* at 198 (internal quotation marks omitted) (quoting Brief for Respondents at 35, Bd. of Educ. v. *Rowley*, 458 U.S. 176 (1982) (No. 80-1002)).

<sup>111</sup> *Id.* at 200 (internal quotation marks omitted); see also *id.* at 197 n.21 (“Whatever Congress meant by an ‘appropriate’ education, it is clear that it did not mean a potential-maximizing education.”).

<sup>112</sup> *Id.* at 202.

<sup>113</sup> Cf. T. Daris Isbell, Note, *Making Up for Lost Educational Opportunities: Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOK. L. REV. 1717, 1732 (2011) (“[M]any students with disabilities, especially those in an inclusion setting, will advance from grade to grade despite the lack of any meaningful progress.”).

<sup>114</sup> See, e.g., *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988) (“In the case *sub judice*, however, the question of how much benefit is sufficient to be ‘meaningful’ is inescapable.”).

<sup>115</sup> *Rowley*, 458 U.S. at 215 (White, J., dissenting) (“The basic floor of opportunity is . . . intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible.”).

<sup>116</sup> *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)).

<sup>117</sup> *Cty. of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1467 (9th Cir. 1996).

mere access to the schoolhouse door.”<sup>118</sup> The circuit split underlying the educational benefit standard has, at least in the circuits where a slightly more than “de minimis” standard was the prevailing precedent, imposed an exceedingly low responsibility on districts.<sup>119</sup> In these districts, schools meet the educational benefit requirement when academic progress is essentially invisible, and the status quo is the norm.<sup>120</sup>

Notwithstanding *Andrew F.* and the potentially large impact it can have on IDEA interpretations,<sup>121</sup> the previous sections have described a series of interpretations of the IDEA that provide districts with ample opportunities to avoid creating robust and individualized programs. If the continuum provision means virtually nothing,<sup>122</sup> then the requirement that schools find an appropriate less restrictive environment within their own public setting also has limited impact.<sup>123</sup> And if, prior to *Andrew F.*, the educational benefit standard was increasingly meaningless, then schools were given free rein to provide students with a virtually meaningless educational program—a storage room for children to “sit[ ] idly . . . awaiting the time when they [are] old enough to ‘drop out.’”<sup>124</sup> Though the Court has provided parents with a narrow solution for exiting inappropriate and low-quality public school placements if they unilaterally enroll their children in

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<sup>118</sup> *Polk*, 853 F.2d at 182; see also *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (“[T]he IDEA requires an IEP to confer a ‘meaningful educational benefit’ gauged in relation to the potential of the child at issue.”); *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003) (“[T]he educational benefit that an IEP is designed to achieve must be ‘meaningful.’” (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997))).

<sup>119</sup> It should be noted that courts interpreting *Rowley* prior to the recent *Andrew F.* decision were careful to find that *Rowley* still provided ample opportunity for courts to intervene as they evaluated the substantive quality of education that districts must provide under the IDEA. See, e.g., *Polk*, 853 F.2d at 179 (“[T]he Supreme Court in *Rowley* did not abdicate responsibility for monitoring the substantive quality of education under the EHA.”). However, in the circuits that have interpreted *Rowley* to require an essentially meaningless level of benefit, the stated “merely more than de minimis” standard has resulted in absolute stagnancy for children trapped in those districts. See, e.g., *Andrew F.*, 798 F.3d at 1342 (finding that *Andrew* was making “some progress,” despite the fact that his IEP recycled the same goals year to year).

<sup>120</sup> See *Andrew F.*, 798 F.3d at 1338 (finding that merely more than “de minimis” growth is sufficient under the Act).

<sup>121</sup> See *infra* Part III (discussing the implications of *Andrew F.*).

<sup>122</sup> See *supra* Section I.A (explaining how the continuum of alternative placements provides little to no guidance to districts).

<sup>123</sup> See *supra* Section II.B (discussing the manner in which the least restrictive environment provision works in tandem with the continuum of alternative placements).

<sup>124</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (internal quotation marks omitted) (quoting H.R. REP. NO. 94-332, at 2 (1975)).

private schools and seek reimbursement later,<sup>125</sup> this system only allows parents<sup>126</sup> to benefit if they voluntarily seek segregation for their children.<sup>127</sup> For the vast majority of parents, such a solution comes too late—and they are in desperate need of a mechanism to incentivize district action quickly.

### III

#### ENDREW F.'S PROCEDURAL TOOLS

The preceding Parts have outlined the unimaginative reality that characterizes much of the IDEA's interpretation and implementation in schools, as well as the unfortunate role that the courts have played in bringing us to this point. The result of this reality is an "IDEA puzzle"—a system of confusing provisions that courts have failed to productively link together, and a stalemate of inaction that begs for a solution.

In 2017, the Supreme Court stepped in, thirty-five years after *Rowley*, to clarify the appropriate educational benefit standard districts must provide for children under the Act.<sup>128</sup> In *Andrew F.*, the Court rejected the Tenth Circuit's "merely more than *de minimis*" test for educational benefit.<sup>129</sup> As described in the Introduction, Endrew, a student with autism, had become "essentially stalled" in his academic development.<sup>130</sup> Despite his persistent failure to make adequate progress, his school district continued to provide him with an IEP with nearly identical goals and services to the ones that had proven ineffec-

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<sup>125</sup> See Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369–70 (1985) (concluding that the IDEA authorizes tuition reimbursement for private school education "if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act"); see also Florence Cty. Sch. Dist. Four v. Carter *ex rel.* Carter, 510 U.S. 7, 14 (1993) (holding the same to be true even if the selected private school is not an already approved school by the district, and may fail to "meet state education standards").

<sup>126</sup> Both *Burlington* and *Carter* provide an opportunity for parents only when they are able to shoulder the heavy tuition burden of a private school education upfront and await reimbursement (which could take years). For those parents who cannot afford such a remedy, *Burlington* and *Carter* provide no support.

<sup>127</sup> The *Carter* Court acknowledges that districts can avoid paying parents for the already-incurred private tuition by alternatively "giv[ing] the child a free appropriate public education in a public setting." *Carter*, 510 U.S. at 15. Yet while the IDEA could have been interpreted to mandate such a response, the *Carter* Court suggests it is merely one of several options. See *id.* at 14–15.

<sup>128</sup> *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017) (holding that the "more difficult problem" of defining a standard is before the court (internal quotation marks omitted) (quoting *Rowley*, 458 U.S. at 202)).

<sup>129</sup> *Id.* at 1001 (internal quotation marks omitted).

<sup>130</sup> *Id.* at 996. This stalling is perhaps not too dissimilar from the more systemic stalling—characterized by delays, unimaginative recommendations for placements, and academic failure described in the previous Parts.

tive in the past.<sup>131</sup> The Court held that Endrew's IEP must be designed to "enable [him] to make progress," while "set[ting] out a plan for pursuing academic and functional advancement."<sup>132</sup> Though the *Endrew F.* Court declined to establish a "bright-line rule"<sup>133</sup> or more substantive standard for identifying the bare minimum of special educational programming, it unequivocally heightened the bar for district action in creating and justifying a given student's special education placement.<sup>134</sup>

Though the opinion, as *Rowley* before it, "tend[s] toward the cryptic rather than the comprehensive,"<sup>135</sup> *Endrew F.* provides an opportunity to fill in the gaps left by courts in their interpretations of the least restrictive environment and continuum of alternative placements provisions—to solve the puzzle of the IDEA, and mandate district boldness and creativity. Thus far, scholars have disagreed about the potential that *Endrew F.* has for reshaping IDEA interpretation and mandates in schools,<sup>136</sup> but this Part provides a novel interpretation of the case and its language, demonstrating how the words of the Court can be used to solve this puzzle. Since the announcement of the new "educational benefit" standard, some courts have begun to recognize that *Endrew F.* develops a more rigorous role of inquiry for judges who are evaluating the adequacy of a student's IEP.<sup>137</sup> At the

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 992.

<sup>133</sup> *Id.* at 1001.

<sup>134</sup> See Terry Jean Seligmann, *Flags on the Play: The Supreme Court Takes the Field to Enforce the Rights of Students with Disabilities*, 46 J.L. & EDUC. 479, 490 (2017) (noting that the Supreme Court labeled its standard as "markedly more demanding" than the District Court's standard (internal quotation marks omitted) (quoting *Endrew F.*, 137 S. Ct. at 1000)). *Endrew F.* did not purport to overturn *Rowley*, but instead put a clear stop to the tendency of some district courts to read *Rowley* as narrowly as possible. As a result, it held that the IDEA requires something significantly more robust than a "merely more than *de minimis*" educational benefit. *Endrew F.*, 137 S. Ct. at 1000–01.

<sup>135</sup> *Endrew F.*, 137 S. Ct. at 995 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188 (1982)).

<sup>136</sup> Compare, e.g., Amy Howe, *Opinion Analysis: Court's Decision Rejecting Low Bar for Students with Disabilities, Under the Spotlight*, SCOTUSBLOG (Mar. 23, 2017, 11:26 AM), <http://www.scotusblog.com/2017/03/opinion-analysis-courts-decision-rejecting-low-bar-students-disabilities-spotlight/> (noting that the decision "did not give Endrew F. and his family everything they had asked for" as the court "declined to establish a more stringent standard"), with Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/> ("Clearly this is the most monumental IDEA case decided by the high court in over 30 years . . . ." (internal quotation marks omitted) (quoting Gary Mayerson, a civil rights lawyer and board member of Autism Speaks)).

<sup>137</sup> See, e.g., *Methacton Sch. Dist. v. D.W.*, No. 16-2582, 2017 U.S. Dist. LEXIS 166716, at \*19 (E.D. Pa. Oct. 6, 2017) (noting that *Endrew F.* requires districts to "construct[ ]" IEPs based on child needs and not produce a "form document" and invalidating the

same time, however, some courts<sup>138</sup> have failed to find meaningful differences between the standard they used before *Endrew F.* and the standard articulated by the Court, and some scholars have expressed concerns that *Endrew F.* may not go far enough in placing the burden on districts to serve students with disabilities.<sup>139</sup>

Though this Part recognizes that the language of *Endrew F.* is vague at points<sup>140</sup> and does not establish the more substantive “equal-opportunity standard” that Endrew’s parents had hoped for,<sup>141</sup> it argues that the case lays out a more specific, three-part process in which districts should be engaging prior to establishing a student’s educational program, as laid out in the student’s IEP. Even though courts may still maintain an arms-length distance from the constantly-evolving particulars of education policy,<sup>142</sup> advocates can use the *Endrew F.* Court’s language in three specific ways to evaluate and critique a district’s design process, demanding judicial intervention when the process has failed.

First, *Endrew F.* places individual students at the center of special education programming, requiring that districts use a student’s needs as the guide for developing evolving offerings and for establishing individualized, nuanced goals within existing programs. Second, it encourages productive comparisons between students with disabilities

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district’s action for failure to design a more rigorous program (internal quotation marks omitted) (quoting *Endrew F.*, 137 S. Ct. at 999); *K.D. v. Downingtown Area Sch. Dist.*, No. 16-0165, 2017 U.S. Dist. LEXIS 141428, at \*18–19 (E.D. Pa. Aug. 31, 2017) (describing the “fact-intensive exercise” courts must undertake, with the informed input of school officials and the child’s parents or guardians, when analyzing educational benefit (internal quotation marks omitted) (quoting *Endrew F.*, 137 S. Ct. at 999)). By ushering in a more demanding oversight role for courts, the author argues that *Endrew F.* marks a similar shift in judicial analysis to the landmark class action case *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), which was the first case to explicitly demand that courts undertake a “rigorous analysis” when certifying class actions. *Id.* at 161.

<sup>138</sup> See, e.g., *J.R. v. Smith*, No. DKC 16-1633, 2017 U.S. Dist. LEXIS 133004, at \*10–11 (D. Md. Aug. 21, 2017) (finding that the administrative law judge who found the student’s IEP was sufficient had used a standard that was more than *de minimis*, and thus did not need to be reevaluated in light of *Endrew F.*).

<sup>139</sup> See Claire Raj & Emily Suski, *Endrew F.’s Unintended Consequences*, 46 J.L. & EDUC. 499, 500, 512 (2017) (arguing that *Endrew F.* requires parents to “bear the burden” by generating expert reports that can spur district action—a burden that is particularly difficult for low-income parents).

<sup>140</sup> See Nat Malkus, *The Biggest Special Education Ruling in Years Doesn’t Actually Resolve Much*, AEI: AEI IDEAS (Mar. 24, 2017, 1:59 PM), <http://www.aei.org/publication/the-biggest-special-education-ruling-in-years-doesnt-actually-resolve-much/> (stating that after *Endrew F.* the “definition of an ‘appropriate’ IEP is only a little clearer”).

<sup>141</sup> Julie Waterstone, *Endrew F.: Symbolism v. Reality*, 46 J.L. & EDUC. 527, 530 (2017).

<sup>142</sup> See *J.P. v. City of N.Y. Dep’t of Educ.*, 717 F. App’x 30, 31 (2d Cir. 2017) (acknowledging that “courts lack the ‘specialized knowledge and educational expertise’ of state administrators”) (quoting *M.W. ex rel. S.W. v. N.Y.C. Dep’t of Educ.*, 725 F.3d 131, 138 (2d Cir. 2013)).

and those without, tethering the potential and progress of students with disabilities to the growth of their peers without disabilities. Third, it expresses a fundamental preference for progress, triggering creative action when a district identifies gaps in student needs or potential guidance from other schools' or districts' existing programming. By policing a district's conformance with this three-part process, advocates who work directly with individual students can demand rigor from districts in special education program creation and in the expansion of the continuum of services provision, while increasing the rigor of the least restrictive environment provision.

### A. *Reorienting Around the Individual*

One important feature of the *Endrew F.* decision is the Court's alignment around students as individuals: a focus on the distinctive and unique needs of children with disabilities, and a plea to districts to understand the needs of each child *before* slotting students into already available programs. The Court references the individual in two places: the IEP must be "reasonably calculated to enable *a child* to make progress appropriate in light of *the child's* circumstances."<sup>143</sup> This focus on the individual child (or student) is distinct from the *Rowley* Court's previous standard: an education that is "sufficient to confer some educational benefit."<sup>144</sup> In the *Rowley* framework, the educational plan does not need to be shaped or informed by the child, so long as it has the outcome of providing some benefit; in *Endrew F.*, on the other hand, the Court provides a strong reminder of the individualization that is at the center of the IDEA: The progress must be defined *by the child's specific circumstances*.<sup>145</sup> To be sure, the *Rowley* Court also acknowledged that the IDEA envisions "individualized planning conferences" as the center of the statutory scheme.<sup>146</sup> Yet

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<sup>143</sup> *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017) (emphasis added).

<sup>144</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982).

<sup>145</sup> *Endrew F.*, 137 S. Ct. at 994 (noting that the special education development process envisioned in the IDEA "emphasize[s] collaboration among parents and educators and require[s] careful consideration of the child's individual circumstances," which results in an IEP that must be "tailored to the unique needs of a particular child") (internal quotation marks omitted). By contrast, in *Rowley*, the Court did not delve into whether or how Amy Rowley's IEP was designed with her specific needs in mind. Instead, it affirmed the district court's finding that, because Amy "performs better than the average child in her class and is advancing easily from grade to grade," her IEP was sufficient. *Rowley*, 458 U.S. at 210 (quoting *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980)). The *Rowley* Court's focus, then, was outcome-based, rather than process or design-based, as in *Endrew F.*

<sup>146</sup> *Rowley*, 458 U.S. at 208–09 (internal quotation marks omitted) (quoting S. REP. NO. 94-168, 94th Cong., 1st Sess. 11–12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435–36).



while the *Rowley* Court acknowledged the importance of individualization, it did nothing to interrogate the process of individualization *actually* utilized by Amy Rowley's school, finding that the fact that she was receiving an "adequate" education was enough to establish compliance with the Act.<sup>147</sup> In contrast, the *Endrew F.* Court remanded to the district court so that Endrew's school could provide a "cogent and responsive explanation" for the individualization process that it utilized—requiring a more robust and detailed analysis before letting the school off the hook.<sup>148</sup>

The *Endrew F.* Court's focus on the individual provides an opportunity to demand that districts follow the IDEA's mandate to provide students with disabilities with the "specially designed instruction" required by the Act.<sup>149</sup> It is not sufficient to provide a child with a shell of an IEP that may, coincidentally, provide some benefit;<sup>150</sup> instead, the IEP must be designed *specifically* for that child. Thus, *Endrew F.*'s focus on the individual student presents an opportunity for systemic change through individualized action. Conditioning districts and teachers to focus on individual children inspires them to think in an individualized way for *all* children, which has the potential to yield systemic reforms across a district. When districts steadily create and establish new programs designed to meet the needs of each child, the entire system redefines its vision of what is possible; new programs establish a new system, inspiring teachers<sup>151</sup> and districts to redefine the limits of what schools can provide. Advocates can serve in a watchful role over the process used to generate a special education program for an individual student, ensuring that districts actually build programs with the child at the center—rather than forcing a child to conform to existing programs or looking only at outcomes and

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<sup>147</sup> *Id.* at 209–10 (internal quotation marks omitted) (quoting *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

<sup>148</sup> *Endrew F.*, 137 S. Ct. at 1002.

<sup>149</sup> 20 U.S.C. § 1401(29) (2012).

<sup>150</sup> *See id.* (defining the term "special education" as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability"). Despite the text of the statute, which puts the onus on school districts to design a program with the child's needs as the motivation, the passive language of the *Rowley* standard suggests that the plan simply *happens* to lead to some educational benefit. *Rowley*, 458 U.S. at 200 (describing the IDEA's requirement as demanding that a program "be sufficient to confer some educational benefit upon the handicapped child"). It is not *itself* designed to do so. The *Endrew F.* standard, on the other hand, begins with the reasonable calculation of the educational plan, suggesting a more active process.

<sup>151</sup> *See, e.g.,* Stephen A. Rosenbaum, *Full Sp[eci]al Ed Ahead: Expanding the IDEA Idea to Let All Students Ride the Same Bus*, 4 STAN. J. C.R. & C.L. 373, 388–89 (2008) (advocating for increased special education training for all teachers).

not at process.<sup>152</sup> Districts can no longer simply pay lip service to individualization and assert, without evidence, that a program was designed with the child's specific needs in mind; instead, a district must be able to explain how the special set of resources and services for a student takes into account that student's needs.

### B. *Embedding Comparisons*

Though the *Andrew F.* Court boldly focuses on the individual student—demanding that districts design programs that are based exclusively on the child and his or her needs—the Court simultaneously requires districts to consider how the services provided to children with disabilities compare to those provided to other students. At two separate points in the opinion, the Court acknowledges that districts must consider the services they provide to children with disabilities in light of those provided to other children—including students with more moderate disabilities and those without a disability.<sup>153</sup> First, the Court notes that an educational program for a child with a disability “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.*”<sup>154</sup> Secondly, in explaining why the educational benefit must be more robust than that required by the Tenth Circuit's interpretation, the Court embeds a direct comparison to the standard we typically expect of children with disabilities who are educated in a regular education classroom: “It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.”<sup>155</sup>

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<sup>152</sup> Some critics of *Andrew F.* express concern that the case will place too great a burden on parents to guard a school's actions and that this will harm students who are not able to hire private attorneys. See, e.g., Raj & Suski, *supra* note 139, at 500–02. While it is true that many students are not able to afford attorneys or to access low-cost or free advocates, a process-based approach can have significant spill-over effects beyond an individual student. By forcing rigorous processes for individuals, advocates may also be helping schools generate system-wide solutions that will benefit students who do not have individual representation.

<sup>153</sup> Cf. George B. Daniels & Rachel Pereira, *Equal Protection as a Vehicle for Equal Access and Opportunity: Constance Baker Motley and the Fourteenth Amendment in Education Cases*, 117 COLUM. L. REV. 1779, 1787 & n.52 (2017) (using *Andrew F.*'s comparative approach as an example of the ongoing debate over “how educational opportunities should be distributed among the citizenry”).

<sup>154</sup> *Andrew F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 1000 (2017) (emphasis added).

<sup>155</sup> *Id.* at 1000–01.

Far from being throwaway comments, this comparative language serves a crucial function in the Court's announcement of a new standard: It allows advocates to argue that districts fail students with disabilities when they neglect to compare special education programs against those provided to general education students. Rather than simply offering a standardized program that has been previously developed,<sup>156</sup> schools should be considering how the proposed program compares to other possible programs in terms of the benefit it can provide to a child. Though this does not fully match the "substantially equal" standard advanced by Andrew's parents,<sup>157</sup> it does envision a more rigorous comparison to alternate programs. If a given program's likely educational benefit will appear to be de minimis *in light of* the more substantial advancement expected of other children, then the district must consider alternate programs that provide more substantial advancement based on the child's capacity. Sci Academy's Opportunities Academy program provides an example of the results of such a process; the school realized that the goal of college for all students in the general education setting demanded a more rigorous college-inspired transition program for students with severe disabilities, so that they might benefit from similar milestones and demands.<sup>158</sup>

Advocates can hold districts accountable to this comparative approach by recreating the process of analysis that led to a student's given placement; did the district stop and move on as soon as it arrived at a potential program? Or, did it engage in a more thoughtful analysis about potential placements and their benefits, achieving the scholarly, generative ideal of "examin[ing placements] not only as they exist but also as they might be modified."<sup>159</sup> In contrast to this generative ideal, the Court in *Rowley* found it sufficient that Amy was advancing from grade to grade, and held that it was unnecessary for the district to consider additional services or programs that might be provided to help her reach the level of advancement of her higher-achieving peers.<sup>160</sup> Though a system of comparative achievement is

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<sup>156</sup> *Id.* at 999 ("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.").

<sup>157</sup> *Id.* at 1001 (declining to adopt Andrew F.'s parents' proposed equality standard).

<sup>158</sup> See Hawkins, *supra* note 1 ("If the mantra was 'Every student college bound,' [Teacher Megan] Gold reasoned, special education transition students deserved a chance to experience college, albeit not on an actual college campus.").

<sup>159</sup> Mitchell L. Yell & Antonis Katsiyannis, *Placing Students with Disabilities in Inclusive Settings: Legal Guidelines and Preferred Practices*, 49 PREVENTING SCH. FAILURE 28, 31 (2004).

<sup>160</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 209–10 (1982).

not the same as requiring an equal educational program, like the one advocated by Amy Rowley's parents, *Andrew F.* allows advocates to push courts to consider how a new special education program compares to the programs regularly provided to children in a regular education setting, ranging from specialized extracurricular programs to Advanced Placement classes to after-school tutoring. To take the words of the Court a step further, it cannot be the case that a district regularly innovates for regular education children but is satisfied with recycled programs for children with disabilities.

The comparative focus asks districts to align around a “necessity-based interpretation” of the IDEA, rather than “an availability-based approach.”<sup>161</sup> It also refers back to the positive, but generally rejected, standard proposed by the *Roncker* court: adding a guided inquiry to the *Poolaw* “serious consideration” requirement. Rather than simply requiring bare thought, the comparative approach pairs thought with action, asking that schools envision *potential* programming that can be embedded into the regular education setting and used to advance a child's academic growth without resorting to segregation.<sup>162</sup> It asks districts to document the results of their “analysis and information sharing among educators, experts, and parents.”<sup>163</sup> If the gap between the services provided to students with disabilities and their peers is too wide—or if the district is unable to produce a “cogent and reasonable explanation”<sup>164</sup> to describe the analysis—the comparative approach envisions a remedy in the form of new programming designed to close the gap.

An advocate using this approach can require a district to explain the services and programs provided to students without disabilities in a school, comparing their purpose and outcomes with the IEP provided to a student with a disability. If a district did not engage in this comparison or is unable to explain a disparity, a court can intervene by requiring a more rigorous explanation, without mandating any specific substantive program or prescribing a given response.<sup>165</sup> By inten-

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<sup>161</sup> Cari Carson, Note, *Rethinking Special Education's “Least Restrictive Environment” Requirement*, 113 MICH. L. REV. 1397, 1400 (2015). The Sci Academy example presented in the Introduction of this Note provided an example of a necessity-based approach—developing new programs in response to needs, rather than slotting students into already-available programs.

<sup>162</sup> See *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (“In a case where the segregated facility is considered superior, the court should not determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting.”).

<sup>163</sup> Liebman, *supra* note 10, at 2029–30.

<sup>164</sup> *Andrew F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 1002 (2017).

<sup>165</sup> *Id.* at 1001–02.

tionally linking the growth and progress of regular education students with their peers, the *Andrew F.* Court may help education reformers and advocates reduce the academic disparity described in Part I.<sup>166</sup>

### C. Focusing on Progress

The *Andrew F.* opinion is filled with references to advancement, announcing a dissatisfaction with the status quo and with idleness. The Court reminds us of the “broad purpose” and ambition of the original Act, which was designed to correct the stagnancy of children with disabilities—who were either excluded from schools entirely or warehoused in classrooms with limited resources.<sup>167</sup> The Act, the Court tells us, is designed to “pursu[e] academic and functional advancement” for children with disabilities.<sup>168</sup> As such, it requires a relentless focus on growth and a complete rejection of the “pervasive and tragic academic stagnation that prompted Congress to act.”<sup>169</sup> In contrast with the *Andrew F.* Court’s focus on growth, the *Rowley* Court was backward-looking; upon finding that Amy was “advancing easily from grade to grade,” the Court concluded that her program was “adequate” regardless of any potential additional growth.<sup>170</sup> By beginning with the results rather than considering the additional progress that could otherwise occur, the *Rowley* Court’s statement on “adequacy”<sup>171</sup> (a conclusive bar to additional action) was significantly less progressive than *Andrew F.*’s on “advancement.”<sup>172</sup> Though Amy Rowley had advanced from grade to grade in the past, the Court did not consider any *additional* advancement she might make in the future; in *Rowley*, the Supreme Court found that her program was sufficient because of its past results and data, not because of its potential for future development. In *Andrew F.*, by contrast, the Court was

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<sup>166</sup> In some schools, comparing the services delivered to students with disabilities to those delivered to their peers in the general education program will not do much—too many schools fail to provide appropriate services to *any* of their students, let alone to their students with disabilities. See, e.g., Cory Turner et al., *Why America’s Schools Have a Money Problem*, NPR (Apr. 18, 2016, 5:00 AM), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> (comparing the unequal services and resources provided to students in inner-city schools). While the comparative approach may do little to spur additional action in those situations, the focus on progress and individualization may nonetheless serve as a catalyst for increased action and development for all students.

<sup>167</sup> *Andrew F.*, 137 S. Ct. at 999.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 210 (1982) (internal quotation marks omitted) (quoting *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

<sup>171</sup> *Id.* at 202.

<sup>172</sup> *Andrew F.*, 137 S. Ct. at 1000.

dissatisfied with a program based only on *Andrew's* past progress; indeed, the Court found that the recycling of goals from the past was an insufficient way to assure future progress.<sup>173</sup> Though the *Andrew F.* Court explicitly refused to “elaborate on what ‘appropriate’ progress will look like from case to case,” its insistence on progress itself rather than mere adequacy is notable in contrast with *Rowley*.<sup>174</sup>

In addition to focusing on progress, the *Andrew F.* Court acknowledges the hard work and activity that will be necessary to achieve the Act’s potential. Progress for students with disabilities will not happen accidentally or as an afterthought, but rather only through “careful consideration” of a child and her needs, a “fact-intensive exercise . . . informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians.”<sup>175</sup> The Court’s opinion acknowledges that any progress we have made since the enactment of the IDEA is the result of “extensive research and practical experience [which has] fostered the development of improved teaching methods, educational technology, and behavioral interventions.”<sup>176</sup> Our understanding of how children with disabilities learn and the limits of what a school can provide must constantly evolve to keep pace with new advancements and to incentivize learning.<sup>177</sup> In order to ensure that our students advance, schools must be forced to develop new programs.<sup>178</sup> To this end, schools and parents must also engage in a collaborative process of communication.<sup>179</sup> Indeed,

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<sup>173</sup> *Id.* at 996–97 (describing a series of IEPs viewed as “pretty much the same as his past ones”).

<sup>174</sup> *Id.* at 1001.

<sup>175</sup> *Id.* at 999. While *Rowley* also acknowledged the importance of the IEP development process to the IDEA, its application of the standard to Amy’s own circumstances was cursory at best. Though both opinions recognize the IDEA for the process-based statute it is, only *Andrew F.* engages in a robust evaluation of the process that districts are using to ensure compliance with the Act’s mandates.

<sup>176</sup> Brief of Former Officials of the U.S. Department of Education as Amici Curiae in Support of Petitioner at 5, *Andrew F.*, 137 S. Ct. 29 (2017) (No. 15-827).

<sup>177</sup> *Id.* at 6 (“[T]he FAPE standard must reflect current, and increasingly advancing, teaching methods and the same high expectations for students with disabilities that we have for all students.”).

<sup>178</sup> See, e.g., Brief for Advocates for Children of New York, et al. as Amici Curiae in Support of Petitioner at 11, *Andrew F.*, 137 S. Ct. 29 (2017) (No. 15-827) (“The [*Rowley*] Court recognized, for example, that ‘furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement.’” (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198–99 (1982))).

<sup>179</sup> Cf. Stacey Lynn Sheon, Comment, *Opening the Doors to a Quality Public Education for Children with Disabilities or Slamming Them Shut: A Critique of the Supreme Court’s Treatment of Private-Tuition Reimbursement Under the IDEA*, 49 WASHBURN L.J. 599, 601 (2010) (arguing that the Court’s opinion in *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009), is flawed because it “undermines the collaborative framework and open-door

*Andrew F.* envisions a more substantial role for parents in the development of special education programming for their children; not only must they be present during IEP meetings, but they must also be active participants, “fully air[ing] their . . . opinions on the degree of progress a child’s IEP should pursue” in order to ensure that the resulting program is effective.<sup>180</sup>

Only by focusing on advancement in the context of an individual student will districts establish the structural reforms necessary to provide high-quality services to students with disabilities.<sup>181</sup> With this in mind, a focus on progress requires that districts fully participate in “[t]he nature of the IEP process,” engaging in a “full[ ] air[ing]” out of the unique circumstances of an individual child and giving ample voice and participation to parents and advocates who help guide the process.<sup>182</sup> When districts fail to fully engage in this progress-driven process, advocates can demand increased procedural protections and student-based discussions, and seek a remedy from courts when districts are unable to “offer a cogent and responsive explanation for their decisions.”<sup>183</sup>

#### *D. Solving the Puzzle*

In presenting a framework for courts to demand that districts reorient around the individual, engage in productive comparisons between students with disabilities and their peers, and focus on constant progress, the Supreme Court has articulated a more rigorous process of IEP development which, with the careful attention of advocates and the intervention of courts as needed, can help solve the IDEA puzzle. By increasing the demands of a district-led special education process, *Andrew F.* provides a pathway out of the circular web of tangled interpretations and limited directives.

First, a focus on the individual child can lead to a more demanding continuum of placements, requiring districts to expand the services they provide to individuals, and, in the aggregate, expand the services provided system-wide. Second, the comparative approach will create a more nuanced and complete interpretation of the least restrictive environment provision. Rather than letting districts make a

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policy inherent in the IDEA,” which is conditioned on collaboration between schools and parents).

<sup>180</sup> *Andrew F.*, 137 S. Ct. at 1001.

<sup>181</sup> Colker, *supra* note 26, at 823 (arguing that the current IDEA precedents are “unsatisfactory” because they “do[ ] not always lead to structural reforms that would ensure that school districts offer children with cognitive impairments the opportunity to be educated in a regular public school”).

<sup>182</sup> *Andrew F.*, 137 S. Ct. at 1001–02.

<sup>183</sup> *Id.* at 1002.



half-hearted attempt at inclusion,<sup>184</sup> the comparative approach requires districts to link the services provided to general education students with those provided to their peers with disabilities, identifying gaps in services and forcing action to remedy them. Finally, an insistence on progress and growth will restore the potential power that initially characterized the IDEA<sup>185</sup> but that has been missing from its interpretation. It has the potential to reinvigorate special education, reenergize teachers who express frustration and helplessness,<sup>186</sup> and move our national special education programming forward in pursuit of more equal opportunities for students with disabilities.

While the *Andrew F.* opinion itself may not provide detailed standards, a set of general frameworks paired with a vision for a district-led definition and court supervision may be most effective at improving special education, rather than a set of rigid court-driven requirements. Professors James Liebman and Charles Sabel envision a “new architecture of reform” in education, in which legislatures set broad goals, local teams give them definition, and courts “periodically determine whether particular schools, districts, new administrative centers, and legislatures are providing constitutionally adequate levels

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<sup>184</sup> See, e.g., notes 92–95 and accompanying text describing *Daniel R.R. v. State Board of Education*. As described previously, the court in *Daniel R.R.* found that the school’s mere use of shifting time ratios spent in different educational settings amounted to a rigorous attempt at inclusion. 874 F.2d at 1050. Yet inclusive education is not simply about the proportion of *time* spent with general education peers; it is about the quality of that time, the level of rigorous engagement, and the relationship between teachers, general education students, and special education students in a classroom. See, e.g., *The Value of Inclusive Education*, OPEN SOC’Y FOUND., <https://www.opensocietyfoundations.org/explainers/value-inclusive-education> (last updated Oct. 2015) (“Inclusive education means different and diverse students learning side by side in the same classroom. . . . Inclusive education values diversity and the unique contributions each student brings to the classroom.”); Kaelynn Partlow, *What Real Inclusion of Special Education Students Looks Like*, MIGHTY (Nov. 27, 2017), <https://themighty.com/2017/11/promoting-real-inclusion-for-special-education-students/> (“Simply being allowed to sit at the same lunch table as typical students is not what ‘inclusion’ should look like.”). There was little evidence in *Daniel R.R.* that the school had achieved a more authentic and productive level of inclusion, and no evidence that new tools or techniques were pioneered by the school in an effort to engage Daniel in more rigorous content. Yet by placing a rubber stamp on the school’s rote numerical attempts at proportionate inclusion, the court allowed such a bare-bones approach to satisfy the district’s IDEA obligations. By interpreting *physical* inclusion as an effort to “modify the Pre-kindergarten program and to provide supplementary aids and services for Daniel,” the court watered down the standard of true social, educational, and meaningful integration. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir. 1989).

<sup>185</sup> See *supra* note 78 and accompanying text (describing the legislative history of the IDEA and the aspirations behind the monumental Act).

<sup>186</sup> See, e.g., PERRY ET AL., *supra* note 51, at 28 (describing the frustrations and concerns of teachers who worry they are not providing quality education to students with disabilities).

of education.”<sup>187</sup> The Court in *Endrew F.* may not provide much additional substantive content to define the legislative provisions of the IDEA, but it announces a more careful oversight role for the judiciary in ensuring that districts maintain their responsibilities. For advocates, this new position of judicial oversight is a saving grace—it allows advocates to critique the specific procedures that a district observed when establishing a special education program and placement for an individual student, and gives advocates the vocabulary to seek court intervention without asking courts to intrude impermissibly on the expertise of educators. In this way, districts are allowed to retain their position as innovators that have ample room for creativity and flexibility within a three-part process framework.

In practice, the three-part solution embedded in *Endrew F.* redefines the role of both districts *and* courts. Recall *Endrew F.*’s experiences from the Introduction. A district using the new standards announced by the Supreme Court would first consider *Endrew*’s individual needs: Why is he struggling with behavioral outbursts in school, and why is his existing placement failing to correct or improve these behaviors? Though other students with autism may benefit from the set of services provided to *Endrew*, *Endrew*’s unique set of needs have not been met by these services. Are there other students with similar behavioral needs who might also share characteristics with *Endrew* and who would equally benefit from a new approach? The comparative approach would then encourage the school to consider the growth of other students in the school; while *Endrew* has struggled to meet the same set of goals for the past several years, his peers are steadily reaching new academic milestones each year. What approaches can be gleaned from the school’s programs for non-disabled students, and what would it look like to provide a similar opportunity for students with disabilities?<sup>188</sup> Though the *Endrew F.* Court does not mandate *what* these new programs must look like, advocates can ensure that districts are in fact engaging with these questions and wrestling with a solution. In the event of a process breakdown, courts can intervene to review the analysis, requiring that districts engage in the process of

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<sup>187</sup> James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 279 (2003).

<sup>188</sup> With this in mind, recall Sci Academy’s stated goal in establishing Opportunities Academy (described in the Introduction, *supra*) for developing a program for students who are not able to apply to college but still wish to benefit from a rigorous program that feels “as much like college” as possible. Hawkins, *supra* note 1; see also Dreilinger, *supra* note 2.

individualization, comparison, and progress that are central to the case.

#### CONCLUSION

Since the passage of the IDEA, courts have reduced the force and ambition of the Act through a series of narrowing decisions interpreting its provisions. Though our current state of special education delivery has become notable for its stagnancy, the Supreme Court's recent decision in *Endrew F.* provides a path forward. *Endrew F.* demands that districts engage in an enhanced procedural process by (1) focusing on individual students and their needs; (2) comparing special education programming to programming for non-disabled students; and (3) requiring progress and advancement at all times. As a result, *Endrew F.* provides the impetus needed for advocates to hold districts accountable, to be bolder and more creative in their compliance with the IDEA, and to provide students with disabilities with the personally tailored and unique new programs and services that they deserve.