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## The Eleventh Circuit Permits Schools to Submit Unfinished Homework in *L.J. Ex Rel. N.N.J. V. School Board of Broward County* by Requiring Only "Material" Implementation of IEPs for Students with Disabilities

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## Note

### THE ELEVENTH CIRCUIT PERMITS SCHOOLS TO SUBMIT UNFINISHED HOMEWORK IN *L.J. EX REL. N.N.J. V. SCHOOL BOARD OF BROWARD COUNTY* BY REQUIRING ONLY “MATERIAL” IMPLEMENTATION OF IEPS FOR STUDENTS WITH DISABILITIES

MADLINE E. SMITH\*

“The denial of the right to education and to equal opportunity within this Nation for handicapped children . . . is a travesty of justice and a denial of equal protection of the law.”<sup>1</sup>

#### I. CLASS IS IN SESSION: AN INTRODUCTION TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

In 2018, over six million children across the United States received special education services in the American public school system.<sup>2</sup> Prior to 1975, though, children with disabilities had limited access to educational opportunities.<sup>3</sup> More than 1.75 million students with disabilities in the

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1. 120 Cong. Rec. 15,271 (1974) (advocating for right of students with disabilities to receive public education while attempting to pass Education for All Handicapped Children Act). The Education for All Handicapped Children Act (EHA) was the prior name of the Individuals with Disabilities Education Act (IDEA). *See id.* Senator Harrison Williams was the principal author of this legislation in 1974. *See id.*

2. 2018 Annual Report to Congress on the Individuals with Disabilities Education Act, U.S. DEP’T EDUC., <https://sites.ed.gov/idea/2018-annual-report-to-congress-on-the-individuals-with-disabilities-education-act/#Ages-3-21-Part-B> [<https://perma.cc/Z9WG-XN8L>] (last visited Sept. 12, 2019) (reporting number of students served in 2018 under the IDEA). This is the fortieth annual report to Congress to describe the nation’s progress in providing a free appropriate public education for children with disabilities and measuring the implementation of the other goals of the IDEA. *See id.* *See generally* 20 U.S.C. § 1414 (2018) (providing procedural requirements for obtaining disability status under the IDEA). This requires that the local educational agency shall conduct an evaluation for the child suspected of having a disability with a variety of assessment tools. *See* § 1414.

3. *See* 20 U.S.C. § 1400(c)(2) (2018) (stating that before the enactment of the EHA, educational needs of millions of children with disabilities in the United States were not met because they were largely excluded from public school system and did not receive appropriate educational services when they were included); *see also* Antonis Katsiyannis, Mitchell L. Yell & Renee Bradley, *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL & SPECIAL

United States in 1974 did not receive educational services, while more than three million students did not receive an education appropriate to their needs.<sup>4</sup> In fact, many states even had laws that allowed for the exclusion of students with disabilities, such as children who were deaf, blind, emotionally disturbed, or intellectually disabled, from schooling altogether.<sup>5</sup>

Due to the long-standing history of unequal treatment of students with disabilities, a new wave of reform presented itself in the mid-1960s.<sup>6</sup> Parents, interest groups, state legislatures, federal courts, and other advocates paved the way for new legislation to provide rights to children with disabilities.<sup>7</sup> After multiple pieces of state and federal legislation, Congress finally passed the Education for All Handicapped Children Act

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EDUC. 324, 324–25 (2001) (analyzing development of the IDEA and reiterating the history of limited access to education that children with disabilities had prior to its enactment in the 1970s).

4. See Katsiyannis, Yell & Bradley, *supra* note 3, at 324–25 (providing statistical information on the number of students with disabilities that were not accommodated in the American public school system prior to 1975). These authors also note that because of these limited opportunities within public schools, families often have to find other types of educational services for their children with disabilities that are frequently far away from home and at their own expense. *See id.* at 325.

5. See *Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. DEP'T EDUC., <https://www2.ed.gov/policy/speced/leg/idea/history.html> [<https://perma.cc/QGD4-D99D>] (last modified July 19, 2007) (describing the history of the IDEA and highlighting that students with disabilities were not just socially excluded from schools but were sometimes excluded by state law as well). Prior to the enactment of the IDEA, only one in five children with a disability were educated in American public schools. *See id.* See generally 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, 226 (1998) (describing how the IDEA was updated in the 1990 amendments to reflect language preference changes). The 1990 amendments to the IDEA included changing the language from “handicapped student” to “child/student/individual with a disability” to emphasize the person first, rather than the disability status. *See* Yell, Rogers & Rogers, *supra*, at 226. See generally Steve Drummond, *How the Language of Special Education Is Evolving*, NAT'L PUB. RADIO (Mar. 17, 2016, 7:15 AM), <https://www.npr.org/sections/ed/2016/03/17/469792061/how-the-language-of-special-education-is-evolving> [<https://perma.cc/9MC4-S2J6>] (explaining how certain terms, like “retarded,” were once used but are now generally outdated and special education experts, as well as the general public, do not use them anymore).

6. See Katsiyannis, Yell & Bradley, *supra* note 3, at 325 (describing movement for advocating for rights of students with disabilities). Many of the first efforts were focused in litigation, particularly using claims that argued students' rights to equal educational opportunity under the U.S. Constitution. *See id.*

7. *See id.* (describing how litigation efforts of parents and interest groups impacted the rights of students with disabilities). See generally *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 300–02 (E.D. Pa. 1972) (holding that the Commonwealth of Pennsylvania could not deny a free public education to any child, regardless of disability).

(EHA) in 1975, later renamed the Individuals with Disabilities Education Act (IDEA).<sup>8</sup>

The IDEA mandates that schools provide students with disabilities a free appropriate public education (FAPE).<sup>9</sup> To provide students with a FAPE, school districts, along with parents and experts, develop an individualized education program (IEP) for each child identified as disabled.<sup>10</sup> The IEP is the cornerstone of the IDEA, as it is the tool school districts use to accommodate disabilities and provide each child with a FAPE.<sup>11</sup>

Since the IDEA's creation in the 1970s and its various amendments over the years, school districts, courts, and educational experts have struggled with the meaning of FAPE and the best way to implement it in the classroom.<sup>12</sup> As this area of the law develops, courts and schools continue to face new issues concerning the interpretation of the IDEA.<sup>13</sup> While the

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8. See Katsiyannis, Yell & Bradley, *supra* note 3, at 325–27 (describing how efforts of advocates and changes in society eventually pushed Congress to create federal legislation). Prior to the enactment of the IDEA, other federal legislation that provided rights to students with disabilities included the Elementary and Secondary Education Act of 1965, section 504 of the Rehabilitation Act of 1973, the Family Educational Rights and Privacy Act (FERPA) of 1974, and the Developmentally Disabled Assistance and Bill of Rights Act of 1974. *See id.*

9. *See* 20 U.S.C. § 1400 (2018) (mandating that children with disabilities have access to free appropriate public education to ensure equality of opportunity and full participation in society).

10. *See* 20 U.S.C. § 1414(d) (2018) (defining individualized education programs (IEP)). Section 1414(d) requires that an IEP have a written statement for each child with a disability that includes the child's present levels of academic achievement, how the child's disability affects that achievement and progress, a statement of measurable annual goals for the child to make progress, a description of the services, and steps needed to make those goals. *See id.* The IEP is crafted by the "IEP team," composed of the child's parents, at least one regular education teacher of the child, at least one special education teacher, a qualified representative of the local educational agency, and any other individuals who have special expertise regarding the child that the parents or agency deem appropriate. *See id.*

11. *See* *Honig v. Doe*, 484 U.S. 305, 311 (1988) (describing IEPs as "the centerpiece of the statute's education delivery system for disabled children"). *Honig v. Doe* involved multiple disabled students and emphasized the importance of the IEP. *See id.*; *see also* Bonnie Spiro Schinagle, *Considering the Individualized Education Program: A Call for Applying Contract Theory to an Essential Legal Document*, 17 CUNY L. REV. 195, 209 (2013) (describing IEPs as a "cornerstone" of the IDEA). The IEP sets forth exactly how to provide a disabled child with a FAPE and describes the deliverables and desired outcomes for that particular child. *See* Schinagle, *supra*, at 209.

12. *See* *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017) (discussing what constitutes a FAPE under the IDEA); *see also* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 204–06 (1982) (issuing the first Supreme Court decision on how to determine whether a school district provided student with disability a FAPE); Kurtis A. Kemper, *Construction and Application of Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 et seq.—Supreme Court Cases*, 13 A.L.R. Fed. 2d 321, at § 7 (2006) (describing the complicated history of court system deciding what exactly a FAPE is and how schools are meant to provide it to comply with the IDEA).

13. *See generally* David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Ap-*

Supreme Court has provided some guidance on how to evaluate whether the written *content* of an IEP provides a FAPE, confusion remains around how to determine whether the *implementation* of that content complies with the requirements of the IDEA.<sup>14</sup>

The Supreme Court articulated its most recent guidance on what constitutes a FAPE in *Endrew F. v. Douglas County School District RE-1*<sup>15</sup> in 2017, where the Court held that schools “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>16</sup> There, the Supreme Court rejected a lower standard that required schools only to provide “some educational benefit,” stating that this standard conflicted with the purpose of the IDEA.<sup>17</sup> As cases with questions about IEP implementation arose, some courts have applied a “materiality standard” to determine whether the school district provided a disabled student with a FAPE.<sup>18</sup> This standard considers whether a school has failed to implement substantial or significant provisions of the child’s IEP.<sup>19</sup>

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*propriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 77 (2010) (describing that many courts have struggled to define a FAPE since the IDEA’s enactment). The IDEA does not set out clear standards for a FAPE, making it a challenge throughout the IDEA’s history for schools and courts to decide exactly what “appropriate” means and what the educational benefit looks like for students with disabilities. *See id.*

14. *See Endrew F.*, 137 S. Ct. at 999 (holding that schools must “offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”); *see also* Ferster, *supra* note 13, at 86 (explaining difference between cases determining adequacy of content of IEPs and cases determining adequacy of implementation of IEPs). Cases focusing on IEP implementation occur less frequently because it is unlikely that students in cases will concede that an IEP was adequate and that that school district simply did not implement it correctly. *See id.* at 86–87. This raises issues, though, when these cases do come before courts because there is little guidance from precedent with how to proceed. *See id.* at 87.

15. 137 S. Ct. 988 (2017).

16. *See id.* at 999 (defining level of educational benefit for students with disabilities required by the IDEA). This was a unanimous decision for the Court. *See id.* at 903.

17. *See id.* at 998–1001 (reversing the Tenth Circuit’s decision, which stated that in order to provide child with disability a FAPE, a school district must only provide an educational benefit that is “merely more than *de minimis*”). The Court claimed that the use of this standard can hardly be said to be providing any education at all and that it does not comply with the IDEA. *See id.* at 1001; *see also* Ferster, *supra* note 13, at 81–82 (describing circuit court split prior to *Endrew F.* where lower courts differed in how they evaluated a FAPE). Some lower courts adopted a “some educational benefit” standard, while other courts adopted a “meaningful benefit” standard. *See* Ferster, *supra* note 13, at 81–82.

18. *See* L.J. *ex rel.* N.N.J. v. Sch. Bd. of Broward Cty., 927 F.3d 1203, 1213 (11th Cir. 2019) (concluding that the materiality standard is the appropriate test for courts to utilize when evaluating a “failure-to-implement case”).

19. *See id.* (describing materiality standard applied in analysis).

This Note analyzes the Eleventh Circuit's application of the materiality standard in *L.J. ex rel. N.N.J. v. School Board of Broward County*,<sup>20</sup> and argues that the use of the materiality standard in implementation IEP cases is inconsistent not only with the reasoning in and underlying principles of the Supreme Court's decision in *Andrew F.*, but also with the purpose of the IDEA itself.<sup>21</sup> Further, this Note advocates for a different approach, called the "per se" approach, which is more consistent with the purpose of the IDEA and Supreme Court precedent.<sup>22</sup> Part II explains important context for understanding the legislative and legal history that provide the backdrop for *L.J.* Part III lays out the facts and procedural history of *L.J.* Part IV breaks down the court's holding and reasoning in the case. Part V critically analyzes the issues in the *L.J.* decision and advocates for the per se approach. Finally, Part VI provides discussion around the potential impact of the *L.J.* decision.

## II. CRACKING OPEN A TEXTBOOK: THE LEGISLATIVE AND LEGAL HISTORY OF THE IDEA

In order to fully understand *L.J.*, one must be aware of the relevant history surrounding special education law in the United States. At the time of its creation, the IDEA attempted to combat the inaccessibility of educational opportunities for students with disabilities.<sup>23</sup> The IDEA continues to advance those goals by promising students with disabilities an education appropriate to their needs.<sup>24</sup> Over the years, courts attempted to clarify the IEP provisions and guide schools on how to meet the requirements of the IDEA.<sup>25</sup> Due to the IDEA's ambiguity on how exactly to provide disabled students a FAPE, the legal history surrounding this legislation is full of disagreement and confusion.<sup>26</sup>

### A. *Legislative History and Purpose of the Individuals with Disabilities Education Act*

Congress first enacted the IDEA under the name Education for All Handicapped Children Act of 1975 (EHA), with the purpose of remedying

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20. 927 F.3d 1203 (11th Cir. 2019).

21. See *infra* Part V.

22. See Ferster, *supra* note 13, at 91–95 (explaining per se approach, which advocates for the use of standard that requires complete compliance with an IEP, and not just material compliance as the materiality standard demands).

23. See 20 U.S.C. § 1400(c)(2)(B)–(d)(4) (2018) (stating the purpose of adopting the IDEA as attempting to combat the historically unequal treatment of students with disabilities). For further discussion of the history of unequal treatment of children with disabilities in American public schools, see *supra* notes 3–5 and accompanying text.

24. For a full discussion of the promises of the IDEA, see Section II.A, *infra*.

25. For a full discussion of the legal history surrounding the IDEA, see Section II.B, *infra*.

26. For complete discussion of the confusion surrounding the FAPE requirement of the IDEA, see Section II.B, *infra*.

the systemic issue of excluding children with disabilities from the American public school system.<sup>27</sup> Prior to the enactment of the EHA, Congress found that “the educational needs of millions of children with disabilities were not being fully met” because of inadequate educational services, exclusion from the public school system, isolation from peers, undiagnosed disabilities, and a lack of adequate resources in the public schools.<sup>28</sup> The EHA allocated federal funding to public schools in order to provide appropriate services.<sup>29</sup>

At its core, the IDEA promotes cooperation between schools and parents and mandates that schools provide children with disabilities a FAPE.<sup>30</sup> This is accomplished through an IEP, a detailed plan of special education services that state officials and parents develop and review annually for each disabled child.<sup>31</sup> Because the IEP acts as the main tool to achieve the IDEA’s requirement of a FAPE, the majority of litigation arises from questions surrounding the adequacy of IEPs.<sup>32</sup>

#### B. *Legal History of Defining a Free Appropriate Public Education*

In 1982, the Supreme Court decided *Board of Education of the Hendrick Hudson Central School District v. Rowley*,<sup>33</sup> a landmark case in the area of special education law.<sup>34</sup> In *Rowley*, the parents of a deaf child challenged the adequacy of the child’s IEP when the school district refused to provide certain extra services, such as a sign language interpreter, due to the student’s proper advancement through school and her above-average performance compared to her non-disabled peers.<sup>35</sup> The Supreme Court held that a school provides an adequate FAPE when it delivers personal-

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27. See 20 U.S.C. § 1400(c)(2)(B) (2018) (acknowledging the history of inadequate education for children with disabilities in the United States before the enactment of the EHA).

28. See *id.* § 1400(c)(2)–(3) (listing Congress’s findings accompanying the enactment of the IDEA). Section 1400 also describes the IDEA’s success in ensuring children with disabilities have access to a FAPE. See *id.*

29. See 20 U.S.C. § 1411 (2018) (mandating that the federal government allocate resources to provide services to help schools comply with the IDEA); see also *id.* (outlining allocation of funds to states to assist in compliance with the IDEA).

30. See Kemper, *supra* note 12, at § 2 (describing cooperative process established between parents and schools as the “core of the IDEA”). The IEP team consists of parents and school employees who all work together to develop the IEP that is most suited for the child. See *id.*

31. See 20 U.S.C. § 1414(d) (2018). For further discussion of what is required in an IEP, see *supra* note 10.

32. For a discussion of the importance of the IEP in the IDEA as tool for providing a FAPE, see *supra* note 11 and accompanying text. Also, for a full discussion of the relevant legal questions arising from the IDEA, see Section II.B, *infra*.

33. 458 U.S. 176 (1982).

34. Perry A. Zirkel, *The Supreme Court’s Decision in Endrew F. v. Douglas County School District Re-1: A Meaningful Raising of the Bar?*, 341 EDUC. L. REP. 545, 546 (2017) (calling *Rowley* the Supreme Court’s landmark IDEA decision).

35. See *Rowley*, 458 at 184–86 (describing the facts that gave rise to the case). The school had previously supplied the student with a sign language interpreter,

ized instruction and support services to the student with a disability.<sup>36</sup> It additionally held that the EHA did not require the maximization of potential for each student with a disability to match the opportunity of a child without a disability.<sup>37</sup> In applying this holding, the Court decided that the student in *Rowley* was provided with a FAPE due to her above-average academic performance, and accordingly, the school was not required to provide the extra services requested by her parents even if they may maximize her education in some way.<sup>38</sup>

Ultimately, *Rowley* determined that an IEP must be “reasonably calculated to enable the child to receive educational benefits.”<sup>39</sup> Despite this determination, the issues surrounding how to analyze whether a child has received a FAPE under the IDEA persist.<sup>40</sup> As a result of this ambiguity, U.S. circuit courts of appeal have applied varying standards.<sup>41</sup> The *Rowley* standard demanded an “educational benefit,” but the circuit courts disagree on the test to meet that requirement.<sup>42</sup> Multiple circuit courts, including the Second, Fourth, Seventh, Eighth, Tenth, and Eleventh

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but the school determined that these services were unnecessary after the interpreter reported that the student did not need them. *See id.* at 184–85.

36. *See id.* at 185, 189 (reviewing for the first time the meaning of FAPE under the IDEA when presented with a case involving a deaf child who was performing better academically than the average child in her class). The disabled child’s parents claimed that she was not receiving a FAPE because the school district did not provide her with the opportunity to reach her full potential. *See id.* at 185.

37. *See id.* at 198–200 (reasoning that the EHA does not require schools to provide opportunities for students with disabilities to reach their maximum potential, as that is too difficult to measure).

38. *See id.* at 208–10 (holding that the EHA does not require schools to reach their maximum potential due to the student’s advanced academic performance). The Court decided that even though a sign language interpreter may help the disabled child in some way, that was not enough of a reason to require the school district to provide the service, as the IDEA only requires personalized instruction and support services that aid the student’s education, not ones that maximize it. *See id.*

39. *See id.* at 200–01 (providing that the standard for determining whether a student with a disability has received a FAPE under the IDEA is that child has received educational benefit through an IEP). The Court rejected the idea that the school district must provide a student with a disability with services that will help them to reach their maximum potential and reach the same opportunity level as a student without a disability. *See id.* at 200.

40. *See* Terry Conroy & Mitchell L. Yell, *Free Appropriate Public Education After Endrew F. v. Douglas County School District (2017)*, 35 *TOURO L. REV.* 101, 107 (2019) (describing ambiguity remaining after the *Rowley* decision).

41. *See id.* at 107–08 (explaining the history of the circuit court split prior to the Supreme Court’s decision in *Endrew F.*). For an overview of circuit court decisions on the differing standards for FAPE, see *infra* notes 43–45 and accompanying text.

42. *See* Conroy & Yell, *supra* note 40, at 107–08 (describing circuit court split on the level of educational benefit necessary to meet the requirement of a FAPE where courts did not agree on whether the school must provide students with disabilities with only some educational benefit or a meaningful educational benefit). For further discussion of the meaning of these circuit court decisions and the different levels of educational benefit, see *infra* notes 43–45 and accompanying text.



Circuits, adopted a standard that required school districts to provide students with only “some,” or a “de minimis” degree, of educational benefit to meet the requirement of a FAPE under the IDEA.<sup>43</sup> Conversely, the Third and Sixth Circuits held that the de minimis educational benefit standard was too low to satisfy a FAPE and adopted a “meaningful benefit” standard.<sup>44</sup> The Fifth Circuit also held that a FAPE required more than a de minimis educational benefit.<sup>45</sup>

In 2017, the Supreme Court revisited this issue in *Endrew F. v. Douglas County School District*.<sup>46</sup> In that case, the Court held that “a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the circumstances.”<sup>47</sup> The Supreme Court ultimately rejected the some educational benefit standard (or the merely more than de minimis standard) that the Tenth Circuit applied, but also declined to

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43. See *Thompson R2J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir. 2008) (stating that Congress did not impose any particular substantive educational standard in the IDEA and only requires that a school provide a “basic floor of opportunity” (internal quotation marks omitted) (quoting *Rowley*, 458 U.S. at 200)); see also *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 134 (2d Cir. 1998) (applying the lower de minimis standard and holding that the requirement of a FAPE was met); *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612–13 (8th Cir. 1997) (holding that the IDEA only requires that public schools provide sufficient special education services so that students have some benefit from their education); *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146, 153–54 (4th Cir. 1991) (applying lower de minimis standard in assessing whether the FAPE requirement was met); *Doe v. Ala. State Dep’t of Educ.*, 915 F.2d 651, 665–66 (11th Cir. 1990) (holding that lower de minimis standard met the FAPE requirement under the IDEA); *Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) (applying a lower educational benefit standard to meet the FAPE requirement); *Conroy & Yell*, *supra* note 40, at 107–08 (listing circuit courts that adopted the de minimis standard). The de minimis standard is a very low educational benefit standard and requires little of the school district in order to provide a FAPE. See *Conroy & Yell*, *supra* note 40, at 107–08.

44. See *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (stating that the IDEA requires an IEP to confer a meaningful educational benefit in order to meet the threshold for a FAPE). This court rejected the “some educational benefit” standard in favor of one requiring more of school districts. See *id.*; see also *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988) (adopting the meaningful benefit standard as necessary to meet requirement of a FAPE). The Third Circuit also affirmatively rejected the de minimis standard. See *Polk*, 853 F.2d at 182; see also *Conroy & Yell*, *supra* note 40, at 108 (describing how the Third and Sixth Circuits affirmatively rejected the de minimis standard). The Third and Sixth Circuits held the lower standard, one requiring only some educational benefit, insufficient to provide the type of education guaranteed under the IDEA. See *Conroy & Yell*, *supra* note 40, at 108.

45. See *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 248 (5th Cir. 1997) (holding that an IEP must confer meaningful educational benefits for students with disabilities to comply with the IDEA’s FAPE requirement); see also *Conroy & Yell*, *supra* note 40, at 108 (stating that the Fifth Circuit held that a FAPE required more than the lower standard).

46. 137 S. Ct. 988, 993 (2017) (acknowledging that the “more difficult problem” of the appropriate standard for determining when an adequate FAPE under the IDEA is received is before the court).

47. See *id.* at 999.

adopt the higher standard advocated for by the plaintiffs.<sup>48</sup> The Supreme Court determined that the IDEA is more demanding than the “merely more than *de minimis*” test applied by some circuits.<sup>49</sup> Nevertheless, the Court decided not to establish a particular test to evaluate the adequacy of an IEP, instead holding that “a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”<sup>50</sup>

### C. *Implementation vs. Content IEP Challenges*

In both *Endrew F.* and *Rowley*, the Supreme Court had the task of determining the appropriate standard for the *content* of an IEP under the IDEA.<sup>51</sup> In *L.J.*, the Eleventh Circuit faced a slightly different challenge in determining the standard for the *implementation* of an IEP.<sup>52</sup> Guidance on this question, though, remains limited as the Supreme Court did not address it specifically in *Endrew F.* or *Rowley*.<sup>53</sup>

Though the Supreme Court has yet to rule on the requirements of IEP implementation, some lower courts and legal scholars have provided guidance on the interpretation of the IDEA when considering the implementation of an IEP.<sup>54</sup> One approach for determining the adequacy of IEP implementation is the “materiality standard,” which provides that the party challenging the implementation of an IEP (1) must show more than a *de minimis* failure to implement all elements of the IEP, and (2) must demonstrate that the school failed to implement substantial or significant provisions of the IEP.<sup>55</sup>

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48. *See id.* at 998, 1000–01 (rejecting lower standard requiring “merely more than *de minimis*” educational benefit employed by Tenth Circuit).

49. *See id.* at 1001 (holding that the lower standard is not in compliance with the purpose of the IDEA).

50. *See id.* (declining to develop a specific test but reiterating that the lower standard is not in compliance with the IDEA).

51. *See id.* at 997 (describing how the claim at issue arose from *Endrew*’s parents challenging the content of the school district’s IEP proposal and refusal to reimburse them for private school tuition and other associated costs); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 184–85 (1982) (describing facts that lead to the plaintiff’s claim that the content of the student’s IEP was inadequate to provide the student with a FAPE); *see also* Ferster, *supra* note 13, at 86 (explaining the difference between implementation IEP cases and content IEP cases).

52. *See L.J. ex rel. N.N.J. v. Sch. Bd. of Broward Cty.*, 927 F.3d 1203, 1206–07 (11th Cir. 2019) (distinguishing this case from content IEP precedential cases and identifying the relevant issue as whether the school district has effectively implemented the IEP to provide a student with a disability with a FAPE).

53. For a further discussion of how Supreme Court precedent does not directly answer the question presented in *L.J.*, *see supra* notes 49–51 and accompanying text.

54. For a further discussion of how legal scholars have advocated for a different approach than the one taken in *L.J.*, *see* Section V.C., *infra*.

55. *See L.J.*, 927 F.3d at 1213 (adopting the materiality standard, which asks whether a school has failed to implement substantial or significant provisions of a

Another option is the per se approach, which many legal scholars advocate for.<sup>56</sup> Additionally, the dissenting opinion in *Van Duyn ex rel. Van Duyn v. Baker School District 5J*<sup>57</sup> argued for this approach.<sup>58</sup> The per se approach provides that the definition of a FAPE in the IDEA calls for services to be provided in conformity with the IEP, which requires schools to implement all portions of the IEP, not just those deemed material.<sup>59</sup> The Second Circuit adopted a similar standard but did not call it the per se approach.<sup>60</sup> The decision of the Second Circuit held that mere “substantial compliance” with an IEP does not meet the requirements of the IDEA because the IDEA “requires compliance.”<sup>61</sup>

Since the Supreme Court decided *Endrew F.* in 2017, there have been few challenges concerning a school district’s implementation of an IEP, let alone cases that reach the circuit court level.<sup>62</sup> Many of the cases in this

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child’s IEP as a way to evaluate a school-provided FAPE); *see also* *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (adopting the materiality standard). The Fifth Circuit concluded that to prevail on an implementation IEP claim, the plaintiff must show more than a de minimis failure to implement the IEP. *See id.*; *see also* Perry A. Zirkel, *The Third Dimension of FAPE Under the IDEA: IEP Implementation*, 36 J. NAT’L ASS’N ADMIN. L. JUDICIARY 409, 414 (2016) (explaining how the materiality standard has been adopted by some circuit courts in implementation IEP cases).

56. *See* Ferster, *supra* note 13, at 94–104 (analyzing different standards for evaluating IEP implementation cases and concluding that the per se approach is most consistent with the IDEA).

57. 502 F.3d 811 (9th Cir. 2007).

58. *See, e.g., id.* at 828–29 (Ferguson, J., dissenting) (advocating for the per se approach, as opposed to the materiality standard, by arguing that a school district’s failure to comply with any measure of the IEP is a denial of a FAPE).

59. For complete analysis of the per se approach, *see* Section V.C., *infra*.

60. *See* D.D. *ex rel. V.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 506–14 (2d Cir. 2006) (holding that the IDEA requires IEP implementation to be in complete compliance with what is written). This class action case dealt with preschool children with disabilities, claiming that the New York City Department of Education and the New York State Education Department violated the IDEA by not immediately providing students with disabilities with the services in their IEPs. *See id.*

61. *See id.* at 512 (indicating that what is required under the IDEA is complete compliance with what is written in IEP). The Second Circuit additionally rejected the “substantial compliance” standard, contrasting it with the Supreme Court case *Blessing v. Freestone*, which discussed “substantial compliance” in the context of Social Security Act. *See id.* (citing *Blessing v. Freestone*, 520 U.S. 328 (1997)). The court stated that the plaintiffs here are different from the plaintiffs in *Blessing* because the IDEA’s statutory language is clear that a FAPE is required. *See id.* *See generally* *Blessing*, 520 U.S. at 343 (holding that “substantial compliance” was sufficient for provision of Social Security Act because Title IV-D “was not intended to benefit individual children and custodial parents” and did not create enforceable federal right).

62. *See* L.J. *ex rel. N.N.J. v. Sch. Bd. of Broward Cty., Fla.*, 927 F.3d 1203, 1207 (11th Cir. 2019) (noting that the Supreme Court has yet to set a standard for implementation cases, and that neither has the Eleventh Circuit); *see also* Ferster, *supra* note 13, at 86–87 (stating that there have not been many IEP implementation challenges). It is unlikely that students would concede that an IEP provided a FAPE as written, because that would be giving up an argument in their IDEA chal-

area of the law do not survive motions to dismiss or reach only administrative law judges or mediators.<sup>63</sup> *L.J. ex rel. N.N.J. v. School Board of Broward County*,<sup>64</sup> however, did reach the Eleventh Circuit Court of Appeals.<sup>65</sup> *L.J.* presented an IEP implementation issue of whether the failure to implement any part of an IEP constituted a denial of a FAPE.<sup>66</sup>

### III. CLASS SYLLABUS: THE FACTS OF *L.J.*

In *L.J.*, the plaintiff, who was a disabled teenaged boy diagnosed with autism spectrum disorder and a speech/language impairment, had been identified as a student eligible to receive special education services under the IDEA.<sup>67</sup> *L.J.* received services throughout elementary and middle school in the Broward County, Florida, public school system and had several IEPs over his time in the school district.<sup>68</sup> An IEP from August 2005

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lenge, particularly when content IEP jurisprudence is a more developed area of the law. See Ferster, *supra* note 13, at 86–87.

63. See generally 20 U.S.C. § 1415(e) (2018) (requiring that any local educational agency or state that receives federal funding provides means to allow parties to file claims and deal with disputes, particularly encouraging the use of mediation, rather than going directly to court); Jonathan A. Breyer, *A Modest Proposal: Mediating IDEA Disputes Without Splitting the Baby*, 28 J.L. & EDUC. 37, 37–38 (1999) (explaining that the 1997 amendments to the IDEA included a mediation provision for first time). Mediation may be equipped to handle many of the disputes presented, but it does provide some inconsistency and ambiguity in resolutions across states and across local educational agencies due to the vagueness in the IDEA itself. See Breyer, *supra*, at 37–38.

64. 927 F.3d 1203 (11th Cir. 2019).

65. See *id.*

66. See *id.* at 1206.

67. See *id.* at 1208 (describing that *L.J.*'s school first identified him as a student with a disability in elementary school). See generally *What Is Autism?*, AUTISM SPEAKS, <https://www.autismspeaks.org/what-autism> [<https://perma.cc/36XB-JQ96>] (last visited Oct. 23, 2019) (describing autism, or autism spectrum disorder (ASD), as having a broad range of conditions associated with social skills, sensory sensitivities, repetitive behaviors, speech, and nonverbal communication). The Centers for Disease Control reports an estimate of one in fifty-nine children in the United States are somewhere on the autism spectrum. See *What Is Autism?*, *supra*. Autism presents many challenges to an individual from childhood to adulthood due to differences in the ways that people with autism think, learn, and view the world. See *id.*

68. See *L.J.*, 927 F.3d at 1207–08 (noting that the IEP that remained in place for the majority of *L.J.*'s educational career was one developed in his third-grade year by his mother and an education professional from his elementary school). See generally *Autism Speaks Guide to Individualized Education Programs*, AUTISM SPEAKS, <https://docs.autismspeaks.org/iep/cover/> [<https://perma.cc/YY6N-YKRD>] (last visited Oct. 23, 2019) [hereinafter, *Autism Speaks Guide*] (giving advice to parents of children with autism and school professionals about what should be included in an autistic student's IEP). Students with autism have varying needs and the goals of the IEP will change based on the child's place on the autism spectrum. See *id.* Generally, some types of services that will be included in an IEP for a student with autism are support related to assistive technology, speech and language services, psychological or mental health support, physical or occupational therapy, and social skills services. See *id.*

placed L.J. in a large public middle school where he “immediately displayed a strong aversion” to attending school.<sup>69</sup> His behavior became disruptive, resulting in three suspensions from school.<sup>70</sup> As a result, his mother N.N.J. decided to keep him at home and self-teach for the remainder of the school year.<sup>71</sup>

Following the 2005–2006 school year, N.N.J. challenged the content of the school board’s 2005 IEP and filed a request for a due process hearing with the State of Florida Department of Administrative Hearings.<sup>72</sup> From the time that a due process hearing is requested until the proceedings are completed, the IDEA requires schools to use the “stay-put” provision, which keeps in place the most recently agreed upon IEP (which in this case was in 2002).<sup>73</sup>

After the due process hearing, the administrative law judge determined that the 2005 IEP provided L.J. with a FAPE, that the school board adequately implemented the 2002 stay-put IEP during the pendency of the review proceedings, and that certain services were not necessary for L.J. as requested by N.N.J.<sup>74</sup> L.J. returned to school for the 2006–2007 school year, where his aversion to school and disruptive behavior continued.<sup>75</sup>

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69. *L.J.*, 927 F.3d at 1218 (explaining L.J.’s aversion to school once he started middle school, where he strongly disliked the new setting and that his problematic behaviors, including constant refusal to attend school, began immediately).

70. *See id.* at 1208.

71. *See id.* (describing L.J.’s mother’s decision to homeschool him for rest of the year after L.J.’s problematic behavior in the middle school setting). This prompted L.J.’s mother to file the IDEA complaint challenging the content of the newly proposed IEP by the IEP team in the middle school. *See id.*

72. *See id.* (describing five complaints over an eight-month period that went to an administrative law judge, who consolidated complaints to review together); *see also* 20 U.S.C. § 1415 (2018) (establishing the right of parents of a child with a disability to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child” and the right to an “impartial due process hearing,” as well as other procedural requirements).

73. *See L.J.*, 927 F.3d at 1208 (describing facts of case surrounding the aftermath of N.N.J.’s filed complaint); *see also* 20 U.S.C. § 1414(j) (2018) (outlining the “stay-put” provision). The stay-put provision requires the maintenance of the current educational placement during any pendency of proceedings. *See* § 1414(j); *see also* Zirkel, *supra* note 34, at 554 (explaining the “stay-put” or “pendency” provision of the IDEA as “fluid” and complicated concepts with little guidance from the IDEA). The primary purpose of the stay-put provision is to maintain the status quo of the student’s educational services while disputes regarding the IEP are resolved. *See* Zirkel, *supra* note 34, at 554.

74. *See L.J.*, 927 F.3d at 1208 (describing the administrative law judge’s holding). L.J.’s mother appealed the administrative law judge’s holding, but it was later affirmed by a district court judge. *See id.* These claims are not at issue in the case before the court. *See id.*

75. *See id.* (describing L.J.’s continued problematic behavior in his seventh-grade year when he returned to public school). L.J.’s behavioral problems included frequent absences which, due to either illness or refusal to attend, caused him to be absent for over 100 days—this meant he was present for less than a quarter of his class periods during this school year. *See id.*

Efforts to create a new IEP did not go as planned and, in December 2006, N.N.J. filed a request for another due process hearing, claiming that the school board failed to fully implement L.J.'s stay-put 2002 IEP during the pendency of the previous review proceedings.<sup>76</sup> N.N.J. claimed that the school board failed to comply with the strategies laid out in the IEP in a variety of incidents at school.<sup>77</sup> After multiple appeals, Judge Errol H. Powell issued a decision in October 2009 holding that the school board violated the stay-put provisions of the IDEA by not adequately implementing L.J.'s 2002 stay-put IEP during the pendency of the review proceedings and, thus, failed to provide L.J. with a FAPE.<sup>78</sup> The judge applied the "material failure standard" and concluded, after comparing the terms of the 2002 IEP to the services provided by the school board during that stay-put time period, that N.N.J. successfully demonstrated more than minor discrepancies in the implementation of the IEP.<sup>79</sup> The district court reversed this decision and held that the school board did not fail to implement the stay-put 2002 IEP.<sup>80</sup>

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76. *See id.* at 1209 (explaining challenge that eventually led to the appeal). L.J.'s mother claimed that the school district did not adequately implement the stay-put IEP in the beginning of L.J.'s seventh grade year. *See id.*

77. *See L.J. ex rel. N.N.J. v. Sch. Bd. of Broward Cty., Fla.*, 2017 WL 6597516, at \*21–23 (S.D. Fla. Sept. 28, 2017), *aff'd*, 927 F.3d 1203 (2019) (describing incidents that gave rise to claim by student's mother that school district did not properly implement student's stay-put IEP). Those incidents include times when teachers used negative language with the student, instead of positive language like IEP demands. *See id.* Another incident occurred when the student was disruptive and violent in class and school employees gave him candy to stop instead of using the methods described in the IEP, which involve not rewarding bad behavior. *See id.* at \*22. Finally, a school employee failed to use a social story in an incident, as outlined in the IEP, that may have prevented the student from reacting negatively to having to use a bathroom he did not prefer. *See id.* at \*21.

78. *See id.* at \*3 (describing claim in case). There were multiple administrative challenges, continued problems for L.J. at school, and his mother eventually removed him from the public school about halfway through his eighth-grade year. *See id.*

79. *See id.* (explaining administrative law judge's holding that there were material provisions of the IEP that were not implemented by school). The claim required eighteen non-consecutive days of hearings and the administrative law judge also determined that "the school had discriminated and retaliated against L.J. and his mother for exercising their rights under the IDEA." *See L.J. ex rel. N.N.J. v. Sch. Bd. of Broward Cty., Fla.*, 927 F.3d 1203, 1209 (11th Cir. 2019).

80. *See L.J.*, 927 F.3d at 1210 (explaining district court's reversal of administrative law judge's decision in favor of student). The district court entered a judgment in favor of the school district. *See id.* L.J.'s mother appealed this decision, bringing it before the Eleventh Circuit. *See id.*; *see also L.J. ex rel. N.N.J. v. Sch. Bd. of Broward Cty., Fla.*, 850 F. Supp. 2d 1315, 1325–26 (S.D. Fla. 2012), *aff'd*, 927 F.3d 1203 (reversing the administrative law judge's determination that it deprived L.J. of a FAPE by applying the materiality standard and identifying that evidence did not support conclusion that there was an implementation failure on the part of the school district).

IV. SAVED BY THE BELL: A NARRATIVE ANALYSIS OF *L.J.*

The issue before the Eleventh Circuit in *L.J.* was whether the school board deprived *L.J.* of a FAPE as guaranteed under the IDEA by failing to adequately implement the student's IEP.<sup>81</sup> To address this issue, the Eleventh Circuit began its analysis by deeming this case an "implementation" IEP case.<sup>82</sup> After determining the type of issue presented, the court decided to adopt the materiality standard and applied it to the facts presented.<sup>83</sup>

A. *Implementation IEP Case Determination*

The Eleventh Circuit began its analysis by explaining the difference between content IEP cases and implementation IEP cases.<sup>84</sup> Here, the court distinguished *L.J.* from both *Rowley* and *Andrew F.* because those cases concerned an IEP's content and how an IEP "as written" may fail to offer a FAPE.<sup>85</sup> The Eleventh Circuit determined here, though, that the question in *L.J.* revolved around the implementation of an IEP, rather than its written content because "even where an IEP as written may satisfy the IDEA, schools can also fail to meet their obligation to prove a [FAPE] by failing to implement the IEP *in practice*."<sup>86</sup> Because the court determined that this case concerned implementation of the IEP rather than its content, it then stated that the standard articulated in *Andrew F.* does not apply and, therefore, there was no binding precedent on the issue presented in *L.J.*<sup>87</sup>

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81. See *L.J.*, 927 F.3d at 1203 (describing issue of case as being a new issue to the Eleventh Circuit). The Eleventh Circuit described this case as unlike *Andrew F.* because it dealt with implementation of the IEP rather than the written content. See *id.*

82. For a further discussion of the Eleventh Circuit's determination that this case was an IEP implementation case, see Section III.A, *infra*.

83. For a full discussion of the Eleventh Circuit's adoption and application of the materiality standard, see Section III.B, *infra*.

84. See *id.* at 1210–11 (discussing difference between IEP content cases and implementation IEP cases). For further discussion of the difference between content and implementation IEP cases, see *supra* note 14.

85. See *id.* at 1211 (distinguishing from *Rowley* and *Andrew F.* because those cases provide guidelines for IEP content claims). See generally *Andrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 996–97 (2017) (explaining the school board did not update *Andrew F.*'s IEP when his parents believed his progress stalled and his behavior was not improving); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982) (explaining the alleged issue with the IEP as written was that it did not provide for a sign language interpreter despite the parents' request for one).

86. *L.J.*, 927 F.2d at 1211.

87. See *id.* (identifying this issue as one of first impression for the Eleventh Circuit). The Eleventh Circuit distinguished this case from *Andrew F.*, noting that *Andrew F.*'s content IEP holding did not apply to this implementation IEP case. See *id.*

### B. *Adoption of the Materiality Standard*

The Eleventh Circuit then determined the appropriate standard of review.<sup>88</sup> In doing so, the court adopted the materiality standard, stating that “to prevail in a failure-to-implement case, a plaintiff must demonstrate that the school has materially failed to implement a child’s IEP.”<sup>89</sup> To clarify, the plaintiff must prove more than a minor or technical gap between the IEP and reality of implementation.<sup>90</sup> The court here stated that a school materially fails to implement an IEP when it does not incorporate “substantial or significant provisions” into the student’s education.<sup>91</sup> In adopting the materiality standard, the Eleventh Circuit rejected a standard that would hold that any deviation from the IEP violates the IDEA.<sup>92</sup>

### C. *Application of Materiality Standard*

After adopting the materiality standard, the court applied it to the facts of *L.J.*<sup>93</sup> Here, the court found there was no material failure to implement L.J.’s IEP.<sup>94</sup> First, the Eleventh Circuit stated that many of the administrative law judge’s conclusions were not supported in the record or failed to tie the alleged failure to a provision in the stay-put IEP.<sup>95</sup> Further, in the court’s eyes, other alleged implementation failures “reflected simple disagreements between L.J.’s mother and the school about how to provide the services described in the IEP.”<sup>96</sup> Moreover, the court attrib-

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88. *See id.* at 1211 (explaining the need to establish a standard of review because there was no binding precedent to provide guidance on the implementation issue).

89. *Id.* (establishing materiality standard). For further discussion of the materiality standard, see *supra* note 55 and accompanying text.

90. *See id.* (establishing burden of proof for plaintiff under materiality standard as needing to prove more than de minimis failure in implementation of IEP). Proving more than a de minimis failure means that a small deviation from the IEP is not unlawful under the IDEA. *See id.* The court further explained that “[a] material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.” *Id.* A “minor” gap in IEP implementation, as outlined by the Ninth Circuit in the *Van Dyun* case, is “if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material.” *See Van Dyun ex rel. Van Dyun v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). The Eleventh Circuit in *L.J.* largely relied on the analysis by the Ninth Circuit in *Van Dyun* in the adoption of the materiality standard. *See L.J.*, 927 F.3d at 1211–13.

91. *See id.* (defining the materiality standard).

92. *See id.* at 1213 (rejecting the per se approach). For a further discussion of the per se approach, see Section V.C, *infra*.

93. *See id.* at 1216–17 (analyzing and disagreeing with the administrative law judge’s analysis that previously laid the fault with the school for the shortfalls in the L.J.’s speech and occupational therapy). Here, the Eleventh Circuit stated that these shortfalls by the school were “relatively minor after factoring out the missed sessions attributable to L.J.’s absences.” *See id.* at 1217.

94. *See id.*

95. *See id.*

96. *See id.*



uted the IEP services L.J. missed to his absence from school and found that L.J.'s struggles were not a result of a material IEP implementation failure.<sup>97</sup> Overall, the court affirmed the district court's decision that the school board did not materially fail to implement L.J.'s IEP.<sup>98</sup>

#### V. INCOMPLETE ASSIGNMENTS: A CRITICAL ANALYSIS OF *L.J.*

The adoption of the materiality standard in *L.J.* is not consistent with Supreme Court precedent, the purpose of the IDEA, and the procedural requirements of the IDEA.<sup>99</sup> As the main tool through which the legislation provides a FAPE to students with disabilities, providing parents the right to challenge only those IEP provisions deemed "material" denies students the promises of the IDEA.<sup>100</sup> The per se approach, on the other hand, requires the complete implementation of an IEP and conforms with both Supreme Court precedent and the goals of the IDEA.<sup>101</sup>

##### A. *Materiality Standard's Inconsistency with Supreme Court Precedent and the Court's Role in the IEP Process*

In *Andrew F.*, the Supreme Court specifically rejected a lower standard for IEP content cases, which would have stated that compliance with the IDEA's requirement of a FAPE merely called for a de minimis educational benefit conferred for students with disabilities.<sup>102</sup> The materiality standard the *L.J.* Court applied to IEP implementation mirrors the de minimis standard rejected by the Court in *Andrew F.*<sup>103</sup> In *L.J.*, the Eleventh Circuit defended its conclusion and claimed that it was "keeping with the Supreme Court's example in *Andrew F.*" when it refused to lay out every detail of the test in order to account for each student's differences and allow IEP

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97. See *id.* at 1217–20.

98. See *id.* at 1220. The Eleventh Circuit determined that there was not a material failure in the implementation of the IEP on the part of the school district, and thus, L.J. was not denied a FAPE as guaranteed under the IDEA. See *id.*

99. For a complete critical analysis of the materiality standard's inconsistency with Supreme Court precedent and the IDEA, see Part V, *infra*.

100. For a full discussion of why the materiality standard denies the promises of the IDEA to students with disabilities, see Section V.B, *infra*.

101. For complete discussion of why the per se approach is more consistent than the materiality approach with the IDEA and Supreme Court precedent, see Section V.C, *infra*.

102. See *Andrew F. v. Douglas Cty. Sch. Dist. Re-1*, 137 S. Ct. 988, 1001 (2017) (explaining how the Supreme Court rejected the de minimis standard put forth by Tenth Circuit); see also Conroy & Yell, *supra* note 40, at 129 (arguing that the Supreme Court's decision in *Andrew F.* caused the demise of the de minimis standard).

103. See *Andrew F.*, 137 S. Ct. at 1001 (explaining how the Supreme Court rejected the lower de minimis standard used by Tenth Circuit); see also *L.J.*, 927 F.2d at 1211 (establishing the materiality standard); Zirkel *supra* note 34, at 551 (stating that even though the exact effect of *Andrew F.* remains to be seen, many advocates viewed the decision as elevating a substantive standard for a FAPE).

evaluation on a factual basis.<sup>104</sup> Though the Supreme Court declined to elaborate on its standard in *Endrew F.*, the Court did state that “this absence of a bright-line rule, however, should not be mistaken for ‘an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.’”<sup>105</sup>

Notably, the true spirit of the *Endrew F.* decision does not lie in the Court’s reluctance to craft a particular step-by-step formula to determine the effectiveness of an IEP.<sup>106</sup> Rather, the *Endrew F.* Court was far more concerned with striking down an interpretation of FAPE that led to schools providing students with disabilities an education that could barely be considered an education at all.<sup>107</sup> If the Eleventh Circuit truly meant to reach a holding consistent with the principles of *Endrew F.*, the court should not have emphasized the lack of a specific standard and should

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104. *L.J.*, 927 F.3d at 1214 (explaining how the materiality standard is consistent with Supreme Court precedent because the Court declined in *Endrew F.* to lay out a detailed test for evaluation of the content of an IEP in order to account for differences among children and how one test may not work in every circumstance); see *Endrew F.*, 137 S. Ct. at 1001 (declining to elaborate on what “appropriate” progress looks like in order to give some flexibility on case to case basis). The Supreme Court noted here that each child’s needs are different, and it is important to defer to schools because they have expertise in dealing with decisions about students and education in general. See *id.*

105. *Endrew F.*, 137 S. Ct. at 1001 (quoting Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982)) (clarifying that the lack of specifics in the Court’s test for FAPE does not give courts power to decide the meaning of a FAPE for themselves); see also *Rowley*, 458 U.S. at 206 (1982) (explaining that courts evaluating an IEP must keep in mind the procedural requirements of the IDEA in preparation of the IEP and to be careful not to frustrate those by establishing their own standards of review).

106. See *Endrew F.*, 137 S. Ct. at 999 (holding that “a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”). This is not a very specific standard but is higher than “some” educational benefit. See *id.*; see also Conroy & Yell, *supra* note 40, at 130 (arguing that *Endrew F.* raised the bar for the amount of educational benefit schools need to provide students with disabilities in order to comply with the IDEA). The *Endrew F.* Court’s standard attempts to be consistent with the IDEA’s idea of focusing on the particular child and their unique and individual needs. See *Endrew F.*, 137 S. Ct. at 999.

107. See *id.* at 1001 (“[A] student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”); see also Conroy & Yell, *supra* note 40, at 130–37 (arguing that the Supreme Court created a higher standard for evaluating whether an IEP provided a FAPE for a student with a disability). During oral arguments, the Justices were looking for a standard with some teeth and called the *Endrew F.* decision a “victory for students with disabilities and their parents.” See Conroy & Yell, *supra* note 40, at 130; see also Amy Howe, *Argument Analysis: Justices Grapple with Proper Standard for Measuring Educational Benefits for Children with Disabilities*, SCOTUSBLOG (Jan. 11, 2017), <http://www.scotusblog.com/2017/01/argument-analysis-justices-grapple-proper-standard-measuring-educational-benefits-children-disabilities> [<https://perma.cc/7CZE-GX3R>] (quoting Justices Kagan and Ginsburg during oral arguments for *Endrew F.*, stating that both were in favor of adopting “a standard with a bite”).

have instead focused on the level of educational benefit derived from the implementation of the IEP.<sup>108</sup>

Many experts theorize that the *Endrew F.* decision intended to raise the bar for school districts when educating students with disabilities by elevating the substantive standard for a FAPE.<sup>109</sup> The *Endrew F.* Court acknowledged that progress for each student with a disability would not look the same, but demanded that each student's IEP be "appropriately ambitious in light of his circumstances," and even though the IEP's goals may differ, "every child should have the chance to meet challenging objectives."<sup>110</sup> Consequently, the materiality standard applied in *L.J.* does not conform with these values found in *Endrew F.* and does not further the Supreme Court's goals set forth in that decision.<sup>111</sup>

In fact, the materiality standard looks more like the de minimis standard the Supreme Court rejected in *Endrew F.*<sup>112</sup> The de minimis, or the "some educational benefit" standard, and the materiality standard are similarly situated because they require less of the school district than the conformity required by the IDEA, while providing students with disabilities less than what the IDEA promises.<sup>113</sup> The materiality standard also places

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108. See Conroy & Yell, *supra* note 40, at 129–31 (emphasizing importance of the Supreme Court rejecting the de minimis standard). For a further discussion of the reasoning and holding of *L.J.*, see *supra* notes 88–98 and accompanying text. The *Endrew F.* decision is significant because it raised the educational benefit bar. See Conroy & Yell, *supra* note 40, at 129–31.

109. See *id.* (describing that many legal scholars found that the *Endrew F.* decision holds schools to a higher standard than previously required in order to provide a FAPE). The legacy of *Endrew F.* is uncertain because it will be left up to the school districts to implement this standard and up to lower courts and administrative law judges to interpret the standard when cases and complaints inevitably arise. See *id.*

110. *Endrew F.*, 137 S. Ct. at 1000 (describing how the standard the Court applied for determining whether a FAPE is met is appropriate for evaluation of IEP claims under the IDEA because the IDEA focuses so heavily on individuality and the uniqueness of each child). The IDEA acknowledges that it is vital to the success of the legislation to recognize the different needs in children with disabilities. See *id.*

111. See *id.* at 1001 (holding that the lower de minimis standard is not in compliance with the IDEA because it does not ensure students with a FAPE); see also Ferster, *supra* note 13, at 87–91, 103–04 (analyzing the materiality standard and determining that it does not convey the appropriate level of educational benefit to students with disabilities in order to comply with the IDEA). The materiality standard does not provide students with a FAPE because if implementation is not "in conformity" with an IEP, then it is not meeting the requirements of the IDEA. See generally Ferster, *supra* note 13, at 87–91, 103–04.

112. See *Endrew F.*, 137 S. Ct. at 1001 (rejecting "some benefit" or de minimis educational benefit standard as not complying with the IDEA); see also Ferster, *supra* note 13, at 103 (suggesting that the per se standard is consistent with the purpose of the IDEA, while the materiality standard is not because it does not further the goal of providing a FAPE to students with disabilities).

113. See 20 U.S.C. § 1400(d) (2018) (promising to students with disabilities a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"); see also Ferster, *supra* note 13, at 103 (arguing that the mate-

the burden on the child to prove any material failures in the implementation of the IEP, while removing responsibility from the school district to ensure that the special education services comply with the IEP.<sup>114</sup> The *Endrew F.* decision did not intend to remove accountability from the school district and place more responsibility on the students with disabilities.<sup>115</sup> Instead, a more accurate reading of *Endrew F.* signals that the Supreme Court intended to hold schools accountable for the promises of the IDEA and will not accept such low standards for the education provided to students with disabilities.<sup>116</sup> If the Supreme Court demanded more than “some” educational benefit in the written content of IEPs, it is fair to say that it would require more than “material” implementation of said IEPs.<sup>117</sup> In light of the *Endrew F.* decision, the materiality standard as used

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riality standard does not comply with promises of the IDEA). The per se approach is more consistent with these promises. *See id.*

114. *See* Matthew Scott Weiner, *Material Failure and IEP Implementation: How the Ninth Circuit Pulled the Teeth out of the Individuals with Disabilities Education Act*, 39 Sw. L. REV. 541, 559–67 (2010) (arguing that the materiality standard places the burden of proving that the school materially failed to implement an IEP on students and parents). Placing the burden of proving the school’s material failure in IEP implementation on the disabled students and their parents is not required by the IDEA and it actually frustrates the goals of the IDEA, which are to protect students with disabilities while also putting parents and children “in a precarious position” as it is difficult for these individuals to determine whether a failure is “material.” *See id.*

115. *See Endrew F.*, 137 S. Ct. at 999–1001 (warning that this decision should not be construed as letting schools ignore their obligations under the IDEA). The Court stated that “[t]he ‘reasonably calculated’ qualification reflects a recognition that crafting an appropriate program of education requires prospective judgment by school officials.” *Id.* at 999 (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 209 (1982)). The Court also called the IDEA an “ambitious piece of legislation.” *Id.* Additionally, the Court stated that “it cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.” *Id.* at 1001–02. The Court also claimed that “[t]he Act vests these [school] officials with responsibility for decisions of critical importance to the life of a disabled child.” *Id.* at 1001. Nothing in the *Endrew F.* opinion lends itself to holding schools *less* accountable—in fact, the decision seems to reflect the idea that school officials stand as an incredibly important party in fulfilling the promises of the IDEA. *See id.* at 999–1001.

116. *See supra* note 114; *see also* Conroy & Yell, *supra* note 40, at 130 (“The Supreme Court’s new standard is undoubtedly higher than the *de minimis* educational benefit standard.”) The Supreme Court intends to hold schools accountable to this higher standard. *See* Conroy & Yell, *supra* note 40, at 130.

117. *See Endrew F.*, 137 S. Ct. at 1000–01 (rejecting some benefit standard by arguing that “the IDEA demands more”). The Court indicated that it will not stand for less than the promises made in the IDEA to students with disabilities. *See id.* Additionally, the Court’s tone in the opinion appears very disapproving of the Tenth Circuit’s analysis, which conveyed a concern for ensuring that schools take the IDEA, particularly the IEP process, very seriously. *See id.* Another indication that the Court felt this way is the unanimity of the decision—a unanimous Supreme Court opinion sends a message. *See id.*; *see also* Adam Feldman, *Empirical SCOTUS: Amid Record-Breaking Consensus, the Justices’ Divisions Still Run Deep*, SCOTUSBLOG (Feb. 25, 2019), <https://www.scotusblog.com/2019/02/empirical->

in the Eleventh Circuit's holding is inappropriate and does not promote *Andrew F.*'s underlying principles.<sup>118</sup>

Not only is the materiality standard inconsistent with Supreme Court precedent, but it also creates an issue involving judicial interpretation.<sup>119</sup> The materiality standard requires the court to determine what is "material" in an IEP, but this distinction is unnecessary as everything in the IEP has already been deemed material by the IEP team.<sup>120</sup> A provision in the final version of an IEP has gone through many steps and deliberation to get there and, thus, must be substantially important to the education of the student.<sup>121</sup> As previously stated, the IDEA sets forth procedural requirements and specific steps that the IEP team must take in order to craft an IEP, which will be discussed *infra*.<sup>122</sup>

The members of the IEP team have deliberated each provision placed in the plan, deeming each provision important enough to include in the IEP.<sup>123</sup> Not only did the IEP team determine that each provision is important, but it must have determined that each provision was vital to provid-

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scotus-amid-record-breaking-consensus-the-justices-divisions-still-run-deep/ (stating "the importance of unanimity in providing a gloss of legitimacy to the Supreme Court's decisions."); *see also* Conroy & Yell, *supra* note 40, at 132 (stating that *Andrew F.* raises the bar for level of educational benefit for students with disabilities).

118. For further discussion about what the *Andrew F.* opinion accomplished, see *supra* notes 109–111 and accompanying text (supporting that *Andrew F.* intended to raise bar for level of educational benefit for students with disabilities, to hold schools accountable for promises made in the IDEA, to focus on individual child to help them make appropriate progress, and to show how seriously the Court takes the IDEA).

119. See Jeffrey A. Knight, *When Close Enough Doesn't Cut It: Why Courts Should Want to Steer Clear of Determining What Is—and What Is Not—Material in a Child's Individual Education Program*, 41 U. TOL. L. REV. 375, 409 (2010) (arguing that "[b]y engaging in a debate over whether a provision of an IEP is material, the court necessarily adds judges to the list of members of the IEP team"). Requiring judges to determine materiality is not included in the IDEA and adds another layer of complication to the determination of whether the IEP implementation was sufficient to provide a FAPE. See *id.*

120. See *id.* (claiming that everything present in IEP has already been deemed material by the IEP team). Allowing courts to deem portions of the IEP immaterial grants undue authority over what is not a power vested in the judiciary. See *generally id.*

121. See 20 U.S.C. § 1414(d) (2018) (setting forth the requirements for the development of IEP, mandating that it be developed by the entire IEP team, with considerations to many different factors); *see also* Knight, *supra* note 119, at 409 (stating that the IEP process is long and includes much discussion from the IEP team). If a provision was significant enough to make it into the final cut of the IEP, then it must be material. See *id.* Judges do not need to be engaging in this discussion. See *id.*

122. See Section V.B, *infra*, for a further discussion of the procedural requirements of the IDEA and how the materiality standard does not comply with them.

123. See *infra* notes 139–140 for a further discussion about how each provision placed in the IEP is material after the process that it went through to make it into the final version of the student's IEP.

ing the student with a FAPE.<sup>124</sup> As one legal commentator notes, an “IEP, in its final form, is the document designed to deliver the education necessary to bring the child on a par with her peers.”<sup>125</sup> If a provision has made it into the final version of a child’s IEP, it means it was important enough for the student’s education, and is therefore material.<sup>126</sup> At this stage, the courts should not engage in debate over what they consider material when the actual content of the IEP is not in question.<sup>127</sup>

### B. *The Materiality Standard Is Inconsistent with the IDEA*

Beyond *L.J.*’s inconsistency with Supreme Court precedent, the decision does not comply with the requirements and purpose of the IDEA.<sup>128</sup> The IDEA requires that the special education services be provided “in conformity with” the IEP in order to provide a FAPE.<sup>129</sup> The materiality standard is inconsistent with the IDEA’s requirement of a FAPE as provided through an IEP, and it also undermines the procedural protections of the IDEA.<sup>130</sup>

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124. See *infra* notes 139–140 for a further discussion about the importance of each provision in the IEP; see also *infra* notes 129–130 and accompanying text (discussing link between requirement of a FAPE and requirement that services provided be “in conformity with” the IDEA). It is clear that a FAPE is directly related to complete compliance with the IEP because the IEP team deemed these services necessary to provide the student with a disability a FAPE. See Knight, *supra* note 119, at 409 (noting that the “IDEA was designed to afford a certain level of flexibility to schools, administrators, and teachers alike, and given the extensive procedures for revising or amending an IEP, there should be no reason for school officials to alter the document without the consent of the parents and the rest of the IEP team”).

125. See Knight, *supra* note 119, at 407.

126. For a full discussion about the IEP process and how significant each provision is in the final version of the IEP, see *infra* notes 138–142 and accompanying text.

127. See Knight, *supra* note 119, at 409 (arguing that if an IEP has reached this stage, where challenge relates to implementation and not content of IEP, then courts should accept that every provision in the IEP is material). The courts should not be engaging in discussion that has essentially already been had by the IEP team when developing the IEP. See *id.*

128. See 20 U.S.C. § 1401(9)(d) (2018) (requiring that schools offer students with disabilities a FAPE “in conformity” with the IEP); see also Ferster, *supra* note 13, at 103 (arguing that the IDEA requires complete conformity with IEP and any deviation from the content of an IEP in implementation violates the IDEA’s procedural requirements). The IDEA’s extensive procedural protections attempt “to ensure that parents and students fully participate in the development of IEPs.” See Ferster, *supra* note 13, at 103.

129. See *id.* (identifying struggle that courts, schools, and legal scholars have had over what “in conformity with” means). While some believe that the IDEA requirement means that schools must provide complete conformity with the IEP, others believe that substantial conformity with the IEP is sufficient. See Ferster, *supra* note 13, at 103.

130. See 20 U.S.C. § 1414(c)(3)(F) (2018) (requiring, as part of procedural protections, that changes to the IEP must be made by the entire IEP team with few exceptions); see also Ferster, *supra* note 13, at 99 (describing procedural protections of the IDEA as heavily emphasized for the protection of students and parents

The provision in the IDEA requiring implementation to be “in conformity with” the IEP is not a suggestion.<sup>131</sup> Nevertheless, the materiality standard ignores the IDEA’s conformity language.<sup>132</sup> The full section in the IDEA reads: “[t]he term ‘free appropriate public education’ means special education and related services that . . . are provided in conformity with the individualized education program under section 1414(d) of this title.”<sup>133</sup> The word “conformity” means “exact correspondence *to* or *with* a pattern,” as defined by the *Oxford English Dictionary*.<sup>134</sup> Congress chose the word “conformity” to describe the requirements of IEP implementation.<sup>135</sup> The materiality standard, as articulated in *L.J.*, disregards this term in the IDEA, but this cannot be what Congress intended when drafting this legislation.<sup>136</sup>

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in the IEP process). The implementation of the IEP is another one of those procedural elements. *See id.*

131. *See* 20 U.S.C. § 1401(9)(D) (2018) (providing that a FAPE will be provided through special education and related services “in conformity with the individualized education program”).

132. *See* *L.J. ex rel. N.N.J. v. Sch. Bd. of Broward Cty., Fla.*, 927 F.3d 1203, 1216 (11th Cir. 2019) (mentioning briefly the IDEA’s requirement that the education provided should be “in conformity with” the IEP but not analyzing further). This suggests that the Eleventh Circuit did not find this language important enough—even though it is an important provision in the IDEA about IEP implementation—or it did not want to have to grapple with the implications of this language. *See id.*

133. *See* 20 U.S.C. § 1401(9)(D) (2018); *see also* Weiner, *supra* note 114, at 557 (stating the IDEA’s conformity provision in order to make the point that demanding that services be provided “in conformity with” IEP is directly tied to the requirement of a FAPE).

134. *See* OXFORD ENGLISH DICTIONARY 717 (2d. ed. 1989) (providing definition of “conformity”); *see also* Weiner, *supra* note 114, at 557 (quoting *Oxford English Dictionary*’s definition of “conformity” to point out that “conformity” means “exact”). A legal commentator notes that the *Van Dyun* opinion is “engaging in a desperate game of semantics to support an unsupportable position” when using the materiality standard in the analysis of an implementation IEP case. *See* Weiner, *supra* note 114, at 557. *See generally* *Van Dyun ex rel. Van Dyun v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007).

135. *See* 20 U.S.C. § 1401(9)(D) (2018) (stating that a FAPE is provided through special education services “in conformity with” the IEP). According to the “plain meaning” rule of statutory interpretation, words should be interpreted to mean their “ordinarily accepted sense.” *See* David L. Shapiro, *Continuity and Change in Statutory Language*, 67 NYU L. REV. 921, 932–33 (1992). This means that conformity should be taken to mean its ordinary definition of the word. Additionally, according to the *inclusio unis* maxim of statutory construction, “statutes should not be casually construed to mandate changes not specified by the language chosen.” *See id.* at 928. Congress meant what was written and that if it had wanted IEP implementation to be “materially” close, then it would have written that. Statutory language is important and cannot be disregarded simply to make the argument for the materiality standard easier.

136. Even in the preliminary stages of adopting the IDEA’s predecessor, the EHA, drafters noted the importance of procedures in order “to protect the rights of handicapped children and their parents,” suggesting the importance of language in the procedural requirements. *See* 120 Cong. Rec. 15,271 (1974). For further discussion of how the language in the statute does not indicate that the

Not only does the materiality standard neglect to address specific provisions of the IDEA, but it also undermines important portions of the IDEA's procedural requirements.<sup>137</sup> By allowing for a flexible implementation of IEPs, the materiality standard gives schools the unilateral power to make changes to the IEP when failing to implement the entire IEP.<sup>138</sup> Even though an entire team of parents and school experts create the IEP, teachers and administrators ultimately have the power over a student's education on a daily basis—leaving the student and parents vulnerable to the school to correctly implement the plan.<sup>139</sup> The creation of the IEP then acts as an important procedural requirement under the IDEA that ensures both the parents and school leaders have a say in determining what is best for the child.<sup>140</sup>

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materiality standard approach would be appropriate in evaluating IEP implementation cases, see Section V.B, *infra*.

137. See 20 U.S.C. § 1414(c)(3)(F) (2018) (providing some of the IDEA's procedural requirements). These procedural requirements include “[c]hanges to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.” See *id.*; see also § 1415 (outlining “[p]rocedural [s]afeguards” of the IDEA which extensively protect rights and interests of children with disabilities and their parents); Ferster, *supra* note 13, at 99 (demonstrating how important procedural protections are to the IDEA's purpose). Importantly, the IDEA's procedural protections are a “stricter standard for IEP implementation” than those required by the materiality standard. See Ferster, *supra* note 13, at 99.

138. See *Van Dyun*, 502 F.3d at 827–28 (Ferguson, J., dissenting) (arguing that the materiality standard gives schools unilateral power to change IEPs, which undercuts procedural requirements of the IDEA because IEP creation is an “extensive process” and involves an entire team, including parents and other educational experts); see also Ferster, *supra* note 13, at 97–100 (arguing that the materiality standard allows schools to exert more power to change IEPs than what the IDEA provides). Even though the IEP team creates the IEP, teachers and administrators have “ultimate control” over what actually finds its way into the IEP because they know and understand the modifications and accommodations available. See Ferster, *supra* note 13, at 97. This provides all the more reason to hold them accountable for the content in the IEP. See *id.* Additionally, “parents occasionally request additional or different services from those included in the draft IEP, but those services will only be included in the IEP if the school consents to them.” *Id.* at 97–98. This suggests that a school's argument that complete compliance with what is written in the IEP is too burdensome for the school, either financially or otherwise, is not justified, because if they did not have resources to provide certain services to the student with a disability, then they would not have agreed to it when writing the IEP. See *id.* at 97–100.

139. See 20 U.S.C. § 1414(d)(B) (2018) (requiring that IEP teams consist of parents of students, a number of students' teachers, including regular education teachers and special education teachers, representatives of schools, different experts when necessary, and sometimes children themselves); see also *id.* § 1414(c)(3)(F) (laying out the procedural requirements in the IDEA for changing an IEP).

140. See *supra* notes 127–130 (supporting argument that materiality standard is not consistent with procedural requirements of the IDEA and that it actually undermines those requirements). Because the school district took an active role in crafting the IEP, it should not later take issue with implementation of that IEP.



In writing the IEP, the IEP team made decisions based on an implicit definition of a FAPE for that particular child.<sup>141</sup> Allowing the school to disregard a piece of the IEP undercuts the procedural protections provided by the IDEA, which the IEP team crafted to provide the most appropriate educational services to the student.<sup>142</sup> As the dissent in Ninth Circuit case *Van Dyun ex rel. Van Dyun v. Baker School District 5J*<sup>143</sup> stated, a school's ability to ignore portions of the IEP would "essentially give the district license to unilaterally redefine the content of the student's plan by default."<sup>144</sup> This license undermines the collaborative nature of the IEP team and ignores the parental participation provisions of the IDEA.<sup>145</sup> Giving schools the power to not implement the entire IEP as written and only hold the school district responsible for "material" failures directly contradicts the purpose of the IDEA.<sup>146</sup>

### C. *The Per Se Approach Makes the Grade*

The per se approach is the most consistent approach with both the purpose and procedure of the IDEA, as well as Supreme Court precedent, because it ensures that each student with a disability gains a meaningful educational benefit from their IEP.<sup>147</sup> As one commentator describes it,

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If the school district has concerns with how to implement an IEP, it should raise those concerns during the creation process. *See id.*

141. For a further discussion on how the FAPE requirement is tied to the IEP implementation conformity requirement, see *supra* notes 129–130 and accompanying text.

142. *See* Ferster, *supra* note 13, at 97–99, 103 (arguing that the procedural requirements of the IDEA in the IEP process protect children and parents, that the materiality standard undermines this process, and stating that the "IDEA's emphasis on procedure seeks to ensure that parents and students fully participate in the development of IEPs"). For a further discussion of the procedural requirements of the IDEA, see *supra* notes 137–140 and accompanying text.

143. 502 F.3d 811 (9th Cir. 2007).

144. *See id.* at 828 (Ferguson, J., dissenting) (emphasizing unilateral power conferred in district by materiality standard).

145. *See id.* at 828–29 (Ferguson, J., dissenting) (arguing that the materiality standard gives schools too much unilateral power in making decisions that are not mandated under the IDEA). Providing schools with this unilateral power undercuts procedural provisions of the statute as well as its purpose—to encourage cooperation between parents and schools in the decision-making process when it comes to students with disabilities. *See id.*

146. *See* Ferster, *supra* note 13, at 99 (citing *Van Dyun ex rel. Van Dyun v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007)) (reiterating *Van Dyun* dissent's argument that the per se approach should be utilized). The implementation of the IEP is a crucial procedural requirement of the IDEA, and school districts should not be allowed to effectively change the content by failing to implement the full plan. *See id.*

147. *See Van Dyun*, 502 F.3d at 828–29 (Ferguson, J., dissenting) (arguing for the per se approach by stating "an IEP is the product of an extensive process and represents the reasoned conclusion of the IEP Team that the specific measures it requires are necessary for the student to receive a [FAPE]. . . . A school district's failure to comply with the specific measures in an IEP to which it has assented is, by definition, a denial of FAPE . . ."); *see also* Ferster, *supra* note 13, at 103 (sug-

the per se approach as applied to implementation challenges considers “a failure to implement *any* portion of the IEP” as a denial of a FAPE.<sup>148</sup>

As stated *supra*, the IDEA requires that the special education services be provided “in conformity with” the IEP.<sup>149</sup> The per se approach reflects the IDEA’s requirements because it mandates the implementation of the *entire* IEP, not just what is deemed “material.”<sup>150</sup> As the Second Circuit held in *D.D. ex rel. V.D. v. New York City Board of Education*,<sup>151</sup> the “IDEA does not simply require substantial compliance; . . . it requires compliance.”<sup>152</sup> Though this court did not name the per se approach in its holding, it advanced the same idea that the IDEA demands a mirror image of the IEP’s written content and the IEP’s implementation to provide a student with a disability with a FAPE.<sup>153</sup>

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gesting that the per se standard is consistent with the IDEA because it ensures that each disabled student is provided with a FAPE). The per se approach is also in line with the procedural requirements of the IDEA. *See* Ferster, *supra* note 13, at 103. Adopting the per se standard reaffirms the idea that all of the IEP must be implemented in schools. *See id.* School officials still reserve the right to decide what an appropriate education is and determine any potential financial burden. *See id.* The implementation of the IEP, however, is not the place for that discussion, and it should have been decided before arriving at this stage in the IEP process. *See id.*

148. *See* Ferster, *supra* note 13, at 91–92 (describing how any failure in implementation constitutes denial of a FAPE to student with disability). When asked the question “How much of an IEP do you have to implement?” at a special education conference, a few hundred special education administrators answered, “all of it.” *See id.* This indicates that experts in the field believe that complete compliance with the IEP in implementation is necessary. *See id.*

149. For a discussion of the IDEA’s conformity requirement for services provided in accordance with the IEP, see *supra* notes 140–142 and accompanying text.

150. *See Van Duyn*, 502 F.3d at 828–29 (Ferguson, J., dissenting) (arguing that schools have to implement all portions of the IEP in order to comply with the IDEA); *see also* Ferster, *supra* note 13, at 95 (reiterating *Van Duyn* court’s analysis and arguing that the per se approach is most consistent with the IDEA by requiring complete implementation of the IDEA). The materiality standard is also disfavored in some administrative decisions. *See* Ferster, *supra* note 13, at 95 (noting that not many administrative decisions do not favor the materiality standard because they have decided that the IDEA calls for implementation “in conformity with” an IEP, arguing that this standard is not “universally accepted” and making the argument that the per se approach is best way to analyze these cases). For a more thorough analysis of the conformity requirement, see *supra* notes 129–142 and accompanying text.

151. 465 F.3d 503 (2d Cir. 2006).

152. *See id.* at 512 (explaining “substantial compliance” with the terms of the IEP does not meet the standards of the IDEA and that the IDEA demands more because it mandates “conformity” and has strict procedural requirements).

153. *See id.* (holding that IEP implementation must be in complete compliance with the content of the IEP). The Second Circuit did not directly adopt the per se approach here, but its reasoning and holding is consistent with the main ideas of the per se approach and serves as a good example of how to apply the standard. *See id.*; *see also* Ferster, *supra* note 13, at 92–93 (indicating that *D.D.* correctly applies per se approach, even if court does not directly name standard used (citing *D.D.*, 465 F.3d at 510–12)).

Further, the dissenting opinion in *Van Dyun* articulates one of the best arguments for the use of the per se approach.<sup>154</sup> The dissenting judge states:

[A]n IEP is the product of an extensive process and represents the reasoned conclusion of the IEP Team that the specific measures it requires are necessary for the student to receive a [FAPE]. . . . A school district's failure to comply with the specific measures in an IEP to which it has assented is, by definition, a denial of FAPE . . . .<sup>155</sup>

If the IDEA requires complete compliance, then the standard used to evaluate implementation challenges should reflect such compliance.<sup>156</sup> If the Eleventh Circuit had applied the per se approach to *L.J.*, the court may have determined that the student was denied a FAPE.<sup>157</sup>

#### VI. A BAD REPORT CARD: THE IMPACT OF *L.J.*

The decision in *L.J.* and the materiality standard it sets forth are deeply troubling for students with disabilities who need IEPs in order to learn.<sup>158</sup> This standard significantly deviates from the principles in *Su-*

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154. *Van Dyun ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 828–29 (9th Cir. 2007) (Ferguson, J., dissenting) (standing as one of the most thorough arguments for the per se approach). The majority opinion, though, did adopt the materiality standard. *See id.* at 821. The court reasoned that “minor failures” in IEP implementation should not constitute a violation of the IDEA. *See id.* The majority opinion also cited to *Rowley*'s language that the IDEA's purpose is to provide “a basic floor opportunity” to disabled students rather than a “potential-maximizing education” in support for its argument that the IDEA “also supports granting some flexibility to school districts charged with implementing IEPs.” *See id.*; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). *Endrew F.*, however, clarified that more than “some” educational benefit is necessary to provide a FAPE, making the majority's argument in *Van Dyun* less persuasive. *See Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

155. *See id.* at 827 (Ferguson, J., dissenting) (reasoning that the IDEA requires implementation of all portions of an IEP). The judge also states that this approach does not impose too much of a burden on schools because they can amend the IEP through the process laid out in the IDEA if they find that there are unnecessary portions of the IEP. *See id.*; *see also* Ferster, *supra* note 13, at 94–95 (quoting *Van Dyun*, 502 F.3d at 827 (Ferguson, J., dissenting)) (referencing dissenting judge in *Van Dyun* as critical support for per se standard).

156. *See* Section V.B for a full discussion on how the IDEA requires complete compliance in order to provide students with disabilities a FAPE.

157. *Compare L.J. ex rel. N.N.J. v. School Bd. of Broward Cty.*, 927 F.3d 1203, 1207 (11th Cir. 2019) (applying materiality standard and determining that student was not denied a FAPE), *with D.D.*, 465 F.3d at 506–14 (holding that “substantial compliance” with an IEP was not enough to satisfy the IDEA). If this kind of analysis was applied to the *L.J.* case, the failure to implement the IEP entirely would indicate that this was a denial of a FAPE to the student with a disability.

158. *See* Weiner, *supra* note 114, at 567 (calling the Ninth Circuit's material failure standard in *Van Dyun* “dangerous precedent”). The same could be said for

preme Court precedent and the IDEA itself.<sup>159</sup> Further, it creates a pathway for schools to break the promise of a FAPE, which is guaranteed under the IDEA.<sup>160</sup>

Compliance with the IEP means complete compliance—anything less than complete compliance fails to provide a FAPE.<sup>161</sup> The IEP team drafted the IEP, as required by the IDEA, with the idea that every provision and service outlined in that IEP is necessary to provide the student with a FAPE.<sup>162</sup> The IEP is the main tool by which this objective is achieved.<sup>163</sup> If the IEP is not implemented fully, this denies children with disabilities their guaranteed right to special education services under the IDEA and breaks the promise of a free appropriate public education.<sup>164</sup>

The Supreme Court in *Rowley* and again in *Endrew F.* wanted to provide flexibility for schools when it comes to how they decide to educate students with disabilities.<sup>165</sup> Nevertheless, neither the IDEA nor the Supreme Court intended to give schools unilateral power to change the IEP

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the *L.J.* court's adoption of the materiality standard here. *See id.*; *see also L.J.*, 927 F.2d at 1207; *Van Dwyne*, 502 F.3d at 828–29.

159. *See* Section V.A, *supra*, for a further discussion of how the materiality standard is inconsistent with the Supreme Court's decision in *Endrew F.*

160. *See* Section V.B, *supra*, for full discussion of how the materiality standard provides too much power to schools to change the IEP, which is not consistent with the IDEA's procedural requirements.

161. *See* Ferster, *supra* note 13, at 97 (defining “in conformity” with the IEP under the IDEA as strict conformity). Not following the IEP is therefore diverting from what the IEP team agreed as to what would provide the child with a disability with a FAPE. *See id.*; *see also* Knight, *supra* note 122, at 382 (articulating the idea that compliance with the IEP under the IDEA means complete compliance, and any deviation is not providing a FAPE to child with disability).

162. For further discussion on how insufficient compliance with the IEP during implementation denies students with disabilities a FAPE, as guaranteed under the IDEA, *see* Section V.A and B, *supra*.

163. For a discussion of how the IEP is the “cornerstone” of the IDEA's promise of providing a FAPE to students with disabilities, *see supra* note 11 and accompanying text.

164. *See* 20 U.S.C. § 1401(9) (2018). The IDEA defines a FAPE as special education and related services that . . . (A) have been provided at public expense . . . ; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

*Id.*

165. *See* *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 999 (2017) (stating that “reasonably calculated” standard holds school districts to higher standard than “some” educational benefit). The Court in *Endrew F.* also gave deference to the school officials on how to best serve its students. *See id.*; *see also* *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 209 (1982) (arguing that it is important to defer to schools in these matters, as they have knowledge and experience guiding them in their decisions regarding educational policy).

through implementing only what they find material.<sup>166</sup> The IEP process, as previously discussed, has necessary procedural elements.<sup>167</sup> Disregarding this process hands over unauthorized power to schools to decide what portions of a child's IEP to implement.<sup>168</sup>

The Eleventh Circuit's decision in *L.J.* erodes the importance of the written content in IEPs.<sup>169</sup> Every provision in the IEP is included to provide a FAPE, as required by the IDEA, and is necessary to ensure students with disabilities progress through school and gain an education, just like every other child.<sup>170</sup> To achieve this goal, schools must be held accountable for the full implementation of what is written in the IEP.<sup>171</sup> Particularly in light of the Supreme Court's decision in *Endrew F.*, the materiality standard used in the case at hand does not uphold the principles, goals, and procedural requirements of the IDEA.<sup>172</sup> Ultimately, the Eleventh Circuit—as well as other courts applying the materiality standard—have forgotten what one learns in school from an early age: there is no credit for unfinished homework.

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166. See Ferster, *supra* note 13, at 97 (arguing that giving schools this unilateral power to change the IEP undercuts the procedural requirements of the IDEA); see also *supra* notes 131–149 and accompanying text for a further discussion on how the materiality standard is not in compliance with the procedural requirements of the IDEA.

167. For complete discussion of the IDEA's procedural requirements, see Section V.B, *supra*.

168. For full discussion of how the materiality standard provides unilateral power for the school district to make changes to the IEP, see *supra* notes 138 and 168 and accompanying text.

169. For complete discussion of how the materiality standard disregards what is written in the IEP, see Section V.B, *supra*.

170. See 20 U.S.C. § 1400 (2018) (promising a FAPE to students with disabilities); see also *supra* notes 27–32 and accompanying text for full discussion of the promises of the IDEA.

171. See *supra* notes 112–115 and accompanying text for a discussion of how schools should be held accountable for what is written in the IDEA.

172. See Part V, *infra*, for full critical analysis of how *L.J.*'s holding is inconsistent with Supreme Court precedent and the IDEA.