

# Indicators of Progress in the Wake of Andrew F.

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**2023 OSEP LEADERSHIP AND PROJECT DIRECTORS' CONFERENCE**





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*(Authority: 20 U.S.C. 1221e-3 and 3474)*

# Welcome to the PROGRESS Center!

The PROGRESS Center provides information, resources, tools, and technical assistance services to support local educators in developing and implementing high-quality educational programs that enable children with disabilities to make progress and meet challenging goals.



## HOW WILL WE HELP IMPROVE OUTCOMES FOR STUDENTS WITH DISABILITIES?



Share current research, policies, guidance, success stories, and experiences from students, parents, educators, and other stakeholders.



Partner with selected local educators to develop and implement high-quality educational programs.



Provide tools, resources, and training materials for ALL educators, leaders, and families.

Visit us at [www.promotingPROGRESS.org](http://www.promotingPROGRESS.org) to learn more!

# Why We Do What We Do

“To meet its substantive obligation under the IDEA, a school must offer an IEP **reasonably calculated** to enable a child to **make progress** appropriate **in light of the child’s circumstances.**” [emphasis added]

—*Endrew F. v. Douglas County School District RE-1 (2017)*



# PROGRESS Center Special Education Law Modules



## Introduction to Special Education Law: Understanding the Sources of the Law

This course is part of a series covering the legal foundations of laws supporting students with disabilities. Those who enroll...

*Faculty/PD Provider, General Educators, LEA/School Leaders, Special Educators/Providers*

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## Introduction to Federal and State Laws Impacting Students With Disabilities

This course is part of a series covering the legal foundations of laws supporting students with disabilities. Those who enroll...

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## IDEA and the IEP: From Compliance to PROGRESS

This course provides an overview of the seven required components of the individualized education program (IEP) as outlined in the...

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
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## The IEP Team: Who's Who and Other Considerations

This course provides a review of the team members responsible for collaboratively developing the students individualized education program (IEP) as...

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# Overview of Session

- **Thesis:** The coverage in the special education literature often does not distinguish between legal requirements, as established by the courts, and professional best practices, as determined by special education experts.
- **Illustrative Focus:** The indicators of progress that courts identify in applying *Endrew F.* and the differentiation from the professional literature.

**Citation:** Zirkel, P.A. & Yell, M.L. (in press). Indicators of progress in the wake of Endrew F.: The distinction between judicial rulings and professional recommendations. *Exceptional Children*.



# Substantive Std. for FAPE under Rowley and Endrew F.

- *The Supreme Court in Endrew F. v. Douglas County School District RE-1 (2017) refined the substantive standard for a free appropriate public education (FAPE) under the IDEA.*
- *Board of Education v. Rowley (1982): required IEPs to be “reasonably calculated to enable the child to receive educational benefit.”*
- *Endrew F. v. Douglas County School District RE-1 (2017): required IEPs to be “reasonably calculated to enable the child to make progress in light of the child’s circumstances.”*

# Initial Indicators: Rowley

*The Rowley Court identified two indicators of progress:*

- *“[I]f the child is being educated in the regular classrooms of the public education system, [the IEP] should be reasonably calculated to enable the child to achieve **passing marks** and **advance from grade to grade** [i.e., promotion].”*
  - *with clarifying dicta (i.e., side comments):*
    - » *not automatic*
    - » *deference to local and state school authorities*



# Initial Indicators: Rowley Progeny

- *The lower courts' application of the substantive standard of Rowley Court identified limited other indicators of progress:*
  - *Various rulings did not focus on specific indicators based on the “reasonable calculation” component and the “snapshot” approach.*
  - *Those rulings that identified indicators largely relied on the two in Rowley only to confirm the positive snapshot or to add other purportedly “objective evidence” – test scores, progress reports, and teacher testimony.*

# Andrew F.: Selective Reaffirmations

- *snapshot approach: “The ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials.”*
- **differentiation**: *The legal focus is on “whether the IEP is reasonable, not whether the court regards it as ideal.”*
- *progress indicators: “[F]or a child fully integrated in the regular classroom, an IEP typically should, as Rowley put it, be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”*

# Andrew F.: Nuanced Refinements

- *For “a student who is not fully integrated in the regular classroom and not able to achieve on grade level,” the reasonably calculated analog to passing grades and promotion is an “appropriately ambitious” IEP, including “challenging objectives.”*
- *Repeated judicial deference but with judicial expectation that school authorities provide “a cogent and responsive explanation” for their decisions to show that the IEP meets the substantive FAPE standard.*

# Framework of This Analysis

Categories of progress indicators:

- grades and promotion
- standardized tests
- other tests not covered in the “standardized” category
- progress reports
- other evidence of academic, functional, and behavioral advancement

Comparison of:

- the “should” of the professional literature
- the “*must*” of the judicial rulings applying *Endrew F.*

# Overall Attributes from the Professional Literature

The “should” dimension is based on the professional literature in special education and related fields (e.g., school psychology).

- ✓ The primary use of progress indicators is for **formative purposes** to guide instruction.
- ✓ Progress indicators should have **strong psychometric properties**.
- ✓ Progress indicators should be **time-efficient and easy** for the teacher to administer.
- ✓ Progress indicators **directly sample the behaviors** of interest.
- ✓ Progress indicators should **provide meaningful data** in relation to a student's needs.
- ✓ Progress indicators should **inform instruction** in different ways, thus accounting for multiple categories.

Source: [https://charts.intensiveintervention.org/aprogressmonitoring?\\_gl=1\\*15472zl\\*\\_ga\\*MTQ5NDk0Mzk5OC4xNjQxNDE1Mzg4\\*\\_ga\\_8HTR3VBRFZ\\*MTY4NzUyODUyMC4yNDguMC4xNjg3NTI4NTlwLjAuMC4w](https://charts.intensiveintervention.org/aprogressmonitoring?_gl=1*15472zl*_ga*MTQ5NDk0Mzk5OC4xNjQxNDE1Mzg4*_ga_8HTR3VBRFZ*MTY4NzUyODUyMC4yNDguMC4xNjg3NTI4NTlwLjAuMC4w)

# Overall Features of the Judicial Rulings

*Court rulings during 5 years after Endrew F. (3/22/17) that (a) applied its substantive standard and (b) identified at least one progress indicator: 58 (13%) of 461 court decisions that cited Endrew F.*

*The outcomes distribution of the 58 substantive FAPE rulings was 88% in favor of school district and 12% in favor of parents.*

*The rulings largely did not rely on the more nuanced distinctions in the Endrew F. decision.*

*The courts were generally holistic and relatively relaxed rather than particularistic and rigorous in the approach to progress indicators.*

# Comparison of Professional & Judicial Interpretations

## Grades and Promotion:

### ➤ Professional recommendations

- Grades should (a) focus solely on student proficiency, (b) adhere to clearly described performance standards, (c) be consistent from teacher to teacher, and (d) communicate useful and concrete information to students and their parents.
- Yet, teachers often rely on informal and idiosyncratic adaptations, which lead to validity problems.
- Thus, use of grades or promotions are not suggested for use as progress indicators.

### ➤ *Judicial rulings*

- *Grades were the most frequent progress indicator in the court rulings.*
- *The courts accorded negligible considerations to the limitations of these measures.*
- *The absence of best practice standards for grades and promotion were likely attributable to the filtering factors endemic to the judiciary.*

# Comparison of Professional & Judicial Interpretations: Standardized Tests

## ➤ Professional recommendations

- Standardized tests refer to any measures that are administered, scored, and interpreted a consistent or standard manner across different times and places.
- Include norm-referenced tests of achievement and proficiency assessments.
  - Caveats: e.g., use of percentile ranks, such as grade equivalent scores.
  - Questionable indicators of progress.
- Include general outcome measurement (GOM).

## ➤ *Judicial rulings*

- *Standardized tests were the second most frequently identified progress indicators.*
- *Those most commonly identified were standardized achievement measures and state proficiency tests.*
- *Critical assessment of the limitations of these measures was absent.*



# Comparison of Professional & Judicial Interpretations: Other “Tests” (e.g., mastery measures)

## ➤ Professional recommendations

- Mastery monitoring assessments can be standardized or teacher-made tests.
- Standardized mastery monitoring may have manuals that report psychometric data.
- Teacher-made tests do not have known psychometric properties.
- The empirical research on mastery monitoring tests warns against the overreliance or incautious use as progress indicators.

## ➤ *Judicial rulings*

- *The 58 rulings identified these other tests much less frequently than standardized instruments.*
- *These tests received negligible critical examination.*

# Comparison of Professional & Judicial Interpretations: Progress Reports

## ➤ Professional recommendations

- Progress reports should (a) provide data specific to the IEP goals, (b) explain the data clearly for the service providers and parents, and (c) use the data to predict whether a student will meet his or her goals.
- A key qualifier for progress reports is high frequency.
- Include in the IEP, with systematic implementation, analysis, and reporting.

## ➤ *Judicial rulings*

- *The court rulings specifically identified progress reports almost as frequently as standardized tests but less than expected in light of the statutory IEP requirement.*
- *This difference may be attributable to limited scope and specificity of this requirement.*

# Comparison of Professional & Judicial Interpretations: Other Progress Indicators (e.g., disciplinary referrals or task analysis)

## ➤ Professional recommendations

- Data-based decision making-making procedures share the following data characteristics: (a) collected, (b) displayed, (c) interpreted, and (d) use for instructional decisions.
- The literature refers to data-based judgments as integral for assessing student progress.

## ➤ *Judicial rulings*

- *Although the court rulings occasionally address other indicators (e.g., behavioral records or work samples), the most heavily weighted progress indicator was the testimony of teachers and other district personnel.*
- *This preeminence is largely attributed to (a) the institutional nature of courts, in which witnesses serve as the primary source of evidence, and (b) the Rowley-Endrew F. emphasis on judicial deference to school authorities.*

# One Reason for the Discrepancy

## Institutional Characteristics of the Judiciary:

- ✓ Courts are not only congested, but also generalists.
- ✓ The adjudication system of the IDEA allocates a reviewing, not trial, role to the courts.
- ✓ Courts are oriented to procedural, not policy, analysis.
- ✓ Courts are increasingly unlikely to engage in activism, leaving such matters to the other two branches.

# Implications

- Do not fuse or confuse the minimum “musts” of the case law with the higher “should” of the education profession.
- To the extent that closing the gap is sought, the appropriate ways are via (a) effective lobbying at state or federal levels and (b) serving as expert witness in due process hearings to educate the courts in the identification, evaluation, and application of progress indicators.
- Conversely, the emphasis should be on developing and disseminating evidence-based best practice that yields professionally appropriate progress in collaboration with parents, thus proactively exceeding and superseding the *legal standard*.

# Questions and Reflections



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# Resource Spotlight

- Q&A: *Endrew F. v. Douglas County School District Case* Q&A (Dec. 7, 2017), <https://sites.ed.gov/idea/idea-files/qa-endrew-f-v-douglas-county-school-district-case-qa/>
- Individuals with Disabilities Education Act (IDEA) website, <https://sites.ed.gov/idea/>
  - Brings together IDEA information and resources from the Department and its grantees.
- IDEAS That Work, <https://osepideasthatwork.org/>
  - For information from research to practice initiatives funded by OSEP that address the provisions of IDEA and ESSA. This website includes resources, links, and other important information relevant to OSEP's research to practice efforts.



# PROGRESS Center Resources

The **PROGRESS** Center provides information, resources, and support for local educators and leaders responsible for the **development** and **implementation** of high-quality educational programming for students with disabilities that ensures access to free appropriate public education (FAPE) and progress toward appropriately ambitious goals... [MORE](#)

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## The State of the States: National Trends in State Education Agency Guidance on Special Education

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**Billy Pickens tells us how his teacher's high expectations for him may not have been welcome in high school but that as an adult who is deaf-blind, he now appreciates how important it was for his future.**

## Improving Access and Outcomes for Students with Disabilities

Development of high-quality educational programming for students with disabilities  $\times$  Implementation of high-quality educational programming for students with disabilities = Ensure access to FAPE and improve outcomes for students with disabilities

<https://promotingprogress.org/>

**IDEA and the IEP: From Compliance to PROGRESS**

This course provides an overview of the seven required components of the individualized education program (IEP) as outlined in the...

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**The What and Why of Measurable Annual Goals**

This course is intended to explain the Individuals with Disabilities Education Act (IDEA) requirements for measurable annual goals and the...

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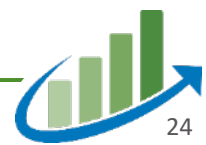
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**Path to PROGRESS: Developing and Implementing High-Quality Educational Programs**

This course is intended to encourage reflection on the larger purpose of the Individuals with Disabilities Education Act (IDEA) and...

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# References

- Zirkel, P. A. (2020). Legal information in special education: Accuracy with transparency. *Exceptionality*, 28(4), 312–315.
- Zirkel, P.A. (2022a). Legal requirements for progress monitoring under the IDEA: What do the courts say? *Exceptionality*, 30, 297–309.
- Zirkel, P. A. (2022b). Which progress indicators do court use in applying the *Endrew F.* substantive standard for FAPE under the IDEA? *West's Education Law Reporter*, 399, 1–10
- Zirkel, P.A. & Yell, M.L. (in press). Indicators of progress in the wake of *Endrew F.*: The distinction between judicial rulings and professional recommendations. *Exceptional Children*.

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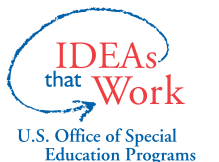


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