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Foreword: The Special Education Cases of 2017

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In the Spring of 2017, the Supreme Court issued two key decisions interpreting provisions of the Individuals with Disabilities Education Act (IDEA).[1] In *Fry v. Napoleon Community Schools*,[2] decided on February 22, the Court for the first time took up whether and when cases asserting violations of statutes such as Title II of the Americans with Disabilities Act[3] and Section 504 of the Rehabilitation Act[4] should be subject to the IDEA's administrative exhaustion requirement.[5] Then on March 22, in *Endrew F. v. Douglas County School District RE-1*,[6] the Court considered the meaning of the requirement that public schools provide free, appropriate public education to children with disabilities,[7] a question it had last addressed thirty-five years earlier in *Board of Education v. Rowley*.[8]

Fry involved a student with a severe form of cerebral palsy whose goldendoodle named Wonder assists her in everyday tasks, including picking up things that are dropped, stabilizing her when she uses her walker, opening doors, turning on lights, and helping her take off her coat and make toilet transfers.[9] Her public school forbade her from bringing the dog to class, then permitted a trial period of limited use of

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1. 20 U.S.C. §§ 1400–1482 (2012 & Supp. III 2015).
2. 137 S.Ct. 743 (2017).
3. 42 U.S.C. §§ 12131–12165 (2012).
4. 29 U.S.C. § 794 (2012 & Supp. III 2015).
5. 20 U.S.C. § 1415(*l*) (2012).
6. 137 S.Ct. 988 (2017).
7. 20 U.S.C. § 1412(a)(1)(A) (2012).
8. 458 U.S. 176 (1982).
9. Fry v. Napoleon Cmty. Schs., 137 S.Ct. 743, 751 (2017).

the dog, but then in the following year again denied permission to bring the dog to school.[10] The school contended that the child's needs were met by provision of a human aide and other accommodations.[11] Bowing to the outcome of a complaint her parents filed with the U.S. Department of Education Office for Civil Rights, the school eventually relented, but the parents, concerned that the environment had become negative, transferred her to a different school, which welcomed child and dog.[12]

The Frys sued, requesting declaratory relief and damages for violations of ADA Title II and Section 504.[13] The district court and court of appeals found the case barred because the parents had not exhausted administrative remedies under the IDEA.[14] That defense hinged on the meaning of a provision of the Handicapped Children's Protection Act of 1986, which states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, [IDEA administrative] procedures . . . shall be exhausted to the same extent as would be required had the action been brought under this subchapter.[15]

Congress enacted § 1415(*l*) to overrule *Smith v. Robinson*, which held, among other things, that the statute that is now the IDEA supplanted remedies for violations of Section 504 as well as remedies under 42 U.S.C. § 1983 for violations of equal protection, in contexts covered by the federal special education law.[16] Congress restored those remedies, among others, but, concerned that litigants might inappropriately bypass

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10. *Id.*
11. *Id.* at 751, 758.
12. *Id.* at 751.
13. *Id*. at 751–52.
14. *Id*. at 752.
15. 20 U.S.C. 1415(*l*) (2012).
16. Smith v. Robinson, 468 U.S. 992, 1009 (1984), *superseded by statute*, Handicapped Children's Protection Act, Pub. L. No. 99-372, 100 Stat. 796, *as recognized in* Fry v. Napoleon Cmty. Schs., 137 S.Ct. 743 (2017).

the special education law's due process hearing procedure before suing, it inserted the "except that" clause at the end of § 1415(*l*).[17]

In *Fry*, the Court vacated the court of appeals decision and remanded. Justice Kagan's opinion reasoned that the IDEA makes relief available for denials of free, appropriate public education, so complaints seeking relief for denial of free, appropriate public education are those that § 1415(*l*) subjects to exhaustion.[18] In determining whether a suit seeks relief for denial of free, appropriate education, courts should look to the gravamen of the complaint, something that depends on the complaint that was actually filed in court, not whether the family could have filed a complaint asking for an IDEA remedy.[19]

The Court said there are clues for lower courts to use in deciding whether the substance of a complaint is denial of free, appropriate public education: whether essentially the same claim could be made in a situation where no appropriate education obligation exists, as would be the case in a suit for access to a public library that does not have ramps for wheelchairs, and whether a similar case could have been brought by an adult visitor to the school or a school employee.[20] Conversely, if the parents began IDEA administrative proceedings, that would indicate that the gravamen of the complaint was denial of free, appropriate public education, and hence subject to exhaustion.[21] The Court explicitly reserved the question whether § 1415(*l*) requires exhaustion when the complaint alleging a violation of the ADA or another law concerns the denial of free, appropriate public education, but, following the language of § 1415(*l*), the "civil action under such laws [is] seeking relief" not available under this subchapter," such as compensatory damages other than tuition reimbursement.[22] In a concurrence in part and in the judgment by Justice Alito, he and Justice Thomas stressed the overlaps among the laws governing education of children with

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17. *See Fry*, 137 S.Ct. at 750.

18. 137 U.S. at 754 ("§ 1415(*l*)'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education.").

19. *Id*. at 755.

20. *Id*. at 756.

21. *Id*. at 757.

22. *Id*. at 752 n.4.

disabilities and questioned the usefulness of the clues the majority identified.[23]

Endrew F. was brought by the parents of a child with autism who felt that the program Drew was offered was inadequate and did not satisfy the obligation to provide free, appropriate public education.[24] Drew displayed significant behavioral challenges in school, screaming, climbing over furniture and other students, showing irrational fears, and occasionally running away; his parents believed that his educational progress had stalled, yet the school proposed an educational program for his fifth grade year that carried over similar objectives and goals from previous years.[25] They contested the program in IDEA administrative proceedings and enrolled Drew in a private program, which developed a behavioral intervention plan for him and made his academic goals more demanding.[26] In a matter of months, his behavior improved and he made academic progress he had not been able to achieve before.[27] The public school proposed another revised program, which the parents contested in IDEA administrative proceedings.[28] Ultimately, the court of appeals ruled that the program offered by the public school offered free, appropriate public education, applying a standard that "a child's IEP [individualized education program] is adequate as long as it is calculated to confer an 'educational benefit [that is] merely . . . more than de minimis.'"[29]

The Supreme Court vacated and remanded.[30] In a unanimous opinion by Chief Justice Roberts, the Court noted that the *Rowley* decision did not establish a single test for the adequacy of educational programs for children with disabilities, but said it imposed "a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress

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23. *Id*. at 759 (Alito, J., concurring in part and concurring in judgment).
24. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S.Ct. 988, 997 (2017).
25. *Id.* at 996.
26. *Id*. at 996–97.
27. *Id*. at 997.
28. *Id.*
29. *Id*. (quoting Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1338 (10th Cir. 2015), *vacated and remanded*, 137 S.Ct. 988 (2017)).
30. *Id.* at 993.

appropriate in light of the child's circumstances."[31] Following *Rowley*, the Court said that for children who are fully integrated in regular classrooms, their educational programs typically should enable them to achieve passing marks and advance from grade to grade, although not every such child who advances from grade to grade necessarily receives appropriate education.[32] But whether fully integrated or not, each child needs to have an educational program that is "appropriately ambitious" in light of the child's circumstances, something "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit."[33] At the same time, the Court reaffirmed *Rowley*'s rejection of a standard that the child must be offered an opportunity to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to that afforded children without disabilities, and it noted the importance of deferring to the expertise and judgment of school authorities.[34]

This special issue of the *Journal of Law and Education* scrutinizes both decisions, drawing on the expertise of writers with deep experience on issues of special education law and related legal topics.

Ruth Colker discusses the *Fry* case, arguing that the decision may effectively overturn *Rowley* on its facts: that under *Fry*, a student with Amy Rowley's degree of hearing impairment could obtain sign language interpretation services by suing under the ADA or Section 504. *Fry* thus has special importance because it facilitates obtaining communication services without exhausting IDEA administrative remedies. Professor Colker suggests that parents may request services or accommodations that could be required in non-educational contexts and sue under Section 504 if the services are denied, without ever invoking the IDEA, much less using its due process hearing procedure. She notes that the ADA effective communication regulation requires public entities, including public schools, to ensure that communications with people with disabilities are as effective as communications with people who do not have disabilities, and that obligation applies not only to

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31. *Id*. at 998.
32. *Id*. at 1000 & n.2.
33. *Id*. at 1000.
34. *Id*. at 1001–02.

program applicants or participants (students, for example) but also to members of the general public (such as adult visitors to a school).[35] Under the regulation, sign language interpreters may be required when the information exchanged is complex or the session is for any lengthy time.[36] The choice of the individual as to the means of communication is to be given primary consideration in supplying auxiliary communication aids and services.[37] A parent in the position of the Rowley family may thus be able to bring a claim similar to those in the Communication Access Realtime Translation (CART) litigation in California, only seeking an interpreter rather than CART, and the parent would be able to make the claim directly in court.

Professor Colker's understanding meshes with other interpretations of the interaction of the IDEA and Section 504-ADA Title II. Shortly after passage of the Handicapped Children's Protection Act, more than one commentator declared that the Act restored the availability of claims under the Section 504 free, appropriate public education regulation,[38] the language that the lower courts in *Rowley* borrowed in construing the law that is now IDEA so as to support Amy's right to a sign language interpreter:[39] "[T]he provision of an appropriate education is the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . . ."[40] Plaintiffs have generally been

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35. 28 C.F.R. § 35.160(a)(1) (2017).

36. U.S. Dep't of Justice Civil Rights Div., Title II Technical Assistance Manual: Covering State and Local Government Programs and Services § II-7.1000 (2010), 28 C.F.R. § 35 App. A (2017).

37. 28 C.F.R. § 35.160(b)(2) (2017).

38. *See* Thomas F. Guernsey, *The Education for All Handicapped Children Act, 42 U.S.C. § 1983, and Section 504 of the Rehabilitation Act of 1973: Statutory Interaction Following the Handicapped Children's Protection Act of 1986*, 68 NEB. L. REV. 564, 591–92 (1989); Mark C. Weber, The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes, 24 U.C. DAVIS L. REV. 349, 417–21 (1990).

39. *See* Rowley v. Bd. of Educ., 483 F. Supp. 528, 533–34 (S.D.N.Y.) (quoting Section 504 appropriate education regulation and applying standard that child be given opportunity to achieve full potential commensurate with opportunity given children without disabilities), *aff'd*, 632 F.2d 945, 948 (2d Cir. 1980) ("[W]e are satisfied that the court meticulously applied precisely the standard prescribed by Congress."), *rev'd*, 458 U.S. 176 (1982).

40. 34 C.F.R. § 104.33(b)(1) (2017).

unsuccessful relying on this language in Section 504 claims[41] because of the subsection of the regulation that immediately follows: "Implementation of an Individualized Education Program developed in accordance with the [IDEA] is one means of meeting the standard established in . . . this section."[42]

Reliance on that provision has always been dubious, however, for it is illogical to have that language mean that compliance with the *Rowley* standard necessarily constitutes compliance with the standard of meeting needs as adequately as those of others are met. *Rowley*, after all, rejected that interpretation of appropriate education in applying the law that is now the IDEA.[43] A far more logical reading of the second subsection is that the IEP may be a means of meeting the standard in the sense of a mechanism or device for delivering services that comply with the Section 504 standard.[44] Reliance on the ADA communications regulation avoids whatever problems there might be with relying on the Section 504 appropriate education regulation.

There is yet another basis on which one might conclude that *Rowley* would come out differently if it were rerun today. The 1997 IDEA Amendments included the requirement that in development of the IEP:

> (B) Consideration of Special Factors
> The IEP Team shall—
> . . . .
> (iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and

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41. *See* Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 611, 626 & n.80 (2012) (collecting cases).

42. 34 C.F.R. § 104.33(b)(2) (2017).

43. *Rowley*, 458 U.S. at 186 & n.8.

44. *See* Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases,* 16 TEX. J. ON C.L. & C.R. 1 (2010) (developing argument at greater length).

communication mode . . . .[45]

The emphasis on the individual child's language and communication mode places a much more positive light on a request for an interpreter, which would be the only means to achieve "direct instruction in the child's language and communication mode."[46] Thus a case with the same facts as *Rowley* would likely reach a different result today on any of a number of grounds. Neither *Fry* nor *Endrew F.* said that subsequent legislative developments have required that the case be overruled, however. That state of affairs is unsurprising given the Court's longstanding position that Congress is presumed to be aware of Supreme Court interpretations of statutes and that new legislation will not be read to alter an interpretation unless Congress makes a clear expression of its intent to do so.[47] But one way or another, *Rowley* as a direct precedent is eroding away.[48]

Robert Garda also discusses *Fry*, analyzing the exhaustion issue and, like Professor Colker, he draws some larger conclusions about the operation of Section 504 and the ADA in the public schools. He points out that students who are disabled so as to be eligible for services under

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45. Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105–17, § 101, 111 Stat. 37 (1997) (codified at 20 U.S.C. § 1414(d)(B)(3)(iv) (2012)).

46. *Id.* It should also be remembered that *Rowley* was decided very early in the history of legally mandated special education. In his 1996 study of the case's background, R.C. Smith recounted his interview with the principal at Amy Rowley's school: "And if the case had not come up when it did, but did come up now, I asked, could it come out differently? 'I really believe it would . . . . You've got to appreciate the fact that we're talking 1975 here, when [Public Law] 94-142 was enacted.'" R.C. SMITH, A CASE ABOUT AMY 180 (1996). It is somewhat unclear whether the principal was talking about the case in the sense of the events and what the school would voluntarily do or the case in the sense of the court case. When the Rowley family moved to New Jersey after the Supreme Court decision, Amy's new school provided an interpreter. Amy June Rowley, Rowley *Revisited: A Personal Narrative*, 37 J.L. & EDUC. 311, 327 (2008).

47. *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 240 (2009) ("Accordingly, absent a clear expression elsewhere in the Amendments of Congress' intent to repeal some portion of that provision or to abrogate our decisions in *Burlington* and *Carter*, we will continue to read § 1415(i)(2)(C)(iii) to authorize the relief respondent seeks.").

48. This is a point advanced in Weber, *supra* note 38, at 377–404, and though one might argue that it remains premature, it is supported by the reality that even in cases relying on the IDEA, courts have found that free, appropriate public education demands sign language interpretation or CART services in various circumstances. Strawn v. Mo. State Bd. of Educ., 210 F.3d 954, 958–59 (8th Cir. 2000) (sign language instruction); DeKalb Cty. Bd. of Educ. v. Manifold, No. 4:13–CV–901–VEH, 2015 WL 3752036, at *10 (N.D. Ala. June 16, 2015), *appeal dismissed*, No. 15-13197 (11th Cir. Aug. 14, 2015) (CART).

the IDEA are necessarily covered under Section 504 and the ADA,[49] but there remains a large class of children covered by Section 504 and the ADA but not the IDEA. He states that *Fry* "properly, and dramatically, liberalizes access to courts for students with disabilities." It does this by adopting "a rights-centered approach" that does not disadvantage children who qualify for coverage under the IDEA as well as under Section 504 and the ADA by imposing the exhaustion requirement on them but not their Section 504/ADA-only classmates in cases that are not over the alleged denial of free, appropriate public education. But he finds a weakness in the decision's failure to address the question whether exhaustion is required when the plaintiff alleges denial of appropriate education but, following the actual terms of the statute, the "civil action [is] seeking relief that is" not "also available under" the IDEA,[50] such as compensatory damages. He goes on to observe that by directing courts to look to the gravamen of the complaint and the specified clues about whether that gravamen is the denial of free, appropriate public education, lower courts may impose exhaustion in instances when the plaintiff does not explicitly allege the denial. He calls attention to the fact that in the *Fry* case itself, reliance on the Court's clue of the history of the proceedings misleads as to the complaint's gravamen.

Professor Garda's larger conclusion about the scope of Section 504 and the ADA in the public schools is that under *Fry*, compliance with the IDEA does not constitute compliance with Section 504 and the ADA. As noted above, there are courts that appear to accept that proposition but maintain nonetheless that compliance with the free, appropriate public education obligation of the IDEA constitutes

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49. 34 C.F.R. § 104.3(*l*)(2)(iii) (2017). Oddly, the Second Circuit seems unaware of the regulation. *See* B.C. v. Mount Vernon City Sch. Dist., 837 F.3d 152, 159–61 (2d Cir. 2016) (rejecting ADA and Section 504 disparate impact claim on ground that data relating to IDEA-eligible students could not be used to establish prima facie case respecting students covered under Section 504 and ADA, reasoning that children eligible under IDEA are not necessarily covered under Section 504 and ADA).

50. 20 U.S.C. § 1415(*l*) (2012). The text dictates no exhaustion in that situation, but one might imagine that the Court may be concerned that litigants could bypass administrative remedies simply by requesting damages rather than, or in addition to, other relief. Of course, courts should not ignore what Congress says simply because following the law places a burden on the courts that they would prefer to shift to administrative adjudicators.

compliance with the free, appropriate public education obligation of Section 504.[51] Professor Garda states that "reading between the lines makes it fairly clear that the Court believes the FAPE standards are identical," yet he acknowledges that some of the language of *Fry* indicates there is a difference, in particular the language about how Section 504 and the ADA require accommodations to allow people with disabilities to participate equally in public facilities and federally supported programs. *Endrew F.*, needless to say, makes this reading of the difference inescapable, because it interprets the appropriate education obligation of IDEA as something other than—apparently less than—what the parents contended, which is virtually identical to the language of the Section 504 appropriate education regulation: "special education and related services that . . . are designed to meet individual needs of handicapped persons *as adequately* as the needs of nonhandicapped persons are met."[52] It remains to be seen whether the Court will recognize the difference and countenance different results in IDEA cases and in those alleging violation of Section 504's meeting-needs-as-adequately standard.

Three other contributions to this special issue take on *Endrew F.*, asking what it means and what impact it will have on future cases. Terry Jean Seligmann makes two signal observations about *Endrew F.* First, the case uses multiple methods in interpreting the statutory language embodying the appropriate education obligation. Second, it reinforces the importance of the process by which parents may challenge the educational programs public schools offer children with disabilities, including the role of courts in evaluating the evidence that may justify deference to decisions of school authorities. The first point, concerning statutory construction, is surely correct, though one thing that is striking about the contrast between the opinions in *Rowley* and *Endrew F.* is that the *Rowley* opinion makes much more use of formal legislative history of the statute than *Endrew F.* does. In fact, Justice Rehnquist engages in a legislative history duel with Justice White, who, writing in dissent, marshals an even more impressive display of sources for a more

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51. *See supra* note 41 and accompanying text.

52. 34 C.F.R. § 104.33(b)(1)(i) (2017) (emphasis added); *see* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1,137 S.Ct. 988, 1001–02 (2017).

demanding interpretation of the appropriate education term.[53] Chief Justice Roberts may have felt less of a need to look back at the committee reports and congressional debates on the statute because he was preserving *Rowley*'s fundamental view of appropriate education, but it is also true that interpretation through legislative history faces more skepticism today than it did in 1982, *King v. Burwell*[54] and other recent cases that rely on legislative history notwithstanding.[55]

Professor Seligmann also notes that the Roberts opinion stresses that courts reviewing school authorities' decisions on children's education programs may require the school authorities to justify those decisions:

> By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. 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.[56]

Much has been made of the power that school authorities hold in the IDEA framework, even though the statute gives parents clear rights to participate in educational decisions and demand impartial review of school district actions.[57] Some decisions of the Supreme Court, notably

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53. *Compare* Bd. of Educ. v. Rowley, 458 U.S. 176, 191–200 (1982) (majority opinion), *with id*. at 213–18 (White, J., dissenting).

54. 135 S.Ct. 2480, 2496 (2015) (upholding regulation authorizing tax credits for purchases on insurance exchanges established by federal government even though statutory language refers to exchanges established by states).

55. The literature on statutory interpretation and the propriety of reliance on legislative history is massive. For a summary of approaches and sources, see Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1125–29 (2010) (collecting authorities and concluding that restrained use of legislative history is valuable). As that article notes, there has been a bit of a movement back to defending some use of legislative history in the past ten years or so. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3–4 (2006). A celebrated and spirited defense of using legislative history is Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). Professor Seligmann's work includes extensive discussion of legislative interpretation issues. *E.g.*, Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067 (2010); Terry Jean Seligmann, *Sliding Doors: The* Rowley *Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71 (2012).

56. *Endrew F.*, 137 S.Ct. at 1001–02.

57. *See, e.g.,* S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 544, 549–50 (2012); Cali Cope-Kasten,

the ones generally placing the burden of persuasion in contests over educational programs[58] and denying prevailing parents expert witness fees,[59] reinforce the power disparity. Courts' ability to overrule the authorities when the decisions lack sufficient support may help restore a balance.

Claire Raj and Emily Suski catalogue the difficulties that parents with few financial resources have in making sure that their children with disabilities obtain sufficient educational services, and they state that *Endrew F.*'s interpretation of appropriate education stressing the individualized nature of the inquiry and its emphasis on deference to school authorities will maintain or increase the difficulties. Their analysis parallels those of Professors Pasachoff[60] and Caruso,[61] who identified problems of information asymmetry; leveraging weaknesses due to the costs of obtaining advocacy and evidence; and transaction barriers, particularly time and the ability to purchase services and then sue for reimbursement.[62] Professors Raj and Suski state that individualization of the appropriate education duty makes the issue a difficult and potentially expensive one to litigate. The promise of attorneys' fees for prevailing parties is of no avail unless the parent can

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Note, Bidding Fair(Well) to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution, 42 J.L. & EDUC. 501, 530–32 (2013); Katherine McMurtrey, Comment, The IDEA and the Use of Mediation and Collaborative Dispute Resolution in Due Process Disputes, 2016 J. DISP. RESOL. 187, 192–95; Kelly D. Thomason, Note, The Costs of a "Free" Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation Under the IDEA, 57 DUKE L.J. 457, 470–74, 476–85 (2007).

58. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 66–67 (2005).

59. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 304 (2006).

60. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011).

61. Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J. L. & PUB. POL'Y 171, 178–79 (2005).

62. A concern is that good-faith criticism of aspects of the IDEA's protections of parents' and children's rights will be seized upon by those who would restrict or eliminate those protections, when that is not at all the intention of scholars pointing out weaknesses in the system and seeking to strengthen the protections. *Compare* SASHA PUDELSKI, AM. ASS'N SCH. ADM'RS, RETHINKING SPECIAL EDUCATION DUE PROCESS AM. ASS'N SCH. ADM'RS 2 (April 2013), http://www.aasa.org/uploadedfiles/policy_and_advocacy/public_policy_resources/special_education/aasarethinkingspecialeddueprocess.pdf, (proposing abolition of parents' due process rights), *with* Denise Goldberg, *A Letter to the School Superintendents Association*, EDUC. NEWS (May 10, 2013), https://www.educationviews.org/a-letter-to-the-school-superintendents-association-aasa/ (criticizing Pudelski's use of sources advocating improvements in IDEA procedures).

provide a fee up front subject to repayment or the attorney is willing to work on contingency. The remedy Professors Raj and Suski propose is not to rewrite *Endrew F.*, but rather to amend the IDEA to overturn two other cases, *Schaffer v. Weast*,[63] which places the burden of persuasion on parents in most special education cases, and *Arlington Central School District Board of Education v. Murphy*,[64] which reads the attorneys' fees provision in the IDEA to exclude expert witness fees as part of costs for parents who prevail.

In IDEA litigation as in other administrative and judicial proceedings, there is no doubt that it helps to have resources. The "haves" come out ahead.[65] In IDEA proceedings, however, the effect of wealth disparity among families is reduced by ripple effects when cases brought by better resourced parents expand children's legal rights to services, increase expectations for children with disabilities, and induce school districts to create new programs.[66] Class action and other group litigation may also confer benefits on children even if their parents cannot easily access the administrative or judicial systems on their own.[67] Compensatory education remedies exist for children whose families cannot afford to place them unilaterally and demand reimbursement.[68] What is remarkable is that even with the difficulties in mustering resources and the various thumbs on the scale (deference to school authorities, burdens of persuasion on parents, no expert fees), parents are on the whole fairly successful in due process proceedings. The success rate, if measurable but partial success is included, is around

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63. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 66–67 (2005).

64. *Murphy,* 548 U.S. at 304.

65. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). Ella Fitzgerald once said, "I have been rich, and I have been poor. Believe me baby, rich is better!" *Quotable Quote*, GOODREADS, https://www.goodreads.com/quotes/954768-i-have-been-rich-and-i-have-been-poor-believe (last visited Aug. 18, 2017).

66. *See* Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495, 505, 515–16 (2014).

67. *See* Mark C. Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471 (2014) (discussing prospects for class and other systemic litigation to establish rights under IDEA).

68. *See, e.g.*, L.M. v. Willingboro Twp. Sch. Dist., No. 16-3672, 2017 WL 2539388, at *8 (D.N.J. June 12, 2017) (requiring establishment of compensatory education trust fund of $265,160 for educational, rehabilitative, therapeutic, or recreational program provider of parents' choice).

40%—far better than, say, plaintiffs' odds of success in medical malpractice cases.[69]

Criticism has been directed at the individualized nature of the appropriate education duty at the heart of IDEA,[70] but there seems little doubt that the statute is written to put individualization front and center, and few authorities would want that to be different.[71] *Endrew F.* did provide an opening for the Court to soften the deference-to-the-schools language in *Rowley*, though one might question how realistic any such expectation was when Congress had not overruled the case over thirty-five years and the current Court seems at best ambivalent about holding states to obligations imposed by conditional federal funding programs.[72] As Professor Seligmann points out, the passage in *Endrew F.* stating that courts will require school districts to justify their decisions does something to mitigate deference.[73] Of course, none of these various observations undermines the case for congressional overruling of *Schaffer* and *Murphy* based on asymmetry of information and other resources between parents and school districts.[74]

Julie Waterstone analyzes the text of *Endrew F.*, pointing out that the language the Court used should help make the rulings of courts and other decision makers more uniform, and that the opinion provided some, but not all, of what advocates wanted. Specifically, the case "raise[d] the threshold for educational standards" and applied that threshold to a child with very significant needs. Yet, though it reinterpreted *Rowley* it did not adopt the position of the *Rowley* dissent

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69. *See* Weber, *supra* note 66, at 509–10 (analyzing studies).

70. *See* Karen Syma Czapanskiy, *Kids and Rules: Challenging Individualization in Special Education*, 45 J.L. & EDUC. 1 (2016).

71. *See, e.g.*, Jennifer Rosen Valverde, *An Indefensible Idea: Eliminating Individualization from the Individuals with Disabilities Education Act*, 46 J.L. & EDUC. 235 (2017); Mitchell L. Yell, *Individualization Is Special Education: A Response to Czapanskiy*, 46 J.L. & EDUC. 245 (2017).

72. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 630–43 (2012) (invalidating Medicaid expansion as exceeding congressional spending power).

73. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 137 S.Ct. 988, 1001–02 (2017).

74. Given the current congressional situation, prospects may be better at the state level. *See* A.M. v. N.Y.C. Dep't of Educ., 845 F.3d 523, 534 (2d Cir. 2017) (placing burden on public school system on issue of appropriateness of program offered, in accordance with New York law).

that a commensurate opportunity standard should prevail.[75] Professor Waterstone describes changes that *Endrew F.* will bring as changes of degree, rather than kind, but for any child whose educational goals have not been appropriately ambitious, that change of degree will matter.

Like Professors Raj and Suski, Professor Waterstone notes some of the challenges parents will have in realizing the promise of the newly clarified special education law for their children. She highlights the tension between the Court's extolling of parental involvement and its embrace of deference to the decisions of public school officials. Tellingly, however, the Court qualified its language about deference to school authorities by saying that hearing officers and courts "may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions."[76] Professor Waterstone observes that this twist on the usual formula may have a real impact.

Finally, the Waterstone article contains a few tips for practitioners, along with a few exhortations. Parents and their advocates should not be content with "some" educational benefit for a child with a disability: objectives must be challenging. All children who can meet grade level achievement standards should be given the tools to do so. Professor Waterstone sees *Endrew F.*'s emphasis on individualization as an opportunity for advocacy for programs that meet the specific needs of each individual child.

Maureen MacFarlane ties the *Fry* and *Endrew F.* decisions together, noting that both make the meaning of free, appropriate public education pivotal for courts handling special education cases. If the case is one complaining of the deprivation of free, appropriate public education, it will be subject to administrative exhaustion under *Fry*, and its free, appropriate public education claim will be interpreted under the standards newly clarified by *Endrew F.*

Those standards, of course, are anything but clear even after the unanimous *Endrew F.* opinion, but Ms. MacFarlane advances the discussion by investigating the dictionary definitions of "appropriate"

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75. *See Endrew F.*, 137 S.Ct. at 1001–2.
76. *Id.* at 1002.

and "education" and by collecting and analyzing lower court decisions.[77] As she notes, many courts have read free, appropriate public education broadly when requiring administrative exhaustion, and the use of the "clues" has not been uniform. In evaluating the merits of claims about adequacy of programs, many courts seem inclined to adhere to approaches they used before, though, as Ms. MacFarlane concludes, "Despite differing approaches, it appears that the courts are placing a strong emphasis on 'cross-checking' a school district's efforts to provide individualized services to a student against the student's actual progress." What may be of special interest to those looking at the interaction of the administrative process and judicial appeals are the cases that courts have returned to the administrative decision maker for a second look under the *Endrew F.* standard.[78]

Ms. MacFarlane predicts that the most challenging exhaustion cases will be those that concern physical restraints, bullying, and other behavior-related matters, and it is indeed difficult to apply Justice Kagan's clues in those situations. Are restraints and their misuse something that could arise in a non-school public facilities context or with respect to an adult? Yes, at least if one considers people in state institutions,[79] but the argument might nevertheless be made that restraints are part of behavioral intervention services within the meaning of free, appropriate public education.[80] Failure to prevent disability-

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77. The relevant section of the article is "Searching for Clarity." To this reader, that search evokes the plight of the addicted detective in the movie version of *Minority Report*, who picks through the slums of the future to find a drug called "clarity." MINORITY REPORT (Twentieth Century Fox 2002). I must admit that I have hunted for the drug myself. *See* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 40 (2006).

78. *E.g.*, M.C. *ex rel.* M.N. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir. 2017) (remanding issue of sufficiency of IEP goals for reconsideration in light of *Endrew F.*), *petition for cert. filed*, No. 17-325 (U.S. Aug. 28, 2017) ; C.D. *ex rel.* M.D. v. Natick Pub. Sch. Dist., No. CV 15-13617-FDS, 2017 WL 2483551 (D. Mass. Mar. 28, 2017) (remanding matter to hearing officer, noting that it was not certain whether *Endrew F.* changed "some educational benefit" standard used by First Circuit). Ultimately, the *C.D.* court agreed with the hearing officer that the standards were not materially different. 2017 WL 3122654, at *16 (D. Mass. July 21, 2017).

79. ADA Title II applies to public residential institutions and embodies a duty to avoid unnecessary restrictions on personal freedom. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597–603 (1999).

80 *See* Rohrbaugh v. Lincoln Intermediate Unit, No. 1:16-cv-2358, 2017 WL 2608869, at 4–6 (M.D. Pa. June 16, 2017).

related bullying gives rise to claims under the ADA in workplace and other non-school settings and with adults,[81] but courts have found schools' failure to address bullying to be a deprivation of free, appropriate public education.[82] Very careful examination of the gravamen of the complaint would seem to be in order.

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81. *E.g.*, Fox v. General Motors Corp., 247 F. 3d 169, 175–76 (4th Cir. 2001).

82. *E.g.*, Shore Reg'l High Sch. Bd. of Educ. v. P.S. *ex rel.* P.S., 381 F.3d 194, 200–02 (3d Cir. 2004) (Alito, J.).