



Measuring Progress under *Endrew F.* :

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Rowley Revisited: Where we Were

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley

Appropriateness

- Education that is “sufficient to confer some educational benefit” or provide a “basic floor of opportunity.”
- Sufficient for students in the general education setting to advance from grade to grade.
- Little guidance for students with disabilities in other settings.

The *Rowley* Battles

- ▶ From the mid-80's through early 2017, what we litigated about:
 - ▶ How much benefit
 - ▶ “Educational” vs. “Non-educational”
 - ▶ “Chevrolet” vs. “Cadillac”

Endrew F. v. Douglas County School District RE-1.

- ▶ On March 22, 2017, a unanimous Supreme Court recognized the problem and, with clear and simple logic, put an end to the thirty-five years of aiming too low and missing the point. *Endrew F.* affords an opportunity to return to a commitment to progress for all of our students.

Specifically, what does *Endrew F.* change?

- ▶ In *Endrew F.*, the Supreme Court rejects a limited view of the IDEA and stresses the importance of providing disabled students with educational programs that lead to actual progress. The Court emphasizes that an, “IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Endrew F.*, 137 S. Ct. at 999. The Court reasons that, “a substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.” *Id.*

Endrew F.: Where we Arrived

4 Major Themes:

1. Rejection of “Some” Educational Benefit
2. Focus on Progress
3. Challenging the Student
4. Cogent and Responsive Explanations

Rejection of “Some” Educational Benefit

- The Court rejected the “some educational benefit” and “more than minimal” standards
- The Court defined appropriateness as “markedly more demanding than the ‘merely more than de minimis’ test”

Focus on Progress

- ▶ The Court emphasizes that an, “IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.”
- ▶ “A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.”

Cogent and Responsive Explanations

- ▶ School systems are not entitled to deference unless they apply their expertise
- ▶ School systems must, “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.”

Applying *Endrew F.*: Where we are going

- ▶ Commitment to progress for all of our students.
- ▶ Reinforcement of Central Role of IEP Team
- ▶ Burden of Proof?

Applying *Endrew F.*: Where we are going

Consistent and faithful implementation.

- ▶ Shift the analysis from benefit to actual progress
- ▶ Shift the burden to school systems for explanation

Applying *Endrew F.*: Where we are going

Consistent and faithful implementation.

- ▶ Substantive challenges to IEPs
- ▶ Procedural challenges to the IEP process



THREE KEY ISSUE AREAS

1. The Unique Child
2. It's all About “Progress”
3. Parents are Important

I. At the IEP table

- ▶ Assessments:
 - ▶ Impact of disabilities
 - ▶ Recommended interventions

At the IEP Table

Present levels of performance

- ▶ Comprehensive and thorough-strengths and challenges
- ▶ Review strengths and needs
- ▶ Assessment info
- ▶ Anecdotal info
- ▶ Parental info
- ▶ Data
- ▶ Address Potential

II. It's all about “Progress”

New definition

- ▶ Progress is
“appropriate in light of the child’s circumstances”
- ▶ Progress is *not*
“merely more than de minimis”

II. It's all about “Progress”

How to measure progress?

- ▶ Evidence-based interventions
 - ▶ Fidelity
- ▶ Rigorous and attainable goals
 - ▶ Measurable
- ▶ Academic *and* functional
- ▶ IEP comparison

III. Parents are Important

Definition:

Meaningful partners at every stage of the process

III. Parents are Important

Parent-initiated documentation

- ▶ (1) Parent report, including work samples, and input from private providers, for IEP meetings
 - ▶ Help draft
- ▶ (2) Cogent and responsive explanations
 - ▶ Assist with parent request
- ▶ (3) Prior Written Notice
 - ▶ Accurate reporting of disagreements

Andrew F. on Remand

Andrew F. by & through Joseph F. v. Douglas Cty. Sch. Dist. RE 1, 290 F. Supp. 3d 1175 (D. Colo. 2018)

- Court returns to same set of facts regarding same student.
- Court reverses itself finding that Andrew's educational plan was not reasonably calculated, "to enable [him] to make progress, even in light of his unique circumstances, based on the continued pattern of unambitious goals and objectives of his prior IEPs."
- Court concludes that despite changes from year to year the IEP did not reveal "immense educational growth, they were sufficient to show a pattern of, at the least, minimal progress."

Why is the Remand Decision is Important?

- ▶ Focus on the need for ambitious goals.
- ▶ Repetition of IEP goals without significant change does not equate progress.
- ▶ “minimal progress” no longer enough.
- ▶ The court on remand provides a road map of application of the Supreme Court standard.

Courts That Have Applied *Endrew F.*

D.C. Circuit

Z.B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018)

- ▶ Circuit Court remands for application of *Endrew F.*
- ▶ “The Supreme Court . . . raised the bar on what counts as an adequate education under the IDEA.”
- ▶ Merely reacting when parents complain is not enough. A school has an affirmative obligation to “conduct a full and individual initial evaluation” of an eligible student “before” it begins providing services. 20 U.S.C. § 1414(a)(1)(A). If it considers only whatever information parents pass along, a school may miss what reasonable evaluation would uncover and, as a result, offer an inadequate education.”

Courts Trying to Apply *Endrew F.*

Third Circuit

K.D. by & through Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248 (3d Cir. 2018)

Endrew F. mirrors their longstanding standard: child must receive educational benefits in light of his/her intellectual potential and individual abilities.

Fourth Circuit

M.L. by Leiman v. Smith, 867 F.3d 487 (4th Cir. 2017)

“Our prior FAPE standard is similar to that of the Tenth Circuit which was overturned by *Endrew F.* We have cited to the Tenth Circuits standard in the past, including that court’s decision in *Endrew F.* itself.”

N.P. v. Prince George's County Public Schools

- ▶ N.P. is twice exceptional student.
- ▶ Appeal to 4th Circuit. Court holds case in abeyance pending decision of *Endrew F.*
- ▶ Court remands to Administrative level for application of *Endrew F.*
- ▶ ALJ reverses based on consideration of N.P.'s unique needs as a twice exceptional student.

N.P. Continued....

- ▶ After considering the decline in scores and repeated failure to achieve IEP goals, ALJ concludes, “in light of his unique circumstances as a twice-exceptional student with well above average cognitive ability, [the school system] fell short of what should be expected in order for the Student to have received FAPE.”
- ▶ “Placement cannot be considered appropriate based on the fact that the Student is ‘not bombing out’”.

Some Courts Take More Time...

- ▶ *Johnson v. Boston Pub. Sch.*, 906 F.3d 182, 194 (1st Cir. 2018)
- ▶ *Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 756 (2d Cir. 2018)

Measuring Progress in Real Time

- ▶ Behavior: Present Levels from May 2018:
- ▶ According to Behavior Intervention Plan (BIP) data dated from May 7, 2018 to May 18, 2018, Student engaged in the following behaviors with the specified frequency and duration:
- ▶ Verbalizations: Frequency: 11; Average Duration: 5 seconds
- ▶ Property Destruction: Frequency: 151; Average Duration: 7 minutes
- ▶ Personal Space: Frequency: 92; Average Duration: 3.9 seconds
- ▶ Oral Behaviors: Frequency: 155; Average Duration: 22 minutes
- ▶ Between the dates of May 25, 2018 to June 1, 2018, Nicholas began a half- day schedule at school. Behavioral data for the BIP was collected as follows:
- ▶ Oral Behavior Frequency: 136
- ▶ Personal Space Frequency: 34
- ▶ Property Destruction Frequency: 43

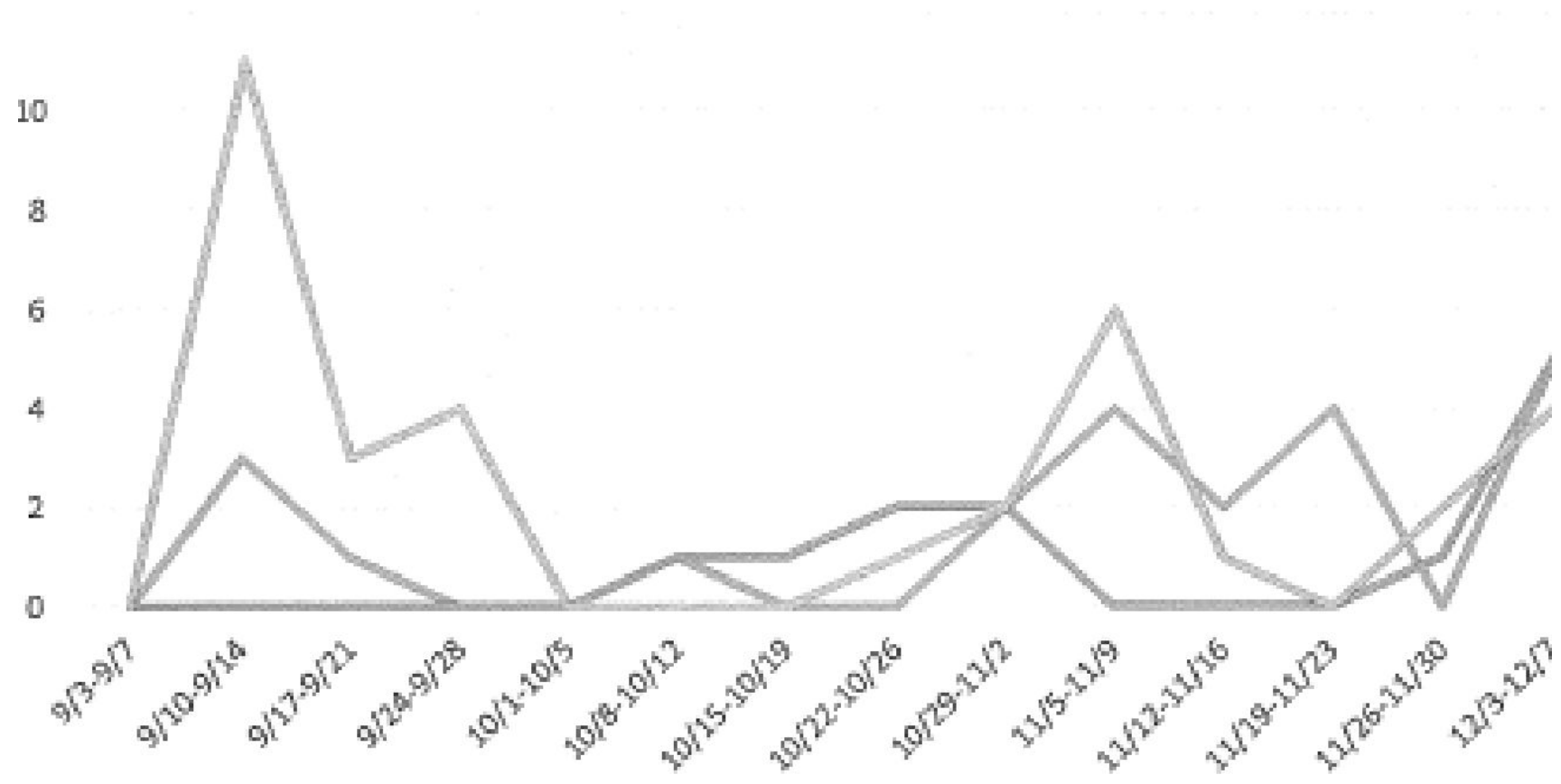
Behavior

- ▶ Verbalizations is defined as what Student is saying as he is engaged in a behavior.
- ▶ Oral behaviors is defined as putting objects/task supplies that are not specified as his chewy into his mouth/against his lips, biting, and/or chewing on the object/material and or licking objects, surfaces, or people (himself included).
- ▶
- ▶ Personal Space is defined as eloping out of the room, touching others and/or their materials without their permission, using objects to touch others or their materials without permission.
- ▶
- ▶ Property Destruction is defined as breaking, ripping, throwing objects/materials, dumping bins of objects/materials, using pencil, pen, crayon, marker, dry erase markers to draw or scribble on surfaces (walls,/desks/chair/floor) and/or worksheets that are for him or others, displacing furniture by pushing it, tipping it, or throwing it.
- ▶

December 2018:

- ▶ Student has made improvement in respecting both other people's property and modeling other student's appropriate behavior in both structured and unstructured environments. He continues to use "five star listening" and has improved his ability to attend during whole group and calls out less without raising his hand. He is also more consistent about asking permission to touch someone else's property. He has had several instances of touching items without asking permission on his teacher's desk and picking up or hiding his teacher's phone which she uses for timing his behaviors for data collection. To date BIP data indicates an increase in these behavior over the last two months but a reduction from last year. Data is provided in attached chart.

Behavior



Sample Goal

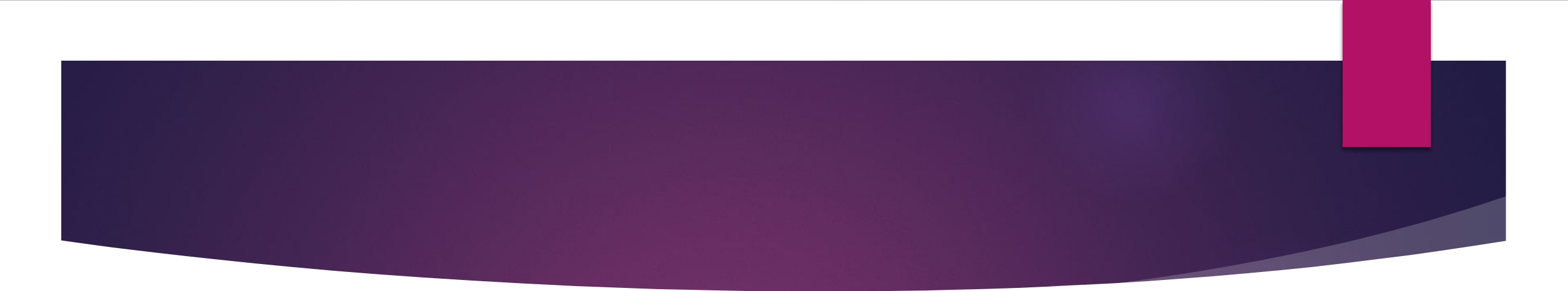
- ▶ When provided with adult support, pre-identified student models and faded adult coaching, and given direct instruction with faded prompts and reinforcement/rewards in structured and unstructured activities, Nicholas will appropriately use materials and school property.

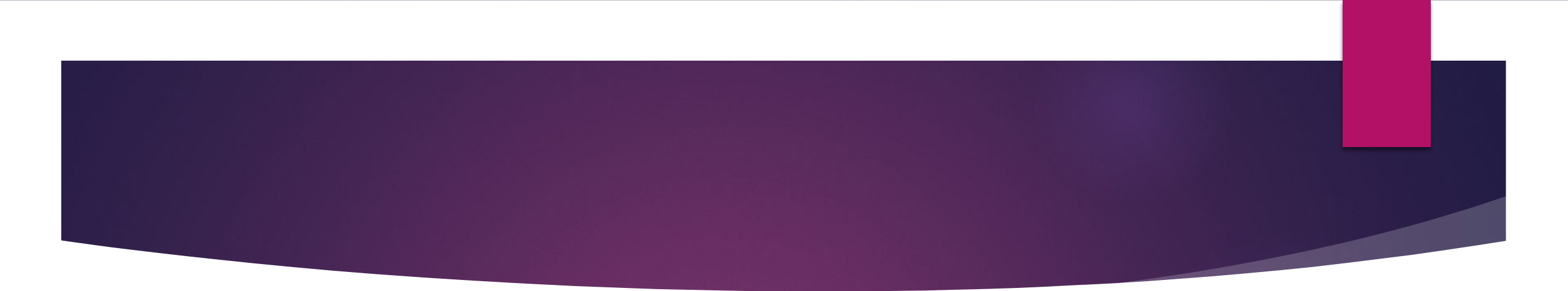
Student with ID

- ▶ March 2019
- ▶ Fountas & Pinnell Running Record
- ▶ Instructional Grade Level Performance: 1st Grade
- ▶ (Consider private, state, local school system, and classroom based assessments, as applicable.)
 - Level F (Fiction)
- ▶ o Accuracy- 95%
- ▶ o Errors- 4
- ▶ o Visual Errors- 3
- ▶ o Meaning Errors- 1
- ▶ o Structure Errors- 1

Student with ID

- ▶ Words their Way
 - Word Sorts for Letter Name: Alphabetic Spellers
- ▶ o Unit III: Digraphs and Blends Picture Sorts

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- ▶ The IEP is a tool which parents must be able to use “to monitor and enforce the services that their child is to receive.” *M.C. v. Antelope Valley Union H.S. Dist.*, 858 F.3d 1189 1198 (9th Cir. 2017).

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- ▶ With direct adult support and verbal prompting, Student is able to identify and produce all consonant and short vowel sounds in isolation. Student is also able to identify and produce common blends (sh, th, wh) when given the same adult support and prompting. Student is inconsistent in his ability to identify and produce long vowel sounds in isolation. Student is dependent on adult support, pictures, and verbal prompts to produce long vowel sounds in isolation. When attempting decode an unknown or unfamiliar word, Student is able to identify the consonant and short vowels sounds within the word with direct adult support and wait time. Student is unable to decode unknown words containing long vowel sounds within a text.

Student with ID

- ▶ Within words their way, Student is able to correctly identify all the pictures presented in the sort with adult support and verbal prompting. Student is unable to independently match the picture presented within the sort to the provided columns. Student requires adult support to slowly produce the name of the given picture and verbal prompting to help Student place the picture into the correct column. Once Student has sorted his pictures, Student is able to read all picture names and draw his own corresponding pictures with wait time and verbal prompting. When given a sentence starter containing one of the word sort words, Student is able to supply an appropriate ending with adult prompting and support. When given a sentence frame with the word sort vocabulary missing, Student is able to supply the correct missing word from his word sort when given verbal prompts to reference his sort, adult prompting, and wait time.

Sample Goal

- ▶ Given highlighting, models, direct instruction, adult support, verbal cues, frequent eye contact, proximity control, sentence frames, sentence starters, wait time, positive reinforcements, guiding questions, scribe (as appropriate) and verbal praise, Student will use a combination of drawing, dictating, and writing to generate a narrative about a single event and tell about the event in sequential order.

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- ▶ Discussion/Questions?