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Payton Aldridge

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Cover Page Footnote

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COMMENT

ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT: HOW THE GROUNDBREAKING SUPREME COURT CASE HAS IMPACTED MARYLAND SPECIAL EDUCATION LAW

By: Payton Aldridge*

INTRODUCTION

For decades, families of children with disabilities have had to fight for their children to receive a free and appropriate education. While the 2017 Supreme Court case *Endrew F.* has changed the standard, "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," many Maryland families and individuals still question whether or not this decision will actually improve the education of children with disabilities.[1] However, while the rule is still considered very malleable, it is the stepping stone to the next era of special education rights. As further progressive changes are made, the *Endrew F.* standard will have a meaningful and positive effect on Maryland families.

Part II of this comment will discuss the history of special education law and the requirements under federal and Maryland law. Part III will examine the Supreme Court case *Endrew F.* and how the standard set has impacted special education law in Maryland. Next, it will discuss the debate over the value of *Endrew F.*, and the main issues that still exist in special education law. Finally, Part IV will suggest improvements to the special education system for Maryland families, based on the standard set out by *Endrew F.*

I. HISTORY & SUMMARY OF SPECIAL EDUCATION LAW

Brown v. Board of Education is a case that is well known but not necessarily associated with special education.[2] Nevertheless, this case was crucial to special education jurisprudence because it established that

* Payton Aldridge: J.D. Candidate, 2020, University of Baltimore School of Law. Special thanks to the *University of Baltimore Law Forum* staff for their editorial assistance. I would also like to thank my faculty advisor, Donald Stone, for his continued support and feedback. I owe much gratitude to Selene Almazan, the incredible attorneys at Project HEAL (Health, Education, Advocacy, and Law), and Alyssa Fieo for their crucial perspectives and critiques, and for showing me the importance of special education advocacy. Finally, many thanks to my family and friends for their unwavering encouragement throughout my law school career.

[1] *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017).

[2] *Brown v. Bd. Of Educ.,* 347 U.S. 483 (1954).

educational opportunities must be equal for all students, which also prohibits separating or excluding groups of students.[3] This laid the foundation for the Court to address the inequality of education for children with disabilities. The following groundbreaking cases came in 1972 with *Pennsylvania Association of Retarded Citizens (PARC) v. Pennsylvania*, and *Mills v. District of Columbia Board of Education.*[4] Those cases, for the first time, established that mentally handicapped individuals had a right to an education.[5] This ruling was pivotal for individuals with disabilities and their families. Prior to these cases, individuals with disabilities were often institutionalized or given little to no form of education.[6] But, while these cases showed great progress, the question remained – how will this right to an education be guaranteed?

A. The Individuals with Disabilities Education Act

The federal government found that the most efficient way to ensure the right to an education for individuals with disabilities was through federal funding.[7] Thus, states could put the funds to use in the ways they saw fit.[8] The proposal which would become the *Individuals with Disabilities Education Act* (IDEA) was designed to reserve federal funds for each state to dedicate to special education services.[9] Additionally, the Act stated in plain language that individuals with disabilities had a right to a free and appropriate education ("FAPE").[10] FAPE is accomplished by giving each child with a disability an Individual Education Program ("IEP"), that details what the child needs in terms of services and aides, as well as the yearly goals they are to meet.[11]

The IDEA began as the Educational for All Handicapped Children Act ("EHA") in 1970.[12] The law required that all public schools were to provide children with disabilities between the ages of three and twenty-one with services and programs that gave them equal access to education.[13] The EHA

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[3] *Id.*
[4] *Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279, 307 (E.D. Pa. 1972); *see also Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).
[5] *Pa. Ass'n for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279, 307 (E.D. Pa. 1972); *see also Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).
[6] LAURA F. ROTHSTEIN & ANN C. MCGINLEY, DISABILITY LAW: CASES, MATERIALS, PROBLEMS, 515 (5th ed. 2010).
[7] *Id.*
[8] *Id.*
[9] 20 U.S.C.A. § 1400 (West 2004).
[10] *Id.*
[11] 34 C.F.R. § 300.17 (2006).
[12] Rothstein, *supra* note 6, at 515.
[13] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612, 89 Stat 773, 780 (1975).

was also the first time that the federal government reserved funding specifically for special education services.[14] The main debate in Congress was over the financial burden the EHA would create for state and local school systems.[15] Along with providing federal funding, the EHA defined what is considered a FAPE for children with disabilities, what disabilities would be eligible for services, and how students would be assessed and evaluated.[16] In 1990, the Education for All Handicapped Children Act was renamed to the IDEA.[17] Over time, the IDEA made multiple modifications, in order to better protect students and address new issues that arose in special education.[18] These modifications included increased procedural safeguards; emphasis on minority students, effective transition plans for students in secondary education, and increased research on disabilities through the creation of the National Center for Special Education Research("NCSER").[19]

B. COMAR & Maryland Special Education Regulations

While each state is subject to the regulations of the IDEA, most states have also adopted their own legislation that addresses specific regulations, which may impose a higher standard on school systems.[20] The state of Maryland is bound by the *Code of Maryland Regulations* ("COMAR"), "Provision of a Free and Public Education to Students with Disabilities."[21] This act heavily mirrors the IDEA, but focuses on how the IDEA regulations can be specifically implemented in Maryland schools.[22] One of the most crucial

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[14] *Id.*

[15] Memorandum from Jim Cannon to the President, Enrolled Bill S. 6 - Education for All Handicapped Children Act of 1975 (Nov. 28, 1975) (on file with the Gerald R. Ford Presidential Library), https://www.fordlibrarymuseum.gov/library/document/0055/1669134.pdf.

[16] 20 U.S.C.A. § 1412 (West 2016). The disability categories eligible for special education services are: Autism Spectrum Disorder (ASD), Deaf-Blindness, Developmental Delay, 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. 34 C.F.R. § 300.8(c) (2017).

[17] Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 901, § 601(a), 104 Stat. 1103 (1990).

[18] *Id.*

[19] Rothstein, *supra* note 6, at 600-601; *see also* 20 U.S.C.A § 1400 (c)(10-14); *OSEP Programs and Projects*, OFFICE OF SPECIAL EDUC. PROGRAMS (OSEP), U.S. DEPT. OF EDUC.,(2019), https://www2.ed.gov/about/offices/list/osers/osep/programs.html#discretionary-grant.

[20] *See generally* Ellen A. Callegary & Wayne D. Steedman, Special Education: A Maryland Handbook (3rd ed. 2015).

[21] MD. CODE REGS. 13A.05.01.14. (2019).

[22] Callegary, *supra* note 20.

portions of COMAR sets out the duties and processes of the "IEP Team."[23] This is a group of individuals that includes the students' educators, the student (if appropriate), the student's parents or guardians, an IEP chair, as well as other professionals.[24] The role of the IEP Team is to meet to evaluate the student and their needs, and create an IEP that accurately reflects those needs.[25] The IEP should include the child's evaluations and functional performances, the accommodations and services the student requires, and the student's goals.[26]

Unlike the IDEA, COMAR defines a number of terms that are used heavily in special education, to define a student's progress as well as the school's duty to the student.[27] The first major term that was defined was "free and appropriate education." FAPE is used to determine whether or not the school has violated a student with a disability's right to an education.[28] According to COMAR, FAPE is established when special education and all related services are provided at the local school system's expense and direction, meet the Maryland State Department of Education's (MSDE) standards, and conform with the supports and services of the student's IEP.[29] A FAPE must be provided by the school system from preschool through secondary education.[30] The second major term defined was "least restrictive environment" ("LRE").[31] LRE aims to allow students with disabilities to be educated with their non-disabled peers whenever possible and as long as a child is still able to receive a free and appropriate education.[32] If it not possible to fulfill the student's IEP in this setting, then other options would be discussed by the IEP Team.[33] This could mean providing a child with "related services", such as speech or physical therapy sessions, a smaller classroom, or a one-to-one teaching aide.[34] If these options were unsuccessful, the IEP team could consider an alternative, non-public school placement.[35]

Additionally, IDEA requires that COMAR set guidelines for when the parent or guardian and the IEP team cannot come to an agreement.[36] The

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[23] MD. CODE REGS. 13A.05.01.07(A) (2019).
[24] *Id*.
[25] MD. CODE REGS. 13A.05.01.07(B) (2019).
[26] MD. CODE REGS. 13A.05.01.09(A)(1)(b) (2019).
[27] MD. CODE REGS. 13A.05.01 (2019).
[28] 20 U.S.C.A. § 1400 (West 2004).
[29] MD. CODE REGS. 13A.05.01.03(B)(27) (2019).
[30] MD. CODE REGS. 13A.05.01.03(B)(28) (2019).
[31] MD. CODE REGS. 13A.05.01.10 (2019).
[32] MD. CODE REGS. 13A.05.01.10©(1)(b) (2019).
[33] *Id.*
[34] MD. CODE REGS. 13A.05.01.03(B)(65) (2019).
[35] MD. CODE REGS. 13A.05.01.10(C)(1) (2019).
[36] MD. CODE REGS. 13A.05.01.15 (2019).

parent or guardian may request mediation over a dispute involving the student's IEP.[37] The mediation, however, is voluntary for both parties, and the local school system could decide not to attend the mediation.[38] Finally, the parent or guardian may file for due process.[39] In a due process case, both parties will argue their position to an Administrative Law judge and can be represented by an attorney at their discretion.[40] The administrative law judge will decide whether or not the student's rights were violated.[41] Due process case decisions are based on the preponderance of the evidence.[42]

Due process cases can revolve around a number of issues. One of the primary issues occurs when a parent requests the local school system to reimburse them for the costs of a non-public educational program.[43] According to COMAR, if no public education program in the area can fulfill the student's IEP, then the local school system has the duty to pay to send the child to a non-public program.[44] However, as determined by *Sch. Committee of the Town of Burlington, MA v. Dept. of Education*, when a parent or guardian makes the decision to place a child in a non-public education program without the consent of their local school system, they do so "at their own financial risk."[45] This is referred to as a unilateral placement.[46] If the administrative law judge determines that the school system is not responsible for the reimbursement, the parent or guardian must pay the tuition.[47] If the administrative law judge agrees with the parent, the school system must pay the tuition, even if the student never received special education services beforehand.[48] However, the school system is also not permitted to unilaterally change the placement of a student without the parent's knowledge or input.[49] Many due process hearings also involve disputes over the aids and services the school system must provide, or disputes over IEP implementation or revisions.[50] In *Cedar Rapids Community School District*, a school system denied a request to provide a medical nursing aid for a student, without which

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[37] MD. CODE REGS. 13A.05.01.15(B) (2019).
[38] *Id.*
[39] MD. CODE REGS. 13A.05.01.15(C)(1)-(3) (2019).
[40] MD. CODE REGS. 13A.05.01.15(C)(12) (2019).
[41] MD. CODE REGS. 13A.05.01.15 (2019).
[42] *See Schaffer v. Weast*, 546 U.S. 49 (2005).
[43] *Id*.
[44] MD. CODE REGS**.** 13A.05.01.16(A)(1)-(2) (2019).
[45] *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 374 (1985).
[46] MD. CODE REGS**.** 13A.05.01.16(C) (2019).
[47] *Id.*
[48] *Forest Grove Sch. Dist. v. T.A*., 638 F.3d 1234, 1237 (9th Cir. 2011).
[49] *See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Distr. v. Rowley*, 458 U.S. 176 (1982).
[50] *Cedar Rapids Cmty. Sch. Dist. v. Garret F*., 526 U.S. 66, 68-69 (1999).

the student would be unable to remain in public school.[51] The Supreme Court agreed with the parents, stating that a school system is required to provide the related services to a student that are necessary for them to receive a free appropriate public education.[52] The implementation of an IEP or IEP revision are also common issues in due process hearings.

Finally, LRE is also a key issue in due process hearings.[53] In *Kingwood Township*, the court found that LRE is considered the educational setting that provides, whenever possible, for a child with disabilities to be educated with their non-disabled peers.[54]

C. The Impact of *Rowley*

Board of Education of the Hendrick Hudson Central School District v. Rowley was a 1982 case that impacted special education law for decades.[55] It was the first time the Supreme Court ever addressed a possible denial of FAPE.[56] *Rowley* set a precedent that, to some families and professionals, appeared to be a low standard.[57] In *Rowley*, the parents of Amy Rowley, a deaf first grade student, sued the school district of Hendrick Hudson Central in the state of New York, for Rowley to receive a sign language interpreter in the classroom.[58] The school system argued that this service was not necessary for Rowley's academic success, as she was grade levels ahead of her classmates. Rowley's parents argued that, even though she was succeeding academically, she was not reaching her full potential.[59] However, the courts noted that it is not required that students with disabilities reach their "full potential."[60] The law only requires them to receive "some educational benefit," which became the new legal standard for special education.[61]

Since Rowley, many different districts have interpreted the educational benefit standard slightly differently. The main interpretation for educational

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[51] *Id.* at 70.
[52] *Id.* at 79.
[53] *Fact Sheet: Resolving Special Educ. Disagreements,* EDUC. LAW CTR. (Aug. 2019), https://www.elc-pa.org/wp-content/uploads/2019/08/Resolving-Special-Ed-Disagreements-Rev-Aug-2019.pdf.
[54] *T.R. v. Kingwood T*wp. Bd. Of Educ., 205 F.3d 572, 578 (3rd Cir. 2000).
[55] *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982).
[56] *Id.* at 187.
[57] Julie F. Mead & Mark A. Paige, *Bd. of Ed. of Hendrick Duson v. Rowley: An Examination of Its Precedential Impact*, 37 J.L. & EDUC. 329 (2008).
[58] *Rowley*, 458 U.S. at 184.
[59] *Id.* at 185.
[60] *Id.* at 185-186.
[61] *Id.* at 200.

benefit is that it must be "merely more than *de minimis*."[62] This implies that as long as a student is receiving some educational benefit, it is satisfactory, and the IEP was reasonably calculated.[63] Few districts have interpreted it to mean a "meaningful benefit."[64] However, this standard left many disability rights organizations and families feeling shorthanded.[65] This would be used for decades as a tool for school systems to deny services to students with disabilities, as long as they were performing at grade level, or showing moderate progress.[66] It would be over three decades before the Supreme Court would address special education law again, leaving three decades of students with disabilities and their families feeling as if they have been put on hold.[67]

II: ISSUE: WHAT IMPACT HAS *ENDREW F.* HAD ON MARYLAND SPECIAL EDUCATION LAW, AND IS IT SUFFICIENT?

Endrew F. v. Douglas County School District is the second and most recent time that the Supreme Court has addressed special education law.[68] The case had an unparalleled and groundbreaking effect on students with disabilities, and altered the standard for educational benefit in a way that surpassed the *Rowley* standard.[69] However, while most can agree that the standard has had a symbolic impact on special education, there is still a significant debate over whether *Endrew F.* has actually led to a change in how special education cases are treated in the court system, and within the school systems.[70] That debate also exists in the state of Maryland, where special education is a key issue.[71] When analyzing the due process data since the decision on *Endrew F.* was published, there has been an objective impact on Maryland special education cases.[72] Since *Endrew F.,* more cases are

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[62] Peter Wright & Pamela Wright, *Educational Benefit: "Merely More Than De Minimis" or "Meaningful"?* , WRIGHTSLAW (Dec. 30, 2016), https://www.wrightslaw.com/law/art/endrew.douglas.benefit.fape.htm.
[63] *Id.*
[64] *Id.*
[65] Gary L. Monserud, *THE QUEST FOR A MEANINGFUL MANDATE FOR THE EDUCATION OF CHILDREN WITH DISABILITIES*, 18 ST. JOHN'S J. CIV. RTS. AND ECON. DEV. 675, 707-08 (2004).
[66] *Rowley*, 458 U.S. at 192.
[67] Julie Waterstone, *Endrew F.: Symbolism v. Reality*, 46 J.L. & Educ. 527, 527 (2017); *see also* Monserud, *supra* note 65, at 707-08.
[68] Wright, *supra* note 62.
[69] Wright, *supra* note 62.
[70] Wright, *supra* note 62.
[71] See *infra* Appendix Figure 1-2.
[72] See *infra* Appendix Figure 1-2.

being decided in the parents' favor.[73] However, the subjective standard has left all parties in a state of confusion. Courts are still struggling with continuity in interpreting and applying the *Endrew F.* standard. Likewise, school systems are struggling to determine what the new standard requires of them within the classroom and at the IEP table (where the IEP team meets to discuss the student's progress). While the federal courts are making progress in interpreting *Endrew F.* further, more needs to be done in order to make sure the case doesn't just have a symbolic effect, but a lasting, positive effect for children with disabilities.

A. *Endrew F.*, in general – "The IDEA Demands More"

Endrew F. v. Douglas County School District revolved around a child in a Colorado school system, with Autism Spectrum Disorder and ADHD.[74] In 2015, Endrew's parents saw his IEP for his fifth grade year as inadequate, and when the school system refused to alter it further, the parents placed Endrew in a private school.[75] Endrew's parents then sought reimbursement for the private school tuition by Douglas County School District.[76] They claimed that since the school did not provide Endrew with a FAPE, they were entitled to this reimbursement.[77] According to the IDEA, if this was indeed a denial of FAPE, the school system could have a duty to reimburse the parents.[78] The parents also claimed that an "education benefit" for *Endrew F.* should be equal to that of his peers, and should allow him to be self-sufficient.[79] Both the district court and the United States Court of Appeals for the Tenth Circuit sided with the school district, saying that Endrew received "some benefit" from the IEP, and therefore there was not a denial of FAPE, based on the *Rowley* decision.[80] They also used the "*merely* more than de minimus" standard.[81] The word "merely," was adopted by current Supreme Court Justice, Neil Gorsuch.[82] While on the bench for the United States Court of Appeals for the Tenth Circuit in 2008 while reviewing another special

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[73] See *infra* Appendix Figure 1-2.
[74] *Endrew F. Endrew F. v. Douglas County Sch. Dist. RE 1*, 137 S.Ct. 988 (2017).
[75] *Id*. at 996.
[76] *Id*. at 997.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 1001.
[80] *Endrew F. Endrew F. v. Douglas County Sch. Dist. RE 1*, 137 S.Ct. 988, 997-998 (2017).
[81] Valerie Strauss, *Why the word 'merely' turned many advocates for students with disabilities against Gorsuch*, WASH. POST: ANSWER SHEET (Apr. 7, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/04/07/why-the-word-merely-turned-many-advocates-for-students-with-disabilities-against-gorsuch/.
[82] *Id*.

education case, then-Judge Gorsuch stated, "From this direction, we have concluded that the educational benefit mandated by IDEA must merely be more than de minimis."[83] To many, Justice Gorsuch's use of "merely" made the standard even lower, and was cited in the lower *Endrew* decision.[84] Endrew's parents then filed for a writ of certiorari for the Supreme Court of the United States to hear the case.[85] It was granted, and in 2017, both parties presented their cases to the eight current justices of the Supreme Court.[86] Additionally, dozens of disability rights and special education law organizations completed amicus briefs, advocating for a higher standard for educational benefit.[87] The court published their decision, and sided unanimously with the parents.[88] Not only did the Court conclude that the IEP was not reasonably calculated to provide Endrew with a free and appropriate education, but the Court also stated that the "merely more than de minimis" standard was erroneous and not in accordance with the IDEA.[89] Instead the standard was changed so that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[90] This standard did not go to the level that Endrew's parents suggested (for a student with disabilities' progress to be equal to that of their peers); however, it is still considered a heightened standard from *Rowley*.[91] The Court also refused to cite specific examples of what this reasonably calculated progress would look like, and said no bright-line rule could be used because educational benefit looks different to every student.[92] The *Endrew F.* decision was published on March 22, 2017, at the same time that Justice Gorsuch was participating in his Supreme Court confirmation hearings.[93] This decision, and his past treatment of special education cases, became a main focus of the hearings.[94] Gorsuch argued that he was bound by the Tenth Circuit's precedent, but it remained a point of contention.[95]

B. Applying the *Endrew F.* standard to Maryland

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[83] *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008).
[84] Endrew F. v. Douglas County Sch. Dist. RE 1, No. 12-CV-2620-LTB, 2014 U.S. Dist. WL 4548439, *12 (D. Colo. Sept. 15, 2014).
[85] Endrew F. v. Douglas County Sch. Dist. RE 1, 137 S.Ct. 988, 997 (2017).
[86] *Id.*
[87] *Id.*
[88] *Id.* at 993.
[89] *Id.* at 1001.
[90] *Id* at 993.
[91] *Endrew F.*, 137 S.Ct. at 1001.
[92] *Id.*
[93] Strauss, *supra* note 81.
[94] *Id*.
[95] *Id*.

As stated previously, there is still much debate as to whether or not the *Endrew F.* standard has actually changed the way special education law is treated.[96] In Maryland, however, the research shows us that there has been an increase in success for parents and families in special education cases.[97] This can be evaluated by reviewing due process cases, mediation cases, and cases that were settled in the parent's favor over the Fiscal Year (FY) 2018 (July 1, 2017 – June 30, 2018), which increased by 42.1% from the previous year.[98] In general, the number of due process cases remained stagnant when comparing the FY 2018 to that of pre-*Endrew F.* FY 2017, decreasing from 282 cases to 277.[99]

Additionally, the number of cases that were dismissed remained stagnant at 247 cases.[100] Of those 247 cases, 57 were resolved with mediation in FY 2018, compared with 60 in FY 2017.[101] It is difficult to make any conclusions about this raw data without further details. However, the Maryland State Department of Education does publish the decisions of all the cases that make their way completely through due process, as well as the opinion of the Administrative law judge.[102] Of the 21 due process cases that were decided in Maryland in FY 2018 (post-*Endrew F.*), four were decided in favor of the parents.[103] This gave parents a success rate of approximately 19%.[104] This is up from the 11% average from FY 2015-2017 (pre-*Endrew F.*), giving an increase of 42.1%.[105] While four wins for parents does not seem significant, it is considered a large success rate when viewed in terms of the historically low rates for wins of parents in Maryland.[106] Additionally, the number of due process hearing cases throughout the United States are also very low, notwithstanding the few outlier states.[107]

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[96] *Id*.
[97] *See infra* Appendix Figure 1-2.
[98] *See infra* Appendix Figure 1-2.
[99] *See infra* Appendix Figure 1-2.
[100] *See infra* Appendix Figure 1-2.
[101] *See infra* Appendix Figure 1-2.
[102] *See, e.g., Due Process Hearing Decisions - FY18 - 3rd Quarter*, MD. STATE DEP'T OF EDUC., http://marylandpublicschools.org/programs/Pages/Special-Education/FSDR/HearingDecisions/2018/FY18_3rdqtr.aspx.
[103] MD. STATE DEP'T OF EDUC., *supra* note 97.
[104] *Id*.
[105] *Id*.
[106] *Id.*
[107] Joseph B. Tulman et al., *Are There Too Many Due Process Cases? An Examination of Jurisdictions with Relatively High Rates of Special Education Hearings*, 18 U.D.C. L. REV. 249, 253 (2015) (The states and districts with the highest number of due process cases are the District of Columbia, New York and Puerto Rico).

While other factors may have impacted this increase, it is highly probable that the new *Endrew F.* standard is connected. This becomes even more likely when analyzing the language of the opinions of the Administrative judges in these cases. The first Maryland special education due process case that occurred in Maryland in FY 2018 (post-*Endrew F.*) was a case from Anne Arundel Public Schools in October 2017.[108] In this case, a student in sixth grade with a specific learning disability, ADHD, anxiety, and extensive speech difficulties, was placed in a private school after years of pull-out services in a public school.[109] The Administrative law judge, in their analysis, went into particular detail to explain how the standard shifted from the standard of "some educational benefit" to the new *Endrew F.* standard, "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[110] The judge applied this standard to the facts of the case, reviewed the educational evaluations of the student, and also considered the regulations according to the IDEA and COMAR. Based on the preponderance of the evidence, the judge found that the student's IEP had not allowed them to make appropriate progress in light of the circumstances.[111] The "circumstances" in this case were the lack of changes to the IEPs year-to-year, despite lack of progress in reading and writing, and testimony from professionals that stated the public school was not able to meet the student's needs, and the private school was the appropriate placement.[112] This case was significant to Maryland special education law because, for the first time, courts were applying the *Endrew F.* standard, and also showing how this leads to a different result than it would have under the *Rowley* standard. It is important to note, however, that even in the cases that sided with the local school system, the administrative law judges still used the language and standard of *Endrew F.* in their decisions.[113]

In a Montgomery County decision from February 2018, the parents of a child with ADHD, anxiety, and Developmental Dyslexia, filed a due process claim for the local school system refusing to place the child in a private separate day school, and to reimburse the parents for unilaterally placing the child in the private school.[114] As with the previous due process case, the Administrative law Judge explained how the law had shifted from *Rowley* to *Endrew F.*[115] However, using the same analysis, the judge found that the IEP

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[108] *Anne Arundel Pub. Sch.*, OAH No. MDSE-AARU-OT-17-18091, 1(2018).
[109] *Id.* at 10, 18.
[110] Endrew F. v. Douglas County Sch. Dist. RE 1, 137 S.Ct. 988, 988 (2017).
[111] *Anne Arundel Pub. Sch.*, OAH No. MDSE-AARU-OT-17-18091 OAH at 2.
[112] *Id.* at 46.
[113] *Montgomery Cty. Pub. Sch.,* OAH No. MDSE-MONT-OT-17-22806 OAH, 1, 24 (2018).
[114] *Id.* at 19.
[115] *Id.* at 24.

was reasonably calculated.[116] The judge explained that, after reviewing the different goals and services that the student received, as well as the assessments and expert opinions, the school system's decisions did not constitute a denial of FAPE.[117] Furthermore, the judge states that, while additional services might have helped the student maximize their potential, that is not the standard that the school must meet.[118] After listing all of the variety of services and aides that the local school system offered, the judge concluded that, according to the *Endrew F.* standard, the IEP was reasonably calculated to meet the student's needs.[119] This case is a prime example of how, even in cases that do not side with the parents, administrative law judges are able to make greater analyses using the new standard, which makes the decisions more equitable, no matter the result.

It should also be noted that in a case that was remanded after the *Endrew F.* decision was published, the decision clearly stated that they would have come to the same conclusion under this standard.[120] Additionally, in 2017, a 2014 administrative law decision was remanded by the Court of Appeals Fourth Circuit in light of the *Endrew F.* standard.[121] On remand, the school system was required to reimburse the parents for the costs of the private school tuition, stating that the school system had not acknowledged the student's academic strengths as a twice-exceptional student (a student who is both gifted and requires special education services).[122] Therefore, there was a denial of FAPE, and the parents were entitled to reimbursement.[123]

While, in the previous cases, judges have applied the *Endrew F.* standard to each case's facts, the standard is still not being used in a uniform manner in every case.[124] Until the standard is made clear and used unilaterally among all judges, *Endrew F.* will not be able to take its full effect.[125]

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[116] *Id.* at 64.
[117] *Id.* at 65.
[118] *Id.*
[119] *Id.*
[120] *Prince George's Cty. Pub. Sch.,* OAH No. MDSE-PGEO-OT-00767, 1, 12 (2017).
[121] *N.P. v. Maxwell*, 711 Fed. Appx. 713, 719 (4th Cir. 2017).
[122] *N.P. v. Maxwell*, 711 Fed. Appx. 713, *vacated, Student v. Prince George's County Public Schools,* No.: MSDE- PGEO-OT-14-27568, 52 (2018); *see also Twice Exceptional Children*, WRIGHTSLAW (Jan. 9, 2009), https://www.wrightslaw.com/info/2e.index.htm.
[123] *N.P. v. Maxwell*, 711 Fed. Appx. 713, vacated, *Student v. Prince George's County Public Schools*, No.: MSDE- PGEO-OT-14-27568, 52 (2018).
[124] Waterstone, *supra* note 67 at 532-35.
[125] Waterstone, *supra* note 67 at 532-35.

C. *Endrew F.'s* Malleability and Enforceability

Because the *Endrew F.* standard has not been applied in a consistent manner, courts have a lot of discretion in its enforcement. Selene Almazan, Esq. is the Legal Director of Coalition of Parents, Attorneys, and Advocates ("COPAA"), and has represented families in special education cases for the past 25 years.[126] COPAA is a national organization that advocates for stronger enforcement of special education laws.[127] However, Mrs. Almazan argues, because courts continue to be confused about what the *Endrew F.* standard really means, it makes it extremely difficult to advocate for enforcement in the classroom, and at the IEP meetings.[128] As federal courts continue to be confused by the standard, each circuit is applying the standard slightly differently.

Another enforcement issue in due process cases are the viewpoints that exist among the Office of Administrative Hearings ("OAH"), who make decisions on special education cases. Some administrative law judges do not feel sympathetic towards the families, and instead see them as creating unfair demands on the school system.[129] This is especially true when the family in question is from a more affluent background.[130] As Ms. Almazan stated, "Administrative law judges often ask - what more do these families want the school system to do?"[131]

The view of these families as overly burdensome not only affects due process case results, but affects outcomes at the IEP table itself. Teachers and school professionals also often feel there is an exceptionally high burden on their abilities and resources.[132] The school system has limited funds and so many students, and there is a view that these families are unfairly "taking away" funds from other students who need it. This may lead to adverse relationships between the families and the school professionals, which further harms the potential progress of the student.[133] Because of the malleability of the standard, there is frequently a debate among the IEP team over whether appropriate progress in light of the student's circumstances is made.[134] A common issue that occurs is when a student's IEP goals do not change, and

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[126] *Members*, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, https://www.copaa.org/members/?id=16558794 (last visited Jan. 11, 2020).
[127] *Mission*, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, https://www.copaa.org/page/Mission (last visited Jan. 11, 2020).
[128] Interview with Selene Almazan, Esq., in Silver Spring, Md. (Feb. 15, 2019).
[129] *Id.* (referencing Ms. Almazan's professional experience).
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Waterstone, *supra* note 67 at 533.

the meeting of one or more of the goals, or a slight improvement in testing, is argued to be considered adequate progress.[135] Or, the IEP goals themselves are not challenging enough to have a meaningful effect on the child's education.[136] Courts in the future must address these issues, so the IEP team can have a clear vision of when the IEP was reasonably calculated in light of the child's individual circumstances.

III. BEYOND *ENDREW F.*: IMPROVING SPECIAL EDUCATION LAW IN MARYLAND

While it can be agreed that *Endrew F.* has had an impact on Maryland Special Education law, both symbolically and objectively, it is also clear that the new standard is not all that is needed to reform special education law. A number of separate goals must also be met alongside the new *Endrew F.* standard in order to make the special education system in Maryland as successful as possible.

A. Changes at the IEP Table

New laws, regulations, and court decisions all have a profound effect on the special education system. However, if those changes aren't accompanied by enforcement in the school system, they may be deemed useless. The new standard has set the stage for increased enforcement within the school system. In order to decide if a FAPE has been met, IEP meetings need to constantly address the question – what type of progress, if any, is being made in this child's education? If, after reviewing the education data and professional evaluations, the progress has not been meaningful, then there could be a denial of FAPE.[137]

In order for progress to be meaningful, three aspects of the IEP must be analyzed. First, the IEP team must analyze the goals that have actually been met by the student, and what changes have been made to the goals over time.[138] If there have been virtually no changes to goals with the new updated IEP each year, then that means that meaningful progress is not being made. Next, the number of goals being met must be analyzed.[139] The number of goals that are met should vary based on the student's circumstances, but one met goal is not enough to constitute a FAPE.[140] Finally, it is necessary for the

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[135] Interview with Selene Almazan, Esq., in Silver Spring, Md. (Feb. 15, 2019).
[136] *Id.*
[137] *Endrew F. v. Douglas County Sch. Dist. RE 1*, 137 S.Ct. 988, 1001 (2017).
[138] Interview with Selene Almazan, Esq., in Silver Spring, Md. (Feb. 15, 2019).
[139] *Id*.
[140] *Id*.

goals of the IEP to be considered challenging. In order to determine what goals are challenging, but attainable, the IEP team needs to create and analyze data on the child's progress. The use of data allows the IEP team to compare the child's progress to baselines, and helps the team understand the progress in a more clear-cut way. For example, data on a student's daily behaviors, such as completing tasks, is very useful for analyzing the student's progress.[141] Compliance with the *Endrew F.* decision begins at the IEP table. In order to comply with this standard, goals of the IEP must change over time, be numerous, and considered challenging. When this does not occur, the school system could be liable for a denial of FAPE.[142] However, many parents and special education advocates say this requirement is not being followed, and needs to be enforced more effectively.[143]

B. Changing State and Federal Special Education Laws

As the judicial standard shifts to better represent the special education system, laws and regulations should also be moderated. Maryland has not created any legislation in any state in accordance with the *Endrew F.* decision. Because of this, the only portion of the special education system that was affected is due process. This prevents *Endrew F.* from having an effect on the education itself, unless families have the ability to obtain counsel and file a claim. A number of laws or regulations should be changed in order to improve the system, such as requiring IEP teams to meet with a mediator whenever there is a disagreement over placement or services. A mediator prior to the due process claim itself would allow a professional to apply the *Endrew F.* standard earlier, and also ensure that the child was receiving the proper education before they could be deprived of it.

While states are bound to the IDEA, they are permitted to make their laws stricter if they so wish. Therefore, if Maryland made changes to their special education laws, including COMAR, they could establish the same goals that *Endrew F.*, while also avoiding costly and timely litigation. This could be established by increasing funding for special education programs and increasing the number of special education specialists in a school system.[144]

C. Increasing the Involvement and Education of Parents and Families

Parents and families play a unique role in the lives of children with disabilities. They are the only members of the IEP team that see the child in

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] Interview with Selene Almazan, Esq., in Silver Spring, Md. (Feb. 15, 2019).

the home-setting; however, they are dependent upon the school system to learn about their child's progress in the classroom. Lack of education, information, or involvement often prevents the two groups from working together cohesively.

In *R.F. v. Cecil County*, the Fourth District court reviewed a case where school officials in the Cecil County, Maryland school system unilaterally moved a child with disabilities to a more self-contained classroom, and did so without calling an IEP meeting, and without informing the parents.[145] The District Court settled in favor of the school system, and the family is in the process of appealing that ruling.[146] The parents, joined by an amicus brief by COPAA, the National Disability Rights Network, and Disability Rights Maryland, argued that this was a violation of the IDEA.[147] As stated in a Ninth Circuit Court of Appeals case, "[P]arents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know."[148] A unilateral change in the IEP is not permitted, and is considered a denial of FAPE. The *R.F.* case shows the need for parents to be as involved and informed as possible, in order to make decisions that are in the best interest of the child. The results of this case in the Court of Appeals will determine whether or not families will be given this role in the future.

In April 2017, a change to COMAR was made that would require the parents or guardian to consent to moving a child from a high school diploma track to a certificate, non-diploma track where the child remains in school until age twenty-one.[149] Before the change, the school system could make this change, even if the change was protested by the parent.[150] Allowing for this consent gives parents more control over the type of education that their child receives. However, there are many other instances where the school system can make these choices, and can move forward with the change even if a parent disagrees. For example, if the rest of the IEP team decides that the student no longer requires speech language services, the team may decide to end these services.[151] The parent, in return, may only file for due process or

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[145] *R.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 244 (4th Circ. 2018).
[146] *Id.*
[147] Brief for Amici Curiae Council of Parent Attorneys and Advocates, Inc., et al., in Support of Plaintiffs-Appellants, *R.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237 (2018) (No. 18-1780).
[148] *Doug C. v. State of Haw. Dept. of Educ.*, 720 F.3d 1038, 1044 (9th. Cir. 2013).
[149] MD. CODE REGS. 13A.03.02.09(E)(5) (2019).
[150] MD. STATE DEP'T OF EDUC., Parental Rights: Maryland Procedural Safeguards Notice 6 (2019), http://marylandpublicschools.org/programs/Documents/Special-Ed/mpsn/MDProceduralSafeguardsNoticeEnglish.pdf.
[151] *Id*.

meditation.[152] While the school system argues that, as professionals, they should be permitted to make these decisions, this allows the school system to wield a lot of power over the child's life. In order to continue to put the best interests of the child first, more education-based decisions should require the consent of the parents.

It is often difficult for parents to navigate the special education process when they are not properly informed and the law, and the rights that their children have. If parents are unaware of their child's rights, they are unable to know when those rights are being violated. Furthermore, with the incorporation of the *Endrew F.* standard into practice, it is crucial for parents to understand the new standard and how it may affect them. Not only will this make parents better informed, it may affect parents' views of what can be done to address their concerns for their child. It can increase communication between parents and local school systems, and lead to better collaborative solutions for the student. While this will not change the standard's application, it will hold school systems more accountable, and improve the enforceability of the standard. Increasing education can be done in a variety of ways, from a variety of sources. Both the Maryland State Department of Education can do more to keep parents educated, as well as private disability rights and special education organizations in Maryland. This can be done through seminars, webinars, pamphlets, brochures, or resource centers that provide case reviews and pro bono legal advice. These options will allow parents to make sure that the *Endrew F.* standard is being followed, and that the child's circumstances are being adequately considered.[153]

D. Increasing Representation for Low-Income Families

As mentioned previously, *Endrew F.* cannot make a positive impact on special education law unless issues within the classroom and at the IEP tables are properly addressed. One of the greatest barriers to addressing a special education issue is the difficulty of receiving representation for families of low socioeconomic status.[154] There are some options in Maryland for low or no-cost representation in special education matters, by organizations like Disability Rights Maryland and Project HEAL of the Kennedy Krieger Institute.[155] However, these organizations have incredibly limited resources,

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[152] *Id* at 18.
[153] *Endrew F. v. Douglas County Sch. Dist. RE 1*, 137 S.Ct. 988, 1001 (2017).
[154] Claire Raj & Emily Suski, *Endrew F.'s Unintended Consequences*, 46 J.L. & EDUC. 499, 501 (2017).
[155] *Project HEAL at Kennedy Krieger Institute*, KENNEDY KRIEGER INSTITUTE (last visited Feb. 21, 2020), https://www.kennedykrieger.org/community/initiatives/maryland-center-developmental-disabilities/project-heal.; *see also* DRM's Services, DISABILITY RIGHTS

and cannot meet the demand. Private lawyers, while some take pro bono cases, are not affordable for low income families, especially in conjunction with the other costs that families with a child with disabilities may face.[156] While parents are able to file a due process claim *pro se*, it is not a viable option for many low-income families.[157] Furthermore, representation is not just needed at due process hearings. Representation is also helpful at IEP meetings themselves, to make sure that the local school system is following the law.[158] It may be argued that this would highly increase the costs and expenses of the school system, who would feel obligated to ensure their school system was also represented by an attorney at these meetings. However, this idea feeds into the bias that families with disabilities are taking funds away from students who really need it. The injustice of denying low-income families representation highly outweighs this argument.

Organizations like Disability Rights Maryland are funded by the federal government, and should receive an increase in funding, through federal grants and legislative advocacy, in order to provide more representation to low-income families.[159] Not only will these assist individuals in addressing their concerns, it may also lead to more issues being resolved without having to go to a due process hearing.

CONCLUSION

In Maryland, there has been a clear change in the way that due process cases are being handled since the decision of *Endrew F.* While this has had a direct impact on the hearings themselves, it remains unclear whether other systemic changes will occur. In order for special education in Maryland to really improve, there needs to be changes throughout the system that reflect the new standard.

MARYLAND (last visited Feb. 21, 2020), https://disabilityrightsmd.org/services/.

[156] Interview with Selene Almazan, Esq., in Silver Spring, Md. (Feb. 15, 2019).

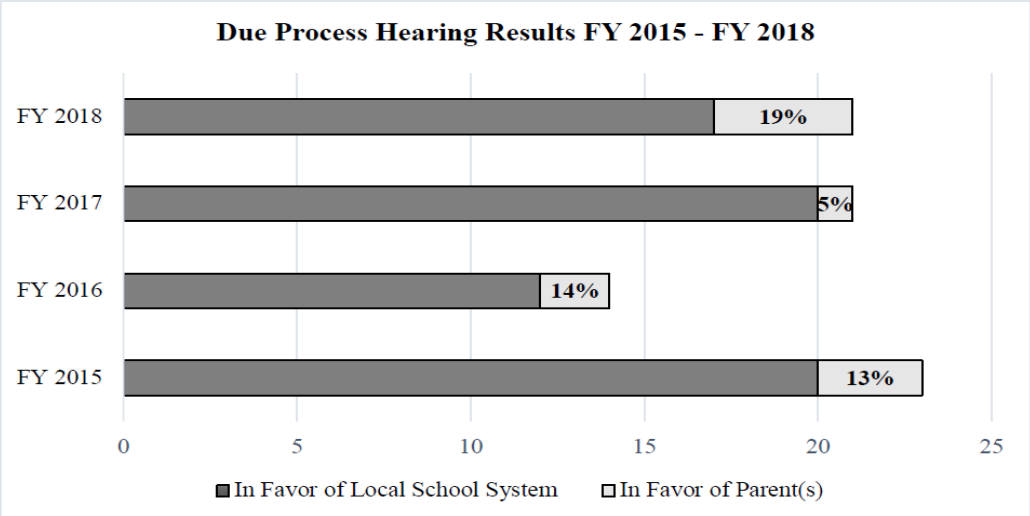
[157] *Winkleman v. Parma City Sch. Dist.,* 550 U.S. 516, 518 (2007); *see also* Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 450-51 (2012).

[158] Callegary, *Supra* note 20.

[159] *Id.*

APPENDIX: DUE PROCESS HEARINGS

Figure 1. [160]



[160] MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2018 (2018), http://marylandpublicschools.org/programs/Documents/Special-Ed/FSDR/HearingDecisions/2018/FY18EndYrDPComplaintsFiled.pdf.; MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2017 (2017), http://marylandpublicschools.org/programs/Documents/Special-Ed/FSDR/HearingDecisions/2017/FY17EndYrHRGChart.pdf.; MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2016 (2016), http://marylandpublicschools.org/programs/Documents/Special-Ed/FSDR/HearingDecisions/2016/StatusDueProcessComplainsFiledDuringFiscalYear2016.pdf.; MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2015 (2015), http://archives.marylandpublicschools.org/MSDE/divisions/earlyinterv/complaint_investigation/hearing_decisions/2015/docs/StatusDueProcessComplainsFiledDuringFiscalYear2015.pdf.

Figure 2. [161]

Due Process Hearing Results FY 2015 – FY 2018

Year	Total Number of Hearings	Number of Hearings that Ruled in Favor of Parent(s)	Percentage (%) of Hearings that Ruled in Favor of Parent(s)
FY 2015	23	3	13.04
FY 2016	14	2	14.29
FY 2017	21	1	4.76
FY 2018	21	4	19.01

FY 2018 Due Process Hearing Results by County

County	Total Number of Hearings in FY 2018 Per County	Number of Hearings that Ruled in Favor of Parent(s)	Number of Hearings that Ruled in Favor of the Local School System	Percentage (%) of Hearings that Ruled in Favor of Parent(s)
Anne Arundel	4	1	3	25.00
Baltimore City	1	1	0	100.00
Baltimore County	2	0	2	0.00
Howard County	1	0	1	0.00
Montgomery	10	1	9	10.00
Prince George's	3	1	2	33.33

[161] MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2018 (2018), http://marylandpublicschools.org/programs/Documents/Special-Ed/FSDR/HearingDecisions/2018/FY18EndYrDPComplaintsFiled.pdf.; MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2017 (2017), http://marylandpublicschools.org/programs/Documents/Special-Ed/FSDR/HearingDecisions/2017/FY17EndYrHRGChart.pdf.; MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2016 (2016), http://marylandpublicschools.org/programs/Documents/Special-Ed/FSDR/HearingDecisions/2016/StatusDueProcessComplainsFiledDuringFiscalYear2016.pdf.; MD. STATE DEP'T OF EDUC., OUTCOME OF DUE PROCESS COMPLAINTS – FISCAL YEAR 2015 (2015), http://archives.marylandpublicschools.org/MSDE/divisions/earlyinterv/complaint_investigation/hearing_decisions/2015/docs/StatusDueProcessComplainsFiledDuringFiscalYear2015.pdf.