

Forming a Better IDEA of Progress: Goals for Similarly Situated Students with IEPs

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I. INTRODUCTION

Both Mrs. Garcia and school officials suspected that her son, Alfredo, might have a learning disability.¹ Mrs. Garcia was concerned, and she found herself in a situation that was unfamiliar to her: working with school officials to develop an Individualized Education Program (“IEP”) for her son.² Before the official IEP team meeting, Alfredo’s third-grade teacher and special education teacher met with Mrs. Garcia to discuss the IEP process and her role as a parent.³ They allowed her to ask questions and provided her with written resources, all of which were in Spanish, her primary language.⁴ The teachers also met with the Spanish interpreter, providing her with information regarding the structure of the meeting as well as a glossary of terms commonly used in IEP meetings.⁵ When the time came for the IEP meeting, the third-grade teacher greeted Mrs. Garcia at the office and brought her to the IEP meeting room, where a team of professionals and the interpreter took turns introducing themselves and their roles.⁶ Mrs. Garcia, though nervous, felt prepared because she had previously received copies of the meeting agenda and evaluation reports.⁷

While Mrs. Garcia’s experience as a parent seems ideal, it is unfortunately uncommon.⁸ Parental involvement, though necessary in the IEP process, is often limited due to a variety of factors that include lack of parental resources, inconvenient scheduling during parent work

1. Lusa Lo, *Demystifying the IEP Process for Diverse Parents of Children with Disabilities*, 44 *TEACHING EXCEPTIONAL CHILD* 14, 16 (2012) (describing the experience of Mrs. Garcia, the mother of a third grader with a learning disability).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 15 (explaining the opposite experience of Mr. Sau, a parent who “simply nodded nervously” throughout his child’s IEP meeting due to his isolation during the process). Among other things, Mr. Sau was directed to the wrong school building for the meeting, was not provided with the meeting start and end times, and received a translator who spoke Mandarin, even though he spoke Cantonese. *Id.*

hours, and overall intimidation by the process.⁹ Parents may also feel a sense of guilt or embarrassment due to their child's low performance on schoolwork.¹⁰ These factors are only enhanced by inequities grounded in race, socio-economic status, and language barriers. Even when parents are fully present at IEP meetings and feel truly concerned about their child's educational progress, they often feel unable to voice their concerns and complaints to teachers and other school personnel.¹¹

After acknowledging the challenges that exist surrounding parental involvement in the IEP process, one might consider what role, if any, Congress and the courts have in dealing with this problem. Ultimately, parental involvement seems to be a widespread issue across the field of education, reaching far beyond the special education sphere.¹²

9. Andrea G. Zetlin, Marina Padron & Susan Wilson, *The Experience of Five Latin American Families with the Special Education System*, 31 EDUC. AND TRAINING IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 22, 22 (1996) (providing six factors found to influence lack of parental involvement in the IEP process: "(a) inconvenient scheduling of and amount of time required to attend IEP meetings; (b) transportation and/or child-care constraints; (c) parents' intimidation by the IEP process and reluctance to question professionals; (d) parents' [feeling overwhelmed by] educational jargon and paperwork; and (e) financial constraints if parents disagree with decisions and desire independent testing").

10. Wade W. Fish, *Perceptions of Parents of Students with Autism Towards the IEP Meeting: A Case Study of One Family Support Group Chapter*, 127 EDUC. 56, 57 (2006) (describing how parents often view "IEP meeting[s] as . . . opportunit[ies] for educators to brief them on the failures of their child," a concept that can leave parents feeling embarrassed and less likely to provide input during IEP meetings).

11. Zetlin et al., *supra* note 9, at 27 (providing the accounts of five Latin American mothers, four of whom felt a sense of mistrust during the IEP meeting but who were "unable to voice their complaints regarding classroom curriculum and teaching methodology").

12. There are a variety of systemic reasons why parental involvement is limited in some circumstances, one being parenting style. The American Psychological Association breaks down the spectrum of parenting into three styles: authoritative, permissive, and uninvolved. *Parenting Styles*, AM. PSYCHOLOGICAL ASS'N, <https://www.apa.org/act/resources/fact-sheets/parenting-styles> (last visited Oct. 24, 2020). Uninvolved parents are generally "unresponsive" and "unavailable" in relationships with their children. *Id.* Beyond parenting styles, parent income has been shown to affect the level of parent participation in schools, with participation increasing as parent income increases. Sarah D. Sparks & Alex Harwin, *How Parents Widen—or Shrink—Academic Gaps*, EDUC. WEEK (Apr. 18, 2017), <https://www.edweek.org/ew/articles/2017/04/19/how-parents-widen--or-shrink--academic-gaps.html>.

Understanding parental involvement in education as a systemic concern might lead one to doubt the existence of a real solution.¹³

However, throwing our hands in the air in response to challenges stemming from lack of parental involvement in the IEP process is not enough when Congress, in developing the Individuals with Disabilities Education Act (“IDEA”), explicitly made parental involvement an essential component of the IDEA’s mandates.¹⁴ And if Congress chose to require parents to play an active role in developing and maintaining IEPs, it is up to Congress to provide some sort of framework that safeguards a child’s rights when parental involvement, for one reason or another, does not meet the IDEA’s expectations.

The IDEA requires IEPs to contain a statement of measurable annual goals designed to “meet the child’s needs that result from the child’s disabilit[ies] to enable the child to be involved in and make progress in the general education curriculum.”¹⁵ Like all mandates in the IDEA, this requirement to develop appropriate progress goals for children relies upon parents as vital members of the IEP team.¹⁶ The purpose of these annual goals is for the IEP team to make student progress projections during a particular year.¹⁷ Then, the IEP team is able to

13. See J. Richard Gentry, *A Lack of Parent Engagement Helps Create Failing Schools*, PSYCHOL. TODAY (July 13, 2011), <https://www.psychologytoday.com/us/blog/raising-readers-writers-and-spellers/201107/lack-parent-engagement-helps-create-failing-schools> (explaining a teacher’s concern that many parents are disengaged and that “[f]ew parents show up at open house or communicate with teachers unless there is a problem”).

14. Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1414 (using the word “parent,” “parents,” or “parental” over 400 times in this section of the IDEA, which sets forth the requirements for IEPs); Alex Meyer, Note, *Disabling Parents: How the Minnesota Supreme Court’s Well-Intentioned Decision in Independent School District No. 12 v. Minnesota Department of Education Undermines the Role of Parents on IEP Teams*, 34 HAMLIN L. REV. 623, 634 (2011) (describing how the 1997 version of the IDEA codified parents’ roles in special education).

15. IDEA, 20 U.S.C.S § 1414(d)(1)(A)(i)(II)(aa).

16. IDEA, 20 U.S.C. § 1414(d)(1)(B). This section of the IDEA defines the individualized education program team, which must include “the parents of a child with a disability,” as well as certain teachers and school personnel. *Id.* The section goes on to explain that parents have discretion to choose additional individuals to be involved in the IEP process. *Id.* at § 1414(d)(1)(B)(vi).

17. Eric Drasgow, Mitchell L. Yell & T. Rowand Robinson, *Developing Legally Correct and Educationally Appropriate IEPs*, 22 REMEDIAL & SPECIAL EDUC. 359, 364 (2001).

monitor the goals to determine whether anticipated outcomes are being met and if the special education services are effective for the child.¹⁸ As one might imagine, progress goals can vary widely based solely on parental advocacy during IEP meetings. However, the adequacy of a student's progress goals should not turn on his or her parents' unique experience in an IEP meeting, especially when some parents do not understand their advocacy rights.¹⁹

This Note will address the issues arising at the intersection between vague guidelines on what constitutes sufficient progress under the IDEA and the barriers parents face as members of IEP teams. The Supreme Court and lower courts have focused on the subjective nature of disabilities when interpreting what constitutes sufficient progress under the IDEA, which has led them to develop vague standards of adequate progress.²⁰ Ultimately, although progress goals are inherently individualized, the IDEA lends itself to the creation of a semi-objective standard which will help to mitigate some of the discrepancies in progress goals that stem from unequal parental involvement.

Because we cannot guarantee that every parent—regardless of race, primary language, socio-economic status, and other factors—will have an experience like that of Mrs. Garcia, Congress must step in to offer, in addition to the subjective student standard, a semi-objective standard that sets general guidelines for student progress goals based upon students who are similarly-situated in terms of their diagnosed disability. These general guidelines should be informed by available research, including, where appropriate, the Diagnostic and Statistical Manual of Mental Disorders.²¹

18. *Id.* (explaining that annual goals help to determine the effectiveness of a student's placement).

19. *See* Zetlin, et al., *supra* note 9, at 27 (describing how one Guatemalan American mother did not make an objection during the IEP meeting, even though her son's IEP goals were fully prepared before the meeting).

20. *See infra* Section II.C (explaining two Supreme Court holdings and subsequent application of those holdings in lower courts).

21. While the IDEA represents the educational perspective of a disability, the Diagnostic and Statistical Manual ("DSM") represents the medical perspective. NAT'L ACADS. OF SCIS., ENG'G & MED., MENTAL DISORDERS & DISABILITIES AMONG LOW-INCOME CHILDREN 179 (Thomas F. Boat & Joel T. Wu eds., 2015). The DSM, published by the American Psychiatric Association, "contains descriptions of symptoms and criteria for diagnosing a wide range of disorders." CANDACE CORTIELLA & SHELDON H. HOROWITZ, THE STATE OF LEARNING DISABILITIES: FACTS, TRENDS AND

Part II will explain the history of the IDEA, from its development in 1975 to its current form, focusing on the IDEA's reliance on parents in the creation of IEPs for their children. Part II will analyze the ambiguous results of the Supreme Court's decisions in *Rowley* and *Endrew*, two cases where the Court interpreted the definition of "progress" under the IDEA.²²

Part III of this Note will analyze how courts post-*Endrew*, the latest Supreme Court decision, have interpreted the meaning of "progress." Additionally, Part III will use court cases to provide evidence of parental challenges and inequities in the special education system. Part III will also describe an eye-opening study that revealed discrepancies in IEP progress goals based upon the primary language of the students' parents.

Part IV of this Note will propose, in addition to the existing subjective standard, a semi-objective standard that creates general guidelines and benchmarks for IEP progress goals based upon similarly situated students who have the same or similar disabilities. This semi-objective standard will serve to ensure that the quality of student progress goals is not completely at the mercy of parental resources and advocacy skills. Specifically, the standard will require educators and IEP teams to consider relevant research regarding the individual child's disability. This research can help inform decisions about appropriate progress goals for each child. Finally, Part V of this Note will briefly conclude on the need for Congress to take a next step toward equity in special education through a semi-objective standard for IEP progress goals.

II. BACKGROUND

IEPs are a recent invention. In the 1970s, the United States began rethinking its stance toward educating students with disabilities.²³

EMERGING ISSUES (3d ed. 2014), <https://www.nclld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf>.

22. See generally *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

23. Mitchell L. Yell, David Rogers & Elisabeth Lodge Rogers, *The Legal History of Special Education: What a Long, Strange Trip It's Been!*, 19 REMEDIAL & SPECIAL EDUC. 219, 225 (1998) (explaining how United States senators introduced multiple bills addressing education of students with disabilities).

This attention on special education resulted in legislative and judicial efforts to better the educational opportunities for these students.²⁴ From the IDEA's inception in 1975 to a recent Supreme Court decision in 2017, Congress and courts continue to grapple with the mandates of the IDEA, particularly as they relate to the requirements of progress goals and what "progress" really means. Challenges have also emerged at the ground level, as the IDEA's reliance on parents has evolved, placing on them great responsibilities in the development and maintenance of IEP progress goals.

A. History of Special Education in the United States: How Parents Came to be an Important Part of the Process

Before 1975, schools had no obligation to educate children with disabilities.²⁵ Instead, these children usually ended up at home or institutionalized.²⁶ Many states followed a trend of preventing children from attending public schools if they had a disability that fell within a certain category.²⁷ In these states, school administrators were allowed to exclude a child from attending school if they decided that the child would not benefit from public education or if the child posed a disruption to other students.²⁸ Further, if parents insisted that their children

24. *Id.*

25. Trisha Lynn Sprayberry, *The Impact of I.D.E.A. for Students with Disabilities and Education Equality: 40 Years Later*, HUFFPOST (Dec. 30, 2014), https://www.huffpost.com/entry/idea-for-students-with-disabilities_b_6312830 (describing the brief history of special education law in the United States) (last updated Mar. 1, 2015).

26. *Id.*

27. Megan McGovern, Note, *Least Restrictive Environment: Fulfilling the Promises of IDEA*, 21 WIDENER L. REV. 117, 118 (2015) (explaining that some states prohibited children from attending public schools if they were "deaf, blind, emotionally disturbed, or mentally handicapped").

28. Philip T.K. Daniel, *Education for Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 6 (2000); see also *Watson v. Cambridge*, 32 N.E. 864, 864 (Mass. 1893) (upholding a school committee's decision to expel a student on the basis that he was "weak in mind" and "troublesome to other children"). The committee noted that the student could not take care of himself, made loud noises, and pinched other students. *Id.*; see also *Dep't of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958) (holding that states are not required to provide free education to "feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education").

be allowed to attend public schools, parents could face legal repercussions.²⁹

In the 1970s, under the original version of the Education for All Handicapped Children Act, “parents were expected to be only peripherally involved in special education decisions.”³⁰ Over time, however, the IDEA came to rely upon parents as members of the IEP team, who help define an appropriate education for their individual children.³¹ IEPs are now considered the “backbone of parental safeguards.”³² But the safeguards come with a two-fold responsibility for parents: (1) to participate in the creation of IEPs and (2) to enforce free appropriate public education (“FAPE”) standards by taking legal action when IEPs are inadequate.³³

Within their first responsibility, parents must participate in the evaluation of the child by contributing information and opinions on the child’s unique needs.³⁴ This participation takes place during IEP meetings, which must occur at least once during the year but may need to occur more frequently if there are changes or new developments to the child’s progress.³⁵ The IDEA does not allow for the passive presence of parents in the IEP process; rather, it treats parents as “equal partners” whose voices are required, not simply encouraged.³⁶ Because of the

29. Daniel, *supra* note 28, at 6 (describing a North Carolina statute that made it a misdemeanor for parents of a child with a disability to insist upon their child receiving a public education).

30. Meyer, *supra* note 14, at 634.

31. See IDEA, 20 U.S.C. § 1414(d)(1)(B)(i).

32. Daniel, *supra* note 28, at 10 (explaining that parents must be given notice of and must be fully informed regarding all IEP meetings).

33. See Meyer, *supra* note 14, at 634 (describing how parents are expected to participate in the formulation of their child’s IEP and also to file complaints or request due process hearings if their child’s IEP seems inadequate).

34. See Daniel, *supra* note 28, at 7 (explaining that parents are expected to render opinions on “whether inhibitors to academic progress result from reading, math, or language problems”).

35. See Meyer, *supra* note 14, at 631–32 (describing the requirements for IEP team meetings).

36. Daniel, *supra* note 28, at 11. Among other responsibilities, parents participate in their child’s evaluations, provide information during the IEP review and revision processes, and contribute to decisions regarding their child’s educational placement. See IDEA, 20 U.S.C. § 1414(c)–(e). Further, the IDEA provides for an alternative when parents are not able to be physically present at meetings: participation through video conferences and conference calls. *Id.* § 1414(f).

crucial role that parents play, schools must have ongoing communication with parents, working with them to schedule meetings and providing them with interpreters where language differences exist.³⁷ As members of the IEP team,³⁸ parents are expected to contribute to all decisions involving changes to a student's IEP.³⁹

The second prong of parental responsibility arises during the IEP meeting when parents are asked to sign a drafted IEP for their child.⁴⁰ Most parents, under this time-sensitive pressure and sometimes without knowledge that they may choose otherwise, sign the IEP on the spot; however, all parents have a right to refuse to sign the IEP if they disagree with its accommodations for their child.⁴¹ This refusal must then be followed by the complex process of filing an appeal under federal law.⁴² In addition to the procedural complexities of filing an appeal, parents who disagree with their child's IEP are effectively challenging the teachers and aides who work with their child every day.⁴³

37. Daniel, *supra* note 28, at 10–11. Schools must notify parents in writing of any IEP meeting, which must occur at a mutually agreed upon time and place. *Id.* at 10.

38. The IEP team consists of the parents of the child with a disability, at least one regular education teacher, at least one special education teacher, a representative of the local educational agency, other individuals with knowledge or special expertise, and the child, when appropriate. IDEA, 20 U.S.C. § 1414(d)(1)(B).

39. Daniel, *supra* note 28, at 10–11 (describing the specific requirements of notices to parents). Notices “must indicate the purpose of the meeting, must fully list those who will be in attendance, and must alert parents that they may be accompanied by an advocate or an attorney.” *Id.* at 10.

40. Matthew Denn, *The Best Public Education in America—For Whom?*, 28 DEL. LAW. 18, 20 (2010). At this moment, parents are faced with a group of professionals who care for and teach their child on a daily basis and who have set forth their opinions on the child's progress and status. *Id.*

41. *Id.* Only the most “assertive” parents decide to do anything but the expected signing of the IEP at that moment. *Id.*

42. *Id.* (explaining the process of filing an appeal, which includes “pleading requirements, deadlines, substantive standards set by evolving case law, and a need in most cases to retain expert witnesses and present evidence to a legal tribunal.”). While parents navigate through this intensive and often expensive process, school systems have the advantage of built-in expert witnesses and legal expertise through outside counsel for the district. *Id.*

43. *Id.* These teachers and aides are backed by school districts, which are institutions that prevail over parents in the majority of cases. A Texas study of 139 due process filings and adjudications over a five-year period found that the school district

Parents often fear that pushing back against these professionals might have a negative impact on the way their children are treated and the level of care their children receive.⁴⁴

Even though the IDEA relies upon parental input and advocacy in achieving FAPE, many parents do not know their advocacy rights or do not have the resources to fully capitalize on them.⁴⁵ Additionally, parents report that their requests and concerns are often dismissed by professional members of the IEP team, who enact their own decisions without true consideration of parents as equal partners.⁴⁶ Thus, while Congress intended for parents to be heavily involved in every decision throughout their child's special education journey, a gap currently exists between that intention and the actual, limited role that parents often find themselves playing. This Note explores the gap as it relates to one particular mandate in the IDEA: development of yearly progress goals for students.⁴⁷

prevailed in about 72% of the cases. G. Thomas Schanding et al., *Analysis of Special Education Due Process Hearings in Texas*, SAGE OPEN, Apr.–June 2017, at 1, 5, <https://journals.sagepub.com/doi/pdf/10.1177/2158244017715057>. Similarly, in an analysis of 575 hearings that occurred in 41 states over a one-year period, researchers found that districts prevailed over parents in 59% of the hearings. Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131, 137 (2011).

44. Meyer, *supra* note 14, at 635.

45. See Zetlin, *supra* note 9, at 24–25 (describing the experience of a Guatemalan American mother during her son's IEP meeting). The mother was provided with a translator, but the copy of the IEP provided to her was in English. *Id.* at 25. Ultimately, she was not informed of her son's assessment results and did not object to the IEP goals and objectives being prepared before the meeting. *Id.*

46. See Meyer, *supra* note 14, at 635 (explaining how courts have labeled this practice as “predetermination”). Predetermination takes place when school personnel make decisions regarding a child's placement and program before the actual IEP meeting. Mitchell L. Yell et al., *Individualized Education Programs and Special Education Programming for Students with Disabilities in Urban Schools*, 41 FORDHAM URB. L.J. 669, 682 (2013); see, e.g., *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004) (finding predetermination when a special education supervisor met with a parent to discuss programs available for children with autism but did not inform the parents of programs that the supervisor apparently did not want to implement).

47. See IDEA, 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(aa); see also discussion *infra* Section III.

B. Acknowledging the Impact of No Child Left Behind (“NCLB”) on Setting Low Progress Goals

A contributing force that parents—and the IEP team as a whole—face when seeking to establish adequate progress goals for children with disabilities can be found in a major piece of legislation passed in the early 2000s. Congress’ passage of NCLB in 2001 led to the reauthorization of the IDEA in 2004, which was meant to align the IDEA’s goals with those of NCLB.⁴⁸ Specifically, NCLB focused on measuring student achievement through standardized testing, and Congress required “that performance goals be altered under the IDEA to mimic the goals under NCLB.”⁴⁹

Because states feared losing federal funds, many reacted by “dumbing down” performance goals for students in order to show progress, a process that effectively rewarded states for setting lower standards.⁵⁰ Lower standards for performance goals and the focus on standardized testing stood at odds with two objectives of the IDEA: (1) setting high expectations for students with disabilities and (2) individualizing programs to focus on unique needs of students.⁵¹

In December 2015, Congress replaced and updated NCLB with the Every Student Succeeds Act (“ESSA”), which scaled back the extensive federal education regulations of NCLB.⁵² With the passage of

48. Kelsey A. Manweiler, *IDEAs that Provide a Solution When the Courts Have Disabled the System*, 38 CHILD. LEGAL RTS. J. 47, 53 (2018).

49. *Id.*

50. Christy Marlett, *The Effects of the IDEA Reauthorization of 2004 and the No Child Left Behind Act on Families with Autistic Children: Allocation of Burden of Proof, Recovery of Witness Fees, and Attainment of Proven Educational Methods for Autism*, 18 KAN. J.L. & PUB. POL’Y 53, 63 (2008); see also Debra Viadero, *NCES Finds States Lowered ‘Proficiency’ Bar*, EDUC. WEEK (Oct. 29, 2009), <https://www.edweek.org/ew/articles/2009/10/29/10nces.h29.html> (describing a U.S. Department of Education study showing that between 2005 and 2007, there were twenty-six instances of states making their standards less rigorous in one or more grade levels or subjects, as compared to twelve instances of states increasing the rigor of their standards). For example, Wyoming lowered its proficiency bar in reading and math at both grade levels examined in the study. *Id.*

51. Manweiler, *supra* note 48, at 53.

52. Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUC. WEEK, (Mar. 31, 2016), <http://www.edweek.org/ew/issues/every-student-succeeds-act/>. The ESSA made major diversions from NCLB by eliminating punitive consequences for states and school districts with poor performances and barring the federal

the ESSA, states were given more flexibility to choose how to implement accountability systems and to move away from evaluating teachers solely based on test scores.⁵³ Yet, the ESSA “has not made any noticeable improvements for students with disabilities.”⁵⁴ Thus, even though NCLB is no longer in effect, the lowering of performance standards that took place during the NCLB era continues to present challenges for IEP teams in their mission to create appropriate progress goals for students.

C. Ambiguous Guidance from Supreme Court Precedent

The Supreme Court has interpreted the IDEA’s progress standards twice in the past forty years, but these decisions have left IEP teams (practitioners and parents) with only vague guidance to determine what constitutes sufficient progress under the IDEA. Given the Supreme Court’s evasive answers to questions regarding progress goals, there remains a need for something more—something concrete to help IEP teams on the frontlines of special education develop appropriate progress goals for students.

1. The *Rowley* Decision

The United States Supreme Court first addressed the FAPE requirement in its 1982 *Rowley* decision.⁵⁵ This case involved a first grader with impaired hearing; the Court considered whether FAPE required the student to be provided with a sign-language interpreter in all of her classes.⁵⁶ The Court refused to “establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act,” due to the wide range of disabilities that are covered under the IDEA.⁵⁷ Rather, the Court came to a broader

government from establishing Common Core and similar requirements. Julie Hirschfeld Davis, *President Obama Signs into Law a Rewrite of No Child Left Behind*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/11/us/politics/president-obama-signs-into-law-a-rewrite-of-no-child-left-behind.html>.

53. Manweiler, *supra* note 48, at 53.

54. *Id.* at 54.

55. *See generally* 458 U.S. 176 (1982).

56. *Id.* at 184–85.

57. *Id.* at 202.

conclusion that the FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”⁵⁸ For children being educated in regular classrooms, the Court further held that the personalized instruction “should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”⁵⁹

Specifically, the Court in *Rowley* developed a two-prong test for evaluating both the procedural and substantive adequacy of IEPs: (1) “has the state complied with the procedures set forth in the Act?” and (2) “is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?”⁶⁰ This test continues to guide courts’ analyses of the adequacy of progress goals in IEPs.⁶¹ The *Rowley* decision opened the door to new conversations and legislation surrounding the securing of FAPE for individuals with disabilities.⁶²

2. The *Endrew* Decision

More recently in 2017, the Supreme Court heard a case involving a fourth grader with autism whose parents had become dissatisfied with his progress levels.⁶³ The parents believed that their son’s development had stalled and that he was no longer making meaningful progress in school.⁶⁴ They provided evidence of this by showing that his IEP goals and objectives had largely been carried over from one year to the next.⁶⁵ The lower court found that the slight modifications to the child’s annual progress goals, while not revealing “immense educational growth,” were “sufficient to show a pattern of, at the least, minimal progress.”⁶⁶

58. *Id.* at 203.

59. *Id.* at 204.

60. *Id.* at 206–07.

61. *See* cases cited *infra* notes 81–85 (describing lower courts’ use of *Rowley* standards in their analyses).

62. Manweiler, *supra* note 48, at 56.

63. *See generally* *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988 (2017).

64. *Id.* at 996.

65. *Id.*

66. *Id.* at 997.

The child's parents appealed the lower court decision, maintaining that "the District's proposed fifth-grade IEP was substantively inadequate."⁶⁷ The United States Court of Appeals for the Tenth Circuit affirmed the lower court's decision and followed the "some educational benefit" standard.⁶⁸ Under this standard, a school provides sufficient educational services to a student with a disability as long as the school provides a "basic floor of opportunity."⁶⁹ Thus, despite the mother's testimony that her child was not reaching his potential under his yearly IEPs and that there was no evidence of an upward trend in his progress, the court found that the child still had "some" progress and that this progress was enough.⁷⁰

The Supreme Court ultimately overturned the Tenth Circuit's decision that an educational program providing "merely more than *de minimis*' instruction was enough to meet the progress standard set forth in the IDEA."⁷¹ Delivering the opinion of the Court, Justice Roberts wrote, "The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate *in light of the child's circumstances*."⁷² With this holding, the Supreme Court mandated higher standards and expectations for students with disabilities.⁷³

67. *Andrew F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329, 1338 (10th Cir. 2015), *vacated*, 137 S. Ct. 988 (2017).

68. *Id.* at 1341. The parents argued that the Tenth Circuit previously adopted a higher standard for progress, "meaningful educational benefit." *Id.* at 1340. However, the Court of Appeals rejected this argument, maintaining the court's "some benefit" standard. *Id.* at 1341.

69. *Id.* at 1338.

70. *Id.* at 1342.

71. *See Andrew*, 137 S. Ct. at 1000–01. For the child in this case, using the "merely more *de minimis*" standard meant implementing the same basic progress goals from year to year. A higher standard, however, meant implementing a "behavioral intervention plan" that identified the child's problematic behaviors and developed strategies for addressing them. *Id.* at 996.

72. *Id.* at 1001 (emphasis added).

73. *See* Christina A. Samuels, *A Year Ago the Supreme Court Raised the Bar for Special Ed. What's Happened Since?*, EDUC. WEEK (Apr. 27, 2018), <https://www.edweek.org/ew/articles/2018/05/02/a-year-ago-the-supreme-court-raised.html>. The Supreme Court's holding did not only inform lower courts in their decision-making processes; it also equipped parents with language to use when drafting IEPs and communicating with school personnel to ensure ambitious goal setting. *Id.*

III. APPLYING PROGRESS STANDARDS TO THE IEP PROCESS

Following the Supreme Court's decisions, both IEP teams and lower courts have struggled on their quest to determine what constitutes adequate progress goals. And for parents, setting progress goals is only one piece of a multifaceted set of challenges that arises from advocating for their children with disabilities. The following subsections describe these challenges and use a recent study to illustrate the unequal effects they can have on the substance of a child's IEP.

A. Post-Andrew: Identifying the Standards Lower Courts Have Developed in Defining "Sufficient Progress" under the IDEA

From the Supreme Court's ruling in *Rowley*, lower courts were left with a few key, though somewhat difficult-to-apply, phrases to measure the adequacy of progress goals under the IDEA. The Court in *Rowley* held that progress goals should be "reasonably calculated" so as to allow the child to "achieve passing marks" and to move forward from "grade to grade."⁷⁴ The Supreme Court in *Andrew* gave a little more detail about what level of progress is sufficient, but courts were still left with only two guidelines from the *Andrew* decision: (1) minimal progress is not enough and (2) progress goals must be reasonably calculated and appropriate according to the child's circumstances.⁷⁵ Over the past two years, courts have operated within the *Andrew* framework to develop standards that account for the individual nature of progress goals but that err on the side of vagueness when deciding on just how much progress is enough under the IDEA.⁷⁶ And although *Andrew*

74. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982). The Court in *Rowley* admitted that "Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP." *Id.* at 206. However, the Court concluded that this sketchiness was not an invitation for judiciaries to implement their own ideas of proper educational policy in place of those of the school authorities. *Id.*

75. *Andrew*, 137 S. Ct. at 999.

76. See *Mr. P. v. West Hartford Bd. of Educ.*, 885 F.3d 735, 757 (2d Cir. 2019) (explaining that sufficient progress goals create "an opportunity greater than mere 'trivial advancement'"); *R.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 252 (4th Cir. 2019) (concluding that adequate progress should be interpreted as "challenging objectives" and "reasonably ambitious goals"); *D.F. v. Smith*, No. PJM 18-93, 2019 U.S. Dist. LEXIS 53805, at *13 (D. Md. Mar. 28, 2019) (recognizing the lack of a bright-

is the more recent decision, lower courts continue to be guided by the Court's dicta in *Rowley*.⁷⁷ After all, the Court in *Endrew* recognized that "*Rowley* sheds light on what appropriate progress will look like in many cases."⁷⁸

When determining the appropriateness of progress goals under the IDEA, it is helpful to consider progress goals within the broader context of "educational benefit."⁷⁹ Some courts have concluded that the IDEA requires only "some educational benefit," while others maintain that the IDEA requires a "meaningful educational benefit."⁸⁰ Because the IDEA mandates the development of yearly progress goals by the IEP team, the question thus becomes whether progress goals must seek to ensure a "meaningful educational benefit" or just "some educational benefit." The answer to this question depends on how the jurisdiction's court understands the relationship between *Rowley* and *Endrew* and the language that Congress chose to use in the IDEA itself.

In the "some educational benefit" camp, courts cling to *Rowley*'s conclusion that states are only required to provide a "basic floor of opportunity" to students with disabilities and are not required to maximize the education of these students.⁸¹ A mandate of *some* educational benefit deters courts from meddling in the substantive requirements of a child's education.⁸² In this school of thought, requiring

line rule and holding that courts should focus on appropriateness on a case-by-case basis).

77. See cases cited *supra* note 82 (noting several lower court cases that have used *Rowley* language in their analyses).

78. *Endrew*, 137 S. Ct. at 999.

79. See Manweiler, *supra* note 48, at 56 (describing the two-prong test set out in *Rowley*, with the second prong focused on whether the substance of the IEP confers an educational benefit on the individual student).

80. See Manweiler, *supra* note 48, at 56–58.

81. *J. L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 947 (9th Cir. 2008) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982) (explaining that Congress intended for students with disabilities to have equal protection under the IDEA and did not seek to mandate anything beyond equal access)); see also Manweiler, *supra* note 48, at 57.

82. See *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 102 (2d Cir. 2000) (warning that district courts should not substitute their own subjective judgment about the appropriateness of education progress goals); see also *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005) (explaining that courts should defer to administrative agencies and other experts when determining the substantive adequacy of students' IEPs).

meaningful educational benefit would mean issuing a substantive educational standard, one which Congress intentionally has not imposed upon states.⁸³

On the other side, however, a court that supports the “meaningful educational benefit” standard relies upon Congress’s intent to help young people with disabilities in becoming self-sufficient adults.⁸⁴ Such courts focus on the overarching goals of the IDEA and conclude that these goals cannot be met unless the standard is meaningful educational benefit.⁸⁵ After all, a stated purpose of the IDEA is “to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs *and prepare them for employment and independent living.*”⁸⁶

The physical location of a student should not determine whether his or her progress goals require “meaningful educational benefit” or merely “some educational benefit.” Knowing that courts have come to different conclusions regarding the progress standard, Congress has the responsibility to ensure that all students with IEPs benefit from a common, minimum instructional standard based on their diagnoses. Congress can achieve this by adding a semi-objective element to the standard as it is written in the IDEA.

B. Challenges Parents Face When Exercising Their Rights

Cases dealing with the appropriateness of IEPs and progress goals within IEPs are significant not only for their holdings and the courts’ analyses, but they are also useful in understanding the broader

83. See *Endrew F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329, 1338 (10th Cir. 2015), *vacated*, 137 S. Ct. 988 (2017) (explaining that Congress maintained the same definition of FAPE, despite multiple opportunities to define it using a higher standard).

84. See *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181–82 (3d Cir. 1988) (reasoning that Congress intended for the IDEA to promote a specific goal of education: self-sufficiency; thus, *Rowley* must be interpreted as requiring meaningful educational benefit that has the effect of producing self-sufficient members of society).

85. See *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (describing how Congress created the IDEA largely in response to “shortcomings of the previous act, the Education for all Handicapped Children Act of 1975, [which] included low expectations for disabled children”).

86. *Id.* (emphasis added) (quoting IDEA, 20 U.S.C. § 1400(d)(1)(A)).

context of a parent's advocacy role in special education. First, each of the above cases exists because of a parent's decision and ability to challenge the adequacy of their child's IEP. These are the parents who refuse to sign off on their child's IEP because they disagree with some part of it and who are willing and able to endure the complex legal process following their disagreement.⁸⁷

Additionally, the circumstances leading to this kind of litigation provide an eye-opening glimpse into the challenges that parents face as they exercise their rights to participate in their child's education. In a recent Maryland case, parents were concerned about their fourth-grader's progress, despite the school's assessments that the child was making progress and reading above grade level.⁸⁸ They decided to move their child to a new school, and according to assessments by the new school system, the child was actually reading and writing *below* grade level.⁸⁹ Thus, in the midst of trying to understand their child's academic progress, the parents were faced with two different schools showing two competing sets of results.⁹⁰

In many cases, timing and delays create additional challenges for parents and their children with disabilities. For example, parents of a high schooler were concerned that their child was regressing rather than progressing in her classes.⁹¹ At the final IEP meeting of the school year, the parents asked to receive a copy of the new IEP early in the summer so that they could review it.⁹² Months passed, and the parents sent several letters to the school district, without ever receiving the IEP.⁹³ The District finally provided a copy of the IEP, just a few days before the start of the new school year.⁹⁴ Other parents encountered a

87. See Denn, *supra* note 40, at 20 (explaining that most parents, under the pressure of IEP meetings, sign off on the IEP without pushback).

88. C.B. v. Smith, No. 8:18-cv-01780-PX, 2019 U.S. Dist. LEXIS 113945, at *8 (D. Md. July 9, 2019).

89. *Id.*

90. *Id.*

91. Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 189 (2d Cir. 2005).

92. *Id.* at 190 (explaining that at the IEP meeting, the student's parents were only provided with a draft document of goals and objectives but that this document contained unfamiliar, complicated coding that did not make sense to the parents).

93. *Id.*

94. *Id.* (pointing out that the district mailed the student's IEP to her parents on August 29, with school beginning on September 4).

school system that delayed implementing important parts of their child's IEP.⁹⁵ This particular student's IEP required him to receive help from an instructional assistant.⁹⁶ School began on August 17, but it was not until September 15 that an instructional assistant was made available to the student.⁹⁷

There is nothing necessarily unique about the above-mentioned cases. Rather, for the purposes of this Note, they serve as evidence—evidence that even the most involved parents, those with resources and abilities to dispute the adequacy of their child's IEP progress goals, often face challenges beyond their control. Congress cannot anticipate and account for every challenge that parents will face when fulfilling their responsibilities under the IDEA. However, because Congress has mandated specific parental involvement, Congress should take steps to mitigate discrepancies where parental challenges present unequal opportunities for students with disabilities. The vague standards for progress goals in the IDEA and Supreme Court decisions, combined with real-world challenges parents face, has led to inequities in the development of annual progress goals for students with autism, in particular, as seen in the study below.

C. Autism Study – Discrepancies in IEP Progress Goals for Students with the Same Disability

A recent study illustrates the extent to which challenges faced by parents of children with autism impact the actual substance of the children's IEPs. In 2018, a group of doctors and researchers in California published a study that assessed progress goals across the IEPs of 152 children with the same documented disability: autism spectrum disorder (“ASD”).⁹⁸ Specifically, this study focused on disparities between the goals of children whose parents' primary language was

95. *Mt. Vernon Sch. Corp. v. A.M.*, No. 1:11-cv-637-TWP-TAB, 2012 U.S. Dist. LEXIS 122918, at *5 (S.D. Ind. July 10, 2012).

96. *Id.* at *3.

97. *Id.* at *5.

98. Helaine G. St. Amant et al., *Language Barriers Impact Access to Services for Children with Autism Spectrum Disorders*, 48 *J. AUTISM & DEVELOPMENTAL DISORDERS* 333, 335 (2018).

English and those of children whose parents' primary language was not English.⁹⁹

The study found a significant association between parents' primary language and the presence of ASD-related goals with IEPs.¹⁰⁰ Analyses revealed that "children of parents whose primary language was English were significantly more likely to have both social skills goals and communication skills goals listed in their IEP."¹⁰¹ Put another way, the children of parents whose primary language was not English were more likely to have social and communication skills goals *left out* of their IEPs. While acknowledging a range of factors that could be involved in the discrepancy in the quality of IEPs found by the study, the researchers suggested that the results "may also reflect the heightened challenge faced by parents whose primary language is not English to advocate for specific, appropriate IEP content."¹⁰²

While the 152 students with ASD undoubtedly had unique needs and circumstances to which their IEPs were tailored, they each also had a documented diagnosis of ASD. And per the recommendations for educating children with autism, which are outlined by the National Research Council ("NRC"), "services for children with autism should address social skills to improve involvement in daily activities and verbal and non-verbal communication skills, among others."¹⁰³ Surely, when the Supreme Court held that IEP progress goals should be reasonably calculated according to the child's circumstances, the Court did not mean for those circumstances to extend so far as the child's parents' primary language.¹⁰⁴

99. *Id.*

100. *Id.* at 337.

101. *Id.* at 338.

102. *Id.*

103. *Id.* at 334.

104. *See* *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 996 (2017) (holding that each educational program should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade").

D. Inherent Injustice: Inequities in the Special Education System

The results of the above study are troubling yet quite informative. Students had the same diagnosed disability.¹⁰⁵ Research showed that educating children with this disability should involve addressing social skills.¹⁰⁶ Thus, the natural conclusion is to expect social skills to be a part of each student's annual progress goals. However, only some of the children had progress goals involving social skills in their IEPs. Why the discrepancy? The inclusion or exclusion of these progress goals was based on the primary language of the child's parents.¹⁰⁷

To help put the above study in perspective, based on 2016 data, around 700,900 English Language Learners ("ELLs") in U.S. public elementary and secondary schools were identified as students with disabilities.¹⁰⁸ Students who are ELLs typically come from environments where a language other than English is dominant.¹⁰⁹ Thus, in 2016, approximately 700,900 sets of parents, who also share in their children's environments where English is not primary, were expected to help develop progress goals for their child's IEP. It is worth noting that the IDEA itself comments on the need to address the discrepancies in special education services for the "limited English proficient population," which is "the fastest growing in our Nation."¹¹⁰

In addition to differences in primary language, disparities in special education services also exist based on households' differing socioeconomic statuses.¹¹¹ For example, the IDEA gives parents the right

105. See Amant et al., *supra* note 98, at 334 (describing the group of students in the study as being diagnosed with the same disability).

106. *Id.*; see also NAT'L RESEARCH COUNCIL, EDUCATING CHILDREN WITH AUTISM 5 (Catherine Lord & James P. McGee eds., 2001) (explaining that appropriate educational goals for children with ASD should involve "progress in social and cognitive abilities, verbal and nonverbal communication skills, and adaptive skills; reduction of behavioral difficulties; and generalization of abilities across multiple environments").

107. Amant et al., *supra* note 98, at 338.

108. *English Language Learners in Public Schools*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/pdf/Indicator_CGF/coe_cgf_2019_05.pdf (last visited Oct. 24, 2020).

109. IDEA, 20 U.S.C. § 7801(20)(c)(iii).

110. IDEA, 20 U.S.C. § 1400(c)(11)(A).

111. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1426–27 (2011); JAY G. CHAMBERS ET

and responsibility to dispute the adequacy of IEPs (including the appropriateness of progress goals) through the legal system.¹¹² Research indicates that districts serving families with the highest median family income are more likely to have cases, mediations, and litigation than districts serving families with the middle or lowest family incomes.¹¹³ And not only do the wealthier districts have more legal disputes regarding special education services, they also generally have better special education services than those of lower-income districts.¹¹⁴

Inequities arising from the wealth gap are even more apparent when race and ethnicity become a factor. Students of color with disabilities are disproportionately affected by poverty, with more than half of secondary students in these groups living in households with family incomes of \$25,000 or less.¹¹⁵ This is compared to only twenty-five percent of White secondary students with disabilities living in similar households.¹¹⁶ The IDEA already acknowledges that children of color are disproportionately *identified* as having intellectual disabilities, but perhaps Congress should also recognize that once these children are identified and begin to receive services under the IDEA, the unequal implementation of the IDEA's mandates often serves to perpetuate existing social inequities.¹¹⁷

AL., HOW DOES SPENDING ON SPECIAL EDUCATION VARY ACROSS DISTRICTS?, at iv, 7–8 (2002), <https://www.air.org/sites/default/files/SEEP2-How-Does-Spending-Vary-Districts.pdf>; THOMAS HEHIR, NEW DIRECTIONS IN SPECIAL EDUCATION 120–24 (2005); MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE 67–92 (1997).

112. See Meyer, *supra* note 14, at 634–37 (explaining parents' multiple responsibilities as members of the IEP team).

113. See Pasachoff, *supra* note 111, at 1426 (“[O]nly four percent of the lowest income and ten percent of middle-income districts had due process hearings, while fifty-two percent of the highest income districts did.”).

114. *Id.* at 1427 n.64. In two studies, results showed that: (1) districts that serve lower-income families spend less money per child with a disability than do districts that serve middle- and higher-income families and (2) students in lower-income districts are more affected by “later interventions, more segregated classrooms, less access to the general curriculum, and higher staff-to-student ratios.” *Id.*

115. *Id.* at 1432.

116. *Id.*

117. See IDEA, 20 U.S.C. § 1400(c)(12). The IDEA explains that minority children are disproportionately represented in the special education system and that African American children are identified “as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.” *Id.* at § 1400(c)(12)(C).

Discrepancies among special education services based on parents' primary language, socio-economic status, and race do not align with the goals and purposes of the IDEA. In the IDEA's opening section, Congress acknowledges the need to ensure "equality of opportunity" for individuals with disabilities, along with the need to provide "equal educational opportunity for all [students]."¹¹⁸ Additionally, Congress writes that one of the purposes of the IDEA is "to ensure that educators *and parents* have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities."¹¹⁹ Congress further acknowledges that the education of children with disabilities can be made more effective by establishing a stronger role and responsibility for parents to meaningfully contribute to their child's education.¹²⁰

Toward these ends, Congress included parents as contributing, vital members of the IEP team. Congress gave parents responsibilities to help form annual progress goals, as well as legal steps to take when progress goals are inadequate.¹²¹ These responsibilities are generally seen as a positive aspect of the IDEA.¹²² However, Congress' reliance on parents has led to unforeseen consequences of additional inequalities based upon parents' resources.¹²³ These consequences work against the IDEA's purpose to promote equal educational opportunities

118. IDEA, 20 U.S.C. § 1400(c)(1), (7).

119. IDEA, 20 U.S.C. § 1400(d)(3) (emphasis added).

120. IDEA, 20 U.S.C. § 1400(c)(5)(B) ("[S]trengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.").

121. Meyer, *supra* note 14, at 634–37.

122. See Pasachoff, *supra* note 111, at 1424 ("The individualized right and private enforcement mechanisms are generally seen as important victories for the disability community, allowing parents (and indeed disabled children themselves) a degree of autonomy and control in the construction of their educational experience.").

123. *Id.* at 1426–27 (providing further examples of parents with higher annual household incomes taking advantage of their enforcement responsibilities through due process hearings more than parents in lower-income households). Notably, only eight states—with New York and New Jersey at the forefront—account for 80% of the adjudicated due process hearings each year. SASHA PUDELSKI, AM. ASS'N SCH. ADM'RS, RETHINKING SPECIAL EDUCATION DUE PROCESS 10 (2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf. This is yet another way in which processes set forth in the IDEA have led to disproportionate effects.

for students with disabilities. While Congress might not be able to directly address the challenges that stand in the way of a parent's success as a member of an IEP team, Congress can mitigate the negative effects of these challenges by implementing a standard that bases progress, in part, on common goals of those with a particular diagnosis.

IV. PROPOSED SOLUTION: INCLUSION OF A SEMI-OBJECTIVE STANDARD

In accordance with the intent of the IDEA to serve the individual needs of students, the Supreme Court acknowledged that it would “not attempt to elaborate on what ‘appropriate’ progress will look like from case to case The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”¹²⁴ In the same vein, the Court has been careful to differentiate between the procedural requirements that are mandated by Congress through the IDEA and the intentional absence of any express substantive requirements of a particular student's IEP.¹²⁵

The individualized nature of special education services is undoubtedly at the heart of the IDEA.¹²⁶ However, when courts focus so heavily on the subjective adequacy of progress goals, they lose the opportunity to incorporate research-based information that can help to create benchmarks for children based upon the same or similar disabilities. For example, appropriate benchmarks for students with ASD should include some elements of social skills goals and communication skills goals.¹²⁷ Other disabilities, such as speech and language impairment, developmental delay, intellectual disability, emotional

124. *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

125. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07 (1982) (explaining that a court must answer only two questions to determine the adequacy of IEPs under the IDEA: (1) did the state follow the procedures outlined in the IDEA? and (2) does the resulting IEP pass the test of being reasonably calculated to enable the student to receive educational benefits?).

126. *Endrew*, 137 S. Ct. at 999 (“A focus on the particular child is at the core of the IDEA.”).

127. *See Amant*, *supra* note 98, at 334 (describing the research-based finding that students with ASD should have progress goals related to both social and communication skills).

disturbance, and hearing impairment, would have different research-based benchmarks.¹²⁸

This Note argues that a student’s diagnosed disability should be taken into account as part of the child’s “unique circumstances.”¹²⁹ In other words, Congress should provide a loose statutory definition of “progress,” which includes both a subjective and a semi-objective element. Certainly, the definition of progress should first consider what the IDEA and courts have deemed crucial: the child’s unique needs and circumstances.¹³⁰ But it should not stop there. The second part of the progress definition should allow for research-based, general guidelines appropriate for students based upon their disability diagnosis.¹³¹ This proposal for the addition of a semi-objective standard is not meant to uproot the current subjective nature of IEP progress goals; rather, the semi-objective standard will serve as a supplement to bridge the gaps that exist from variable levels of parental resources and involvement.¹³²

As it is currently written, the IDEA requires IEP teams to annually develop “(II) a statement of measurable annual goals, including academic and functional goals, designed to— (aa) meet the child’s needs that result from the child’s disability to enable the child to be

128. For example, a fluency goal should always be included when students with dyslexia need to improve their reading skills. Kelli Sandman-Hurley, *Dyslexia: How to Write Goals*, DYSLEXIA TRAINING INST., https://www.dyslexiatraininginstitute.org/pdfs/Website_HowtoWriteGoals.pdf (last visited Oct. 24, 2020). Even for a child who is currently reading only twelve words per minute, the IEP should contain a fluency goal, because this is the ultimate goal of reading. *Id.* Making sure that the ultimate goal of fluency is included in the IEP is important because it sets a high bar in driving the services provided to the student. *Id.*

129. See *Andrew*, 137 S. Ct. at 992 (“The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.”).

130. *Id.*

131. For example, children with learning disabilities and/or ADHD often display disruptive behavior in the classroom, taking the form of “inappropriate verbalizations, impulsive or inappropriate behaviors, or excessive motor activity.” ELSEVIER ACADEMIC PRESS, *LEARNING ABOUT LEARNING DISABILITIES* 180–181 (Bernice Y.L. Wong ed., 3d ed. 2004). Research has indicated that using self-monitoring techniques can help to reduce these behaviors. *Id.* Thus, for students with learning disabilities and ADHD, it would make sense for progress goals, where appropriate, to include benchmarks to increase self-monitoring. *Id.*

132. No harm exists in the addition of a semi-objective element to the standard. It can only serve to inform parents and IEP teams by providing access to additional resources during the development of progress goals.

involved in and make progress in the general education curriculum.”¹³³ This Note proposes the inclusion of additional language in the above standard, language that will mitigate discrepancies among progress goals for students with similar disabilities: “informed both by the child’s unique circumstances and, to the extent practicable, research based upon the diagnosed disability” after “functional goals.”

Thus, the final product would be the requirement for IEP teams to annually develop:

“(II) a statement of measurable annual goals, including academic and functional goals, *informed both by the child’s unique circumstances and, to the extent practicable, research based upon the diagnosed disability*, designed to—(aa) meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum.”¹³⁴

This new language would effectively require IEP teams to start with a baseline set of IEP progress goals, informed by the child’s disability/disabilities; then, teams would still have the freedom and ability to change these goals to fit the unique circumstances of the child.

For example, at an IEP meeting for a child with ASD, the parents would be provided with research-based benchmarks for progress.¹³⁵ These would likely indicate a listed number of goals, including academic, social, and communication skills.¹³⁶ Parents would be

133. IDEA, 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa).

134. *Id.* (adding and emphasizing this author’s proposed additional language).

135. At this time, there is not an obvious body of research or text from which all benchmarks can be drawn, and the precise nature of benchmarks falls outside the scope of this Note. However, generally, benchmarks would be based upon any available research and, for those disabilities found in the DSM-5, would be informed by the listed criteria for diagnosis. Diagnoses for disabilities with similar criteria would likely include similar benchmarks.

136. Those who are concerned with the “piles of paperwork” that already overwhelm special education teachers might be opposed to adding yet another step and additional criteria to the IEP process. Amanda Reaume, *How Good Tech Can Help Ease the Paperwork Burden for Teachers*, FORBES (Nov. 29, 2018 03:26 PM), <https://www.forbes.com/sites/kyocera/2018/11/29/how-good-tech-can-help-ease-the-paperwork-burden-for-teachers/#184d827c7f3e>. The burden on special education teachers should be duly considered and taken into account when developing research-

able to read through these categories and goals, and along with the other IEP team members, further develop the goals to better fit their child. If the IEP team concluded that some of the baseline benchmarks were inapplicable or inappropriate for the particular child, then they could together decide to amend those progress goals.

Even with the guidance of research-based benchmarks, an informed decision based on the child's unique circumstances should still trump the baseline set of IEP progress goals. This is acceptable, as the intention of the new standard is not to supplant the IDEA and the Supreme Court's focus on the individuality of the child and presentation of his or her disability. Rather, the intention of the new standard is to ensure that basic goals which are appropriate for students with the same diagnosed disability are included in the IEP, irrespective of variable levels of parental involvement and resources surrounding special education.

V. CONCLUSION

Over the past thirty-five years, the United States has made great strides in special education. Those strides have culminated in a significantly increased parental role in the special education process, one that evolved from expecting parents to be only "peripherally involved" in their child's special education in 1975 to *mandating* parental involvement under the current version of the IDEA.¹³⁷

Though the IDEA mandates parental contribution in the development of annual progress goals for students, students should not be negatively affected when barriers prevent their parents from fully and successfully contributing. Studies have revealed a harsh reality of unequal contribution—based upon parents' primary language, socio-economic status, race, and other factors—which in turn affects the quality of a child's IEP. The purpose of requiring parents to contribute to the development of IEPs, and specifically the development of annual progress goals, is to promote the IDEA's overarching goal of ensuring FAPE and an equal educational opportunity for students with disabilities. Yet, Congress's reliance upon parents, without equipping them

based benchmarks, but an additional burden on teachers and schools ultimately does not outweigh the need for equality in setting progress goals.

137. Meyer, *supra* note 14, at 634–37 (explaining how parents' roles in special education have continued to increase, ultimately becoming codified in the IDEA).

with any resources, often creates a situation quite opposed to this goal. In fact, studies reveal that educational opportunities for students with disabilities are *unequal* based upon parental resources.

Given the individualized nature of special education and IEPs, Congress and the Supreme Court have intentionally hesitated to create any substantive standards for adequacy of progress goals.¹³⁸ Yet, appreciation of individual circumstances can be reinforced by a semi-objective standard that helps to fill in some of the gaps that exist based on parent resources and involvement. Congress should include additional language in Section 1414(d)(1)(A)(i)(II)(aa) of the IDEA, language that requires a baseline of progress goals based upon the child's disability. From this research-guided baseline, parents and the IEP team can work together to change and modify the IEP to better serve the individual student. While we can hope that more parents have the experiences of the Garcia family, it is critical that the quality of IEP progress goals is not *dependent* upon any one parent's circumstances. Implementing a semi-objective standard would provide the guidance necessary to make progress goals more equitable across varying parental situations, a concept that would help achieve the IDEA's aim to provide equal educational experiences for all students with disabilities.

138. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (warning against the court having "a free hand to impose substantive standards of review which cannot be derived from the Act itself").