ENVISIONING A WORKABLE STANDARD FOR THE DEVELOPMENTALLY DISABLED WHO WANT TO WORK

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In *Endrew F. v. Douglass County School District RE-1*, the Supreme Court of the United States addressed the quality of education required by the Individuals with Disabilities Education Act ("IDEA").[1] This area of the Court's jurisprudence has been relatively stable, as the Court has not addressed this issue since its 1982 decision in *Board of Education v. Rowley*.[2] In *Rowley*, a divided Court held that public schools provide a free and appropriate public education ("FAPE") when the child's individualized education plan is "reasonably calculated to enable the child to receive educational benefits."[3] In addition to creating this low standard, the Court declined to "establish any one test for determining the adequacy of education benefits conferred upon all children covered by the act."[4]

In *Endrew F.*, the Court raised the minimum standard it articulated in *Rowley*, holding that the IDEA requires a higher standard.[5] Speaking through Chief Justice Roberts, the Court held that the IDEA "required an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[6]

While the Court's new standard does raise the bar, it does not go far enough. In this comment, I will argue that the Supreme

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1. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE–1, 137 S. Ct. 988 (2017).
2. *Id.* at 993 (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 202 (1982)).
3. *Rowley*, 458 U.S. at 207.
4. *Id.* at 202.
5. *Endrew F.*, 137 S. Ct. at 1001.
6. *Id.*

Court issued a holding that is too general and will result in future litigation that will define what type of educational program is "*reasonably calculated* to enable a child to make progress *appropriate in light of the child's circumstances.*"[7]

More specifically, I will assert that the Court missed the opportunity to delineate different standards based on the intellectual capabilities of students with developmental disabilities.[8] Had the Court chosen to further define its holding and create different standards for individuals protected under the IDEA based on their prospects for gaining meaningful employment after finishing high school, individuals with developmental disabilities who have the potential to contribute to the workforce would receive an education that would significantly increase their chances of securing jobs after graduation.

The practical purpose of receiving an education is to gain the tools necessary to become a productive member of society, contribute to the workforce, and, therefore, become economically self-sufficient.[9] This is how the American education system treats individuals without developmental disabilities.[10] Accordingly, public schools should tailor the education they provide to individuals with developmental disabilities to the same purpose—to provide such individuals with an education that provides them with the necessary tools to contribute to the workforce and become economically self-sufficient. Now, it is true that there are individuals with developmental disabilities who lack the ability to join the workforce and become economically self-sufficient.[11] For these individuals, the Court's standard as articulated in *Endrew F.* is sufficient. However, for individuals who can, or potentially can, contribute to the workforce, the *Endrew F.* standard is sorely lacking and does not require that public schools provide an education that gives them a meaningful chance at joining the workforce after completing their education. Had the Court

7. *Id.* (emphasis added).

8. The IDEA covers children with "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . ." 20 U.S.C. § 1401(3)(A)(i)(2012). For the purposes of this comment, students with "developmental disabilities" shall only include students who suffer from intellectual disabilities, autism, and traumatic brain injuries.

9. *See* S. REP. NO. 94–168, at 9 (1975).

10. *Id.*

11. *See Endrew F.*, 137 S. Ct. at 999.u

articulated a standard that focused on providing such individuals with an education that gave them a meaningful chance at developing the requisite skills to contribute to the workforce, the Court would have required that those individuals receive an education most similar to their peers without developmental disabilities.

I. THE IDEA

When enacting the IDEA, Congress included the following language:

> Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.[12]

By including this language in the findings for the legislation, Congress clearly asserted that educating individuals with disabilities, including those with developmental disabilities,[13] is aimed at allowing such individuals to receive an education that gives them a chance to be a contributing member of society.[14] This includes the ability to procure economic self-sufficiency by obtaining an education that allows them to join the workforce.[15]

The IDEA further provides that states must guarantee "[a] free appropriate education is available to all children with disabilities residing in the State between the ages of 3 and 21."[16] A FAPE, as defined by the IDEA, includes "special education and related services."[17] The Act defines special education as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability,"[18] and requires that children with

12. 20 U.S.C. § 1400(c)(1)(2018).
13. *Id.* § 1401(3)(A)(i).
14. *Id.* § 1400(c)(1).
15. *Id.*
16. *Id.* § 1412(a)(1)(A).
17. *Id.* § 1401(9).
18. *Id.* § 1401(29).

disabilities receive special education "in conformity with the [child's] individualized education program" ("IEP").[19] An IEP is defined as "a written statement for each child with a disability that is developed, and revised."[20] The Court has accurately and aptly recognized that the IEP is "the centerpiece of the statute's education delivery system for disabled children."[21] Among other requirements, an IEP must include: "a statement of the child's present levels of academic achievement and functional performance";[22] "a statement of measurable annual goals, including academic and functional goals";[23] "a description of how the child's progress toward meeting the annual goals";[24] and "a statement of the special education and related services . . . that will be provided" in order for the child "to advance appropriately toward attaining the annual goals" and "be involved in and make progress in the general education curriculum."[25]

The IEP is the vehicle that drives how individuals with developmental disabilities will receive a personalized education. Obviously, creating a plan that maximizes the student's gains is incredibly important to the student and to his or her parents. Accordingly, developing an IEP can sometimes be a contentious process when the parents and school officials have divergent views on what is appropriate and in the student's best interests. When school officials and parents cannot agree on the content of the IEP, the IDEA provides that they can engage in a preliminary meeting,[26] or in mediation,[27] if the parties cannot come to an agreement in the preliminary meeting. In situations where the parties still cannot agree after undergoing mediation, the IDEA allows for a "due process hearing" conducted by either the state or local educational agency, depending on state law.[28] After exhausting this administrative remedy, the dissatisfied party can appeal out of the agency to either federal or state court.[29]

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19. *Id.* § 1401(9)(D).
20. *Id.* § 1401(14).
21. Honig v. Doe, 484 U.S. 305, 311 (1988).
22. 20 U.S.C § 1414(d)(1)(A)(i)(I)(2018).
23. *Id.* § 1414(d)(1)(A)(i)(II).
24. *Id.* § 1414(d)(1)(A)(i)(III).
25. *Id.* § 1414(d)(1)(A)(i)(IV).
26. *Id.* § 1415(f)(1)(B)(i).
27. *Id.* § 1415(e).
28. *Id.* § 1415(f)(1)(A).
29. *Id.* § 1415(i)(2)(A).

II. THE SUPREME COURT'S FAPE ANALYSIS IN *ROWLEY*

The Court initially addressed the IDEA's FAPE requirement in *Rowley*.[30] The FAPE requirement was first adopted as part of the Education of the Handicapped Act, which was subsequently amended and renamed the IDEA.[31] In *Rowley*, the student suffered from a hearing disability.[32] Rowley was placed into a standard kindergarten class and was provided a hearing aid in order for her to hear her teacher and other classmates, and participate in class activities.[33] She successfully completed her year in kindergarten and advanced to the first grade.[34] Prior to beginning her first-grade academic year, Rowley was provided with an IEP.[35] It stated that she would be placed into a standard first-grade class, would continue to receive a hearing aid, and would work with a tutor for the deaf one hour a day and with a speech therapist for three hours each week.[36]

Rowley's parents agreed with some provisions of the IEP, but insisted that the school provide a sign-language interpreter.[37] The school disagreed, noting that during Rowley's kindergarten year she was provided with a sign-language interpreter as a trial for two weeks and that the interpreter concluded Rowley did not require his services at that point in time.[38] Rowley's parents objected to this determination, and an independent examiner upheld the school's decision not to provide the sign-language interpreter because Rowley was progressing without the interpreter.[39] This determination was affirmed by the New York Commissioner of Education.[40]

Rowley's parents then appealed to the District Court for the Southern District of New York, claiming that the denial of the sign-language interpreter amounted to a denial of a FAPE under

30. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE–1, 137 S. Ct. 988, 994 (2017).

31. *Id.* at 944 n.1.

32. Bd. of Educ. v. Rowley, 458 U.S. 176, 184 (1982).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 184–85.

39. *Id.* at 185.

40. *Id.*

the IDEA.[41] The district court concluded that Rowley was denied a FAPE because, although she performed better than the average child, she was not "learning as much, or performing as well academically, as she would without her handicap."[42] The district court defined a FAPE as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[43] The United States Court of Appeals for the Second Circuit affirmed the district court's adoption of the "full participation" standard,[44] and the United States Supreme Court granted certiorari to review the interpretation of the act.[45]

The Court first noted that the IDEA does not include a substantive standard for a FAPE.[46] In an opinion authored by Justice Rehnquist and joined by four other justices,[47] the Supreme Court then rejected the district court's conclusion that the IDEA required states to maximize the potential of disabled students "commensurate with the opportunity provided to other children."[48] It noted that the district court's holding failed to reference the language of the IDEA or its legislative history in making its ruling.[49]

To determine whether the IDEA required a FAPE to satisfy a substantive standard beyond the definition provided in the statute, the Court turned to the legislative history to discern congressional intent.[50] The majority concluded that "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."[51] In supporting its conclusion, the majority cited federal cases from 1971 and 1972 that established the right to education for all handicapped children.[52] The majority concluded that these cases both held that

41. *Id.*

42. Rowley v. Bd. of Educ., 483 F. Supp. 528, 532 (S.D.N.Y. 1980).

43. *Id.* at 534.

44. Rowley v. Bd. of Educ., 632 F.2d 945, 946 (2d Cir. 1980).

45. *Id.*, *cert. granted*, 454 U.S. 961 (Nov. 2, 1981) (No. 80-1002).

46. Bd. of Educ. v. Rowley, 458 U.S. 176, 189 (1982).

47. *Id.* at 178.

48. *Id.* at 189–90 (quoting Rowley v. Bd. of Educ., 483 F. Supp. 528, 534 (S.D.N.Y. 1980)).

49. *Id.* at 190.

50. *Id.*

51. *Id.* at 192.

52. Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

children with disabilities are entitled to "an *adequate*, publicly supported education."[53] The majority then held that "the basic floor of opportunity provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefits to the handicapped child."[54] Thus, the Court rejected the lower court's "full potential" test in favor of the much lower "educational benefits" standard. While the majority defined what constituted a FAPE, it left the more important question unanswered and declined to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[55] Indeed, the *Endrew F.* Court noted that the *Rowley* Court left "the more difficult problem" for a future case.[56]

III. THE SUPREME COURT RAISES THE BAR IN *ENDREW F.*

The Supreme Court next addressed the substantive standard for FAPE under the IDEA in *Endrew F.*[57] While the *Rowley* case dealt with a student who suffered from a physical disability, the Court in *Endrew F.* addressed the IDEA in the context of a student with a developmental disability.[58] Endrew F. was diagnosed with autism, which qualified him for services under the IDEA.[59] Endrew attended public school in the Douglas County School District between preschool and fourth grade and was provided an IEP every year.[60] After his fourth-grade year, Endrew's parents became dissatisfied with his progress and asked the school to drastically alter the IEP for his fifth-grade year.[61] His IEP had been very similar in the previous years, which amounted to an admission that he was not making progress.[62] The school proposed an IEP for Endrew's fifth-grade year that was substantially the same as his previous IEPs.[63] Dissatisfied, his parents removed him from

53. *Rowley*, 458 U.S. at 193 (emphasis added).
54. *Id.* at 201.
55. *Id.* at 202.
56. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 993 (2017).
57. *Id.*
58. *Id.* at 996.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

public school and enrolled him in a private school exclusively for individuals with autism.[64] At the private school, Endrew received the functional equivalent of an IEP, and began to make immediate academic and behavioral progress.[65] During Endrew's fifth-grade year at the private school, his parents met with representatives from the public school Endrew had attended, who presented his parents with an IEP that was yet again very similar to his previous ones.[66] The Supreme Court accurately noted that the school declined to adopt a different approach for addressing Endrew's behavior problems, despite the fact that he made significant progress at the private school, which used a different approach.[67] Still dissatisfied with the school system's efforts, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew's private school tuition under the theory that Endrew was denied FAPE before enrolling in a private school.[68]

The administrative law judge held that Endrew was provided a FAPE by the public school because his IEP met the standard the Supreme Court articulated in *Rowley*.[69] The United States District Court for the District of Colorado affirmed the administrative law judge's findings.[70] The district court reasoned that the IEP was reasonably calculated to allow Endrew to make minimal progress, that he had in fact made minimal progress, and that this was all *Rowley* required.[71] On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the district court,[72] explaining that *Rowley* requires nothing more than for IEPs to offer an "educational benefit [that is] merely . . . 'more than *de minimis*.'"[73] Applying this standard, the Tenth Circuit held that Endrew's IEP was sufficient and that he had not been denied

64. *Id.*

65. *Id.* at 996–97.

66. *Id.* at 997.

67. *Id.*

68. *Id.*

69. *Id.*

70. Endrew F. v. Douglas Cty. Sch. Dist. RE–1, No. 12-CV-2620-LTB, 2014 WL 4548439, at *12 (D. Colo. Sept. 14, 2014).

71. *Id.* at *9.

72. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE–1, 798 F.3d 1329, 1343 (10th Cir. 2015).

73. *Id.* at 1338 (quoting Thompson R2–J Sch. Dist. v. Luke P. *ex rel.* Jeff P., 540 F.3d 1143, 1149 (10th Cir. 2008)).

a FAPE.[74] Endrew's parents appealed, and the Supreme Court granted certiorari.[75]

In a unanimous opinion authored by Chief Justice Roberts, the Court vacated the Tenth Circuit's holding and remanded the case for proceedings in accordance with a new, heightened standard.[76] The *Endrew F.* Court began its analysis by noting that the *Rowley* Court "declined to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[77] The Court then rejected the school district's interpretation of *Rowley*, which argued that an IEP is sufficient if it is "reasonably calculated to provide some benefit, as opposed to none."[78]

After rejecting the *Rowley* standard, the Court turned to the IDEA and concluded that "[i]t requires an educational program reasonably calculated to make progress appropriate in light of the child's circumstances."[79] In rejecting *Rowley*, the Court noted that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have offered an education at all."[80]

IV. THE SUPREME COURT'S MISSED OPPORTUNITY

The Supreme Court's decision in *Endrew F.* was certainly a victory for students with disabilities and their families. The *Endrew F.* standard precludes school districts from arguing that they fulfill their responsibilities to students with developmental disabilities under the IDEA by merely offering these students *de minimis* educational benefits.[81] Given the plain language of the IDEA,[82] it is shocking that it took the courts more than forty years to rebuke such an argument. However, the more important takeaway is that the Supreme Court missed an opportunity to further delineate a

74. *Id.* at 1342.

75. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE–1, 137 S. Ct. 988, 997 (2017).

76. *Id.* at 1001–02.

77. *Id.* at 977 (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 202 (1982)).

78. *Id.* at 997–98.

79. *Id.* at 1001.

80. *Id.*

81. *Id.*

82. 20 U.S.C. § 1400(c)(1)(2018).

clearer standard that protects and furthers Congress's stated intent when it initially passed the IDEA.

An appropriate place to begin analyzing Congress's intent is the text at the beginning of the IDEA.[83] Congress began the act by noting:

> Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and *economic self-sufficiency* for individuals with disabilities.[84]

Shortly thereafter, Congress clearly stated: "Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by – having high expectations for such children . . . in order [for children with disabilites] to – be prepared to lead *productive and independent lives*, to the maximum extent possible."[85]

Any reasonable reading of these provisions leads to the conclusion that Congress enacted the law with the intent to provide students with disabilities the opportunity to receive an education that would allow them to have a fighting chance to become a part of the workforce after completing their education.[86] It is worth noting that there are conflicting views surrounding the purpose of education in America today.[87] Some argue that the purpose is to prepare students for the workforce, while others say that education should focus on intellectual development and preparing students to become engaged citizens.[88] While the purpose of education for non-disabled students can certainly

83. *IDEA – the Individuals with Disabilities Education Act*, CTR. FOR PARENT INFO. & RESOURCES (Sept. 24, 2017), https://www.parentcenterhub.org/idea.

84. 20 U.S.C. § 1400(c)(1)(2018) (emphasis added).

85. *Id.* § 1400(c)(5)(A)(ii) (emphasis added).

86. CTR. FOR PARENT INFO. & RESOURCES, *supra* note 83.

87. Valerie Strauss, *What's the Purpose of Education in the 21st Century?*, WASH. POST (Feb. 12, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/02/12/whats-the-purpose-of-education-in-the-21st-century.

88. *Id.*

encompass both,[89] a main focus of educating individuals with disabilities must be, as Congress itself stated,[90] helping these students learn and internalize skills that will allow them to join the workforce.[91]

Why did the Supreme Court lay down a standard in *Endrew F.* that was completely devoid of any reference to ensuring that students with developmental disabilities are educated in a manner that provides them with a reasonable opportunity to obtain the skills necessary to allow them to join the workforce? There is more than one answer to this question, but the Supreme Court clearly missed an opportunity to do so.

Although, not all students with developmental disabilities have the necessary skills to enter the workforce,[92] there is certainly a subset of these students who either are capable of joining the workforce or, with an education that focuses on preparing them, can successfully join the workforce.[93] These students are the individuals that Congress sought to protect when passing the IDEA, and they are the individuals that the Supreme Court failed to protect when it issued a standard in *Endrew F.* that failed to appropriately differentiate between students who could not and who potentially could join the workforce. Still, the Supreme Court in *Endrew F.* noted that the *Rowley* Court "declined, however to endorse any one standard for determining 'when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the [IDEA],'"[94] and further noted that the *Rowley* Court left the "more difficult problem" for the *Endrew F.* Court to address.[95]

The *Endrew F.* Court in fact left an even more difficult problem for the lower courts to address: what constitutes an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"[96]

89. *Id.*

90. 20 U.S.C. § 1400(c)(1)(2018).

91. Strauss, *supra* note 87.

92. Edward M. Levinson & Eric J. Palmer, *Preparing Students with Disabilities for School-to-Work Transition and Postschool Life*, PRINCIPAL LEADERSHIP MAG., Apr. 2005, at 11, 11–12.

93. *See generally* OFFICE OF DISABILITY EMP'T POLICY, U.S. DEP'T OF LABOR, BUSINESS STRATEGIES THAT WORK: A FRAMEWORK FOR DISABILITY INCLUSION (2012).

94. Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. RE–1, 137 S. Ct. 988, 993 (2017).

95. *Id.*

96. *Id.* at 1001.

for students with the potential to join the workforce? As all individuals with developmental disabilities are capable of making different progress based on the specifics of their disability, what is reasonably calculated to enable one student to make progress may not be reasonably calculated for a similarly situated child to make progress.[97] To the Supreme Court's credit, its holding in *Endrew F.* recognizes this.[98]

Unfortunately, the Court failed to create a standard that differentiated between students who do not have a realistic possibility of contributing to the workforce and those students who can or might be able to contribute to the workforce.[99] While the *Endrew F.* standard is sufficient for the students who will be unable to join the workforce in an independent capacity,[100] the standard is totally lacking for students who can, or potentially can, join the workforce.[101] Creating a standard specifically for students who have the potential to join the workforce would ensure that Congress's stated intent in enacting the IDEA is fulfilled.

The standard for students with developmental disabilities with the potential to join the workforce need not be one that requires equal educational benefits to those afforded to students without disabilities. In *Endrew F.*, Endrew's parents advocated for a standard that required an education that provides children with disabilities "opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities."[102] The Supreme Court rejected such a standard, noting that it was contradictory of the *Rowley* Court's analysis, which found a standard that required equal educational benefits to be "entirely unworkable."[103] This may well be true. However, this should not be

97. *See id.*

98. *Id.*

99. *Id.* at 999–1001.

100. *See* Bd. of Educ. v. Maez, No. 16-CV-1082, 2017 WL 3278945 (D.N.M. Aug. 1, 2017) (illustrating how the Endrew F. standard can fulfill the requirements of the IDEA for a student who may be able to join the workforce).

101. *But see* Pocono Mountain Sch. Dist. v. J.W., No. 3:16-CV-0381, 2017 WL 3971089 (M.D. Pa. Sept. 8, 2017).

102. *Endrew F.*, 137 S. Ct. at 1001.

103. *Id.* However, in a concurring opinion in Rowley, Justice Blackmun noted that legislative history dictated that the appropriate analysis was to determine "whether Amy's program . . . offered her an opportunity to understand and participate in the classroom that was substantially equal to that given to her non-handicapped classmates." Bd. of Educ. v. Rowley, 458 U.S. 176, 210–11 (1982) (Blackmun, J., concurring).

the focus of the standard for students with disabilities. The appropriate standard should focus on ensuring educational benefits of "equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[104]

A standard for students with disabilities who can potentially join the workforce appears to be harmonious with the *Endrew F.* opinion. The Court noted that a developmentally disabled student's "educational program must be appropriately ambitious in light of his circumstances . . . ."[105] The Court went on to make clear that it would not create a bright line rule on what constitutes appropriate progress.[106] It reasoned that "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created."[107] The language of the opinion and its holding do not preclude schools from creating IEPs that fulfill Congress's intent by ensuring that IEPs focus on providing an education that aims to allow the student to become economically self-sufficient.[108] To be sure, the standard laid down in *Endrew F.*—that the IDEA requires "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"[109]—could be read to require schools to create IEPs that focus on providing students with the skills for economic self-sufficiency. However, to ensure that the IDEA's goals are met, the Supreme Court should not have left this question open for interpretation.

In order to ensure that the purpose of the IDEA was fulfilled, the Supreme Court should have crafted two standards in its *Endrew F.* holding: one for students who will not join the workforce, and a separate standard for students who might join the workforce. The Supreme Court's standard in *Endrew F.* is sufficient for students who will not be able to join the workforce due to their intellectual or behavioral disabilities. However, students with developmental disabilities who have the necessary capacity to join the workforce are not adequately protected from

104. 20 U.S.C. § 1400(c)(1)(2018).
105. *Endrew F.*, 137 S. Ct. at 1000.
106. *Id.* at 1001.
107. *Id.*
108. *See id.* at 1000.
109. *Id.* at 1001.

attending schools that do not provide an education that fulfills the purpose of the IDEA under the *Endrew F.* holding.

V. PROPOSED STANDARD FOR STUDENTS WHO POTENTIALLY CAN JOIN THE WORKFORCE

If *Endrew F.* does not go far enough to protect students with disabilities who can, or potentially can, join the workforce, then what is an appropriate standard? Again, the IDEA provides the answer, just as it provided evidence of how the *Endrew F.* standard was lacking.

The standard should be a combination of the Supreme Court's holding in *Endrew F.* and the language from the IDEA regarding the purpose of the Act. For students with disabilities who can or potentially can join the workforce, the IDEA requires educational programs reasonably calculated to enable a child to make progress, appropriate in light of the child's circumstances, towards gaining skills that will allow the child to obtain economic self-sufficiency.

The most important benefit the proposed standard offers is that it will require schools to provide students with developmental disabilities with an education that mirrors the logic Congress employed in drafting and passing the IDEA.[110] It is clear from the language of the IDEA that the benefits that the Act sought to provide students were in large part focused on allowing the students to achieve economic self-sufficiency.[111] Obtaining economic self-efficiency is inherently tied to the ability to make a living for oneself—which is, of course, tied to the ability to obtain and maintain a job. Replacing the portion of the *Endrew F.* standard that requires an education that allows a child "to make progress appropriate in light of the child's circumstances"[112] with language that is specific to providing educational benefits that seek to improve the child's chances of joining the workforce, addresses the underlying flaw in the *Endrew F.* standard. The proposed standard removes the possibility that students who have the intellectual capacity to join the workforce are not provided with educational benefits that seek to make that possibility a reality—a possibility that the *Endrew F.* standard allows for.

110. *See* 20 U.S.C. § 1400(c)(1) (2018); *see also id.* § 1400(c)(5)(A)(ii).

111. *See* § 1400(c)(1), (5)(A)(ii).

112. *Endrew F.*, 137 S. Ct. at 1001.

The first question raised by the proposed standard is, which students will fall into the category of capable, or potentially capable, of joining the workforce? This is a question that must be answered, as the IDEA requires, by educators, not by the courts.[113] 20 U.S.C. § 1414 says in no uncertain terms that the student's IEP shall be made by the child's parents,[114] educators,[115] and representatives of the local education agency who are "qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities."[116] Furthermore, the *Rowley* Court noted that courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set decisions at nought."[117]

The second question the proposed standard lends itself to is, how would the IEP of a disabled student that has been deemed to have the potential to contribute to the workforce change under the standard? Imagine a high school student, Betty, who is on the Autism spectrum.[118] Despite the fact that she is autistic, she still functions at a high level. Betty can read, write, and do math at an

113. 20 U.S.C. § 1414 (a)(1)(A)(2018).

114. *Id.* § 1414 (d)(1)(B)(i).

115. *Id.* § 1414 (d)(1)(B)(ii–iii).

116. *Id.* § 1414 (d)(1)(B)(iv)(I).

117. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

118.

> Autism spectrum disorder (ASD) is a complex developmental disability; signs typically appear during early childhood and affect a person's ability to communicate, and interact with others. ASD is defined by a certain set of behaviors and is a 'spectrum condition' that affects individuals differently and to varying degrees. There is no known single cause of autism, but increased awareness and early diagnosis/intervention and access to appropriate services/supports lead to significantly improved outcomes. Some of the behaviors associated with autism include delayed learning of language; difficulty making eye contact or holding a conversation; difficulty with executive functioning, which relates to reasoning and planning; narrow, intense interests; poor motor skills' and sensory sensitivities. Again, a person on the spectrum might follow many of these behaviors or just a few, or many others besides. The diagnosis of autism spectrum disorder is applied based on analysis of all behaviors and their severity.

AUTISM SOC'Y, *What is Autism*, http://www.autism-society.org/what-is (last visited Mar. 31, 2018).

eighth-grade level; can understand and follow basic instructions; and does not suffer from behavior issues that prevent her from working productively with others. If Betty's school is required to provide her with an IEP that prioritizes preparing her to work an entry-level job such as bagging groceries, working on an assembly line, or cleaning car interiors at a full service car wash, Betty can begin to learn, and potentially master, the skills she would need to be successful in one of these roles. However, if the *Endrew F.* standard dictates what her IEP must include, then her school is not required to provide an education that will allow Betty to make progress towards joining the workforce. This is the fatal flaw in the Supreme Court's *Endrew F.* decision.

VI. POLICY CONSIDERATIONS SUPPORTING A MORE NARROWLY TAILORED STANDARD

Apart from the fact that the IDEA supports a standard that provides educational benefits that are targeted to allow individuals with disabilities to enter the workforce after graduation, there are policy considerations that also support such a standard. Fiscal policy and business considerations each support providing students who fall under the purview of the IDEA an education that increases their chances of joining the workforce.[119]

Individuals with developmental disabilities who complete their education without the ability to enter into the workforce are eligible for significant financial public support.[120] The question arises: does significant financial public support for individuals with developmental disabilities throughout their entire lives cost more than investing in educational programs that would allow some of these individuals to become economically self-independent? Or, can state and local school systems effectively use the public funding they currently receive to provide students with educational benefits tailored to helping them develop skills which will allow them to join the workforce? Significant research in this area is necessary to provide comprehensive answers to these questions. However, it is worth noting that Pennsylvania's

119. *See* Alia Wong, *Escaping the Disability Trap*, THE ATLANTIC (June 15, 2016), https://www.theatlantic.com/education/archive/2016/06/escaping-the-disability-trap/487070.

120. *See, e.g.*, GRANT WATCH, https://www.grantwatch.com/cat/7/disabilities-grants.html (last visited Apr. 1, 2018).

Intellectual Disabilities System, which provides care for individuals with developmental disabilities and mental health issues, received a total funding of $3 billion during the 2013 and 2014 fiscal year.[121] That is a significant increase from the 1999 and 2000 fiscal years, when the system received only $1.4 billion.[122] Again, targeted research is needed on the narrow issue of whether it is in the taxpayers' best interest to provide funding for these individuals for the remainder of their lives, or whether society's financial burden will be decreased if it invests in allowing these individuals to become economically self-independent through educational benefits. However, this issue is worthy of significant attention.

While the financial benefits of the proposed standard to society as a whole are uncertain, it is clear that society places significant value on working with businesses that employ individuals with developmental disabilities.[123] Research conducted by Autism Speaks Inc. found that "92% of Americans view companies hiring people with disabilities more favorably than those that do not [and] 87% would prefer to give their business to companies who hire disabled people."[124] Furthermore, American companies, including EY and Microsoft, have invested in creating workforces that are more "neurodiverse."[125] These companies are motivated by the fact that high-functioning autistic individuals possess special qualities that the companies are looking for in their employees.[126] If the general public and corporate America both have indicated that they value doing business with and employing individuals with developmental disabilities, then does common sense not dictate that schools should provide these individuals with an education that focuses on allowing them the ability to join

121. Joe Markosek, *Department of Human Services Intellectual Disabilities System*, INTELL. DISABILITIES SYS. PRIMER (Jan. 22, 2015), http://www.pahouse.com/Files/Documents/Appropriations/series/737/DHS_ID_BP_Update_012215.pdf.

122. *Id.*

123. *See* AUTISM SPEAKS, EMPLOYER'S GUIDE TO HIRING AND RETAINING EMPLOYEES WITH AUTISM SPECTRUM DISORDERS (ASDS) (2013), https://www.autismspeaks.org/sites/default/files/docs/employer_guide_to_hiring_and_retaining.pdf.

124. *Id.*

125. Bourree Lam, *Why Some Companies Are Trying to Hire More People on the Autism Spectrum*, THE ATLANTIC (Dec. 28, 2016), https://www.theatlantic.com/business/archive/2016/12/autism-workplace/510959.

126. *Id.* at 1–2; *see also* Ronald Alsop, *Are Autistic Individuals the Best Workers Around?*, BBC (Jan. 7, 2016), http://www.bbc.com/capital/story/20160106-model-employee-are-autistic-individuals-the-best-workers-around.

the workforce after graduating? The answer seems to weigh heavily in favor of an increased focus on educating individuals with developmental disabilities with a goal of providing these students with a fighting chance to join the workforce.

VII. CONCLUSION

The IDEA clearly requires that schools and school systems provide students with developmental disabilities educational benefits that seek to provide these students with a meaningful opportunity for economic self-sufficiency. However, the Supreme Court did not protect students with developmental disabilities who have the potential to join the workforce in its *Endrew F.* decision. While the *Endrew F.* standard could possibly be read to require school systems to fulfill Congress's intent in passing the IDEA, reasonable minds could differ on whether the standard requires school systems to provide individuals with developmental disabilities an education that focuses on preparing them to join the workforce. This is why the Court should have delineated a standard that ensures schools provide educational benefits that focus on obtaining the necessary skills to be a productive member of the workforce for students with developmental disabilities who have the potential to join the workforce. The proposed standard precludes any argument that students with developmental disabilities who could potentially join the workforce are not entitled to an education that strives to allow them to join the workforce—an education that the IDEA requires for such students.

The *Endrew F.* standard certainly is an improvement on the *Rowley* standard. However, it simply does not go far enough to ensure that it invariably works for students with developmental disabilities who want to work.