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# Endrew F. Clairvoyance

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## **ENDREW F. CLAIRVOYANCE**

*Mark C. Weber\**

### ABSTRACT

*The Second Circuit Court of Appeals has declared that “Prior decisions of this Court are consistent with the Supreme Court’s decision in Endrew F.,” the 2017 Supreme Court case interpreting the Individuals with Disabilities Education Act obligation to furnish students with disabilities free, appropriate public education. This Essay considers whether that statement is accurate, and concludes that while some of the past Second Circuit decisions fit comfortably with Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1, others do not. The Essay submits that the court of appeals should confess a lack of clairvoyance in its earlier decisions and forthrightly overrule or limit those cases that are not consistent with the interpretation of the appropriate education duty found in Endrew F.*

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### INTRODUCTION

Ambrose Bierce defined a clairvoyant as someone “who has the power of seeing that which is invisible to her patron, namely, that

he is a blockhead.”<sup>1</sup> In the wake of *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*,<sup>2</sup> the Second Circuit Court of Appeals declared that its previous caselaw anticipated the legal development that the *Andrew F.* decision represented, and thus its earlier decisions continue to be reliable guides to the meaning of free, appropriate public education.<sup>3</sup> Whether those earlier cases actually are consistent with *Andrew F.*'s approach is the question this Essay tries to address. Was the Second Circuit clairvoyant in foreseeing *Andrew F.*'s interpretation of the appropriate education obligation, or should litigants and observers fear they are being taken for blockheads?

The answer is mixed. A number of Second Circuit cases, including recent and prominent ones, employ language about appropriate education that is similar to what the Supreme Court rejected in *Andrew F.* and reach outcomes that could well come out differently under *Andrew F.*'s interpretation of the law.<sup>4</sup> Nevertheless, other cases of the court of appeals appear to interpret appropriate education consistently with *Andrew F.* or at least to reach conclusions on the facts of the cases that *Andrew F.* would support.<sup>5</sup> This Essay suggests that the court of appeals and district courts in the Second Circuit should acknowledge the inconsistency of those former cases with *Andrew F.* and overrule them or restrict their application. At the very least, the court of appeals should not make a blanket assertion that the cases are all reliable precedent.

The list of cases applying *Andrew F.* is still fairly modest, and the commentary on the case remains of manageable scope.<sup>6</sup> Only a few sources have begun to collect and analyze the case's sequels.<sup>7</sup> This

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<sup>1</sup> AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* 16-17 (Dover Publ'ns. 1993) (1911).

<sup>2</sup> 137 S. Ct. 988 (2017).

<sup>3</sup> *Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 322 (2018).

<sup>4</sup> *See infra* text accompanying notes 41-53.

<sup>5</sup> *See infra* text accompanying notes 54-59.

<sup>6</sup> *See, e.g., Andrew F. and Fry Symposium, The Special Education Cases of 2017*, 46 J.L. & EDUC. 425 (2017). Some commentary focuses on specific aspects of appropriate education or specific educational settings. *See, e.g., Maliha Ikram, When Local Governments Waiver: Giving Bite to Students With Disabilities' Federal Right to Avail Physical Education*, 15 RUTGERS J.L. & PUB. POL'Y 345, 358-63 (2018); David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 MARQ. L. REV. 601, 639-42 (2018); Michael A. Naclerio, Note, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1166-69 (2017).

<sup>7</sup> *See, e.g., Maureen A. MacFarlane, In Search of the Meaning of an "Appropriate Education": Ponderings on the Fry and Andrew Decisions*, 46 J.L. & EDUC. 539, 548 & n.56,

Essay seeks to add to the literature by critiquing the effort of the Second Circuit in *Mr. P* to harmonize previous caselaw with *Endrew F.*

Part I of this Essay describes *Endrew F.* and its impact on existing caselaw regarding the duty to provide appropriate education. Part II discusses *Mr. P v. West Hartford Board of Education*, the Second Circuit case that declares that prior circuit precedent is consistent with *Endrew F.*, and considers its basis for drawing that conclusion. Part III lists and discusses a number of Second Circuit cases that embody approaches at odds with *Endrew F.*, as well as a few that might accurately be said to anticipate the Supreme Court decision. It argues that the Second Circuit should evaluate its prior cases carefully and individually, and overrule, limit, or, if justified, reaffirm them in light of *Endrew F.*, rather than issuing a blanket statement of approval.

## I. *ENDREW F.*

In *Endrew F.*, the parents of Drew, a child with autism, argued that the program he was offered did not satisfy the school district's obligation under the Individuals with Disabilities Education Act (hereinafter "IDEA")<sup>8</sup> to provide free, appropriate public education.<sup>9</sup> Drew had significant behavioral problems when he was in school. He screamed, he climbed over furniture and other students, he displayed irrational fears, and he occasionally ran from the classroom.<sup>10</sup> Drew's

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553-57 (2017); see also Patricia E. Kefalas Dudek, *Endrew F. v. Douglas County School District RE-1*, 14 NAELA J. 73 (2018) (discussing three court of appeals cases). Professor Zirkel has studied outcomes of a total of 49 court cases with substantive appropriate education holdings in which administrative decision makers relied on pre-*Endrew F.* caselaw and the court addressed the issue applying *Endrew F.* He found that the administrative outcome was unchanged in 90% of the court decisions, though he noted that 7 of the 44 outcomes that did not change were in favor of the parent. Perry A. Zirkel, *The Aftermath of Endrew F. One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP. 448, 450 (2018). *Endrew F.* may currently be having a significant impact at the administrative level. In Illinois in the post-*Endrew F.* period, the fraction of due process cases decided in favor of parents on at least one significant issue appears quite high, see *Due Process Decisions*, ILL. ST. BOARD EDUC., <https://sec1.isbe.net/sedsinquiry/dueprocessdecisions.aspx> (last visited Dec. 20, 2018), compared to the historical rate of about 20-40% in various states that were surveyed in the years before *Endrew F.*, see Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495, 509-10 (2014) (collecting studies).

<sup>8</sup> 20 U.S.C. §§ 1400-1482 (2012 & Supp. IV 2016).

<sup>9</sup> *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 997 (2017).

<sup>10</sup> *Id.* at 996.

parents felt that his educational progress had plateaued, and the school reinforced that impression by offering a fifth grade individualized educational program (hereinafter “IEP”) for him that carried over objectives and goals from previous years.<sup>11</sup> The parents contested the program in an administrative due process hearing and unilaterally placed Drew at a private program. The private school, Firefly Autism House, developed a behavioral intervention plan for Drew and wrote more demanding academic goals for him. Within months, his behavior improved and he made academic progress he had not achieved before.<sup>12</sup> The public school proposed another revised program, which the parents again contested. In the culmination of the proceedings, the Tenth Circuit Court of Appeals ruled that the public school’s program offered Drew a free, appropriate public education.<sup>13</sup> The court evaluated the program under the standard that “the educational benefit mandated by IDEA must merely be ‘more than *de minimis*.’”<sup>14</sup>

The Supreme Court responded by vacating and remanding. The unanimous opinion by Chief Justice Roberts pointed out that the Court’s previous decision on the meaning of appropriate education, *Board of Education of the Hendrick Hudson Central School District v. Rowley*,<sup>15</sup> did not produce a single test for the adequacy of educational programs under the IDEA. Rather, it embodied “a general approach: 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.”<sup>16</sup> The Court said *Rowley* established that for a child who is fully integrated in the regular classroom, an IEP typically should permit the student to achieve passing marks and advance from grade to grade, although not every child who advances from grade to grade necessarily receives appropriate education in satisfaction of the law.<sup>17</sup> But whether a child is fully integrated or not, each student must be offered an educational program that is “appropriately ambitious in light of [the child’s] circumstances . . . . [E]very child should have the chance to meet

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 996-97.

<sup>13</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 798 F.3d 1329 (10th Cir. 2015), *vacated*, 137 S. Ct. 988 (2017).

<sup>14</sup> *Id.* at 1338 (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)).

<sup>15</sup> 458 U.S. 176 (1982).

<sup>16</sup> *Andrew F.*, 137 S. Ct. at 999.

<sup>17</sup> *Id.* at 1000 & n.2.

challenging objectives.”<sup>18</sup> The Court declared that this standard for appropriate education is “markedly more demanding than the ‘merely more than *de minimis*’ test applied by the Tenth Circuit.”<sup>19</sup> After further litigation, the case returned to the district court, which decided in favor of the parents.<sup>20</sup> Press reports indicate that the case settled on appeal.<sup>21</sup>

*Andrew F.* did not overrule *Rowley*, so it kept current Supreme Court caselaw intact. But *Rowley* is the only previous Supreme Court case to consider the content of appropriate education, so there was not much to disturb. With regard to lower court decisions, *Andrew F.* made clear that an interpretation of *Rowley*, and of appropriate education, that imposes only minimal obligations is wrong. Language like “merely more than *de minimis* benefit” is no longer an accurate description of the appropriate education standard. Instead, at the least, the program has to be appropriately ambitious and feature challenging objectives, a markedly more demanding standard.

## II. *ENDREW F. MEETS MR. P*

*Mr. P v. West Hartford Board of Education* involved a high school student with high functioning autism spectrum disorder-Asperger’s Syndrome, nonverbal learning disabilities, and psychotic disorder.<sup>22</sup> The student, who previously had done well in school, was receiving grades of D in all his classes in the December of his sophomore year.<sup>23</sup> A brief hospitalization revealed that he manifested suicidal and homicidal thoughts, which led to his diagnosis.<sup>24</sup> The

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<sup>18</sup> *Id.* at 1000.

<sup>19</sup> *Id.* The Court went on to reaffirm *Rowley*’s rejection of the claim that all children must be offered an opportunity to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to the opportunity afforded children without disabilities. The Court stressed the importance of deferring to the expertise and judgment of school authorities, but further declared that “a reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1001-02.

<sup>20</sup> *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE 1, 290 F. Supp. 3d 1175 (D. Colo. 2018), *appeal dismissed*, No. 18-1089, 2018 WL 4360885 (10th Cir. Apr. 5, 2018).

<sup>21</sup> *E.g.*, Anne Schimke, *Douglas County District Pays \$1.3 Million to Settle Landmark Special Education Case*, DENVER POST (June 20, 2018, 6:25 PM), <https://www.denverpost.com/2018/06/20/douglas-county-district-special-education-case/>.

<sup>22</sup> 885 F.3d 735 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 322 (2018).

<sup>23</sup> *Id.* at 742.

<sup>24</sup> *Id.* at 740.

school did not initiate a special education evaluation under the IDEA, but in January approved accommodations, including counseling, pursuant to Section 504 of the Rehabilitation Act.<sup>25</sup> The student stopped attending school in February and received tutoring at home.<sup>26</sup> His parents requested special education for him in March and he was hospitalized again in April.<sup>27</sup> After an evaluation, the school district found him eligible in June and developed a special education program for his junior and senior years.<sup>28</sup> The school placed him in an alternative high school program called STRIVE, which featured data-driven behavior management in addition to coursework geared to the school's graduation requirements.<sup>29</sup> His grades in the program were generally good, though he had attendance problems and one physical altercation with a classmate.<sup>30</sup> He graduated on time, but a dispute developed over post-secondary services and the parents eventually contested the school's treatment of the student from the beginning of sophomore year through the school's rejection of the post-secondary services requested by the parents.<sup>31</sup> The parents sought compensatory education and prospective relief. The school prevailed on all but a minor issue at the administrative and district court levels,<sup>32</sup> and the court of appeals affirmed.

There was a significant dispute in the case regarding the timing and adequacy of the student's evaluation for special education eligibility. But as relevant to this Essay, the key issue was the substantive adequacy of the programs the public school offered the student. The court of appeals agreed that the programs provided appropriate education, stressing that the alternative high school program enabled the student to pass from junior to senior year and achieve As and Bs, which permitted him to meet graduation requirements and make progress as to his behavior.<sup>33</sup> The homebound tutoring was not adequate at first, but the school offered compensatory tutoring hours during the summer.<sup>34</sup> Though the parents argued that

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<sup>25</sup> 29 U.S.C. § 794 (2012).

<sup>26</sup> *Mr. P*, 885 F.3d at 743.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 740.

<sup>29</sup> *Id.* at 744.

<sup>30</sup> *Id.* at 745.

<sup>31</sup> *Id.* at 746-47.

<sup>32</sup> The issue concerned transportation to the post-secondary program. *Id.* at 747.

<sup>33</sup> *Id.* at 757-58.

<sup>34</sup> *Id.*

their proposed post-secondary program was superior to that of the school district, the court said that was not the relevant question and that with a modification as to transportation the school's program was sufficient to provide appropriate education.<sup>35</sup>

The court of appeals stated that “[p]rior decisions of this Court are consistent with the Supreme Court’s decision in *Endrew F.*”<sup>36</sup> relying solely on the 1998 decision *Walczak v. Florida Union Free School District*, which declared, “Plainly, . . . the door of public education must be opened for a disabled child in a ‘meaningful’ way. This is not done if an IEP affords the opportunity for only ‘trivial advancement.’”<sup>37</sup> In a note, the court distinguished *Cerra v. Pauling Central School District*, which contains language very similar to that of the Tenth Circuit opinion the *Endrew F.* Court vacated: “a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is ‘likely to produce progress, not regression,’ and if the IEP affords the student with an opportunity greater than mere ‘trivial advancement.’”<sup>38</sup> *Mr. P* noted that the state review decision that the case upheld said that the student had made meaningful progress.<sup>39</sup> “Thus, *Cerra* should not be read or cited for the proposition that anything more than ‘mere trivial advancement’ is sufficient to satisfy the IDEA.”<sup>40</sup>

Of course, it is possible to dispute whether the court of appeals faithfully followed the Supreme Court’s *Endrew F.* in *Mr. P*. The district court in that case had used a standard of likely “progress, not regression,” and “an opportunity greater than mere trivial advancement,” mirroring the language of the vacated Tenth Circuit decision in *Endrew F.* The court of appeals in *Mr. P* did not go into depth about whether the goals set for the student plaintiff were “challenging objectives,” but relied instead on the fact that he had a good grade point average, was promoted from tenth to eleventh grade, and managed to graduate on time. The court never asked whether the program was “appropriately ambitious,” nor did it discuss whether the IEP satisfied a standard “markedly more demanding than the ‘merely *de minimis*’ test.” The word “ambitious” appears nowhere in the

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<sup>35</sup> *Id.* at 759-60.

<sup>36</sup> *Id.* at 757.

<sup>37</sup> 142 F.3d 119, 130 (2d Cir. 1998) (citations omitted).

<sup>38</sup> 427 F.3d 186, 195 (2d Cir. 2005) (quoting *Walczak*, 142 F.3d at 130).

<sup>39</sup> *Mr. P*, 885 F.3d at 757 n.12.

<sup>40</sup> *Id.*



opinion. But the fact remains that the student did do well under the school's program by a number of measures.

### III. PRESCIENT OR OBSTINANT?

Of greater importance for future cases, however, is the court's assertion that not only *Mr. P* but also *Walczak* and the whole catalogue of older Second Circuit decisions anticipated *Andrew F.*'s view of appropriate education. Here skepticism is in order. *Walczak* overturned a ruling by Judge Brieant that had rejected the school district's placement of a child in a "developmentally disabled" intermediate program that was the continuation of the program from which she was aging out.<sup>41</sup> Judge Brieant agreed with the parent that the program was not adequate to provide appropriate education, and found the parent's unilateral placement of the child at a private, residential school justified. Reversing, the court of appeals emphasized the learning the child had achieved in the public program. The court noted, but did not put any emphasis on, the social advancement that the child made in a year at the private placement: "B.W. began to establish friendships with other children and to participate in group activities. Dr. Liss reported that B.W.'s 'living skills' had also improved from the level of a five-year old to those of a nine-year old."<sup>42</sup> The huge improvement in appropriate behavior that the child made looks very similar to that made by Drew when his parents put him in a specialized private placement. It is an open question whether the goals set for the child in *Walczak* were "appropriately ambitious" and whether she would continue to make progress such that her program in the public school would be "markedly more demanding" than one that would provide for more than merely trivial advancement. The court of appeals resolved doubts about whether the education was appropriate by deferring to the administrative decision makers, but there was no discussion of what standards they applied, and of course neither they nor the court had any reason to anticipate *Andrew F.*'s reading of the law.

A sampling of other Second Circuit decisions reveals several whose consistency with *Andrew F.* is questionable. Consider, for example, *T.P. v. Mamaroneck Union Free School District*, which took

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<sup>41</sup> *Walczak*, 142 F.3d at 121.

<sup>42</sup> *Id.* at 128.

the “an opportunity greater than mere trivial advancement” standard from *Cerra* and overturned a district court determination that the program proposed for the child was inadequate for failure to provide in-home Applied Behavioral Analysis as the child made the transition into kindergarten.<sup>43</sup> The court noted that the program offered ten hours of in-school Applied Behavioral Analysis (down from 30-35 hours that the child previously received), and the court relied, perhaps implausibly, on an administrative finding that the child’s biting and off-topic recitation of language picked up from television shows did not interfere with his learning.<sup>44</sup> Although the child’s biting behavior eventually ceased, it is an open question whether that was enough of an appropriately ambitious goal.

In *A.C. v. Board of Education of the Chappaqua Central School District*, the Second Circuit also relied on *Cerra*’s language about greater than merely trivial advancement and reversed the holding of the district court that the child’s program was insufficient.<sup>45</sup> There was a significant dispute over whether and to what extent the child was making progress in the public school program. The impartial hearing officer and the district court took one position but the state review officer, and ultimately the court of appeals, took the other.<sup>46</sup> No adjudicator was tasked with asking if the progress was markedly more demanding than what a “merely more than *de minimis*” standard would require, and the quotation of *Cerra*’s language parallel to the Tenth Circuit language in *Andrew F.* casts doubt whether the program met *Andrew F.*’s standard for appropriate education.

*Grim v. Rhinebeck Central School District* upheld a public school IEP that did not guarantee the provision of Orton-Gillingham reading instruction, which the trial court had said was the only method supported by the record for educating the dyslexic child who was the subject of the suit.<sup>47</sup> Citing *Walczak*, the Second Circuit said the sole question on the substantive appropriateness of the IEP was whether the child was “likely to make progress or regress under the proposed plan.”<sup>48</sup> Both on the facts and on the language, the case is closer to the

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<sup>43</sup> 554 F.3d 247 (2d Cir. 2009).

<sup>44</sup> *Id.* at 254.

<sup>45</sup> 553 F.3d 165, 173 (2d Cir. 2009).

<sup>46</sup> *Id.*

<sup>47</sup> 346 F.3d 377 (2d Cir. 2003).

<sup>48</sup> *Id.* at 383 (quoting *Walczak v. Fla. Union Free. Sch. Dist.*, 142 F.3d 119, 130 (1998)).

court of appeals decision in *Andrew F.* than that of the Supreme Court.<sup>49</sup>

Reaching back to the period before the Education for All Handicapped Children Act was retitled the Individuals with Disabilities Education Act, the prominent case<sup>50</sup> *Karl ex rel. Karl v. Board of Education of the Geneseo Central School District* overturned a district court order that a student with intellectual disability be offered a more favorable teacher-student ratio in a vocational program.<sup>51</sup> The court simply asked whether the student's program as a whole was reasonably calculated to confer educational benefit,<sup>52</sup> without any consideration of whether it was appropriately ambitious in light of the student's circumstances or whether its goals were challenging. The dissent felt that the vocational program did not meet even the educational-benefit standard in light of the teacher-student ratio that was offered.<sup>53</sup> The standard the court applied, being drawn

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<sup>49</sup> Some Second Circuit cases that principally involve issues other than appropriate education also contain language regarding appropriate education dubiously compatible with *Andrew F.* See *M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ.*, 725 F.3d 131, 143 (2d Cir. 2013) (“[T]he ‘IEP must provide the opportunity for more than only “trivial advancement.”” (quoting *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008))).

<sup>50</sup> *Karl* was cited as recently as March 17, 2017, five days before *Andrew F.* came down. *J.B. v. N.Y.C. Dep't of Educ.*, 242 F. Supp. 3d 186, 199 (E.D.N.Y. 2017).

<sup>51</sup> 736 F.2d 873 (2d Cir. 1984).

<sup>52</sup> *Id.* at 877-78.

<sup>53</sup> *Id.* at 878 (Pratt, J., dissenting). Nonprecedential Second Circuit cases (even one decided after *Andrew F.*) and cases from district courts within the Second Circuit are also doubtfully consistent with the Supreme Court decision, in light of the similarity between the Tenth Circuit's standard of “merely more than *de minimis*” and the Second Circuit cases' variations on more than only trivial progress. The cases are not necessarily wrongly decided on their facts, but should be examined carefully for consistency with *Andrew F.* if a court is contemplating relying on them. See, e.g., *R.B. v. N.Y.C. Dep't of Educ.*, 689 F. App'x 48, 51 (2d Cir. 2017) (interpreting *Andrew F.* to mean that “the IEP need not bring the child to grade-level achievement, but it must aspire to provide more than *de minimis* educational progress”); *D.A.B. v. N.Y.C. Dep't of Educ.*, 630 F. App'x 73, 78 (2d Cir. 2015) (applying standard of “likely to produce progress and not regression”); *F.L. v. Bd. of Educ. of the Great Neck U.F.S.D.*, 274 F. Supp. 3d 94, 119 (E.D.N.Y. 2017) (“Therefore, a school district satisfies its obligations arising under the IDEA ‘if it provides an IEP that is likely to produce progress, not regression, and if the IEP affords the student with an opportunity greater than mere trivial advancement.’” (quoting *M.P.G. ex rel. J.P. v. N.Y.C. Dep't of Educ.*, No. 08 Civ. 8051, 2010 WL 3398256, at \*10 (S.D.N.Y. Aug. 27, 2010)), *aff'd*, 735 F. App'x 38 (2d Cir. 2018); *A.G. v. Bd. of Educ. of the Arlington Cent. Sch. Dist.*, No. 16 CV 1530, 2017 WL 1200906, at \*9 (S.D.N.Y. Mar. 29, 2017) (stating that in district program student “did make progress both in decoding and in reading during the 2013-2014 school year and that his progress was not trivial”); *Y.D. v. N.Y.C. Dep't of Educ.*, No. 14 CV 1137-LTS, 2017 WL 1051129, at \*8 (S.D.N.Y. Mar. 20, 2017) (finding that IEP met standard of “likely to produce progress, not regression,” and must afford the student “an opportunity greater than mere trivial

from *Rowley*, was not rendered unsound by *Andrew F.*, which reaffirmed *Rowley* as precedent. Nevertheless, *Andrew F.* added a gloss to the language that affects application of the *Rowley* standard going forward and does not match the approach used in *Karl*.

All this is not to deny that some Second Circuit cases effectively anticipated *Andrew F.*'s approach or otherwise may be correct on their facts under *Andrew F.* For example, *A.M. v. New York City Department of Education* applied a standard of whether the department's proposed program was reasonably calculated to confer educational benefits, and determined that a lack of one-on-one Applied Behavioral Analysis therapy rendered it substantively inadequate.<sup>54</sup> Similarly, in *R.E. v. New York City Department of Education*, the court applied the unelaborated "reasonably calculated to create educational benefit" standard and found a denial of appropriate education in one of the three cases before it and no denial in two others, stressing in each case the evidence about the individual needs of the children.<sup>55</sup> In *M.H. v. New York City Department of Education*, the court referenced the educational-benefit standard and other language from *Rowley*, and found that one of the two children in the cases before the court was not offered appropriate education for failure to offer the child intensive one-on-one instruction.<sup>56</sup> The court rejected the claim concerning the other child largely on the basis of witness credibility.<sup>57</sup> In contrast to these cases decided in favor of the parents' position, *T.Y. v. New York City Department of Education* ruled against the parents' claim.<sup>58</sup> Nevertheless, it appears consistent with *Andrew F.* in that it relied on the fact that the public school's offer of a one-on-one aide provided

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advancement"), *appeal dismissed*, No. 17-1150 (2d Cir. Oct. 23, 2017); *D.B. v. Ithaca City Sch. Dist.*, No. 5:14-CV-01520, 2016 WL 4768824 (N.D.N.Y. Sept. 13, 2016) (applying standard of opportunity for greater than mere trivial advancement), *aff'd*, 690 F. App'x 778 (2d Cir. 2017).

<sup>54</sup> 845 F.3d 523, 541 (2d Cir. 2017); *see also* *Reyes ex rel. R.P. v. N.Y.C. Dep't of Educ.*, 760 F.3d 211 (2d Cir. 2014) (finding that proposed program with only temporary provision of one-on-one services failed to offer appropriate education, applying standard of whether program was likely to provide progress, not regression).

<sup>55</sup> 694 F.3d 167, 194 (2d Cir. 2012).

<sup>56</sup> 685 F.3d 217, 242, 252 (2d Cir. 2012).

<sup>57</sup> *See id.* at 258. Another example of a case foreshadowing *Andrew F.*, *Mrs. B. ex rel. M.M. v. Milford Board of Education*, 103 F.3d 1114 (2d Cir. 1997), rejected the school district's proposed program for a child with a learning disability and other conditions, and endorsed the parent's unilateral residential placement of a child; departing from a standard of trivial advancement, the court emphasized that the private placement was needed for the child to make "meaningful progress." *Id.* at 1121.

<sup>58</sup> 584 F.3d 412 (2d Cir. 2009).

“significant benefits” to the child with regard to behaviors that interfered with his learning.<sup>59</sup>

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Both intellectual honesty and the duty of providing accurate guidance to lower courts require a court of appeals to review its previous cases carefully when the Supreme Court adopts an interpretation that is at odds with the interpretations the court applied in the past. *Mr. P*'s discussion of *Cerra*, though it did not overrule the case, at least earned *Cerra* a yellow flag on Westlaw. Judges and litigants are entitled to the warning that other Second Circuit cases are not necessarily consistent with *Andrew F*. They should not be given an unconsidered assurance that existing precedent remains intact. In contrast to the Second Circuit's decision in *Mr. P*, the Fourth Circuit acknowledged the likelihood of conflicts between extant circuit caselaw and the Supreme Court decision in *Andrew F*.<sup>60</sup> That step put litigants and judges on notice of the danger of relying on pre-*Andrew F*. cases.

## CONCLUSION

The temptation to validate one's past work as times change is perfectly natural, whether one is a scholar, an artist, or a judge. But a hasty reaffirmance of what has gone before provides poor counsel to those who must render decisions in the future. The development of the law that occurred in *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1* demands careful and individual consideration of existing precedent concerning the duty to provide appropriate education. The opinion writers of the past were not clairvoyants. They

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<sup>59</sup> *Id.* at 419.

<sup>60</sup> See *M.L. ex rel. Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017) (“Our prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by *Andrew F.*”), *cert. denied*, 138 S. Ct. 752 (2018). But see *E.F. ex rel. Fulsang v. Newport Mesa Unified Sch. Dist.*, 726 F. App'x 535, 537 (9th Cir. 2018) (stating that Ninth Circuit's previous appropriate education “standard comports with *Andrew*'s clarification of *Rowley*”); *C.G. ex rel. Keith G. v. Waller Indep. Sch. Dist.*, 697 F. App'x 816, 819 (5th Cir. 2017) (declaring that *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997), is consistent with *Andrew F.*'s interpretation of appropriate education). The Ninth Circuit's position is alarming, not the least because prior circuit caselaw on appropriate education is internally contradictory. Compare *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1213 (9th Cir. 2008) (stating that *Rowley* standard has been effectively superseded by heightened “meaningful benefit” standard), with *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 951 (9th Cir. 2010) (finding *Rowley* standard not superseded and proper standard to be that of “educational benefit”).

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*ANDREW F. CLAIRVOYANCE*

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were judges working in good faith but in the absence of all but a single Supreme Court opinion that considered a single set of facts half a lifetime ago.