Breaking News! On March 22, 2017, the Supreme Court in *Endrew v. Douglas County unanimously rejects the "de minimis" standard* for one that "is markedly more demanding than the 'merely more than de minimis' test applied by the 10th Circuit." In his opinion, Chief Justice Roberts says "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."

On Wednesday, Jan. 11, 2017 - Oral Argument was held before the Supreme Court
Pete and Pam Wright were in the audience

Educational Benefit: "Merely More Than *De Minimis*" or "Meaningful"? Supreme Court Revisits Requirements in *Endrew F. v. Douglas Co. Sch. Dist. RE-1*

by Peter Wright, Esq. and Pamela Wright, MA, MSW

A 2015 ruling from the U.S. Court of Appeals for the Tenth Circuit widened the split among circuits about the level of educational benefit school districts must provide to children with disabilities. The question presented to the Supreme Court is whether the "educational benefit" provided by a school district must be "merely more than *de minimis*" or "*meaningful*" to satisfy the requirements for a free appropriate public education (FAPE).

Note to the Reader: Links to the decisions, briefs and pleadings referenced in this article are at the end of the monograph.

Background

Endrew F. (Drew) is a child with attention deficit/hyperactivity disorder and autism. His disabilities affect his cognitive functioning, language and reading skills, and social abilities, including his ability to communicate his emotions and needs.

Drew attended public school in Douglas County, Colorado from preschool through fourth grade. He had an Individualized Education Program (IEP) and received special education services.

In 2010, Drew's parents concluded that their child did not make meaningful academic progress in fourth grade. His behavior problems worsened with head banging, taking off his clothes and running away from school. Despite the escalating behavior problems that impeded his learning, the school failed to develop and implement an appropriate behavioral intervention plan (BIP).

The parents rejected the IEP proposed for fifth grade and enrolled their child in a private school that specializes in educating children with autism.

In 2012, Drew's parents filed a due process complaint with the Colorado Department of Education pursuant to 20 U.S.C. §1412(a)(10)(C) (see page 76-77 in *Wrightslaw: Special Education Law, 2nd Edition*). The parents asserted that Douglas County did not provide their son with a free appropriate public education and requested reimbursement for Drew's private school tuition.

After a three-day due process hearing, the hearing officer held that Drew made "some academic progress" in the public school program – and that the district only needed to develop and implement an IEP that provided "***some*** educational benefit" to comply with the IDEA. (emphasis added).

Drew's parents appealed to the U.S. District Court. That court upheld the hearing officer's finding that the IDEA requires school districts to provide only "some educational benefit." The court held that Drew made "at the least, minimal progress" in the public school program and that this is all the law requires.

Drew's parents appealed to the United States Court of Appeals for the Tenth Circuit. The parents argued that the hearing officer and district court erred in concluding that the IEP was substantively adequate because

(1) Drew did not make measurable progress on the goals set in his past IEPs, and
(2) the IEP did not address Drew's escalating behavior problems.

The Tenth Circuit affirmed the decisions of the hearing officer and the district court.

That court held that IDEA requires "some educational benefit" that "must merely be more than *de minimis*" and that under this minimal standard, the IEP developed for Drew's fifth grade year was adequate.

Petition for Certiorari

In December 2015, Drew's parents filed a Petition for a Writ of Certiorari and asked the U.S. Supreme Court to resolve the split among circuits on the issue of educational benefit.

In their Petition, the parents described conflicting rulings from several circuits about the level of educational benefit required. The parents claimed that the intent of the IDEA is to provide a meaningful education, not "just-above-trivial" benefit:

> "Some courts, including the Tenth Circuit below, hold that an IEP satisfies the (IDEA) if it provides a child with a just-above-trivial educational benefit, while others hold that the act requires a heightened educational benefit ..."

Solicitor General Advised Supreme Court

The U.S. Supreme Court asked the Solicitor General to file a brief about the views of the United States on how much educational benefit schools must provide to satisfy the requirements of the IDEA.

On August 18, 2016, the Solicitor General filed a brief as Amicus Curiae and urged the Supreme Court to grant the parent's Petition and decide this issue. The question presented is "whether the 'educational benefit' provided by a school district must be 'merely more than *de minimis*' to satisfy the FAPE requirement" as established in the U.S. Supreme Court decision in *Board of Education of the Hendrick Hudson Central School District v. Amy Rowley*, 458 U. S. 176 (1982).

> "The Tenth Circuit . . . stated that *Rowley* merely requires 'some educational benefit.' The court further explained that under its longstanding interpretation of *Rowley*, 'the educational benefit mandated by IDEA must *merely be more than de minimis*'." Id.

> "This Court should grant certiorari and overturn the Tenth Circuit's erroneous holding that States must provide children with disabilities educational benefits that are 'merely * * * more than *de minimis*' in order to comply with the IDEA. That interpretation of the IDEA—which is shared by at least five other courts of appeals—directly conflicts with the published decisions of the Third and Sixth Circuits, both of which have rejected the 'more than *de minimis*' test in favor of a more robust standard."

> "The Tenth Circuit's approach is not consistent with the text, structure, or purpose of the IDEA . . . and it has the effect of depriving children with disabilities of the benefits Congress has granted them by law."

In the amicus brief, the Solicitor General advised the Supreme Court:

> "Resolving the conflict among the circuits will ensure that millions of children with disabilities receive a consistent level of education, while providing parents and educators much-needed guidance regarding their rights and obligations."

Board of Education v. Amy Rowley

In 1982, the Supreme Court defined "free appropriate public education (FAPE)" in their first special education decision, *Board of Education of the Hendrick Hudson Central School District v. Amy Rowley*, 458 U. S. 176 (1982).

When Amy's case began, she was a first grader who was also deaf. Before Amy entered first grade, her parents asked the school to provide her with a sign language interpreter. Although she could lip-read, her parents asserted that an interpreter would enhance her ability to learn.

As the U.S. District Court noted (*Amy Rowley v. Bd. of Ed. of Hendrick Hudson Cent. SD*, 483 F. Supp. 528, 536 (S.D.N.Y. 1980)), Amy Rowley's standardized test scores were at the 70th to 80th percentile ranks when compared to her peer group. She scored two to four grade levels above her peers on this testing.

The U.S. Supreme Court found that Amy was "a remarkably well-adjusted child" who performed "better than the average child in her class and is advancing easily from grade to grade." Although Amy was not performing as well as she would if not for her handicap, the Court concluded that the law did not require public schools to furnish "every special service necessary to maximize each handicapped child's potential." The Court held that Amy did not need a full-time sign language interpreter at that time.

In *Rowley*, the Supreme Court attempted to clarify the requirements for a "free appropriate public education" (FAPE) and "educational benefit":

> "A 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction ... such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction ... the child is receiving a 'free appropriate public education' as defined by the Act."

The Court stated that the child's individualized educational program (IEP) should be reasonably calculated to enable the child to receive educational benefit.

The Court held that Congress intended school districts to provide services that conferred "some educational benefit" upon students with disabilities because:

> "It would do little good for Congress to spend millions of dollars in providing access to public education only to have the handicapped child receive no benefit from that education."

But ...

> "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."

In Rowley, the Court held that IEPs must confer "an educational benefit on the child:

"Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., public schools must provide children with disabilities a 'free appropriate public education.' The key mechanism by which schools meet this requirement is the individualized education program, or IEP. Each IEP must be reasonably calculated to confer an educational benefit on the child." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

But the Court concluded that it did not have to establish a test for educational benefits at that time because. . .

> ". . . in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to the situation."

What Level of Educational Benefit is Required?

The Solicitor General noted, "Since the Court first described this requirement in *Rowley* over thirty years ago, federal courts of appeals have become intractably divided over the level of educational benefit the Act demands. Some courts, including the Tenth Circuit . . . hold that an IEP satisfies the Act if it provides a child with a just-above-trivial educational benefit, while others hold that the Act requires a heightened educational benefit."

Resolving the Split Among Circuits

After the Supreme Court's 1982 decision in *Rowley*, courts continued to wrestle with the requirements for a "free appropriate education" and "educational benefit." Some courts held that schools only need to provide "some educational benefit" to meet the standard for a free appropriate education (FAPE). Others held that a child must receive "meaningful educational benefit" to receive a FAPE.

After the Supreme Court granted certiorari in *Endrew F.*, numerous organizations and advocacy groups submitted amicus briefs in support of the child. These groups include Advocates for Children of New York, et al., 118 Members of Congress, Former Officials of the U.S. Department of Education, National Disability Rights Network, et al., the National Education Association, the Council of Parent Attorneys and Advocates, et al., the Coalition of Texans with Disabilities, et al., Delaware, et al., and the National Center for Special Education in Charter Schools, et al.

The National Association of State Directors of Special Education submitted a brief "in support of neither party."

The Court will revisit the issue of "educational benefit" as it relates to the requirements for providing a free appropriate public education.

Will the Court modify their earlier definition of FAPE as set forth in *Rowley?* The questions asked during oral argument may provide a hint.

On Wednesday, January 11, 2017, the Supreme Court heard oral argument in *Endrew F. v. Douglas County School District RE-1*.

Pete and Pam attended and are pictured on the Court steps with other COPAA members.

Link to the transcipt of oral argument.

In-depth analysis of oral argument from the SCOTUSblog.

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Opinions

1980 - *Amy Rowley v. Bd. of Ed. of Hendrick Hudson Cent. SD*, 483 F. Supp. 528, 536 (S.D.N.Y. 1980)
https://scholar.google.com/scholar_case?case=3543672433238340786

1982 - *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982)
https://www.wrightslaw.com/law/caselaw/ussupct.rowley.htm

2014 - *Endrew F., by and through his parents and next friends, Joseph F., and Jennifer F. v. Douglas County School District RE-1*, U.S. District Court (D. Colorado 2014)
https://scholar.google.com/scholar_case?case=17799416685246649265
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2015 - *Endrew F. by and through his parents and next friends, Joseph F., and Jennifer F. v. Douglas County School District RE-1*, 798 F.3d 1329 (10th Cir. 2015)
https://www.wrightslaw.com/law/caselaw/2015/10th.endrew.douglas.benefit.fape.pdf

Pleadings

12/22/15 – Petition for a Writ of Certiorari by Endrew F.
https://www.wrightslaw.com/law/pleadings/endrew.douglas.petition.cert.2015.12.pdf

04/15/16 – Brief of respondent Douglas County School District RE-1 in Opposition to Petition for Writ of Certiorari.
http://www.scotusblog.com/wp-content/uploads/2016/05/15-827-Opposition-Brief.pdf

05/02/16 – Reply brief of Petitioner Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/05/15-827.Reply-Brief.pdf

08/18/16 – Amicus curiae brief of the United States in support of Petitioner, Endrew F.
https://www.wrightslaw.com/law/scotus/endrew/2016.0818.amicus.brief.us.endrew.pdf

09/06/16 – Supplemental brief of Respondent Douglas County School District RE-1.
http://www.scotusblog.com/wp-content/uploads/2016/09/15-827-supplemental-respondent-brief.pdf

11/14/16 – Brief of Petitioner Endrew F.
https://www.wrightslaw.com/law/scotus/endrew/2016.1114.petitioner.merits.brief.pdf

Amicus Briefs

01/25/16 – Brief amici curiae of Autism Speaks and The Public Interest Law Center in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/05/15-827-Amicus-Brief-Autism-Speaks.pdf

11/15/16 – Solicitor General's Amicus Brief of the US in support of Petitioner, Endrew F.
https://www.wrightslaw.com/law/scotus/endrew/2016.1115.us.amicus.petitioner.pdf

11/17/16 – Brief amicus curiae of National Association of State Directors of Special Education in support of neither party.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-neither-party-NASDSE.pdf

11/21/16 – Brief of 118 Members of Congress as Amici Curiae in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-118-members-of-congress.pdf

11/21/16 – Brief amici curiae of Advocates for Children of New York, et al. in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-Advocates-for-Children-of-New-York-et-al.pdf

11/21/16 – Brief amici curiae of Former Officials of the U.S. Department of Education in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-FormerU.S.DeptofEduc.Officials.pdf

11/21/16 –Brief amici curiae of National Disability Rights Network, et al. in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-NDRN.pdf

11/21/16 - Brief amicus curiae of The National Education Association,in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-National-Education-

Association.pdf

11/21/16 - Brief amici curiae of The Council of Parent Attorneys and Advocates, et al., in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-Council_of_Parent_Attorneys_and_Advocates.pdf

11/21/16 - Brief amici curiae of The Coalition of Texans with Disabilities, et al., in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-The-Coalition-of-Texans.pdf

11/21/16 - Brief amici curiae of Delaware, et al. in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-delaware.pdf

11/21/16 – Brief amici curiae of the National Center for Special Education in Charter Schools, et al. in support of Petitioner, Endrew F.
http://www.scotusblog.com/wp-content/uploads/2016/11/15-827-pet-amicus-NCSECS.pdf

12/05/16 – Scheduled for oral argument on **Wednesday, Jan 11, 2017**.

Articles

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The Beacon: Journal of Special Education Law and Practice. (Fall 2003)
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Weber, Mark C. (2016) New Developments in Free, Appropriate Public Education for Students with Disabilities: Policy and Practice Implications. *CEPI Education Law Newsletter*, Vol 14-8.
http://www.cepi.vcu.edu/media/university-relations/cepi/pdfs/newsletters/2015-16/2016-4EdLawNewsletter-FAPE-Weber.pdf

Weber, Mark C. (2011) A New Look at Section 504 and the ADA in Special Education Casesew Developments. Children's Rights Litigation, American Bar Association.
http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2011-section-504-ada-idea.html

Wright, Peter W.D. and Pamela Darr Wright. (2007) Rebutting *Rowley*? Independence and Self-Sufficiency Are New Standards for FAPE.
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