University of Michigan Journal of Law Reform

Volume 53

2020

Making a Reasonable Calculation: A Strategic Amendment to the IDEA

Hetali M. Lodaya
University of Michigan Law School

https://doi.org/10.36646/mjlr.53.2.making

MAKING A REASONABLE CALCULATION: A STRATEGIC AMENDMENT TO THE IDEA

Hetali Lodaya*

ABSTRACT

The Individuals with Disabilities Education Act (IDEA) lays out a powerful set of protections and procedural safeguards for students with disabilities in public schools. Nevertheless, there is a persistent debate as to how far schools must go to fulfill their mandate under the IDEA. The Supreme Court recently addressed this question with its decision in Endrew F. v. Douglas Cty. School District Re-1, holding that an educational program for a student with a disability must be "reasonably calculated" to enable a child's progress in light of their circumstances. Currently, the Act's statutory language mandates Individual Education Program (IEP) teams to consider a variety of factors including "the strengths of each child," "the concerns of the parents," "the results of the . . . most recent evaluation of the child," and "the academic, developmental, and functional needs of the child."[1] *This Note proposes an amendment to the IDEA, inspired by the Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis framework used in business strategy, that adds external "threats" to this list of factors. This amendment will help parents, advocates, and schools better understand the* Endrew F. *standard and implement it with fidelity to the IDEA's broad mandate.*

TABLE OF CONTENTS

---

* J.D., December 2019, University of Michigan Law School; M.A. Educational Studies Candidate, May 2020, University of Michigan School of Education. I am so grateful to everyone at the Education Law Center-PA for inspiring this work; Nick Hazen, Pat Forte, and the whole *JLR* team, as well as Margie Wakelin, Rachel Brady, Maureen Carroll, Sam Bagenstos, and the attendees of my SRR presentation, for their helpful feedback; Phid House for being my law school community; my parents, brother, all of my grandparents, and the educators in my family for never letting anything get in the way of learning; and all of my teachers. To my students: may we keep making progress toward the world you deserve.

1. 20 U.S.C. § 1414(d)(3)(A) (2012).

INTRODUCTION

How does a school, charged with the education of potentially hundreds or thousands of students, keep track of students with disabilities and make sure they are getting the services they need to succeed? What, in fact, does it *mean* for them to succeed? Congress attempted to address the first question when it passed what is now known as the Individuals with Disabilities Education Act, outlining a robust framework for providing support and services to students with disabilities in K-12 public schools.[2] The second question was most recently taken up by the Supreme Court in *Endrew F. v. Douglas Cty. Sch. Dist. Re-1;* the Court held that an educational program for a student with a disability cannot simply provide a *de minimis* benefit, but must instead be "reasonably calculated to enable a child to make progress appropriate in light of the child's circum-

2. *See infra* Part I.

stances."[3] While advocates seem to generally agree that this statement represents a positive raising of the standard of education to be provided under the Act, there has been very little change in outcomes in the lower courts when adjudicating special education disputes.[4] By extension, it is unclear if there has been a significant change at the school level in terms of how on-the-ground administrators and personnel responsible for creating each student's IEP approach this process.[5]

The IDEA is framed prospectively: members of a student's IEP team must use what they know about the child, along with their own expertise and the wishes of the parents, to set goals for the upcoming year and identify strategies to reach them.[6] Children do not learn in a vacuum, however—their learning takes places in a broader school environment. This environment inevitably brings with it a variety of potential complications that can affect the viability of a plan developed in a conference room. Conspicuously missing from the current IEP framework is an explicit consideration of potential external threats to a child's ability to progress through their IEP goals. This deficiency is made clear by looking at IEPs through the lens of the SWOT (Strengths, Weaknesses, Opportunities, and Threats) Analysis framework, a business strategic planning tool now used across a variety of disciplines including education.[7] SWOT calls for strategy decisions to be informed by a balanced understanding of Strengths, Weaknesses, Opportunities, and Threats.[8] Currently, when developing a student's plan for learning, the statutory language of the Act mandates IEP teams to consider a variety of factors including "the strengths of each child," "the concerns of the parents," "the results of the . . . most recent evaluation of the child," and "the academic, developmental, and functional needs of the child."[9] Putting this language in the SWOT framework, IEP teams must consider the Strengths and Weaknesses of the child, as well as Opportunities for growth and progress. There is no mandate, however, to also evaluate potential Threats.

This Note will argue that, particularly in light of *Endrew F.*, an amendment to the IDEA incorporating threat analysis into IEPs is

---

3. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1002 (2017).

4. Perry A. Zirkel, *The Aftermath of Endrew F. One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP. 448, 454 (2018) ("[A]t this first anniversary of *Endrew F.* the net effect appears to have been close to negligible."). *See also infra* Part II.c.

5. *Id.* at 453.

6. *See infra* Part I.b.

7. *See infra* Part III.a.

8. *Id.*

9. 20 U.S.C § 1414(d)(3)(A) (2012).

necessary to create clarity for the courts regarding Congress' intentions and to help parents and school personnel work together to best serve students. Part I will introduce the Individuals with Disabilities Education Act's main substantive provisions, as well as the procedural protections afforded to students covered by the Act and their parents or guardians.[10] It will go into detail regarding the substance of IEPs and the problems schools face in successfully implementing them. Lastly, it will discuss how the Act defines an adequate education, termed a 'free and appropriate public education,' or 'FAPE.'

Part II will first discuss the pre-*Endrew F.* standard for determining whether a student was receiving FAPE and how it was applied in lower courts. Next, it will examine the *Endrew F.* holding and its subsequent application in lower courts. It will conclude with a summary of how schools and courts seem to view their obligations today, arguing that *Endrew F.* on its own is not enough to achieve substantive change in IEP implementation.

Part III will outline the proposed reform: an amendment that explicitly requires IEPs to include a "statement of any factors affecting the school environment but outside the child's control that, based on the experience or insight of any team member, may impede the child's progress toward her stated goals, and a statement of the strategies to be employed in that eventuality." Substantively, this will lead to IEPs that are more robust in the first instance, rather than requiring teams to re-convene in a reactive manner and edit them as problems arise. Procedurally, it will create a clear obligatory step for courts to look for in determining whether an IEP is "reasonably calculated to enable a child to make progress" or not.

Part IV will conclude by examining bullying as an example of a barrier to the achievement of students with disabilities that might be mitigated by the proposed reform. It will also briefly outline several other examples of threats faced by students with disabilities and will discuss how they could be better managed if they were explicitly taken into account under a reformed IDEA regime.

---

10. Guardians are included in the definition of "parent" in the Act. 20 U.S.C § 1401 (23) (2012). For simplicity, "parents" will be used throughout this piece.

I. LEGAL PROTECTION AT SCHOOL FOR STUDENTS WITH DISABILITIES: THE IDEA

Students with disabilities have been excluded from the classroom, either informally or by law, for the majority of this country's history.[11] The Supreme Court's seminal ruling in *Brown v. Board of Education* paved the way for advocates to argue that children with disabilities were entitled equal access to public schools the same as any other child.[12] Two cases at the district court level raised awareness regarding these issues and laid the foundation for eventual statutory reform. In *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*, the court held that Pennsylvania's statutes excluding "retarded children" from public education did not pass rational basis review under the Equal Protection Clause: after deciding to provide public education, the state had no colorable reason to deny that education to one group of children.[13] This argument was extended to cover all children with disabilities in *Mills v. Board of Education of District of Columbia*, with the court rejecting the school's defense of insufficient funds.[14]

While these two decisions offered a strong basis for change, they did not come with any specific instructions to schools, other than a requirement to include children with disabilities in public educational institutions. Additionally, they did not provide a nationwide mandate. Congress created these affirmative obligations in the Education for All Handicapped Children Act of 1975 (EAHCA).[15] This legislation has been modified and reauthorized over time. As of the 1990 amendments, it is known as the Individuals with Disabilities Education Act (IDEA).[16] Supplemented by the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act, the IDEA is the core source of statutory authority regarding both sub-

---

11. *The Segregation of Students with Disabilities*, NATIONAL COUNCIL ON DISABILITY (Feb. 7, 2018), https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf ("As late as the 1960s, it was standard for students with disabilities to be completely excluded from the public education system.").

12. DEREK W. BLACK, EDUCATION LAW 469 (2d ed. 2016).

13. Pa. Ass'n for Retarded Children v. Com. of Pa., 343 F. Supp. 279, 297 (E.D. Pa. 1972) ("[P]laintiffs question whether the state, having undertaken to provide public education to some children (perhaps all children) may deny it to plaintiffs entirely. We are satisfied that the evidence raises serious doubts (and hence a colorable claim) as to the existence of a rational basis for such exclusions.").

14. Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 876 (D.D.C. 1972) ("[F]ailure to fulfill this clear duty to . . . provide [these children] with publicly-supported education . . . cannot be excused by the claim that there are insufficient funds.").

15. BLACK, *supra* note 12, at 470.

16. Education for All Handicapped Children Act, Pub. L. No. 94-142 (1975) (current version at 20 U.S.C § 1400 (2012)). *See generally Timeline of the Individuals with Disabilities Education Act (IDEA)*, U. KAN. SCH. EDUC., https://educationonline.ku.edu/community/idea-timeline (last visited Sept. 22, 2019).

stantive rights and procedural protections in school for students with disabilities.[17]

A. *Main Provisions and Protections of the IDEA*

There is a two-part test to determine whether a child is covered by the IDEA. First, the child must have a disability specifically enumerated under the statute.[18] Many chronic conditions such as diabetes or cancer do not fall under the enumerated disabilities list.[19] This disability must also "adversely affect [the child's] educational performance."[20] Second, the child must need both special education and related services. Special education is the adaptation of content, methodology, or delivery of instruction to meet a child's unique needs.[21] Related services are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education."[22] Children who do not meet all of these requirements can sometimes receive assistance in school under the ADA or § 504 of the Rehabilitation Act, which are less restrictive in their eligibility requirements.[23]

Once a student is found to be eligible, the IDEA instructs schools to ensure they are providing the student FAPE in the least restrictive environment (LRE) by implementing an IEP.[24]

The primary purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education."[25] The FAPE standard was first outlined in regulations for § 504 of the Rehabilitation Act[26] and has its origins in the idea of a "free and adequate public education" outlined in *Mills*.[27] FAPE consists of "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State

---

17. BLACK, *supra* note 12, at 470.
18. BLACK, *supra* note 12, at 471. *See also* 20 U.S.C. § 1401(3)(A)(i) (2012) ("[I]ntellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . .").
19. BLACK, *supra* note 12, at 471.
20. *Id.*
21. 34 C.F.R. § 300.39(b)(3) (2018).
22. 20 U.S.C. § 1401(26)(A) (2012).
23. BLACK, *supra* note 12, at 472.
24. *See generally* BLACK, *supra* note 12, at 469–546.
25. 20 U.S.C. § 1400(d)(1)(A) (2012).
26. *See* 34 C.F.R. § 104.33.
27. *See* Mills v. Bd. of Ed. of D.C., 348 F. Supp. 866, 878 (D.D.C. 1972).

educational agency; (C) include an appropriate . . . education in the State involved; and (D) are provided in conformity with the individualized education program."[28]

Students are also required to be educated in the "least restrictive environment" appropriate based on their circumstances.[29] While not clearly defined by the statute, "restrictive" is understood in the context of proximity to the general education classroom—educational environments exist on a continuum, ranging from totally separated to totally integrated, and a school should always strive to place a child in the most integrated settings possible that still meet their individualized needs.[30] This provision was meant to address the historical practice of segregating students with disabilities away from general classrooms.[31] By contrast, Congress wanted children to see that "disability is a natural part of the human experience."[32] The statute creates a presumption towards integration into general classrooms, permitting segregation only if a child's circumstance demands it.[33] In *Daniel R.R.*, Daniel's parents were challenging the school's decision to essentially fully segregate him; he only interacted with non-special education students at lunch and at recess.[34] The court found this segregation to be acceptable: Daniel's speech and learning difficulties were so advanced that he was getting essentially no benefit from the general education classroom, and modifying the classroom to meet his needs would have taken "all or most of" his teacher's time.[35] This situation is an extreme, however; schools are required to strive for inclusion in regular classroom settings to the greatest extent possible based on the child's needs.

Under the IDEA, students with disabilities also receive protections related to disciplinary violations. If a student is found to be in violation of their school's code of student conduct, the school is required to make a determination as to whether the student's conduct was "caused by, or had a direct and substantial relationship to, [their] disability" or was "the direct result of the local educational

---

28. 20 U.S.C. § 1401(9) (2012).

29. *See* 20 U.S.C. § 1412(5) (2012).

30. Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1045 (5th Cir. 1989) ("Schools must provide a free appropriate public education and must do so, to the maximum extent appropriate, in regular education classrooms. But when education in a regular classroom cannot meet the handicapped child's unique needs, the presumption in favor of mainstreaming is overcome and the school need not place the child in regular education.").

31. *See The Segregation of Students with Disabilities*, *supra* note 11.

32. Sue Swenson, *Taking Intellectual Disability Seriously Shows Us That Education Is a Human Right*, 42 HUM. RTS., 18, 19 (2017) (quoting 20 U.S.C. § 1400 (c)(1) (2012)).

33. Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. ONLINE 174, 174 (2007).

34. *Daniel R.R.*, 847 F.2d at 1039.

35. *Id.* at 1050–51.

agency's failure to implement the IEP."[36] If so, the school is directed to take corrective steps to attempt to prevent the behavior from happening in the future, but generally cannot suspend, expel, or transfer the student, or otherwise change the student's placement, unless the parents agree.[37]

The statute also includes procedural protections for students and their families.[38] Parents in particular are meant to play a significant role in the special education process. The procedural safeguards aimed at making parent participation meaningful have been a part of the IDEA's design from the beginning,[39] and the 2004 reauthorization of the Act reaffirmed this commitment.[40] Parents have the right to examine all records related to their child and to participate in any meetings having to do with their child's educational placement or the provision of FAPE.[41] They are entitled to written notice any time there is a change, or a refusal on the school's part to make a change, to their child's educational placement.[42] There are provisions for both due process[43] and mediation proceedings[44] in the event of disagreement between the school and the parents, with eventual recourse to federal courts if no resolution is reached.[45] Students are to stay in their current educational placement until any dispute is resolved.[46]

B. *IEPs in Theory*

The workhorse innovation of the IDEA is the requirement to create an IEP for any child with a qualifying disability who is to receive special education services from their school.[47] IEPs are often

---

36. 20 U.S.C. § 1415(k)(1)(E) (2012). This is commonly called a manifestation determination review (MDR).

37. EDUC. L. CTR., THE RIGHT TO SPECIAL EDUCATION IN PENNSYLVANIA: A GUIDE FOR PARENTS AND ADVOCATES 62–71 (2016), https://www.elc-pa.org/wp-content/uploads/2014/03/ELC_Right_to_SpecialEducation_revisedapndx_Sept2016.pdf.

38. 20 U.S.C. § 1415 (2012).

39. 20 U.S.C. § 1415 (1976).

40. 20 U.S.C. § 1400(c)(5) (2012) ("Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home."); 20 U.S.C § 1400 (c)(8) ("Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.").

41. § 1415(b)(1).

42. § 1415(b)(3).

43. § 1415(b)(6).

44. § 1415(e).

45. § 1415(i)(2)(A).

46. § 1415(j). This is commonly called the "stay-put" provision.

47. *See* 20 U.S.C. § 1414(d) (2012); Megan Roberts, *The Individuals with Disabilities Education Act: Why Considering Individuals One at a Time Creates Untenable Situations for Students and*

described as contracts between schools and parents,[48] outlining what services the school is to provide in a level of detail that allows for an assessment of how those services will help a child make progress.[49]

The IEP process begins by identifying and evaluating a student who might be eligible for services under the IDEA.[50] A parent may ask to have their child evaluated,[51] but schools also have an affirmative obligation—known as "child find"—to ensure that children with disabilities are "identified, located, and evaluated."[52] Some schools address their child find obligation by offering developmental screenings or other regularly scheduled testing opportunities; others rely on teachers and other school personnel, most of whom will have had basic training or familiarity with special education, to identify students that they think need to be evaluated.[53] The IDEA has a detailed list of what tools, procedures, and experts should be employed when evaluating a child to ensure as complete a picture as possible of the child's disability.[54] Schools are required to provide parents with a copy of this evaluation report, regardless of the outcome.[55]

Finding that a child has a disability covered by the Act, and is eligible for special education and related services, triggers the creation of an IEP. Any child with the requisite disability and eligibility must have an IEP in effect at all times.[56] The group that meets to develop and periodically revise a student's IEP, or the "IEP team," must include at a minimum the student's parents; at least one regular education and special education teacher; a school or district representative who is qualified to provide or supervise specially designed instruction, who understands the school's resources, and is familiar with the general education curriculum (generally, a special education director); someone who can interpret any evalua-

---

Educators, 55 UCLA L. REV. 1041, 1049 (2008) ("To achieve this goal, the EAHCA included certain key provisions that have remained consistent throughout the many later versions of the Act; three fundamental and continuing requirements of the EAHCA are (1) that children with disabilities receive Individualized Education Programs (IEPs); (2) that schools provide to students with disabilities a free and appropriate public education (FAPE); and (3) that this education occur in the least restrictive environment (LRE) appropriate.").

48. *See* Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE Under the IDEA: IEP Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409, 420 & n.53 (2016).

49. EDUC. L. CTR., *supra* note 37, at 31.

50. *Id.* at 12.

51. § 1414(a)(1)(B).

52. 20 U.S.C. § 1412(a)(3)(A) (2012).

53. *See generally* EDUC. L. CTR., *supra* note 37, at 13.

54. § 1414(b).

55. § 1414(b)(4)(B).

56. § 1414(d)(2).

tions of the child (generally, a special education director or school psychologist); and, when appropriate, the child.[57]

In general, the IEP team is to consider a broad set of inputs when developing an IEP.[58] These include the strengths of the child, the parents' concerns regarding their child, the results of any relevant evaluations, and the "academic, developmental, and functional needs of the child,"[59] as well as special factors such as a child's behavior, limited English proficiency, or particular communication needs relating to their disability.[60]

The IDEA lays out a thorough accounting of the specific information that must be included in an IEP.[61] It must include a statement of the child's present academic achievement and behavioral performance, annual goals along with plans for measurement and progress reporting, a statement of the "special education and related services" to be provided, and an explanation of when, if at all, the child will "not participate with nondisabled children in the regular class."[62] Additionally, the IEP must cover any modifications the student will receive when they take state and district assessments, the start date for services and the "frequency, location, and duration" of services, and for students over sixteen, goals related to their transition out of school including "training, education, employment, and . . . independent living skills."[63]

Once created, the IEP team must review the plan "periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved."[64] The IEP is to be revised to address lack of expected progress, as well as information provided by the parents, a child's anticipated needs, or "other matters."[65] This might mean a child exceeding or meeting one of their goals or a major change in a child's life such as illness or surgery.[66]

Conceptually, IEPs are meant to be a resource for both parties: they outline for parents exactly what to expect, and outline for schools exactly what they are supposed to do. IEPs are the ultimate repudiation of the factory approach to educating students with dis-

---

57. § 1414(d)(1)(B); *see also* EDUC. L. CTR., *supra* note 37, at 31–32.
58. 20 U.S.C. § 1414(d)(3) (2012).
59. 20 U.S.C. § 1414(d)(3)(A) (2012).
60. 20 U.S.C. § 1414(d)(3)(B) (2012).
61. 20 U.S.C. § 1414(d)(1)(A) (2012).
62. *Id.*
63. *Id.*
64. 20 U.S.C. § 1414(d)(4)(A)(i) (2012).
65. 20 U.S.C. § 1414 (d)(4)(A)(ii) (2012).
66. *Requesting a Meeting to Review Your Child's IEP*, CTR. FOR PARENT INFO. & RESOURCES, https://www.parentcenterhub.org/iep-2/ (noting that parents have the ability, as members of the IEP team, to request that their child's IEP be reviewed and revised in light of particular life events).

abilities— a historical approach that would lump together any students who were identified as struggling, no matter their individual needs.[67] The idea that every student has the potential to succeed, even if they have a disability, logically flows to the conclusion that every student can benefit from an individual plan tailored to help them achieve that success.[68] An argument can be made that by creating the IEP structure, the IDEA has made incredible strides in ensuring that these students are not left behind. Previously, close to two million children with disabilities were excluded from public schools.[69] Today, six million children are currently served by an IEP.[70]

C. *IEPs in Practice*

In practice, the successful implementation of an IEP after a student has been successfully identified is a difficult task. These difficulties range from the substantive to the procedural. At a basic level, a child's IEP is sometimes defective. Missing data, poorly written goals and objectives, weak linkages between goals and the services provided, and a lack of systematic progress monitoring are all examples of major content flaws that will eventually affect a child's achievement.[71]

Schools can face challenges in implementing an IEP even if it is rigorously developed. First, the IDEA has no mandatory attendance requirement at IEP team meetings. While the Act outlines the required composition of an IEP team, the presence of any particular member is not required if "the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary."[72] Practically, this can look like a school administrator telling a parent that a given teacher cannot attend

---

67. *Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. DEP'T OF EDUC. (Jul. 19, 2007), https://www2.ed.gov/policy/speced/leg/idea/history.html ("Before the enactment of Public Law 94-142 . . . [t]oo often, persons with disabilities . . . were merely accommodated rather than assessed, educated, and rehabilitated.").

68. *See* Tracy Thompson, *The Special-Education Charade*, THE ATLANTIC (Jan. 3, 2016), https://www.theatlantic.com/education/archive/2016/01/the-charade-of-special-education-programs/421578/ ("And so, the IEP meeting, which is where the overarching purpose of federal law ('to ensure that all children with disabilities have available to them a free appropriate public education . . . [that provides] services to meet their unique needs') meets the nitty gritty question: How do we do that for this particular child?").

69. *About IDEA: History of the IDEA*, DEP'T OF EDUC., https://sites.ed.gov/idea/about-idea/#IDEA-History.

70. Swenson, *supra* note 32, at 20.

71. James Gallagher & Laura Desimone, *Lessons Learned from Implementation of the IEP: Applications to the IFSP*, 15 TOPICS IN EARLY CHILDHOOD SPECIAL EDUC. 353, 356 (1995).

72. 20 U.S.C. § 1414(d)(1)(c)(i) (2012).

and that others will take their place during the meeting, with the parent agreeing rather than risking delay if the meeting is rescheduled.[73] It is easy to imagine the scenarios that can follow when IEP team members are absent: a missing special education teacher leads to parents left with unanswered questions about a proposed intervention; a missing general education teacher leads to a misunderstanding about how they are supposed to implement the IEP; a missing school official leads to the team deciding on a transportation strategy that is not logistically feasible for the district.

Second, many schools experience a lack of capacity on the part of teachers to properly execute the IEP. Although the IEP is a contract between the school and the parents, the people responsible for its implementation in the day-to-day classroom environment are the teachers. Teachers must, as agents of the school, receive appropriate information from their school so they understand and can execute their obligations under the IEPs for any students in their classroom.[74] Take, for example, a teacher with two students with IEPs that include fairly common modifications: one requires both oral and printed directions, and one requires the teacher to stand near the student when giving directions.[75] This teacher will always have to read directions out loud and have them in writing, and will always have to stand in a particular place when giving directions. While this might seem manageable, imagine the same scenario with six or ten students with IEPs in one classroom, all potentially being revised throughout the course of the school year. The pull on a teacher's time, between modifying curriculum, fill-

---

73. In fact, the 2004 IDEA amendments included a provision allowing IEPs to be amended by written document, *without* convening an IEP team meeting, in recognition of the fact that these meetings can be difficult to convene. In this situation, all team members are required to be notified of any changes, though there is no provision indicating that all team members must *agree* on changes before they go into effect. *See* Jeffrey A. Knight, *When Close Enough Doesn't Cut It: Why Courts Should Want to Steer Clear of Determining What Is—and What Is Not—Material in a Child's Individual Education Program*, 41 U. TOL L. R. 375, 391 (2010). This procedural bypass is likely helpful in decreasing the administrative burden teams might otherwise face in order to make small, routine changes. It is disturbing, however, to consider the possibility that extensive or substantive changes might be made completely legally without anyone with relevant expertise discussing with the parents firsthand what exactly is being done to the IEP. With written amendments, the give-and-take discussion of an in-person IEP meeting is lost, and along with it, one of the key chances for parents to advocate for their student.

74. EDUC. L. CTR., *supra* note 37, at 45 ("When the IEP is approved, the school must explain to its staff their responsibilities and the specific supports, modifications, and accommodations that they must give the child under the IEP.").

75. *School Accommodation and Modification Ideas for Students Who Receive Special Education Services*, PACER CTR. (2015), https://www.ctdinstitute.org/sites/default/files/file_attachments/School%20Accommodation%20and%20Modification%20Ideas%20for%20Students%20who%20Receive%20Special%20Education%20Services%20English.pdf.

ing out reporting and progress monitoring documents, and attending IEP meetings, can stretch them beyond capacity.

A third issue, related to lack of capacity within a school, is a shortage of necessary resources, such as modified curricular supports, adaptive furniture, or specialized staff. The presence of a school administrator on the IEP team who understands the school's resources ideally prevents the school from promising services that they cannot offer. It is still the case, however, that the school might know a better strategy or intervention exists for a child, but simply cannot afford it or fit it into their school structure. Alternatively, the school might not be able to afford the level of staffing needed to properly implement the IEPs of all students in the building as written. Congress has never fully funded the IDEA's mandates, and federal funding covers less than 20% of the estimated excess cost to schools and districts of educating students with disabilities.[76] If state legislatures do not make up the shortfall, districts must rely on what they raise through property taxes, fundraising, or other measures. A lack of adequate funding for special education can result in IEPs not being properly implemented in a variety of ways.

A fourth issue is the difficulty of achieving the leveling of power between parents and school officials that the IDEA seeks to attain. A parent's role can be limited if school officials do not think the parents are qualified to participate or make constructive contributions.[77] Pragmatically, a parent's role can also be limited if they have difficulty getting time off work to attend meetings, limited English proficiency, lack of experience with or understanding of the school environment, or face any other structural barriers to successful advocacy on behalf of their child.

Fifth, the procedural safeguards of the IDEA, meant to empower parents and address these situations where schools do not follow through on their obligations, are difficult to access for all but the most well-resourced parents, have uncertain outcomes, and can take a long time.[78] The IDEA provides parents with opportunities to challenge decisions they do not agree with regarding their child's educational placement through resolution meetings, due process, or mediation.[79] Once all administrative remedies are exhausted, parents have the ability to bring suit in state or federal

---

76. BLACK, *supra* note 12, at 470.

77. Gallagher & Desimone, *supra* note 71, at 361.

78. *See* Kevin Hoagland-Hanson, Comment, *Getting Their Due (Process): Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV. 1805 (2015).

79. 20 U.S.C. § 1415 (2012).

court.[80] These options are often difficult to navigate, intimidating, and time-consuming, particularly without the support of an advocate or a lawyer. While many non-profit advocacy organizations exist to provide support to parents in the IEP process, they cannot serve everyone.[81] In a review of due process hearings from 1978 to 2012, parents won 58% of cases where they were represented by an advocate and just 14% of cases when they were not.[82]

D. *FAPE: An Appropriate Education Defined Under the IDEA*

The IDEA seeks to guarantee that "all children with disabilities have available to them a free appropriate public education."[83] The definition of what comprises an "appropriate" education sufficient to meet this FAPE standard is one of the most frequently litigated portions of the IDEA.[84] The IEP is essentially a memorialization of how the school is proposing to provide FAPE to a student, and is therefore at the center of any dispute regarding whether a school is meeting its obligations under the IDEA or not.[85] This is, arguably, the crux of the statute—the requirements, procedural protections, and funding allocations are all put in place to ensure that students with disabilities get an education. That mandate, however, seems to leave open to interpretation "how much" education is meant to be provided.

The Supreme Court first clarified this standard in *Rowley*, a case involving a student who was deaf, Amy Rowley, whose parents wanted a sign-language interpreter to be included in her IEP.[86] The school refused, and her parents appealed. A hearing officer agreed with the school, saying, "Amy was achieving educationally, academically, and socially" without an interpreter, and that the school was therefore meeting its obligation to provide a FAPE.[87] The Rowleys asked for review from a district court, which found that although Amy's performance was above average, she could

---

80. 20 U.S.C. § 1415 (f)(1)(B)(iii)(II) (2012).

81. *See, e.g.*, *Ensuring Equal Access*, EDUC. L. CTR., https://www.elc-pa.org/ensuring-equal-access/ (last visited Sept. 27, 2019); *Who We Serve: Students with Disabilities*, ADVOC. FOR CHILD. N.Y., https://www.advocatesforchildren.org/who_we_serve/students_with_disabilities (last visited Sept. 27, 2019).

82. G. Thomas Schanding et al., *Analysis of Special Education Due Process Hearings in Texas*, SAGE OPEN, Apr.–June 2017 at 2, https://journals.sagepub.com/doi/pdf/10.1177/2158244017715057.

83. 20 U.S.C. § 1400(d)(1)(A) (2012).

84. BLACK, *supra* note 12, at 504.

85. *Id.* at 503 (calling IEPs "the linchpin for services under the IDEA.").

86. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 184 (1982).

87. *Id.* at 185.

learn more if she were not deaf, and therefore needed a sign-language interpreter to achieve her true potential.[88] This "disparity between Amy's achievement and her potential" led the district court to find she was being denied a FAPE.[89]

The Supreme Court reversed, taking particular issue with the district court's attempt to create their own standard for a FAPE without adequately assessing congressional intent.[90] While acknowledging that the Act does not contain any "substantive standard prescribing the level of education to be accorded handicapped children," the court held that based on the legislative history of the Act, its intent was "more to open the door of public education to handicapped children . . . than to guarantee any particular level of education once inside."[91] Refusing to adopt the standard advocated by the plaintiffs—that of "maxim[izing] the potential of each handicapped child"[92]—the court concluded that the Act calls for "access to specialized instruction and related services which are individually designed to provide educational benefit."[93] In order to achieve provision of a FAPE, IEPs must be "reasonably calculated to enable the child to receive educational benefits."[94] The court confined its analysis to the case of a student who was performing above average in a regular classroom, rather than articulating a standard that could be applied to determine whether any child covered by the Act is receiving educational benefit.[95] Lower courts have subsequently interpreted the *Rowley* standard in a variety of ways, ranging from a "meaningful benefit" to a "some benefit" standard.[96]

---

88. *Id.*

89. *Id.*

90. *Id.* at 189–190 ("Certainly the language of the statute contains no requirement like the one imposed by the lower courts . . . That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act.").

91. *Id.* at 189, 192.

92. *Id.* at 200.

93. *Id.* at 201.

94. *Id.* at 207. This is one part of a two-part test outlined in *Rowley* to determine whether FAPE has been provided. A court is also required to determine whether the state entity in question has "complied with the procedures" of the Act. *Id.* at 206–07. Often, however, any procedural violations are *de minimis*, and so the focus of analysis is generally whether a child received educational benefit from their IEP. BLACK, *supra* note 12, at 511.

95. *Rowley*, 458 U.S. at 202 ("Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.").

96. Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 EDUC. L. REP. 1 (2009). *See also infra* Part II.a.

The latest amendments to the IDEA were passed in 2004.[97] This reauthorization was designed in part to align the IDEA with the No Child Left Behind Act's focus on raising expectations for learning and achievement, and on outcomes rather than process and compliance.[98] The purpose of the IDEA was amended to indicate, in line with No Child Left Behind, that there should be an emphasis on "high expectations": schools should work to ensure access to the general education environment so that students with disabilities can "meet . . . to the maximum extent possible, the challenging expectations that have been established for all children."[99] This change in language, however, also provides further support for an idea articulated by the *Rowley* court, that "educational benefit" must mean something more than *de minimis* access to school.[100]

Overall, the IDEA is a strong framework of protections for students with disabilities in public school settings. Moreover, rather than just setting a protective floor, it is inherently aspirational, seeking to integrate students with disabilities into mainstream environments and recognize they too can achieve in the classroom. IEPs as the main operative tool of the IDEA are very thoroughly outlined in the statute, but in practice are not always implemented with a high level of fidelity. Parents can attempt to remediate what they see as a deficient provision of services by challenging their student's IEP, alleging that the school is not providing a FAPE as required by the Act. *Rowley* was the first Supreme Court case to squarely address the question of what level of "educational benefit" was intended by Congress when it passed the IDEA.

II. THE *ENDREW F.* STANDARD AND ITS APPLICATION IN COURTS AND SCHOOLS

The two-part test developed in *Rowley* gave lower courts a standard to use when determining whether a child was receiving a FAPE. The test was not, however, uniformly interpreted across the circuits—some used a "meaningful benefit" standard while others

---

97. *Timeline of Individuals with Disabilities Act (IDEA)*, U. KAN. SCH. EDUC., https://educationonline.ku.edu/community/idea-timeline (last visited Sept. 16, 2019).

98. Kathleen B. Boundy, *Examining the 2004 Amendments to the Individuals with Disabilities Education Act: What Advocates for Students and Parents Need to Know*, CLEARINGHOUSE REV. J. POVERTY L. POL'Y 550, 551 (2006), https://www.cleweb.org/sites/cleweb.org/files/assets/2004%20Amendments%20to%20IDEA%20boundy_0.pdf.

99. 20 U.S.C. § 1400(c)(5) (2012); *see also* Boundy, *supra* note 98, at 551.

100. *Rowley*, 458 U.S. at 200–01 ("It would do little good for Congress to spend millions of dollars in providing access . . . to have the handicapped child receive no benefit from that education.").

used a lower "some benefit" standard.[101] While the Supreme Court's decision in *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*[102] does seem to have established that an IEP must provide more than "some benefit" to achieve a FAPE, there are still open questions about how exactly it will be implemented in schools, and whether any changes in implementation will lead to greater compliance with the IDEA's mandate. Early data suggests the new standard has not led to a significant shift in how lower courts conceptualize FAPE in the context of IEPs.[103]

A. *The Pre-*Endrew F. *Standard: Interpreting* Rowley

Rowley established a two-part test for courts to use when asked to resolve an IEP complaint under § 1415(e)(2) of the Act: "First, has the State complied with the procedures set forth in the Act? And second, is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"[104] Although there is agreement the "benefits" requirement is more than *de minimis*,[105] circuits have generally split into two categories: those that apply a "meaningful benefit" standard and those that apply a lower "some educational benefit" standard.[106]

The Third Circuit stands out for its rigorous and continuous application of a higher standard, consistently using the words "meaningful educational benefit" in its opinions.[107] The Court of Appeals derives this standard by focusing on the text and legislative history of the Act, in addition to the *Rowley* language, as indicating that "the state must provide some sort of meaningful education—more than mere access to the schoolhouse door."[108] Acknowledging the Supreme Court's warning from *Rowley* that courts not "interfer[e] with educational methodology" and tell schools in great detail how

---

101. *Compare* Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 179 (3d Cir. 1988) ("[T]he Rowley Court described the level of benefit conferred by the Act as 'meaningful.'") (citing *Rowley*, 458 U.S. at 192), *with* A.B. *ex rel* D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004) ("The FAPE must only be 'calculated to confer *some* educational benefit on a disabled child.'") (emphasis in original).

102. 137 S. Ct. 988 (2017).

103. *See generally* Zirkel, *supra* note 4.

104. *Rowley*, 458 U.S. at 206–07.

105. *See generally* Wenkart, *supra* note 96.

106. *Id.*

107. *Id.* at 17.

108. Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3d Cir. 1988). *See also* Shore Reg'l High Sch. Bd. of Educ. v. P.S. *ex rel.* P.S., 381 F.3d 194, 199 (3d Cir. 2004); T.R. v. Kingwood Twp. Bd. of Educ., 205 F.3d 572, 577 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 247 (3d Cir. 1999) (superseded on other grounds).

they should be educating students, the Third Circuit nevertheless sees this elevated standard as in line with its duty to enforce the statutory provisions of the Act.[109]

Other circuits seem to support the "meaningful benefit" standard, though the language they use can be ambiguous. The Second Circuit in *Mrs. B. v. Milford Bd. Of Educ.*, for example, begins by stating that IEPs must be calculated to achieve "some 'meaningful benefit.'"[110] It also agrees that the standard means more than "mere trivial advancement,"[111] finally landing on the student's "meaningful progress" as the appropriate indicator of whether a student is receiving a FAPE.[112] However, the words "benefit" and "progress" also appear throughout the opinion without any modifiers, making it unclear how rigorous the standard is.[113] Additionally, the court frames the question before it as "whether the district court justifiably concluded that M.M. was not receiving adequate educational benefit in the public school system," introducing the new term "adequate" without any clear definition of what level of benefit the word is meant to convey.[114] The court's opinion in *Mrs. B* discusses factors that might contribute to an understanding of benefit and progress, such as grades and test scores, but sticks to the facts of the case in determining how those factors cut.[115] It is therefore difficult to come to any generalized understanding of how much "benefit" the student was due.

Lastly, the D.C. Circuit as well as the First, Fourth, Eighth, Tenth, and Eleventh Circuits all characterize the IDEA as requiring only "some benefit" or a similarly stated lower standard.[116]

---

109. *Polk*, 853 F.2d at 184.

110. Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 (2d Cir. 1997) (citing *Rowley*, 458 U.S. at 192).

111. *Id.* at 1121 (citing *Polk*, 853 F.2d at 183).

112. *Id.*

113. *See, e.g.*, *id.* at 1120 ("[W]e must consider whether the district court justifiably concluded that M.M. was not receiving adequate educational benefit in the public school system."); *id.* at 1118 ("[A]t Devereux, a program that provided M.M. with the highly structured setting recommended in the Yale evaluations, M.M. showed some progress."); *id.* at 1122 ("[T]he state had to fund the program because it was necessary for M.M. to make educational progress."); *id.* ("[T]he court must determine whether the child requires the residential program to receive educational benefit.").

114. *Id.* at 1120.

115. *See id.* at 1121.

116. *See* A.B. *ex rel* D.B. v. Lawson, 354 F.3d 315, 319 (4th Cir. 2004) ("The FAPE must only be 'calculated to confer *some* educational benefit on a disabled child.'"); O'Toole *ex rel.* O'Toole *v.* Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 708 (10th Cir. 1998) ("In sum, our review of the record in this case convinces us that Molly's IEPs, even if 'not optimal,' . . . were calculated to, and did, confer some educational benefits, as required by the IDEA and Kansas law."); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 613 (8th Cir. 1997) ("The court erred by requiring a program to maximize Nicholas' ability, by comparing his progress to non-disabled students . . . ."); G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 948 (1st Cir. 1991) ("Barring higher state standards for the handicapped, a FAPE is

Although this circuit split would seem to be significant, it is unclear that these varying interpretations affect how an IEP is ultimately adjudicated.[117] A common theme across the circuits is to determine whether an IEP was "reasonably calculated to enable the child to receive educational benefits" in large part based on the student's outcomes, rather than by using some standard understanding of "benefit" or by interrogating the IEP itself or the process by which it was developed.[118] Ronald D. Wenkart, a school district attorney and author of numerous practice guides for education law, counsels attorneys representing students to focus on "evidence [that shows] whether the child is making educational progress."[119] Additionally, the first prong of the court's test requires only procedural compliance with the text of the Act.[120] This focus on outcomes rather than inputs most likely arises from the Court's statement in *Rowley* that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States."[121] This judicial reluctance means that courts are unlikely to clarify for either schools or for parents how they should be *constructing* IEPs to be in line with the mandates of the IDEA.

B. Endrew F.'*s Background and Holding*

Perhaps acknowledging the confusion in the circuits, the Supreme Court granted certiorari to hear *Endrew F. v. Douglas Cty. Sch. Dist. Re-1* in 2017.[122] Endrew F. was a student with autism who had received IEPs continuously since preschool in the same school district.[123] By fourth grade, his parents felt his progress had stalled and the district could no longer serve his needs, and chose instead to enroll him in a private school and ask the school district to reimburse his tuition.[124] The school district challenged them, saying

---

simply one which fulfills the minimum federal statutory requirements."); Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1583 (D.C. Cir. 1984) ("The EAHCA does not secure the *best* education money can buy; it calls upon government, more modestly, to provide an *appropriate* education for each child.") (emphasis in original).

117. *See generally* Zirkel, *supra* note 4.

118. *See* Wenkart, *supra* note 96, at 30 (quoting Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982)).

119. *Id.*

120. *See* Wenkart, *supra* note 96 and accompanying text.

121. *Rowley*, 458 U.S. at 208.

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

123. *Id.* at 991.

124. *Id.* If a district cannot provide the necessary supports or services to achieve a FAPE, and the student instead enrolls in another school or academic setting that *can* provide a FAPE, the district is required to bear any associated costs; that district remains the student's

that the IEP proposed by the district met the standard of FAPE required by the IDEA, and therefore, the district could not be required to reimburse his tuition at another school.[125] The lower courts, in finding for the school district, used a standard closer to "some benefit." The Tenth Circuit held that he was only due "educational benefit [that is] . . . more than de minimis,"[126] and concluded that Endrew's IEP had been "reasonably calculated to enable [him] to make some progress."[127]

The importance of this case is demonstrated by the Supreme Court's acknowledgement that the question in *Endrew F.* is broader than that posed in *Rowley*—Amy Rowley was fully integrated into her school's regular classrooms, and the court confined its analysis to that set of facts.[128] Taking on *Endrew F.* required the court to "endorse . . . one standard for determining 'when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act,'" even if, like Endrew, they required more intensive supports than Rowley and were not fully integrated into their school's classrooms.[129]

The Court was clear first that *Rowley* intended more than the "some educational benefit" standard advanced by the district.[130] At the other end of the spectrum, it declined to take up the standard proposed by Endrew's parents, that FAPE means "an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities."[131] Instead, the Court charted a "middle ground" and held that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[132]

---

public school, and as such is still charged with fulfilling the student's IEP, even if they have to pay another entity to do so.

125. *Id.*

126. Endrew F. *ex rel.* Joseph F. *v.* Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015) (internal quotation marks omitted).

127. *Id.* at 1342 (emphasis in original) (internal quotation marks omitted).

128. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 202 (1982).

129. *Endrew F.*, 137 S. Ct. at 993 (quoting *Rowley*, 458 U.S. at 202).

130. *Id.* at 998 ("More important, the school district's reading of these isolated statements runs headlong into several points on which *Rowley* is crystal clear . . . It would not have been 'difficult' for us to say when educational benefits are sufficient if we had just said that *any* educational benefit was enough. And it would have been strange to refuse to set out a test for the adequacy of educational benefits if we had just done exactly that. We cannot accept the school district's reading of *Rowley*.") (emphasis in original).

131. *Id.* at 1001.

132. *Id.* at 999.

Expanding on the words "reasonably calculated", which also appeared in *Rowley*, Chief Justice Roberts stated that the words "reflect[] a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. . . . [T]his fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians."[133] The use of the phrase "child's circumstances" reflects the IDEA's "focus on the particular child."[134]

C. *Post-*Endrew F.*, What Comprises FAPE in the Lower Courts?*

In the immediate aftermath of *Endrew F.*, advocates seemed to generally feel that the decision represented a raising of the standard required to provide FAPE under the IDEA, with the Council for Parent Attorneys and Advocates noting that "we expect this unanimous decision . . . to be transformative in the lives of the students and families for whom the law is intended to benefit."[135] Secretary of Education Betsy DeVos wrote that "challenging students with disabilities" would "empower[] them" and raise the standards considered acceptable for such students.[136]

However, while the standard might seem higher on paper, it is unclear if it will lead to a substantially larger number of cases coming out in favor of students. In a study of forty-nine IEP rulings made by a hearing officer under the pre-*Endrew F.* standard and then revisited by a district court within the first year post-*Endrew F.*, 90% of the rulings were unchanged by the district court.[137] Of those that changed, two were still on remand at the time of the analysis and one had been reversed in favor of the district, leaving only two that were reversed in favor of the student. One of those reversals, notably, was Endrew's case, which had been remanded by the Supreme Court for consideration under the new standard.[138] The other, *S. B. v. New York City Dep't of Educ.*, while finding the school's provision of FAPE deficient on substantive grounds, seems to simply recite the *Endrew F.* standard—within the discussion sec-

---

133. *Id.*
134. *Id.*
135. Christina Samuels, *Advocates Hail Supreme Court Ruling on Special Education Rights*, EDUC. WEEK (Mar. 22, 2017, 5:42 PM), http://blogs.edweek.org/edweek/speced/2017/03/advocates_hail_supreme_court_r.html.
136. Christina Samuels, *A Year Ago the Supreme Court Raised the Bar for Special Ed. What's Happened Since?*, EDUC. WEEK (Apr. 27, 2018), https://www.edweek.org/ew/articles/2018/05/02/a-year-ago-the-supreme-court-raised.html.
137. Zirkel, *supra* note 4, at 450.
138. *See id.*

tion of the opinion, it only substantively engages with other S.D.N.Y and Second Circuit cases, which were all functionally decided before *Endrew F.* and which only cite preexisting Second Circuit precedent.[139]

Of course, it is possible that these cases were not close calls—that under any standard, it would have been clear that the school in question was, in fact, meeting its obligations. But as opposed to deciding their cases on the merits of the *Endrew F.* test, it seems that some of these lower court decisions had trouble engaging with the standard at all.[140] Alternatively, others simply stated that the test was the same or "substantively similar" to their previous test.[141] This indicates a continuing confusion regarding the exact standard required by the IDEA for meeting FAPE. This confusion was not resolved in any significant way by the *Endrew F.* decision. While the opinion's dicta may have provided "untapped veins for the parties' attorneys to mine," this sort of legal wrangling may not significantly impact the day-to-day decision making of school authorities or the outcomes of administrative-level hearings for some time.[142]

D. *Post-*Endrew F.*, What Deference is Owed to the Choices of School Personnel?*

Another important question raised by *Endrew F.* is the amount of deference that will be given to school personnel in their choices and expertise when creating IEPs. A clear mandate on deference might provide some information regarding how the standard is likely to be applied and how school districts might or might not subsequently change their behavior with regard to IEPs. *Endrew F.* states that "deference is based on the application of expertise and

---

139. *See* S.B. v. New York City Dep't of Educ., 2017 WL 4326502, at *12–18 (E.D.N.Y. Sept. 28, 2017). The only post-*Endrew F.* case discussed by the *S.B.* court had been briefed *before* the *Endrew F.* opinion was issued, and the court in that case chose not to take *Endrew F.* into account. *See* J.C. v. Katonah-Lewisboro Sch. Dist., 690 F. App'x 53, 55 (2d Cir. 2017) ("Because we conclude that the School District failed to provide T.C. with a free and appropriate public education under the existing precedent in this circuit, we need not decide whether *Endrew F.* raised the bar for a free and appropriate public education or left Second Circuit precedent intact (the Supreme Court's decision certainly did not reduce the force of the requirement).").

140. Zirkel, *supra* note 4, at 450 ("Second, the lower courts' treatment of *Endrew F.* remains rather cursory, with limited and scattered, rather than skewed, use of its various dicta.").

141. *Id.* at 452 ("[T]hree of the fifteen cases during this second six-month period recognized the lack of material difference between their pre-existing substantive standard and that of *Endrew F.*, and two of them were in the unclear, or mixed, category.").

142. *Id.* at 453.

the exercise of judgment by school authorities."[143] Presumably, this still means that some proof of this application and exercise of judgement needs to be presented in order for a court to defer to a school's substantive decisions.[144] Some scholars argue this decreases the amount of deference owed, "mov[ing] away from some of the constrained interpretations of *Rowley's* language concerning deference and school district expertise."[145]

The court did reaffirm, however, that the lack of a bright-line rule regarding what constitutes a FAPE is not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."[146] The addition of this language cautions against the conclusion that *Endrew F.* will lead to a drastic change in how courts review the performance of schools in creating IEPs. Particularly given the general reluctance of courts to get involved in topics that are gauged to involve significant expertise in any subject area, in this case education policy, it seems unlikely the courts will require a particularly rigorous showing of proof from school personnel to justify their decisions.

An avenue that does remain clearly open for holding schools accountable, however, is their compliance with the process requirements of the IDEA. Ironically, this understanding stems from the Court's rejection of the District's proposed standard in *Endrew F.*, that the IDEA imposes "only procedural requirements—a checklist of items the IEP must address."[147] In stating that the IDEA requires *more* than procedural compliance in order for a school to demonstrate that it has offered FAPE, the Court implicitly acknowledges that procedural compliance is still a necessary component of FAPE.[148] This point is not more thoroughly developed in the opinion because it was not at issue: the parties disagreed on the substance of FAPE, not whether the school had failed, for example, to act within statutory deadlines or to properly provide Endrew's fam-

---

143. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017).

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

145. 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).

146. *Endrew F.*, 137 S. Ct. at 1001 (quoting Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982)).

147. *Id.* at 1000.

148. *Id.* ("But the procedures are there for a reason, and their focus provides insight into what it means, for purposes of the FAPE definition, to 'meet the unique needs' of a child with a disability.").

ily with notice regarding changes to his IEP.[149] Additionally, less guidance is required from the Supreme Court on this topic because procedural or process compliance is much easier for courts to evaluate.[150] It can clearly be shown on the record whether a deadline was met or a statutory obligation was fulfilled.

While *Endrew F.* brought the issue of special education and outcomes for students with disabilities to the national stage, its amorphous standard and reaffirmation of the deference owed to school personnel will, standing alone, not be enough to change or improve implementation of the IDEA. Legal reform clarifying Congress' intent regarding the level of FAPE owed to students with disabilities is needed to supplement the opinion and truly give it force in the IEP context. Additionally, it is currently unclear to what degree courts need to defer to school personnel regarding the substantive content of IEPs. Courts therefore may be more comfortable focusing on process measures. The strongest avenue for reform, then, is to create a clear process obligation on schools that advances the objectives of the Act and the *Endrew F.* standard and increases the quality of IEPs in the first instance.

III. AMENDING THE IDEA TO INCLUDE AN ASSESSMENT OF THREATS

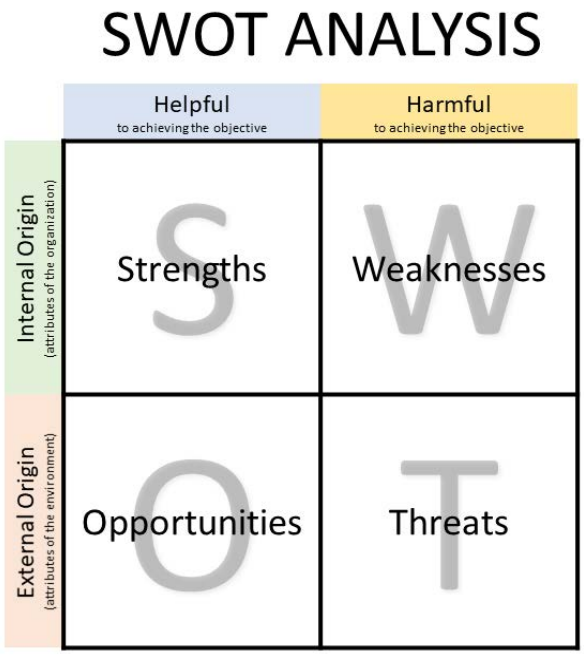
As already discussed, the IDEA outlines a very clear set of processes to be followed when developing an IEP. One category of considerations that is not included, however, is threats: interactions between the child and their environment that are out of the child's control, but could nevertheless impede their progress toward their goals. The Strengths, Weaknesses, Opportunities, and Threats (SWOT) analysis framework, taken from the business strategy context, provides a useful lens for understanding why incorporating threats into IEPs is important and how it could help lead to more robust IEPs overall.

149. *Id.* at 997 ("Endrew's parents contended that the final IEP proposed by the school district was not 'reasonably calculated to enable [Endrew] to receive educational benefits' and that Endrew had therefore been denied a FAPE.").

150. Congress has also codified a statutory definition of FAPE in the context of procedural violations, making it easier for courts to determine whether a violation has occurred or not. 20 U.S.C. § 1415(f)(3)(E) (2012).

A. *Background on SWOT Analysis*

The SWOT analysis framework is a tool used by businesses and large organizations to undertake strategic planning.[151] Although its exact origins are unclear, scholars agree that SWOT was developed sometime between the 1950s and 60s.[152] Large companies, increasingly dominant in the post-World War II landscape, realized that conscious strategic thinking, rather than simply letting the "invisible hand" guide the market, offered a number of business and productivity advantages and would increase their ability to make a return on large financial investments.[153] Business schools also began to train managers in strategic thinking tools, including SWOT analysis.[154]



151. Marilyn M. Helms & Judy Nixon, *Exploring SWOT Analysis – Where Are We Now?: A Review of Academic Research from the Last Decade*, 3 J. STRATEGIC MGMT. 215, 216 (2010).

152. *Id.*

153. Pankaj Ghemawat, *How Business Strategy Tamed the "Invisible Hand*," HARV. BUS. SCH. (Jul. 22, 2002), https://hbswk.hbs.edu/item/how-business-strategy-tamed-the-invisible-hand.

154. *See id.*

SWOT analysis starts with a 2 x 2 grid.[155] Internal strengths and weaknesses of the organization—structure, access to capital, efficiency, core competencies, unique resources—are listed in the top row.[156] External opportunities and threats—customers, competitors, new technologies, and social or political factors—are listed in the bottom row.[157] By using her knowledge not only of her company, but also of the broader landscape of competitors and market that the company operates in, this framework distills the vast knowledge a manager has in her head into clear variables, and displays them in a way that hopefully allows her to make connections between them. For example, explicitly identifying a threat to the business—a new competitor, for instance—while simultaneously highlighting internal strengths might identify a function this company does much better than the competitor. The company might then choose to strategically invest more resources in that function in order to differentiate itself and protect its market share from the imminent threat.

The clean approach provided by the SWOT framework for breaking down what are often complex problems means it has found applications in business and beyond.[158] Indeed, some scholars assert it is used more than "any other strategic planning tool."[159]

B. *Using the SWOT Framework to Highlight a Gap in IEPs*

Not only is SWOT used to analyze organizations across a variety of fields, ranging from for-profit companies to education to healthcare,[160] it can also be used for individual analysis.[161] An IEP can certainly be conceptualized as an individual strategic planning tool, allowing the IEP team to put on paper a year-long plan for achieving student success. Comparing the SWOT and IEP approaches to strategic planning, it becomes clear that the existing structure of an IEP can be neatly mapped to the categories of SWOT, with one exception—currently, IEPs contain no explicit consideration of threats. Specifically, the IDEA outlines eight categories of information that must be included in an IEP. These can

---

155. *SWOT Analysis*, NEWMAN LIBR. BARUCH C. (July 22, 2019, 3:50 PM), https://guides.newman.baruch.cuny.edu/c.php?g=188239&p=1243104.
156. *Id.*
157. *Id.*
158. Helms & Nixon, *supra* note 151, at 216.
159. *Id.* at 217.
160. *Id.* at 226.
161. Marie Herman, *Creating a Personal SWOT Analysis*, EXECUTIVE SECRETARY MAG. (May 25, 2017), http://executivesecretary.com/creating-a-personal-swot-analysis/.

all be categorized as either an assessment of an internal strength or weakness or provision of an external opportunity through services:

IEP REQUIREMENTS:	S	W	O	T
Present levels of academic achievement and functional performance[162]	X	X		
Measurable annual goals[163]	X	X		
Plan for measuring goals, progress monitoring, and reporting[164]	X	X		
Statement of special education and related services to be provided[165]			X	
Statement of any circumstances under which the child will not be in the regular classroom[166]		X		
Any accommodations for state or districtwide testing[167]			X	
Date for the beginning of services, as well as their frequency, location, and duration[168]			X	
Transition planning for students over the age of 16[169]			X	

Some of these sections could reasonably be expanded to include threat analysis, but they are not defined that way in the statute. Rather, the interpretation of what is required to be documented under each of these parts is constrained by the first two sections, which focus solely on a student's *internal* strengths and weaknesses and setting goals to achieve those. On one hand, this inward-looking focus of the IDEA makes sense given the overall goal of the statute: to create an individualized program of study that addresses the unique needs of a child. The categories as currently defined, however, miss out on something made clear from the SWOT framework: when one is trying to meet a goal, external factors can get in the way. Without a consideration of those external factors, the strategic plan is incomplete.[170]

---

162. 20 U.S.C. § 1414(d)(1)(A)(i)(I) (2012).
163. 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2012).
164. 20 U.S.C. § 1414(d)(1)(A)(i)(III) (2012).
165. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2012).
166. 20 U.S.C. § 1414(d)(1)(A)(i)(V) (2012).
167. 20 U.S.C. § 1414(d)(1)(A)(i)(VI) (2012).
168. 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (2012).
169. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) (2012).
170. Notably, threats *are* analyzed and successfully incorporated in a different special education strategic planning context: the development of functional behavior assessments (FBAs) and behavior intervention plans (BIPs). This two-step process is not core to the

The fact that IEPs are not currently structured to include a consideration of threats is a problem for two distinct reasons. First, the current structure for dealing with threats, or problems that arise during the school year, is to call an IEP team meeting and revise the student's IEP accordingly.[171] Anyone on the team who notices a problem can call a meeting to discuss the issue and get input.[172] Because this strategy is reactionary, however, there can be a delay that ends up harming the child. To the extent that the IEP team can anticipate threats that a child will face, the team can discuss those points, create a plan of attack in case the threats arise, and explicitly document steps to address the threats in the IEP. The school then has at least an interim strategy to put in place immediately while the team is being convened. The current approach is akin to a corporation calling an emergency board meeting to discuss the threat posed by a competitor after already beginning to lose market share, rather than when they first knew the competitor was going to launch a new product. Particularly for parents who work multiple jobs or are single parents, or schools with a high-needs population and many students served by IEPs, there can be extensive delay before an IEP meeting even gets scheduled. In the meantime, the student continues to suffer.

Second, the IDEA's procedural safeguards are designed to allow the parent to hold the school accountable only to what is or is not in writing in the IEP, based on the categories of information outlined in the statute. Challenging a school's failure to address a problem is much easier if the potential for a problem is acknowledged at the IEP team meeting, and if clear strategies are agreed upon to address the problem if it does come up. This more thorough documentation of the meeting of the minds, much as one would see in a contract negotiation, gives the school a clearer pic-

---

IDEA in the way that IEPs are, but it is codified in many states as a part of the IEP process. BIPs are meant specifically to support students with disabilities who exhibit behaviors in the classroom that affect their ability or their peers' ability to learn (e.g. aggression or inability to control speech). Core components of the functional behavior assessment include, in relevant part, "descriptions of the assessment conditions that may reliably predict the occurrence and nonoccurrence of problem behaviors . . . [and] descriptions of the consequence events that maintain problem behaviors." These "conditions" and "consequence events," or "threats," are then required to be incorporated into the BIP, which is essentially a supplement to the IEP that offers guidance to the student and the teacher regarding how to manage, control, and approach various behaviors that the student might exhibit in the classroom. Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 179–186 (2011). Schools are also required to conduct an FBA and implement relevant "behavioral intervention services and modifications" for most children with disabilities who face disciplinary action. 20 U.S.C. 1415(k)(1)(D) (2012).

171. 20 U.S.C. § 1414(d)(4)(A)(ii) (2012).

172. *See id.*

ture of what they are responsible for doing and gives a parent the ability to hold them to account if they do not.

C. *Amending the IDEA: Adding in an Explicit Consideration of Threats*

The strategic and substantive goals of the IDEA would be better served if IEP planning teams were required to consider potential external threats when developing a student's IEP. This Note proposes an amendment, added to 20 U.S.C. § 1414 (d)(1)(A)(i) as a ninth section of content, requiring IEPs to include a "statement of any factors affecting the school environment but outside the child's control that, based on the experience or insight of any team member, may impede the child's progress toward her stated goals, and a statement of the strategies to be employed in that eventuality." Schools should have an explicit mandate not just to consider what they are going to do for a child in terms of academic and behavioral supports and goals, but also what, based on their experience, might derail those efforts (e.g. bullying; changes in school personnel, resources, or scheduling; a change in the child's medication, etc.), and how they are going to respond in the event that one of these circumstances arises.

1. Substantive and Procedural Dimensions of the Amendment

By adding a consideration of threats into IEPs, this amendment adds a new substantive dimension to the IDEA. This addition brings the language of the statute closer together with the Supreme Court's explanation of what it means to provide a FAPE and be in compliance with the Act. Looking at the plain language of the Court's standard, the idea that an educational program must be "reasonably calculated" implies that imposing some sort of strategic framework on the program development process is at the very least appropriate, if not required. A "reasonable" approach—one that is "sensible" and "according to reason"—should not leave out an entire category of events (threats) that are likely to impact the eventual outcome of the plan.[173] The Supreme Court in *Endrew F.* noted that the categories of information listed in this section of the IDEA do not merely constitute a "checklist" of items for a school to

173. *Reasonable*, BLACK'S LAW DICTIONARY (10th ed. 2014).

tick off.[174] Rather, they "provide insight[] into what it means, for purposes of the FAPE definition, to 'meet the unique needs' of a child with a disability."[175] This amendment would add to that insight, providing schools with a stronger understanding of what it means to provide a FAPE—considering threats as well as opportunities—and providing parents, advocates, and IEP team members like teachers or therapists with a statutorily defined opportunity to put on paper any concerns they may not have been able to fit into any of the previous categories. Provision of FAPE is at the core of many disagreements between parents and schools over IEPs.[176] A clearer understanding of what it means to provide FAPE and how to document it in an IEP, therefore, should lead to fewer disputes between these parties.

However, in keeping with the direction from *Endrew F.* that courts not over-involve themselves in substantive decisions at the school level,[177] this amendment is sufficiently procedural in nature that courts should not have a difficult time determining whether the requirement has been met or not. Because the threat assessment is added to a list that already exists within the statutory framework, it can be considered in the same way the categories in that list currently are. Courts can ask themselves, are all of the statutorily defined sections present? Did the school officials "bring their expertise and judgement to bear" when they were developing the IEP?[178] Can the school officials "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress"?[179] These categories provide guidance for courts when they are asked to determine whether an IEP was properly constructed in the first instance, a further indication of whether FAPE has been provided.

---

174. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000 (2017).

175. *Id.*

176. A Tennessee study found that 78.6% of state due process hearings over a ten-year period involved a question of FAPE. Michael B. Shuran & M.D. Roblyer, *Legal Challenge: Characteristics of Special Education Litigation in Tennessee Schools*, 96(1) NASSP BULL. 44–66 (2012). *See also* Schanding et al., *supra* note 82, at 1.

177. *Endrew F.*, 137 S. Ct. at 1001 ("This absence of a bright-line rule, however, should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" (quoting Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982))).

178. *Id.*

179. *Id.* at 1002.

2. How Searching Would a School's Inquiry Need to be in Order to Satisfy this New Mandate?

One clear criticism of this reform is that IEP teams do not have crystal balls—they have no way to know what might happen to a child, and it would be unfair to hold them accountable for a broad range of potentialities they have no way of predicting. To this end, it would be important to write the language of the amendment with reasonable expectations in mind. The goal of this reform is not to somehow extract clairvoyance from the IEP team, but rather to harness the information team members already have that is not currently making its way into the IEP through any of the required sections.

For example, if parents are planning on having another child during the school year, they might be aware that the change in routine is likely to exacerbate their student's need for structure in the classroom. Alerted of this ahead of time, the IEP team could write into the IEP extra provisions for structure during the day or make a commitment not to change the student's schedule unless absolutely necessary, with these provisions to be used if the student does indeed react poorly to the change in routine at home. As will be discussed in Part IV, if a teacher noticed during the previous school year that the student seemed to be susceptible to bullying from a particular group of students in a way that was interfering with their ability to achieve their academic goals, the IEP team could discuss classroom or behavioral supports to mitigate the impact of that bullying.

One way to achieve this clarity regarding the scope of the amendment would be for the amendment language to include subsections, or categories, of threats to be considered, along with specific examples.[180] This would provide a clearer indication of legislative intent as to what sorts of threats are meant to be discussed and documented by the IEP team. An amendment with subcategories could be framed as follows:

> "a statement of any factors affecting the school environment but outside the child's control that, based on the experience or insight of any team member, may impede the

---

180. Several of the other content sections in this part of the Act are outlined in this way. *See, e.g.*, 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2012) ("(II) a statement of measurable annual goals, including academic and functional goals, designed to . . . (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (bb) meet each of the child's other educational needs that result from the child's disability.").

child's progress toward her stated goals, including but not limited to factors such as:

(I) bullying or harassment from other students;
(II) changes in routine or schedule;
(III) changes in transportation;
(IV) persistent or problematic interactions with staff or school resource officers; or
(V) difficulties with consistent attendance;

and a statement of the strategies to be employed in that eventuality."[181]

3. How Does This Help Students Whose IEPs Are Poorly Written to Begin with?

Another criticism of this proposed reform is that it creates more work on already-burdened IEP teams, particularly in low-resource schools. For a student whose IEP is poorly written to begin with, filled with boilerplate text that is hardly changed from year to year, adding another box on the form is unlikely on its own to increase the quality of the document and might even initially add more confusion into the process. This concern highlights a more fundamental structural concern with the IEP as a tool: in low-resource, high-needs schools, more significant structural changes regarding funding and implementation will have to occur in order to realize the full potential of the IEP to serve students with disabilities.[182] The proposed reform on its own cannot fix that larger problem. It is likely that in some schools, this reform will have little to no day-to-day effect on students, at least initially.

However, this reform will certainly improve IEPs in schools that already put the requisite time and effort into IEP planning by drawing the attention of IEP teams to an issue that is not currently explicitly documented. In schools that struggle to implement IEPs with fidelity, this provision will hopefully give advocates and parents another lever for discussion and service provision as they push their school to do its best. In the long run, these problems cannot be solved without Congressional and state action to fully fund the mandate of the IDEA; this reform looks ahead to that future and hopes to improve the IEP structure in anticipation of that eventuality.

---

181. *See infra* Part IV for more detail on threats that could be included as subcategories.
182. BLACK, *supra* note 12, at 470.

IV. BULLYING OF STUDENTS WITH DISABILITIES: AN EXAMPLE OF THE POTENTIAL BENEFIT OF DOCUMENTING THREATS IN IEPS

In considering the various potential challenges faced by students with disabilities that this amendment to the IDEA might be able to capture, bullying stands out. Virtually every state has some kind of anti-bullying statute on the books, indicating a national acknowledgement that bullying interferes with students' learning.[183] Schools, however, can be unprepared, unable, or unwilling to help parents and students address this bullying.[184] Aside from following any procedures for seeking relief within a school's administrative system, the most practical option available to parents under federal law to seek redress if their child is facing bullying is to write a "*Gebser* letter" to their school.[185] The purpose of this letter is to put the school on notice that bullying is occurring, which, under the standard outlined by the Supreme Court in *Gebser v. Lago Vista School District*, prevents the school from later avoiding liability by arguing that it was not aware anything was wrong.[186] *Gebser* letters do not guarantee or mandate any action on the part of the school, however, and do not redress the imminent potential effects of the bullying on the child's education.

While there is a strong case for unaddressed bullying in school resulting in a *per se* denial of FAPE, this idea has not been adopted across circuits.[187] Even if a parent is eventually able successfully claim that bullying resulted in their student being denied FAPE, the damage has been done—the time that goes into figuring out a solution and resolving the litigation permanently affects the student's education. The *T.K.* case demonstrates this problem.[188] The bullying at issue in that case began during the 2007–2008 school

---

183. Douglas E. Abrams, *Bullying Victimization as a Disability in Public Elementary and Secondary Education*, 77 MO. L. REV. 781, 784 (2012).

184. *See* Jill Barshay, *Research Evidence on Bullying Prevention at Odds with What Schools Are Doing*, HECHINGER REP. (Oct. 29, 2018), https://hechingerreport.org/research-evidence-on-bullying-prevention-at-odds-with-what-schools-are-doing/.

185. *See Discrimination, Harassment, and Bullying* 2, EQUIP FOR EQUALITY (Feb. 29, 2016), https://www.equipforequality.org/wp-content/uploads/2018/10/Bullying-Fact-Sheet-2.29.16-1.pdf.

186. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 274 (1998).

187. Kathleen Conn, *Failure to Discuss Bullying in the IEP Meeting May Violate IDEA*, 334 EDUC. L. REP. 45, 48-49 (2016). In T.K. v. New York City Dept. of Educ., 810 F.3d 869 (2d Cir. 2016), the court held that when a school did not include any discussion of bullying in a student's IEP, despite her parents raising the issue in meetings more than once and it having a clear impact on her academic performance, this was a procedural violation of the IDEA. *See also* Sarah H. Ganley, *Bullying and the Individuals with Disabilities Education Act (IDEA): A Framework for Providing Relief to Students with Disabilities*, 38 CARDOZO L. REV. 305, 317-28 (2016).

188. *See* T.K. v. New York City Dep't of Educ., 810 F.3d 869 (2d Cir. 2016).

year. Between filing due process appeals, exhausting available administrative remedies, and then finally pursuing the litigation from a federal district court up to the Second Circuit, relief was not awarded until 2016.

In the case of the student in *T.K.*, her parents expressed concern more than once that she was facing bullying in school.[189] At least once, they were told by the school principal that bullying was an "inappropriate topic" for discussion at an IEP meeting.[190] As a result, strategies to mitigate the threat T.K. was clearly facing never made it into her IEP, and her parents had to remove her from school to fix the problem. If there had been an explicit statutory mandate to discuss the bullying—a threat that at least some individuals in the room were clearly aware she was facing—years of litigation could have been avoided. Acknowledging threats like bullying ahead of time and developing strategies to deal with them would lead to better outcomes for all parties involved, most of all for the students meant to be supported by their IEPs in achieving "ambitious" academic and social goals.[191]

In addition to bullying, a variety of other features of the school environment that could present threats might be addressed in a student's IEP:

- Changes in routine or schedule: Particularly for students on the autism spectrum, changes in routine or schedule can lead to difficulties in learning and acquiring new skills.[192] These types of stressors could be planned for when parents or teachers are aware of them.
- Transportation: Some students are provided with transportation as a part of "related services" under the IDEA.[193] Particular traffic patterns or weather-related challenges might cause predictable disruptions in the provision of transportation to and from school. IEP teams could plan for these predictable disruptions by developing contingency strategies to get the student to school.
- School staff: Conflicts with any given staff member in the school that the student might have revealed to

189. *Id.* at 873.
190. *Id.*
191. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000 (2017).
192. Kara Hume, *Change Is Good! Supporting Students on the Autism Spectrum When Introducing Novelty*, IND. RESOURCE CTR. FOR AUTISM, https://www.iidc.indiana.edu/pages/change-is-good-21-supporting-students-on-the-autism-spectrum-when-introducing-novelty.
193. *See supra* text accompanying note 22.

parents or that teachers might have observed could be discussed and addressed as a threat in the student's day-to-day school experience.

- School resource officers (SROs): Sworn police officers in schools, or SROs, represent one of the "fastest growing areas of law enforcement,"[194] and many are not trained to work with students with disabilities.[195] Problematic interactions with an SRO could be anticipated and planned for.
- Attendance: Students with disabilities are 1.5 times more likely than their peers to be chronically absent from school.[196] Particular threats in their environments leading to absenteeism could be investigated and addressed to decrease their impact on the student's attendance.

What makes a good IEP? Ideally, it meets the relevant legal standards, but also truly serves as a resource for the student, their parents, and their school. A key insight from this short consideration of various threats is that the challenges a student with disabilities will face are incredibly individualized. Both the IEP structure and *Endrew F.* acknowledge this reality, even if they cannot fully address it. Different environmental stressors and life events affect students in different ways. A well-crafted, reasonably calculated IEP should acknowledge these stressors and should make every effort to incorporate the widest possible range of information held by members of the IEP team. Though teams could theoretically incorporate any of the above considerations now, an explicit mandate to consider threats would increase the chances that this kind of relevant information makes its way into the written IEP.

CONCLUSION

Aside from having pragmatic and procedural benefits for all involved, this reform is in the spirit of the IDEA. The words of the Act at this time do not explicitly reflect the importance of the IEP

194. Cheryl Corley, *Do Police Officers in Schools Really Make them Safer?*, NAT'L PUB. RADIO (Mar. 8, 2018, 5:00 AM), https://www.npr.org/2018/03/08/591753884/do-police-officers-in-schools-really-make-them-safer.

195. *See* Mark Keierleber, *Why So Few School Cops Are Trained to Work with Kids*, THE ATLANTIC (Nov. 5, 2015), https://www.theatlantic.com/education/archive/2015/11/why-do-most-school-cops-have-no-student-training-requirements/414286/.

196. Brian A. Jacob & Kelly Lovett, *Chronic Absenteeism: An Old Problem in Search of New Answers*, BROOKINGS (July 27, 2017), https://www.brookings.edu/research/chronic-absenteeism-an-old-problem-in-search-of-new-answers/.

team working together to consider real-world threats that might impede planning for student achievement. Amending the IDEA accordingly is in line with Congress' intent in creating the Act and will enhance its ability to serve millions of students across the country for years to come.