In Need of Better Material: A New Approach to Implementation Challenges Under the IDEA

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The Individuals with Disabilities Education Act (IDEA) provides a substantive guarantee to a "free appropriate public education" (FAPE) to students with disabilities. The education is to be provided "in conformity with" an "individualized education program" (IEP): an educational plan for the student that is created through a statutorily defined process. Scholars and courts have focused tremendous attention on the level of educational quality that an IEP must offer to meet the IDEA's requirements. But the creation of an adequate plan is, of course, not the end of the story; the school district then has to implement the plan. This leaves an important question: How far may a school district deviate from the services specified in an IEP and remain in compliance with the IDEA? In other words, how much of the adequate written plan is the student in fact entitled to receive? There are two existing approaches to failure-to-implement cases: the materiality approach and the per se test.

This Comment argues that both approaches are flawed. The materiality standard circumvents the procedural protections of the IDEA, provides little predictability to parents and schools, offers little guidance to courts, forces judges away from areas of institutional competence, and incentivizes school districts to overpromise and underdeliver. The per se rule, on the other hand, is insufficiently flexible given its practical and statutory constraints, would disincentivize ambition and innovation in IEPs, and is unlikely to be adopted by courts.

This Comment proposes a new approach—a burden-shifting test that accounts for both (1) unforeseen or unavoidable circumstances and (2) the proportionality of the school's response to those circumstances. This approach integrates the benefits of both the materiality inquiry and the per se rule. It better honors several important aspects of the statutory scheme, better aligns with the statutory text, and accords with Supreme Court precedent. It also encourages IEP drafters to craft realistic plans that nonetheless aspire to deliver the best results for students.

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INTRODUCTION

For much of U.S. history, children with disabilities were excluded from the public education system entirely.[1] When they were admitted to schools, the education and services that they received were often deeply inadequate and unresponsive to their circumstances.[2] In response to parents' and advocates' legal victories in the early 1970s, these practices began to change, but the change was slow and incomplete.[3] In 1990, Congress passed the Individuals with Disabilities Education Act[4] (IDEA) to provide a national response to the deficiency.

The IDEA is the primary federal statute governing the provision of education to children with disabilities. The IDEA requires school districts to provide eligible children with a "free appropriate public education"[5] (FAPE). The services that make up the FAPE must be provided "in conformity with [an] individualized education program"[6] (IEP), as embodied in a written statement of

1 *See infra* Part I.A.
2 *See infra* Part I.A.
3 *See infra* Part I.A.
4 Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified at 20 U.S.C. §§ 1400–1482).
5 20 U.S.C. § 1412(a)(1).
6 20 U.S.C. § 1401(9)(D).

the school district's educational plan for each eligible student.[7] In other words, an IEP is the plan for the education of a student with disabilities. The Supreme Court has held that the FAPE requirement establishes a substantive, statutory right to an education of a certain caliber.[8] More specifically, the school must "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[9] As of the 2019–20 school year, 7.3 million students—14% of all public school students—were receiving special education services through IEPs under the IDEA.[10]

Most legal challenges under the IDEA focus on alleged inadequacies in IEPs as written. The proper standard for evaluating the content of IEPs has been the subject of extensive scholarship and decades of focus from federal courts.[11] But the creation of an adequate plan is, of course, not the end of the story. The school district must then carry out the plan that it has formulated.

This leaves a key question that has been relatively underdiscussed by both courts and scholars: How far may a school district deviate from the services specified in the IEP document while remaining in compliance with IDEA? In other words, how much of the written plan is a student entitled to receive to ensure a FAPE? Parents may bring suit for a school district's failure to implement an individualized education plan.[12]

There are two existing approaches to failure-to-implement cases in the courts and the literature. The first approach, adopted by every federal appellate court to address the issue, is a materiality standard.[13] As this Comment explores in Part II, however, the materiality inquiry is vague and unpredictable—both in theory and in practice—leading to inconsistencies and inadequate protection for students. One notable dissent in the Ninth Circuit vehemently argued against the materiality approach for similar

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7 20 U.S.C. § 1414(d)(1)(A)(i).

8 Bd. of Educ. v. Rowley, 458 U.S. 176, 200–02 (1982); *see also* Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE–1, 137 S. Ct. 988, 998–99 (2017).

9 *Endrew F.*, 137 S. Ct. at 999.

10 *Students with Disabilities*, NAT'L CTR. FOR EDUC. STAT. (last updated May 2021), https://perma.cc/EFN9-RAXF.

11 *See infra* Part I.C. *See generally* Terrye Conroy & Mitchell L. Yell, *Free Appropriate Public Education After* Endrew F. v. Douglas County School District *(2017)*, 35 TOURO L. REV. 101 (2019).

12 *See, e.g.*, L.J. *ex rel.* N.N.J. v. Sch. Bd., 927 F.3d 1203, 1207 (11th Cir. 2019).

13 *See, e.g.*, *id.* at 1213 & n.6.

reasons.[14] It advocated instead for the second approach—a per se test—under which any deviation from an IEP, no matter how small or unavoidable, would be an IDEA violation.[15] Robust alternative approaches have not been seriously considered by scholars or courts.

This Comment argues for a new approach to failure-to-implement cases: a burden-shifting test requiring the school district to demonstrate that (1) any implementation failures were the result of unforeseen or unavoidable circumstances and (2) the school responded proportionally in light of those circumstances by amending the IEP as soon as possible and providing compensatory services in the meantime. Part I provides the necessary legal background. It describes the purpose and structure of the IDEA at a high level, outlines major doctrinal developments around the meaning of a FAPE, and establishes the legal bases for failure-to-implement cases. Part II explores the two existing approaches. It examines the varying and sometimes inconsistent ways that courts have understood and applied the materiality standard. It then highlights the many problems with both the materiality and per se approaches. Part III proposes a new approach to implementation cases. It argues that the new standard is more in line with the statutory scheme, more consistent with precedent, and more desirable on policy grounds.

The stakes for the resolution of this issue are high. The current quagmire of implementation case law fails to provide clear notice to parents or school officials and makes negotiating solutions and settlements challenging. The educational outcome in each individual dispute can acutely impact the student and their family. There's also a lot of money in play: school districts that fail to provide a FAPE can be required to reimburse parents for private educational services obtained in the meantime,

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[14] Van Duyn *ex. rel.* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 826 (9th Cir. 2007) (Ferguson, J., dissenting).

[15] *Id.* at 826–27; *see also id.* at 822 n.4 (majority opinion) (describing the dissent's proposed test as a per se test).

potentially including compensatory services,[16] private school tuition,[17] and attorneys' fees and costs.[18]

Further, the materiality standard currently permits schools to deny students their rights under the IDEA. Specifically, if a school has promised the minimum amount required by Supreme Court precedent in the content of the plan, then even a small deviation during implementation might result in a child receiving less support than the IDEA's FAPE guarantee entitles them to. In such a circumstance, neither a content nor an implementation challenge would succeed. Thus, the current materiality approach creates a doctrinal gap—students can be denied a FAPE but have no legal recourse. This doctrinal gap incentivizes schools to overpromise instead of encouraging schools to focus on creating realistic IEPs that optimize the use of the school's resources. The tradeoffs and judgment calls that school officials make should be part of the IEP process, not subsequent to it. If school districts ultimately lack the resources necessary to provide the services in IEPs that meet the statutory minimum, then that issue needs to come to the fore.[19]

Finally, schools have remained responsible for providing a FAPE throughout the disruptions of the COVID-19 pandemic.[20] Parents across the country are beginning to bring claims for compensatory services in state agencies and federal courts.[21] The need for a coherent and legally sound standard for failure-to-implement cases is more urgent than ever.

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16 *See, e.g.*, G. v. Fort Bragg Dependent Schs., 343 F.3d 295, 309 (4th Cir. 2003).

17 *See, e.g.*, Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009) ("[The] IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate."); Spring Branch Indep. Sch. Dist. v. O.W. *ex rel.* Hannah W., 961 F.3d 781, 799–800 (5th Cir. 2020) (extending the reimbursement and compensation analysis to an implementation case).

18 20 U.S.C. § 1415(i)(3)(B).

19 Congress originally promised to provide 40% "of the average cost to educate a child with disabilities," and it later amended the law to cap federal funding at a maximum of 40% of costs per student. As of 2018, Congress covered only 18% of the costs per student. NAT'L COUNCIL ON DISABILITY, BROKEN PROMISES: THE UNDERFUNDING OF IDEA 13 (2018).

20 *See, e.g.*, KATHERINE NEAS & DAVID CANTRELL, U.S. DEP'T OF EDUC. OFF. OF SPECIAL EDUC. & REHAB. SERVS., OSEP DCL 21-01, RETURN TO SCHOOL ROADMAP: CHILDREN WITH DISABILITIES UNDER IDEA 2–3 (2021), https://perma.cc/Z3B9-P8GV.

21 *See, e.g.*, Cory Turner & Rebecca Klein, *After Months of Special Education Turmoil, Families Say Schools Owe Them*, NPR (June 16, 2021), https://perma.cc/6542-YGGN.

I. LEGAL BACKGROUND

This Part provides the legal background necessary for understanding implementation challenges. Part I.A describes the lack of education that was available to children with disabilities before the IDEA and advocates' legal victories that helped shape the application of the statute. Part I.B lays out the relevant statutory framework, emphasizing the importance of parental involvement and parents' procedural protections to the statutory scheme. Part I.C explores Supreme Court precedent identifying and explaining the content of the IDEA's substantive right to a FAPE. Finally, Part I.D turns to implementation challenges and ground them in the statutory language and case law.

A. Before the IDEA

Prior to the passage of the IDEA, students with disabilities had very limited opportunities to receive a public education. "Through most of the history of public schools in America," only "minimal" services were provided to children with disabilities, and such services were entirely discretionary.[22] Schools frequently "exclud[ed] some children because of their supposed 'depressing and nauseating' impact on their peers."[23] In fact, "[u]ntil the mid-1970s, laws in most states allowed school districts to refuse to enroll any student they considered 'uneducable,' a term generally defined by local school administrators."[24]

Inspired by the civil rights movement and the Supreme Court's decision in *Brown v. Board of Education*,[25] "parents and advocacy groups [ ] beg[a]n using the courts in an attempt to force states to provide a public education that was appropriate for their children's unique needs."[26] This effort won two early, substantial

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22 Edwin W. Martin, Reed Martin & Donna L. Terman, *The Legislative and Litigation History of Special Education*, 6 FUTURE CHILD., Spring 1996, at 25, 26.

23 Jeffrey A. Knight, Comment, *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, 377 (2010) (quoting State *ex rel.* Beattie v. Bd. of Educ., 172 N.W. 153, 154 (Wis. 1919)); *see also id.* at 384 ("While the shortcomings were many, several that stood out: the hiring of special-education providers who failed to meet school standards; overcrowded classrooms, resulting in teachers failing to provide an appropriate education; and schools overlooking disabled children by not providing direct services to them.").

24 Martin et al., *supra* note 22, at 26.

25 347 U.S. 483 (1954).

26 Antonis Katsiyannis, Mitchell L. Yell & Renee Bradley, *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL & SPECIAL EDUC. 324, 325 (2001).

victories. In the early 1970s, both *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*)[27] and *Mills v. Board of Education*[28] "resulted in schools being required to provide educational services to students with disabilities."[29] These cases introduced a few principles that would become foundational to defining the educational rights of children with disabilities. *PARC* introduced the notion of "appropriateness—that is, that each child be offered an education appropriate to his or her learning capacities."[30] Additionally, *Mills* required that when a school considered changing the enrollment status of students with disabilities (e.g., placement in or removal from special education), "the children were entitled to full procedural protections, including notice of proposed changes, access to school records, a right to be heard and to be represented by legal counsel at hearings to determine changes in individual programs, and regularly scheduled status reviews."[31]

In the immediate aftermath, despite similar litigation successes in many states and the passage of several state laws to the same effect, students with disabilities were still frequently denied educational services.[32] The national landscape was inconsistent, and even states with better laws provided services inconsistently.[33] According to congressional findings from 1974, "more than 1.75 million students with disabilities did not receive educational services," and more than 3 million of those who were enrolled were not receiving an appropriate education.[34] Still, "the education of children with disabilities was seen as a privilege, rather than a right."[35] The insufficiency and inconsistency prompted Congress to act.

B. The IDEA—FAPE and IEPs

In 1975, Congress passed the IDEA[36] in order "to ensure that all children with disabilities have available to them a free

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27 334 F. Supp. 1257 (E.D. Pa. 1971).

28 348 F. Supp. 866 (D.D.C. 1972).

29 Katsiyannis et al., *supra* note 26, at 325.

30 Martin et al., *supra* note 22, at 28; *see also PARC*, 334 F. Supp. at 1258–60.

31 Martin et al., *supra* note 22, at 28; *see also Mills*, 348 F. Supp. at 880–81.

32 Katsiyannis et al., *supra* note 26, at 325.

33 *Id.*

34 *Id.* at 324–25.

35 *Id.* at 325.

36 The IDEA was originally titled the Education for All Handicapped Children Act of 1975, Pub L. No. 94-142, 89 Stat. 773. It took on its current name after the 1990

appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[37] According to the House Report, this "ambitious" piece of federal legislation "was passed in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[38]

The law incorporated key aspects of the *PARC* and *Mills* decisions. In particular, the statute adopted these decisions' emphasis on procedural safeguards and educational appropriateness. The IDEA is heavily process focused. The core notion is that the best substantive outcomes will be reached for children with disabilities by involving parents in their children's education and by giving them formal procedural rights to object to and appeal school decisions. The Supreme Court has attributed this in part to Congress's "aware[ness] that schools had all too often denied such children appropriate educations without in any way consulting their parents."[39] In addition to the procedural protections, Congress added a substantive guarantee: every child is entitled to a "free appropriate public education."[40]

Specifically, the IDEA provides state and local agencies federal funding to support the education of children with disabilities and "conditions such funding upon a State's compliance with extensive goals and procedures."[41] Each state that receives money under IDEA must make a FAPE available to all eligible children.[42] As defined in the statute, a FAPE includes both "special education and related services."[43] "Special education" means "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[44] "Related services" refers to "developmental, corrective, and other supportive services

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amendments. *See* Katsiyannis et al., *supra* note 26, at 324, 327. This Comment refers to the law as the IDEA throughout. For a useful description of the IDEA's many amended forms, see generally Knight, *supra* note 23.

37 20 U.S.C. § 1400(d)(1)(A).

38 Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982) (alteration in original) (quoting H.R. REP. NO. 94-332, at 2 (1975)).

39 Honig v. Doe, 484 U.S. 305, 311 (1988).

40 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(1).

41 *Rowley*, 458 U.S. at 179.

42 20 U.S.C. § 1412(a)(1).

43 20 U.S.C. § 1401(9).

44 20 U.S.C. § 1401(29).

. . . as may be required to assist a child with a disability to benefit from special education."[45]

The statutory definition of a FAPE imposes four explicit requirements. The special education and related services must "have been provided at public expense, under public supervision and direction, and without charge;"[46] "meet the standards of the State educational agency;"[47] and "include an appropriate preschool, elementary school, or secondary school education in the State involved."[48] Finally, most relevant to this Comment, the statute defines a FAPE as special education and related services "provided in conformity with the individualized education program."[49]

An IEP is a written statement that forms "the centerpiece of the statute's education delivery system" of that FAPE "for disabled children."[50] At a high level, an IEP must contain "a statement of the child's present levels of academic achievement and functional performance," "a statement of measurable annual goals," "a description of how the child's progress . . . will be measured," and "a statement of the special education and related services . . . that will be provided."[51] An IEP is prepared by an IEP team, which includes teachers, school officials, and the parents of the child.[52] The statute also lists factors that the IEP team "shall consider" in formulating the plan.[53] In general, the IEP team must consider "the strengths of the child"; "the concerns of the parents for enhancing the education of their child"; "the results of the initial evaluation or most recent evaluation of the child"; and "the academic, developmental, and functional needs of the child."[54]

The procedures governing the creation of the IEP heavily "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances."[55] In fact, "Congress 'took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into the

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45 20 U.S.C. § 1401(26)(A).
46 20 U.S.C. § 1401(9)(A).
47 20 U.S.C. § 1401(9)(B).
48 20 U.S.C. § 1401(9)(C).
49 20 U.S.C. § 1401(9)(D).
50 *Honig*, 484 U.S. at 311.
51 20 U.S.C. § 1414(d)(1)(A)(i).
52 20 U.S.C. § 1414(d)(1)(B).
53 20 U.S.C. § 1414(d)(3)(A)–(B).
54 20 U.S.C. § 1414(d)(3)(A).
55 Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE–1, 137 S. Ct. 988, 994 (2017).

[IDEA].'"[56] Further, one of the primary functions of the 1997 amendments to the IDEA was to increase the parents' role in the IEP process.[57] The Supreme Court observed in *Schaffer v. Weast*[58] that "[t]he core of the statute [ ] is the cooperative process that it establishes between parents and schools."[59] Although "[p]arents and educators often agree about what a child's IEP should contain,"[60] the IDEA provides "'procedural safeguards' to protect disabled children and their parents"[61] in the event of disagreements. Among them is a "graduated set of dispute resolution mechanisms: informal meetings, formal mediation, a 'due process hearing' before a state or local administrative agency, and, if necessary, judicial review."[62]

The IDEA also provides procedures for modifications of an IEP. The IDEA requires at least annual review of an IEP "to determine whether the annual goals for the child are being achieved" and revisions "as appropriate to address" issues such as "any lack of expected progress," "information about the child provided to, or by, the parents," and "other matters."[63] If a school district wishes to change a student's IEP outside of the annual review, then it is required to provide advanced written notice to the parents, who then have an opportunity to make known any concerns and objections or file a complaint about the changes.[64] Altering an IEP need not be an especially onerous process. If a school has held the required yearly IEP meeting but further changes are desired, "the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP."[65]

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56 Schaffer v. Weast, 546 U.S. 49, 58 (2005) (quoting Weast v. Schaffer, 377 F.3d 449, 455 (2004)).

57 *See, e.g.*, Stacey Gordon, *Making Sense of the Inclusion Debate Under IDEA*, 2006 BYU EDUC. & L.J. 189, 214–15.

58 546 U.S. 49 (2005).

59 *Id.* at 53 (citing *Rowley*, 458 U.S. at 205–06).

60 *Endrew F.*, 137 S. Ct. at 994.

61 L.J. *ex rel.* N.N.J. v. Sch. Bd., 927 F.3d 1203, 1207 (11th Cir. 2019) (quoting 20 U.S.C. § 1415).

62 *Id.*

63 20 U.S.C. § 1414(d)(4)(A).

64 34 C.F.R. § 300.324(a)(4)(i) (2021).

65 20 U.S.C. § 1414(d)(3)(D); *see also* 34 C.F.R. § 300.324(a)(4)(i).

C. Courts Grapple with the Meaning of a FAPE

Immediately after the passage of IDEA, confusion arose as to whether the law provided a substantive right to an education beyond mandating compliance with the detailed procedures. The Supreme Court soon answered that question in the affirmative. In *Board of Education v. Rowley*,[66] the Court held that, by requiring schools to provide a FAPE, the IDEA created a substantive entitlement to "specialized instruction and related services which are individually designed to provide educational benefit."[67] In other words, the school must provide enough support to "permit the child to benefit educationally from [the] instruction."[68]

The more challenging task, the *Rowley* Court noted, is defining the contours of this substantive right—in other words, determining when "handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act."[69] The Court explicitly declined to answer this question.[70] The Court held only that "the furnishing of every special service necessary to maximize each handicapped child's potential is . . . further than Congress intended to go."[71] Between any benefit and maximal benefit, however, there is obviously a broad range.

The Supreme Court recently revisited this question in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE–1*.[72] Its

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66 458 U.S. 176 (1982).

67 *Id.* at 201.

68 *Id.* at 203.

69 *Id.* at 202. The *Rowley* Court used the phrase "handicapped children," reflecting the language of the statute before it was amended to use the phrase "individuals with disabilities." *See supra* note 36. For a discussion of how the language of disability has evolved in U.S. legal history, see Meg E. Ziegler, *Disabling Language: Why Legal Terminology Should Comport with a Social Model of Disability*, 61 B.C. L. REV. 1183, 1187–1202 (2020).

> The term "handicap" . . . began to fall out of favor with the disability community in the mid-1980s because of its association with negative stereotypes. The word was replaced with "disability," and while the two words have been and continue to be used interchangeably, they have distinct definitions. A "disability" is a condition of an individual, while a "handicap" is a restriction or disadvantage, often the result of society, that hinders one's ability to function. "Handicapped" was no longer an acceptable label for people with disabilities, but it was still used sparingly in professional literature to describe barriers to access.

Id. at 1199.

70 *Rowley*, 458 U.S. at 202 ("Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.").

71 *Id.* at 199.

72 137 S. Ct. 988 (2017).

decision created the "*Endrew F.* standard": in order "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[73] This standard incorporates a few notable principles. First, the standard focuses on reasonable calculation rather than actual educational outcomes. The "reasonably calculated" qualification reflects a "recognition that crafting an appropriate program of education requires a prospective judgment by school officials."[74] The Court found additional comfort in this qualification given that the "fact-intensive exercise" of crafting an IEP "will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians."[75] In other words, the Court's respect for the forward-looking judgment calls made by school officials in forming IEPs is partially justified by the involvement of parents in the IEP-formation process. The *Endrew F.* standard also emphasizes the individualization of IEPs. *Endrew F.* replaced *Rowley*'s inquiry about whether the child received sufficient "benefit" with a focus on "appropriate progress."[76] The Court said that this focus on individualization "should come as no surprise," because "[a] focus on the particular child is at the core of the IDEA."[77]

The *Endrew F.* Court also provided important analysis about how and when courts should defer to school officials in the context of defining a FAPE. The Court noted that "deference is based on the application of expertise and the exercise of judgment by school authorities."[78] Given "[t]he nature of the IEP process, from the initial consultation through state administrative proceedings," school authorities will have had ample opportunity to consider the disagreements over the content of the IEP (including the "degree of progress a child's IEP should pursue").[79] By the time of judicial review, then, "[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" meets *Endrew F.*'s substantive standard.[80]

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73 *Id.* at 999.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Endrew F.*, 137 S. Ct. at 999.
78 *Id.* at 1001.
79 *Id.*
80 *Id.* at 1002.

D. Implementation of the IEP

The IDEA establishes both procedural and substantive entitlements, and these entitlements center around the IEP. Students have a right to a plan created in compliance with the statutory process and subject to extensive procedural safeguards. Under *Endrew F.*, the plan must be reasonably calculated to enable them to make appropriate progress given their circumstances.

Those rights give rise to a closely related but distinct right: the right to the implementation of that plan. In failure-to-implement cases, "the parent [ ] argue[s] that while their child's IEP clears [the] IDEA's substantive threshold *as written*, the school has nonetheless failed to properly put the plan into practice."[81] For example, what if an IEP calls for fifteen hours of speech therapy a week, and the student is provided only five hours a week? What if the student is provided fifteen hours most weeks but none other weeks? Similarly, is some other communication-related therapy sufficient? Especially given the level of detail involved in IEPs, the key question becomes: How far can the school stray from an IEP's written terms before it has violated the IDEA? Neither Congress nor the Supreme Court has spoken directly to this question.

There are two legal bases for concluding that an implementation failure is a violation of the IDEA. First, a failure to implement an IEP could be a denial of a FAPE because it violates the *Rowley* and *Endrew F.* requirements that a certain quality of education be offered to children with disabilities. Parents making such a claim would argue that the IEP *as implemented* does not satisfy *Endrew F.*'s standard, even if the IEP *as written* does. For example, if the school offered an IEP that was close to the minimum amount required under law and it failed to implement some of what was included in the IEP, then it might not be providing an education reasonably calculated to enable the child to make appropriate progress.

The second legal basis is § 1401(9)(D) of the IDEA, the fourth prong of the statutory definition of a FAPE: "The term 'free appropriate public education' means special education and related services that . . . are provided *in conformity with* the individualized education program."[82] This provision gives effect to the IDEA's approach of protecting students through parental

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81 *L.J.*, 927 F.3d at 1207 (emphasis in original).

82 20 U.S.C. § 1401(9)(D) (emphasis added).

involvement and procedural rights. In summary, a student is entitled to educational services of a certain quality under Supreme Court precedent, and a student is entitled to services that are "in conformity with" the IEP pursuant to § 1401(9)(D).

Finally, a word on remedies for failure-to-implement claims. When a school district fails to provide a FAPE, it can be obligated to reimburse the student's family for appropriate private educational services obtained in the interim.[83] Similarly, if the parents did not seek out replacement services, school districts can be responsible for providing compensatory services.[84] The prevailing party in an IDEA suit can also receive attorneys' fees and costs.[85] Failure-to-implement cases are no exception. Even when the school is merely ordered to rectify the failure, it "amounts to actual relief on the merits" and entitles parents to attorneys' fees.[86]

II. EXISTING APPROACHES TO IMPLEMENTATION CHALLENGES

This Part explores both of the recognized approaches to failure-to-implement cases: materiality and per se. Part II.A starts by identifying the meaning of materiality as it has been articulated by several federal appellate courts. It also explores the reasoning that those courts used in adopting the materiality standard. Afterward, it considers various theories of what a materiality inquiry might entail in the implementation context. Then it digs into the application of materiality to several actual cases. In doing so, this Section demonstrates the unpredictability and unworkability of this approach. Part II.A concludes with several additional arguments against materiality, including its circumvention of the IDEA's procedural protections, its incentivization of overpromising and underdelivering on IEPs, and its tension with Supreme Court precedent about the meaning of a FAPE. Part II.B then turns to the per se test and explain why it is a problematic alternative. The per se test is too inflexible, does not distinguish between better and worse responses to unavoidable or unforeseen circumstances, and incentivizes schools to create IEPs that promise as little as possible.

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83 Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009).

84 G. v. Fort Bragg Dependent Schs., 343 F.3d 295, 309 (4th Cir. 2003).

85 20 U.S.C. § 1415(i)(3)(B).

86 Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1030 (8th Cir. 2003).

A. The Materiality Standard

All federal circuit courts that have ruled on the proper approach to failure-to-implement cases have articulated a materiality standard. But the content, contours, and application of the standard vary across circuits and cases. This Section digs into the different formulations and applications of the materiality standard, demonstrating its unworkability. This Section also explores the reasoning that courts employed in adopting the materiality standard.

1. Adopting materiality.

The materiality standard was first adopted, in 2000, by the Fifth Circuit in *Houston Independent School District v. Bobby R.*[87] The court drew on its established four-factor approach to substantive claims alleging that a FAPE has been denied under the IDEA—an operationalization of *Rowley* that weaves together elements related to content and implementation.[88] The first two factors are related to IEP content.[89] The third factor considers whether "the services are provided in a coordinated and collaborative manner by the key 'stakeholders.'"[90] The fourth factor examines the benefit that the child actually received from the education.[91]

The court concluded that to successfully challenge an IEP's implementation, plaintiffs "must show more than a *de minimis* failure to implement all elements of that IEP."[92] The court explained that a FAPE has been provided if "substantial or significant provisions of the IEP" were followed.[93] In deriving this approach from the third and fourth factors, the Fifth Circuit asserted that materiality is a "reasonable" standard given "*Rowley*'s flexible approach."[94] The court elaborated that the approach strikes a proper balance: it "affords local agencies some flexibility in implementing IEP's, but it still holds those agencies

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87 200 F.3d 341 (5th Cir. 2000).

88 *Id.* at 346–48 (citing Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. *ex rel.* Barry F., 118 F.3d 245, 253 (5th Cir. 1997)).

89 *Id.* at 347 (focusing on the individualization of the IEP and the student's placement in the least restrictive environment).

90 *Id.* at 347–48 (citing *Cypress-Fairbanks*, 118 F.3d at 253).

91 *Bobby R.*, 200 F.3d at 347–49.

92 *Id.* at 349.

93 *Id.*

94 *Id.*

accountable for material failures and for providing the disabled child a meaningful educational benefit."[95]

As other federal circuit courts confronted implementation cases, they drew heavily on the Fifth Circuit's approach in *Bobby R.* For example, in *Neosho R-V School District v. Clark*,[96] the Eighth Circuit derived from *Rowley* the conclusion "that an IEP is [not] reasonably calculated to provide a [FAPE] if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."[97] Years later, the Fourth Circuit held, in *Sumter County School District 17 v. Heffernan ex rel. T.H.*,[98] that "a failure to implement a material portion of an IEP[ ] violates the IDEA."[99] The court also asserted that this standard follows from *Rowley*.[100]

In 2007, the Ninth Circuit entered the implementation fray in *Van Duyn ex rel. Van Duyn v. Baker School District 5J*[101] and used similar language.[102] The court in *Van Duyn* held that a failure to implement an IEP is a violation of the IDEA only if the school district "is shown to have materially failed to implement the child's IEP."[103] The court elaborated: "A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP."[104] The court also considered how the actual benefit to the child should fit into the analysis, "clarify[ing] that the materiality

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95 *Id.*

96 315 F.3d 1022 (8th Cir. 2003).

97 *Id.* at 1027 n.3. Interestingly, the Eighth Circuit stated in a footnote that it was not adopting the *Bobby R.* analysis, despite it "more accurately suit[ing] the posture of th[e] case," because the parties did not argue for it. *Id.* However, it's a bit difficult to tell if there's any daylight between the two approaches. The facts of the case were relatively straightforward: the student's IEP called for a behavior-management plan, behavior management was clearly a primary goal of the IEP, the school did not develop or implement a behavior-management plan, and behavioral issues resulted in the student losing any benefit from the rest of the IEP. Thus, the court held that the implementation failure violated the IDEA. *Id.* at 1030.

98 642 F.3d 478 (4th Cir. 2011).

99 *Id.* at 484.

100 *Id.* at 483. The facts of this case were straightforward as well, so its application tells us little more about the functioning of the materiality standard. The IEP "called for 15 hours per week of applied behavioral analysis therapy ('ABA') therapy," but the student was only provided 7.5–10 hours per week of that therapy, and testimony clearly established that the therapy was provided incorrectly. *Id.* at 481, 484–85.

101 502 F.3d 811 (9th Cir. 2007).

102 *Id.* at 815, 822.

103 *Id.* at 815.

104 *Id.*

standard does not require that the child suffer demonstrable educational harm in order to prevail," but "the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall."[105]

The Ninth Circuit offered a more robust set of justifications for the materiality approach.[106] The *Van Duyn* court drew heavily on *Rowley*, as other circuits had before, but it provided a more detailed explanation of how *Rowley*'s reasoning militated in favor of materiality. However, the extensions of *Rowley* into the implementation context are somewhat flawed. First, the court reasoned that—because *Rowley* held that "procedural flaws in an IEP's formulation do not automatically violate the IDEA, but rather do so only when the resulting IEP" is inadequate[107]—"minor failures" in IEP implementation should "not automatically be treated as violations of the statute."[108] However, the Ninth Circuit did not explain why the Supreme Court's flexible treatment of procedural violations ought to extend to substantive violations. In theory, *Rowley* might have been more permissive of procedural failings because the output of the procedures (the IEP and the education itself) could be reviewed on their own merits by administrative officers and courts. Additionally, elsewhere in the *Van Duyn* opinion, the majority rejected an argument that implementation failures should be treated like procedural violations: "[T]here is no indication that a conflation of this sort is intended or permitted

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[105] *Id.* at 822.

[106] The case also included a vehement dissenting opinion, discussed in Part II.B, which rejected the materiality standard and argued for a per se test. *See Van Duyn*, 502 F.3d at 826–29 (Ferguson, J., dissenting). Much of the academic literature on implementation was published in response to and immediately following *Van Duyn*. *See, e.g.*, Elexis Reed, Casenote, *The Individuals with Disabilities Education Act—The Ninth Circuit Determines That Only a Material Failure to Implement an Individualized Education Program Violates the Individuals with Disabilities Act*, 61 SMU L. REV. 495, 498–99 (2008) ("Indeed, the majority established the incorrect standard for assessing an IEP's implementation. The dissent correctly identified the flaws in the majority's 'materiality' standard and applied the proper standard for assessing the implementation of IEPs—failure to implement any portion of an IEP violates the IDEA." (emphasis omitted) (citing *Van Duyn*, 502 F.3d at 829 (Ferguson, J., dissenting)); David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 100–03 (2009) (arguing that the per se rule is most consistent with the purposes of the IDEA); David G. King, Note, Van Duyn v. Baker School District*: A "Material" Improvement in Evaluating a School District's Failure to Implement Individualized Education Programs*, 4 NW. J.L. & SOC. POL'Y 457, 479–86 (2009) (arguing that materiality is a generally workable and desirable standard, despite some flaws in the majority's reasoning).

[107] *Van Duyn*, 502 F.3d at 821 (citing *Rowley*, 458 U.S. at 207).

[108] *Id.*

by the statute."[109] In other words, the court acknowledged that implementation is part of the substantive right and ought not be treated as a procedural failing, but it then justified its implementation approach by pointing to the *Rowley*'s treatment of procedural flaws.

The Ninth Circuit extended *Rowley* in another troubling way. The court stated that *Rowley*'s "description of the IDEA's purpose as providing a 'basic floor of opportunity' to disabled students rather than a 'potential-maximizing education' also supports granting some flexibility to school districts charged with implementing IEPs."[110] But even if *Rowley* set the substantive bar for content well below potential-maximizing, there's no reason that the implementation bar should be similarly permissive. There is also no suggestion that providing every service that the school said it would provide would be potential maximizing.

Finally, beyond extending *Rowley*, the Ninth Circuit was also the first circuit court to invoke the "in conformity with" language of § 1401(9)(D), part of the statutory definition of a FAPE. The court concluded that the phrase "counsels against making minor implementation failures actionable" and that "[t]here is no statutory requirement of perfect adherence to the IEP."[111] Ultimately, *Van Duyn* used precedent and statutory language to argue for some flexibility when schools implement IEPs. It did not, however, justify why or how this need for some amount of flexibility necessitates a materiality standard. Nor did it sufficiently grapple with the relationship between substantive challenges—including both IEP content and IEP implementation—and procedural ones.

In 2017, the Supreme Court decided *Endrew F.*, providing another touchpoint for courts grappling with the implementation issue. The Eleventh Circuit did not confront a failure-to-implement case until after *Endrew F.* In a long and thoughtful opinion in *L.J. ex rel. N.N.J. v. School Board*,[112] the Eleventh Circuit also determined that "a material deviation from [the IEP] violates the statute."[113] The court elaborated that "[a] material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child's

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109 *Id.* at 819.

110 *Id.* at 821 (quoting *Rowley*, 458 U.S. at 197 n.21, 201).

111 *Id.*

112 927 F.3d 1203 (11th Cir. 2019).

113 *Id.* at 1206.

IEP."[114] The opinion clarified that "courts must consider implementation failures both quantitatively and qualitatively to determine *how much* was withheld and *how important* the withheld services were in view of the IEP as a whole."[115] Further, citing *Van Duyn*, *L.J.* treated "actual educational progress (or lack thereof)" as useful evidence but not dispositive.[116] In particular, the court expressed concern about holding school districts responsible for a lack of progress without a showing of a link to the "specific implementation failure."[117]

In interpreting the "in conformity with" language of § 1401(9)(D), the Eleventh Circuit brought dictionary definitions to the debate: "'Conformity' means '[c]orrespondence in form, manner, or use; agreement; harmony; congruity.'"[118] On the other hand, "[c]onspicuously absent from this definition are words like 'exact' or 'identical,' suggesting that the IDEA recognizes that some degree of flexibility is necessary in implementing a child's IEP."[119] It's worth noting, however, that at least one commentator identified an alternative dictionary definition pointing in the opposite direction: the *Oxford English Dictionary* defines "conformity" as "exact correspondence *to* or *with* a pattern."[120]

Beyond definitions, the Eleventh Circuit pointed to other "contextual clue[s]" supporting flexibility.[121] For example, in certain circumstances, a dispute may be over "a child's old IEP that a school district is required to implement during the pendency of disputes over the content of a new one," sometimes referred to as a "stay-put" IEP.[122] In such instances,

> [a]n old IEP may quite literally be impossible to fully implement in a new setting. . . . [I]t would be odd—and again, often impossible—for the IDEA to demand blind compliance with an out-of-date IEP in an educational context that it was not

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114 *Id.* at 1211.

115 *Id.* at 1214 (emphasis in original).

116 *Id.*

117 *L.J.*, 927 F.3d at 1214.

118 *Id.* at 1212 (alteration in original) (citing *Conformity*, BLACK'S LAW DICTIONARY (6th ed. 1991)).

119 *Id.*

120 Madeline E. Smith, 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*, 65 VILL. L. REV. 451, 472 (2020) (quoting *Conformity*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (emphasis in original)).

121 *L.J.*, 927 F.3d at 1213.

122 *Id.* (citing 20 U.S.C. § 1415(j)).

> designed for and in which it cannot be carried out in its entirety.[123]

The opinion also noted that the IDEA recognizes that children develop quickly and that their needs "do not remain static," but the statute requires only annual review of the IEP.[124] From this, the court concluded that "IEPs have some amount of flex in their joints with an expectation that parents and schools will work together to keep the plans up to date as circumstances and the child's needs demand."[125] Although perhaps not giving enough visibility to the revision procedures of the IDEA, which permit changes outside the annual structure and even allow them to be made in writing without calling another IEP-team meeting,[126] it is true that circumstances will sometimes change faster than IEP revisions can be made.

The biggest issue with the Eleventh Circuit's reasoning echoes the above critique of the Ninth and Fifth Circuit's approach: the need for some flexibility does not go all the way to justifying materiality. The Eleventh Circuit acknowledged this, framing its arguments as responses to "the alternative to a materiality standard—holding that any deviation, however minor, necessarily and conclusively amounts to an IDEA violation."[127] However, if another viable approach that allowed the school flexibility were on the table, this reasoning would do little to justify the materiality standard.

Finally, the *L.J.* court addressed *Endrew F.*'s relevance to implementation challenges. The court asserted that the "presumptively valid IEP" "stands in as a proxy for *Endrew F.*'s substantive threshold," and reviewing courts are left only to determine whether the implementation was "in conformity with" the IEP.[128] Under this theory, *Endrew F.* and *Rowley* do not establish the educational quality that a child is actually due but only the educational quality that the school must offer in the content of the plan. Thus, even if a plan would barely survive an *Endrew F.* inquiry, a school is afforded flexibility to deviate from it without facing scrutiny into the absolute quality of the resulting education. This articulation is understandable: the *Endrew F.* standard speaks

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123 *Id.*

124 *Id.* at 1212.

125 *Id.*

126 20 U.S.C. § 1414(d)(3)(D); *see also* 34 C.F.R. § 300.324(a)(4)(i).

127 *L.J.*, 927 F.3d at 1213.

128 *Id.* at 1216.

only in terms of IEP content.[129] However, that should not be read to cut IEP implementation off from the substantive guarantees of this line of cases. The Supreme Court has repeatedly described the substantive right in terms of the education itself, not merely the text of the IEP. For example, in *Honig v. Doe*,[130] the Court noted that the law "confers upon disabled students an enforceable substantive right to public education in participating States."[131] Additionally, the *Rowley* Court described the entitlement in terms of the student actually receiving education and related services.[132] The *Endrew F.* Court articulated a standard for evaluating content cases because *Endrew F.* was a content case providing valuable analysis about the contours of the broader substantive right.

The materiality standard emerged in response to courts' perception that flexibility is a necessary part of IEP implementation. This perceived need for flexibility arose out of aspects of the statutory scheme and a general sense of the practicalities of educating children with disabilities. Courts also considered the relevance of *Rowley* and *Endrew F.*, looking at both the way that those cases defined the underlying substantive right and the approach that the Court took to the IDEA. Several circuits concluded that the cases supported a flexible implementation approach. Finally, courts contemplated the meaning of "in conformity with," ultimately using dictionary definitions. As this Section draws out, none of these rationales is without its flaws. The extensions of Supreme Court precedent into the implementation realm are sometimes hard to follow. But more fundamentally, the need for flexibility that animates the doctrine doesn't point directly to materiality. Instead, it counsels rejection of the only live alternative, a rigid per se approach to liability.[133] The next Section turns from conceptual issues with materiality to practical ones, arguing that the standard is applied to the varied facts of failure-to-implement cases unpredictably and inconsistently.

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[129] *Endrew F.*, 137 S. Ct. at 999 ("To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

[130] 484 U.S. 305 (1988).

[131] *Id.* at 310.

[132] *Rowley*, 458 U.S. at 201 (holding that the IDEA created a substantive entitlement to "specialized instruction and related services which are individually designed to provide educational benefit").

[133] *See infra* Part II.B.

2. Applying materiality.

Considerable difficulties emerge when applying a materiality standard in failure-to-implement cases. There are several possible ways to consider whether an implementation failure was material. First, a court could look holistically at the IEP, comparing the implemented services to the denied services and determining whether the difference is material. In theory, this seems sensible. In practice, thorny questions quickly emerge: Should the court simply add up the number of hours or the number of IEP provisions? Or should it make a more qualitative judgment?[134] What if some provisions are only partially fulfilled? What if some services are more integral to the success of the IEP, more important to the child's parents, or more expensive or time-consuming?

Perhaps this points to a second understanding of materiality: evaluating implementation provision by provision. Courts can assess which provisions are most important for the child's progress, deem them "significant" or "substantial," and hold schools liable for violating only those provisions (excusing violation, then, of provisions deemed immaterial). This seems to tie the inquiry closer to the child's educational progress. Again, however, uncertainty abounds. In addition to the questions above, how does a court decide which provisions included in the IEP by the school and the parents are the important ones? Can the various provisions even be meaningfully differentiated? Arguably, IEPs are indivisible—the provisions are meant to work together in complex ways.[135] Why would an IEP contain provisions that courts will not (or are very unlikely to) enforce? Further, if a provision is partially met, or a substitute is provided, how should that count?[136]

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134 For example, in *Turner v. District of Columbia*, 952 F. Supp. 2d 31 (D.D.C. 2013), the court noted that the focus of an implementation inquiry is "on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the *specific service that was withheld*." *Id.* at 40 (emphasis in original). The court elaborated on this approach by exploring how many hours of difference between what was promised and what was provided constituted a denial of a FAPE. *Id.* at 41. Another court directly ran the numbers: "Since [the school] failed to provide 83% of the required services, it cannot be seriously argued that its failure to implement the IEP was *de minimis*." Holman v. District of Columbia, 153 F. Supp. 3d 386, 393 (D.D.C. 2016).

135 *See* Perry A. Zirkel, *Failure to Implement the IEP: The Third Dimension of FAPE Under the IDEA*, 28 J. DISABILITY POL'Y STUD. 174, 175 (2017).

136 Courts applying this understanding sometimes find the offered compensatory services to be inadequate. *See, e.g.*, *Turner*, 952 F. Supp. 2d at 41. One court concluded that "[p]roviding more hours outside of general education is [ ] not an acceptable alternative for supported hours inside the general education environment." *Id.* Similarly, that court

Finally, courts could assess the materiality of implementation failures by looking at the educational progress that the child actually made. This inquiry is also problematic. What if the student makes progress toward some of the IEP's goals but not others? How much actual progress is enough? On the other hand, if a student does not make progress, it is possible that this happened because of circumstances unrelated to the implementation failures. For example, perhaps the overall plan was not a good fit.

Each conception of materiality, on its own, provides little guidance. The confusion is only amplified by courts invoking multiple of these understandings. The next sections explore how courts have applied the materiality inquiry in practice, demonstrating that these thorny questions arise in reality as well as in theory. The unpredictability leaves parents and schools with insufficient guidance.

a) Bobby R. Caius R. was a child with dyslexia and attention deficit disorder.[137] Multiple implementation failures were alleged. First, his third-grade IEP called for "one hour of speech therapy per week."[138] However, from January to May 1995, the elementary school did not have a speech therapist, resulting in a denial of approximately sixteen hours of speech therapy.[139] Instead, Caius received twenty-five hours of compensatory speech therapy over the summer.[140] Second, Caius's sixth-grade IEP included a number of modifications, including highlighted and taped texts.[141] These were not provided consistently.[142] Finally, following Caius's parents' realization that he "learned more readily when information was presented in a multisensory fashion," Caius's IEP called for him to be taught with an alphabetic-phonics (AP) program.[143] No teacher at the school, however, was trained in AP techniques, and the school had difficulty finding an AP teacher, so Caius went without AP programming for two months.[144] The school offered "compensatory AP services" until it

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rejected the argument that a "paraprofessional in special education" could stand in for a "special education assistant." *Id.* at 41–42.

137 *Bobby R.*, 200 F.3d at 343.

138 *Id.* at 344.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Bobby R.*, 200 F.3d at 348.

143 *Id.* at 344.

144 *Id.*

could hire a teacher, and Caius's parents refused.[145] The implementation failures had a real impact: Caius progressed slower than he would have with AP training, and "his progress in word attack skills was de minimis."[146]

The Fifth Circuit held, however, that these deviations from the IEP were not material, and thus they were not violations of the IDEA.[147] It embraced the district court's assertion that "local school agencies should retain some flexibility in scheduling services and, when necessary, providing compensatory services,"[148] allowing the school district to make adjustments to *when* services should be provided as long as the *quantity* of the services is unchanged.[149] The court seems to have determined, then, that at least some IEP specifications regarding the timing of services are immaterial, even when the student was denied a benefit that the IEP was designed to confer and where potentially important provisions were not followed as written. While *Bobby R.* could be read to give schools carte blanche to create timelines for the provision of services during the IEP process and then abandon them without fear of liability, it seems more likely that there is a point at which the Fifth Circuit's approach would deem a rescheduling of services a material violation. The opinion provides little guidance about where that line might or ought to be drawn.

In this case, the court simply assumed that the subsequent services, provided all at once rather than gradually, were a sufficient substitute within a reasonable window of flexibility and timeline adjustment. That assumption is intuitively suspect, however. Imagine telling an athlete with a knee injury that, as opposed to receiving an hour of physical therapy every week for five months, she would instead receive thirty hours the subsequent summer. Not only could she not benefit from the therapy for a substantial portion of the year, likely impacting her ability to practice and develop other skills in the meantime, but there is also a good case that the therapy would be less effective when delivered all at once. The fact that she was overcompensated in terms of hours does little to alleviate these concerns. The opinion acknowledged neither concern, underscoring an issue with generalist judges drawing conclusions about the materiality of special

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[145] *Id.* at 348.
[146] *Id.* at 350.
[147] *Bobby R.*, 200 F.3d at 350.
[148] *Id.* at 348.
[149] *Id.*

education and related services. This also highlights the difficulty of assessing the significance of individual provisions to the efficacy of the educational scheme as a whole, as the materiality standard calls for. Perhaps a test calibrated to the appropriate level of flexibility in timing, rather than one based on the importance of the timing, would help address these issues.

b) Spring Branch. Almost two decades after *Bobby R.*, the Fifth Circuit heard another failure-to-implement claim in *Spring Branch Independent School District v. O.W. ex rel. Hannah W.*[150] O.W. was a child with "poor emotional and behavioral regulation."[151] Before the IEP at issue had been formulated, O.W. had engaged in violent and disruptive behavior, including "climbing the walls of the gym" and "assault[ing] his fifth-grade teacher."[152]

O.W.'s IEP had an extended section on discipline. In response to physical aggression, staff were instructed to use several tactics, including "help[ing] O.W. learn replacement behaviors (e.g., removing himself to a cooling-off area, implementing deep breathing, calming sequences, stop and think)" and "avoid[ing] power struggles and arguments, and instead offer choices, frequent/movement breaks, and access to preferred activities."[153] Yet in response to physical aggression from O.W., the school "used restraints, time-outs, and police intervention."[154]

The Fifth Circuit found that the use of time-outs violated the IDEA. They were prohibited by the IEP because they were not included in the list of approved tactics, and thus "the recurrent use . . . amounted to a substantial or significant departure from the IEP."[155] Further, "O.W.'s grades dropped and his behavior deteriorated" after these tactics were implemented.[156] Given both the significance of the failure and O.W.'s regression, the court found that the time-out discipline was an "actionable failure to implement."[157] It is unclear after *Spring Branch*, however, whether either regression or a significant departure from the IEP alone would be sufficient to carry a failure-to-implement claim.

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150 961 F.3d 781 (5th Cir. 2020).

151 *Id.* at 787.

152 *Id.*

153 *Id.* at 788 (quoting Spring Branch Indep. Sch. v. O.W., No. 16-CV-2643, 2018 WL 2335341, at *7 (S.D. Tex. Mar. 29, 2018)).

154 *Id.* at 789.

155 *Spring Branch*, 961 F.3d at 797.

156 *Id.*

157 *Id.*

The Fifth Circuit found that the physical restraints and police intervention, however, were not material failures. The court reasoned that because Texas law allowed for physical restraints in emergency situations and the IEP did not explicitly state that the strategies for physical aggression applied in such situations, the tactics were permissible when "the school determined the restraint was necessary to prevent serious physical harm to O.W. or to another" and after "attempts by district staff to utilize at least some of the strategies enumerated in the IEP."[158] Similar reasoning was applied to the police intervention.[159] It is striking, given O.W.'s history, that the IEP did not explicitly address or define emergency situations, and it is unclear if O.W.'s parents were aware that the IEP did not apply in such emergencies.

Ultimately, the court appeared to condone a significant deviation from the IEP because it was not convinced that the school had an alternative—but this has nothing to do with materiality. If the potential unavoidability of the deviation is the relevant question, the analysis would be more effective and honest if the court had focused on and heard evidence related to that inquiry as opposed to forcing it into the materiality framework.

c) Van Duyn. Van Duyn was a thirteen-year-old "severely autistic boy," and "a "team comprised of teachers, district representatives and Van Duyn's mother finalized a comprehensive IEP for the 2001-02 school year."[160] Van Duyn transitioned from elementary school to middle school in that year. The IEP was quite detailed, but many of the services that it included were provided improperly, inconsistently, or not at all.

First, the IEP called for a full-time "behavior management plan," which included "a daily behavior card, a visual schedule, social stories and a quiet room."[161] However, Van Duyn's "behavior was not accurately recorded on the card, he did not set up his daily schedule before starting each school day, social stories were not properly used and he was not ordered to go to the quiet room after all incidents of misbehavior."[162] Next, "the IEP required the regional autism specialist to visit the middle school twice per week," but the regional consultant visited "a dozen times over the

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158 *Id.* at 798.

159 *Id.*

160 *Van Duyn*, 502 F.3d at 815.

161 *Id.* at 815–16. For more about social stories, see *What Is a Social Story*, CAROL GRAY SOC. STORIES, https://perma.cc/B33M-8X2K.

162 *Van Duyn*, 502 F.3d at 816.

first three months," and "other autism consultants also came by with some regularity."[163] Additionally, the IEP stated that Van Duyn's aide was to "receive state autism training," but she "did not receive state-level training in educating autistic children."[164] Instead, she "attend[ed] local autism classes and [met] with individuals who had worked with him in the past."[165] Further, the IEP stated that "progress was to be measured by quarterly report cards, and approximately 70 short-term objectives corresponding to a series of annual goals were to be pursued."[166] However, Van Duyn's quarterly report cards only partially corresponded to the IEP's goals, and he "worked toward many but not all of the short-term objectives set out in the IEP. For example, he did not participate in any telephone activities or write a daily note home" for much of the IEP period.[167]

The Ninth Circuit concluded that the failures were immaterial because many of the techniques were actually used by the school, "even if not quite as Van Duyn envisioned."[168] The court further reasoned that certain elements of the IEP, which bore substantial similarities to his elementary school IEP, were inappropriate for the middle school context if implemented as they had been at his previous school.[169] Finally, the court noted that Van Duyn had made some educational progress in areas related to the implementation failures.[170]

A few aspects of the application are worth highlighting. First, there appears to have been a critical misunderstanding between the school and the parents as to the meaning of the IEP's terms, and the materiality standard allowed that misunderstanding to be resolved in the school's favor. In doing so, the court rejected the notion that the IEP be interpreted as a contract and against the drafter.[171] If one party understands a behavior-management plan to include four different things and one party understands it to include only two different things, then it is unclear why an interpreter should prefer the latter merely because it is narrower. This approach devalues the parents as parties whose meaningful

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163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.*
167 *Van Duyn*, 502 F.3d at 816.
168 *Id.* at 824.
169 *Id.*
170 *Id.*
171 *Id.* at 820.

and informed participation in the process and consent to the IEP are crucial. It also incentivizes broad or unclear language. When adapting the provisions to the middle school context, the school could have specified how the provisions would be implemented or written down the bounds of the flexibility.

Second, assessing materiality through after-the-fact judgments about the student's educational progress is a fraught task. Courts are left trying to make sense of markers of progress that may not be relevant because of the very implementation failures alleged. For example, the court used Van Duyn's report cards as evidence that he had improved "in the vast majority of categories" despite having previously noted that one of the implementation failures was a lack of correspondence between the report cards and the IEP's goals.[172] As additional evidence that Van Duyn's behavior had improved, the court pointed to the fact that he was sent to the quiet room for bad behavior far less frequently than in previous years. However, one of the implementation failures was teachers not sending Van Duyn to the quiet room for misbehavior every time, unlike the practice from prior years. These disjunctures highlight the difficulty of incorporating benefit to the student into the materiality approach.

Finally, the facts show that the school district systemically overpromised in the IEP, and the materiality standard excused it. Overpromising prevents parents from bringing challenges on the front end: The overpromised IEP would offer enough to presumably sail past a *Rowley–Endrew F.* inquiry. If the IEP had reflected a realistic assessment of what the school would provide, then the parents could have expressed their concerns or raised administrative or legal challenges to the content, and the IEP would have been assessed for substantive adequacy. Any issues could then have been resolved before the student had experienced a loss and before the need arose to judge the adequacy of compensatory services.

Further, overpromising forecloses parents' ability to advocate for or negotiate toward the services that they consider most important. Consider a hypothetical: During an IEP formation, a school admitted that it didn't have a properly equipped quiet room. School officials could have suggested an alternative and explained why they did not believe it was necessary in middle school, or they could have provided a timeline to add a quiet room

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[172] *Van Duyn*, 502 F.3d at 816.

and included it in the IEP. Returning to *Van Duyn*, his mother could have decided how important she thought the quiet room was, perhaps saying that she would rather have it than some of the other IEP services or noting that the quiet room was not necessary as long as Van Duyn received some other provision. Such advocating cannot happen when the school adds provisions that it cannot or is not planning to meet.

3. Additional issues with materiality.

In his dissent in *Van Duyn*, Judge Warren Ferguson summarized many of the problems with the materiality standard that have been demonstrated above. In addition to the issues raised above, three more objections are found in his dissent: materiality undermines the IDEA's procedural requirements, forces judges outside their areas of expertise, and is vague and unworkable. Further, materiality has several points of inconsistency with *Endrew F.* This Section highlights and elaborates on those points and explore some additional concerns.

First, the materiality inquiry allows school districts to circumvent the procedural requirements of the IDEA. Judge Ferguson made the objection clear: "[A]llowing the school district to disregard already agreed-upon portions of the IEP would essentially give the district license to unilaterally redefine the content of the student's plan by default."[173] In other words, materiality allows schools to forgo the revision provisions of the IDEA. *Endrew F.* only strengthens this argument with its emphasis on the importance of the IEP process in airing disputes, facilitating parental input and inclusion, and ensuring careful deliberation by school officials.[174] Allowing the school to disregard some amount of what it offers creates an incentive to include additional provisions to assuage parents in negotiations without confidence about whether they can be met. This inhibits the efficacy of content challenges and interferes with parents' ability to weigh in on difficult tradeoffs.

The second argument is about institutional competence. Judge Ferguson made a general point about judicial expertise,

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[173] *Id.* at 828 (Ferguson, J., dissenting); *see also* Smith, *supra* note 120, at 473–74 ("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. . . . This license undermines the collaborative nature of the IEP team and ignores the parental participation provisions of the IDEA.").

[174] *Endrew F.*, 137 S. Ct. at 1001.

one that should sound familiar after the foregoing discussion about how materiality has been applied. Given their expertise and access to information, "[j]udges are not in a position to determine which parts of an agreed-upon IEP are or are not material."[175] The various application issues identified in the materiality cases above provide further evidence on this point. As Judge Ferguson noted, judicial review of substantive educational decisions is appropriate in the face of disagreement between the student or the student's parents and the school officials about the sufficiency of the IEP.[176] In such cases, a third-party adjudicator (an administrative-hearing officer or a judge) is needed.[177] However, once "all parties have agreed that the content of the IEP provides FAPE,"[178] that necessity is eliminated, and judicial review involves increasingly difficult substantive judgments. For instance, the judge is no longer comparing a prospective plan to a legal standard but is instead considering the plan, the implementation, the actual effects, the adequacy of compensation, and more. Further, in content challenges, courts are entitled to defer to school officials because those officials were exercising their expert judgment in formulating the plan.[179] However, in implementation cases, school officials are alleged to have abandoned their prior judgments, and courts are left at sea.[180] Finally, as Professor Perry Zirkel has argued, an IEP is a "unitary concept, [ ] not subject to further differentiation."[181] Judges assessing materiality would not only have to decide which elements are important on their own but also understand how all the various pieces are meant to fit together. For example, some provisions might function only if others are met. For all these reasons, it would be far better for judges to avoid substantive evaluations of educational quality.

Third, Judge Ferguson argued that the majority's materiality standard "suffers from vagueness."[182] This objection should ring true after following other appellate courts' (and subsequent

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175 *Van Duyn*, 502 F.3d at 827 (Ferguson, J., dissenting); *see also* Zirkel, *supra* note 135, at 177.

176 *Van Duyn*, 502 F.3d at 827 (Ferguson, J., dissenting).

177 *Id.*

178 *Id.*

179 *See Endrew F.*, 137 S. Ct. at 1001 ("[D]eference is based on the application of expertise and the exercise of judgment by school authorities.").

180 *See* Zirkel, *supra* note 135, at 174–75.

181 *Id.* at 177.

182 *Van Duyn*, 502 F.3d at 828 (Ferguson, J., dissenting).

district courts') attempts to make sense of the materiality inquiry in challenging cases. It's difficult to conclude that the current state of the law offers much clarity or direction to schools, parents, administrative decision makers, or courts. Judge Ferguson asked:

> If an IEP requires ten hours per week of math tutoring, would the provision of only nine hours be "more than a minor discrepancy"? Eight hours? Seven hours? Because most IEPs contain such quantitative requirements for special education services, the majority's standard will provide little guidance in resolving these implementation issues.[183]

Both conceptually and in practice, materiality gives regulated parties insufficient guidance about what will be required.

In addition to Judge Ferguson's critiques, the reigning materiality standards are also arguably inconsistent with *Endrew F.*[184] Materiality allows students to be denied the quality of education that they are entitled to under *Endrew F.* If the IEP as written would have been a very close call, but still sufficient, in a content case (in other words, if it provides the substantive minimum), then essentially *any* deviation in implementation would be a violation of the FAPE requirement. However, courts that ask whether a "significant provision" has been denied (or that compare the proportion of services offered to those withheld) would find that there had been no actionable implementation failure. Therefore, a student could receive less than what they are entitled to under *Endrew F.* and yet have no legal recourse in a content or implementation challenge. Additionally, many circuits derived their materiality standard from the FAPE tests that they developed after *Rowley*, but *Endrew F.* established a standard "markedly more demanding" than many circuits' FAPE tests.[185]

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[183] *Id.*

[184] *See* Smith, *supra* note 120 at 466–70 (critiquing the Eleventh Circuit's adoption of materiality as inconsistent with *Endrew F.*); *see also id.* at 469–70:

> 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. In light of the *Endrew F.* decision, the materiality standard as used in the Eleventh Circuit's holding is inappropriate and does not promote *Endrew F.*'s underlying principles.

[185] *Endrew F.*, 137 S. Ct. at 1000; *see also* Smith, *supra* note 120, at 468–70 (arguing that *Endrew F.* was meant to raise the bar for the education of children with disabilities under the IDEA in a way that is inconsistent with the materiality approach). *But see* William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation After* Endrew F., 22 N.Y.U. J. LEGIS. & PUB. POL'Y 495, 513–15 (2020) (concluding, based on an empirical

For example, the Fourth, Eighth, and Eleventh Circuits had all followed a "some benefit" standard, similar to the one rejected in *Endrew F.*[186]

Additionally, *Endrew F.* emphasized the importance of individualization and year-to-year progress. Thus, the meaning of a FAPE is contingent on the unique circumstances and abilities of the child in question.[187] If a school gave a child a one-size-fits-all IEP without considering the child's unique circumstances or an IEP that remains static even in the face of minimal progress, then the school likely would have failed to provide a FAPE. A reviewing court would have deemed the IEP insufficiently individualized or insufficiently responsive to enable progress. Yet certain services that promote progress and are individualized might not be deemed "material" under current case law.

Further, *Endrew F.* emphasizes that deference to school authorities is earned from their "application of expertise and [ ] exercise of judgment."[188] The materiality approach, however, gives school authorities broad discretion outside of the process that the IDEA provides for bringing that discretion to bear on a child's educational program. This indicates that the importance of flexibility, derived from *Rowley* and emphasized in justifying materiality, might be diminished in the implementation context. Finally, at least in the overpromising context, there's a good argument that a plan has not been "reasonably calculated"—language in both *Rowley* and *Endrew F.*—to enable the necessary

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study, that most federal courts did not consider *Endrew F.* to be a significant departure from *Rowley*); Perry A. Zirkel, *The Aftermath of* Endrew F. *One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP. 448, 450 (2018).

186 *See, e.g.*, Fort Zumwalt Sch. Dist v. Clynes, 119 F.3d 607, 614 (8th Cir. 1997) ("As long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology." (citing *Rowley*, 458 U.S. at 208)); Drew P. v. Clarke Cnty. Sch. Dist., 877 F.2d 927, 930 (11th Cir. 1989) ("The state must provide the child only with 'a basic floor of opportunity.'" (quoting *Rowley*, 458 U.S. at 201)); O.S. v. Fairfax Cnty. Sch. Bd., 804 F.3d 354, 360 (4th Cir. 2015) (explaining that "some educational benefit" means "a benefit that is more than minimal or trivial").

187 *See* Julie Waterstone, Endrew F.*: Symbolism v. Reality*, 46 J.L. & EDUC. 527, 531 (2017).

188 *Endrew F.*, 137 S. Ct. at 1001; *see also* 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, 480–81 (2017) ("[*Endrew F.*] makes explicit what lower courts have been implicitly applying in assessing whether FAPE is being denied—deference to school authorities is not abdication, and evidence, not just assertions, is needed to justify deference by courts charged with review.").

progress if the school has included provisions that it expects to have difficulty meeting.[189]

That being said, a proponent of the materiality approach might argue that vagueness and inconsistency with *Endrew F.* aren't inherent to a focus on materiality and that the approach could be salvaged by the right formulation. Perhaps there is a platonic materiality inquiry, but it seems telling that federal appellate courts have yet to identify one, explain it clearly, or apply it effectively in an edge case. More importantly, a new and improved materiality test would address neither procedural circumvention—namely, overpromising and making de facto IEP changes outside the IDEA's amendment process—nor judges' lack of expertise to make substantive judgments about which provisions are immaterial despite being included in the IEP (the document constructed by those with substantive expertise).

B. A Problematic Alternative—the Per Se Rule

In his *Van Duyn* dissent, Judge Ferguson argued for a per se rule in materiality cases: "Given the extensive process and expertise involved in crafting an IEP, the failure to implement *any* portion of the program to which the school has assented is *necessarily* material" and thus a violation of the IDEA.[190] He excoriated the majority for adopting a materiality standard, describing it as "inconsistent with the text of the [IDEA], inappropriate for the judiciary, and unworkably vague."[191]

In the aftermath of the case, several authors have built on the groundwork laid by Judge Ferguson and elaborated on his arguments for a per se rule.[192] Courts have remained unmoved. Despite a relative consensus in the academic literature, no federal court has embraced a per se rule.

There are several reasons why a per se rule is not a viable alternative. The first reason is laid out effectively in the cases above. Both the IDEA itself and the Supreme Court cases interpreting it clearly call for some amount of school flexibility,[193] which the per se rule does not allow.

The per se rule is also unrealistic as a general matter. Human error means that compliance with the written plan will not be

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189 *Rowley*, 458 U.S. at 204; *Endrew F.*, 137 S. Ct. at 999.

190 *Van Duyn*, 502 F.3d 826–27 (Ferguson, J., dissenting) (emphasis in original).

191 *Id.* at 826.

192 *See* Reed, *supra* note 106, at 498–99; *see also* Ferster, *supra* note 106, at 100–04.

193 *See supra* Part II.A.1.

perfect every time. This is especially true given how long and complicated IEPs can be and how many different actors are involved in implementing them properly. When the timing and frequency of the services are added to the mix, the per se rule is even more troubling: if speech therapy is missed only one week due to a scheduling error on the school's part, it seems quite harsh to deem it an IEP violation even if the same therapy is provided every subsequent week. Such a scenario is far less problematic than the one in *Bobby R.*, where several months' worth of weekly service were provided over a single summer.[194] But a per se rule would not distinguish between the two. Perhaps the differences could be sorted out in damages awards, but that would require courts to wade back into the troublesome waters of determining whether and to what extent replacement services met the same need (thus obviating a key justification for per se over materiality).

Further, the per se rule might be unrealistic in specific contexts. A stay-put IEP—an old IEP that remains in place while a new IEP is being challenged—is a good example.[195] If a child has changed schools or placements in the meantime, certain provisions of the old IEP might not be applicable, but the amendment process is unavailable because the new IEP is already under contention. As the Eleventh Circuit put it, "Adopting a hair-trigger standard for implementation cases would turn the stay-put provision into a sword rather than a shield."[196] The per se rule "fail[s] to distinguish between schools that implement stay-put IEPs to the fullest extent possible in a new setting and schools that simply give up."[197]

Emergency situations are another example. No amount of planning or orderly revisions can fully account for unavoidable or unforeseen circumstances. This is always true—it's why contracts contain force majeure clauses. A deadly pandemic might sweep the country and make the former IEP impossible as schools transition online. In a more quotidian example of an unavoidable (but nonemergency) circumstance, a speech therapist might quit unexpectedly, and an interim measure would be needed for some time before the IEP can be revised or a new speech therapist can be found. Either way, courts are sympathetic to school districts dealing with unexpected or unavoidable circumstances, and that

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194 *Bobby R.*, 200 F.3d at 344.

195 *See L.J.*, 927 F.3d at 1213.

196 *Id.*

197 *Id.*

sympathy should be built into the proper standard. That said, a per se rule could allow for flexibility by affording schools various defenses to violations. Because no majority has deployed the rule, it's difficult to say whether courts would have expanded defenses alongside the expanded definition of a violation. This Comment's proposed solution puts forward one such possibility.

There's also an important policy objection to the per se rule: it might result in lower-quality IEPs for children with disabilities. Schools would be incentivized to stick as close as possible to the minimum required by *Endrew F.* because any violation could lead to liability and a lawsuit. Schools would promise less, innovate less, and be less responsive to parents' requests for additional services in the IEP.[198] In fact, the per se rule might have the perverse effect of pushing parents' advocacy and their colloquies with educators out of the carefully circumscribed IEP process entirely. The school would promise the bare minimum in the IEP, and if it later chose to supplement that with additional services, then it would do so outside the IDEA's careful statutory framework. Additionally, the per se rule risks eliminating the more positive, aspirational aspects of overpromising: in some circumstances, inclusion of a certain accommodation or service in an IEP might serve as an impetus for the school to adopt new services, develop new infrastructure, or hire new employees.

Finally, courts are simply unlikely to adopt a per se rule. Courts are reluctant to interfere so heavily in the provision of education, to remove discretion entirely from the school decision makers, and to eliminate their own judicial oversight. No court has embraced a per se rule despite all of the issues with materiality, the *Van Duyn* dissent, and subsequent scholarship. This is at least some evidence that courts are unlikely to adopt the per se rule in the future.

Courts are left in a bind. Materiality is imprecise, unworkable, and inconsistent with the IDEA's emphasis on procedure. It also incentivizes overpromising, brings the court outside its institutional competence, and is in tension with the Court's analysis in *Endrew F.* As highlighted in the case discussions, courts have often justified their use of materiality, notwithstanding these issues, by pointing to the need for some flexibility and the lack of a viable alternative that affords it. This Comment argues for such

198 *See* Rachel B. Hitch, *Flags on the Play?: We're on the Same Team!*, 48 J.L. & EDUC. 87, 90 (2019) (asserting that *Endrew F.*'s heightened standard has had little effect on the ground because school districts don't write IEPs "aimed at providing minimal benefit").

a viable alternative—a new test that would push decisions about a student's education back into the IEP process, divert substantive inquiries about the quality of the IEP back to content challenges, and allow flexibility where warranted.

III. A NEW APPROACH

The binary way in which courts and scholars have approached implementation cases—limiting the choice to either a materiality standard or a per se standard—has led to an undertheorizing of the legal justifications and policy arguments in this area. This Comment has attempted to lay out some of those complications and put the various applications of the materiality standard in conversation both with each other and with the broader range of factual circumstances that can arise under the IDEA. This Comment aims to provoke a more robust discussion and more thorough understanding of implementation cases and the critical role that they play in the overall statutory scheme. Specifically, this Part identifies an alternative that attempts to resolve many of the issues with the materiality and per se standards. In addition to demonstrating the value of this proposed standard, this analysis also highlights more generally the value of alternatives to the prevailing approaches in this area of law.

A. The Burden-Shifting Test

This Comment's proposed test would operate as follows. First, the parents and child would have the burden of demonstrating the failure to implement the IEP akin to a per se violation. In response, the school district could defend its failure to implement the IEP by demonstrating that (1) the deviation from the IEP occurred as the result of unforeseen or unavoidable circumstances *and* (2) the school's response was proportional to the challenge posed by the circumstances. The proportionality inquiry would consider both the school's efforts to revise the IEP through the statutory processes and the provision of replacement services in the meantime. This Section explores in further detail the operation of both steps of the test.

1. The failure to implement—a per se violation.

At the first step, the parents and child would carry the burden of demonstrating that the school failed to implement the IEP. This step would operate like a per se test: The court would *not*

screen out failures to implement that it deems immaterial, insignificant, or insubstantial. The parents would have to show evidence of the implementation failures, and the school could rebut those facts and argue that it followed the IEP.

The most likely source of conflict at this stage, then, would be interpreting the written terms of the IEP in order to determine whether what actually occurred was consistent with what was promised. Although burdensome, both the materiality and per se inquiries require the court to perform this role at some point. The materiality standard permits judges to be less precise about what exactly the IEP calls for because they only need to decide if what the child received was in the realm of what was offered. Yet it seems preferable for judges to be more precise about what they understand an IEP to require—it helps parents know what to expect and encourages schools to draft IEPs more clearly. Moreover, interpreting language in a written document is squarely within judges' expertise.

2. The affirmative defense.

At this point, the burden would shift to the school district to assert its affirmative defense in order to avoid liability. The defense has two prongs. First, the school district must demonstrate that the implementation failure was the result of an unforeseen or unavoidable circumstance.[199] We've already seen the examples of a stay-put IEP or an emergency situation. Other simple examples might include a teacher quitting, a critical technology malfunctioning, or some other turn of events that the IEP team did not contemplate and could not have been reasonably expected to plan for.

This should be distinguished from gaps in resources or capability that the school either did foresee or should have foreseen

[199] This prong is similar in some ways to a thoughtful theory proposed by Jeffrey Knight in a student comment. Knight suggested that courts "look[ ] simply at why the failure occurred" when resolving any implementation cases that arise in the "gray area" between de minimis failures and material or substantial failures. Knight, *supra* note 23 at 404 (emphasis omitted). Under his theory, the "intent of the actor—typically the teacher or a school administrator—becomes paramount in determining whether an IEP violation has occurred." *Id.* Some of the benefits of this theory are similar to benefits with this Comment's proposed approach—encouraging IEP revision and avoiding "abstract inquiries into the significance of IEP provisions." *Id.* However, this Comment's proposed approach is distinct in several ways: the burden-shifting element, the focus on objective factors in the first prong as opposed to intent, and the requirement of the second response prong are a few of the differences.

while forming the IEP. For example, promising a certain kind of therapy while not having anyone trained in that therapy nor realistic plans to recruit or train someone would not be sufficient to justify after-the-fact deviations. In such instances, the school would be held to the letter of the IEP and would have to compensate the child for what was lost or reimburse the parents for replacement services already purchased. Parents and school districts can still have aspirational provisions in IEPs and use the document as a signal of forward commitment, but the IEP should reflect realistic expectations as far as timeline and certainty. For example, if the school does not have a properly equipped quiet room, but the parents advocate for it strenuously in IEP meetings and the school is convinced that the quiet room is a good idea, the IEP can contain the school's commitment to add a quiet room. If unexpected difficulties arise in creating it, the school would have this affirmative defense available. In other words, IEPs should be explicit about which provisions are aspirational and which ones establish immediate expectations.

The facts of *Spring Branch* provide another example of the value of this first prong of the affirmative defense. In *Spring Branch*, as described above, the student's IEP did not include clarification about how school officials should respond in "emergency" situations, such as danger to the safety of the student, classmates, or teachers.[200] This Comment already expressed some concern about why, given the student's history, the IEP did not provide for such emergency circumstances. Requiring the school to explain its decision would encourage courts to focus that inquiry. Should the IEP have contemplated such circumstances? Overall, it would be better for students, school officials, and parents if challenging situations that are reasonably foreseeable are dealt with during the deliberative IEP process, with the input and understanding of all parties, rather than addressed in the moment and with results that shock students and families. More facts would be needed about the circumstances in *Spring Branch* to determine whether the school district would have been liable under this requirement. The point here is that foreseeability of the circumstances—rather than how far the response deviated from what the IEP did specify—is the proper inquiry.

The second prong of the affirmative defense addresses the school's response to the unforeseen circumstances, which must be

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[200] *See supra* Part II.A.2.b.

proportional to the challenge posed by the circumstances. This prong is a flexible inquiry, designed to ensure that schools do not throw their hands up in the face of unforeseen circumstances but rather make a concerted effort to address the situation, support the child's education in conformity with the previous IEP, involve the parents in collaborative and responsive decision-making, and amend the IEP to reflect any changes as soon as practicable. Courts should place a heavy thumb on the scale in favor of requiring amendment through the IDEA's statutory processes.

The Eleventh Circuit's approach in *L.J.* provides support for the second prong of the affirmative defense. The school district was implementing a stay-put IEP that was inapplicable in many respects to the student's new school, and the court found it legally relevant that "the school did not simply sit on its hands" in response to indications that L.J. was not progressing under the IEP but instead offered "a wide range of supports."[201] The court essentially found that the school did the best that it could have done, which has little to do with materiality. The court wanted to distinguish between good and bad responses to unavoidable circumstances that interfere with perfect compliance—rewarding and incentivizing the former while penalizing and disincentivizing the latter. This second prong allows courts to do so.

It's important to note that this prong is *not* a materiality inquiry. Under the materiality standard, the comparison is between what was offered and what was given, with the judge often making decisions about educational quality and importance. In contrast, this proportional-response prong compares the difficulties created by the unforeseen or unavoidable situation to the efforts that the school made in response. At this stage of the analysis, judges should consider factors like the extent to which the parents were involved in responsive decision-making, how promptly the school moved to amend the IEP to account for the disruption, and what compensatory services were offered in response relative to what the school had available. Another important distinction between the use of proportionality in the burden-shifting test and the materiality inquiry is that this analysis is performed only after the court has already identified meaningfully changed circumstances that made IEP implementation fail. Any concerns about unworkability or lack of notice are lessened because schools would not draft and parents would not negotiate IEPs with the

[201] *L.J.*, 927 F.3d at 1218–19.

proportional-response prong of the defense in mind. In other words, the flexibility of the proportionality prong is earned by the unforeseen- or unavoidable-circumstances prong.

The initial stages of the COVID-19 pandemic provide a good example for the test. A substantial number of IEPs were massively disrupted, with serious consequences for children with disabilities and their families. At least in theory, a materiality analysis would have, after the fact, afforded those families relief for the gap between the IEP and what they received. But a materiality analysis, which is already difficult to perform, is especially complicated in a disaster context. First, courts likely and understandably would consider whether the school district could have avoided the failure or whether it acted proportionally in response to the circumstances. The proposed approach would focus that inquiry and help calibrate the proper amount of flexibility. The proposed rule would have allowed some IEP deviations in the immediate wake of the COVID-19 outbreak, which was unforeseen and unavoidable, so long as the school's response was proportional in light of the circumstances. At some point, however, some amount of continued COVID-19 disruption became foreseeable, and IEPs had to be amended and written in response to those circumstances. Second, parents would have to attribute lack of progress or regression to the implementation, which is challenging even without the massive disruption of a pandemic, isolation, and lockdowns. Third, judges would be entirely focused on assessing whether virtual services were an appropriate substitute for in-person ones. This is a gargantuan task, especially in the context of an unprecedented disruption in which experts are still studying the impacts on children with disabilities.

Under the proposed approach, however, judges would focus instead on how the school responded in the immediate aftermath of the crisis given the resources available. Questions that courts would consider include: How involved were the parents in decision-making about remote services and education? How effectively did the school utilize its available resources in the immediate scramble when the pandemic hit? Once it became clear that the pandemic was a long-term disruption, did the school amend IEPs to address the new reality? Did IEPs reflect the possibility of future outbreaks to the extent that they were foreseeable?

B. Benefits

This approach integrates the benefits of both the materiality inquiry and the per se rule. It honors several aspects of the statutory scheme by respecting the judgment of the school decision makers and parents who thoughtfully and collaboratively constructed an IEP and by not second-guessing the importance of any of the provisions. For the same reasons, it gives due weight to the tradeoffs that parents made in advocating for their child in the process. It respects the IDEA's IEP-revision provisions by channeling changes to the IEP back into that process as soon as practicable rather than by allowing them on an ad hoc basis as long as they're deemed immaterial. It is in line with the "in conformity with" language of § 1401(9)(D), which calls for correspondence with the plan but contemplates something less than precise compliance. And it is more consistent with the *Rowley*–*Endrew F.* line of precedent by pulling back the deference to school decision makers where it isn't governed by the IDEA's procedure, reemphasizing the process that allows for individualization, and avoiding the theoretical gap between content and substance inquiries created by bare-minimum IEPs. This Section elaborates on the benefits of the proposed approach.

1. Honoring the IEP process.

First, and most importantly, this test funnels decisions about what it means for a child to receive a FAPE back into the IEP formation, revision, and evaluation processes. If circumstances or the opinions of school officials change, then the IEP itself must be changed. The IEP process is the core of the statutory scheme. Under the proposed rule, school districts would lose an implementation challenge for knowingly flouting an IEP instead of revising it. This could happen either because the school knew in formulating the IEP that it wouldn't be able to live up to the content (and thus the affirmative defense would fail under prong one) or because the school did not proceed to amend the IEP in response to changed circumstances (and thus would fail under prong two). If the content of the revised IEP is below the statutory minimum required by *Endrew F.*, then the school district would lose a content challenge—but that would not factor into the implementation analysis. In this way, substantive decisions about educational quality will be kept in the content context rather than shoehorned into an implementation inquiry.

One possible objection to this focus on process is the power differential in IEP-formation proceedings. While parents can provide input, if the school decision makers continue to disagree, then parents' only recourse is to threaten or pursue administrative proceedings and litigation, both of which are expensive and time-consuming. Further, parents suffer from information asymmetries relative to the school.[202] Specifically, they probably lack the school's specialized information about their child's ability level, knowledge of the school's resources and options for providing support, or awareness of the legal regime itself.[203] This is especially true given Supreme Court decisions denying parents reimbursement for educational experts and other nonlegal costs of challenging an IEP.[204] The threat of further action is sometimes insufficient leverage to exert pressure in the IEP process.[205] These disparities make the ability of parents to influence their child's education dependent on the family's resources, frequently pushing lower-income parents out of the process despite the IDEA's formal protections.[206] As such, recentering the procedural protections may be misguided.

Ultimately, however, these unequal dynamics are a broader critique of the IDEA's approach. The proportionality prong does require that parents have an understanding of the school's capabilities in the face of a challenge and a sense of whether the school could have expected the challenge causing the implementation failure to arise. Arguably, parents could be in a better position to assess whether something is important to their child's education—as they have to show under the existing materiality test. However, in order to win an implementation challenge, the parents still have to prove to courts (which are inclined to be deferential to school districts) that the missing service was material. The proposed rule addresses these unequal dynamics better than the materiality test does: It shifts the burden to the school district to assert the affirmative defense, making it easier for parents to bring these claims and have leverage in negotiations. It does not require parents to have specialized knowledge about the

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202 *See* Claire Raj & Emily Suski, Endrew F.*'s Unintended Consequences*, 46 J.L. & EDUC. 499, 506–10 (2017).

203 *See id.*

204 *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 304 (2006).

205 Raj & Suski, *supra* note 202, at 508–09, 518–19.

206 *Id.* at 516–22.

materiality of any particular provision nor expert testimony to that effect.

2. Calibrating incentives.

Second, this Comment's proposed test better calibrates the dynamic relationship between IEP formation and the implementation standard. Proponents of the per se rule have not fully considered the incentives that it would create for school districts to lower the quality of IEPs and provide any additional services over and above the IEP outside the IDEA's prescribed process without its informational benefits. In other words, stricter implementation standards (including the proposed approach, relative to the materiality standard) are likely to lower the ambition and detail of IEPs. On the other hand, courts expounding a materiality standard have failed to grapple with the incentive to overpromise and thus prevent parents from making their concerns heard or escalating disagreements about content prior to implementation. More permissive implementation standards push the hard choices about a student's education out of the IEP process and away from the administrative and judicial checks mandated by *Rowley* and *Endrew F.* The proposed test is a middle ground, cognizant of these dynamic effects. The proposed test forces difficult decisions about resource tradeoffs into the IEP process. A school might also be incentivized, under the proposed approach, to be more explicit about when and how it might adopt certain "reach" services, seeking permission for flexibility rather than asking courts for forgiveness.

3. Improving notice and predictability.

Third, and relatedly, the proposed test gives the regulated parties and the rights holders far better notice than the materiality approach. Parents could rely on an IEP being implemented as written—except in the context of exceptional circumstances, in which case they could expect short-term, remedial efforts and prompt revision. School districts would be put on alert that they generally have to deliver what is promised and will compose IEPs that are achievable. At the same time, school districts would know that they will and do have flexibility in the face of true disruptions: this should make them less fearful about offering certain services and better able to act to support students in the face of a crisis. Even if courts were to interpret the unavoidable-and-unforeseen-circumstances prong leniently, giving schools leeway

as long as there is a colorable argument that the IEP team was surprised by the change in circumstances, at least parents would have a sense of when the IEP would and wouldn't be binding on the school from that precedent.

The bottom line for both the second and third arguments is this: Under the materiality test, the school is incentivized to overpromise and underperform the IEP, and there isn't a clear doctrinal way to address it. Under the per se rule, however, the liability risk is so high that schools would promise as little as they could, and anything more that they do for students would happen outside the IEP process. In an ideal world, the school would use the IEP process to find and adopt solutions optimized for each child's situation and the school's available resources. Schools would be realistic about what could be accomplished with the knowledge that there would be some amount of flexibility if circumstances changed in a way the school didn't or couldn't predict. The proposed approach is an attempt to bring us closer to that world than either the materiality or the per se test would.

4. Harnessing the court's institutional competence.

Fourth, judges have greater institutional competence in making the decisions called for by the proposed rule. The first step involves a potentially complex, but conceptually straightforward, assessment of the facts of implementation and a student's education. It might also involve interpreting IEP terms, but, as mentioned above, courts are well-equipped to perform that task. The second step involves an unavoidability or foreseeability inquiry and a proportionality inquiry, neither of which requires making substantive judgments about how an IEP is supposed to work as a whole, comparability of similar but different services, or how much progress a child might have been expected to make given their particular circumstances. Instead, judges assess whether (1) the school exercised its judgment about its own capabilities during the IEP's creation, and (2) the school responded promptly and proportionally once circumstances forced deviation from the IEP.

5. Addressing information and expertise asymmetry.

Fifth, by shifting the burden to the school district to demonstrate an affirmative defense in the implementation context, the proposed test helps address the issues of information and expertise asymmetry that make it hard for parents to bring

claims. Burden shifting is not a cure-all for resource disparities or other inequities in litigation. However, the school district is well equipped to justify its decisions whereas parents suffer from an informational asymmetry; the IEP process is meant to bring parents into the fold and cure that imbalance, but, in implementation cases, the school has strayed from the IEP that the parents helped to craft.[207] Given that imbalance, parents are less equipped to bear the burden in an implementation case than a content case. Further, because these disparities between parents and schools disproportionately impact low-income families,[208] the proposed rule makes implementation challenges more equitably available. Parents would not need to pay out of pocket for experts to demonstrate that the education their child actually received was insufficient under *Rowley* and *Endrew F.* or was meaningfully and significantly different from what was agreed upon. To shift the burden, parents need only demonstrate that what their child received was not what was agreed upon. Parents will likely still need expertise to respond to the school's assertion of its affirmative defense, but information about a school's resources and the state of its planning requires less expertise to analyze than reports about education. For example, if a school promises a quiet room, has no quiet room, and makes no effort to equip a quiet room for several of the months in which the quiet room was promised, it's hard to imagine what role expertise would play. The burden shifting could also alter the dynamics of prelitigation negotiation.

A brief word on the legality of this burden shifting. The Supreme Court held in *Schaffer* that the burdens of proof and persuasion in a challenge to the content of an IEP are on the party seeking relief.[209] There are several reasons why this does not pose a problem for the proposed test. First, *Schaffer* did not extend the principle to implementation challenges.[210] Second, the Court noted that placing the burden of persuasion on plaintiffs with regard to "the essential aspects of their claims" is a "default rule" that "admits of exceptions."[211] One noted exception is when certain "elements can fairly be characterized as affirmative defenses

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[207] *Id.* at 506.
[208] *Id.* at 516–22.
[209] *Schaffer*, 546 U.S. at 62.
[210] *Id.* at 59–60.
[211] *Id.* at 56–58.

or exemptions."[212] Third, the Court's IDEA-specific reasoning about burdens does not apply to the implementation context. For example, the Court refused to "assume that every IEP is invalid until the school district demonstrates that it is not" by requiring the school district to carry the burdens.[213] The proposed burden shifting wouldn't have that effect. Fourth, the Court invokes Congress's faith in the collaborative procedures, citing *Rowley*'s description of a "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."[214] Putting a burden on the school in the implementation context carries with it no problematic presumptions about IEP invalidity—in fact, it honors the validity of the IEP initially created and furthers parents' ability to trust that it will be implemented. Fifth, and most importantly, the proposed test does not run afoul of *Schaffer* because the initial burdens are still placed on the party seeking relief for the underlying claim. The proposed test allows the school to assert and win a defense that would insulate it from liability under certain circumstances—but only where the plaintiff has already carried their burden regarding the failure to implement.

CONCLUSION

This Comment analyzed an underdiscussed aspect of the IDEA's delivery of education and services to children with disabilities: What happens after an IEP has been agreed upon and the school has to carry it out, but the school arguably fails to meet its responsibility? Part II established how courts have understood the predominant materiality inquiry in failure-to-implement cases and concluded that the approach is both unworkable and unwarranted. This Comment also established the many issues with both the materiality standard and the per se rule—the materiality standard's only judicially identified alternative. The materiality standard circumvents the procedural protections of the IDEA; provides little predictability to parents and schools and little guidance to courts; forces judges away from areas of institutional competence; and incentivizes school districts to overpromise and underdeliver, creating a doctrinal gap between

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[212] *Id.* at 57.

[213] *Id.* at 59–60.

[214] *Schaffer*, 546 U.S. at 60 (citing *Rowley*, 458 U.S. at 206).

content and implementation challenges that allows students' substantive right to a FAPE to fall through the cracks. The per se rule, on the other hand, is insufficiently flexible given both practical concerns and statutory constraints, would disincentivize ambition and innovation in IEPs, and is unlikely to be adopted. Finally, this Comment proposed an alternative test that addresses the greatest concerns with both the materiality and per se approaches. Part III sketched out the broad contours of the test, gave concrete guidance on how it might operate, argued for its consistency with the statute and precedent, and articulated additional benefits that it might generate.

The IDEA was enacted to cure a grave societal ill. The statute incorporated parents into decision-making about the quality and content of their child's education and attempted to ensure that educational plans were deliberately constructed and individualized. The IDEA also introduced procedures for managing disagreement between parents and the rest of the IEP team.

On top of those important procedural rights, the statute created a substantive right to an education of a certain quality. As the Court described in *Rowley* and *Endrew F.*, the aim of the statute was to actually provide the opportunity for educational advancement to children with disabilities. A "free appropriate public education" means something, but defining it is a challenge. Given all that, it's understandable—even desirable—that a substantial amount of scholarly literature and case law has focused on understanding the IDEA's procedural requirements and exploring the meaning of FAPE in the IEP context. However, the current materiality approach undermines the value of the procedural protections and the underlying substantive rights. The problems identified with the per se approach, from a legal and policy perspective, are also well-taken. The search for an implementation standard must go on.

While one contribution of this Comment is the proposed test itself, perhaps more important is its attempt to prompt further discussion about intermediate approaches that might replace the binary choice between materiality and per se that has dominated scholarship and judicial decision-making. Additional research might raise further issues with the proposed approach or identify an entirely new alternative that better addresses the concerns raised in this Comment. Courts will be able to better calibrate the flexibility that schools require with the deliberation and quality created by the IEP process, resulting in better educational

outcomes for students with disabilities. The implementation portion of IDEA litigation matters. Certainly, children with disabilities and their families deserve the follow-through.