NEW YORK LAW SCHOOL

NYLS Law Review

Volume 63 | Issue 1 Article 4

March 2019

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VOLUME 63 | 2018/19

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63 N.Y.L. Sch. L. Rev. 51 (2018–2019)

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Autism is a type of Pervasive Developmental Disorder—it "permanently and adversely affects all aspects of a person's development."[1] In 2014, the incidence rate for autism in the United States was one in fifty-nine, a nearly 200% increase since the year 2000.[2] Some experts attribute this autism "tsunami"[3] to greater awareness and better diagnostics.[4]

Whatever the cause, children with autism grow up to be adults with autism, with markedly diminished employment prospects[5] and significantly higher healthcare costs than adults without autism.[6] Without proper services, children with autism may never develop the social and behavioral skills necessary to live independent, higher-functioning lives.[7] The alarming outlook for adults with autism demonstrates the need for children with autism to have access to high quality educational services that promote independence and self-sufficiency.[8]

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1. *Understanding Autism*, Autism Project, http://www.theautismproject.org/asd-resources (last visited Oct. 10, 2018).

2. *Autism Spectrum Disorder (ASD): Data & Statistics*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/ncbddd/autism/data.html (last updated Nov. 15, 2018); *see also* Jon Baio et al., Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years—Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States 2 (2014), https://www.cdc.gov/mmwr/volumes/67/ss/pdfs/ss6706a1-H.pdf (sampling eight-year-olds residing in Arizona, Arkansas, Colorado, Georgia, Maryland, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, and Wisconsin); *The Numbers Behind the Autism Tsunami*, Global Med. Educ., https://www.gmeded.com/gme-info-graphics/numbers-behind-autism-tsunami (last visited Oct. 15, 2018) (providing a graphic view of autism statistics for 2013).

3. Amir Khan, *The U.S. Is on the Verge of an 'Autism Tsunami*,' Bus. Insider (Jan. 12, 2015), https://www.businessinsider.com/increasing-numbers-of-autistic-adults-2015-1.

4. *See* Jamie Ducharme, *This May Be Why Autism Diagnoses Are on the Rise, According to the CDC*, Time (Apr. 26, 2018), http://time.com/5255729/us-autism-rates; *see also* Jessica Wright, *The Real Reasons Autism Rates Are Up in the U.S.*, Sci. Am. (Mar. 3, 2017), https://www.scientificamerican.com/article/the-real-reasons-autism-rates-are-up-in-the-u-s.

5. Maanvi Singh, *Young Adults with Autism More Likely to Be Unemployed, Isolated*, NPR (Apr. 21, 2015), https://www.npr.org/sections/health-shots/2015/04/21/401243060/young-adults-with-autism-more-likely-to-be-unemployed-isolated.

6. Mary Ann Liebert, Inc., *Healthcare Costs for Adults with Autism More Than Double Those for General Population*, Med. Xpress (Apr. 24, 2018), https://medicalxpress.com/news/2018-04-healthcare-adults-autism-population.html.

7. *See* James B. Adams et al., *Advice for Parents of Young Autistic Children*, Autism Res. Inst., https://www.autism.com/understanding_advice2a (last visited Jan. 13, 2019) (noting that a major reason for chronic unemployment for adults with autism is often attributed to underdeveloped social skills from inadequate services and treatment as children).

8. *See id.*; *CDC Increases Estimate of Autism's Prevalence by 15 Percent, to 1 in 59 Children*, Autism Speaks (Apr. 26, 2018), https://www.autismspeaks.org/science-news/cdc-increases-estimate-autisms-prevalence-15-percent-1-59-children (urging government leaders to support policies that improve transition-to-adulthood services and residential and employment options for autistic children and adults); *see also* Brief for Amicus Curiae Autism Speaks, in Support of Petitioners, at 5, Luke P. v. Thompson R2-J Sch. Dist., 555 U.S. 1173 (2009) (No. 08-800) (noting that the only way to avoid the social and financial cost of institutional care is to provide educational programming that is designed to meaningfully promote independence and self-sufficiency).

While most neurotypical students have the innate capacity to easily learn by observing the behaviors of others, it is generally accepted by psychologists, behaviorists, and educators alike that most students with autism have great difficulty learning by mere observation.[9] This is because a student with autism has trouble with "generalization"—the ability to transfer skills learned in one environmental context to another.[10] The ability to generalize is essential for students with autism to learn in a sustainable manner that fosters independence.[11]

For example, in order for students with autism to learn to recognize the color red, it must be presented in all its many manifestations—a red ball, a red ketchup bottle, a red ribbon, a red car.[12] These students may need to be presented with the color red by different instructors and across different environments.[13] Over time, with repetition and practice, the student can learn to reliably understand what "red" is.[14] Now, apply that painstaking process to all of the many skills and behaviors that a child needs to learn to live a functional life. If a student with autism never learns to generalize, only demonstrating learned skills and behaviors in the isolated setting in which they were taught, what has the student actually learned?

I. EDUCATION FOR ALL: STATUTORY PROTECTIONS FOR CHILDREN WITH DISABILITIES

On November 29, 1975, President Gerald Ford signed into law the Education For All Handicapped Children Act (EAHCA), mandating access to the public school

9. *See* Joshua B. Plavnick & Kara A. Hume, *Observational Learning by Individuals with Autism: A Review of Teaching Strategies*, 18 Autism 458, 458 (2014) ("[I]ndividuals with autism are characterized by a severe deficit in attentiveness to surroundings and therefore may not be as likely to learn skills by observing the behavior of others.").

10. Ashley B. de Marchena et al., *Brief Report: Generalization Weaknesses in Verbally Fluent Children and Adolescents with Autism Spectrum Disorder*, 45 J. Autism & Developmental Disorders 3370, 3370 (2015); *see* Latha V. Soorya et al., *An Overview of Imitation Skills in Autism: Implications for Practice*, 4 Behav. Analyst Today 114 (2003), http://psycnet.apa.org/fulltext/2014-44575-001.pdf (discussing the various learning and behavioral deficits and excesses associated with autism spectrum disorders). The diagnostic criteria of autism speaks to this problem. Am. Psych. Assoc., Diagnostic and Statistical Manual of Mental Disorders (DSM-V) 50 (5th ed. 2013) ("Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).").

11. *See* de Marchena et al., *supra* note 10; *see also* Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1150 (10th Cir. 2008).

12. *See, e.g.*, Ariane Zurcher, *Autism: An Inability to Generalize*, Huffpost (July 24, 2011, 11:51 AM), https://www.huffingtonpost.com/ariane-zurcher/an-inability-to-generaliz_b_907853.html.

13. *See* Shirley Cohen, Targeting Autism: What We Know, Don't Know, and Can Do to Help Young Children with Autism and Related Disorders 98–99 (2002).

14. *See id.*; *see generally* Kathleen A. Liberty & Felix F. Billingsley, *Strategies to Improve Generalization*, *in* Generalization for Students with Severe Handicaps: Strategies and Solutions 145 (Norris G. Haring ed., 1988), https://education.uw.edu/sites/default/files/areas/edspe/white/docs/StratForGen.pdf (providing various examples of situations in which teachers can incorporate generalization techniques into the classroom for autistic students).

system and a free appropriate public education (FAPE) for students with eligible disabilities.[15] Prior to the EAHCA, students with autism and other learning disabilities "were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[16] The enactment of the EAHCA and its inclusive approach to educating special needs students represented the disability community's *Brown v. Board of Education* moment.[17]

In the landmark decision of *Board of Education v. Rowley,* the United States Supreme Court considered the meaning of FAPE for the first time since the enactment of the EAHCA.[18] Amy Rowley,[19] an eight-year-old deaf child, sued her school district for denying her request for a sign-language interpreter.[20] Justice William Rehnquist, writing for a divided court, explained that the FAPE entitlement did not require schools to provide services that might allow a disabled student to achieve her full potential; it merely opened the schoolhouse door to provide access to "a basic floor of [educational] opportunity."[21] Further, the Court held that so long as the child's individualized educational plan (IEP) is "reasonably calculated" to enable the student to progress from grade to grade, then it complies with what the IDEA requires.[22] Since Amy was afforded access to an "adequate education" at her local public school

15. Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. §§ 1400–82 (2017)); *see also Special Education Public Policy*, Project IDEAL, http://www.projectidealonline.org/v/special-education-public-policy (last visited Jan. 13, 2019). A FAPE includes "related services" that are designed to assist a child in benefitting from "special education"—instruction that is specifically designed "to meet the unique needs of a child with a disability." § 1401(9), (26), (29).

16. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982) (quoting H.R. Rep. No. 94-332, at 2 (1975)); *see* § 1400(c).

17. 347 U.S. 483 (1954). Just as *Brown* provided a judicially imposed remedy for an educational exclusion based on a student's race, the EAHCA provided a statutory remedy for an educational exclusion based on a student's disability. *See* § 1400(d).

18. 458 U.S. at 187.

19. Amy Rowley remains an advocate for students with disabilities. See a transcript of her remarks at the 2018 Special Education Symposium in this Issue. *Address by Amy June Rowley, Ph.D., Professor, California State University, East Bay*, 63 N.Y.L. Sch. L. Rev. 21 (2018–2019).

20. *Rowley*, 458 U.S. at 184–85. In kindergarten, Amy was receiving supplemental services that included a teletype machine and an FM hearing aid. *Id.* at 184. After successfully completing kindergarten, Amy's parents requested she also be provided a qualified sign-language interpreter in all her academic classes. *Id.* After the school denied her request, Amy's parents demanded a hearing and subsequent administrative appeal, both of which resulted in a determination in favor of the school district. *Id.* at 184–85. Amy's parents then sought relief in federal court. *Id.* at 185. Both lower courts found that the IDEA required states to "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.* at 200.

21. *Id.*

22. *Id.* at 203–04. Under the statute, an IEP is the means by which special education and related services are provided for a particular child. *See* § 1401(9)(D) (2017); *Rowley*, 458 U.S. at 181.

and was advancing in grade level, the Court declined to hold that the school district was additionally obligated to provide her with a sign-language interpreter.[23]

Nearly fifteen years after *Rowley*, Congress recognized that the implementation of the EAHCA—subsequently re-authorized as the Individuals with Disabilities Education Act (IDEA)—suffered from unproven teaching methods and low expectations for students with disabilities.[24] Moreover, when students with disabilities transitioned out of the public educational system,[25] too few were meaningfully prepared for adult life and far too many were becoming costly wards of the state.[26] Accordingly, Congress re-authorized the IDEA and expressly identified the problem with a corresponding call to action:

> 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 and ensuring their access to the general education curriculum in the regular classroom . . . in order to meet developmental goals and . . . the challenging expectations that have been established for *all children;* and *be prepared to lead productive and independent adult lives*.[27]

The amended IDEA goes on to explain that its intent and purpose is to meet the "unique needs" of children with disabilities and prepare them for "further education, employment and independent living."[28] The statute's outcome-oriented objectives provide a bundle of transition services and related support to ensure that by the time students transition out of the public education system, they will have acquired the

23. *Rowley*, 458 U.S. at 209–10 (internal quotations omitted). Relying on the statutory definition of FAPE, legislative history and precedent, the Court held that the statutory requirements for a FAPE were satisified by providing personalized instruction with support services to allow a disabled child to benefit from that instruction. *Id.* at 203. The grading and advancement system would be a factor in determining the child's educational benefit. *Id.* at 207 n.28. As long as the instruction (i) was provided at the public's expense; (ii) met the state's educational standards; (iii) was available for every grade; and (iv) comported with the child's IEP, the statute's requirements were met. *Id.* at 203.

24. "[T]he implementation of [the IDEA] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." § 1400(c)(4); *see also* Lauren Zykorie, *Reauthorizing Discipline for the Disabled Student: Will Congress Create a Better Balance in the Individuals with Disabilities Education Act (IDEA)?*, 3 Conn. Pub. Int. L.J. 101, 115 (2003).

25. The time of transition will vary from student to student. While some students with disabilities will graduate and leave the system at eighteen or nineteen years old, others (based on their needs) may remain in the public educational system until they turn twenty-one. *See Transition Planning for Students with Disabilities: What's After Public Education?*, Navigate Life Tex., https://www.navigatelifetexas.org/en/education-schools/transition-planning-for-students-with-disabilities (last visited Jan. 13, 2019).

26. *See, e.g.*, Peter W. D. Wright & Pamela Darr Wright, Wrightslaw: Special Education Law 9 (Valerie O'Brian ed., 1st ed. 1999) (explaining that many children with disabilities were placed into public institutions, costing billions of dollars each year, and that with proper educational services, many of these children would have been less dependent on society and more successful in life).

27. § 1400(c)(5)(A)(i)–(ii) (emphasis added).

28. § 1400(d)(1)(A).

skills necessary to graduate *to* something meaningful for them.[29] Yet, despite these amendments to the IDEA, prior to 2017, courts continued to rely on *Rowley*'s minimal, access-oriented standard, which purportedly requires nothing more than providing a "basic floor of opportunity."[30]

II. THE "MERELY MORE THAN *DE MINIMIS*" STANDARD

All too predictably, aiming for the basic floor of educational opportunity does not work well for the autism community. In 2008, the United States Court of Appeals for the Tenth Circuit addressed the issue of generalization in *Thompson R2-J School District v. Luke P.*[31] Luke, then a second-grade student, was diagnosed with autism at the age of two.[32] Behavior evaluations administered both in school and at home revealed that Luke was not generalizing the skills he was ostensibly learning at school.[33] For example, while Luke was fully toilet-trained at school, at home he would spread his feces around his bedroom.[34] After several meetings with Luke's parents, the school district proposed a revised IEP that called for continued placement at the public school.[35] Luke's parents rejected the school district's proposal and, due to the severity of Luke's condition, placed him in a private residential program and sought reimbursement from the school district.[36]

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29. *See* § 1401(34). These "transition" entitlements include vocational and other related assessments; post-secondary planning including the development of goals; involvement of the family and the student in identifying the student's post-secondary interests; and programs and services to develop the skills the student will need at the time of transition. *Id.*

30. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982); *see also* Reyes v. N.Y.C. Dep't. of Educ., 760 F. 3d 211, 221 (2d Cir. 2014); Barron v. S.D. Bd. of Regents, 655 F.3d 787, 793 (8th Cir. 2011); Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 382 (5th Cir. 2007); Bd. of Educ. v. L.M., 478 F.3d 307, 314 (6th Cir. 2007); Aaron P. v. Dep't of Educ., No. 10-00574 LEK-KSC, 2011 U.S. Dist. LEXIS 126450, at *50 (D. Haw. Oct. 31, 2011).

31. 540 F.3d 1143 (10th Cir. 2008). The *Luke P.* decision was written by then Judge Neil Gorsuch and became a focal point of inquiry during his United States Supreme Court confirmation hearings in 2017. *See* Joseph P. Williams, *Supreme Court Decision Opens Neil Gorsuch to Senate Scrutiny*, U.S. News & World Rep. (Mar. 22, 2017), https://www.usnews.com/news/politics/articles/2017-03-22/supreme-court-decision-opens-neil-gorsuch-to-senate-scrutiny. I had an amicus role in *Luke P.* supporting the student's position on behalf of Autism Speaks when the case reached the Supreme Court. *See* Brief for Amicus Curiae Autism Speaks, in Support of Petitioners, Luke P. v. Thompson R2-J Sch. Dist., 555 U.S. 1173 (2009) (No. 08-800).

32. *Luke P.*, 540 F.3d at 1145.

33. *Id.* at 1145–46. Luke's occupational therapist reported that Luke had made little to no progress on many of his educational goals and objectives, and that Luke had "great difficulty generalizing skills taught in one environment to natural daily living routines." *Id.* at 1146.

34. *Id.*

35. *Id.* at 1147.

36. *Id.* Under 20 U.S.C. § 1412(a)(10)(C)(ii) (2017), parents can seek reimbursement of the cost of private tuition from the school district if their zoned school violates the IDEA by failing to provide a reasonably calculated FAPE.

Luke's parents filed for an impartial hearing for a determination that the school district failed to provide Luke with a FAPE, that a residential program was necessary, and that the school district must reimburse them for the cost of the private school.[37] After the hearing and subsequent appeal, the state's department of education found in favor of Luke's parents.[38] The school district brought suit in federal court, which affirmed the prior administrative rulings.[39] The school district then appealed to the Tenth Circuit.[40]

On appeal, the school district argued it had met the Tenth Circuit's "merely more than *de minimis*" standard when it provided the revised IEP.[41] A unanimous Tenth Circuit panel agreed. The court acknowledged that although "one can well argue that generalization is a critical skill for self-sufficiency and independence," it was not "essential" under the IDEA.[42] Finding that the goal of generalization does not "carr[y] special weight" under the law, and that Luke had made at least "*some* progress," the court determined that the school district sufficiently complied with the IDEA.[43]

III. THE NEW FAPE STANDARD

In 2017, a unanimous Supreme Court reviewed and rejected the Tenth Circuit's "merely more than *de minimis* standard" in *Endrew F. v. Douglas County School Distict RE-1*.[44] Endrew, an autistic student, exhibited behaviors that impeded his ability to learn in the classroom.[45] However, unlike in *Luke P.*, the school district in *Endrew F.* proposed an IEP that was substantially the same as those provided in years past.[46] When Endrew's progress stalled, his parents placed him in a private school and

37. *Luke P.*, 540 F.3d at 1147. The IDEA provides parents the opportunity to request an impartial hearing with the state or local educational agency. § 1415(f).

38. *Luke P.*, 540 F.3d at 1147.

39. *Id.* at 1148.

40. *Id.*

41. *See id.* at 1149. The Tenth Circuit's precedent interpreted the IDEA as only mandating a "more than *de minimis*" educational benefit. *See* Urban v. Jefferson Cty. Sch. Dist. R-1, 89 F.3d 720, 726–27 (10th Cir. 1996).

42. *Luke P.*, 540 F.3d at 1150. Citing *Rowley*, the Tenth Circuit concluded that the Supreme Court had expressly rejected the idea that self-sufficiency was the standard that Congress imposed on the states. *Id.* at 1151. Thus, the statutory scheme was interpreted narrowly to ensure a disabled student's access to public education, but stopped short of guaranteeing substantive outcomes. *Id.*

43. *Id.* at 1154. The Tenth Circuit also found that Luke's revised IEP contained substantive goals expressly related to improving Luke's generalization skills. *Id.* at 1153.

44. 137 S. Ct. 988, 1001 (2017). The attorney representing Endrew F. (Jack D. Robinson of Spies, Powers and Robinson), also represented Luke P. *See id.* at 993; *Luke P.*, 540 F.3d at 1144. After the Supreme Court granted Endrew F.'s petition for certiorari, my firm was accorded another amicus opportunity on behalf of Autism Speaks. *See* Amici Curiae Brief of Disability Rights Organizations and Public Interest Centers in Support of Petitioner, *Endrew F.*, 137 S. Ct. 988 (No. 15-827).

45. *Endrew F.*, 137 S. Ct. at 996.

46. *Id.*

requested tuition reimbursement.[47] Endrew's parents contended—and the Court agreed—that a FAPE that provides "merely more than *de minimis*" progress falls short of what the IDEA requires.[48]

First, the Court reaffirmed that a student's IEP is "the centerpiece of the statute's education delivery system for disabled children."[49] In order to be "reasonably calculated," the IEP must be designed to enable a child to progress in light of her circumstances, which requires a fact-intensive exercise with school officials, educators, and parents or guardians.[50] The Court then made clear—for the first time—that a student's educational program must be "appropriately ambitious;" although each student's goals may differ, "every child should have the chance to meet challenging objectives."[51] Finally, to meet the requirements of a FAPE, an IEP should be constructed "after careful consideration of the child's present levels of achievement, disability, and *potential for growth*."[52]

Although the Court adopted an expansive view of the FAPE mandate, it reiterated its position from *Rowley*: A FAPE does not require an education that aims to provide a child with a disability an equal opportunity as her non-disabled peers to achieve academic success, attain self-sufficiency, and contribute to society.[53] However, it does guarantee a reasonably calculated education plan that "enable[s] a child to make progress appropriate in light of [her] circumstances,"[54] one that is "appropriately ambitious" and "challenging" considering her potential for growth.[55] The Court made clear that this new standard is "markedly more demanding than the 'merely more than *de minimis*' test" previously employed by the Tenth Circuit.[56]

IV. CONCLUSION

Each year, some 50,000 students with autism will leave the public school system and enter adulthood.[57] What will be their outcome? The Supreme Court's new and more robust FAPE standard in *Endrew F.* cries out for a careful reexamination of the generalization issue. As the court acknowledged in *Luke P.*, for students with autism, the generalization of skills is "critical" to promoting independence and self-

47. *Id.* at 996–97.

48. *Id.* at 1001.

49. *Id.* at 994.

50. *Id.* at 999.

51. *Id.* at 1000.

52. *Id.* at 999 (emphasis added).

53. *Id.* at 1001 (citing Bd. of Educ. v. Rowley, 458 U.S. 176, 198 (1982)).

54. *Id.* at 999.

55. *Id.* at 1000.

56. *Id.*

57. *What Is Autism?: Autism Facts and Figures*, Autism Speaks, http://www.autismspeaks.org/autism-facts-and-figures (last visited Jan. 13, 2019).

sufficiency.[58] For the autism population, promoting the generalization of skills requires that skills be taught across different environmental settings and with different instructors.[59] Educators and school district administrators have the resources and power to address much of this need without waiting for the court system to tell them what to do. But will they?

As Congress has recognized in the IDEA, having high expectations is an essential component in affecting outcomes.[60] The Supreme Court's decision in *Endrew F.* reinforces the pursuit of high expectations by requiring that IEP goals and objectives be sufficiently ambitious and challenging, taking the student's circumstances and potential into account. It signals a reaffirmation of a vision of children with autism making meaningful progress in our education system based on their individual needs, whether that be through a residential program, private school, or one-on-one instruction across multiple settings. It will take time to understand the full implication of this decision for students with disabilities, but for many, the decision is a welcome sign that they deserve more than the bare minimum.

58. *See* 540 F.3d 1143, 1150 (10th Cir. 2008).

59. *See generally* Kent McIntosh & Leslie D. MacKay, *Enhancing Generalization of Social Skills: Making Social Skills Curricula Effective After the Lesson*, 18 Beyond Behav. 18 (2008).

60. *See* 20 U.S.C. § 1400(c) (2017).