ROWLEY DEFERENCE IN THE CIRCUIT COURTS AND THE INFLUENCE OF *ENDREW F.*

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INTRODUCTION

Fifty years ago in 1975, Congress enacted the Individuals with Disabilities Education Act (IDEA) "to ensure that all children with disabilities have available to them a free appropriate public education."[1] The IDEA was originally enacted as the Education for All Handicapped Children Act (EHA); the name changed to the IDEA in 1990.[2] In the EHA's Statement of Findings and Purpose, Congress explicitly found that "more than half" of the eight million handicapped children in the United States at the time did "not receive appropriate educational services which would enable them to have full equality of opportunity."[3] The EHA's purpose was to address this disparity by requiring public schools to provide a free, appropriate public education (FAPE) and by allowing parents to pursue administrative and judicial remedies when schools denied their children that FAPE.[4]

This Note will analyze the effects that judicial deference to school administrations' educational methodology decisions has on parents' lawsuits under the IDEA. Parents can sue schools under the IDEA for allegedly failing to provide FAPE for their child.[5] These lawsuits span from procedural violations such as failing to include parents in decisions about their child's Individualized Education Plan (IEP)[6] to

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1 Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2018).

2 *A History of the Individuals with Disabilities Education Act*, U.S. DEP'T OF EDUC. (Feb. 16, 2024), https://sites.ed.gov/idea/IDEA-History [https://perma.cc/C69T-JFTK].

3 Education for All Handicapped Children Act of 1975, Pub. L. No. 94-192, sec. 3, § 601(b)(1)–(3), 89 Stat. 773, 774.

4 *Id.* § 601(c).

5 *See* 20 U.S.C. § 1415(i)(2)(A) (2018) (providing cause of action in federal court).

6 *See, e.g.*, Deal *ex rel.* Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 857 (6th Cir. 2004) ("The evidence reveals that the School System, and its representatives, had pre-decided not to offer Zachary intensive ABA services regardless of any evidence concerning

substantive violations such as failing to provide an appropriate learning methodology for their child.[7] When parents allege that the school used an inappropriate educational methodology, however, courts typically defer to the school administration's methodology choice.

The first Part of this Note will introduce the IDEA and the Supreme Court case that created the deference requirement, *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*.[8] It will also describe one of the most recent Supreme Court cases interpreting the IDEA, *Endrew F. v. Douglas County School District RE-1*,[9] which I later argue opened the door for courts to defer less to school administrations' decisions in certain circumstances. The second Part will explain the rationale for traditional *Rowley* deference. It will also describe how that deference limits parents' success in IDEA lawsuits and students' educational opportunities under the IDEA. The third Part will describe and analyze the current split between circuit courts regarding the level of deference now due to schools' methodology decisions. Finally, the fourth Part will argue that, under the framework laid out in *Endrew F.*'s explanation of educational deference, courts can and should defer less to the educational methodology decisions of schools where there is a factual record suggesting that a student is best served by a different, specific methodology. The conclusion will summarize the legal and policy reasons for following the Second and Ninth Circuits' approach to *Rowley* deference.

I. THE IDEA, *ROWLEY*'S DEFERENCE STANDARD, AND *ENDREW F.*'S RESPONSE

A. Requirements of the IDEA

The primary mandate of the Individuals with Disabilities Education Act (IDEA) is that "all children with disabilities have available to them a free appropriate public education."[10] To enact such a mandate, Congress requires states to find and evaluate children with potential disabilities (the "[c]hild find" requirement),[11] implement

Zachary's individual needs and the effectiveness of his private program. This predetermination amounted to a procedural violation of the IDEA.").

7 *See, e.g.*, A.M. *ex rel.* E.H. v. N.Y.C. Dep't of Educ., 845 F.3d 523, 530 (2d Cir. 2017) (alleging that "the IEP failed to provide a placement in a 1:1 classroom that 'implement[ed] an [ABA] or substantially similar methodology'") (alteration in original) (citation omitted).

8 Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176 (1982).

9 Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

10 Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2018).

11 *Id.* § 1412(a)(3).

"individualized education program[s]" for children with disabilities,[12] and educate these children in the "[l]east restrictive environment" (i.e., in the general education setting if possible) appropriate for their disability.[13] Parents and their children with disabilities are entitled to certain procedural safeguards to ensure that the child receives a free, appropriate public education, which include the right to sue the school district after exhausting administrative remedies.[14] The federal courts hearing such claims are statutorily required to receive the administrative record, hear additional witnesses at the parties' request, and make a decision based on the preponderance of the evidence.[15] Other limitations on the courts relate to attorneys' fees and do not impact their substantive decisions about violations of the right to a free, appropriate public education.[16]

B. Rowley*'s Deference Standard*

The Supreme Court first interpreted the IDEA (then EHA) and the FAPE standard in 1982, in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*.[17] *Rowley* concerned a young Deaf student, Amy Rowley, whose school refused to provide her with an in-class sign language interpreter.[18] The school instead provided an FM hearing aid to amplify what Amy Rowley heard and trained several teachers in sign language interpretation.[19] Additionally, the school hired an in-class sign language interpreter for a trial period of two weeks; at the end of that period, the interpreter told the school that, in his opinion, Amy did not need his services.[20] Without that interpreter, Amy understood "less than half" of what was said in the classroom.[21] Amy's parents, after exhausting the available administrative remedies, sued in federal court for the denial of a FAPE because of the denial of the sign language interpreter.[22]

Since *Rowley* was the first case before the Court about the IDEA,[23] the Court began by discussing the policy concerns behind the Act. The Court recognized that "[t]he Act represents an ambitious federal

12 *Id.* § 1412(a)(4).
13 *Id.* § 1412(a)(5).
14 *Id.* § 1415(i)(2).
15 *Id.* § 1415(i)(2)(C).
16 *Id.* § 1415(i)(3)(B).
17 Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176 (1982).
18 *Id.* at 184–85.
19 *Id.* at 184.
20 *Id.*
21 *Id.* at 215 (White, J., dissenting).
22 *Id.* at 185 (majority opinion).
23 *Id.* at 187.

effort to promote the education of handicapped children" but explicitly rejected the argument that Congress intended "strict equality of opportunity or services" between disabled and abled children.[24] The Court came to this conclusion despite the 1975 Act's emphasizing "*full* equality of opportunity" in its findings.[25] Instead, the Court determined that the test for whether a school had provided a FAPE was whether the "individualized educational program developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits."[26]

The Supreme Court in *Rowley*, in making its finding on the merits of Amy Rowley's case, cautioned its audience that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'"[27] "[Q]uestions of [educational] methodology," such as whether to provide an in-class sign language interpreter versus an FM hearing aid, "are for resolution by the States," and courts should defer to the state's determination regarding which educational methodology is appropriate for a child.[28] And by "States," the Court meant "state and local educational agencies."[29] Amy was "receiving personalized instruction and related services *calculated by the Furnace Woods school administrators* to meet her educational needs."[30] Therefore, the Court found that the school had not violated the IDEA in failing to provide a sign language interpreter, even though without that interpreter Amy did not understand even half of what was said in the classroom.[31] Federal courts throughout the country still quote this "specialized knowledge and experience" language today when ruling on special education cases brought under the Individuals with Disabilities Education Act.[32]

C. Endrew F.*'s Response*

Thirty-five years later, in *Endrew F. v. Douglas County School District RE-1*, the Court addressed the FAPE standard it had set forth in *Rowley* and clarified a circuit split regarding the level of "educational benefits"

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24 *Id.* at 179, 198.

25 Education for All Handicapped Children Act of 1975, Pub. L. No. 94-192, sec. 3, § 601(b)(3), 89 Stat. 773, 774 (emphasis added).

26 *Rowley*, 458 U.S. at 207.

27 *Id.* at 208 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

28 *Id.*

29 *Id.* at 207.

30 *Id.* at 210 (emphasis added).

31 *Id.* at 185, 210.

32 *See, e.g.*, Lachman *ex rel.* Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 297 (7th Cir. 1988).

Rowley's interpretation of the IDEA required.[33] The Court emphasized that the standard for educational benefits conferred upon a student covered by the IDEA "is markedly more demanding than the 'merely more than *de minimis*' test applied by" some circuits.[34] Instead, the Court determined that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[35]

The Court declined to define "appropriate" progress.[36] The "nature" of the IDEA, the Court explained, is such that progress depends on "the unique circumstances of the child," so "appropriate" progress must be analyzed on a case-by-case basis.[37] In almost the same breath, though, the Court reaffirmed the deference given to educational administrators in matters of "sound educational policy."[38] The "absence of a bright-line rule" defining "appropriate" progress was not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."[39] Instead, that absence seemed to be an invitation to the school administrations to define "appropriate" progress for each of their students.

However, the *Endrew F.* Court arguably limited the educational policy deference requirement immediately after reaffirming it. The Court explained:

> At the same time, deference is based on the *application of expertise and the exercise of judgment* by school authorities. . . . The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a *cogent and responsive explanation for their decisions* that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.[40]

This paragraph, I will argue, breathed new life into IEP litigation, as parents and courts began to find ways to argue or decide, respectively, that deference to school authorities was inappropriate because

33 Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 993 (2017).

34 *Id.* at 1000.

35 *Id.* at 1001.

36 *Id.*

37 *Id.*

38 *Id.* (quoting Bd. Of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 206 (1982)).

39 *Id.* (quoting *Rowley*, 458 U.S. at 206).

40 *Id.* at 1001–02 (citations omitted) (emphasis added).

the authorities either did not exercise judgment at all or could not provide a "cogent and responsive explanation" for their judgments. While not essential to the holding of *Endrew F.*, and therefore not binding on lower courts, the "cogent and responsive" standard is very persuasive dicta that some courts are beginning to follow.

II. RATIONALE FOR AND PROBLEMS WITH *ROWLEY* DEFERENCE

Before delving into the ways litigants and courts have interpreted the *Endrew F.* limitation on *Rowley* educational policy deference, I will discuss the rationale for and issues with *Rowley* deference.

Plaintiff parents suing under the IDEA usually allege a denial of a free, appropriate public education (FAPE) as guaranteed by the IDEA. They often allege an inappropriate individualized education plan (IEP) that does not satisfy their child's needs. However, when the requested remedy involves a change in the methodology the school uses to teach the child, federal courts tend to return to the language in *Rowley*: judges "lack the 'specialized knowledge'" to resolve "questions of education policy."[41] Courts thus defer significantly to the decisions of the school, the teachers, or the officials who ruled in the administrative procedures required before an IDEA plaintiff can enter the court system.

In *Rowley* itself, the Supreme Court explained the reason it was adopting a standard of deference toward school administrations' educational policy decisions. The IDEA (EHA at the time) had no deference requirements, and indeed expressed concern about "the rights of . . . parents or guardians,"[42] specifically conditioning federal funding on "the participation and consultation of the parents or guardian."[43] In deciding to grant deference to schools, *Rowley* focused on a different aspect of the congressional intent in passing the IDEA: state supremacy in education. The Court pointed out that the EHA "expressly charge[d]" states with many responsibilities to disabled children, including finding and sharing with teachers and administrators research on the education of disabled children and adopting teaching methodologies.[44] Because of this express language, the Court reasoned, "it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories."[45] The Court

41 *Rowley*, 458 U.S. at 208 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)).

42 Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3, § 601(c), 89 Stat. 773, 775.

43 *Id.* at sec. 5, § 614 (a)(1)(C)(iii), 89 Stat. 773, 785.

44 *Rowley*, 458 U.S at 207.

45 *Id.* at 207–08.

did mention Congress's focus on parental involvement, claiming that such involvement "protect[s] individual children" when a child's education is "entrust[ed]" to "state and local agencies."[46]

The *Rowley* Court did not just rely on the EHA's language in deciding to defer to school administrations' decisions. It also relied on the general principle that schools are the experts on educational policy, not courts.[47] Lack of expertise is a common reason for courts to defer instead of using their own judgment. For example, courts judging cases involving business decisions usually defer to the business judgment of the directors of a corporation because "it has long been thought beneficial to investors for courts, which are not experts in business, to defer to the disinterested decisions of directors, who are expert."[48] Courts also use lack of expertise as a reason *not* to defer. In overruling *Chevron* deference to agencies' interpretations of ambiguous statutes, the Supreme Court in *Loper Bright Enterprises v. Raimondo* pointed out that "*Chevron*'s presumption [of deference to agency interpretation of statutes] is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[49] But school expertise, I will argue, can be respected *without* being totally relied on if compelling evidence suggests a different conclusion.[50]

At the end of its discussion on deference, after arguing that parental involvement provides protection for individual children's rights, the *Rowley* Court made a curious point. "As this very case demonstrates," said the Court, "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."[51] But "ardor" is not the same as "protection." The Court seems to equate ardor with filing and pursuing a lawsuit. But a parent simply pursuing a lawsuit does not actually provide "protection" if the court defers automatically to the school. While *Rowley* does demonstrate parental "ardor," it does not demonstrate parental "protection," because the parents in *Rowley* lost the case.[52]

While the challenges faced by parents and children are clear from *Rowley*, the challenges faced by the schools themselves should also not be ignored. Schools and their attorneys, much like Congress and the Supreme Court, would like to think that schools and parents are "on

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46 *Id.* at 208.

47 *Id.*

48 *In re* MFW S'holders Litig., 67 A.3d 496, 526 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014).

49 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

50 *See infra* Part IV.

51 *Rowley*, 458 U.S. at 209.

52 *Id.*

the same team."[53] Many special education teachers and school administrators are very committed to their work and their students' educational opportunities.[54] They are "underpaid and overworked," and the work is so "great" and the "scrutiny" so "hostile" that there is a significant shortage of special educators in the United States.[55] Jobs in special education are "among the hardest to staff," yet Congress requires public schools to provide *all* students with disabilities with a free appropriate public education.[56]

However, while the realities of the issues schools face must be considered, so must the realities of the issues faced by students in these understaffed schools. If special education is "constant crisis management," how does that affect the students?[57] They may, for example, be unable to go to school for two months because the school couldn't hire an aide to accompany them.[58] This is clearly an unacceptable result, but is it fairer for the students to bear the burden of understaffed and underfunded programs, or for schools to bear that burden? Realistically, the question is not one of fairness, because Congress has already spoken: schools have a duty to provide a free appropriate public education. The courts have spoken as well: "This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if [the child] is to remain in school."[59] In short, "cost is not a valid objection" to providing required services under IDEA.[60]

Congress further mandates that parents of children with disabilities be "full partners with the school system," at least when it comes to "designing educational services for their children."[61] But even before the school-parent relationship breaks down and results in a lawsuit,

53 Rachel B. Hitch, *Flags on the Play? We're on the Same Team!*, 48 J.L. & EDUC. 87, 87 (2019).

54 *Id.* at 94.

55 *Id.*

56 Cory Turner, *Why Children with Disabilities are Missing School and Losing Skills*, NPR (May 15, 2024, 5:00 AM), https://www.npr.org/2024/05/15/1247795768/children-disabilities-special-education-teacher-shortage [https://perma.cc/7LYK-8QNC].

57 *Id.*

58 *Id.*

59 Cedar Rapids Cmty. Sch. Dist. v. Garret F. *ex rel.* Charlene F., 526 U.S. 66, 79 (1999).

60 Terry Jean Seligmann, *Flags on the Play: The Supreme Court Takes the Field to Enforce the Rights of Students with Disabilities*, 46 J.L. & EDUC. 479, 493 n.77 (2017) (citing *Cedar Rapids*, 526 U.S. at 77–79).

61 Selene A. Almazan, Andrew A. Feinstein, & Denise Stile Marshall, *Quality Education for America's Children with Disabilities: The Need to Protect Due Process Rights*, 5 CHILD & FAM. L.J. 1, 1 (2017).

Congress's vision of a full partnership is usually unrealized.[62] Even when parents bring additional support, such as a lawyer, doctor, or educational consultant—which is rare—parents "routinely remain at a disadvantage."[63] Parents often receive "insufficient information about the IEP process," which, coupled with "the sheer number of school-side team members compared to that of the parent-side," can "intimidat[e] parents into acquiescence" to the school's plan.[64] Although school administrators are supposed to see parents as the "expert[s] on [their] child,"[65] many instead believe that "because parents are the most invested in their child's success, their requests in IEP meetings are inherently unrealistic."[66] These challenges at the school level combined with *Rowley* deference result in a system that disempowers parents and their children every step of the way.

From the perspective of a school attorney, the difference in expertise between parents and educators strongly supports *Rowley* deference, even in the face of *Endrew F.*'s "cogent and responsive explanation" requirement. For one thing, "[e]ducators have years of education, experience, and practice that cannot be imparted to every parent of a student with a disability."[67] But that's not the case for every educator. The "years of education"[68] are no longer at the same level: "Both the number and share of new college graduates with a bachelor's degree in education have decreased over the last few decades."[69] Teachers are instead entering the profession through alternative programs.[70] Furthermore, suggesting that "parents are not equipped to understand

62 The Supreme Court shares this idealistic vision of a full, equal partnership between parents and schools. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017) (claiming that "[t]he nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue"); Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S 176, 208 (1982) ("Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies and in the formulation of the child's individual educational program.") (citations omitted).

63 Jacob W. Wohl, Comment, *A Better IDEA: Utilizing the Department of Education's Rulemaking Authority to Reform the Special Education Process*, 74 ADMIN. L. REV. 621, 640 (2022).

64 *Id.*

65 *Id.* at 641 (quoting Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT'L ASS'N ADMIN. L. JUD. 423, 433 (2012)).

66 *Id.* (citing Margaret M. Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263, 275 (2008)).

67 Hitch, *supra* note 53, at 96.

68 *Id.*

69 Katherine Schaeffer, *Key Facts About Public School Teachers in the U.S.*, PEW RSCH. CTR. (Sept. 24, 2024), https://www.pewresearch.org/short-reads/2024/09/24/key-facts-about-public-school-teachers-in-the-u-s/ [https://perma.cc/CZG4-PHE3].

70 *See id.*

the intricacies of implementing educational services"[71] belies the efforts and understanding of many parents who challenge IEPs and end up suing their school districts. Particularly in cases in which parents have invested significant time and energy in determining which educational methodologies work best for their child, based on diagnostic tests, interviews, and other expert consultations, parents are more likely to recognize a real lack of a "cogent and responsive explanation" for a school's educational methodology choice as compared to an explanation they simply don't understand.

Lachman v. Illinois State Board of Education demonstrates the issues with *Rowley* deference when taken to extremes.[72] The lawsuit was ostensibly about "mainstreaming," or the IDEA requirement that disabled students be educated with (that is, in the same room as) abled students "to the maximum extent appropriate."[73] The Seventh Circuit recognized that other circuit courts had evinced a "very strong congressional preference" for mainstreaming from the "maximum extent" language in the statute.[74] In reality, the parents had two requests: one about mainstreaming, and one about methodology. They wanted their child educated in a regular classroom (mainstreaming) with a "cued speech instructor" instead of a sign language instructor (methodology).[75] But the *Lachman* court found that even the question of mainstreaming, in this case, was really a question of methodology.[76] This finding sprung from the parents *not* proving something (perhaps not knowing they had to): the parents did "not maintain that the fully-mainstreamed placement they s[ought] would be possible without the use of cued speech."[77] This framing of the issues in the case inexorably led to defeat for the parents because of *Rowley* deference.[78] The court took "great care to avoid displacing the educational policy judgments made by" the Board of Education, as required by *Rowley*.[79] As a result of this deference, the *Lachman* court neither defined nor discussed the benefits or drawbacks of the methodology the parents wanted.

The *Lachman* court may have exceeded *Rowley*'s mandate by deferring to general educational policies, not just the specific methodology choices that *Rowley* states are "for resolution by the States."[80]

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71 Hitch, *supra* note 53, at 96.

72 Lachman *ex rel.* Lachman v. Ill. State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988).

73 *Id.* at 294.

74 *Id.* at 295 (emphasis omitted) (quoting Roncker *ex rel.* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983)).

75 *See id.* at 291–92.

76 *Id.* at 296.

77 *Id.*

78 *See id.* at 297.

79 *Id.*

80 Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 208 (1982).

Combining *Rowley*'s deference requirement with "the general discomfort of a court in reviewing educational records and expert evaluations under IDEA" sometimes leads courts "to label disputes as about methodology without actually determining whether the approach of a school district can be supported."[81]

The Seventh Circuit's language in *Lachman* was arguably even stronger than *Rowley*'s. The court held that "*Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, *do not have a right* under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child."[82] Rules in which courts defer to outsiders or to lower court judges often allow for courts to avoid that deference in cases of clear error.[83] For example, reviewing courts usually defer to the fact-finding of the trial court,[84] but courts can ignore those findings if they were made in clear error.[85] *Chevron*'s original deference framework required the agency interpretation to which a court deferred be "permissible."[86] *Lachman*, however, seemed to insist that parents have *no right at all* to argue that a school's methodology decision was inappropriate under any standard.

Courts have interpreted *Rowley* deference to require parents to provide evidence that the school's suggested program would not be successful. In *E.H. v. McKnight*, E.H.'s parents provided evidence that "E.H. needed frequent teacher interaction and worked best with one-on-one or small group teaching."[87] "Notabl[e]" to the district court, however, was the fact that their evidence "did not state that E.H. could *not* be successful in a program such as [the school's]."[88] Immediately after making this point, though, the court mentioned that the school's program involved only one period of small group instruction during the school day.[89] By rigidly deferring to schools' educational policy

81 Seligmann, *supra* note 60, at 492.

82 *Lachman*, 852 F.2d at 297 (emphasis added).

83 Except for the business judgment rule, which tends to result in automatic deference unless the plaintiff can prove the transaction was self-dealing (which is not a standard of review related to the wisdom of the business judgment). *See In re* MFW S'holders Litig., 67 A.3d 496, 526 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018) (overruling *M&F Worldwide* regarding the timing of when a shareholder vote condition must be introduced in a transaction).

84 *See* United States v. Estrada-Gonzalez, 32 F.4th 607, 614 (6th Cir. 2022).

85 *See id.* (requiring that the district court's findings of fact be "plausible").

86 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

87 E.H. *ex rel.* G.H. v. McKnight, No. 21-2297, 2022 WL 3908630, at *17 (D. Md. Aug. 30, 2022).

88 *Id.* (emphasis added).

89 *Id.*

decisions, some courts make it very difficult for parents to succeed in an IDEA claim. A parent in a court that applies *Rowley* deference in the way the *E.H.* court did must prove the school rejected a program that would provide a free, appropriate public education to the student *and* prove—explicitly, not by negative inference—that the school's program would not work. This seems a needlessly difficult task; either the parent must prove how something will play out in the future (speculative and difficult), or the parent *can* prove that a program is unsuccessful based on years of their child being ineffectually educated—in which case the child has spent years being ineffectually educated.

Rowley deference is grounded in federalism and an understanding of courts' lack of expertise in educational methodology. States, not federal courts, are traditionally in charge of education, and educational officials and administrations naturally have more expertise than courts do in matters of educational policy and methodology. But *Rowley* deference can lead to very high burdens for plaintiff parents trying to prove that a school denied their child a free, appropriate public education. Furthermore, this deference does not consider the expertise of the parents, who likely know their child best. More confusingly, even though *Rowley* deference is grounded in the idea that courts are not experts in educational policy, courts do not often defer to educational specialists outside the state educational apparatus who have evaluated the child (that is, the parents' experts). Courts may not have educational expertise, but school administrations are not the only people or institutions that do.

III. THE CIRCUIT SPLIT

In recent years, courts throughout the country have begun to carve out exceptions to the *Rowley* educational policy deference rule. Some courts refer to the *Endrew F.* ruling in doing so, but some do not. Some courts, in fact, moved away from strict *Rowley* deference prior to the *Endrew F.* decision. And courts in several circuits continue to rigidly adhere to *Rowley* deference.

Shortly after the *Endrew F.* decision, authors began to predict and notice difficulties in lower courts' use or interpretation of the "cogent and responsive" dicta. One author noticed an "ambiguity" in *Endrew F.* affirming that "lower courts should defer to school authorities based on their expertise and exercise of judgment" while in the same breath "laud[ing] . . . the reviewing authority's ability to evaluate 'cogent and responsive explanations' for decisions made by a school district."[90] A

90 Josh Cowin, Note, *Is That Appropriate? Clarifying the IDEA's Free Appropriate Public Education Standard Post-*Endrew F., 113 NW. U. L. REV. 587, 607 (2018). Cowin also suggested that "[t]his ambiguity may ultimately cause courts to differ on the level of deference

2020 article pointed out that "questions persist about the level of deference courts should give to school districts on the issue of whether a particular IEP is appropriate."[91] Furthermore, a "lack of clarity" regarding deference "adds to already considerable hurdles facing families with limited resources and capacity to understand legal proceedings when they mount a FAPE challenge in a private action."[92] This lack of clarity has manifested in a split among some of the circuit courts regarding how to apply *Rowley* deference.

A. The Approach of the Second and Ninth Circuits

Both the Second and Ninth Circuits have longstanding interpretations of *Rowley* deference that require courts to look beyond the decisions of the State or the school when it comes to educational methodology. While these interpretations arguably stretched the language in *Rowley* more than it could bear, the addition of *Endrew F.*'s "cogent and responsive" standard in 2017 provides strong support for the Second and Ninth Circuits to continue applying their interpretations of *Rowley* deference.

A.M. v. New York City Department of Education[93] exemplifies the Second Circuit's approach to questions of methodology. In *A.M.*, the plaintiff, A.M., moved her son E.H., who has autism, from public school to a private special education school after deciding that the public school's IEP denied E.H. a free, appropriate public education.[94] The private school provided E.H. with applied behavioral analysis (ABA) therapy to teach the child to break down tasks into discrete elements, while the public school did not.[95] A.M. alleged, and the court found, a substantive violation of her child's right to a FAPE based on the public school's methodology decision not to provide her child with ABA therapy.[96] The court found a violation because "the consensus of the evaluative materials and 'all witnesses familiar with [the child]' specifically recommend[ed] the continued need for 1:1 ABA therapy" and the NYC Department of Education did not "point to any evidence

they provide to school administrators, which would produce different outcomes across jurisdictions despite similar facts being presented in any given case," a prediction that my Note argues has come true. *Id.*

91 Lydia Turnage, Note, *Out of Sight, Out of Mind: Rural Special Education and the Limits of the IDEA*, 54 COLUM. J.L. & SOC. PROBS. 1, 17 (2020).

92 *Id.*

93 A.M. *ex rel.* E.H. v. N.Y.C. Dep't of Educ., 845 F.3d 523 (2d Cir. 2017).

94 *Id.* at 529.

95 *Id.* at 529–30.

96 *Id.* at 529, 545–46.

sufficient to counter these opinions and recommendations."[97] Because of the consensus in support of ABA by almost everyone who knew and had evaluated the child in question, "the District Court and administrative officers' reliance on the views of [the school district] . . . was error."[98] Notably, the *A.M.* court discounted the views of the NYC Department of Education's school psychologist, who did eventually evaluate the child and did not find a need for ABA therapy.[99] But the school psychologist did not evaluate the child until after the school had decided not to provide ABA therapy, which is "a violation of New York law."[100]

Instead of automatically deferring to the decisions of school administrators, the Second Circuit generally relies on the testimony of witnesses who are knowledgeable about the child. This rule applies beyond methodology issues. For example, *S.B. v. New York City Department of Education* was a case about class size, not educational methodology.[101] In this case, the plaintiff requested a 7:1:1 (seven students, one teacher, one paraprofessional) class size for her child, while the school believed a 12:1:1 class size would be adequate.[102] The court arguably went beyond *A.M.*'s "all witnesses" requirement and found that the school district's witness's "anemic testimony [was] countered by the testimony of all three witnesses with intimate knowledge of" the child.[103] Partly because the school district's witness had only met the child in question once, the court did not feel it had to defer to her expertise over three witnesses who knew the child well and argued for a 7:1:1 class size.[104]

The Second Circuit, both prior to and after the *Endrew F.* decision, has followed its own modified deference standard for educational methodology decisions. Where there is a "clear consensus" among professionals and other witnesses that know a child that the child needs a specific methodology to succeed, the school district is not entitled to deference if it fails to implement that methodology.[105] But if there is

97 *Id.* at 545 (first alteration in original) (citations omitted) (quoting C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 81 (2d Cir. 2014)).

98 *Id.*

99 *Id.* at 532.

100 *Id.* at 536.

101 S.B. *ex rel.* C.B. v. N.Y.C. Dep't of Educ., No. 15-cv-1869, 2017 WL 4326502 (E.D.N.Y. Sept. 28, 2017).

102 *Id.* at *17.

103 *Id.*

104 *See id.*

105 *See A.M.*, 845 F.3d at 543.

no clear consensus, the school district does receive *Rowley* deference for its methodology decisions.[106]

The Ninth Circuit, like the Second Circuit, established limitations on its *Rowley* deference prior to *Endrew F.* First, the Ninth Circuit does not defer to just any school official or administrator:

> Under the IDEA, courts owe deference to administrative hearing officers in light of their expertise, but not necessarily to the witnesses for the school district that is party to the dispute. . . . The school authorities whose decisions courts review under the IDEA are the hearing officers, not the staff of individual school districts.[107]

The Ninth Circuit's deference, therefore, doesn't put much weight on the educational expertise of individual teachers or school administrators, or the school as a whole. The court in *Los Angeles Unified School District v. A.O.*, in fact, called the school's invoking of what seemed to be regular *Rowley* deference an "ambitious assertion," even while mentioning *Rowley* itself.[108] The Ninth Circuit seems to allow something close to a traditional battle of the experts in the IDEA context, where the hearing officer is not "required to defer to the expertise of the district's teachers over that of other experienced educators" and can instead give credence to the parents' witnesses.[109] By deferring only to hearing officers, the Ninth Circuit is arguably closer to a regular deference standard for a reviewing court—deferring to the fact-finding of the lowest court (which can include the hearing officer's administrative proceedings), not to one party's witnesses.

Beyond limiting the people who receive deference in the IDEA context, the Ninth Circuit also limits the amount of deference it gives. In *Ojai Unified School District v. Jackson*, the court quoted *Rowley*'s deference standard but immediately qualified it: "How *much* deference to give state educational agencies, however, is a matter for the discretion of the courts[.]"[110] The court later pointed out that "if the views of

106 *See, e.g.*, J.R. *ex rel.* J.R. v. N.Y.C. Dep't of Educ., 748 F. App'x 382, 386 (2d Cir. 2018) (rejecting the argument that the district court erred in deferring to the school district because there was "no clear consensus" against the school district); C.S. *ex rel.* M.S. v. Yorktown Cent. Sch. Dist., No. 16-cv-9950, 2018 WL 1627262, at *27 (S.D.N.Y. Mar. 30, 2018) ("[T]he Court concludes only that the evaluative materials before the May 2015 [IEP team] did not 'yield a clear consensus' that M.S. required Orton-Gillingham instruction such that . . . the SRO's decision is not entitled to deference." (quoting *A.M.*, 845 F.3d at 543)).

107 L.A. Unified Sch. Dist. v. A.O. *ex rel.* Owens, 92 F.4th 1159, 1175 (9th Cir. 2024) (first citing Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1474 (9th Cir. 1993); and then citing Van Duyn *ex rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 817 (9th Cir. 2007)).

108 *Id.*

109 *Id.*

110 *Ojai*, 4 F.3d at 1472 (alteration in original) (quoting Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1311 (9th Cir. 1987)).

school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary."[111] The Ninth Circuit seems extremely reluctant to adopt the full-throated (and perhaps extreme) *Rowley* deference present in cases like *E.H. v. McKnight* and *Lachman v. Illinois State Board of Education*.

While the Ninth Circuit's deference standard is certainly different than the traditional *Rowley* interpretation, it is not in any way toothless. In *Crofts v. Issaquah School District No. 11*, the parents repeatedly asked the school to use the Orton-Gillingham methodology in teaching their child to read, and the school repeatedly used a different method.[112] The court, however, gave deference to the administrative law judge's "determination that [the parents' witness's] testimony deserved little weight" because "[t]he ALJ thoroughly and carefully evaluated [the parents' witness's] testimony against those of teachers and administrators who worked with [the student]."[113] The parents' case was not helped by the fact that their witness "did not evaluate [the student] or speak to her teachers," which the court said "render[ed] her opinions about whether this student received a FAPE less weighty than the opinions of . . . teachers and district administrators who evaluated and observed [the student]."[114] Regarding educational methodology in general, the court only said that "[d]istricts need not specify an instructional method unless that method is necessary to enable a student to receive a FAPE."[115]

When is a method "necessary to enable a student to receive a FAPE" in the Ninth Circuit?[116] The Ninth Circuit has only "mentioned in passing that in some circumstances 'school districts should specify a teaching methodology.'"[117] And in that case, *J.L. v. Mercer Island School District*, the court deferred to the administrative law judge's decision that this was not a case in which the student needed a specific methodology to receive a FAPE.[118] District courts, however, have taken up the question of when a method is necessary for a FAPE.

One district court in Nevada, in *Rogich v. Clark County School District*, may have obliquely (though not explicitly) referenced *Endrew F.*'s

111 *Id.* at 1476.

112 Crofts v. Issaquah Sch. Dist. No. 411, 22 F.4th 1048, 1052 (9th Cir. 2022).

113 *Id.* at 1054.

114 *Id.* at 1053 (citing N.B. *ex rel.* C.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1212 (9th Cir. 2008).

115 *Id.* at 1057 (citing J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 952 (9th Cir. 2010)).

116 *Id.*

117 E.E. *ex rel.* Hutchinson-Escobedo v. Norris Sch. Dist., No. 20-cv-1291, 2023 WL 3124618, at *12 (E.D. Cal. Apr. 27, 2023) (quoting *J.L.*, 592 F.3d at 952).

118 *See J.L.*, 592 F.3d at 953.

"cogent and responsive explanation" requirement in its opinion.[119] The court explained that "O.R.'s parents had presented compelling professional evidence that was unrefuted or challenged by the District which established that O.R. required a teaching methodology with particular facets," while the school district, on the other hand, "failed to provide any response to the specific needs of O.R. except to essentially say to the parents—trust us to provide her with what she needs."[120] The court found this lack of response or explanation "not sufficient."[121] Instead, the court relied on professional evaluations of the child, which all suggested the child needed a particular teaching methodology—Orton-Gillingham.[122] This approach is somewhat similar to that of the Second Circuit: when all the professional evaluations agreed on the Orton-Gillingham methodology and the school district failed to "provide any response," the court deferred to the consensus.[123]

A later district court opinion relied on *J.L.*, a Second Circuit case, and *Rogich* to determine that "[t]aken altogether, th[e] case law establishes the need to specify a specific methodology [in the IEP] when the record shows a consensus on the issue."[124] In this case, *E.E. v. Norris School District*, witnesses on both sides testified that they believed the student needed applied behavioral analysis therapy, so the court found a consensus and refused to defer to the school district.[125] *E.E.*, two years after *Rogich*, further demonstrates that at least the district courts in the Ninth Circuit are leaning toward the "witness consensus" approach used in the Second Circuit.

B. Traditional Rowley Deference after Endrew F.*: the First, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits*

A significant number of the circuit courts still apply what could be considered the standard *Rowley* deference rule. In the years after *Endrew F.*, district and circuit courts in the First, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits have quoted *Rowley*'s language to defer almost entirely to schools' decisions on the subject of educational methodology.

Both before and after the *Endrew F.* ruling, the First Circuit has applied strong deference to schools' educational policy decisions,

119 *See* Rogich v. Clark Cnty. Sch. Dist., No. 17-cv-01541, 2021 WL 4781515, at *6 (D. Nev. Oct. 12, 2021).

120 *Id.*

121 *Id.*

122 *See id.* at *7.

123 *See id.* at *6, *8.

124 E.E. *ex rel.* Hutchinson-Escobedo v. Norris Sch. Dist., No. 20-cv-1291, 2023 WL 3124618, at *12 (E.D. Cal. Apr. 27, 2023).

125 *Id.*

without regard to whether those decisions are backed by "cogent and responsive" reasoning.[126] In *Lessard v. Wilton-Lyndeborough Cooperative School District*, the First Circuit emphasized deference to the educational authorities per *Rowley* and added: "IDEA-provided education need not be 'the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice.'"[127] This quote seems exaggerated: surely if there is only one appropriate choice, then the IDEA-provided education must be that choice. Furthermore, the court's disdain for "the choice of certain selected experts" is clear and suggests that the First Circuit has no desire to engage in the battle of the experts that the Ninth Circuit seems to be considering. The First Circuit has also recently quoted the *Rowley* rule in order to rule on areas in which it does not naturally seem to apply: administrative exhaustion[128] and free speech.[129] The First Circuit clearly embraces *Rowley* deference and perhaps exceeds its natural limits.

The Fourth, Fifth, Tenth, and D.C. Circuits generally seem to apply the normal *Rowley* rule without extending it into the new areas as the First Circuit does. These circuits do not often add their own gloss to the *Rowley* language; they merely quote it and defer to the methodology decisions of the schools.[130] The Fifth Circuit has cited *Endrew F.*

126 *See, e.g.*, C.D. *ex rel.* M.D. v. Natick Pub. Sch. Dist., 924 F.3d 621, 630 (1st Cir. 2019) ("[C]ourts owe respect and deference to the expert decisions of school officials and state administrative boards."); Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 (1st Cir. 2010).

127 *Lessard*, 592 F.3d at 270 (quoting G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 948 (1st Cir. 1991)).

128 *See* Valentín-Marrero *ex rel.* GAJVM v. Puerto Rico, 29 F.4th 45, 51 (1st Cir. 2022) ("That the IDEA provides for judicial review of administrative decisions is 'by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.' Permitting parents to bypass the administrative process in order to have courts determine in the first instance whether an IEP provides a FAPE frustrates the IDEA's 'carefully calibrated balance and shifts the burden of factfinding from the educational specialists to the judiciary.'" (citations omitted) (first quoting Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 206 (1982); and then quoting Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 61 (1st Cir. 2002))).

129 *See* Norris *ex rel.* A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 29 (1st Cir. 2020) ("[T]he district court did not discuss or consider what deference, if any, was owed to the defendants' stated justification for the speech restrictions. The Supreme Court has repeatedly emphasized the necessary discretion school officials must exercise and the attendant deference owed to many of their decisions.").

130 *See, e.g.*, G.M. *ex rel.* E.P. v. Barnes, 114 F.4th 323, 334 (4th Cir. 2024) (affording "great deference to the views of the school system" (quoting A.B. *ex rel.* D.B. v. Lawson, 354 F.3d 315, 328 (4th Cir. 2004))); Renee J. *ex rel.* C.J. v. Hous. Indep. Sch. Dist., 913 F.3d 523, 530 (5th Cir. 2019) ("[T]his court would adopt the problematic role of education policymaker if it were to dictate which pedagogical methods a school district must consider and to what degree they must be incorporated on an individualized, case-by-case basis—an

in addition to *Rowley* in support of its deference policy, as has the Tenth Circuit at the district level.[131] The Tenth and D.C. Circuits have not spoken much about *Rowley* deference at the appeals level, but the district courts do seem to apply standard *Rowley* deference.[132]

The Seventh Circuit, while generally following a typical *Rowley* deference policy,[133] does provide one wrinkle. The Seventh Circuit counts the IEP, once made, as one of the decisions made by educators that the court should defer to.[134] That is, if an IEP requires a specific methodology, class size, or other accommodation, the Seventh Circuit requires courts to defer to that decision. Following an IEP once made is likely a requirement under the procedural elements of the IDEA anyway,[135] but it is interesting that the Seventh Circuit frames it as a deference question.

Six of the twelve circuits continue to defer almost completely to the decisions of schools and school administrators when it comes to educational methodologies used to educate children covered by the IDEA. However, in addition to the clear breaks from *Rowley* deference demonstrated by the Second and Ninth Circuits, there are a few circuit courts that have added minor judicial glosses to *Rowley* deference (which is already a gloss in itself).

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outcome the Supreme Court has specifically cautioned against." (first citing Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 992–93 (2017); and then citing *Rowley*, 458 U.S. at 207)).

131 *See Renee J.*, 913 F.3d at 530; J.T. *ex rel.* A.R. v. Denver Pub. Schs., No. 21-cv-01227, 2023 WL 1100456, at *2 (D. Colo. Jan. 30, 2023).

132 *See, e.g.*, *J.T.*, 2023 WL 1100456, at *12 ("The Court must afford deference to [the school principal's] opinion." (citing *Endrew F.*, 137 S. Ct. at 1001)); H.R. v. District of Columbia, No. 21-1856, 2024 WL 3580663, at *8 (D.D.C. July 30, 2024) ("[C]ourts in this District have held that 'questions about the methodology of instruction cannot be decided by a court.'" (quoting R.B. v. District of Columbia, No. 18-662, 2019 WL 4750410, at *13 (D.D.C. Sept. 30, 2019))).

133 B.G. *ex rel.* J.A.G. v. Bd. of Educ., 901 F.3d 903, 910 (7th Cir. 2018) ("We emphasize that neither the district court nor this court should treat IDEA cases 'as "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."'" (quoting Monticello Sch. Dist. No. 25 v. George L. *ex rel.* Brock L., 102 F.3d 895, 901 (7th Cir. 1996))).

134 *See* R.F. *ex rel.* Holderman v. Bd. of Educ., No. 22-cv-2608, 2022 WL 1805099, at *12 (N.D. Ill. June 2, 2022) (quoting *Rowley* to assert that courts cannot judge and balance the considerations in deciding which elements of an IEP to enact when there are financial limitations; thus, any violation of the guarantees of the IEP is a violation of the IDEA).

135 *See R.F.*, 2022 WL 1805099, at *12 ("[T]he State must ensure that there is no delay in implementing a child's IEP." (alteration in original) (quoting 34 C.F.R. § 300.103(c) (2022))).

C. A Middle Ground: the Third, Sixth, Eighth, and Eleventh Circuits

Four circuit courts have arguably landed on a middle ground between typical *Rowley* deference and the Second and Ninth Circuit's consensus standards. The Third, Sixth, Eighth, and Eleventh Circuits each add their own test to determine if they should defer to schools' educational methodology decisions.

The Third Circuit continues to follow and quote the *Rowley* rule.[136] But in recent years, it has quoted *Endrew F.* while doing so and added caveats like "[w]hen schools *use their expertise* to address each child's distinct educational needs, we must give their judgments appropriate deference."[137] A district court in *Zachary J. v. Colonial School District* took the language from *Endrew F.* to mandate that "[d]eference regarding an IEP's appropriateness '[be] based on the application of expertise and the exercise of judgment by school authorities.'"[138] However, quoting *Endrew F.* did not lead to a significant examination of whether the school authorities applied expertise and exercised judgment in Zachary J.'s case. The school authorities apparently discussed the suggestions from the outside evaluation of the child that the parents had paid for, and that was good enough for the court.[139] But in *A.V. v. West Chester Area School District*, a district court in the Third Circuit affirmed the hearing officer's lack of deference to the school because the court could "discern[] no testimony from school teachers or administrators supporting this rationalization for the formulation of IEP goals."[140]

The Sixth Circuit uses a unique standard of review for administrative decisions on FAPE. Under its standard of review, "[w]hile a court may not 'substitute [its] own notions of sound education policy for those of the school authorities which [it] review[s],' neither may it 'simply adopt the state administrative findings without an independent re-examination of the evidence.'"[141] This standard departs from other circuits which defer substantially to the findings of fact from the

136 *See* K.D. *ex rel.* Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248, 251 (3d Cir. 2018) ("[W]e may not 'substitute [our] own notions of sound educational policy for those of the school authorities which [we] review.'" (second and third alterations in original) (quoting *Endrew F.*, 137 S. Ct. at 1001)).

137 *Id.* at 250 (emphasis added).

138 Zachary J. *ex rel.* Jonathan J. v. Colonial Sch. Dist., No. 22-1509, 2024 WL 366180, at *5 (3d Cir. Jan. 31, 2024) (quoting *Endrew F.*, 137 S. Ct. at 1001).

139 *Id.* at 4–5.

140 A.V. *ex rel.* Stephen W. v. West Chester Area Sch. Dist., No. 23-1306, 2024 WL 4340714, at *29, *29 n.67 (E.D. Pa. Sept. 26, 2024).

141 C.K. *ex rel.* S.R. v. Bd. of Educ., No. 21-3244, 2022 WL 4116491, at *17 (6th Cir. Sept. 9, 2022) (second, third, and fourth alterations in original) (quoting Deal *ex rel.* Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 849 (6th Cir. 2004)).

administrative hearing officer.[142] Mentioning the *Rowley* rule and qualifying it by requiring re-examination of evidence ensures that *Rowley* deference is not automatic.

The Sixth Circuit might also be starting to consider witness consensus in its decisions. In *C.K. by and through S.R. v. Board of Education of Sylvania City School District*, the court pitted the agreement of "almost all of the experts" against the opinion of the state-level review officer.[143] However, this consensus differs from those in the Second and Ninth Circuit cases because "all of the experts" in *C.K.* included the school's representatives *and* the parents' representatives.[144] The Second and Ninth Circuits, on the other hand, sometimes refuse to defer in cases in which all of the parents' experts have come to a consensus opposed by one school individual. It's unclear where the Sixth Circuit would land on a case that was closer to a real battle of the experts.

The Eighth Circuit has begun to adopt *Endrew F.*'s "cogent and responsive explanation" requirement, but has not discussed it in cases about educational methodology, where the urge to defer is strongest. In *Osseo Area Schools, Independent School District No. 279 v. A.J.T. by & through A.T.*, the court found issue with the school district's explanation for its decisions: "None of the District's explanations for refusing to provide evening instruction have ever been grounded in A.J.T.'s individual needs . . . ."[145] The court determined that the school district had not provided the child with a free, appropriate public education, in part relying on the fact that the school district "still ha[d] not offered a 'cogent and responsive explanation for [its] decisions' showing that [the student's] IEPs were 'reasonably calculated to enable [her] to make progress appropriate in light of [her] circumstances.'"[146]

The Eleventh Circuit's district courts have also started to require a "cogent and responsive explanation." In *Enterprise City Board of Education v. S.S.*, the district court in Alabama combined the *Rowley* rule with *Endrew F.*'s dicta:

> Although the court cannot "substitute [its] own notions of sound educational policy for those of the school authorities which they review," the court can "fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that

142 *See* L.A. Unified Sch. Dist. v. A.O. *ex rel.* Owens, 92 F.4th 1159, 1175 (9th Cir. 2024) (reiterating a rule requiring deference to the hearing officer).

143 *See C.K.*, 2022 WL 4116491, at *26 n.29.

144 *See id.*

145 Osseo Area Schs., Indep. Sch. Dist. No. 279 v. A.J.T. *ex rel.* A.T., 96 F.4th 1062, 1067 (8th Cir. 2024).

146 *Id.* (second, fourth, and fifth alterations in original) (quoting Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 (2017)).

> shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances."[147]

In this case, the *Endrew F.* standard "require[d] that the Board articulate some idea of how to address [the student's] behavior."[148] Providing "essentially the same plan year after year" without any sort of behavior intervention plan did not satisfy the *Endrew F.* standard.[149] On the other hand, though, this standard does not eliminate deference in any way. The district courts in the Eleventh Circuit continue to quote the *Rowley* standard; they simply add a "cogent and responsive explanation" requirement and emphasize that courts will defer to the exercise of *expertise* (individual, particularized decisionmaking based on the child's needs, not the same plan each year), which I argue is exactly what *Endrew F.* indicates is the correct path.[150]

While the Third, Sixth, Eighth, and Eleventh Circuits each have their own method of applying *Rowley* deference, they all have one thing in common. In one form or another, these four circuits do not defer as completely to the educational decisions of schools as circuits like the First do. But these circuits don't go as far as the Second and Ninth Circuits, which have arguably established their own, much more limited, deference tests that do not quite follow *Rowley*. In the next Part, I will argue that the Second and Ninth Circuits have chosen the correct path in light of *Endrew F.*

IV. HOW SHOULD COURTS APPLY *ROWLEY* DEFERENCE GOING FORWARD?

Courts across the country apply *Rowley* deference in many different ways. They differ in the education officials whom judges will defer to,[151] the amount of deference given based on the standard of review,[152] whether and how parents can overcome deference,[153] and even in the

147 Enter. City Bd. of Educ. v. S.S. *ex rel.* S.S., No. 19-cv-748, 2020 WL 3129575, at *4 (M.D. Ala. June 12, 2020) (quoting *Endrew F.*, 137 S. Ct. at 1001–02).

148 *Id.* at *6.

149 *Id.*

150 *See, e.g.*, Cockrell *ex rel.* J.B. v. Bessemer City Bd. of Educ., No. 22-CV-01494, 2024 WL 4341321, at *2, *9 (N.D. Ala. Sept. 27, 2024).

151 *Compare* L.A. Unified Sch. Dist. v. A.O. *ex rel.* Owens, 92 F.4th 1159, 1175 (9th Cir. 2024) (deferring only to the hearing officer) *with* A.R. *ex rel.* J.T. v. Denver Pub. Schs., No. 21-cv-01227, 2023 WL 1100456, at *12 (D. Colo. Jan. 30, 2023) (deferring to the school principal).

152 *Compare* C.K. *ex rel.* S.R. v. Bd. of Educ., No. 21-3244, 2022 WL 4116491, at *17 (6th Cir. 2022) (requiring higher courts to re-examine the evidence) *with A.O.*, 92 F.4th at 1175 (deferring to the findings of the hearing officer).

153 *Compare* A.M. *ex rel.* E.H. v. N.Y.C. Dep't of Educ., 845 F.3d 523, 545 (2d Cir. 2017) (overcoming deference with witness consensus) *with* Lessard v. Wilton-Lyndeborough

types of cases in which *Rowley* deference can be applied.[154] But *Endrew F.* provides a compelling argument, albeit based on dicta, for a narrow exception to educational policy deference. I argue that the standard set forth in the Ninth[155] and Second[156] Circuits provides the best interpretation of *Endrew F.* and the principles of IDEA.

The general policy reasons for *Rowley* deference are sensible. Courts are not experts in educational policy and methodology. State and federal judicial systems require deference in many areas of law based on the judicial system's lack of expertise in a specific area.[157] But most deferential standards of review have an escape valve for certain types of acts or decisions that do not require deference.[158] *Rowley*, strictly applied, seems to have no such escape valve. *Endrew F.* provides that escape valve by requiring "cogent and responsive explanation[s] for [schools'] decisions."[159] The witness consensus rule followed in the Second Circuit and laid out in the Eastern District of California in the Ninth Circuit in *E.E.* best supports the *Endrew F.* requirement because if "the record shows a consensus" on a specific methodology, it is

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Coop. Sch. Dist., 592 F.3d 267, 270 (1st Cir. 2010) (deferring to the school district regardless of the parents' opinions).

154 *See supra* notes 128–29 and accompanying text.

155 *See, e.g.*, Rogich v. Clark Cnty. Sch. Dist., No. 217-cv-01541, 2021 WL 4781515, at *7 (D. Nev. Oct. 12, 2021) (refusing *Rowley* deference because the District "ignored the central findings and recommendations of the professional evaluations" regarding the methodology the student needed); J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 952 (9th Cir. 2010) ("[S]chool districts should specify a teaching methodology for some students."); E.E. *ex rel.* Hutchinson-Escobedo v. Norris Sch. Dist., No. 20-cv-1291, 2023 WL 3124618, at *12 (E.D. Cal. Apr. 27, 2023) (noting that specific "case law establishes the need to specify a specific methodology when the record shows a consensus on the issue").

156 *See, e.g.*, *A.M.*, 845 F.3d at 545 ("[W]here, as here, the consensus of the evaluative materials and 'all witnesses familiar with [the child],' . . . specifically recommend [a certain methodology] . . . the [Committee on Special Education] was bound, at a minimum, to require some level of [the methodology] in order to establish the adequacy of the IEP." (first quoting C.F. *ex rel.* R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 81 (2d. Cir. 2014); and then citing *id.*)); S.B. *ex rel.* C.B. v. N.Y.C. Dep't of Educ., No. 15-cv-1869, 2017 WL 4326502, at *17 (E.D.N.Y. Sept. 28, 2017) ("[I]f the 'consensus of the evaluative materials and all witnesses familiar with the child . . . specifically recommend the continued need' for a certain placement, the DOE must point to evidence sufficient to counter those recommendations in order to appropriately recommend a different placement for the student." (quoting *A.M.*, 845 F.3d at 545)).

157 *See, e.g.*, *In re* MFW S'holders Litig., 67 A.3d 496, 526 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014), *overruled in part by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (2018) (justifying the business judgment rule on the basis that "it has long been thought beneficial to investors for courts, which are not experts in business, to defer to the disinterested decisions of directors, who are expert").

158 *See supra* notes 83–86 and accompanying text.

159 Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1002 (2017).

unlikely that a school could provide a "cogent and responsive" explanation for their decision to ignore that consensus.[160]

A witness consensus rule also alleviates some of the concerns that led to *Rowley* deference. Although courts are not educational experts, they *are* experts in determining whose testimony to credit on the witness stand. The Second Circuit's standard does not allow for a true battle of the experts but does allow courts to discredit the opinions of school officials who do not know the child or did not use their expertise in making decisions about the child. This rule, in which a consensus does not have to be unanimous but does need to be persuasive, best resolves the courts' concerns about their lack of educational expertise. Schools are not the only educational experts, and courts should recognize that. Furthermore, parents are experts on their children in a way that school employees, who serve hundreds to thousands of children, cannot be.

Equally importantly, a witness consensus rule gives parents more of an opportunity to challenge schools' decisions, especially in circuits that strongly apply *Rowley* deference. Such a rule would at least require schools' decisions to not be unreasonable based on the evidence. That means schools would have to *consider* the evidence for each child and create a plan that is tailored to that child's needs. This standard is in line with *Endrew F.*'s "appropriately ambitious in light of [the child's] circumstances" standard and arguably allows courts to more easily enforce *Endrew F.*[161]

Other interpretations of the "cogent and responsive" dicta in *Endrew F.* are unpersuasive. A parent arguing before a district court in the Third Circuit stated that the Board of Education failed to provide her with "cogent and responsive explanations for its decisions."[162] But the court, and arguably the plaintiff, misunderstood the purpose of this claim. "Even assuming that North Arlington's response was inadequate," the court said, "Plaintiff fails to explain how the inadequate explanation independently resulted in a loss of educational opportunity, seriously deprived her of her parental participation rights, or caused a deprivation of educational benefits."[163] The "cogent and responsive" requirement is certainly not a separate claim for denial of a free appropriate public education. It provides a reason to defer to the school authorities' decisions on educational policy, as the Supreme

160 *E.E.*, 2023 WL 3124618, at *12.

161 *Endrew F.*, 137 S. Ct. at 1000.

162 E.P. *ex rel.* E.A.P. v. N. Arlington Bd. of Educ., No. 17-08195, 2019 WL 1495692, at *8 (D.N.J. Apr. 1, 2019).

163 *Id.*

Court explained in *Endrew F.*[164] Where there *is* no cogent and responsive explanation, the school authorities should not be entitled to the significant deference they usually receive as expert educational policymakers. The Third Circuit is correct in assuming that a lack of a cogent and responsive explanation of an educational decision does not in itself automatically cause a violation of the IDEA. But it does allow, and perhaps require, courts to avoid deferring to the school's decisions.

Judges and plaintiffs are not the only ones recognizing the potential effect of the dicta in *Endrew F.* on *Rowley* deference. Professor Terry Jean Seligmann immediately homed in on the "cogent and responsive explanation" language in *Endrew F.* as creating a new obligation for schools. Seligmann saw *Endrew F.* as providing "a welcome corrective" to *Rowley* deference and "an encouragement to the lower courts to conduct meaningful review and to hold school districts to account for their choices and proposals with reasons that are 'cogent and responsive.'"[165] *Endrew F.*, in sum, suggests to courts that "deference is to be paid only when it is due."[166]

Responding to Seligmann's assumption that *Endrew F.* provides a new deference standard, school district lawyer Rachel B. Hitch didn't see *Endrew F.* moving the needle. While she agreed that schools should have to provide cogent and responsive explanations for their methodology decisions, "the law has required school systems to explain their special education decisions for years."[167] The issue as Hitch sees it is that parents often don't ask for further explanation beyond the legally required written notice if they don't understand the school's IEP decisions.[168] And when they do ask for further explanation, Hitch argues that educators simply can't impart their years of expertise and experience "to every parent of a student with a disability," especially since "parents are not equipped to understand the intricacies of implementing educational services."[169] But Seligmann's argument is that *lower courts* should conduct review of school districts' choices based on their cogent and responsive explanations. The issue is not whether parents are incapable of understanding the intricacies of educational

164 *Endrew F.*, 137 S. Ct. at 1001–02 ("[D]eference is based on the application of expertise and the exercise of judgment by school authorities. . . . A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.").

165 Seligmann, *supra* note 60, at 493 (quoting *Endrew F.*, 137 S. Ct. at 1002).

166 *Id.*

167 Hitch, *supra* note 53, at 95.

168 *Id.* at 96 ("[O]ften a due process complaint is the school system's first notice that a parent disputes . . . their child's special education program.").

169 *Id.*

methodology decisions, but whether the school district can explain itself to the court.

However, even if courts start to take the Second and Ninth Circuit standard as the correct one, issues will remain. For one thing, a "witness consensus" standard probably requires several witnesses. The Second Circuit has allowed the opinion of three witnesses to overcome the opinion of one school district witness,[170] but it's likely that more would be required in other courts, especially if the school district has several witnesses of its own. This implicates financial issues, because it likely requires parents to pay for several independent evaluations and several expert witnesses just to get courts to decide not to *automatically defer* to the school district's opinion. If one purpose of the IDEA is to provide a *free* education, witness consensus requirements may seem like a significant burden. But it's also possible that the widespread adoption of a less deferential standard of review would encourage school districts to settle more often before the case gets to court, thus significantly decreasing costs and the amount of time that a child has to spend in an educational program that isn't working for them as litigation drags on for years. The benefits of the Second and Ninth Circuit's approaches likely outweigh the costs for most parents of children with disabilities.

CONCLUSION

Rowley, as the first case the Supreme Court decided that interpreted the Individuals with Disabilities Education Act, has been highly influential in almost all litigation under IDEA. Its deference requirement remains prevalent in courts throughout the country, although some circuits have always limited the amount of *Rowley* deference they allow. But *Endrew F.*, decided in 2017 after the benefit of decades of IDEA litigation, reshaped the standards for questions of both educational benefit and deference for schools' decisions on educational methodology. Courts in several circuits have started to quote *Endrew F.*'s requirement that schools be able to provide a "cogent and responsive explanation" for their decisions, and in some circuits, that language has prompted a change in the level of deference schools are provided. This change enables courts to truly follow Congress's mandate that all students with a disability receive a free, appropriate public education.

170 *See* S.B. *ex rel.* C.B. v. N.Y.C. Dep't of Educ., No. 15-cv-1869, 2017 WL 4326502, at *17 (E.D.N.Y. Sept. 28, 2017).