

MORE THAN MORE THAN: MEASURING PROGRESS IN TEXAS SPECIAL
EDUCATION POST-*ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT*

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I. INTRODUCTION TO TEXAS'S SPECIAL EDUCATION CRISIS.

In 2004, the Texas Education Agency (TEA), the state agency tasked with protecting Texas students with disabilities, instituted an arbitrary cap on the proportion of students enrolled in special education services.¹ At the time the TEA set the cap, the Texas special education enrollment rate was 11.6%, already lower than the nationwide average of 13%.² By 2015, Texas schools, on average, had dropped the number of qualifying students to 8.5% to meet the cap's requirements.³ The U.S. Department of Education later declared the cap illegal, and in 2017 the Texas legislature banned the TEA from instituting similar caps curbing special education services in the future.⁴ For students with disabilities, though, the damage was already done.⁵ Although the TEA is responsible for ensuring that Texas schools comply with federal laws such as the Individuals with Disabilities Education Act (IDEA), because of the

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¹Brian M. Rosenthal, *TEA Suspends Special Education Enrollment Target*, HOUS. CHRON. (Nov. 2, 2016, 8:56 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/TEA-suspends-special-education-cap-10534865.php>.

²*Id.*; David E. DeMatthews & David S. Knight, *The Texas Special Education Cap: Exploration into the Statewide Delay and Denial of Support to Students with Disabilities*, 27 EDUC. POL'Y ANALYSIS ARCHIVES 12 (2019).

³Rosenthal, *supra* note 1.

⁴Hannah Dellinger, *Feds Say TEA Has Failed to Fix Its Special Education Problems as It Had Promised*, HOUS. CHRON. (Aug. 31, 2021, 6:05 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Feds-say-TEA-has-failed-to-correct-deficiencies-16425992.php>; Raj Salhotra, *Lessons Learned From Texas' Special Education Cap*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 69, 88 (2018).

⁵*Keep Tabs on TEA: Timeline of Illegal Limit on Texas Special Ed*, DISABILITY RTS. TEX. (Mar. 1, 2019), <https://www.disabilityrightstx.org/en/handout/tea-illegal-sped-cap/>. Disability Rights Texas, the protection and advocacy agency for Texans with disabilities, estimates that the cap caused schools to keep about 250,000 children out of special education illegally. *Id.*

cap, it is estimated that hundreds of thousands of Texas children who should have qualified for special education under the IDEA did not.⁶ In addition, many of these children aged out of the system during the time the cap was in place, preventing them from ever receiving the educational benefits they both needed and deserved.⁷

Texas's systemic special education failures did not end there. Even children whose schools did identify them as eligible for special education services did not necessarily receive the support to which they were legally entitled. The IDEA entitles each child who qualifies for special education and/or related services to an Individualized Education Program (IEP).⁸ The IEP contains measurable annual goals for the child, with each goal being designed to enable the child to be involved in and make progress in the general education curriculum.⁹ The child's teachers and service providers should help the child with these goals by providing the IEP services, accommodations, and/or modifications to the school environment determined by the committee as reasonably calculated to enable the child to make appropriate progress on each goal.¹⁰ The sufficiency of a school's actions in supporting special education students is measured in terms of student progress (that is, the demonstrable educational benefit the school has conveyed to the child).¹¹ For this reason, whether or not a student has made sufficient progress is critical.

The vague notion of "sufficient progress," as described in the IDEA, remains ambiguous—an imprecise term that has long sparked legal conflicts between parents and school districts. Prior to 2017, circuit courts had split on the issue. The Third and Sixth Circuits held that schools conferred sufficient educational benefit through a showing of *meaningful* student progress.¹² However, the majority, including the First, Fourth, Seventh, Tenth, and Eleventh Circuits, held that schools can satisfy the IDEA with a showing of just *some* progress, which it defined as "just above trivial" or "simply more than *de minimis*."¹³ The Fifth Circuit, declaring that its standard demanded

⁶Dellinger, *supra* note 4.

⁷See Rosenthal, *supra* note 1.

⁸Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988, 993–94 (2017).

⁹*Id.* at 994.

¹⁰*Id.* at 999.

¹¹*Id.* at 994.

¹²Petition for Writ of Certiorari at 10–11, Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist., 137 S. Ct. 988 (No. 15-827) (emphasis added).

¹³See *id.* at 11–13 (emphasis added).

meaningful progress, subsequently defined “meaningful” as only “more than mere modicum or *de minimis*,” placing it squarely in the majority camp.¹⁴

In 2017, the United States Supreme Court set out to resolve the split when it considered the appropriate standard for measuring student progress in special education disputes in *Endrew F. ex rel. Joseph F. v. Douglas County School District*.¹⁵ The petitioners framed the question presented as follows: “What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education [(FAPE)] guaranteed by the Individuals with Disabilities Act . . . ?”¹⁶ In theory, the *Endrew* Court raised the standard by rejecting the majority’s “more than *de minimis*” test.¹⁷ However, the Court’s opinion left considerable gray area for schools and parents to sort out on their own. Because the Supreme Court’s direction on what constitutes sufficient student progress under the IDEA was so indefinite, the Fifth Circuit subsequently misinterpreted the new *Endrew* standard of progress as immaterially different than the previous, lower standard.¹⁸ As a result, although the Court intended its decision to improve education for students with disabilities, *Endrew* has not yet provided any tangible benefits to special education students in Texas. In fact, the Court’s lack of guidance on the new standard has allowed the Fifth Circuit, and subsequently Texas school districts, to almost completely overlook it.

A. *The IDEA’s Guarantee of a Free, Appropriate Public Education.*

“[T]he Individuals with Disabilities Education Act establishes a substantive right to a ‘free appropriate public education’ for certain children with disabilities.”¹⁹ The IDEA requires public schools to seek out and timely evaluate children who have a suspected disability through a process known as Child Find.²⁰ The school’s evaluation will establish whether or not the

¹⁴Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F., 118 F.3d 245, 248 (5th Cir. 1997).

¹⁵See 137 S. Ct. at 999.

¹⁶Petition for Writ of Certiorari, *supra* note 12, at i.

¹⁷137 S. Ct. at 1000.

¹⁸E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist., 909 F.3d 754, 765 (5th Cir. 2018) (per curiam).

¹⁹*Endrew F.*, 137 S. Ct. at 993 (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley ex rel. Rowley, 458 U.S. 176, 181 (1982)).

²⁰20 U.S.C. § 1412(a)(3)(A).

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child qualifies as a student with a disability under one or more of the thirteen eligibility categories set forth by the IDEA.²¹

Additionally, the IDEA entitles each child who qualifies for special education and/or related services to an IEP.²² The IEP is a written document developed by a committee²³ consisting of the child's parents, teachers, and service providers with knowledge of the child's current levels of academic achievement and functional performance.²⁴ To satisfy the IDEA's requirements, a school must specifically design an IEP that meets the child's unique needs, as measured by positive academic or non-academic benefits, or "progress."²⁵ The committee drafts annual goals for the child based on his or her academic, developmental, and functional needs, as well as implements accommodations or modifications to the academic environment that will enable the child to make appropriate progress on each goal.²⁶ Additionally, the committee must ensure that the school is educating the child in the least restrictive environment that is supportive enough to meet his or her needs.²⁷ The committee must convene at least once per year to discuss the student's progress and adjust the IEP as needed to ensure continued growth.²⁸

²¹ *Id.* § 1412(a)(3)(B). The thirteen eligibility categories are autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment. *Id.* § 1401(3)(A)(i).

²² *Id.* § 1414(d)(1)(A)(i).

²³ *Id.*

²⁴ *Id.* §§ 1414(d)(1)(A)(i)(I), 1414(d)(1)(B)(i)–(vi).

²⁵ *Id.* §§ 1414(d)(1)(A)(i)(II)(aa)–(bb).

²⁶ *Id.* § 1414(d)(1)(A)(i)(IV)(aa).

²⁷ *See id.* The goal of a least restrictive environment is to reduce the time a special education student spends in self-contained special education classrooms or campuses and increase the time the student spends in general education classrooms with non-disabled peers. The hard push toward the inclusion of students with disabilities in mainstream classes is a major shift from the old way of institutionalizing people with disabilities. Public awareness of horror stories from facilities like the Willowbrook State Developmental Center was a primary motivator behind the IDEA's focus on least restrictive environment. *See* 34 C.F.R. § 300.114(b) (2020); *The Closing of Willowbrook*, DISABILITY JUST., <https://disabilityjustice.org/the-closing-of-willowbrook/> (last visited May 16, 2022).

²⁸ *See* 20 U.S.C. § 1414(d)(1)(D).

B. Progress as an Indicator of a FAPE.

A key marker of a successful IEP is student progress. A student can demonstrate progress in many ways, academic and non-academic.²⁹ The student may have demonstrated progress by mastering some or all of his or her IEP goals, increasing class grades or test scores, learning new skills, or further developing preexisting abilities.³⁰ If a student has not made sufficient progress despite receiving the supports and services set out in the IEP, then the IEP committee should reconvene and modify the IEP.³¹ Generally, a failure to make sufficient progress means the school has a legal obligation, as outlined in the IEP, to provide more—more accommodations, more services, more supports, even if this means paying to send the student to another school that is better equipped to meet his or her needs.³² For schools with limited resources, giving more is often a challenge.

This is the point where disagreements often arise. Parents come to the table with concerns that their child is not receiving the FAPE that the IDEA promises, as evidenced by what they see as their child's insufficient progress at school. Their son with ADHD struggles to make headway with behavioral skills and continues to get into physical altercations with other students.³³ Their deaf child can only understand a fraction of her teacher's speech, and therefore makes less progress than she could if provided a sign language interpreter.³⁴ Their daughter's seizures have caused developmental delays, and she has only advanced one grade level in reading in four years.³⁵ Their second grader with a speech impairment is still barely intelligible to her peers, despite receiving speech therapy twice per week for three years. The

²⁹ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 253 (5th Cir. 1997).

³⁰ *See, e.g., Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349–50 (5th Cir. 2000).

³¹ 20 U.S.C. § 1414(d)(1)(D)(ii)(I).

³² *Id.* § 1414(d)(4)(A); *see generally* *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

³³ *Michael F.*, 118 F.3d at 249–50.

³⁴ *See* Bd. of Ed. of the Hendrick Hudson Cent. Sch. Dist., v. *Rowley ex rel. Rowley*, 458 U.S. 176, 185 (1982) (White, J., dissenting). The Court in *Rowley* refers to the Education for All Handicapped Children Act (EHA) of 1975, which was amended in 1990 and renamed the IDEA.

³⁵ *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 758 (5th Cir. 2018) (per curiam); *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, No. 4:16-CV-0058, 2017 WL 3017282, at *20 (S.D. Tex. June 15, 2017), *report and recommendation adopted sub nom.* *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, No. 4:16-CV-0058, 2017 WL 3016952 (S.D. Tex. July 14, 2017), *aff'd sub nom.* *E.R. ex rel. E.R. v. Spring Branch. Indep. Sch. Dist.*, 909 F.3d 754 (5th Cir. 2018).

heart of special education disputes like these comes down to one issue: How much progress is enough to constitute a FAPE under the IDEA? In all of these cases, the school argued that the student was making sufficient progress to constitute a FAPE and refused to adopt the parents' proposed adjustments to the IEP.³⁶ And, in all of these instances, the school won.³⁷

II. THE *ROWLEY* STANDARD: REASONABLY CALCULATED TO CONFER AN EDUCATIONAL BENEFIT.

The United States Supreme Court first considered the meaning of a FAPE in *Board of Education of the Hendrick Hudson Central School District v. Rowley ex rel. Rowley*.³⁸ In that case, the Rowleys sued their daughter's school district over concerns that the educational opportunities the school provided her were not equal to those provided to her non-disabled peers.³⁹ Although Amy was doing quite well in the first grade,⁴⁰ the Rowleys argued that due to a hearing impairment preventing Amy from hearing 40% of her teacher's speech, Amy was not making the progress she could make if her school district provided a classroom sign language interpreter.⁴¹ While the Second Circuit agreed that the IDEA entitled Amy to "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children," the Supreme Court rejected the equity-based decision.⁴² Instead, the Court made it clear that "passing marks" sufficiently encompassed all the educational benefit to which the IDEA entitles a child like Amy, no matter what he or she was truly capable of achieving.⁴³

The Court held that a school satisfactorily delivers a FAPE when it:

³⁶ *Michael F.*, 118 F.3d at 254–55; *Rowley*, 458 U.S. at 184–85; *E.R.*, 909 F.3d at 760.

³⁷ *Michael F.*, 118 F.3d at 258; *Rowley*, 458 U.S. at 210; *E.R.*, 909 F.3d at 772.

³⁸ 458 U.S. at 186.

³⁹ *Id.* at 185–86.

⁴⁰ Amy Rowley later shared how her mother, who is also deaf, tutored her after school for years to help her learn everything at home that she was missing at school. Her mother communicated with Amy's teachers via a TTY telecommunication device. In third grade, after winning her case in the court of appeals and prior to the Supreme Court's reversal, Amy was provided with an interpreter. She described it as "the first time I had the experience to really interact with my classmates" and felt that she "was finally a part of everything." Amy June Rowley, *Address by Amy June Rowley, Ph.D., Professor, California State University, East Bay*, 63 N.Y.L. SCH. L. REV. 21, 23–24 (2019).

⁴¹ Patricia Anthony, *The Rowley Case*, 8 J. OF EDUC. FIN. 106, 106 (1982).

⁴² *Rowley*, 458 U.S. at 186, 200.

⁴³ *See id.* at 203–04.

[P]rovide[s] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP.⁴⁴

In addition, the student's educational placement must be "reasonably calculated to enable the child to receive educational benefits."⁴⁵ The Court held that in Amy's case, where the school implemented her IEP solely in a general education setting, an educational benefit was shown by her academic progress: passing marks and advancement from grade to grade.⁴⁶ However, the Court forewent the opportunity to form a clear test for future courts to understand how much progress a student must demonstrate before the IDEA considers an "educational benefit" to be conferred, especially in cases of students receiving services in special education settings.⁴⁷

A. Applying Rowley: The Michael F. factors.

One of the key cases guiding special education disputes in Texas, *Cypress-Fairbanks Independent School District v. Michael F. ex rel. Barry F.*, provided a four-factor framework for Fifth Circuit courts applying *Rowley*.⁴⁸ Michael, who was diagnosed with Tourette's syndrome and ADHD, struggled with significant behavioral challenges during his sixth-grade year.⁴⁹ After receiving his first seventh-grade report card, Michael's parents were dismayed to find that he was failing three of his seven classes, despite receiving special education supports and services per his IEP.⁵⁰ He also disrupted classes, refused to comply with teacher instructions, and misbehaved on the school bus.⁵¹ Based on this information, Michael's parents placed him in a full-time private residential education and treatment center, since they viewed the supports and services Michael's school provided as

⁴⁴ See *id.* at 189.

⁴⁵ *Id.* at 207.

⁴⁶ *Id.* at 203–04, 210.

⁴⁷ See *id.* at 202.

⁴⁸ 118 F.3d 245, 253 (5th Cir. 1997).

⁴⁹ *Id.* at 249–50.

⁵⁰ See *id.* at 251.

⁵¹ *Id.*

insufficient for him to make adequate progress under the IDEA.⁵² Michael's school district denied his parents' request to cover the cost of his private placement, so his parents filed a due process complaint to seek the TEA's review of the denial.⁵³ The TEA ordered the reimbursement after finding that the IEP was not reasonably calculated to enable Michael to receive educational benefits, and the school district appealed.⁵⁴ The district court sided with the school, holding that the "IEP was reasonably calculated to, and in fact did, produce more than a modicum of educational benefit for Michael."⁵⁵

The *Michael F.* court cited *Rowley*'s test in its analysis: Was the IEP reasonably calculated to enable the child with disabilities to receive educational benefits?⁵⁶ If the answer was yes, then the school district had provided a FAPE in accordance with the IDEA.⁵⁷ If the answer was no, and the school district could not provide such an IEP, then the district had to pay the cost of sending the child to an appropriate setting.⁵⁸ The court outlined four factors to apply: (1) is the program individualized based on the student's assessment and performance; (2) is the program administered in the least restrictive environment; (3) are services provided in a coordinated and collaborative manner by the key "stakeholders"; and (4) have positive academic and non-academic benefits been demonstrated.⁵⁹ While the Fifth Circuit has "never specified precisely how these [four] factors must be weighed,"⁶⁰ "it has long held that the fourth factor is critical."⁶¹ This fourth factor, an examination of whether the school has afforded "demonstrable academic and non-academic benefits" to the student, is the indicator of progress.⁶²

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 251–52.

⁵⁵ *Id.* at 254.

⁵⁶ *Id.* at 252.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 253. These four factors, used to determine whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA, were developed by the court with input from Christine Salisbury, Ph.D., an educator with "considerable experience" developing IEPs. *Id.*

⁶⁰ *Richardson Indep. Sch. Dist. v. Michael Z. ex rel. Leah Z.*, 580 F.3d 286, 293 (5th Cir. 2009).

⁶¹ *R.S. ex rel. Ruth B. v. Highland Park Indep. Sch. Dist.*, 951 F.3d 319, 335 (5th Cir. 2020) (quoting *Renee J. ex rel. C.J. v. Hous. Indep. Sch. Dist.*, 913 F.3d 523, 529 (5th Cir. 2019)).

⁶² *See Michael F.*, 118 F.3d at 253.

Despite the clear language and supposedly “critical” nature of the fourth factor, courts in the Fifth Circuit have done little more than water it down over the years. While the factor specifically says “academic *and* non-academic *benefits* (plural),” courts have since held that “the fourth factor was met where *only an educational benefit* had been demonstrated.”⁶³ “Similarly, courts have found that the fourth factor is met where *only non-academic benefits* are demonstrated.”⁶⁴ Furthermore, courts have held that the fact that a student demonstrated progress with the help of accommodations “does not diminish the significance of his academic advancement.”⁶⁵ Thus, schools can claim that a student who has learned to perform a skill with assistance has advanced as significantly as a student who has learned to perform the same skill independently. Indeed, the Fifth Circuit has expressly held that a school district substantively complies with the IDEA where the student’s IEP enables him to advance academically, “with accommodations for his disability, in a mainstream high school curriculum.”⁶⁶ However, schools are left with little direction as to what constitutes “advancing academically.”

B. *More Than De Minimis.*

While *Michael F.* set out significantly more guidance for special education disputes by providing a framework for courts to work within, the exact definition of appropriate “progress” under the IDEA was still largely left open to interpretation. The *Michael F.* court described an IEP that complies with the IDEA in the following ways: specifically designed to meet the child’s unique needs; supported by services that will permit the child to benefit from instruction; specialized instruction and related services which are individually designed to provide educational benefit; likely to produce progress; and reasonably calculated to enable the child to receive educational benefits.⁶⁷ Further, “the educational benefit that the IEP is designed to achieve must be meaningful,” not trivial.⁶⁸ The court clarified that these vague targets do not mean that an IEP must provide the best possible

⁶³ See, e.g., *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349–50 (5th Cir. 2000) (emphasis added); *Candi M. ex rel. J.M. v. Riesel Indep. Sch. Dist.*, 379 F. Supp. 3d 570, 599 (W.D. Tex. 2019).

⁶⁴ See *A.B. ex rel. Jamie B. v. Clear Creek Indep. Sch. Dist.*, No. 4:17-CV-2382, 2018 WL 4680564, at *5 (S.D. Tex. Sept. 28, 2018) (emphasis added); *Candi M.*, 379 F. Supp. 3d at 599.

⁶⁵ See *Candi M.*, 379 F. Supp. 3d at 599.

⁶⁶ *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 391 (5th Cir. 2012).

⁶⁷ *Michael F.*, 118 F.3d at 247–48.

⁶⁸ *Id.* at 248.

education,⁶⁹ or even one that maximizes the child's educational potential.⁷⁰ Defining the standard in the negative, the court declared trivial educational advancement⁷¹ in the form of mere modicum or de minimis progress is not enough.⁷² So, what constitutes a non-trivial, "meaningful" educational benefit? Simply put, in the Fifth Circuit, some progress, limited though it may be, can satisfy the IDEA's FAPE requirement, as long as that progress is more than de minimis.

Citing *Michael F.*, subsequent courts have used terms like "meaningful educational benefit" and "positive academic and non-academic benefits" to describe a showing of student progress but have likewise provided limited guidance.⁷³ An examination of the facts of various cases helps, at least somewhat, to shape an answer. Examples of sufficient progress cited by courts include "dramatically improved" grades,⁷⁴ "excellent" ratings on behavioral and academic skills,⁷⁵ increased test scores,⁷⁶ and increased grade-level equivalents in specific subject areas.⁷⁷ Sufficient progress in other cases, though, can be much more limited.⁷⁸

Courts have also held that a decline in percentile scores does not necessarily represent a lack of educational benefit.⁷⁹ Instead of measuring the child's progress in relation to the rest of the class, his or her progress should be measured solely with respect to himself or herself.⁸⁰ This means that even if a child is progressing at an objectively slower rate than other children,

⁶⁹ *Id.* at 247.

⁷⁰ *Id.*

⁷¹ *Id.* at 248.

⁷² *Id.*

⁷³ *See, e.g., E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018) (per curiam); *Candi M. ex rel. J.M. v. Riesel Indep. Sch. Dist.*, 379 F. Supp. 3d 570, 599 (W.D. Tex. 2019).

⁷⁴ *Z.C. ex rel. P.C. v. Killeen Indep. Sch. Dist.*, No. W:14-CV-086, 2015 WL 11123347, at *7 (W.D. Tex. Feb. 17, 2015), *aff'd sub nom. Phoung C. ex rel. Z.C. v. Killeen Indep. Sch. Dist.*, 619 F. App'x 398 (5th Cir. 2015) (per curiam).

⁷⁵ *Id.* Rated tasks included completing assignments on time, following directions readily, using time wisely, working independently, following school/class rules, respecting authority, being considerate of peers, caring for school property, being self-disciplined, and controlling talking. *Id.*

⁷⁶ *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

⁷⁷ *Id.* at 350.

⁷⁸ *See, e.g., R.S. ex rel. Ruth B. v. Highland Park Indep. Sch. Dist.*, 951 F.3d 319, 336 (5th Cir. 2020).

⁷⁹ *Bobby R.*, 200 F.3d at 349.

⁸⁰ *Id.*

causing that child to fall more and more behind, courts could still find sufficient progress to satisfy the IDEA.⁸¹ As a result, the school would not be required by law to provide additional supports and services to promote more significant progress, allowing the gap between a student with disabilities and his or her non-disabled peers to widen with each passing school year.

III. THE *ENDREW* STANDARD: MORE THAN MORE THAN.

In 2017, the United States Supreme Court used the *Endrew* case to reinforce and expand upon earlier standards used in special education disputes. *Endrew* was a Colorado dispute, but the Tenth Circuit's standard at the time, which required "more than *de minimis*" progress to satisfy the IDEA,⁸² was substantially similar to the Fifth Circuit's watered-down standard of "meaningful" benefit (simply "more than mere modicum or *de minimis*" benefit).⁸³

Endrew received special education services designed to support his needs related to autism from preschool through fourth grade.⁸⁴ In fourth grade, Endrew's parents raised concerns that his progress had "stalled," citing the fact that his behavioral challenges had now escalated to defecating on the floor, screaming, climbing furniture, head banging, and running out of the classroom.⁸⁵ At Endrew's fifth grade IEP meeting, the school presented an IEP similar to his previous ones, causing Endrew's parents to raise concerns that the school's presented IEP would not be sufficient to meet his changing needs.⁸⁶ Despite recognizing Endrew's significant and continuing behavioral challenges, the school refused to implement a behavior support plan or make meaningful changes to Endrew's IEP.⁸⁷ As a result, Endrew's parents enrolled him at a specialized private school.⁸⁸ Endrew made "significant

⁸¹ *See id.*

⁸² *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

⁸³ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir. 1997).

⁸⁴ *Endrew F.*, 137 S. Ct. at 996.

⁸⁵ *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist.* RE 1, No. 12-CV-2620-LTB, 2014 WL 4548439, at *2 (D. Colo. Sept. 15, 2014), *aff'd*, 798 F.3d 1329 (10th Cir. 2015), *vacated*, 137 S. Ct. 988 (2017).

⁸⁶ *See Endrew F.*, 137 S. Ct. at 996.

⁸⁷ *Id.*

⁸⁸ *Id.*

progress” at this new school; however, when Andrew’s parents sought reimbursement for the tuition, the school denied their claim.⁸⁹

The Tenth Circuit held that “the educational benefit mandated by IDEA must be ‘more than *de minimis*.’”⁹⁰ Because “the parents have not met their burden of showing that the IEP . . . was not reasonably calculated to enable [Andrew] to receive educational benefits” in light of his circumstances, the court held that the school had provided a FAPE that satisfied the IDEA’s requirements.⁹¹

On appeal, the Supreme Court began by summarizing *Rowley*:

A child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child’s educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.⁹²

The Court reaffirmed *Rowley*’s rule (the same rule expanded by the Fifth Circuit in *Michael F.*)⁹³ that a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.⁹⁴

However, the Supreme Court disagreed with the circuit court on the question of how much progress is required to satisfy the IDEA.⁹⁵ The Court rejected the old standard that the IDEA is satisfied with barely more than *de minimis* progress, instead holding that “some” progress is no longer enough and the IDEA is not satisfied with barely more than *de minimis* progress.⁹⁶ The Court wrote, “Every child should have the chance to meet challenging

⁸⁹ *Id.* at 996–97.

⁹⁰ *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329, 1338–40 (10th Cir. 2015) (quoting *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (2008)), *vacated*, 137 S. Ct. 988.

⁹¹ *Id.* at 1343.

⁹² *Andrew F.*, 137 S. Ct. at 1000.

⁹³ *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 252 (5th Cir. 1997).

⁹⁴ *Andrew F.*, 137 S. Ct. at 1001.

⁹⁵ *Id.* at 992.

⁹⁶ *Id.*

objectives.”⁹⁷ “This standard is more demanding than the ‘merely more than *de minimis*’ test When all is said and done, a student offered an educational program providing merely more than *de minimis* progress from year to year can hardly be said to have been offered an education at all.”⁹⁸ The Court defined the new standard by saying what it is not—more than *de minimis*. Thus, the new *Andrew* standard was announced: more than more than *de minimis*.

But what is more than more than? Although the Supreme Court intended to set a higher bar for schools in the provision of special education services, the vagueness of *Andrew*’s “appropriately ambitious” standard for progress would hamstring the impact of the case on students with disabilities in the Fifth Circuit.

IV. REJECTING *ENDREW*’S POTENTIAL.

The Fifth Circuit first revisited the issue of sufficient progress post-*Andrew* in the 2018 case *E.R. ex rel. E.R. v. Spring Branch Independent School District*.⁹⁹ E.R., a child with life-threatening seizures, brain shunts, ADHD, and global developmental delays, among other things, received special education services in a life skills classroom.¹⁰⁰ While planning her fourth-grade year, E.R.’s parents argued that the school’s presented IEP was insufficient to meet her needs.¹⁰¹ E.R.’s parents also expressed concerns that E.R. had regressed since moving to a new school and that from 2011 to 2015, E.R. had remained at a first grade level in reading and a kindergarten-to-first grade level in math.¹⁰² Because “E.R. did not make meaningful progress” at her new school, her parents argued that “the lack of progress prove[d] that the IEP was deficient.”¹⁰³ When the district court ruled for the school district,

⁹⁷ *Id.*

⁹⁸ *Id.* at 1001.

⁹⁹ 909 F.3d 754, 758 (5th Cir. 2018) (per curiam).

¹⁰⁰ *Id.*

¹⁰¹ *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, No. 4:16-CV-0058, 2017 WL 3017282, at *1, 11 (S.D. Tex. June 15, 2017), *report and recommendation adopted sub nom. E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, No. 4:16-CV-0058, 2017 WL 3016952 (S.D. Tex. July 14, 2017), *aff’d sub nom. E.R. ex rel. E.R. v. Spring Branch. Indep. Sch. Dist.*, 909 F.3d 754 (5th Cir. 2018).

¹⁰² *Id.* at *20.

¹⁰³ *Id.* at *12.

E.R.'s parents argued before the Fifth Circuit that the court had "failed to apply correctly the recent Supreme Court decision in *Endrew F.*"¹⁰⁴

The Fifth Circuit disagreed, writing, "Our court's four *Michael F.* factors and the Supreme Court's holding in *Endrew* do not conflict. . . . Both fit together."¹⁰⁵ The court conceded that the *Endrew* "appropriately ambitious" standard of progress is "markedly more demanding" than the Tenth Circuit's "merely more than *de minimis*" test.¹⁰⁶ Nevertheless, it stated that its own test, defined as "more than mere modicum or *de minimis*," was acceptable (despite *Endrew*'s clear holding that the Tenth Circuit's nearly identical test was not).¹⁰⁷ As the court put it, "Long before the Court decided *Endrew F.*, our court stated in *Michael F.* that 'the educational benefit to which the [IDEA] refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.'"¹⁰⁸ While this statement may literally be true, the Fifth Circuit seemed to either misinterpret *Endrew* or mischaracterize its own test. The *Endrew* Court attempted to raise the bar for special education standards by explicitly holding that the IDEA is not satisfied with barely more than *de minimis* progress.¹⁰⁹ *Endrew* decreed that the standard must be *more than* "more than,"¹¹⁰ but here, the Fifth Circuit seemingly conflated the two, maintaining that it had already set a standard of "more than."¹¹¹ Practically, though, in its previous attempts to define progress as "meaningful" and "not trivial," the Fifth Circuit had generally accepted any progress so long as it was merely more than modicum or *de minimis*, rendering its standard of progress substantially similar to the one *Endrew* explicitly rejected.

The court concluded by downplaying *Endrew*'s impact, writing, "In short, *Endrew F.* represents no major departure from *Rowley*."¹¹² Applied to E.R., the court declared that the fact that she "was not advancing grade levels is

¹⁰⁴ *E.R.*, 909 F.3d at 764.

¹⁰⁵ *Id.* at 765.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*; *see Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 992, 1001 (2017).

¹⁰⁸ *See E.R.*, 909 F.3d at 765 (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir. 1997)).

¹⁰⁹ *Endrew F.*, 137 S. Ct. at 1000–01.

¹¹⁰ *Id.*

¹¹¹ *See E.R.*, 909 F.3d at 765.

¹¹² *E.R.*, 909 F.3d at 766.

not, by itself, proof that there was no academic benefit to the educational program.”¹¹³ Relying on E.R.’s life skills teacher’s report that E.R. had progressed to the first-grade level in reading and was “moving toward” her IEP goals in three of four areas, the court held that “[t]he preponderance of the evidence shows that E.R. was making progress, and was likely to master each of her IEP goals by the end of the school year, and that those goals were appropriate for her abilities.”¹¹⁴ E.R.’s parents argued that the IEP goals themselves were insufficient, as the school had limited these goals to only address E.R.’s “critical needs,” despite the IDEA’s requirement that IEP goals address all of the child’s educational needs.¹¹⁵ Regardless, according to the Fifth Circuit, *Andrew*’s new test would find sufficient “progress” because E.R. had moved up one grade level in reading in four years and had demonstrated growth on the few IEP goals the school had developed.¹¹⁶

The Fifth Circuit explored *Andrew*’s impact in Texas again a year later in *Candi M. ex rel. J.M. v. Riesel Independent School District*.¹¹⁷ J.M.’s parents argued that although their son had earned passing grades in his classes, this measure of progress did not meet the *Andrew* standard, mainly because J.M.’s teachers did not grade him in the same manner as other students.¹¹⁸ This argument did not persuade the court, which focused on the fourth *Michael F.* factor.¹¹⁹ The court held that the fourth factor was met, citing J.M.’s improvement “such that he did not receive a grade below an 80 for the entire school year, and he continued to advance from grade to grade.”¹²⁰ Additionally, he “completed the same assignments as his classmates, kept up with his classmates academically, and earned the grades he received.”¹²¹ He “also demonstrated progress in his mastery of the basic academic skills mandated by the state.”¹²² Finally, his ability to decode words improved.¹²³

¹¹³ E.R. *ex rel.* E.R. v. Spring Branch Indep. Sch. Dist., No. 4:16-CV-0058, 2017 WL 3017282, at *20 (S.D. Tex. June 15, 2017) (*report and recommendation adopted sub nom*).

¹¹⁴ *Id.* at *22.

¹¹⁵ Brief for Appellant at 21–22, E.R. *ex rel.* E.R. v. Spring Branch Indep. Sch. Dist., 909 F.3d 754 (No. 4:16-CV-00058).

¹¹⁶ E.R., 2017 WL 3017282, at *21–22.

¹¹⁷ 379 F. Supp. 3d 570, 596 (W.D. Tex. 2019).

¹¹⁸ *Id.* at 599.

¹¹⁹ *Id.* at 600.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

The court parroted its *E.R.* decision, saying, “[T]he *Michael F.* factors are ‘fully consistent’ with the *Andrew F.* appropriately ambitious standard. Rather than displacing *Michael F.*, *Andrew F.* simply provided ‘more clarity for what constitutes an appropriate IEP’”¹²⁴ Despite its potential, *Andrew* made no practical difference to the court’s analysis.

Candi is just one example of how the Fifth Circuit’s original misinterpretation of *Andrew* in *E.R.* persisted. One year after *Candi*, the Fifth Circuit further diminished *Andrew*’s value as a case designed to improve education standards for students with disabilities in *R.S. ex rel. Ruth B. v. Highland Park Independent School District*.¹²⁵ While R.S.’s parents argued that R.S. suffered severe regression with respect to his communication skills, vision, mobility, academic goals, and emotional state,¹²⁶ the court focused on records from R.S.’s previous school district which stated that R.S. “has difficulty showing mastery of learned skills over time” and that he demonstrated inconsistent progress there:

As a result of R.S.’s multiple disabilities, his accomplishments happen more slowly and incrementally, with the “big gains” occurring over a number of years or long periods of time. Despite periods of regression and varied performance on assessments, overall, R.S. demonstrated growth in his communication skills, mobility, and fine motor skills, in addition to making academic progress.¹²⁷

The court described R.S.’s parents’ reliance on *Andrew*’s rejection of the “merely more than *de minimis*” standard of progress as “misplaced”:

Andrew F.’s rejection of the “merely more than *de minimis*” standard must be viewed in conjunction with its primary holding—that an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Whether advancement is so trivial or minor as to qualify as *de minimis* must be evaluated in light

¹²⁴ *Id.* at 596 (citation omitted) (quoting *E.R. ex rel. E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018)).

¹²⁵ *R.S. ex rel. Ruth B. v. Highland Park Indep. Sch. Dist.*, 951 F.3d 319, 331–32 (5th Cir. 2020).

¹²⁶ *R.S. ex rel. Ruth B. v. Highland Park Indep. Sch. Dist.*, No. 3:16-CV-2916-S, 2019 WL 1099753, at *23 (N.D. Tex. Mar. 8, 2019), *aff’d*, 951 F.3d 319 (5th Cir. 2020).

¹²⁷ *Id.* (citations omitted) (quoting Plaintiff’s Motion at 710, 5793, *R.S.* (No. 3:16-CV-2916-S)); *R.S.*, 951 F.3d at 331–32.

of the child's circumstances, and a court may determine that aiming for small amounts of progress is appropriately ambitious given a child's unique needs.¹²⁸

The court concluded by citing *Rowley*, stating that “the IEPs that Highland Park developed for R.S. cannot remotely be characterized as ‘sitting idly awaiting the time when [he was] old enough to “drop out.”’¹²⁹ Because “R.S. achieved at least some academic and nonacademic benefits as a result of his” IEP, the court held that the school district did provide R.S. with a sufficient FAPE under the IDEA.¹³⁰

As before, the court cited *Endrew*, but the conclusion was far from *Endrew*'s spirit—if the child has made any progress, even limited, it seems that courts in the Fifth Circuit will find that the IDEA is satisfied. Regardless of *Endrew*'s explicit rejection of the “merely more than *de minimis*” standard, the analysis of progress for Texas students with disabilities has remained fundamentally the same as it was pre-*Endrew*. Courts in the Fifth Circuit, following *E.R.*'s example, seem to have resolutely marched away from *Endrew*'s direction that schools should challenge children with disabilities by helping them meet appropriately ambitious educational objectives, just as they provide opportunities to achieve challenging objectives to their students without disabilities.¹³¹ In contrast to *Endrew*'s emphasis on students with disabilities' educational potential, the Fifth Circuit's focus enables schools to explain away limited progress by blaming students' disabilities for low expectations.¹³²

V. THE CRISIS, CONTINUED.

The Supreme Court decided *Endrew* in March of 2017, so Texas public schools are currently in their fifth school year since the new standard was set forth. Unfortunately, the *Endrew* Court, in its declaration that “merely more

¹²⁸ *R.S.*, 951 F.3d at 336–37 (quoting *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017)).

¹²⁹ *Id.* at 337 (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley ex rel. Rowley*, 458 U.S. 176, 179 (1982)).

¹³⁰ *Id.*

¹³¹ See, e.g., *C.J. ex rel. Renee J. v. Hous. Indep. Sch. Dist.*, 333 F. Supp. 3d 674, 692 (S.D. Tex. 2017); *D.C. v. Klein Indep. Sch. Dist.*, No. 4:19-CV-00021, 2020 WL 2832968, at *7 (S.D. Tex. May 29, 2020); *J.M. ex rel. T.L. v. Florence Indep. Sch. Dist.*, No. 1:18-CV-1016-RP, 2020 WL 4434928, at *4 (W.D. Tex. July 31, 2020).

¹³² See *R.S.*, 951 F.3d at 337.

than *de minimis*” progress is insufficient, provided barely more than *de minimis* guidance on precisely what more schools must do to satisfy the IDEA’s requirements. This lack of guidance has effectively allowed courts and school districts to overlook the heightened standard altogether. And, although *Endrew* remains a landmark decision because it raised education standards for children with disabilities, it did not go far enough. *Endrew*’s parents, like Amy Rowley’s parents thirty-five years earlier, argued that the IDEA requires schools “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.”¹³³ This standard would have set a higher bar for school districts and could have provided far greater support to children with disabilities, but the Court did not seize the chance to endorse it. In rejecting this argument, the Court missed a valuable opportunity to mandate equitable opportunities for students with disabilities.

While the *Endrew* decision had the potential to do a great deal of good for Texas students, some would say Texas remains one of the worst states for children with disabilities to receive the free and appropriate education to which the IDEA entitles them.¹³⁴ The year after *Endrew* was decided, the Federal Office of Special Education Programs (OSEP) found that the TEA had continued to fail in its task of ensuring that Texas schools are complying with the IDEA.¹³⁵ Although the TEA had pledged to take many corrective actions to resolve these deficits, four years later, OSEP found that TEA had made only one of the required changes, jeopardizing its grant funding for special education.¹³⁶ Losing special education funds would mean yet another obstacle for students with disabilities—schools forced to make cutbacks to special education services due to budget constraints cannot give what they do not have. During the 2019–2020 school year, the proportion of students qualifying for special education increased to 10.8% of the public-school population in Texas,¹³⁷ but the lasting effects of the TEA’s 2004 cap have

¹³³ Brief for Petitioner at 40, *Endrew F. ex rel. Joseph F v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017) (No. 15-827).

¹³⁴ See U.S. DEP’T OF EDUC., 2020 DETERMINATION LETTERS ON STATE IMPLEMENTATION OF IDEA 3 (Nov. 25, 2020).

¹³⁵ Dellinger, *supra* note 4.

¹³⁶ *Id.*

¹³⁷ *Number and Percentage of Children Served Under Individuals with Disabilities Education Act (IDEA), Part B, by Age Group and State or Jurisdiction: Selected Years, 1990-91 Through*

left Texas standing far below the national average of 14.4%.¹³⁸ That 10.8% equates to 587,987 students with disabilities receiving special education services in public and charter schools in Texas.¹³⁹ So far, though, due to the vagueness of *Endrew*'s holding regarding exactly when schools have facilitated progress that satisfies the IDEA, the new standard of "more than more than *de minimis*" has gone mostly overlooked for these students. Indeed, the IDEA analysis has remained essentially the same as it was pre-*Endrew*.¹⁴⁰ Nevertheless, change takes time, and the full impact of *Endrew* in Texas remains to be seen.

2019-20, NAT'L CTR. FOR EDUC. STATS. (Feb. 2021), https://nces.ed.gov/programs/digest/d20/tables/dt20_204.70.asp.

¹³⁸ *Id.*

¹³⁹ TEX. EDUC. AGENCY, ENROLLMENT IN TEXAS PUBLIC SCHOOLS 2019-20, at 3-4 (Aug. 2020).

¹⁴⁰ See William Moran, *The IDEA Demands More: A Review of FAPE Litigation After Endrew F.*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 495, 510-11 (2020).