No. 15-827

IN THE
Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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BRIEF FOR RESPONDENT

INTRODUCTION

This Court answered the question presented 34 years ago. It held that the Individuals with Disabilities Education Act (IDEA) does not contain "any substantive standard prescribing the level of education to be accorded" children with disabilities. *Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 189 (1982). It concluded that the Act instead contains a straightforward requirement: that the individualized education program (IEP) of personalized instruction and supportive services the statute mandates for each child be reasonably calculated to confer "some educational benefit." *Id.* at 200.

That decision was correct. Congress enacted the IDEA pursuant to the Spending Clause; as a condition of receiving federal funds, States are required to provide such services "as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26). Congress did not think any further substantive standard was necessary to ensure that children with disabilities get a quality education. Rather, it sought to achieve that ambitious aim principally through a comprehensive, finely reticulated scheme of procedural requirements and systemic policies. The Court cannot surprise participating States by superimposing on this scheme a substantive condition of which they had no notice.

Petitioner and the Government nonetheless ask this Court to fashion a sweeping new standard, advanced for the first time in their merits briefs in this case. But even they cannot agree what that standard should be: Petitioner contends (at 40) the Act requires that an IEP be designed to provide educational "opportunities" "substantially equal to the opportunities afforded children without disabilities," while the Government says (at 17) the Act mandates an IEP that provides "an opportunity to make significant progress." Petitioner's *amici* offer still other, conflicting tests. No State agreed to these requirements when it accepted IDEA funds, and the Court cannot adopt any of them without overruling *Rowley*. This Court should apply *stare decisis* and enforce the Act as written.

STATUTE INVOLVED

Key provisions of the IDEA are reprinted in the joint appendix. J.A. 21-111.

STATEMENT

A. Statutory Background

Congress enacted the IDEA pursuant to the Spending Clause. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295 (2006). The Act offers States a deal: If a State "compli[es] with [the statute's] extensive goals and procedures," then it is entitled to receive "federal funds to assist * * * in educating children with disabilities." *Id.* (internal quotation marks omitted). To hold up its end of the bargain, a State must satisfy 25 express conditions. *See* 20 U.S.C. § 1412(a).

1. a. The Act's principal funding condition is the requirement that each participating State make available a "free appropriate public education," or FAPE, "to all children with disabilities residing in the State between the ages of 3 and 21." *Id.* § 1412(a)(1). The Act defines "free appropriate public education" to mean "special education and related services that" meet four specified requirements. *Id.* § 1401(9). "Special education" is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." *Id.* § 1401(29). And "related services" means "transportation, and such developmental, corrective, and other supportive services * * * as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26).

The Act also describes each of the four requirements a child's special education and related services must satisfy to constitute a FAPE. First, the education and services must be "provided at public expense, under public supervision and direction, and without charge." *Id.* § 1401(9)(A). Second, they must

"meet the standards of the State educational agency," *id.* § 1401(9)(B), meaning that States must, as a matter of federal law, abide by any educational requirements they have set for children with disabilities. Third, the education and services must "include an appropriate preschool, elementary school, or secondary school education in the State involved." *Id.* § 1401(9)(C). That means that children with disabilities must be schooled at "approximate[ly] the grade levels used in the State's regular education." *Rowley*, 458 U.S. at 176. Fourth, and most critically, a child's special education and related services must be "provided in conformity with the individualized education program," or IEP, "required under section 1414(d)." 20 U.S.C. § 1401(9)(D); *see id.* § 1412(a)(4).

The IEP is the "centerpiece" of the Act. *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). Schools must follow an "extensive" process in developing an IEP for each child with a disability. *Rowley*, 458 U.S. at 189. At the start, the school must "conduct a full and individual initial evaluation" of the child to determine the nature of his disability and any related needs. 20 U.S.C. § 1414(a)(1)(A); *see id.* §§ 1412(a)(7), 1414(b)-(c). The school must then assemble an "IEP Team" composed of the child's parents, his teachers, and educational experts, *id.* § 1414(d)(1)(B), to "consider" the results of the evaluation, "the strengths of the child," "the concerns of the parents," and the child's "academic, developmental, and functional needs," among other factors. *Id.* § 1414(d)(3)(A).

After conducting that review, the IEP Team must draft an IEP that satisfies a detailed checklist of requirements. The broad outlines of that checklist have remained roughly the same since 1975. *See Rowley*, 458 U.S. at 182 (quoting 20 U.S.C.

§ 1401(19) (1976 & Supp. IV)). Each IEP must contain a statement of the child's present levels of performance, his annual goals, and the educational services to be provided him, among other things. 20 U.S.C. § 1414(d)(1)(A)(i). Pursuant to the Act's "[l]east restrictive environment" requirement, the IEP must also ensure that, "[t]o the maximum extent appropriate," the child is "educated with children who are not disabled." *Id.* § 1412(a)(5)(A).

In 1997 and 2004, Congress added considerable detail to this checklist. *See* IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A), 111 Stat. 37, 83-85; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 614(d)(1)(A), 118 Stat. 2647, 2707-2709. Today, in assessing the child's "present levels," the IEP Team must take into account his "academic achievement and functional performance." 20 U.S.C. § 1414(d)(1)(A)(i)(I). In setting the child's annual goals, the IEP Team must consider what would enable him to "be involved in and make progress in the general education curriculum" and "meet each of [his] other educational needs." *Id.* § 1414(d)(1)(A)(i)(II). And in developing the child's "special education and related services," the IEP Team must consider—"based on peer-reviewed research to the extent practicable"—what would allow him "to advance appropriately toward attaining the annual goals," "to be involved in and make progress in the general education curriculum," and "to be educated and participate with other children" in school activities. *Id.* § 1414(d)(1)(A)(i)(IV). Starting when a child is 16, his IEP must also contain "appropriate measurable postsecondary goals" and a statement of the "transition services

* * * needed to assist [him] in reaching" them. *Id.* § 1414(d)(1)(A)(i)(VIII).

If parents believe a school has failed to provide their child a FAPE, they may file a due process complaint with the state educational agency. *Id.* § 1415(b)(6). If the dispute cannot be resolved consensually, an impartial hearing officer conducts a hearing concerning the parent's claim; should the officer determine that the child was denied a FAPE, the officer may award a broad range of relief. *Id.* § 1415(f)(1), (f)(3)(E), (i)(2)(C)(iii); *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009). Any "party aggrieved" by a hearing officer's decision may seek review in state or federal court. 20 U.S.C. § 1415(i)(2)(A).

b. This Court first considered the meaning of the Act's FAPE requirement in *Board of Education* v. *Rowley*. In that decision, the Court explained that a State's obligation to provide a FAPE is twofold. First, a State must "compl[y] with the *procedures* set forth in the Act," by following the detailed process the Act prescribes for developing an IEP. *Rowley*, 458 U.S. at 206-207 & n.27 (emphasis added). Second, the resulting IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. The IEP, the Court explained, need not provide any particular "level of education." *Id.* at 189. So long as it is designed to provide "*some* educational benefit," the Act's substantive standard is satisfied. *Id.* at 200 (emphasis added).

2. In addition to the FAPE requirement, the Act contains an array of *systemic* conditions that States must satisfy to receive federal funds. For instance, each State must set a state-wide "goal of providing

full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal." 20 U.S.C. § 1412(a)(2). Each State must establish "goals for the performance of children with disabilities" that "are the same as the State's long-term goals" under the Elementary and Secondary Education Act of 1965 (ESEA). *Id.* § 1412(a)(15)(A). And each State must set adequate qualifications for special-education personnel, *id.* § 1412(a)(14), ensure access to instructional materials for the blind, *id.* § 1412(a)(23), and prohibit mandatory medication, *id.* § 1412(a)(25), among many other things.

The Department of Education polices States' efforts to satisfy these systemic requirements. Each State must submit a plan to the Department assuring that it "has in effect policies and procedures" to meet each condition. *Id.* § 1412(a). Pursuant to a 2004 amendment to the Act, States also must submit "performance plan[s]" setting "measurable and rigorous targets" for improvement and performance reports detailing their progress. *Id.* § 1416(b)(2)(A), (C)(ii). If the Department determines that a State is not "meet[ing] the requirements and purposes of [the Act]," the Department may order it to reallocate federal funds or impose other funding conditions. *Id.* § 1416(d)(2)(A)(i), (e)(1)-(2). If a State remains in continual noncompliance, the Department can cut off federal funds in whole or in part. *Id.* § 1416(e)(2)(B)(iii)-(v), (3)(B).

B. Procedural History

1. Petitioner Endrew F. ("Drew") is a child with a diagnosis of autism and attention deficit/hyperactivity disorder. Pet. App. 3a. These conditions affect

his "cognitive functioning, language and reading skills, and his social and adaptive abilities." *Id.* Drew attended schools in the Douglas County School District from preschool through the fourth grade, and received special education and related services under a series of IEPs. *Id.* at 3a-4a.

Drew's preschool and kindergarten years "went well," and he made academic progress through the first and second grades. *Id.* at 61a, 63a. In the second grade, however, Drew's "behavioral problems began increasing," leading his IEP Team to institute a behavioral intervention plan (BIP). *Id.* at 63a.

Drew's third-grade IEP nearly tripled the amount of time he spent either in a significant-support-needs classroom or with a paraprofessional aide to 33.5 hours total, and added the services of a mental-health professional and speech-language therapist. Supp. J.A. 39sa, 73sa. Although Drew "ma[de] progress towards some of [his] goals and objectives," his behavior "beg[a]n to interfere with [his] educational opportunities." Pet. App. 65a. Drew's fourth-grade IEP included a new BIP, designed to help him function better in his general-education classroom. Supp. J.A. 117sa-119sa.

Drew's IEP Team met again in April 2010 to design an IEP for the upcoming fifth-grade year. Pet. App. 67a. Drew's fifth-grade IEP called for more hours in the significant-support-needs classroom or with his paraprofessional aide. Supp. J.A. 109sa, 142sa. Because "[e]veryone" at the meeting agreed "that a new BIP was needed and that an autism specialist should be part of the team," the team agreed to reconvene on May 10, 2010. Pet. App. 68a. But Drew's parents never attended that meeting. In-

stead, on May 1, they notified the school district that they were enrolling Drew at Firefly Autism House, a private school specializing in educating children with autism. *Id.* at 29a, 68a-69a.

2. In February 2012, Drew's parents filed a due process complaint with the Colorado Department of Education seeking reimbursement for the cost of sending Drew to Firefly, where tuition approached $70,000 per year. J.A. 16-20; 2 C.A. App. 72; *see* 20 U.S.C. § 1412(a)(10)(C)(ii). They claimed that Drew had "stopped making progress in his first grade year," and that his fifth-grade IEP "was not substantively different than the IEPs that had failed to provide [him] an appropriate education in the past." J.A. 18-19.

After a three-day hearing featuring arguments from counsel for both sides and testimony from a number of witnesses, a state administrative law judge (ALJ) denied the parents' claims. Pet. App. 47a-49a, 59a-85a. The ALJ concluded that the fifth-grade IEP discharged the school district's obligation to provide a FAPE because the IEP was "reasonably calculated for [Drew] to receive educational benefit." *Id.* at 84a.

3. Drew's parents then filed suit in federal court challenging the ALJ's decision. *Id.* at 33a. After "independently review[ing]" the administrative record, the District Court upheld the ALJ's determination. *Id.* at 38a (internal quotation marks omitted); *see id.* at 41a-49a.

The Tenth Circuit affirmed. *Id.* at 2a. The court explained that it had "long subscribed to the *Rowley* Court's 'some educational benefit' language," which it interpreted to mean that a child's IEP must be

reasonably calculated to offer a "more than *de minimis*" educational benefit. *Id.* at 15a-16a (internal quotation marks omitted). The court noted that this determination must be made "as of the time [an IEP] is offered to the student"; "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id.* at 21a (internal quotation marks omitted). Applying that standard, the court concluded that "the IEP rejected by [Drew's] parents" was "substantively adequate," as demonstrated by Drew's "progress towards his academic and functional goals on his IEPs * * * during the time he was enrolled in the District." *Id.* at 22a-23a.

The Tenth Circuit denied rehearing en banc. *Id.* at 86a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. In *Rowley*, this Court held that States provide a "free appropriate public education" to children with disabilities when they offer special education and related services that are "reasonably calculated" to "confer some educational benefit." 458 U.S. at 200, 207. This Court should not abandon that interpretation in favor of alternatives *Rowley* itself rejected.

Rowley dismissed petitioner's "substantially equal opportunity" standard, Pet. Br. 50—lifted straight from Justice Blackmun's separate opinion—as "entirely unworkable" and inconsistent with congressional intent. 458 U.S. at 198; *see id.* at 210-211 (Blackmun, J., concurring in the judgment). And it foreclosed the Government's contention that the Act requires "an opportunity to make significant educational progress," U.S. Br. 6-7, by holding that the Act does not "prescrib[e] the level of education to be

accorded handicapped children." *Rowley*, 458 U.S. at 189 (majority opinion). The Court likewise declined to read the word "appropriate" to impose any substantive standard, concluding that the legislative history "unmistakably disclose[d]" that "an 'appropriate education' is provided when *personalized* educational services are provided"—nothing more. *Id.* at 197 (emphasis added).

The other side's efforts to recharacterize *Rowley* lack merit. No member of the Court thought *Rowley* left interpreting the Act's substantive standard for another day. Nor did anyone think the Court's isolated reference to providing "meaningful" "access" to public education tacitly reversed the Court's conclusion that the Act was not intended to "guarantee any particular level of education." *Id.* at 192. Rather, every Justice understood the Court to hold that access is meaningful where it is "sufficient to confer some educational benefit." *Id.* at 200; *see id.* at 214 (White, J., dissenting).

Stare decisis requires preserving *Rowley*'s decades-old construction of a Spending Clause statute—an interpretation Congress left untouched through two re-enactments of the Act and on which the States have justifiably relied.

II. If *stare decisis* did not decide this case, the statute's text and structure would. As legislation passed under the Spending Clause, the IDEA must set out its conditions "'unambiguously,'" placing state officials on "clear notice" of their obligations. *Arlington*, 548 U.S. at 296 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Yet petitioner and the Government cannot agree themselves on just what the Act requires. And their

attempt to ground their divergent standards in the word "appropriate" abandons the Act's own definitions in favor of tenuous inferences from broadly worded congressional findings. No reasonable state official reading what the statute actually says could be on "clear notice" of the standards petitioner and the Government would have this Court impose.

Rowley's "some educational benefit" standard, by contrast, is firmly rooted in the text and consistent with the IDEA's purposes. The statutory definition of a FAPE incorporates the requirement that a State provide "supportive services" that "assist a child * * * *to benefit from* special education." 20 U.S.C. § 1401(26) (emphasis added); *see id.* § 1401(9). Any state official would understand this language to require that IEPs be calculated to confer "some" benefit greater than *de minimis*. *Rowley*, 458 U.S. at 200-201.

Nor is that all the Act requires of participating States. Every IEP results from a statutorily mandated process designed to "maximize parental involvement" and ensure "individualized consideration of and instruction for each child." *Id.* at 182 & n.6, 189. And Congress has elaborated and refined the comprehensive list of items that process must address. 20 U.S.C. § 1414(d). Together, these requirements "assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. And they are accompanied by ambitious state-wide goals, enforceable by the Department of Education through funding cutoffs. 20 U.S.C. § 1416(e)(2)-(3). No state official encountering these provisions could conclude that it was "perfectly fine to aim low." U.S. Br. 36.

III. The other side's protean proposals would strain the competence of courts. Petitioner calls for the same "impossible measurements and comparisons" *Rowley* warned would be "entirely unworkable." 458 U.S. at 198. And the Government articulates no principled distinction between what progress is "significant" and what is not. Neither petitioner nor the Government plausibly explains how courts could apply these standards without straying into educational policy disputes they "lack the specialized knowledge and experience necessary to resolve." *Id.* at 208 (internal quotation marks omitted). This is the case in point: Neither petitioner nor the Government says what, under their standards, petitioner's fifth-grade IEP ought to have said. And if they cannot say, it is hard to imagine how a court could.

The only workable standard is the one *Rowley* prescribes and that circuits have applied for decades. That test requires courts to ensure that a child's IEP is reasonably calculated to provide that child some benefit. These are the kinds of commonsense, record-based judgments courts are well equipped to make. The Court should not impose a different standard now.

ARGUMENT

I. *ROWLEY* DEFINITIVELY ANSWERED THE QUESTION PRESENTED

A. *Rowley* Adopted A "Some Educational Benefit" Standard

Petitioner asks this Court to decide what "level of educational benefit" an IEP must aim to provide to satisfy the IDEA's FAPE requirement. Pet. i. The Court answered that question 34 years ago in *Rowley*.

Rowley held that the IDEA does not impose "any substantive standard prescribing the level of education to be accorded" children with disabilities. 458 U.S. at 189. The Court explained that, as a Spending Clause statute, the Act could not "impose [a] burden upon the States unless it d[id] so unambiguously." *Id.* at 190 n.11; *see id.* at 204 n.26. Yet a "substantive standard prescribing the level of education" was "[n]oticeably absent from the language of the statute." *Id.* at 189. Rather, the "definitions contained in the Act" provided that "a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Id.* at 188-189. And, "[a]lmost as a checklist for adequacy," the Act specified a series of additional requirements, including that the special education and related services be free, that they meet state standards, that they "approximate the grade levels used in the State's regular education," and that they "comport with the child's IEP." *Id.* at 189. "[T]he face of the statute" thus "evinces a congressional intent * * * to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child." *Id.*

The legislative history merely "confirm[ed]" that Congress did not mean to "guarantee any particular level of education." *Id.* at 191-192. "Neither" of the two federal-court decisions that "became the basis of the Act" "purport[ed] to require any particular substantive level of education." *Id.* at 193-194 & n.15. And the Senate and House Reports made clear that "an 'appropriate education' is provided when person-

alized educational services are provided." *Id.* at 197. Although the Rowleys argued that "the goal of the Act is to provide each handicapped child with an equal educational opportunity," *id.* at 198, the Court explained that "Congress' desire to provide specialized educational services, even in furtherance of 'equality,' cannot be read as imposing any particular substantive educational standard upon the States." *Id.* at 200.

Still, the Court recognized that "the education to which access is provided" must "be sufficient to confer *some* educational benefit." *Id.* (emphasis added). After all, the statutory definition of a FAPE requires States to offer services sufficient to permit a child "*to benefit* from special education." *Id.* at 201. An IEP designed so that the child could "receive *no* benefit" would violate that textual command. *Id.* (emphasis added). So while an IEP need not promise any particular *level* of benefit, it must be "reasonably calculated" to provide *some* benefit, as opposed to *none*. *Id.* at 207.

The Court then turned to how the "some educational benefit" standard would be applied in individual cases. The Court recognized that "[t]he Act requires participating States to educate a wide spectrum of handicapped children," with vastly different needs and capabilities. *Id.* at 202. While "[o]ne child may have little difficulty competing successfully in an academic setting with nonhandicapped children," another "may encounter great difficulty in acquiring even the most basic of self-maintenance skills." *Id.* A program calculated to confer a benefit on one child might offer only a *de*

minimis benefit to another—and a *de minimis* benefit is no benefit at all.[1] The Court therefore did "not attempt * * * to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id*. Instead, it "confine[d]" its application of the standard to the case before it. *Id.*

The Court concluded by observing that the Act's "elaborate and highly specific procedural safeguards" "demonstrate[] the 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." *Id.* at 205-206. It cautioned judges not to "substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. Rather, in suits alleging the denial of a FAPE, a court was to proceed in two steps: "First, has the State complied with the procedures set forth in the Act," including "creat[ing] an IEP * * * which conforms with the [statutory] requirements"? *Id.* at 206 & n.27. And, second, is the

[1] The vast majority of the federal courts of appeals over the last three decades have equated some benefit with a "more than *de minimis*" or "nontrivial" benefit. *See, e.g.*, *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *K.E. ex rel. K.E.* v. *Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011); *P. ex rel. Mr. & Mrs. P.* v. *Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008); *Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008); *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002); *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997); *JSK ex rel. JK* v. *Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-1573 (11th Cir. 1991).

resulting IEP "reasonably calculated to enable the child to receive educational benefits"? *Id.* at 207. If the answer to both questions is "yes," the State "has complied with the obligations imposed by Congress and the courts can require no more." *Id*.

B. Neither Petitioner's Nor The Government's Standard Can Be Reconciled With *Rowley*

Petitioner and the Government each ask this Court to supplant *Rowley*'s "some educational benefit" standard with a new substantive requirement, advanced for the first time in their merits-stage briefing. Adopting either standard would require overruling *Rowley*.

1. To begin, *Rowley* rejected the very arguments petitioner and the Government make here.

a. Petitioner contends that a FAPE means "an education that aims to provide a child with a disability opportunities * * * that are *substantially equal* to the opportunities afforded children without disabilities." Pet. Br. 40 (emphasis added). Petitioner appears to have lifted that standard straight from Justice Blackmun's separate opinion in *Rowley*. Breaking from his colleagues in the majority, Justice Blackmun argued that "the relevant question" was "not, as the Court says," whether a child's IEP is "reasonably calculated to enable [her] to receive educational benefits," but "[r]ather" whether it offers her "an opportunity to understand and participate in the classroom that [i]s *substantially equal* to that given her nonhandicapped classmates." 458 U.S. at 211 (Blackmun, J., concurring in the judgment) (emphasis added); *see also id.* at 215 (White, J., dissenting) (arguing similarly that children should

be "given an equal opportunity to learn if that is *reasonably possible*" (emphasis added)). There is a reason petitioner's test appears only in Justice Blackmun's opinion: It failed.

Indeed, the Court devoted an entire section of its opinion to rejecting any standard based on equality of opportunity. *See id.* at 198-200 (majority opinion). Requiring States to provide "'equal' educational opportunities," it said, would "present an entirely unworkable standard requiring impossible measurements and comparisons." *Id.* at 198. The very concept of a "free appropriate public education," the Court explained, is "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." *Id.* at 199. The Court therefore concluded that Congress's interest in "equality" could not "be read as imposing any particular substantive standard upon the States." *Id.* at 200.

Attempting to cast *Rowley* in a different light, petitioner (at 30) says the Court held only that the Act does not require "higher levels of achievement for children with disabilities than for children without disabilities." That is simply not true. What the Rowleys advocated—and what the Court categorically rejected—was any requirement that States "maximize the potential of each handicapped child *commensurate with the opportunity provided nonhandicapped children*." 458 U.S. at 200 (emphasis added); *see id.* at 189-190, 198; Resp. Br. 17, *Rowley*, *supra* (arguing that a FAPE is "an education that provides Amy Rowley with an equal educational opportunity," and that "the school district is not required to guarantee her any particular level of achievement").

And nothing in the Court's reasoning suggests—as petitioner would have it (at 42)—that *Rowley* forecloses only "*strict* equality of opportunity." The Court's reasoning makes clear that *Rowley* rejected *any* standard based on equality of opportunity. That is, after all, why Justice Blackmun could not join the Court's opinion, even though his test—like petitioner's—contained the qualifier "substantially."

b. For its part, the Government contends (at 17) that "an education is 'appropriate' when it provides the child with an opportunity to make significant progress in light of his capabilities." But *Rowley* could hardly have been clearer in explaining that the Act contains no "substantive standard prescribing the level of education to be accorded handicapped children," 458 U.S. at 189, and was not intended to "guarantee any particular level of education," *id.* at 192. *Rowley* thus forecloses any standard based on a particular level of progress.

c. *Rowley* also forecloses the textual basis on which the other side rests their standards. Both petitioner (at 16) and the Government (at 17) argue that the word "appropriate" in "free appropriate public education" should be read expansively in light of the IDEA's purposes to contain a broad substantive requirement. The Rowleys made virtually the same argument, down to citing the same dictionary definition of "appropriate" as "specially suitable." Resp. Br. 30, *Rowley*, *supra* (citing *Webster's*).

The Court flatly disagreed. It canvassed the legislative history and concluded that "Congress * * * equated an 'appropriate education' to the receipt of some *specialized* educational services." *Rowley*, 458 U.S. at 195 (emphasis added). That is, "an 'appro-

priate education' is provided when *personalized* educational services are provided." *Id.* at 197 (emphasis added). The Court thus declined to read "appropriate" in light of the Act's purposes, *see id.* at 190 n.11, or as "concisely express[ing]" the standard the Rowleys advocated, *id.* at 197 n.21.

2. The other side's attempts to find a foothold for their standards in *Rowley* are unavailing.

Petitioner (at 31-32) and the Government (at 13-14) claim that *Rowley* left the door open to their novel standards by refusing to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." 458 U.S. at 202. But the Court squarely rejected "any substantive standard prescribing the level of education to be accorded" children with disabilities; it did not leave that issue for another day. *Id.* at 189. Not even Justice Blackmun or the dissent thought the question remained open. *See id.* at 211 (Blackmun, J., concurring in the judgment); *id.* at 214 (White, J., dissenting). The Court's reluctance to "establish any one test" simply reflects the understanding that whether a child's IEP is reasonably calculated to confer a benefit will depend on individual circumstances—a proposition no one disputes. *See* Pet. Br. 48; U.S. Br. 25.

Nor is there any merit to petitioner's and the Government's reliance on *Rowley*'s unremarkable observation that advancing grade-to-grade can be "one important factor in determining educational benefit" where a child "is being educated in the regular classrooms of a public school system." 458 U.S. at 207 n.28; *see* Pet. Br. 30; U.S. Br. 14. In making that observation, *Rowley* meant merely to help courts

decide cases in which the "'mainstreaming' preference of the Act has been met": When "a child is being educated in the regular classrooms," the "grading and advancement system" can provide a simple answer to the otherwise "difficult problem" of measuring the benefit conferred by the child's IEP. 458 U.S. at 202-203. *Rowley*'s application of its "some educational benefit" standard to children who have been mainstreamed should not be mistaken for the standard itself.

Finally, petitioner (at 30-31) and the Government (at 14-16, 33) attempt to ground their standards in *Rowley*'s use of the word "meaningful." Their arguments rest on a single passage in the Court's opinion: "By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such *access* meaningful." 458 U.S. at 192 (emphasis added).

The other side fails to acknowledge that *Rowley* went on to explain exactly what "meaningful" "access" entails. *Id.* It held that the Act requires only "that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. Or, in the dissent's paraphrase of the Court's holding: Amy Rowley "receiv[ed] a meaningful and therefore appropriate education" because she "was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade." *Id.* at 214 (White, J., dissenting). The Court has since confirmed that reading, explicitly distinguishing "meaningful access to the public schools" from

"the level of education that a school must finance once access is attained." *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 79 (1999). That eviscerates petitioner's attempt (at 30) to link "meaningful" access to grade advancement. And it refutes the Government's contention (at 15) that "meaningful" access is "best read as another way of saying that States must give children the opportunity to make significant educational progress."

C. *Stare Decisis* Requires Adherence to *Rowley*

Although *Rowley* is controlling, neither petitioner nor the Government can bring themselves to ask this Court to overrule it. That would be a tall order. While "any departure from" *stare decisis* "demands special justification," four factors converge to endow *Rowley*'s holding with unusual durability. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (internal quotation marks omitted).

First, *stare decisis* "carries enhanced force" in statutory interpretation cases. *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *see also Cedar Rapids*, 526 U.S. at 78 n.10 (applying heightened *stare decisis* to the Court's prior interpretation of the IDEA). That is because "Congress can correct any mistake it sees" in the Court's "interpretive decisions." *Kimble*, 135 S. Ct. at 2409. Congress has repeatedly done just that, swiftly amending the IDEA to correct interpretations with which it disagreed. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 103, 104 Stat. 1103, 1106 (overturning *Dellmuth* v. *Muth*, 491 U.S. 223 (1989)); Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, secs. 2-3, 100

Stat. 796, 796-797 (overturning *Smith* v. *Robinson*, 468 U.S. 992 (1984)).

Second, *stare decisis* is all the stronger here because two Congresses have re-enacted the Act *without* altering the words construed in *Rowley*. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37; *Forest Grove*, 557 U.S. at 239-240 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (internal quotation marks omitted)). Though petitioner and the Government are correct that these amendments reflect Congress's desire to achieve better outcomes for children with disabilities, "Congress implemented [those] higher expectations in specific ways, and altering the standard for providing a FAPE was not one of them." *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *see also Thompson R2-J Sch. Dist.* v. *Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1149 n.5 (10th Cir. 2008) (noting that "the same textual language" *Rowley* interpreted "has survived to today's version of IDEA"). States have thus continued to accept federal funds on the understanding that *Rowley* is good law. *See Forest Grove*, 557 U.S. at 246 (concluding that States were placed "on notice" of the meaning of an IDEA provision by a prior construction ratified by Congress). And "Congress's continual reworking of the [IDEA]"—but not of *Rowley*'s standard—"further supports leaving the decision in place." *Kimble*, 135 S. Ct. at 2410.

Third, "considerations favoring *stare decisis* are at their acme" in cases involving contract rights "be-

cause parties are especially likely to rely on such precedents when ordering their affairs." *Id.* (internal quotation marks omitted). Spending Clause legislation "is much in the nature of a contract." *Arlington*, 548 U.S. at 296 (internal quotation marks omitted). In exchange for federal funding, States have made numerous fixed investments in their education systems in reliance on the *Rowley* standard. Overruling *Rowley* would alter the terms of that decades-old bargain.

Fourth, the reliance interests at stake are not just any reliance interests; they are interests that implicate the division of federal-state power. Under our federal system, the "formulation and execution of educational policy" is a matter traditionally committed to the States. *Rowley*, 458 U.S. at 208 n.30. By subjecting some aspects of education policy to federal standards in exchange for funding, the IDEA shifts some of that power to the Federal Government. Revising the statute's core requirement would thus implicate the ordering of political as well as economic affairs.

Against this, petitioner and the Government offer little more than "retreads of assertions [this Court] rejected before." *Bay Mills*, 134 S. Ct. at 2037. "The [*Rowley*] majority did not find th[ese] argument[s] persuasive then," and petitioner and the Government give the Court "no new reason to endorse [them] now." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2409 (2014).

II. THE IDEA REQUIRES STATES TO PROVIDE "SOME EDUCATIONAL BENEFIT" TO CHILDREN WITH DISABILITIES

Rowley is not just controlling; it is also correct. The IDEA nowhere contains the standards petitioner and the Government propose, let alone puts any State on clear notice that they exist. By contrast, *Rowley*'s "some educational benefit" standard is a straightforward application of the Act's requirement that children receive the services they need "to benefit from special education," 20 U.S.C. § 1401(26), and it accords with both the Act's purpose and the comprehensive scheme Congress enacted to fulfill it.

A. The IDEA's Obligations Must Be Unambiguous

The proper starting point for determining what the Act requires is "the fact that Congress enacted the IDEA pursuant to the Spending Clause." *Arlington*, 548 U.S. at 295. As the Court has time and again explained, Spending Clause statutes are "much in the nature of a contract": In exchange for receiving federal funds, States must agree to be bound by the statute's conditions. *Id.* at 296 (quoting *Pennhurst*, 451 U.S. at 17). States cannot "knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* Accordingly, Spending Clause statutes must set out their conditions "'unambiguously,'" placing state officials on "clear notice" regarding "the obligations that go with [federal] funds." *Id.* (quoting *Pennhurst*, 451 U.S. at 17); *see also, e.g.*, *Davis Next Friend LaShonda D.* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

That clear-notice principle applies with full force to the IDEA. *See Forest Grove*, 557 U.S. at 246; *Winkelman ex rel. Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 533-534 (2007); *Rowley*, 458 U.S. at 190 n.11, 204 n.26. In *Arlington*, for example, the Court considered the scope of the IDEA's provision authorizing an award of "reasonable attorneys' fees as part of the costs" to prevailing parties. 20 U.S.C. § 1415(i)(3)(B)(i). In deciding whether that provision authorizes recovery of expert fees, the Court explained that the IDEA must be viewed from "the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds." *Arlington*, 548 U.S. at 296. Because the provision does not provide "clear notice" that expert fees are recoverable, *id.* at 298, the Court held that the Act does not impose an obligation on States to compensate prevailing parties for such expenses. *Id.* at 293-294; *see also FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012) (applying the sovereign-immunity canon to the scope of a statutory provision).

In fact, the Court has already applied the clear-notice rule to the very issue in this case: the meaning of a FAPE. *See Rowley*, 458 U.S. at 190 n.11, 204 n.26. As this Court has said, the FAPE requirement is the mandate "most fundamental to the Act." *Winkelman*, 550 U.S. at 530. It is the statute's "core requirement," U.S. Br. 1, governing "the educational programs IDEA directs school districts to provide." *Arlington*, 548 U.S. at 305 (Ginsburg, J., concurring in part and concurring in the judgment). There can be no doubt, then, that States would have considered the obligations imposed by this requirement critical when "deciding whether [to] accept IDEA funds." *Id.* at 296 (majority opinion); *see also id.* at 317

(Breyer, J., dissenting) (calling this "the basic objective of *Pennhurst*'s clear-statement requirement").

Remarkably, neither petitioner nor the Government even mentions the clear-notice rule, or attempts to argue that the statute unambiguously contains the standards they propose. Perhaps that is because petitioner and the Government cannot decide for themselves what the statute means. Between the certiorari stage and the merits stage, petitioner's proposed standard has transformed from "substantial educational benefit," Pet. 24, to "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 14. The Government's standard, in turn, has shifted from "educational benefits that are meaningful in light of the child's potential and the IDEA's stated purposes," U.S. Cert. Br. 14, to "an opportunity to make significant educational progress, taking account of the child's unique circumstances," U.S. Br. 6-7. These shifting and inconsistent standards say it all. If even petitioner and the Government cannot figure out what the statute requires—or bring themselves to argue that the clear-notice rule is satisfied—then surely no State could be on "clear notice" of the standards they propose.

B. The IDEA Does Not Require States To Provide "Substantially Equal Educational Opportunity" Or "Significant Educational Progress"

1. A review of the statutory text confirms that the IDEA does not contain the other side's standards. Start by reading the statute as *Arlington* instructs: by "view[ing] [it] from the perspective of a state

official * * * deciding whether the State should accept IDEA funds," and "ask[ing] whether [that] official would clearly understand" that the statute establishes the obligations petitioner and the Government propose. 548 U.S. at 296.

Such an official would begin, naturally, by looking at the Act's 25 enumerated "conditions" for receiving federal funds. 20 U.S.C. § 1412(a). The first condition says that a participating State must make a "free appropriate public education available to all children with disabilities residing in the State between the ages of 3 and 21." *Id.* § 1412(a)(1). To understand what that requirement means, the official would turn to the applicable definition. It says that "[t]he term 'free appropriate public education' means special education and related services that" meet four enumerated requirements. *Id.* § 1401(9). So, the official would conclude, her State must provide "special education and related services" to each child with a disability. Nothing about "equal opportunity" or "significant progress" so far.

The conscientious official would then examine the definitions of each of those subsidiary terms. "The term 'special education' means specially designed instruction * * * to meet the unique needs of a child with a disability." *Id.* § 1401(29). "The term 'related services' means * * * such * * * supportive services * * * as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26). Plainly read, these provisions require States to provide "personalized instruction" to children with disabilities, along with services enabling those children to "benefit" from that instruction. *See Rowley*, 458 U.S. at 189, 197, 201, 203, 207 (adopting this reading). An official would clearly understand,

then, that her State must deliver personalized education that provides children with "some educational benefit." *Id.* at 200. But she would see nothing about the "level of education" those children must receive. *Id.* at 189.

The official would then consider each of the sub-requirements contained in the FAPE definition. A child's special education and related services must be free and publicly supervised. 20 U.S.C. § 1401(9)(A). They must meet state educational standards. *Id.* § 1401(9)(B). They must "include an appropriate preschool, elementary school, or secondary school education in the State involved," *id.* § 1401(9)(C)—that is, they must "approximate the grade levels used in the State's regular education." *Rowley*, 458 U.S. at 189, 203. And they must be "provided in conformity with the [IEP] required under section 1414(d)." 20 U.S.C. § 1401(9)(D). Section 1414(d), in turn, imposes a host of requirements regarding the content of an IEP. *See id.* § 1414(d)(1)(A)(i). But none of these provisions makes any mention of "equal opportunity" or "significant progress."

And that is the end of the FAPE definition. An official winding through each of its terms, sub-definitions, sub-requirements, and cross-references would thus find nothing "even hint[ing] that acceptance of IDEA funds makes a State responsible for" providing substantially equal educational opportunities or significant educational progress to children with disabilities. *Arlington*, 548 U.S. at 297. Such a "substantive standard" is simply "absent from the language of the statute." *Rowley*, 458 U.S. at 189. Under *Arlington* and *Pennhurst*, that is the end of the matter: Those requirements do not exist.

2. Petitioner and the Government nonetheless ask the Court to hold that, for decades, each State has "knowingly accept[ed]" federal funds on the understanding that it must satisfy the sweeping standards they propose. *Arlington*, 548 U.S. at 296. They say the States received notice of those requirements through a single word: "appropriate." Pet. Br. 16; U.S. Br. 16-17. That cannot be.

a. For starters, "appropriate" appears as part of a statutorily defined term: "free appropriate public education." And the Act's definition of that term lacks either of the meanings petitioner and the Government propose. Rather, the Act provides that "[t]he term 'free appropriate public education' means special education and related services that" meet four requirements. 20 U.S.C. § 1401(9). It is black-letter law that "[w]hen * * * a definitional section says that a word 'means' something, the clear import is that this is its *only* meaning"—in other words, the statutory definition "is virtually conclusive." Antonin Scalia & Bryan A. Garner, *Reading Law* 226, 228 (2012). Petitioner and the Government cannot substitute their preferred definition of a FAPE for the one the Act provides.

Perhaps recognizing this, petitioner (at 16) and the Government (at 17) suggest that the standards they propose can also be found in subparagraph (C) of the FAPE definition, which says that the special education and related services a State provides must "include an appropriate preschool, elementary school, or secondary school education in the State involved." 20 U.S.C. § 1401(9)(C). But *Rowley* already settled the meaning of this subparagraph, construing it to require that a child's education and services "approximate the grade levels used in the

State's regular education." 458 U.S. at 189; *see id.* at 203 (same). As the Court explained, Congress used the word "appropriate" in this provision to convey that States must place children in a "suitable" educational "setting[]," not as "a term of art which concisely expresses" the sorts of standards petitioner and the Government suggest. *Id.* at 198 n.21. Two Congresses have re-enacted the statute against the backdrop of that construction, and States have for decades accepted federal funds on that understanding. *See supra* pp. 23-24. The Court cannot revisit it now.

b. The other side's problems do not end there. Even if it were *possible* to infer a substantive standard from the word "appropriate," the word surely does not "unambiguously" impose any such standard. "Appropriate" is the very paragon of ambiguity, and in case after case, the Court has said that it lacks the clarity necessary to overcome *Pennhurst* and similar clear-statement rules.

Pennhurst itself said as much. That case concerned a provision of a Spending Clause enactment stating that persons with disabilities have "a right to appropriate treatment, services, and habilitation" in state facilities. 451 U.S. at 13. Much as in this case, the Government argued that the words "appropriate treatment" obligated participating States to provide a certain "adequate" level of services to persons with disabilities. *Id.* at 7-9, 22. The Court disagreed. The clear-statement principle "applies with greatest force," it said, "where, as here, a State's potential obligations under the Act are largely indeterminate." *Id.* at 24. Because "[i]t is difficult to know what is meant by providing 'appropriate treatment,'" the Court continued, "it strains credulity to argue that

participating States should have known of the[] 'obligations'" the Government described. *Id.* at 24-25. This provision thus "fell well short" of providing the "clear notice" the Spending Clause requires. *Id.* at 25.

The Court has reached similar conclusions in applying other clear-statement principles. In *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), the Court held that a statute authorizing courts to award "costs of litigation * * * whenever * * * appropriate" did not furnish the "clear showing" necessary to abrogate the American Rule or waive sovereign immunity, because "[i]t is difficult to draw any meaningful guidance from * * * the word 'appropriate.'" *Id.* at 682-685 (emphasis omitted). In *Sossamon* v. *Texas*, 563 U.S. 277 (2011), the Court held that the phrase "appropriate relief against a government" did not "unequivocally" waive States' sovereign immunity, because "'[a]ppropriate relief' is open-ended and ambiguous about what types of relief it includes," and "susceptible of multiple plausible interpretations." *Id.* at 285-288.

What was true in *Pennhurst*, *Ruckelshaus*, and *Sossamon* is also true here: The word "appropriate" cannot overcome the clear-notice rule. The Court therefore cannot, as petitioner and the Government suggest, construct a meaning for "appropriate" by freely consulting "context," U.S. Br. 17, and "other sources," Pet. Br. 19. In *Sossamon*, the only "context" that mattered was that "the defendant [was] a sovereign." 563 U.S. at 286. In *Ruckelshaus*, the "other sources" the Court examined were the rules requiring a clear statement shifting fees or waiving sovereign immunity. 463 U.S. at 683-686. Here, the

"context" is that the IDEA is a contract with the States; the Court should look no further.

Forest Grove and *West* v. *Gibson*, 527 U.S. 212 (1999), only reinforce the point. In *Forest Grove*, the Court held that the IDEA provision authorizing "such relief as [a] court determines is appropriate" permits reimbursement of the costs of private-school tuition. 557 U.S. at 232-233, 237-238, 246 (quoting 20 U.S.C. § 1415(i)(2)(C)(iii)). The Court said States were "on notice" of that requirement for two reasons: first, because reimbursement awards merely require States to "'belatedly pay expenses'" that they "expressly agree[d]" to pay when they signed up for the Act; and second, because the Court had previously issued the same interpretation and Congress had ratified it. *Id.* at 246 (quoting *Sch. Comm. of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 370-371 (1985)).[2] *West* similarly concluded that the term "appropriate remedies" in Title VII unambiguously authorizes damages awards against the Federal Government because a separate provision "*explicitly* allow[s] damages in actions under Title VII." *Sossamon*, 563 U.S. at 286 (emphasis added) (describing *West*, 527 U.S. at 217-218, 222); *see also West*, 527 U.S. at 224 (Kennedy, J., dissenting) (contending that even this evidence was insufficiently clear). None of these considerations is present here: The other side identifies no "express" or "explicit" lan-

[2] The Court's prior decision, *Burlington*, did not discuss the Spending Clause clear-statement rule, likely because no party mentioned it. *See, e.g.*, Pet. Br., *Burlington*, *supra*, 1985 WL 669932. The Court has since made clear that "*Pennhurst*'s notice requirement" applies to the Act's remedial provisions. *Forest Grove*, 557 U.S. at 246; *see Arlington*, 548 U.S. at 296.

guage imposing the requirements they advocate, and the history of congressional ratification cuts decisively against them. *See supra* pp. 23-24.

c. Nor is that the last of the other side's problems. Even if one thought that "appropriate" was not limited to the statutory definition of a FAPE, and also that it unambiguously imposed some type of substantive standard on States, petitioner and the Government could *still* not prevail unless the statute unambiguously imposed *their* particular standard(s). There is no way that can be the case.

To begin, petitioner and the Government *themselves* cannot agree what standard the word "appropriate" supposedly conveys. According to petitioner, an "appropriate education" is one that provides "substantially equal opportunit[y]," Pet. Br. 40-41—except a few months back, it meant an education that provides a "substantial educational benefit," Pet. 24. According to the Government, it is one that enables "significant progress," U.S. Br. 17—though in August, it meant one that was "meaningful in light of the child's potential," U.S. Cert. Br. 14. Three *amici* States disagree, saying that *they* are "on notice" that the word "appropriate" simply requires a "meaningful educational benefit." Del., Mass. & N.M. *Amicus* Br. 3-4; *see* Pet. 10-11 (describing circuits that also adopt a "meaningful benefit requirement"). And, of course, all of these readings differ from this Court's interpretation in *Rowley* that "an 'appropriate education' is provided when personalized educational services are provided," 458 U.S. at 197—although three Justices in dissent were sure "appropriate" actually meant "*full* educational opportunity," *id.* at 213 (White, J., dissenting, joined by Brennan and Marshall, JJ.). Five proponents, seven

opinions: This does not sound like a word that is "unambiguous."

All of this confusion stems, perhaps, from the fact that petitioner and the Government are more or less making up their standards from whole cloth. Petitioner tries to link his proposed standard to one of the Act's *findings*, which says that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity * * * for individuals with disabilities." 20 U.S.C. § 1400(c)(1). But as this Court held in *Pennhurst*, a statute's "general statement of 'findings' " is "too thin a reed" to be a source of "rights and obligations." 451 U.S. at 19. And in any event, this particular finding is several steps removed from the standard petitioner proposes: It says that "improving educational results" is an "*element*" of a "*policy*" of "ensuring equality of opportunity." 20 U.S.C. § 1400(c)(1) (emphases added). A State would hardly be on "clear notice" that this phrase imposes a legally enforceable obligation to provide substantially equal educational opportunity.

The Government's brief is even more brazen. It does not pretend that its "significant educational progress" standard appears in the Act. Rather, it seems to have derived that standard by taking the words "meaningful" "access" from *Rowley* and swapping in very rough synonyms. U.S. Br. 14-15 & n.4. In addition to being entirely unmoored from the text of the *statute*, this approach is irreconcilable with *Rowley*, *see supra* pp. 21-22, and this Court's subsequent explanation that "meaningful access" does not require any particular "level of education." *Cedar Rapids*, 526 U.S. at 79; *see also id.* at 73 ("As a general matter, services that enable a disabled child

to remain in school during the day provide the student with 'the meaningful access to education that Congress envisioned.' "). It is also telling that, by all appearances, the agency "responsible for the administration of the Act" has never before adopted this reading, or attempted to cut off IDEA funds on the ground that a State failed to comply with it. *Pennhurst*, 451 U.S. at 23-25.

Petitioner (at 41-43) and the Government (at 18-24) argue that their standards draw support from the Act's structure and purposes. As discussed below, they do not. *See infra* pp. 38-51. In any event, absent an unambiguous text, the Act's broader structure and purpose cannot provide the clear notice *Pennhurst* requires. *See Rowley*, 458 U.S. at 190 n.11 (stating that searching for the meaning of "an 'appropriate education' * * * 'in the purpose of the statute' " is "contrary to the fundamental proposition that Congress" must impose spending conditions "unambiguously"). Indeed, the Court has repeatedly disapproved of reading statutes—and particularly Spending Clause statutes—to impose substantive obligations that take their content mainly from the enactment's broad purposes. *See Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002) ("[A] recipient [of federal funds] may be held liable * * * for intentional conduct that violates the clear terms of the relevant statute, but not for its failure to comply with vague language describing the objectives of the statute." (citation omitted)); *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (stating that courts may not read a statute to establish remedies because they are ostensibly "necessary to make effective the congressional purpose" (internal quotation marks omitted)).

In sum, the Act provides no clue of the "substantially equal educational opportunity" or "significant educational progress" standards petitioner and the Government propose. And the triple bank-shot they need to prevail—ignore the statutory definitions, assert that "appropriate" is unambiguous, and assign it a meaning that lacks any textual mooring—confirms that no reasonable state official would be on "clear notice" of the obligations they ask this Court to impose.

C. The "Some Educational Benefit" Standard Flows From The IDEA's Text, Structure, And Purpose

The "some educational benefit" standard, by contrast, has a firm textual footing and coheres with the statute's structure and purpose. Petitioner and the Government object that this standard cannot achieve all of the statute's aims on its own, but that argument ignores the rest of the Act's comprehensive scheme, which helps ensure that children with disabilities will receive a high-quality education.

1. The textual source of the "some educational benefit" standard is clear. The Act says that a FAPE consists of "special education and related services," 20 U.S.C. § 1401(9), which it defines as "specially designed instruction * * * to meet the unique needs of a child with a disability" along with such "supportive services * * * as may be required to assist a child * * * *to benefit* from" that instruction, *id.* § 1401(26), (29) (emphasis added). Any state official reading this language would understand that it requires States to provide personalized instruction and services designed to enable children "to benefit from" that instruction. *Id.* § 1401(26); *see Rowley*, 458 U.S. at

189, 200-201, 203, 206-207. "Noticeably absent from th[is] language *** is any substantive standard prescribing the *level* of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189 (emphasis added). All that it requires—putting aside for the moment the Act's many other obligations—is that an IEP be reasonably calculated to confer "some educational benefit." *Id.* at 200-201.

The statute also makes clear that that "benefit" cannot be trivial. "[A]ll enactments" are adopted against the background legal principle "*de minimis non curat lex* ('the law cares not for trifles')." *Wis. Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231-232 (1992). Any reasonable official reading the Act would therefore recognize that she must aim to provide a benefit that is "more than *de minimis*." Pet. App. 16a.

2. The "some educational benefit" standard is also consistent with the Act's structure and purpose. The IDEA is a comprehensive and extraordinarily detailed regulatory statute. To advance its broad purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), the Act sets 25 conditions on federal funding that span 59 pages and fill thousands of words of the U.S. Code. These provisions establish two principal mechanisms for ensuring that children with disabilities receive a high-quality education: (a) exacting *procedures* that IEP Teams must follow in developing an individual child's IEP and (b) *systemic requirements* that educational agencies must implement on a state-wide basis. These are the means Congress chose to achieve its ambitious goals. It is unnecessary, and improper, to infer an atextual substantive standard

above "some educational benefit" to try to advance them in a different way.

a. The Act's principal means of achieving its goals is its finely reticulated set of procedures for crafting an IEP. As *Rowley* explained, it was Congress's "conviction" that "adequate compliance with the[se] procedures * * * would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." 458 U.S. at 206.

To see why, just walk through the elaborate process that every school must follow when designing a child's IEP. At the start, the school must conduct a holistic evaluation of the child to determine the nature of his disability and his resulting needs. *See* 20 U.S.C. § 1414(a)-(c). With that evaluation in hand, the school must assemble an IEP Team composed of the child's parents, his teachers, and educational experts. *Id.* § 1414(d)(1)(B). Together, the team examines all relevant factors, including the results of the evaluation, the "strengths" and "needs" of the child, the "concerns of the parents," and, "in the case of a child whose behavior impedes the child's learning," "strategies" to "address that behavior." *Id.* § 1414(d)(3)(A)-(B).

Based on this analysis, the team writes the child's IEP. It must ensure the IEP satisfies a checklist of requirements. Most importantly, the IEP must address the child's present levels of performance, set forth his annual goals, and describe the specific services to be provided to him. *Id.* § 1414(d)(1)(A)(i). The IEP Team must also try, "[t]o the maximum extent appropriate," to ensure that the child is "educated with children who are not disabled." *Id.* § 1412(a)(5)(A).

And, following Congress's amendments in 1997 and 2004, the IEP Team must do still more. Those amendments made even more elaborate the process for developing an IEP. *See* IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 614(d)(1)(A), 111 Stat. 37, 83-85; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 614(d)(1)(A), 118 Stat. 2647, 2707-2709. Today, the IEP Team must think about the child both "academic[ally]" and "functional[ly]" in assessing his "present levels" of performance. 20 U.S.C. § 1414(d)(1)(A)(i)(I). It must focus on the "general education curriculum" and "each" of the child's "educational needs" in setting his annual goals. *Id.* § 1414(d)(1)(A)(i)(II). And it must keep in mind those goals, as well as that curriculum, in developing the child's special education and related services based on "peer-reviewed research to the extent practicable." *Id.* § 1414(d)(1)(A)(i)(IV). Once a child turns 16, the IEP Team must also devise "appropriate measurable postsecondary goals" and "transition services * * * needed to assist the child in reaching" them. *Id.* § 1414(d)(1)(A)(i)(VIII).

In construing these provisions, the Department of Education has imposed requirements even more specific. It has interpreted the words "general education curriculum" to mean that a child's annual goals "must be aligned with the State's academic content standards for the grade in which the child is enrolled." U.S. Dep't of Educ., Dear Colleague Letter 1 (Nov. 16, 2015);[3] *see* 34 C.F.R. § 300.320(a)(1)(i).

[3] *Available at* https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

Accordingly, state academic content standards "must guide" the IEP Team's "individualized decision-making" during the IEP process. Dear Colleague Letter, *supra*, at 4.

All together, then, the IEP process includes a wide array of elements to "assure" that an IEP contains "much if not all of what Congress wished in the way of substantive content." *Rowley*, 458 U.S. at 206. The process compels informed deliberation—ensuring that each IEP is developed only after thorough evaluation of the child, consideration of all relevant factors, and consultation with experts and interested stakeholders. The process "maximize[s] parental involvement," ensuring that a child's most devoted advocates are in the room when the IEP is crafted. *Id.* at 182 n.6. And through a checklist of requirements that both Congress and the Department have made longer and more detailed over the years, the process focuses the IEP Team on the considerations necessary to write an IEP that is personalized, holistic, and ambitious. Each element of this process is enforceable in court, 20 U.S.C. § 1415(f)(3)(E)(ii), and if a school materially violates the terms of the IEP that the process produces, parents may sue for specific performance or other remedies, *see Seth B. ex rel. Donald B.* v. *Orleans Parish Sch. Bd.*, 810 F.3d 961, 977-978 & n.67 (5th Cir. 2016).

These procedures do not, of course, demand any particular substantive outcome. But many statutes rely on a robust procedural framework to ensure good substantive results. The National Environmental Policy Act (NEPA), for example, requires agencies to closely evaluate significant regulatory actions, "consult" with interested stakeholders, and write a

"detailed statement" describing the expected environmental consequences of their decisions. 42 U.S.C. § 4332(C). Like the IEP process, this "hard look" process "does not mandate particular results." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). But as the Court has explained, it is "almost certain to affect [an] agency's substantive decision," and it is the sole means Congress prescribed to ensure that NEPA's "sweeping policy goals * * * are * * * realized." *Id.* Other statutes rely similarly on a rigorous process to achieve sound results. *See* 18 U.S.C. § 3553(a) (describing the factors a district court must consider in imposing a criminal sentence); *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 374-375 (1998) ("The Administrative Procedure Act * * * establishes a scheme of 'reasoned decisionmaking.' * * * Reasoned decisionmaking * * * promotes sound results * * * ."); *Little Bay Lobster Co.* v. *Evans*, 352 F.3d 462, 470 (1st Cir. 2003) ("[T]he [Regulatory Flexibility] Act creates procedural obligations to assure that the special concerns of small entities are given attention in the comment and analysis process * * * .").

The IDEA is no different. The IDEA sets up a process of reasoned decisionmaking, involving the right people with the right information and the right focus. And when a team of parents, teachers, and experts carries out that process in full—as every team must—it is highly likely to result in an IEP that "meet[s] [a child's] unique needs and prepare[s] [him] for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *see also Forest Grove*, 557 U.S. at 247 ("[C]ourts should generally presume that public-school officials are properly performing their obligations under IDEA."). Even

the Government acknowledges as much; "[i]n most cases," it says (at 28), "schools and parents will reach consensus on an IEP that is reasonably calculated to help the child learn and succeed."

b. The Act reinforces those procedures with ambitious systemic requirements. One condition for receiving federal funds requires each State to set a "detailed timetable" for "providing full educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2). Another condition requires States to align their "goals for the performance of children with disabilities" with their goals for other children under the ESEA. *Id.* § 1412(a)(15)(A)(ii), (B). The Act also requires States to adopt a variety of policies concerning teacher qualifications, instructional materials, and other matters. *See id.* § 1412(a)(14), (23).

In 2004, Congress amended the Act to give these requirements teeth. Expressing serious "concern[] about the effectiveness of monitoring and enforcement" under the preexisting statute, it gave the Department of Education broad authority to ensure States' compliance with these conditions. H.R. Rep. No. 108-77, at 120 (2003); *see* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, sec. 101, § 616, 118 Stat. 2647, 2731-2737. The statute now provides that each State must submit a performance plan to the Department establishing "measurable and rigorous targets" for achieving the Act's goals, as well as annual performance reports tracking the State's progress. 20 U.S.C. § 1416(b)(2)(A), (C)(ii). The Department may disapprove a State's performance plan. *Id.* § 1416(c). And if the Department determines that a State is not "meet[ing] the [Act's] requirements and purposes,"

id. § 1416(d)(2)(A), it may implement an escalating series of enforcement measures, from imposing conditions on the State's use of federal funds to cutting off the State's IDEA funding in whole or in part, *id.* § 1416(e)(1)(B)-(C), (2)(B)(iii)-(v), (3)(B).

The Department has made ample use of this authority. In the last three years alone, it has found that Delaware, Texas, Nevada, and the District of Columbia were failing to meet the Act's requirements.[4] Because D.C. was deemed in noncompliance for several years, the Department directed it to reallocate a substantial portion of its federal funding to problem areas, submit a corrective action plan, and regularly report on its remedial efforts. *See* Letter from U.S. Dep't of Educ. to D.C. Superintendent of Educ. 8-9 (June 28, 2016). Other States promptly fixed their errors after the Department's notice—bearing out this Court's prediction, in a related context, that where the Secretary holds the authority to cut off federal funds, it is "doubt[ful] that the Secretary's notice to a State that its [implementation] scheme is inadequate will be ignored." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015).

In short, the "some educational benefit" standard must be viewed within the context of the entire Act, including its procedural and systemic requirements.

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[4] *See* Letter from U.S. Dep't of Educ. to D.C. Superintendent of Educ. (June 28, 2016); Letter from U.S. Dep't of Educ. to Nev. Dep't of Educ. (June 28, 2016); Letter from U.S. Dep't of Educ. to Tex. Educ. Agency (June 30, 2015); Letter from U.S. Dep't of Educ. to Del. Dep't of Educ. (June 23, 2014). These letters may be found at http://www2.ed.gov/fund/data/report/idea/partbspap/allyears.html.

Those elaborate and highly specific provisions refute the notion that Congress thought a greater substantive standard necessary to achieve its aims. Indeed, the structure of the Act suggests the opposite: that Congress did *not* intend to impose a greater substantive requirement. The evident care that Congress took in crafting and revising such a "comprehensive and reticulated statute" weighs heavily against adding requirements that Congress failed to "incorporate expressly." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985) (internal quotation marks omitted); *see also Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2530 (2013) (similar). It would be strange indeed if Congress designed this comprehensive scheme only to leave implicit a substantive standard as significant as the standards proposed by petitioner and the Government. *See Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.").

3. Petitioner and the Government draw a different conclusion from this comprehensive statutory scheme. They argue that the thousands of words Congress wrote in the statute will amount to nothing unless this Court writes in a few more. But each of their arguments springs from the same fundamentally erroneous premise: that "some educational benefit" is the Act's *only* means of achieving its ends.

a. Petitioner and the Government contend that a child cannot receive a FAPE if "at the end of the day" schools have to provide children "only" a "barely more than trivial" educational benefit. Pet. Br. 23; *see* U.S. Br. 36. That assumes, though, that the Act's substantive requirement is its *only* requirement—

which it is not. As just explained, Congress also established "elaborate and robust" procedures for developing an IEP. U.S. Br. 19. And no one who actually goes through that extensive and rigorous process comes away thinking "it is perfectly fine to aim low." *Id.* at 36. Rather, the Act's procedural provisions require that an IEP be developed in a thoughtful and reasoned way—justifying Congress's "conviction" that "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." *Rowley*, 458 U.S. at 206.

Those provisions make clear, moreover, that the Government's parade of horribles is entirely illusory. The Government suggests that the "some educational benefit" standard would permit schools to satisfy the FAPE requirement even while providing a child specialized services (1) for only part of the school year, (2) to address only some of the needs arising from her disability, or (3) to help a child in only some of her classes. U.S. Br. 30-31; *see* Pet. Br. 17.

No. The procedural provisions of the statute plainly prohibit all of these things. A school cannot offer services for only part of the school year both because the obligation to provide services that enable a child "to benefit from special education" is continuous, and because terminating a child's services would require a determination that the child was no longer "disabled"—something that can normally be done only through the IEP process. *See Cedar Rapids*, 526 U.S. at 76-79 (concluding that the "related services" definition prohibits a school from providing "[i]ntermittent" services that do not permit a child "to remain in school" continuously); *see* 20 U.S.C. § 1414(b)(4), (c)(5)(A). A school cannot provide ser-

vices that address some but not all of a child's needs because the Act requires that an IEP be designed with the goal of addressing "*each* of the child's * * * educational needs that result from the child's disability." 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb) (emphasis added); *see also id.* §§ 1401(29), 1414(d)(1)(A)(i)(IV). A school cannot provide a child specialized services in some but not all of her classes because an IEP must have the goal of advancing a child in the "general education curriculum," and, to the extent possible, enable her to be "educated" in the school's "regular classes." *Id.* §§ 1414(d)(1)(A)(i)(II)(aa), 1412(a)(5)(A). Tellingly, the Government cannot identify a single court in three decades that has upheld any of these unlawful practices, even though the "some educational benefit" rule has prevailed in most of the country. That these imagined problems have never actually arisen shows there is no need to adopt the radical new rules petitioner and the Government propose.[5]

b. Petitioner (at 19-21, 35-40) and the Government (at 32-33) also contend that the "some educational benefit" standard is in tension with Congress's findings and purposes. They rely, in particular, on certain findings made by Congress in amending the Act after *Rowley*—among them, that "[i]mproving educational results for children with disabilities is an

[5] Nor is it clear why the Government's standard would address the problems it imagines. By the Government's logic, a school could satisfy the FAPE standard by enabling a child to make "significant progress" in just the first two months (but not the remainder) of the school year, in just her reading skills (but not her communication skills), or in just her social studies class (but not her math and science classes). *See* U.S. Br. 30-31.

essential element of our national policy of ensuring equality of opportunity," that "the implementation of this [Act] has been impeded by low expectations," and that "the education of children with disabilities can be made more effective by * * * having high expectations for such children." 20 U.S.C. § 1400(c)(1), (c)(4), (c)(5).

These findings leave no doubt that Congress wanted to improve educational results and replace low expectations with high ones. But what is important is *how* Congress sought to achieve those goals. In amending the Act in 1997 and 2004, Congress did not alter the definition of a FAPE; indeed, in hundreds of pages of committee reports, the amendments' drafters did not once hint that they intended to revise the *Rowley* standard. Rather, Congress amended the Act by deepening the IEP-development process and strengthening the Act's systemic requirements. The 1997 Amendments, for example, required IEP Teams to place more "emphasis on [a child's] participation in the general education curriculum," S. Rep. No. 105-17, at 20 (1997), and States to include children with disabilities in state and district-wide assessment programs, *id.* at 21. The 2004 amendments required IEP Teams to "focus" on "measuring" a child's "academic achievement," H.R. Rep. No. 108-77, *supra*, at 108, and States to "align their accountability systems" with the No Child Left Behind Act, *id.* at 83. These were the means Congress chose to strengthen the Act. And if anything, the fact that the Act's procedures and systemic requirements have gotten *stronger* over the years only makes a searching substantive standard *less* necessary, not more so.

c. Finally, petitioner and the Government contend that the "some educational benefit" standard is "irreconcilable" with various IDEA provisions. Pet. Br. 21; *see* U.S. Br. 18-19. The Government, for instance, points (at 19) to the Act's procedures, arguing that Congress would not have made them so "elaborate and robust unless it intended to guarantee eligible children an opportunity to make significant educational progress." But the "legislative conviction" behind the Act was that a substantive guarantee of that kind would be unnecessary *precisely because* the procedures were so elaborate and robust. *Rowley*, 458 U.S. at 206. Petitioner and the Government might prefer a different statute, with a greater substantive component. But this Court does not superimpose substantive standards on top of "essentially procedural" requirements on the theory that the statute would work better that way. *Vt. Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 557-558 (1978).[6]

Petitioner (at 25) and the Government (at 20) also point to a State's obligation under the Act to "establish[] a goal of providing full educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2). But that systemic requirement existed at the time of *Rowley*, and the Court still rejected any substantive standard based on equality of opportunity. 458 U.S. at 180, 198-200. For good reason.

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[6] The Department of Education's regulations and interpretive guidance add nothing to the Government's argument. As explained above on pp. 40-41, the Department's Dear Colleague Letter merely fleshes out one of the requirements of the IEP process—namely, that an IEP Team must use the general education curriculum as a guide.

That provision in the Act concerns a state-wide "goal," not a substantive individual entitlement. What's more, the Act gives States leeway to accomplish the goal on their own "timetable." 20 U.S.C. § 1412(a)(2). It would surely "surpris[e]" the States if this provision were read to impose either petitioner's or the Government's substantive mandate. *Pennhurst*, 451 U.S. at 25.

Petitioner's (at 25-27) and the Government's (at 22-23) reliance on the ESEA is similarly misplaced. As amended by the No Child Left Behind Act of 2001, the ESEA establishes a system for holding schools accountable via student testing and performance. 20 U.S.C. § 6311. In 2004, Congress amended the IDEA to make children with disabilities part of this accountability system. *Id.* § 1412(a)(15)(A)(ii), (a)(16)(A). States must now set standards for, and assess, children with disabilities under the ESEA. But that, too, is a state-wide requirement, not a substantive individual entitlement. Moreover, the statute makes plain that the purpose of the assessments is to enable States to "assess progress" toward achieving ESEA goals, *id.* § 1412(a)(15)(B), and "measure the academic achievement of such children relative to" ESEA standards, *id.* § 6311(b)(2)(B)(vii)(II); *see* S. Rep. No. 108-185, at 17-18 (2003). Nothing in the Act suggests Congress intended to establish a sweeping, individual right to some level of achievement on those tests. The fact that Congress chose to strengthen a systemic requirement rather than alter the definition of a FAPE shows, once again, that Congress did not intend to adopt the standards petitioner and the Government propose.

* * *

To sum up: As *Rowley* rightly concluded, the IDEA's text straightforwardly imposes a "some educational benefit" requirement. But that is not the only requirement the Act contains. Its comprehensive and reticulated provisions help ensure that children will and do receive a high-quality education. There is no basis or need to second-guess Congress's design.

III. PETITIONER'S AND THE GOVERNMENT'S PROPOSED STANDARDS ARE UNWORKABLE

This Court should reject the standards proposed by petitioner and the Government for another reason: They are just as "unworkable" today as they were when this Court decided *Rowley*. 458 U.S. at 198. By contrast, more than three decades' experience has shown the "some educational benefit" standard to be readily administrable, and thus worthy of this Court's continued adherence.

1. a. For a standard to be workable in practice, it must "not [be] so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing* v. *Freestone*, 520 U.S. 329, 340-341 (1997). It must not thrust courts into areas of policy in which they lack "specialized knowledge and experience." *Rowley*, 458 U.S. at 208 (internal quotation marks omitted). And it must not "impose upon parties a confusing and onerous legal regime." *Winkelman*, 550 U.S. at 532. In each of these respects, petitioner's and the Government's proposed standards are a problem.

First, both standards lie beyond the competence of judges to administer. Would an IEP provide a level of educational opportunity "substantially equal" to

that provided other children? A "myriad of factors * * * might affect [a child's] ability to assimilate information presented in the classroom." *Rowley*, 458 U.S. at 198. Under petitioner's standard, a court would have to isolate the influence of each factor, and measure the educational opportunity provided by the IEP alone. The court would then have to do the same for "children *without* disabilities," Pet. Br. 30 (emphasis added), measuring what part of *their* progress is due to the opportunities provided by the school, as opposed to other factors. And even if a court could do all that, it would still have to compare the opportunity afforded by the IEP with the opportunities afforded other children, to determine whether they were "substantially equal." As *Rowley* recognized in rejecting such a standard, these are "impossible measurements and comparisons." 458 U.S. at 198.

The measurements required under the Government's test are tremendously difficult, too. How is a court to decide whether the progress promised by an IEP is "significant"? Sometimes, the Government says, "significant" means "master[ing] grade-level content"; other times, though, it does not. U.S. Br. 10. All the Government can say for sure is that schools should "enable eligible children to make progress that is *appropriate* in light of their own particular needs and capabilities." *Id.* (emphasis added). But telling courts that an "appropriate" education means a "significant" one, which in turn means an "appropriate" one, hardly helps them draw a principled line.

Second, both petitioner's and the Government's standards would embroil courts in educational policy disputes best resolved by others. As this Court has

said, education is an area of "intractable economic, social, and even philosophical problems" in which the Court lacks "specialized knowledge and experience." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973) (internal quotation marks omitted); *see also Rowley*, 458 U.S. at 208. Yet, both petitioner and the Government would require courts to evaluate the *level of education* an IEP is designed to provide—either to assess whether it would be substantially equivalent to that afforded other children, or to assess whether it would reflect significant progress for that particular child. And a court cannot evaluate the level of education an IEP would provide without judging the *quality* of the educational methods and services promised: How good are the child's teachers? How effective are their teaching methods—and would a novel method proposed by the parents be better? What difference would smaller class sizes make? Would limited dollars be better spent elsewhere? These "persistent and difficult questions of educational policy" are precisely the questions *Rowley* warned courts should avoid. 458 U.S. at 208 (internal quotation marks omitted); *see also id.* at 207 n.29.

Third, both petitioner's and the Government's standards would generate profound uncertainty about what a child is owed under the statute. Petitioner says that an IEP should provide educational opportunity substantially equal to that provided children without disabilities, but *which* children without disabilities? Those in the same school? The same district? The same State? Petitioner sought certiorari on the ground that "the educational benefit" to which a child is "entitled" should not "depend on the state in which he or she lives." Pet. 15. But

depending on the applicable baseline, a child's entitlement could vary not just from State to State, but from district to district, or even from school to school. Children who might be entitled to certain services in one school (or district or State) might not be entitled to them in another, given disparities in educational opportunities across schools (and districts and States).[7] That would leave parents with little way of knowing the extent of their child's rights, making it difficult "to calculate the risk of unilateral action if they believe their child is not benefitting from his or her education." Pet. 16. And school districts would face a very difficult task in allocating their limited resources by trying to predict what hearing officers and courts would do in the face of such an ambiguous standard.

Given the difficulty of predicting what level of progress a decision-maker might regard as "significant," children, parents, and schools would face uncertainty under the Government's standard, too. Either standard would make figuring out what a child deserves "confusing and onerous." *Winkelman*, 550 U.S. at 532. And the result may well be more—and more complex—disputes between parents and schools, shifting limited resources away from educational services and toward litigation.

b. This case illustrates the problems with the other side's approaches. Indeed, it is telling that neither

[7] If the baseline were instead an average of the opportunities provided children without disabilities *nationwide*, petitioner's standard would create the following anomaly: Children with disabilities would be entitled to *greater* opportunities than children without disabilities in some schools, and *lesser* opportunities in others.

petitioner nor the Government makes any effort to apply their proposed standards to the record here. The true test of workability, though, is whether their standards can provide a clear answer to the following question: What *should* petitioner's fifth-grade IEP have said?

Throughout this litigation, petitioner has complained about the "lack of progress" he made in the Douglas County public schools. Pet. App. 15a. But changing the goals and objectives in his IEP would not have helped him to progress. If, for example, petitioner was having difficulty learning how to "count money up to $5.00," Supp. J.A. 134sa, setting a new objective of counting money up to $100.00 would accomplish nothing. If petitioner's complaint is that he was not making progress, then the issue lies not with the written objectives, but with what his IEP would have done to help him achieve those objectives.

What help, then, did petitioner's fifth-grade IEP propose? It specified that each week, petitioner would receive 35 hours of "instruction from a special education teacher and support from a paraeducator," one hour of "speech/language intervention," a half hour of "mental health support," and a half hour of "occupational therapy"—for a total of 37 hours of special-education services. *Id.* at 142sa. The IEP also stated that petitioner would spend more than 60 percent of his time in a "[s]ignificant support needs classroom" instead of a general classroom. *Id.* at 142sa-143sa.

Under petitioner's test, a court would have to decide whether those services would be enough to provide petitioner an educational opportunity sub-

stantially equal to that provided children without disabilities. At the very outset, though, that task is made impossible by the fact that the record is completely silent on the level of educational opportunity provided other children, anywhere. A court would thus lack the necessary baseline against which to compare the educational opportunity provided in the IEP.

Even if there were a discernible baseline, a court would face another problem still: articulating why the IEP did (or did not) measure up. Should the school be faulted for not embracing a particular educational method—like "applied behavior analysis"? Pet. Br. 10. For not hiring teachers who "specialize[] in the education of children with autism"? J.A. 9. For maintaining a "student to teacher ratio" of greater than "1:1"? Pet. App. 70a. For maintaining class sizes of more than "eight" students? *Id.* Or for allowing petitioner to "engage with non-disabled children" for too much of the day? *Id.* These are "persistent and difficult questions of educational policy," which divide conscientious parents and experts. *Rowley*, 458 U.S. at 208 (internal quotation marks omitted). And yet, under petitioner's test, a court with no expertise would have to answer them—explaining which things are necessary, and which are not, for petitioner to be afforded an educational opportunity substantially equal to that of other children.

A court would face similar questions under the Government's test. If petitioner's IEP was deficient, what should it have included to provide petitioner an opportunity for significant progress? Additional hours with a special-education instructor? Less time in the general classroom? A commitment to apply

"applied behavior analysis"? As above, these are policy questions better resolved by "state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* at 207. But under the Government's test, a court lacking any specialized knowledge would have to resolve them.

c. Against all this, petitioner contends that "[t]he 'substantially equal opportunity' test simply describes the level of education *schools* must strive to deliver." Pet. Br. 49 (emphasis added). But petitioner's test purports to describe the content of a substantive right that is ultimately enforceable in court. *See* 20 U.S.C. § 1415(f)(3)(E), (i)(2). And under the Act, courts must make "independent decision[s] based on a preponderance of the evidence." *Rowley*, 458 U.S. at 205 (quoting S. Rep. No. 94-455, at 50 (1975) (Conf. Rep.)); *see* 20 U.S.C. § 1415(i)(2)(C). To be sure, administrative findings are entitled to "due weight." *Rowley*, 458 U.S. at 206. But under that "modified de novo standard of review," Pet. App. 6a, courts would still have to "determine independently how much weight" is due. *Ashland Sch. Dist.* v. *Parents of Student E.H.*, 587 F.3d 1175, 1182 (9th Cir. 2009). And a court could not evaluate the "persuasiveness of an administrative finding" under petitioner's test, *M.H.* v. *N.Y. City Dep't of Educ.*, 685 F.3d 217, 244 (2d Cir. 2012), without grappling with difficult questions of educational policy. Petitioner's suggestion (at 49) that, instead of a modified de novo standard, courts may apply "whatever other standard is most fitting" is just another bid to overrule *Rowley*.

Petitioner also contends (at 43-44) that his proposed rule is "eminently workable" because "with the right help," children with disabilities *can* succeed

academically. The question, though, is whether courts are capable of determining what the right help is, without engaging in "impossible measurements and comparisons," *Rowley*, 458 U.S. at 198, involving matters of "educational policy," *id.* at 206. What makes petitioner's standard "entirely unworkable" is the capacity of *courts*—not that of *children*. *Id.* at 198.

For its part, the Government contends (at 25-26) that its standard is "flexible and individualized," resulting in "different IEPs for different children with different capabilities." Of course, the fact that the Government's standard *is* individualized does not make it any easier for courts to administer. And the Government gives no reason to believe that, in applying its standard, courts will be capable of determining which children are entitled to which IEPs.

2. The only workable standard is the one that has been on the books for decades: An IEP must be reasonably calculated to confer "some educational benefit" upon a child with a disability. *Rowley*, 458 U.S. at 200.

This standard is readily administrable. An IEP must include "a statement of the special education and related services" that the school will provide. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). And schools must provide "periodic reports on the progress the child is making." *Id.* § 1414(d)(1)(A)(i)(III). When, as is often the case, a proposed IEP is modeled on a prior one, a court can look at the reports developed under the prior IEP to determine whether the child made progress. If the child made progress, and if the proposed IEP promises similar services, the court

may well conclude that the proposed IEP is reasonably calculated to confer some educational benefit. *See* Pet. App. 21a, 40a-41a.

Of course, there will be borderline cases, just as there are under any standard. Courts must discern the difference between *some* benefit and a benefit that is merely *de minimis*. And they must tailor their analysis to the individualized circumstances of each case, recognizing that what may be remarkable progress for one student may be only *de minimis* for another. *See Rowley*, 458 U.S. at 202. But those are commonsense judgments that judges can make—and have made for decades—without delving into tough questions of educational policy. The Court should not impose a different standard now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

REPLY BRIEF FOR PETITIONER

The decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), does not condone schools' providing children with disabilities a "merely more than de minimis" educational benefit. That standard appears nowhere in this Court's opinion. And for all of the School District's bluster regarding the Spending Clause, the School District ultimately uses the same interpretive method to construe the IDEA that petitioner uses. Like petitioner, the School District starts with the text, then consults the statute's purposes and structure, neither of which the School District asserts is unclear. Finally, the School District evaluates the administrability of competing rules. In the end, therefore, the only real dispute is whose position embodies a correct reading of the Act.

Petitioner's does. The words "appropriate public education" in the FAPE requirement signal a transmission of academic proficiency and valuable skills for participating in a complex society. That meaning is crystallized in the IDEA's objectives and FAPE-implementing provisions—most notably, the rules governing IEPs and requiring testing and accountability keyed to grade-level curriculum. Taken together, these objectives and rules dictate that schools must afford children with disabilities substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society.

The School District concedes that these same statutory provisions inform the FAPE requirement, relying on them to show that schools typically will seek educational success for children with disabilities. But the School District tries to strip

these FAPE-implementing rules of their private enforceability by labeling them as mere "procedural" directives. They are not. They are the core of the substantive obligation the Act imposes, the bridge to the meaningful public education guaranteed to every child with a disability. Accordingly, the IDEA's FAPE-implementing provisions cannot be satisfied by simply "think[ing] about" giving a child instruction and skills to succeed in the general curriculum and outside the classroom (Resp. Br. 40), but then adopting an IEP designed to deliver far less: only a barely-more-than-trivial educational benefit.

The "substantially equal opportunity" standard also is more workable than the School District's test. It gives due weight to schools' educational expertise and measures their actions against readily available benchmarks in each school's general curriculum. As the School District and its amici implicitly acknowledge, the "substantially equal opportunity" standard also captures what IEP teams generally are already doing on the ground. By contrast, the School District's "merely more than de minimis" standard is untethered to any objective criteria. The meager expectations it transmits are at odds with what educators themselves say they understand their roles to be. It therefore makes no sense to anchor IEP meetings across the country (or resolution of any dispute that ensues) to that standard.

ARGUMENT

I. *Rowley* does not support a "merely more than de minimis" benefit standard.

Echoing its position at the certiorari stage, the School District begins by asserting that "*Rowley* held that the IDEA does not impose *any* substantive

standard prescribing the level of education to be accorded children with disabilities." Resp. Br. 14 (internal quotation marks and citation omitted; emphasis added); *accord* Supp. BIO 9. But the School District quickly abandons that position, conceding on the next page that *Rowley* held that the IDEA "requires States to offer services sufficient to permit a child to benefit from special education." Resp. Br. 15 (internal quotation marks and citation omitted; emphasis removed).

To define that level of "benefit," the School District assembles various quotations from *Rowley* to contend that the IDEA imposes a "some benefit" standard—which the School District defines as a requirement "to provide a benefit that is 'more than de minimis.'" Resp. Br. 15 38 (quoting Pet. App. 16a). This argument misreads *Rowley*, particularly in light of the IDEA's 1997 and 2004 amendments.

1. *Rowley* nowhere says school districts satisfy the IDEA so long as they provide a "merely more than de minimis" educational benefit. And only once does it use the phrase "some educational benefit." *See* 458 U.S. at 200. That single turn of phrase does not support the School District's position, let alone establish a "definitive[]" construction of the IDEA. Resp. Br. 13.

The "some educational benefit" phrase appears at the beginning of a subsection of *Rowley* confirming that the FAPE requirement imposes more than just a set of procedures. "Implicit in the congressional purpose of providing access to a 'free appropriate public education,'" this Court explained, "is the requirement that the education to which access is provided be sufficient to confer some educational

benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. But, as the Court immediately made clear, this reference to "some benefit" was not meant to settle the standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Id.* at 202. Amy Rowley was receiving an education allowing her to "perform[] above average in the regular classrooms of a public school system," so the Court "confin[ed] [its] analysis to that situation" and held she had received a FAPE. *Id.*; *see also id.* ("We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.").

Viewed in context, therefore, *Rowley*'s reference to "some educational benefit" simply declares that a child with a disability is entitled to an education from which the child will profit. It does not establish a "merely more than de minimis" benefit as the Act's substantive command. To the contrary, *Rowley* explains that whatever exactly a FAPE might require, it "should be reasonably calculated to enable" children such as Amy Rowley, who are being educated in regular classrooms, "to achieve passing marks and advance from grade to grade." 458 U.S. at 204. Providing a "merely more than de minimis" educational benefit will seldom enable a child to achieve grade-level competency and thus pass from grade to grade. Petr. Br. 30-31; U.S. Br. 34.

Nor can the School District's standard be squared with *Rowley*'s insistence that the IDEA requires "access to public education" to be "meaningful." 458 U.S. at 192. In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court explained—in

language almost identical to *Rowley*—that the Rehabilitation Act of 1973 requires states to provide "meaningful access to the benefit" involved. *Id.* at 301. The federal government and lower courts have understood this explanation to require states to "afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement" as persons without disabilities. 45 C.F.R. § 84.4(b)(2); *see Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (surveying case law and agreeing with other circuits adopting that standard). Neither this Court nor any other has suggested that "meaningful access" in that context allows states to provide "merely more than de minimis" benefits. The same should be true here.

The School District's only response is that the IDEA's "meaningful access" demand applies solely to providing "related services"—such as interpretive services designed to enable a child to spend more time in the mainstream classroom—not to instruction itself. Resp. Br. 21-22. But, as *Rowley* makes clear, the "meaningful access" requirement applies generally to the Act's "substantive educational standard" for FAPE. 458 U.S. at 192; *see also* 34 C.F.R. § 300.39(b)(3)(ii) (schools must "ensure *access* of the child *to the general curriculum*, so that the child can meet the educational standards . . . that apply to all children") (emphasis added). And the School District does not, and cannot, claim a just-above-trivial benefit provides a substantively "meaningful" education.

2. The 1997 and 2004 amendments to the IDEA cement this analysis. The *Rowley* opinion—grounding

itself in the flexible statutory term "appropriate"—makes clear that educational programs for children with disabilities "should be formulated in accordance with the requirements of the Act" and consistent with "the goal[s] of the Act." *Rowley*, 458 U.S. at 198, 203-04 (quotation marks and citation omitted). The Act's FAPE-implementing requirements and overall goals, as augmented by the 1997 and 2004 amendments, dictate that aiming for a "merely more than de minimis" educational benefit is impermissible. *See* Petr. Br. 36-40; Br. of Nat'l Ass'n of State Directors of Special Educ. 6-12; Br. of Nat'l Disability Rights Network 21-35. The Act, in its current form, requires schools to provide children with disabilities with opportunities substantially equal to those they provide to all other students so that they can achieve academic success, attain self-sufficiency, and contribute to society. Petr. Br. 40-43.

Faced with the 1997 and 2004 amendments' undeniably "greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quotation marks and citation omitted), the School District is tellingly circumspect. It ignores *Rowley*'s directive to construe the substantive FAPE requirement in harmony with the IDEA's implementing provisions and objectives. And the School District implicitly accepts this Court's case law instructing that when Congress uses the term "appropriate," the term draws meaning from the legislation's purposes and provisions as a whole. Resp. Br. 32 (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)). The School District also implicitly accepts that the meaning of "appropriate" evolves as

other requirements of the statute evolve. Resp. Br. 33 (citing *West v. Gibson*, 527 U.S. 212 (1999)); *see also* Petr. Br. 19, 35-36 (discussing *Ruckelshaus* and *West*).

To be sure, the School District contends that, even after the 1997 and 2004 amendments, the IDEA's implementing provisions and objectives do not imbue the FAPE requirement with the meaning petitioner ascribes to them. Resp. Br. 23, 33. Petitioner will respond to that argument momentarily. But for now, it suffices to pin down that insofar as the 1997 and 2004 amendments impose substantive requirements at odds with a "merely more than de minimis" standard, *Rowley* cannot be read to require that test here.

Congress's amendments to the IDEA similarly answer the School District's argument that the IDEA cannot impose the "substantially equal opportunity" test because *Rowley* "reject[ed] any standard based on equality of opportunity," Resp. Br. 18. *Rowley* held merely that the Act does not require "*strict* equality of opportunity." 458 U.S. at 198 (emphasis added); *see also* Petr. Br. 42. In any event, following the enactment of the Americans with Disabilities Act of 1990, the plain language of the Act now declares a "national policy of *ensuring equality of opportunity*, full participation, independent living, and economic self-sufficiency for individuals with disabilities" that requires "[i]mproving educational results for children with disabilities." Pub. L. No. 105-17, § 601(c)(1), (3), 111 Stat. 37, 38-39 (1997) (now codified at 20 U.S.C. § 1400(c)(1)) (emphasis added); *see also* Br. of Nat'l Disability Rights Network 15-16 (elaborating linkage between the ADA and the IDEA's amendments). And

the 1997 and 2004 amendments—unlike the original version of the IDEA—require schools to strive to educate, test, and prepare children with disabilities for post-secondary-school living consistent with the opportunities provided to their peers without disabilities. Petr. Br. 36-40. These amendments demonstrate that a "free appropriate public education" should be calibrated to provide substantially equal opportunities, not a modicum of educational "benefit."

II. The Spending Clause does not support a "merely more than de minimis" standard.

1. The School District criticizes petitioner for omitting explicit reference to the Spending Clause, and it infuses its brief with the rhetoric of the clear-notice rule. But the School District analyzes the IDEA's FAPE requirement using the same method as petitioner. The School District starts with the statutory definition. *Compare* Resp. Br. 28-29, 37-38, *with* Petr. Br. 16-19, 41. It then turns to "the statute's structure and purpose"—just as petitioner does—and claims its substantive standard "flows from" those sources. *Compare* Resp. Br. 37-51, *with* Petr. Br. 19-29, 40-43. Indeed, when push comes to shove, the School District acknowledges that the Act's provisions for crafting IEPs directly and explicitly inform the FAPE requirement—again, just as petitioner maintains. *Compare* Resp. Br. 46-47, *with* Petr. Br. 21-24.

This agreement on methodology is as it should be. As noted above, *Rowley* looked to all of these sources, as well as the Act's legislative history, and indicated they all provided adequate notice to states receiving IDEA funds. *See supra* at 6; *see also*

Rowley, 458 U.S. at 204 n.26 (disregarding only "isolated statements in the legislative history" that contravened the IDEA's "language and the balance of its legislative history"). Subsequent IDEA cases have done so as well. *See, e.g.*, *Forest Grove*, 557 U.S. at 244-46 (rejecting school district's reading of IDEA because it was "at odds with . . . [t]he express purpose of the Act" and its implementing provisions).

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), on which the School District relies (Resp. Br. 35), conducted the same sort of analysis. *Pennhurst* concerned whether a federal statute imposed a legally enforceable obligation to provide appropriate treatment to individuals with developmental disabilities. The Court held that the statute did "no more than express a congressional *preference* for certain kinds of treatment." 451 U.S. at 19 (emphasis added). But the Court reached that conclusion—just as it has in other Spending Clause cases—by consulting the "language and structure," history, and "purposes of the Act." *See id.* at 18. And here, the IDEA indisputably imposes a legally enforceable obligation to provide a FAPE; the question is simply how the Act's language, structure, history, and purposes define that substantive obligation.[1]

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[1] Because the statutory analysis in this case is the same regardless of whether the Spending Clause applies, this Court need not decide whether the IDEA rests independently on Congress' power to legislate under "§ 5 of the Fourteenth Amendment." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305 (2006) (Ginsburg, J., concurring in part and concurring in the judgment). A strong argument exists that it

2. That leaves the School District's contention that the Spending Clause can require no more than a "merely more than de minimis" educational benefit because the higher standards advanced by petitioner, the United States, and some amici use different language from one another. Resp. Br. 27. This is like arguing that the various formulations this Court has used over the years to describe the "probable cause" standard, *see Ornelas v. United States*, 517 U.S. 690, 695-96 (1996), tells magistrates nothing more than that they may not issue warrants based on trifling evidence of wrongdoing. In other words, the School District's argument is nonsense.

Petitioner and the United States agree that a school district must offer far more than a benefit that is just above trivial. And they agree that a school must aim for grade-level competence for students who are in the regular classroom. They further agree that schools must offer a comparably rigorous program for students who are either too far behind to benefit fully from grade-level instruction without instruction on prerequisite skills or have such serious disabilities that an alternative benchmark is required. *See* Petr. Br. 43-48; U.S. Br. 23-27.

Variations in the precise terminology necessary to capture these fundamental areas of agreement do not permit this Court to ratchet the IDEA's substantive mandate all the way down to a "merely more than de minimis" standard. "In accepting IDEA

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does. *See id.*; *Rowley*, 458 U.S. at 198 (noting that the IDEA is designed to enforce the states' obligation "to provide equal protection of the laws") (quotation marks and citation omitted).

funding, States expressly agree to provide a [free appropriate public education] to all children with disabilities." *Forest Grove*, 557 U.S. at 246. And the IDEA's text, statutory objectives, and FAPE-implementing provisions inform what is and is not "appropriate" under the Act. The only real issue is whether petitioner's articulation (or the Government's substantially similar articulation) of what those sources dictate is correct, or whether the School District's alternative interpretation of those sources is accurate. We now turn to that issue.

III. The IDEA's text, purposes, and implementing provisions require much more than a just-above-trivial educational benefit.

Try as it might, the School District is unable to ground its "merely more than de minimis" standard in the text, purposes, or structure of the IDEA.

1. *Text.* The School District claims that the IDEA requires nothing more than a "merely more than de minimis" educational benefit because the Act mandates that children with disabilities receive "special education and related services," 20 U.S.C. § 1401(9), and "related services" are defined as things "required to assist a child with a disability *to benefit* from special education," *id.* § 1401(26) (quoted in part at Resp. Br. 37 (emphasis added by School District)).

The School District's reasoning is misguided. The IDEA's "related services" definition is distinct from the overall statutory requirement that schools provide a certain "level of education." *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999). And even in that definition, "benefit" is used as a verb, not a noun. "Related services" are merely

various *means*—things like "transportation," hearing aids, and iPads, 20 U.S.C. § 1401(26)—allowing children to benefit from the education the IDEA requires, not the education itself.

This brings us back to the original requirement to provide "an appropriate . . . education . . . in conformity with [an IEP]." 20 U.S.C. § 1401(9)(C)-(D). The word "education" signals not some minor benefit, but a comprehensive inculcation of skills necessary to prepare children to live in, and contribute to, society. Petr. Br. 17-19. The words "appropriate" and "in conformity with [an IEP]" direct us to "other sources" to complete the definition of the Act's substantive requirement, *Ruckelshaus*, 463 U.S. at 683—specifically, the purposes of the IDEA and its FAPE-implementing requirements.

2. *Purpose.* The School District acknowledges there is "no doubt that Congress wanted to improve educational results and replace low expectations with high ones." Resp. Br. 48. Beyond that, the School District has little to say about the IDEA's goal of ensuring all children receive an "effective[]" education, 20 U.S.C. § 1400(d)(4), and Congress's related finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities," *id.* § 1400(c)(1); *see also id.* § 1400(d)(1); Petr. Br. 20 (citing cases explaining that statutory purposes and findings imbue an operative term such as "appropriate" with meaning).

This is not surprising. No reasonable official charged with educating children could think that a

statute with these objectives allows schools to seek just-above-trivial educational advancement. Indeed, as the School District's amici make clear, no school official does think that. *See, e.g.*, Br. of Nat'l School Boards Ass'n 16-17.

3. *Structure.* The IDEA's FAPE-implementing provisions confirm that the Act requires far more than a just-above-trivial benefit. The School District acknowledges these provisions are "finely reticulated," "exacting," and "systemic." Resp. Br. 38-39; *see also* Br. of AASA, Sch. Superintendents Ass'n 15 (these provisions "make[] clear . . . that school districts *must* aim high"). In other words, there is no fair-notice problem here. But the School District says the provisions are irrelevant to the "substantive standard" the IDEA imposes because they are purely "procedural." Resp. Br. 38-39. So long as the team crafting an IEP "think[s] about," "focus[es] on," or "keep[s] in mind" the provisions governing IEPs, the school necessarily provides a FAPE regardless of what the school actually tries to teach the child in the classroom. *Id.* at 40; *see also id.* at 41 (these provisions "compel[]" only "informed deliberation").

Not so. The FAPE-implementing provisions clearly impose substantive obligations. To begin, the Act says that a FAPE must be "provided in conformity with the individualized education program required under section 1414(d)." 20 U.S.C. § 1401(9)(D). The IEP program, in turn, requires an IEP to "include[]":

- "measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum";

- a summary of the "special education and related services[,] . . . based on peer-reviewed research to the extent practicable," that will enable the child "to be involved in and make progress in the general education curriculum";
- "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments" applicable to all students (or, in the case of a child with a serious disability, an appropriate "alternate" assessment);
- beginning "when the child is 16," "postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills."

Id. § 1414(d)(1)(A)(i)(II), (IV), (VI), (VIII). Finally, "[t]he local educational agency shall ensure" that the IEP is reviewed and "revise[d]" "periodically," "as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum." *Id.* § 1414(d)(4)(A).

None of these requirements can be satisfied, as the School District would have it, simply by an IEP team's "think[ing] about" Section 1414(d)'s requirements. The IDEA and its FAPE-implementing provisions compel schools to put substantive goals directly in IEPs—goals keyed to the general curriculum. *See* U.S. Br. 18-19, 31-32. The statute then requires schools to provide education "in conformity" with those goals, 20 U.S.C. § 1401(9)(D), and to revise IEPs as necessary to stay on track. If a

school fails to do so, a child can obtain relief on the "substantive ground[]" that the school has denied him a FAPE, or otherwise "caused a deprivation of educational benefits" the IDEA guarantees. 20 U.S.C. § 1415(f)(3)(E)(i), (ii)(I), (ii)(III).

When pressed, the School District and its amici ultimately admit as much. Under a process-only view of the IEP requirements, it would be perfectly fine for an IEP team to provide specialized services to a child for only certain subjects, so long as the IEP team thought seriously about providing the child such services for every subject. It likewise would be acceptable, under a process-only view, for a school to refuse a parent's request to provide a readily available, peer-reviewed alternative to an outdated service currently giving a child only a minimal benefit, so long as the IEP team discussed the existence of the IDEA's preference for services based on peer-reviewed research. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Yet, confronted with scenarios like these, the School District says that "the statute plainly prohibit[s]" such outcomes. Resp. Br. 46-47. Its amici agree. *See, e.g.*, Br. of AASA, Sch. Superintendents Ass'n 19 ("To maintain conformity with the IDEA and ESEA, then, educators simply cannot . . . aim to barely clear the bar by seeking minimal benefit and limited progress for students with disabilities.").

If the School District and its amici are right about that (and petitioner and the United States agree that they are), then the School District cannot also be right that the FAPE-implementing provisions do nothing more than "set[] up a process of reasoned decisionmaking," Resp. Br. 42. These "finely

reticulated" provisions inform the IDEA's "substantive" obligation to provide "sufficient educational benefits to satisfy the requirements of the Act." *Rowley*, 458 U.S. at 202, 205-06; *see also* Petr. Br. 33 (citing other case law).

IV. The "substantially equal opportunity" standard best meets the administrative needs of the Act's stakeholders.

1. The School District attacks the workability of the "substantially equal opportunity" standard. Resp. Br. 51-54, 58-59. But that standard outperforms the School District's standard on every metric.

a. The "substantially equal opportunity" standard is plainly less "vague and amorphous," Resp. Br. 51 (quotation marks omitted), than the School District's "some benefit" standard. All agree that the most important decision makers here are the IEP teams that craft individual IEPs. The "substantially equal opportunity" standard gives those teams a set of readily identifiable benchmarks. As the IDEA directs, the standard tells IEP teams that they should set goals aimed at achieving the educational targets in the school's "general education curriculum"—the reference point that establishes what all children are expected to learn and be able to do at each grade level. 20 U.S.C. § 1414(d)(1)(A)(i)(II); *see also id.* § 1414(d)(1)(B)(ii) (mandating, for this reason, that the IEP team include at least one "regular education teacher"). In *Rowley*'s words, the school must aim, to the extent practicable, to provide a child with a disability with an education "reasonably calculated to enable the child to achieve

passing marks" in that curriculum "and advance from grade to grade." 458 U.S. at 204.[2]

In the "relatively small number" of cases that generate litigation, U.S. Br. 28; *see also* Petr. Br. 4, courts easily can follow these guideposts as well. Courts have ample experience administering tests very much like the "substantially equal opportunity" standard. As noted above, the federal government and federal appellate courts have concluded that the Rehabilitation Act requires states to abide by a test along these lines. *See supra* at 4-5. Federal courts of appeals also have applied a similar test in cases under Title III of the ADA, which requires states to ensure that people with disabilities have "full and equal enjoyment" of public accommodations, including schools. 42 U.S.C. § 12182(a). *See, e.g.*, *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012).

By contrast, it is hard to think of a more "vague and amorphous" standard than the one the School

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[2] The School District claims confusion over where to look to find the "general education curriculum" that serves as the point of comparison here. Resp. Br. 53. But the School District's own "Guaranteed and Viable Curriculum" is posted online and describes in great detail "what students need to know and be able to do." Douglas County Sch. Dist., *GVC*, https://www.dcsdk12.org/world-class-education/gvcs##. This is typical. A school's general education curriculum is usually developed at the district level and must comport with "the standards of the State educational agency." 20 U.S.C. § 1401(9)(B) (FAPE definition); *see also id.* § 1412(a)(1), (a)(11) (requiring local practices for educating children with disabilities to satisfy statewide standards).

District promotes to encapsulate the "merely more than de minimis" test: "some benefit." That standard is not tied to any guidepost, and the word "some" is about as nebulous as any in the English language. *See* Petr. Br. 31. The only way the "some benefit" standard could provide any real guidance would be if it meant simply that IEPs need not try to achieve anything at all because the IDEA is really just a procedural law. But, after initially gesturing in that direction, *see* Resp. Br. 14, the School District assiduously denies this is its position, *see id.* 46-47. It is at pains to the last page of its brief to emphasize that courts must "tailor their analysis to the individualized circumstances of each case" and "discern the difference between *some* benefit and a benefit that is merely *de minimis*," *id.* 59. How IEP teams and courts can reliably do that, with no substantive touchstones to guide them, is left unsaid.

b. The "substantially equal opportunity" standard also does a better job than the School District's standard of keeping courts from "substitut[ing] their own notions of sound educational policy for those of the school authorities," *Rowley*, 458 U.S. at 206. Because the "substantially equal opportunity" standard measures a school's efforts to educate a child with a disability against the methodologies and goals the school district has already set respecting other children, courts do not have to decide what pedagogies or educational objectives are suitable or proper. Nor do courts have to determine the best way to pursue those pedagogies and objectives with respect to a particular child with a disability. *See* Petr. Br. 49 (noting that the question presented here is distinct from whether courts should defer to school officials' determinations). If litigation

arises, courts need only determine—using traditional tools used to evaluate equality claims—whether the school's actions were "reasonably calculated," *Rowley*, 458 U.S. at 204, to provide opportunities to the child with a disability equivalent to those it affords to other children in the school district.

On the other hand, the School District's "some benefit" test offers judges no guidance regarding what educational practices a school should be implementing or what post-secondary goals it should be pursuing. Even peer-reviewed research—which, as noted above, each child's IEP must be "based on" wherever practicable, 20 U.S.C. § 1414(d)(1)(A)(i)(IV)—is apparently not a necessary compass. *See supra* at 13-15. Faced with such an undefined playing field, courts would have no choice but to decide for themselves what educational practices and objectives *they* think are needed to provide a "more than de minimis" educational "benefit."

c. The "substantially equal opportunity" standard, in contrast to the "merely more than de minimis" test, tracks what most schools are already generally doing for students in the real world. *See* Br. of Nat'l Ass'n of State Directors of Special Educ. 6-12; Br. of Former Officials of the U.S. Dep't of Educ. 10-25; Br. of Disability Rights Orgs. & Public Interest Ctrs. 28-38. Even if educational officials do not use petitioner's precise terminology, most of them "are already aiming high." Br. of AASA, Sch. Superintendents Ass'n 4. Moreover, experience has shown that "setting high expectations for students with disabilities . . . , in fact, *works*." Br. of Nat'l Ass'n of State Directors of Special Educ. 11; *see also*

Br. of Nat'l School Boards Ass'n 6-7, 16-17 (special education programs aiming above "a 'more than de minimis' legal standard" have been "successful").

The School District counters that the "merely more than de minimis" standard has been "on the books" in the Tenth Circuit and certain other jurisdictions "for decades." Resp. Br. 58. True enough. But even in those jurisdictions, not one organization or educational official appearing here claims to aim for that meager standard. To the contrary, the National Association of State Directors of Special Education reports that "all" its members providing information have "expressed their belief that a standard more meaningful than just-above-trivial is the norm today." Br. of Nat'l Ass'n of State Directors of Special Educ. 9. The National Association of School Boards likewise reports that "IEP teams are *not* basing their recommendations on the goal of meeting a 'more than *de minimis*' legal standard." Br. of Nat'l School Boards Ass'n 17 (emphasis added).

That educators—even when given the chance—say they decline to aim as low as the School District says the law allows speaks volumes about the School District's test. This Court should not now christen a just-above-trivial standard simply to bail out a school, such as respondent, that plainly fell short of its IDEA obligations. Doing so would only invite more schools to do the same.

2. Although the question presented asks only what the proper standard is, the School District also challenges petitioner to apply the "substantially equal opportunity" standard to the facts of this case. Resp. Br. 54-56. That is a strange demand. The School District does not claim its efforts satisfied

petitioner's standard. Furthermore, this Court is one "of review, not of first view." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). So even if the parties actually disagreed over whether the School District satisfied the "substantially equal opportunity" test, this Court's "ordinary practice" would be to remand so the lower courts could reconsider petitioner's claim "under the proper standard," *id.*

Be that as it may, we briefly explain how the School District fell short of its statutory obligations in dealing with Drew's educational needs. First and foremost, the School District should not have kept trying to educate Drew through instructional practices that obviously were not working. *See* Petr. Br. 8-10. When the academic goals in IEPs stay the same year after year, it is clear that new strategies are needed. In addition, the School District should have conducted a behavioral assessment to identify the sources of the specific behaviors that interfered with Drew's ability to function at school and to help the IEP team select interventions to directly address them. As the Department of Education's commentary to its regulations explains, "a failure to . . . address [behaviors impeding learning] in developing and implementing the child's IEP" constitutes "a denial of FAPE." 34 C.F.R. pt. 300, app. A, § IV, at 115.

Looking forward, the School District should have established academic goals for Drew as close as reasonably possible to the grade-level goals for other students in the school. The School District also should have assessed his aptitude for self-sufficiency and participating in social activities outside of school.

Based on those assessments, the School District should have offered Drew an IEP and educational and related services designed to meet those goals. The School District was not required to adopt any one specific educational practice or behavioral therapy. Educators and other experts can reasonably disagree on specific courses of action. But the IDEA did not permit the School District simply to propose a fifth-grade IEP that "was similar in all material respects to Drew's past IEPs" that had so obviously and woefully failed. Pet. App. 15a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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December 30, 2016

No. 15-827

In The Supreme Court of the United States

ENDREW F., a Minor, By and Through His Parents and Next Friends, Joseph F. and Jennifer F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

What is the level of educational benefit that local education agencies (LEAs) must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTERESTS OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, *Amicus Curiae* National Association of State Directors of Special Education ("NASDSE") respectfully submits this brief in support of neither party.[1] NASDSE is a not-for-profit organization established in 1938 to promote and support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education, the Part B data managers and the 619 coordinators in the states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, federal territories and the Freely Associated States. NASDSE's mission is to work with state educational agencies to ensure that all children and youth with disabilities receive the educational supports and services they need to be prepared for post-school education, career, and independent living choices. NASDSE accomplishes its mission by establishing and maintaining relationships with those individuals and groups responsible for the development of policies, educational and other programs serving individuals with disabilities, and those responsible for

[1] Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *Amicus* notes that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or its counsel made a monetary contribution to the preparation and submission of this brief.

implementation at the school, local district, state and national levels. NASDSE regularly represents its members' interests before federal courts and has participated as *amicus curiae* in several cases before this Court involving the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

Amicus has a profound interest in the Court's resolution of the instant matter. *Amicus* and its members believe all children with disabilities have a right to a free appropriate public education. Without addressing the specific facts of this case, *Amicus* offers arguments and information from its experience "in the field" that we hope will assist this Court in reaching a decision reinforcing the use of collaborative means to resolve the disagreements arising between parents and schools in matters relating to students with disabilities. Our experience confirms that educators of students with disabilities are already providing – on a daily basis and all across the country – those students an education that is more than "just-above-trivial" and that is specifically tailored to individual student needs.

SUMMARY OF ARGUMENT

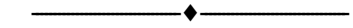
Amicus possesses decades of experience educating children with disabilities. We understand acutely the ways in which both the educational backdrop and expectations under the Individuals with Disabilities Education Act ("IDEA") have evolved in the thirty-four

years since this Court decided *Board of Education v. Rowley*, 458 U.S. 176 (1982), and the forty-one years since Congress originally enacted the IDEA. Over that time, Congress has recognized and responded to this evolution through a series of amendments to the IDEA and other federal education laws establishing significantly higher academic expectations for students with disabilities that go beyond merely providing for their inclusion. Instead, Congress has continually strengthened the requirements of the IDEA and other education laws in an effort to provide every student with disabilities a quality education and preparation for post-secondary opportunities.

Our member-educators across the country have adapted to implement these more rigorous requirements. Today, public school educators across the country set high expectations for students with disabilities – focusing on their abilities, not their disabilities – consistent with the 1997 and 2004 amendments to IDEA, as well as the 2000 amendments to the Elementary and Secondary Education Act in the No Child Left Behind Act. *See also* Every Student Succeeds Act, 20 U.S.C. § 6301, *et seq.*, P.L. 114-95.

In other words, our member-educators already apply these high standards every day in the field. We can attest that our educators are prepared to and do provide an education at a level more meaningful than the Tenth Circuit's "just-above-trivial" standard. Our educators tailor their efforts to each individual student to make sure that each student's education is *meaningful* in light of the specific abilities and educational

challenges. Our member-educators believe that this standard better serves the students and their families, the schools they attend, and the communities in which they are located.



ARGUMENT

I. The IDEA Has Markedly Evolved in the Thirty-Four Years Since this Court Decided *Rowley*.

In the 1970s, Congress began to address the educational crisis caused by wholly excluding children with disabilities from access to public schools and a meaningful public education. *See Rowley*, 458 U.S. at 179 (summarizing Congress's findings that children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out' "). In 1975, Congress enacted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), later amended and renamed the IDEA. The Act's overarching goal was to address this crisis and create a norm of inclusion. Thus, the IDEA provided that, in all states receiving federal education funds for special education programs, every child with a disability is entitled to a free appropriate public education ("FAPE"). *Rowley*, 458 U.S. at 775. To provide a FAPE, parents and public school educators collaborate to create annual individualized education programs ("IEPs") which, consistent with the wide range of abilities

present in children with disabilities, are "tailored to the unique needs" of each child. *Rowley*, 458 U.S. at 181; *see also* 20 U.S.C. § 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327.

This Court first addressed the requirements of the IDEA in 1982 in *Rowley*, 458 U.S. at 176. At that time, many schools were struggling to achieve the IDEA's goal of basic inclusion. Operating in that context, the Court expressly declined to specify the level of benefit to which children with disabilities were entitled. *Id.* at 202. The Court recognized that students with disabilities may have "dramatically" different capabilities. *Id.* Indeed, it cited these very differences in explaining why it declined to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.*

When Congress revisited the IDEA decades later, the educational backdrop had dramatically evolved. Consistent with this shifting context, the 1997 Amendments to the IDEA set significantly higher expectations for the inclusion of students with disabilities. The 1997 Amendments broadened the IDEA's goals from simply a baseline of inclusion to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In reauthorizing the IDEA, Congress required states to include children with disabilities in statewide educational assessments. *Id.* § 1412(a)(16). In sum, these amendments "place[d]

greater emphasis on improving student performance and ensuring that children with disabilities [would] receive a quality public education." *Forest Grove Sch. Dist.*, 557 U.S. at 239 (quoting S. Rep. No. 105-17, at 3 (1997)).

By 2004, public schools across the nation had implemented these more rigorous standards, including striving to provide every student a quality education and preparing students with disabilities to be able to graduate high school and prepare for full participation in life and their communities after high school. Reflecting this progress, Congress revisited the IDEA again in 2004, codifying in even stronger requirements the importance of setting "high expectations" for children with disabilities. *See, e.g.*, 20 U.S.C. § 1400(c)(5)(A) (recognizing that educators should set "high expectations" including preparing children with disabilities "to lead productive and independent lives, to the *maximum* extent possible") (emphasis supplied); § 1414(d)(1)(A)(i)(VIII) (requiring IEPs to assist children with disabilities in transitioning to post-secondary education, employment, and, if possible, independent living).

II. *Amicus* Can Attest: A Standard More Rigorous than the "*Rowley* Standard" Is Working And Practiced Everyday "in the Field."

Consistent with the IDEA's 1997 and 2004 amendments, public school educators across the nation have regularly set high expectations for and provided

meaningful educational benefits to students with disabilities. Decades of research and experience establish that the education of children with disabilities is enhanced by placing high expectations on these children – tailored to their individual abilities and potential – in order to prepare them to be college- and career-ready and to lead productive and independent adult lives. These high expectations are implemented every day in the field through carefully crafted IEPs, drafted with the participation of the parents and child, based on the child's individual needs. In crafting an IEP, educators take into account a child's present level of academic achievement, overall academic performance, and how the child's disability impacts his or her ability to be involved in and make progress in the general education curriculum. 34 C.F.R. § 300.320.

Research has demonstrated that children with disabilities can make significant academic progress related to reading and math when appropriate instruction, services, and support are provided. *See* Letter from U.S. Dep't of Educ., Office of Special Educ. Programs ("OSEP") (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. Moreover, setting high expectations for students with disabilities correlates positively with academic achievement. *See* Kevin S. McGrew & Jeffrey Evans, *Expectations for Students with Cognitive Disabilities: Is the Cup Half Empty or Half Full? Can the Cup Flow Over?*, NAT'L CENTER ON EDUC. OUTCOMES SYNTHESIS REP. 55 (Dec. 2004), https://nceo.info/Resources/publications/onlinepubs/Synthesis55.html

("[E]xpectancy effects and academic achievement do appear to correlate positively"); *Teacher Expectations: MetLife Survey of the American Teacher: Collaborating for Student Success*, EDUC. WEEK (Mar. 30, 2010), http://www.edweek.org/ew/articles/2010/03/31/27report-3.h29.html. On the other hand, low expectations can result in children with disabilities receiving less challenging instruction and thereby "not learning what they need to succeed" at their grade level. *Id.*[2] *Amicus* strongly believes that the application of high expectations in the field have resulted in meaningful progress for students with disabilities. For example, in 2000, the graduation rate for students with disabilities was approximately 56%. U.S. Dep't of Educ., *OSEP 2002 Annual Report to Congress on the Implementation of the Individuals with Disabilities Act (IDEA)*, Section IV. Results, Figure IV-1, at IV-1-IV-2, https://www2.ed.gov/about/reports/annual/osep/2002/section-iv.pdf. Today, it is 63%, and *Amicus* expects that number to continue to rise in the future. *See* National Center for Education Statistics, Table 1: Public high school four-year adjusted cohort graduation rate (ACGR), by race/ethnicity and selected demographics for the United States, the 50 states, and the District of Columbia: School year 2013-14, http://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2013-14.asp.

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[2] Consistent with the goal of providing appropriate instruction, each child's IEP must include a statement of measurable annual goals designed to meet "the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." 34 C.F.R. § 300.320(a)(2)(i)(A).

III. A Standard More Meaningful than Just-Above-Trivial Is the Norm Today.

Amicus acknowledges that it must be quite difficult for courts to adjudicate disputes under the IDEA. However, to the extent that courts *must* be involved in adjudicating these disputes, NASDSE has polled its members and, of those who responded, all expressed their belief that a standard more meaningful than just-above-trivial is the norm today. To the extent that the Court intends to define that standard in this case, *Amicus* respectfully requests that the Court carefully considers two important policy priorities. First, any standard should encourage communities to *raise* expectations regarding students with disabilities. We must create an environment where all stakeholders feel empowered to consider how the needs of all students align with, and support, the needs of children with disabilities. Second, any standard should advance the goals reflected in Congress's amendments to the IDEA to ensure that all children with disabilities receive the educational support to prepare for college and post-school integration into their communities.

Amicus does not believe that a child who receives only just-above-trivial educational benefits has received an appropriate education. Consistent with Congress's amendments to the IDEA, we should not accept low expectations for our children with disabilities, just as we would not settle for low expectations for our non-disabled children. *See* U.S. DEP'T OF EDUC., OFFICE OF SPECIAL EDUC. & REHAB. SVCS., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR

FAMILIES 36 (2002). All students, including those with disabilities, should receive an education that ensures that they are held to high academic standards with supports that are appropriate to meet their needs.

In addition, recognizing that our nation's educators aim high *every day in the field* benefits our public schools and neighborhoods as a whole. A school's overall performance can achieve real improvement where students with disabilities are given the resources they need to receive an appropriate and quality education. *See* Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L. J. 623, 624-25 (2003) (explaining that a school's overall student performance on standardized testing "can . . . have a huge impact on teachers, school, and districts" because it can affect "how much money a school receives"); Michael Metz-Topodas, *Comment: Testing – The Tension between the No Child Left Behind Act and the Individuals with Disabilities Act*, 79 TEMP. L. REV. 1387, 1400 (2006) (explaining that setting high standards for students with disabilities improves their performance on state assessments). By contrast, when students with disabilities are neglected and not challenged, that can reflect negatively on a school's progress as a whole, adversely affecting the school and the community as a whole. *Cf.* Henry M. Levin, *What are the Mechanisms of High-Poverty Disadvantages?: On the Relationship between Poverty and Curriculum*, 85 N.C.L. REV. 1381, 1404 (June 2007) ("The lower expectations for children feed the lower expectations the staff have for themselves. The staff members are often reluctant to try new ideas

because they are afraid that the ideas will not work with 'our children.' ").

Finally, setting high expectations for schools empowers state directors of special education and local school district special education directors across the nation to provide services that meet the needs of individual students with disabilities at a level consistent with the IDEA's requirements. Where legal requirements appropriately recognize the need to aim high – but tailor individual expectations to the unique abilities and limitations of individual children with disabilities – more state and local resources can be deployed in service of this goal. For all of these reasons, a more meaningful standard than just-above-trivial is the right standard for children with disabilities, pubic schools, and our member-educators across the country.

Thus, based on our experience every day in the field, our members believe that setting high expectations for students with disabilities is both appropriate under the IDEA and, in fact, *works*. However, *Rowley*'s basic premise, that students with disabilities may have "dramatically" different capabilities, remains true today. 458 U.S. at 202. *See Educating Children with Special Needs*, SPECIAL EDUC. NEWS, Nov. 10, 2016, http://www.specialednews.com/educating-children-with-special-needs.htm ("Special education instructors work with youths and children with a wide range of disabilities."); *cf.* Peter David Blanck, *ADA Study and Commentary: Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from*

1990-1993, 79 IOWA L. REV. 853, 863 (1994) ("Persons with disabilities encompass a wide range of individuals."). Students' disabilities can range from a significant cognitive disability or autism to a mild to moderate learning disability. *See Educating Children with Special Needs*, *supra*. Because of that broad spectrum of abilities and potential, the proper standard must be sensitive to the individual abilities of each student; due consideration must be accorded at an individualized level to academic, physical, and health needs, among other child-specific characteristics.

For all of these reasons, our members respectfully suggest that any legal standard adopted in this case should take account of what our members are already doing every day "in the field" – namely, applying the requirements enacted by Congress and providing students with educational benefits that are *meaningful* in light of the students' potential and the IDEA's stated purposes.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court consider our experience and observations in its resolution of this case.

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No. 15-827

IN THE

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ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

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DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Legislative Materials

Other Authorities

BRIEF FOR PETITIONER

Petitioner Endrew F. respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, Pet. App. 1a, is published at 798 F.3d 1329. The opinion of the United States District Court for the District of Colorado, Pet. App. 27a, is unpublished but is available at 2014 WL 4548439. The opinion of the State of Colorado Office of Administrative Courts, Pet. App. 59a, is also unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 25, 2015. Pet. App. 1a. Petitioner's request for rehearing and rehearing en banc was denied on September 24, 2015. Pet. App. 86a. The petition for a writ of certiorari was filed on December 22, 2015, and granted on September 29, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA or "the Act"), 20 U.S.C. § 1400 *et seq.*, requires that public schools receiving federal funds for special education services provide each child with a disability a "free appropriate public education." 20 U.S.C. §§ 1401(9), 1412(a)(1)(A). This free and appropriate public education must be "provided in conformity with the individualized education

program," or IEP, "required under" the IDEA. *Id.* § 1401(9)(D).

Other relevant provisions of the IDEA are included in the joint appendix, J.A. 21-111.

STATEMENT OF THE CASE

A. Legal background

1. Several decades ago, concerned that children with disabilities often were not receiving proper education in public schools, Congress conducted an investigation. It found that such children sometimes "did not receive appropriate educational services" while others "were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2)(A), (B). Still other children with disabilities "were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting H.R. Rep. No. 94-332, at 2 (1975)); *see also Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982); Edwin W. Martin et al., *The Legislative and Litigation History of Special Education,* 6 Special Educ. Students Disabilities 25, 26-28 (1996).

These findings gave reason for alarm. Their "long range implications" were that "public agencies and taxpayers w[ould] spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle." S. Rep. No. 94-168, at 9 (1975); *see also Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) (not receiving an education imposes an "inestimable toll" on society as well as "the social, economic, intellectual, and psychological wellbeing of the

individual."). Yet "[w]ith proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, at 9.

To address this situation, Congress in 1975 passed the Education for All Handicapped Children Act – now known as the Individuals With Disabilities Education Act, or IDEA. In order to receive federal funding for special education services, the IDEA requires states to "identi[fy], locat[e], and evaluat[e]" students who may need special education. 20 U.S.C. § 1412(a)(3). Once children with disabilities are identified and evaluated, the Act then requires local schools to provide them a "free appropriate public education" (FAPE). *Id.* § 1412(a)(1)(A).

The IDEA defines a FAPE (somewhat circularly) as "special education and related services" that are (A) provided without charge; "(B) meet the standards of the State educational agency; (C) include *an appropriate preschool, elementary school, or secondary school education* in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9) (emphasis added).

The "centerpiece of the statute's education delivery system for disabled children" is the individualized education program, or IEP. *Honig*, 484 U.S. at 311. Each IEP is created by an "IEP team" comprised of the child's parents or guardian, the child's teachers, and other qualified personnel able to "provide, or supervise the provision of, specially

designed instruction to meet the unique needs of" the child. 20 U.S.C. § 1414(d)(1)(B)(iv)(I). The "IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing 20 U.S.C. § 1414(d)(1)(A)).

2. Congress recognized that parents and educators will occasionally disagree on the content of an IEP or whether it has provided their child with a FAPE. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). The IDEA requires that parents be afforded an opportunity to resolve these differences informally, including through mediation. 20 U.S.C. § 1415(d)(2)(E), (e). These informal means often are sufficient to resolve any concerns. *See* Consortium for Appropriate Dispute Resolution in Special Education, *IDEA Dispute Resolution Data Summary for: U.S. and Outlying Areas 2004-05 to 2013-14*, at 4 (Sept. 2015).[1] But when that is not possible, either the school district or the parents may request a "due process hearing" before a hearing officer at a local or state educational agency. 20 U.S.C. § 1415(f).

Most requests for due process hearings are withdrawn, dismissed, or resolved without an actual hearing. *See IDEA Dispute Resolution Data, supra*, at 12. But when the matter goes to a full hearing, the hearing officer decides whether the school district has

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[1] http://www.directionservice.org/cadre/pdf/2013-14%20DR%20Data%20Summary%20US%20&%20Outlying%20Areas.pdf.

met the statute's requirements, principally whether it has provided the student with a FAPE. 20 U.S.C. § 1415(b)(3), (f)(3)(E). Aggrieved parties may appeal to a state or federal court, *id.* § 1415(*i*)(2)(A), which "shall grant such relief as the court determines is appropriate," *id.* § 1415(*i*)(2)(C)(iii). This relief may require placing the child in a regular or a special classroom, awarding "compensatory" special education services to make up for past inadequacies, or reimbursing parents for tuition payments to a private school while the public school was failing to provide a FAPE. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *see* 20 U.S.C. § 1412(a)(10)(C)(ii).

3. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court considered the Act's requirement to provide a FAPE. The Court held that schools are not required to "maximize" the potential of children with disabilities. *Id.* at 189-90, 200. At the same time, this Court noted that schools must provide educational services designed to deliver "some educational benefit" and "formulated in accordance with the requirements of the Act." *Id.* at 200, 203-04. As the IDEA then stood, that meant "providing personalized instruction with sufficient support services to permit [a disabled] child to benefit educationally from that instruction" and "to achieve passing marks and advance from grade to grade." *Id.* at 203-04. By affording children with disabilities access to public education, this Court explained, Congress meant to provide enough "substantive" educational benefit "to make such access meaningful." *Id.* at 192; *see also id.* at 202 (school district discharged its duty to provide a FAPE by providing "substantial specialized educational instruction and related services").

4. While the 1975 Act made significant progress in terms of educating children with disabilities, Congress determined after surveying the post-*Rowley* landscape that more needed to be done to "improv[e] the quality of services and transitional results or outcomes obtained by [such] students." S. Rep. No. 104-275, at 14 (1996); *see also* S. Rep. No. 108-185, at 6 (2003). Accordingly, Congress enhanced the IDEA – first in 1997 and again in 2004. *See* Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The purpose of these amendments was "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)). In doing so, Congress stopped short of demanding any particular outcomes for students with disabilities. But Congress insisted that school districts abandon the "low expectations" many had been setting for such students and instead strive to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1), (4).

a. The 1997 amendments heightened the requirements for IEPs. For instance, Congress required that IEPs include "measurable" goals as well as descriptions of how those goals should be evaluated, so that progress, or lack thereof, could be ascertained and documented. Pub. L. No. 105-17, § 101, 11 Stat. 37, 84 (1997). Congress required educators to reevaluate students' overall education annually, considering present levels of performance,

educational needs, and "whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum." Pub. L. No. 105-17, § 101, 111 Stat. 37, 83 (1997).

The 1997 amendments further require that, beginning when a student reaches age 16, the student's IEP include a plan for services to enable students with disabilities to transition to life after high school. Pub. L. No. 105-17, § 101, 111 Stat. 37, 84-85 (1997). They did so to "promote movement from school to post-school activities, including post-secondary education, vocational training, integrated employment, . . . continuing adult education, adult services, independent living, or community participation." Pub. L. No. 105-17, § 101, 111 Stat. 37, 46 (1997).

b. In 2004, Congress further strengthened the IDEA's commitment to high academic expectations for students with disabilities. The 2004 amendments aligned the IDEA's IEP requirements with the challenging academic standards and testing requirements of the Elementary and Secondary Education Act, which generally requires that the States' academic expectations and assessments for students with disabilities be the same as those for students without disabilities. *See generally* 20 U.S.C. § 1412(a)(15), (16).

In addition, IEPs now must include not only the transition services required by the 1997 amendments but also "appropriate measurable postsecondary goals," such as employment, higher education, and

independent living. Pub. L. No. 108-446, § 101, 118 Stat. 2708, 2709 (2004). Along the same lines, the 2004 amendments removed a requirement that IEPs include short-term goals because evidence showed that they "distract from the real purpose of special education, which is to ensure that all children and youth with disabilities achieve high educational outcomes and are prepared to participate fully in the social and economic fabric of their communities." S. Rep. No. 108-185, at 28-29 (2003).

B. Factual and procedural background

1. Petitioner Endrew F. (Drew) was diagnosed with autism at age two. Pet. App. 3a. Autism is a neuro-developmental disorder that can impair social and communicative skills and cause an individual to engage in "repetitive activities, . . . resist[] environmental change or change in daily routines, and [have] unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i) (IDEA regulation). In Drew's case, autism impairs his "cognitive functioning, language and reading skills, and his social and adaptive abilities." Pet. App. 3a. Because autism is one of the disabilities categorically covered by the IDEA (and because Colorado, the state where he lives, has elected to accept IDEA funds), Drew is entitled to the Act's protections. *See* 20 U.S.C. § 1401(3)(A).

Drew attended public schools in respondent Douglas County School District from preschool through fourth grade and received an IEP from the school district each year. Pet. App. 3a-4a. Drew's IEP goals included functional goals alongside traditional academic goals. For instance, Drew's third grade IEP stated that "Drew will make and maintain eye contact with peers and adults" and "will indicate the

time shown" on an analog clock. Supp. J.A. 59sa, 67sa. Yet the School District never implemented any plan for helping Drew manage his autism-related behavioral and adaptive struggles.

While in school, therefore, Drew experienced growing behavioral and adaptive difficulties. He had frequent outbursts and suffered from fixations that caused him to disrupt neighboring classrooms and sometimes to crawl over students to get to things, such as a timer. Drew was also gripped by extreme fear of flies and spills, and public restrooms, which made it nearly impossible for him to go to the bathroom at school. Pet. App. 31a, 61a, 73a.

Drew's "behavioral issues interfered with his ability to learn." Pet. App. 56a. Yet the School District's special education teacher claimed to be "unable to discern" any way to prevent his disability-related challenges from impeding his educational progress. *See id.* 56a-57a. Consequently, as Drew grew older, the School District postponed the majority of his academic goals from one year to the next or abandoned them altogether. *See id.* 76a.

The vast majority of Drew's IEP goals for fourth grade were "continued," that is, not achieved. *See* Supp. J.A. 92sa-108sa. Furthermore, Drew was regressing in several areas, including the skills needed to prepare him for an independent life. *Id.* 92a (goal of retelling a passage deemed "no longer appropriate"); *id.* 100sa (regressing in goal of learning division with numbers ranging from 0-5). He was generally unable to express the cause of his feelings to others, *id.* 140sa, to learn his peers' names, *id.* 141sa, or to put on a coat, *see* CA10 J.A. vol. 5, at 196-97.

Drew's negative behaviors – without receiving any coping mechanisms or therapies from his school – intensified. He struggled with self-harming behaviors like head banging. On at least two occasions, he ran away from school unattended. Pet. App. 66a-67a. When he was brought back to school, he became so agitated that he took off his clothing and relieved himself on the floor. *Id.*

The School District's IEP for Drew's fifth grade year had fewer goals than in previous years. And the goals it contained were "the same or similar" to those goals from previous years. Pet. App. 76a; *see also id.* 15a (fifth grade IEP was "similar in all material respects to Drew's past IEPs"). For instance, for the third consecutive year, the IEP included the goal of learning multiplication for single-digit numbers. *See* Supp. J.A. 67sa, 99sa, 135sa.

2. Drew's parents rejected Drew's fifth grade IEP as ineffective and placed him in a private school that specializes in educating children with autism.

The new school immediately recognized that, for Drew to make academic progress, his behavior problems had to be addressed. The school instituted a behavioral intervention plan addressing Drew's particular needs. Supp. J.A. 198sa-200sa. The plan identified each of Drew's problematic "target" behaviors and proposed a specific strategy to deal with them. *Id.* 198sa-199sa. Drew then received applied behavior analysis, *id.* 210sa-217sa, a therapeutic program "the most authoritative voices in American pediatrics have found effective for children with autism," Cert. Br. of Autism Speaks 7. For instance, to increase Drew's ability to tolerate feared items such as flies, teachers in the new school

systematically exposed Drew to the items while providing positive reinforcements aimed at improving Drew's tolerance for each item. Supp. J.A. 199sa.

The new school also ordered a speech therapy consultation. Supp. J.A. 204sa. Based on the consultant's recommendations, Drew was provided regular speech therapy to improve his speaking skills. *Id.* 226a.

The new school enhanced Drew's academic goals as well. Gone were the days in which Drew's IEP goals were largely repeated year after year, with little effort at improvement. In math, for example, Drew's goals went from mastering multiplication through the "threes" table to mastery though the "twelves" table. Supp. J.A. 222sa. Similarly, upon entering the school, Drew was able to do no more than distinguish the proper use of addition and subtraction signs, but his new IEP sought significant improvement, explaining that, with "systematic teaching," Drew would "complete word problems using addition, subtraction, and multiplication." *Id.* And though Drew could identify time on an analog clock only by the hour and half hour, Drew's new IEP expected him, in the coming year, to identify time on a variety of clocks "to the minute." *Id.* 223sa.

Drew immediately made significant "academic, social and behavioral progress." Pet. App. 29a. Less than four months after transferring to the new school, Drew "quickly mastered multiplication," CA10 J.A. vol. 7, at 92, learned to type over 17 words per minute, *id.* vol. 4, at 165, and began identifying emotions in himself and others, *id.* vol. 4, at 161. Within six months, Drew had overcome his fear of public restrooms and the frequency and severity of

his behavioral outbursts were greatly reduced, which, in turn, allowed him to progress academically. *See id.* vol. 4, at 154.

3. Drew's parents filed an IDEA due process complaint in 2012, maintaining that the School District's IEP for his fifth grade year had denied him a FAPE. They pointed to Drew's serious behavioral decline during his attendance at the District's school, to the fact that Drew had made "little to no progress" academically, and to the IEP itself, which included mostly the same objectives as previous years and abandoned other goals. Pet. App. 15a, 76a. Drew's parents sought reimbursement for the tuition at his new school. *Id.* 59a-60a.

The hearing officer sided with the School District. She determined that the District had provided Drew with a FAPE because Drew had received "some" educational benefit while enrolled in public school. Pet. App. 72a.

4. Having exhausted his administrative remedies, Drew, through his parents, filed an IDEA suit in the U.S. District Court for the District of Colorado. The district court reasoned that the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." Pet. App. 36a (citation omitted). Viewing the case through that lens, the district court agreed with the hearing officer that the School District had provided a FAPE to Drew because it had enrolled him in classes and enabled him to make "minimal progress" on some of his IEP goals. *Id.* 49a.

5. The Tenth Circuit affirmed. As relevant here, the court of appeals adhered to its holding in a 1996 case that a school district discharges its FAPE obligation so long as it aims to provide a "merely . . . more than *de minimis*" educational "benefit." Pet. App. 16a (quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). Even under this "merely more than de minimis" test, the Tenth Circuit observed that this was "without question a close case." *Id.* 23a. But because the School District had aimed for just-above-trivial academic progress, the Tenth Circuit held that the School District's proposed fifth grade IEP was "substantively adequate." *Id.*

SUMMARY OF ARGUMENT

I. The Tenth Circuit erred in assessing the substantive adequacy of the School District's actions against a "merely more than de minimis benefit" standard. The IDEA charges schools with providing an "appropriate public education" to children with disabilities. This directive – informed by other provisions of the statute and societal norms – means striving to transmit the "necessary tools" to "prepare [children with disabilities] for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3). What is more, the IDEA demands "equality of opportunity." *Id.* § 1400(c)(1). Schools must set academic goals for students with disabilities commensurate with the targets for the student body as a whole and generally measure their progress against the same challenging benchmarks. Providing a child with a disability with a "merely more than de minimis" educational benefit offers little hope of meeting those objectives.

The Tenth Circuit's standard also contravenes this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982). *Rowley* explained that the FAPE requirement, as it then existed, required schools to provide services necessary to make access to public education "meaningful" – that is, to "enable the child to achieve passing marks and advance from grade to grade." *Id.* at 192, 204. An educational benefit that is barely more than trivial cannot discharge that duty.

Rowley also makes clear that the IDEA's mandate to provide an "appropriate" education requires accounting for the Act's expressed objectives and implementing provisions. Yet the Tenth Circuit's standard ignores the 1997 and 2004 amendments to the IDEA, which significantly enhanced the Act's commitments to equality of opportunity and measurable educational results and expressly told schools to shun "low expectations," 20 U.S.C. § 1400(c)(4). Once those amendments are integrated into the analysis, it is beyond debate that a "merely more than de minimis" benefit does not provide a FAPE.

II. The most accurate understanding of the IDEA's FAPE requirement is that it obligates schools to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society. This construction of the words "appropriate education" tracks the Act's directive to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." At the same time, the qualifier "substantially" recognizes that seeking grade-level achievement is not always possible for

children with especially significant cognitive impairments or who have fallen seriously behind their peers.

The "substantially equal opportunity" standard is also eminently workable. Decades of scientific research show that, with proper assistance, children with disabilities generally can perform at the same level as their peers without disabilities. The Department of Education agrees and has instructed school districts accordingly.

Finally, the "substantially equal opportunity" standard leaves school officials ample leeway to craft the particulars of educational programs to meet each child's needs, while protecting the inherent dignity and worth of every child. Educators need not guarantee – much less accomplish – any particular outcomes. But they must set the same kinds of high goals for children with disabilities as they set for their other students. Nothing less than such substantially equal treatment can achieve the IDEA's goals of full participation in the classroom and integration in society.

ARGUMENT

I. The Tenth Circuit's "merely more than de minimis" benefit standard defies the IDEA's directive to provide a "free appropriate public education."

The Tenth Circuit held that a school district provides a child with a disability a "free appropriate public education" if it seeks to provide the child educational benefits that barely exceed de minimis. Pet. App. 16a-23a. This ruling cannot be reconciled with the IDEA's text, purposes, or structure, all of

which require school districts to strive, wherever possible, for much greater academic achievement. Nor is the Tenth Circuit's standard consistent with *Board of Education v. Rowley*, 458 U.S. 176 (1982).

A. The Tenth Circuit's standard is incompatible with the IDEA's text.

1. We begin with the most directly relevant text. *See, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). The IDEA requires States to provide children with disabilities a "free *appropriate* public *education*." 20 U.S.C. § 1412(a)(1)(A) (emphasis added). The statute's definition of FAPE, in turn, emphasizes that the special education afforded to such children must include "an *appropriate* preschool, elementary, or secondary school *education* in the State involved." *Id.* §1401(9)(C) (emphasis added).

"Appropriate" means "specially suitable: fit, proper." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (quoting *Webster's Third International Dictionary* (1961)). "Suitable," in turn, means "well fitted for the purpose." *Oxford American Dictionary of Current Meaning* 813 (1999). And the IDEA's purposes – discussed in greater detail in the next section – include "ensur[ing] the effectiveness of efforts to educate children with disabilities," providing children with disabilities the "necessary tools to improve educational results," and "prepar[ing] them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3), (4).

No one, much less the parents and educators who together craft each child's IEP, could properly view an IEP aimed at "merely . . . more than *de minimis*" educational achievement, Pet. App. 16a (quotation marks and citation omitted), as one calculated to

accomplish those purposes. Something is considered de minimis when it is "trifling," "negligible," or "so insignificant that a court may overlook it," *Black's Law Dictionary* (10th ed. 2014) – that is, "[t]oo trivial or minor to merit consideration." *English Oxford Living Dictionaries* (2016).[2] Thus, an IEP that seeks an educational "benefit" that is "merely more than de minimis" is one that aims for educational achievement that barely exceeds the trivial.

As the United States has explained, "[n]o parent or educator in America" would view that standard as an acceptable goal for educating children with disabilities. U.S. Cert. Br. 14. The standard, for instance, would tolerate an IEP that sought a student's minimal achievement in reading without seeking any achievement at all in math – or in targeting just a few multiplication tables or rules of grammar, even where the student is capable of learning more. Or it would tolerate providing a sign language interpreter for one hour of the day but not other periods where it would be equally beneficial. It is hard to fathom how such actions would be "appropriate."

2. This conclusion is bolstered by considering the statutory term that "appropriate" is modifying: "public education." *See, e.g.*, *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (proper understanding of statutory terms are often crystallized by neighboring terms); Singer & Singer, 2A *Statutes and Statutory Construction* § 47:16 (7th ed. 2014). Mandating an "education" is different from, demanding, say, mere

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[2] https://en.oxforddictionaries.com/definition/us/de_minimis.

"access to schools" or "accommodations in classrooms." In society's view, public education is a profound endeavor – an essential building block for democratic citizenship and for socialization, as well as a key determinant of a child's future economic well-being and independence. *See* William J. Reese, *America's Public Schools* 215-19 (2011).

This understanding of public education is deeply rooted in this Court's precedents, which "have consistently recognized the importance of education to the professional and personal development of the individual." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 437 (1993) (Blackmun, J., concurring); *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stressing "the importance of public education in maintaining our basic institutions" and "on the life of the child"). "[E]ducation," the Court has explained, "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler*, 457 U.S. at 221. It "prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). And it is "the principal instrument [of state and local government] in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

This Court's understanding of the role of education comports with the contemporary "common understanding" of that term. *Perrin v. United States*, 444 U.S. 37, 45 (1979); *see also, e.g., Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (common understanding of statutory term provides guidance);

Rousey v. Jacoway, 544 U.S. 320, 326 (2005) (same). "Education" today is understood to denote preparation for living a useful, fulfilling, and independent life in a complex world. Thus, for instance, a leading organization that emerged from the 1996 National Education Summit of a bipartisan group of governors and corporate leaders describes "education" as targeted at "ensuring all students graduate from high school 'college and career ready,' or, in other words, fully prepared academically for any and all opportunities they choose to pursue." Achieve, Inc., *Our Agenda*, http://www.achieve.org/ college-and-career-ready-agenda.

In light of this robust understanding of "education," the IDEA's insistence on an "appropriate *education*" signals that schools must seek educational attainment for their students with disabilities that is well beyond just-above-trivial. Schools must provide students with disabilities substantial opportunities designed to allow them to succeed academically and to lead meaningful and economically productive lives.

B. The Tenth Circuit's standard thwarts the IDEA's express purposes.

When this Court construes a statutory phrase, it "look[s] not only to the particular statutory language, but also to the design of the statute as a whole and to its object and policy." *Neguise v. Holder*, 555 U.S. 511, 519 (2009) (quotation marks and citation omitted). This is particularly important when interpreting the word "appropriate," which necessarily "requires references to other sources" to determine what the thing it modifies "should be 'specially suitable,' 'fit,' or 'proper' *for*." *Ruckelshaus*, 463 U.S. at 683.

Identifying the object and policy of a statute is sometimes difficult. But here, it "requires no guesswork to ascertain Congress' intent regarding" the IDEA, "for Congress included a detailed statement of the statute's purposes" and detailed legislative findings. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2233 (2014) (internal citations and quotation marks omitted); *see also, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744 (2014) (affording substantial weight to express congressional findings in determining statutory meaning); *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751 (2012) (same).

Congress has declared that the IDEA is designed to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In other words, the purpose of requiring school districts to provide a "free appropriate public education" is "to improve educational results for children with disabilities" and to prepare them "for further education, employment, and independent living." *Id.* § 1400(d)(1)(A), (3). Those purposes are built on express congressional findings – some dating back to the original Act – that despite "advance[s]" in teacher training and instructional methods, the educational needs of children with disabilities were "not [previously] being fully met" and that many children with disabilities were not "receiv[ing] appropriate educational services which would enable them to have full equality of opportunity." Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 (1975) (codified in substantially identical form at 20 U.S.C. § 1400(d)(1)(A), (4)).

It defies belief that a statute designed to "ensure equal opportunity" and the "effectiveness" of the states' special educational efforts would also authorize states to seek just-above-trivial educational advancement for children with disabilities. A statute that seeks to provide "equality of opportunity" for children with disabilities would not give educators license to seek barely more than educational benefits the law would regard as de minimis.

C. The Tenth Circuit's standard cannot be reconciled with the IDEA's FAPE-implementing provisions.

In addition to considering a statutory phrase's text and purpose, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) (quotation marks and citation omitted). Indeed, "[i]t is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013); *see also, e.g., Holloway v. United States*, 526 U.S. 1, 6 (1999). And this Court has stressed the importance of this precept when construing the IDEA, explaining that a "proper interpretation of the Act requires a consideration of the entire statutory scheme." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007).

Applying this basic interpretive principle, the Tenth Circuit's "merely more than de minimis" standard is irreconcilable with various IDEA provisions that implement the FAPE requirement.

1. The "primary vehicle for implementing" the IDEA's "enforceable substantive right to public education . . . is the 'individualized educational program,'" or IEP. *Honig v. Doe*, 484 U.S. 305, 310-11 (1988). As explained earlier, an IEP is an annual plan "which the [Act] mandates for each disabled child." *Id.* at 311. Crafted by educators in collaboration with parents, it sets each child's educational goals and objectives for the coming academic year. *See* 20 U.S.C. § 1414(d).

This statutory link between a child's IEP and the provision of a FAPE is fundamental to the IDEA's operation. It originates in the Act's definition of FAPE, which requires "that special education be provided *in conformity with the individualized education program* required under" the Act. 20 U.S.C. § 1401(9)(D) (emphasis added). The Act's particular IEP requirements, therefore, "provide reliable insight into what level of education Congress would have deemed 'appropriate' for purposes of the FAPE requirement." U.S. Cert. Br. 15.

An IEP must include a statement of the child's "present levels of achievement," including how "the child's disability affects the child's involvement and progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa); *see also* 34 C.F.R. § 300.320(a)(1)(i) (making clear "general education curriculum" for children with disabilities is "the same curriculum as for nondisabled students"). An IEP must have "a statement of annual goals, including academic and functional goals, designed to . . . enable the child to be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs." 20 U.S.C.

§ 1414(d)(1)(A)(i)(II)(aa), (bb). It must also contain a "description of how the child's progress meeting the[se] annual goals . . . will be measured" and when periodic reports will be issued "on the progress the child is making toward meeting the annual goals." *Id.* § 1414(d)(1)(A)(i)(III). Thus, the IEP must reflect the results of an annual assessment of the child's academic status, *see id.*, and then, against that baseline, it measures the child's ability to "make progress" – that is, to attain greater achievement – year after year. *Id.* § 1414(d)(1)(A)(i)(II)(aa).

As the United States has explained, Congress would not have trained its attention "on promoting measurable annual progress" through the IEP, "if at the end of the day" it believed that schools had to provide only "some degree of educational benefit that is barely more than trivial." U.S. Cert. Br. 15.

That is not all. An IEP also must contain a statement of the particular special education and related services that will be provided to the child, "based on peer-reviewed research to the extent practicable," as well as an explanation of "program modifications or supports for school personnel that will be provided for the child – to advance appropriately toward attaining the [child's] annual goals." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). It would not be worth the candle to demand that educators invest the effort required to justify an IEP's educational goals with peer-reviewed research, or the expense needed to provide support for school personnel in meeting each child's annual goals, if minimal educational attainment was all that the IDEA demanded.

Finally, for children aged 16 and older, each IEP must include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment" and "the transition services needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa), (bb). This requirement envisions children with disabilities as fully engaged, valuable members of their communities, emerging from public school ready for college, other further training, productive employment, and independent living – just like their peers without disabilities. This IEP requirement is incompatible with a view of FAPE that seeks only just-above-trivial educational benefit. A child with a disability, who for a dozen or more years has struggled with IEPs aimed at a "merely more than de minimis" educational benefit, could not possibly be poised to achieve the post-high school goals envisioned by the IDEA.

2. The Tenth Circuit's standard is also incompatible with the IDEA's focus on *individualized* educational services. Various provisions of the Act – beginning, as just explained, with the requirement of drafting an "*individualized* education program" for each child, 20 U.S.C. § 1414(d) (emphasis added) – demand that school districts provide an education "in relation to each child's potential." *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (Alito, J.); *see also, e.g.*, 20 U.S.C. § 1400(d)(1)(A) (education provided to children with disabilities must be "designed to meet their unique needs"); *Rowley*, 458 U.S. at 203 (FAPE must be "personalized"). Because "logic dictates that the benefit 'must be gauged in relation to a child's potential,' [o]nly by considering an individual child's

capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (citation omitted).

When a child is fully capable with proper assistance of achieving at a high level, it could hardly be thought "appropriate" to seek for that child a "merely more than de minimis" educational benefit. Doing so would squander that child's potential, in derogation of the IDEA's objective of enabling children with disabilities to obtain educational services "designed to meet their unique needs" that enable them to meet "high expectations" and the "developmental goals" applicable to all children, 20 U.S.C. §§ 1400(c)(1), (5) & (d)(1)(A).

3. Other key provisions of the IDEA further underscore the Tenth Circuit's erroneous understanding of the FAPE requirement. In crafting its plan for implementing the Act, each state "must establish[] a goal of providing *full* educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2) (emphasis added). The states must "establish goals for the performance of children with disabilities" that "promote the [express] purposes of this chapter." *Id.* § 1412(a)(15)(A)(i). These goals include ensuring that schools "improve educational results for children with disabilities" and that children with disabilities are prepared "for further education, employment, and independent living." *Id.* § 1400(d)(1)(A), (3); *see supra* 20-21 (discussing express statutory purposes).

To these ends, the IDEA requires that, to the extent possible, "[a]ll children with disabilities are

included in all general State and districtwide assessment programs, including assessments described under" the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 1412(a)(16)(A) (incorporating ESEA requirements codified at 20 U.S.C. § 6311(b)). ESEA, in turn, requires States to employ "*challenging* academic standards and academic assessments . . . that will be used by the State, its local educational agencies, and its schools." 20 U.S.C. § 6311(b)(1)(A) (emphasis added). In doing so, each state "must demonstrate" that its "challenging academic standards" are "aligned with the entrance requirements" for the state's public colleges and universities. *Id.* § 6311(b)(1)(D)(i).

Under ESEA, states must implement their challenging standards for students with disabilities through "a set of high-quality student academic assessments" in math, reading or language arts, and science, 20 U.S.C. § 6311(b)(2)(A), administered to students regularly from third through twelfth grade, *id.* § 6311(b)(2)(B)(v). These tests must "involve multiple up-to-date measures of student academic achievement, including *measures that assess higher-order thinking skills and understanding*." *Id.* § 6311(b)(2)(B)(vi) (emphasis added).

Moreover, the assessments ESEA contemplates must be administered to "all students," 20 U.S.C. § 6311(b)(2)(B)(vii)(I) – that is, to those with and without disabilities. In this regard, Congress specifically required that children served under the IDEA be provided "appropriate accommodations" necessary to measure their academic achievement in relation to the challenging academic standards. *Id.* § 6311(b)(2)(B)(vii)(II) (citing 20 U.S.C. § 1401(3)).

Where children have serious cognitive disabilities, ESEA authorizes states to "adopt alternate academic achievement standards." 20 U.S.C. § 6311(b)(1)(E)(i)(I), (II). But even those assessments must be "aligned with [ESEA's] challenging State academic content standards," and "promote access to the general education curriculum" available to all students. *Id.* Moreover, these alternative standards "must reflect professional judgment as to *the highest possible standards achievable* by" students with significant cognitive disabilities. *Id.* § 6311(b)(1)(E)(i)(III) (emphasis added). Expressly cross-referencing the IDEA, ESEA requires that these alternative academic achievement standards be used "for each [affected] student" and be "designated in" each student's IEP. *Id.* § 6311(b)(1)(E)(i)(IV) (citing 20 U.S.C. § 1414(d)(3)). Finally, these alternative standards must be "aligned to ensure" that a student who meets these high standards "is on track to pursue postsecondary education or employment" consistent with the federal Rehabilitation Act. *Id.* § 6311(b)(1)(E)(i)(V) (citing Pub. L. No. 93-112, 87 Stat. 355 (1973)).[3]

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[3] The principal purpose of the Rehabilitation Act is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C § 701(b)(1). As particularly relevant here, the Rehabilitation Act seeks "to ensure, to the greatest extent possible, that youth with disabilities and students with disabilities who are transitioning from receipt of special education services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) . . . have opportunities for postsecondary success." 29 U.S.C. § 701(b)(5).

Congress linked the IDEA with ESEA's insistence on challenging academic standards and assessments for a reason: It determined that "too many children in special education classes [were being] left behind academically," H.R. Rep. No. 108-77, at 83 (2003), so, wherever possible, it wanted children with disabilities to be held to the same standards as all other children. Congress recognized that, although "the underlying premise of the [IDEA] was to educate children in a manner equal to their nondisabled peers," it was necessary to "shift from process accountability" to accountability concerning "substantive performance of students with disabilities." S. Rep. No. 108-185, at 46 (2003). By "align[ing] the IDEA with the accountability system established under" ESEA, Congress sought to "ensure that all children, including children with disabilities, are held to high academic achievement standards" and that schools seek adequate yearly progress of all students. *Id.* at 17-18.[4]

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[4] For other legislative history showing that IDEA's incorporation of ESEA's standards was intended to hold children with disabilities to high levels of academic achievement, see H.R. Rep. No. 108-77, at 78, 96-97, 108-111, 120, 130; S. Rep. No. 108-185, at 2-3, 4-6, 28-29 (2003); 103 Cong. Rec. H3458 (Apr. 30, 2003) (statement of Rep. Sessions); 150 Cong. Rec. H10010-11, H10019-20 (Nov. 19, 2004) (statement of Rep. Boehner); 150 Cong. Rec. H10014 (Nov. 19, 2004) (statement of Rep. Castle); 150 Cong. Rec. H10016-17 (Nov. 19, 2004) (statement of Rep. Ehlers); 150 Cong. Rec. S11654 (Nov. 19, 2004) (statement of Sen. Gregg); 150 Cong. Rec. S11656 (Nov. 19, 2004) (statement of Sen. Dodd); 150 Cong. Rec. S11658-59 (Nov. 19, 2004) (statement of Sen. Bingaman).

The Tenth Circuit's adherence to the just-above-trivial standard runs headlong into the IDEA's and ESEA's demands for academic accountability and achievement. If the Tenth Circuit were correct that IEPs can be aimed at providing educational benefits that barely exceeded the trivial, it would make no sense for the IDEA to require IEPs to seek, wherever possible, academic accountability through "challenging State academic content standards," 20 U.S.C. § 1412(a)(16)(C)(ii)(I), and exacting academic assessments, *id.* § 6311(b)(2). Nor would the statute insist, even for students with the most serious cognitive disabilities, that states adopt "academic achievement standards" based on "the highest possible standards achievable by such students." *Id.* § 6311(b)(1)(E)(i)(III). But the IDEA *does* make those demands, thus showing it does not tolerate the meager educational aims the Tenth Circuit has ascribed to it.

D. The Tenth Circuit's standard misapprehends this Court's decision in *Rowley*.

The Tenth Circuit's "merely more than de minimis" benefit test contravenes *Board of Education v. Rowley*, 458 U.S. 176 (1982). Nothing in the Court's opinion says that school districts can satisfy the IDEA by providing just-above-trivial, or "merely more than de minimis," educational benefits to children with disabilities. To the contrary, the opinion indicates schools must aim much higher, and subsequent amendments to the IDEA solidify that demand.

1. *Rowley* involved a deaf child who was "remarkably well-adjusted," "perform[ing] better

than the average child in her class," and "advancing easily from grade to grade." 458 U.S. at 185 (quoting district court findings). She argued that, even though she was "receiving substantial specialized instruction and related services," she was not receiving a FAPE because her school district was not giving her "a potential-maximizing education." *Id.* at 197 n.21, 202; *accord id.* at 198-99.

This Court rejected that argument. *See Rowley*, 458 U.S. at 200. Nothing in the IDEA requires schools to aim for higher levels of achievement for children with disabilities than for children without disabilities. And public schools do not typically offer educational services designed to "maximize" the potential of every child without a disability. *Id.* at 199.

At the same time, the Court emphasized that the IDEA requires schools to provide children with disabilities more than simply "access" to their classrooms and other facilities. 458 U.S. at 201. The statute requires schools to supply enough "substantive educational" benefit "to make such access *meaningful*." *Id.* at 192 (emphasis added). Access that is "meaningful" is access that is infused with "significance, purpose, or value," *Webster's Unabridged Dictionary* 1191 (Random House 2d ed. 1998) – or, as the Court put it later in the opinion, an education "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."458 U.S. at 204; *see also id.* at 203 ("Children who graduate from our public schools are considered by our society to have been 'educated' at least to the grade level they have completed.").

Providing a "meaningful" education that includes "personalized instruction and related services," 458 U.S. at 192, 203, requires conferring much more than a just-above-trivial benefit for children with disabilities. Indeed, the just-above-trivial-benefit standard used by the Tenth Circuit is practically the opposite of making access to public education "meaningful."

2.a. The Tenth Circuit has embraced a "merely more than de minimis" standard premised on a statement elsewhere in *Rowley* that the Act was intended to confer "*some* educational benefit" on children with disabilities. Pet. App. 16a (quoting *Rowley*, 458 U.S. at 200) (emphasis added by Tenth Circuit); *see also O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) (same). That approach is misguided.

To be sure, the word "some," read in isolation, *occasionally* means a slight amount. (Even when signifying a certain amount, though, the word usually connotes more than a negligible level.) But that is not the way in which *Rowley* used the term. Read in the full context of this Court's decision, *Rowley*'s statement that schools must provide "some" benefit simply notes that the IDEA imposes not just procedural demands but also a *substantive* obligation to provide "specialized instruction and related services." 458 U.S. at 201. The Court did not use the word "some" to pinpoint the level of that substantive obligation – that is, exactly "*when* handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Id.* at 202 (emphasis added).

When the Court turned to that question, it said that it was not attempting "to establish any one test for determining the adequacy of educational benefits." *Rowley*, 458 U.S. at 202. But the Court did make clear that the FAPE requirement, as it then existed, required schools to provide the services necessary to make access to public education "meaningful" and to "enable the child to achieve passing marks and advance from grade to grade." *Id.* at 192, 204. As just explained, that target is considerably higher than what the "merely more than de minimis" standard permits. A student might well receive more than a de minimis amount of educational benefit without being positioned for advancement to the next grade.

b. The School District advances an even emptier reading of *Rowley* than does the court of appeals. According to the School District, *Rowley* holds that "the IDEA achieves Congress's goals through its *procedures*" only and prohibits courts from "second-guess[ing] the *substance* of [schools'] educational decisions by requiring a 'particular . . . level of education.'" Resp. Supp. Br. 9 (quoting *Rowley*, 458 U.S. at 192). Likening the IDEA to the Administrative Procedure Act's arbitrary-and-capricious standard of judicial review, the School District further claims that the IDEA's supposedly exclusive focus on procedures is all that is needed to "ensure" that educators "aim high" when they craft IEPs. *Id.*

This argument blinks reality on several levels. First, *Rowley* repeatedly says that the FAPE requirement imposes a *substantive* duty on school districts to educate children with disabilities. *See* 458 U.S. at 206 (noting that the IDEA has "a substantive

standard"); *id.* at 205 (the Act has "substantive admonitions"). Lest there be any doubt, this Court has expressly repeated the point three times since *Rowley*. In *Smith v. Robinson*, 468 U.S. 992, 1010 (1984), the Court declared outright that "the Act establishes an enforceable substantive right to a free appropriate public education." In *Honig v. Doe*, 484 U.S. 305, 310 (1988), the Court explained that the IDEA "confers upon disabled students an enforceable substantive right to public education." And in *Winkelman v. Parma City School District*, 550 U.S. 516, 531-32 (2007), the Court held that that the IDEA authorizes parents to sue on their children's behalf over "the substantive inadequacy of their child's education."

That the Act's FAPE obligation requires school districts to seek a substantive level of educational attainment is evident, too, in the Act's provisions conferring decisional authority on "due process" hearing officers. Those provisions state that "in general," hearing officers' decisions "shall be made on *substantive* grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added); *see also id.* § 1415(f)(3)(E)(ii) (allowing relief when school district "caused a deprivation of educational benefits").

Second, the School District's analogy to the Administrative Procedure Act is inapt. That law, as its name indicates, governs *procedure*; indeed, the provision on which the School District relies establishes only a standard for *judicial review* of agency action. *See* Resp. Supp. Br. 9 (citing 5 U.S.C. § 706(2)(A)). By contrast, the FAPE requirement is a

substantive, on-the-ground requirement imposed on school districts in locating and evaluating eligible children, crafting and revising IEPs, and providing children with disabilities with special education and related services. *Id.* §§ 1412(a)(3), (4), (7) & 1414. Indeed, the first obligation that the Act imposes on states is to ensure that a "free appropriate public education is available to all children with disabilities residing in the State." *Id.* § 1412(a)(1)(A).

Third, contrary to the School District's assertion, a procedures-only conception of the IDEA would fail to "ensure" that school districts aim for a high level of academic achievement. This case proves the point. The courts below acknowledged that Drew's progress had been "minimal," Pet. App. 49a (district court), and that his fifth grade IEP "was similar in all material respects to [his] past IEPs," *id.* 15a (court of appeals). Indeed, the Tenth Circuit characterized it as a "close case" whether the School District had aimed even for more than merely trivial achievement. *Id.* 23a. Yet the Tenth Circuit blessed the School District's decision about what to offer Drew. That is another way of saying that the School District aimed low, and that doing so was good enough.

It may well be, as the School District maintains, that schools often will aim high. And when they do, disputes over the FAPE requirement generally will be avoided. But neither *Rowley* nor anything in the IDEA itself lets schools off the hook if they, like the School District here, view FAPE as merely a procedural guarantee that authorizes them to seek just-above-trivial substantive advancement for children with disabilities.

3. The Tenth Circuit's "merely more than de minimis" standard, originally adopted in 1996, also contravenes *Rowley* because it ignores the subsequent amendments to the IDEA. *See* Pet. App. 16a (citing *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). *Rowley* instructs that the personalized instruction and related services that constitute a FAPE "should be formulated in accordance with the requirements of the Act" and consonant with "the goal[s] of the Act." 458 U.S. at 198, 203-04 (quotation marks and citation omitted). And insofar as Congress enhanced the IDEA's requirements and goals in 1997 and 2004, the statute's command to provide an "appropriate" education demands recalibration to account for those enhancements.

Another decision involving the statutory term "appropriate" demonstrates why this is so. In *West v. Gibson*, 527 U.S. 212 (1999), this Court considered whether Title VII allows the EEOC to award the remedy of compensatory damages. The statute, as originally enacted in 1972, gave the EEOC the authority to enforce it "through *appropriate* remedies." *Id.* at 217 (emphasis in original) (quoting 42 U.S.C. § 2000e-16(b)). In 1991, without touching that provision, Congress amended Title VII to permit a "complaining party" for the first time to "recover compensatory damages." *Id.* at 215 (quoting 42 U.S.C. § 1981a(a)(1)).

This Court explained that "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West*, 527 U.S. at 218. That being so, the

Court held that when Congress used the term "appropriate," it "d[id] not freeze the scope" of permissible remedies in time. *Id.* Rather, "[t]he meaning of the word 'appropriate' permit[ted] its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change are appropriate now." *Id.*; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (statutory term "appropriate" "naturally and traditionally includes consideration of all the relevant factors" (quotation marks and citation omitted)); *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) ("appropriate" is "inherently context dependent").

The same logic applies here. Petitioner disputes that the Tenth Circuit's "merely more than de minimis" standard is faithful to the IDEA as originally enacted or is a fair reading of *Rowley*. But whatever the precise substantive demand of an "appropriate" education was then, the 1997 and 2004 amendments significantly strengthened the IDEA's mandate and heightened its emphasis on striving for equality of opportunity. *See supra* 6-8; *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1213 n.3 (9th Cir. 2008) (The amendments "represented a significant shift in the focus from the disability education system prior to 1997."); *Deal*, 392 F.3d at 864 (same); Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 126 Educ. L. Rep. 1, 17 (1998) (same).[5] Those amendments,

[5] Numerous other commentators have made the same observation. *See* Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & Educ. 367, 377-79 (2008); Scott

which responded to "[a]lmost 30 years of research and experience" under the Act, 20 U.S.C. § 1400(c)(5), make clear beyond a shadow of a doubt that a school district that seeks a just-above-trivial educational benefit has not provided a FAPE.

In particular, Congress found in 1997 that "the implementation of this Act ha[d] been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." Pub. L. No. 105-17, § 101, 111 Stat. 37, 39 (2007) (codified as amended at 20 U.S.C. § 1400(c)(4)). The 1997 amendments, therefore, instructed school districts that their provision of FAPEs "can be made more effective by . . . having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible." *Id.* (codified as amended at 20 U.S.C. § 1400(c)(5)).

The amended objectives of the IDEA reflect these extensive post-*Rowley* findings, derived from decades of on-the-ground experience. In 1997, Congress declared for the first time: "Disability is a natural part of the human experience and *in no way* diminishes the right of individuals to participate in or contribute to society." Pub. L. No. 105-17, § 101, 111 Stat. 37, 38 (1997) (codified at 20 U.S.C. § 1400(c)(1)) (emphasis added). Therefore, among the amendments' express purposes is to ensure that

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F. Johnson, *Reexamining* Rowley*: A New Focus on Special Education Law*, 2003 BYU Educ. & L.J. 561, 585; Mitchell L. Yell et al., *Reflections on the 25th Anniversary of the U.S. Supreme Court's Decision in* Board of Education v. Rowley, Focus on Exceptional Children 1, 9 (May 2007).

children with disabilities – just like all other children – obtain an education that prepares them "for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A)).[6]

To that end, the 1997 amendments "place[d] greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)). The amendments required, among other things, that states for the first time include children with disabilities in general state and districtwide assessment programs. *See* 20 U.S.C. § 1412(a)(16). The amendments further sought to enable children with disabilities "to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children" so that they are "prepared to lead productive, independent, adult lives, to the maximum extent possible." Pub. L. No. 105-17, § 101, 111 Stat. 37, 39 (1997) (codified as amended at 20 U.S.C. § 1400(c)(5)(A)).[7]

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[6] The 1997 amendments' findings and purposes came on the heels of those in the American with Disabilities Act of 1990 (ADA), which ushered in "a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments." *Bd of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring); *see also* 42 U.S.C. § 12101 (findings and purposes of ADA).

[7] In 1997, Congress also enacted what is now subchapter IV of the Act, 20 U.S.C. § 1450 *et seq.*, establishing grant programs for states seeking to enhance their "systems for providing educational, early intervention, and transitional services . . . to

The 2004 amendments further refined and elevated the IDEA's concept of an "appropriate public education." These amendments instruct that a FAPE should prepare children with disabilities for post-secondary education as well as for employment and independent living. *See* Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2648-49 (2004) (codified at 20 U.S.C. § 1400(d)(1)(A)). Consistent with this directive, the Act for the first time required that, beginning at age 16, each IEP describe "appropriate measurable postsecondary goals" for the child's training, education, employment, and independent living skills and "the transition services . . . needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). And in harmony with a new congressional finding that education for children with disabilities "can be made more effective" by employing the "improvement efforts" established under ESEA, *id.* § 1400(c)(5)(C), Congress required children served by the IDEA to be held accountable under ESEA's challenging academic standards and periodic assessments, *id.* § 1412(a)(16); *see supra* 26-28.

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improve results for children with disabilities." Pub. L. No. 105-17, § 101, 111 Stat. 37, 124 (1997) (codified as amended at 20 U.S.C. § 1451(a)). In passing this subchapter, Congress found that "[a]n effective educational system serving students with disabilities should . . . maintain high academic achievement standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that all children with disabilities have the opportunity to achieve those standards and goals." 20 U.S.C. § 1450(4)(A).

None of these enhanced objectives can be achieved under the Tenth Circuit's pre-amendments standard. Nor would it make any sense to establish high expectations for children with disabilities and to administer the same challenging assessments given to other students if all schools had to do was to seek a merely more than de minimis educational benefit. Schools would be setting up children with disabilities to fail.

II. A FAPE is an education that seeks to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society.

The free and appropriate public education that the IDEA requires is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities. This standard flows directly from the same sources that demonstrate that the Tenth Circuit's decision is wrong: the IDEA's text, declared purposes, and structure. It also is eminently workable.

A. This standard flows directly from the IDEA's text, purposes, and structure.

1. The most accurate understanding of the IDEA's FAPE requirement is that it obligates schools to provide children with disabilities with substantially equal opportunities to achieve academic

success, attain self-sufficiency, and contribute to society.[8]

This "substantially equal opportunity" standard correctly describes the FAPE requirement because, as petitioner has explained, the IDEA's language indicates that an "appropriate public education" is something of considerable importance and value. *See supra* 30-31. In particular, a FAPE must be aimed at improving educational results on par with a school's student body as a whole. 20 U.S.C. § 1412(a)(1)(A). Furthermore, a school must strive, to the extent feasible, to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1); *see also* 20 U.S.C. § 1400(d)(1) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that . . . prepare[s] them for further education, employment, and independent living").

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[8] Reflecting the nomenclature used in the lower courts, the petition maintained that the FAPE requirement compels schools to provide a "substantial educational *benefit*." Pet. 21 (emphasis added). At the same time, this Court has explained that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). For that reason, and to provide better forward-looking guidance to school officials and parents who draft IEPs on the front lines, we believe it would be useful for the legal standard to be more fully informative. We therefore now describe the FAPE standard as requiring schools to provide children with disabilities "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society."

At the same time, the qualifier "substantially" accounts for the fact that the IDEA does not demand "*strict* equality of opportunity or services." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) (emphasis added). In circumstances involving students with "the most significant cognitive disabilities," states have leeway to "adopt alternative academic achievement standards." 20 U.S.C. § 6311(b)(1)(E)(i). Those standards, as elaborated above, still must be "aligned with [ESEA's] challenging State academic content standards," "promote access to the general education curriculum" available to all students, and be aimed at preparing students for "postsecondary education or employment." *Id.*; *see also supra* 26-28. But the IDEA recognizes that it is "appropriate" in this setting to adjust expectations for achievement.

2. The IDEA's provisions that implement the FAPE requirement also dictate the "substantially equal opportunity" standard. In particular, the Act demands that each child's IEP measure annual educational gains to enable her to "make progress in the general education curriculum," 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa), (bb), and, for children aged 16 or older, set measurable goals and provide appropriate services to enable the child to transition to post-secondary education, training, and employment, *see id.* § 1414(d)(1)(A)(i)(VIII); *see also supra* 39-40. The IDEA also requires that children with disabilities be held to the same "challenging academic content standards" and "academic achievement standards" as children without disabilities. 20 U.S.C. § 1412(a)(16)(C)(ii)(I) (incorporating the provisions of the Elementary and Secondary Education Act at 20 U.S.C. § 6311(b)); *see supra* 26-28.

These provisions show not only that the IDEA precludes a just-above-trivial FAPE standard, but that when the statute required schools to provide children with disabilities with a free and appropriate public education, it is focused on something much more. It wanted to ensure that children with disabilities would receive IEPs designed to provide them with substantially equal educational opportunities to those enjoyed by their peers without disabilities.

3. The "substantially equal opportunity" standard also comports with this Court's decision in *Rowley*. That decision characterizes an "appropriate public education" as one that provides "meaningful" educational access to the public schools – that is, education infused with significance, purpose, and value. *See supra* 30-31. And this Court held that the school district there had provided Amy Rowley with a FAPE because it had delivered "*substantial* specialized instruction and related services" that were "reasonably calculated to enable [her] to achieve passing marks and advance from grade to grade." 458 U.S. at 202, 204 (emphasis added). Finally, *Rowley* requires a FAPE to align with the IDEA's objectives and IEP-implementing requirements, and the post-*Rowley* amendments to the IDEA make clear that schools cannot meet those demands by providing children anything less than substantially equal opportunities to succeed. *See supra* 35-40.

B. This standard is eminently workable.

1. While the IDEA's goals are ambitious, they are achievable. Categorized by disability, the largest group of children served by the IDEA – roughly 40% – are those with learning disabilities. U.S. Dep't of

Educ., *37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Act* 36 (2015) ("37th Annual Report").[9] Children with learning disabilities often have a language skill impairment that "may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." 34 C.F.R. § 300.8(c)(10). But with the right help, they can thrive academically and leave school as "self-determined young people." Michael Wehmeyer & Michelle Schwartz, *Self-Determination and Positive Adult Outcomes*, 63 Exceptional Children 245, 253 (1997). Indeed, research shows that many grow up to become "highly successful adults" who contribute "handsomely to society." Paul J. Gerber, Rick Ginsberg, and Henry B. Reiff, *Identifying Alterable Patterns in Employment Success for Highly Successful Adults with Learning Disabilities*, 25 J. Learning Disabilities 475, 486 (1992).

Take, for example, children with dyslexia. Dyslexia is a language-based disability that can impair reading fluency and comprehension, writing, spelling, and even speech. Absent intervention, the disability can hamper a child's ability to absorb and process information and to progress from grade to grade. But with proper personalized instruction and tools as simple as iPads, children with dyslexia typically achieve at the same levels as others in their classes. *See, e.g.*, Sally E. Shaywitz et al., *The Education of Dyslexic Children from Childhood to*

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[9] http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf.

Young Adulthood, 59 Ann. Rev. Psychology 451 (2008).

Other children served by the IDEA have orthopedic and other health conditions, such as heart conditions, leukemia, and sickle cell anemia. *See* 34 C.F.R. § 300.8(c)(8), (9). With the provision of specialized services and assistive technology, these conditions do not prevent them from participating and thriving in their schools' academic programs. *See Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 888-95 (1984); 37th Annual Report, at 36 (13.8% of children served by the IDEA have "[o]ther health impairments" including various physical disabilities). So, too, for many children with autism, who comprise more than eight percent of children served by the IDEA. *See* 37th Annual Report, *supra*, at 36. Like Drew, children with autism often flourish in school with proper special education services. *See* Cert. Br. of Autism Speaks 7-8, 19-22.

In light of these realities and the IDEA's expressed desire to advance "our national policy in ensuring equality of opportunity," 20 U.S.C. § 1400(c)(1), the "substantially equal opportunity" standard generally requires schools to seek grade-level achievement for children with disabilities (as schools do for children without disabilities) through IEPs reasonably calculated to that end. After all, the IDEA requires children with disabilities to be integrated into the general education curriculum, which, by definition, strives for grade-level achievement wherever possible. *See, e.g.*, 20 U.S.C. § 6311(b)(2)(B)(ii) (challenging academic assessments for children with and without disabilities must assess

whether "the student is performing *at the student's grade level*" (emphasis added)).

2. The Department of Education – whose Office of Special Education Programs Congress has charged with "administering and carrying out" the IDEA, 20 U.S.C. § 1402(a) – agrees. The Department's regulations explain that schools must adapt instruction to ensure "that [a child with a disability] can meet the educational standards" that "apply to *all* children." 34 C.F.R. § 300.39(b)(3) (emphasis added).

In a recent guidance document addressed to state and local education officials regarding the meaning of FAPE, the Department elaborated on this directive. "Research has demonstrated," the Department explained, "that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided." U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015) ("Dear Colleague Letter"), http://1.usa.gov/1MkxyAE. Generally speaking, therefore, "IEP goals must be aligned with grade-level content standards for all children with disabilities." *Id.* This emphasis on grade-level achievement means that children with disabilities must "receive high-quality instruction that will give them the opportunity to meet the State's challenging academic achievement standards and prepare them for college, careers and independence." *Id.* at 4.

3. Finally, the "substantially equal opportunity" standard has the flexibility necessary to be administered effectively on the ground.

a. As we have emphasized, the free appropriate public education required by the IDEA must be "tailored to the unique needs of" children with disabilities through each child's IEP. *Rowley*, 458 U.S. at 181; *see also supra* 24-25. Accordingly, the "substantially equal opportunity" standard does not require school districts to provide identical services to all children, even those who share the same or similar disabilities. The particular personalities, needs, and capabilities of each child determine what sorts of educational and related services are "appropriate."

Similarly, the Department of Education has explained that "there is a very small number of children with the most significant cognitive disabilities" for whom seeking grade-level achievement is unrealistic. Dear Colleague Letter, *supra*, at 5. For these students, performance may be measured against alternative achievement standards, so long as they are "clearly related to grade-level content." *Id.* Although "annual IEP goals for these children [must] reflect high expectations," their academic goals "may be restricted in scope or complexity or take the form of introductory or pre-requisite skills." *Id.*; *see also supra* 27-28.[10]

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[10] The Department of Education's understanding that only "a very small number" of children with disabilities have the most significant cognitive disabilities is fully consistent with Congress's expectations. *See* 20 U.S.C. § 6311(b)(2)(D)(i)(I)

Likewise, when a child who has fallen behind by several grade levels on certain educational goals, it might be unrealistic (and, thus, not statutorily required) for an IEP to seek immediate elevation to grade level with respect to those goals. *See* Dear Colleague Letter, *supra*, at 5-6. This could occur, for instance, if the child's disability created unusual difficulties in one facet of knowledge acquisition. *See id.* (providing example). It would be consistent with the "substantially equal opportunity" standard to take a more measured approach to educational advancement in that type of situation, just as it might for a student without disabilities who has fallen behind significantly. Of course, if children with disabilities begin their education in a school operating under the proper FAPE standard, it is less likely that they will fall behind in the first place.

In sum, precisely because every child's needs are different, and because the IDEA designates parents and educators, working together, to craft each child's IEP, 20 U.S.C. § 1414(d)(1)(B), the "substantially equal opportunity" standard does not usurp the role of educators or parents in tailoring particular special education services to particular situations.

b. In the infrequent situations where FAPE disputes result in lawsuits, *see supra* at 4, the "substantially equal opportunity" formula similarly avoids inviting courts to presume they have more educational expertise than school districts.

(States must ensure that, for each subject-matter assessment, no more than one percent of the total number of students assessed use alternative assessments).

In *Rowley*, this Court explained that the IDEA should not be construed as a license for courts "to substitute their own notions of sound educational policy for those of the school authorities which they review." 458 U.S. at 206. Accordingly, the federal courts assess the adequacy of IEPs under a system of "modified de novo" review, which gives "due weight" to school districts' expertise and administrative findings. *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 270 (3d Cir. 2003) (collecting and agreeing with law of other circuits); *see also* Pet. App. 6a-7a.

The standard of review courts should apply when assessing the adequacy of IEPs is not at issue here. The "substantially equal opportunity" test simply describes the level of education schools must strive to deliver. Once that legal requirement is established, courts can continue to use the modified de novo standard of review that prevails in the lower courts – or whatever other standard is most fitting – to resolve the disputes over whether school districts have discharged their duty to provide a substantially equal opportunity to succeed.

c. Lastly, it bears emphasis that providing a child a FAPE "is not guaranteed to produce any particular outcome" for any particular child, S. Rep. No. 94-168, at 11 (1975), any more (or any less) than educational outcomes can be guaranteed for children without disabilities. *See Rowley*, 458 U.S. at 210-11 (Blackmun, J., concurring in the judgment). Rather, providing a FAPE is about the public schools' obligation to implement the IDEA's "goal of providing full educational *opportunity* to all children with disabilities." 20 U.S.C. § 1412(a)(2) (emphasis added).

While the FAPE requirement does not promise particular results, it does require an IEP that is reasonably calculated to provide a child with a disability a substantially equal opportunity to succeed. And when the schools aim high, they are much more likely to land high, which is what Congress sought when it conditioned funding for special education on the states' undertaking an obligation to provide children with disabilities a free appropriate public education.

CONCLUSION

The judgment of the court of appeals should be reversed. Because the School District provided educational instruction and related services that barely satisfied a "merely more than de minimis" standard, *see* Pet. App. 23a, it follows that the School District failed to provide petitioner a FAPE. At a minimum, the case should be remanded for application of the correct FAPE standard.

Respectfully submitted,

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No. 15-827

In the Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Individuals with Disabilities Education Act provides federal funds to States that agree to make available a "free appropriate public education" (FAPE) to every eligible child with a disability. 20 U.S.C. 1401(9), 1412(a)(1)(A), 1414(d)(1)(A). The question presented is whether the "educational benefit" provided by a school district must be "merely * * * more than *de minimis*" in order to satisfy the FAPE requirement. Pet. App. 16a (citations and internal quotation marks omitted).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

This case involves the core requirement of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, that States make available a "free appropriate public education" (FAPE) to eligible children with disabilities. 20 U.S.C. 1401(9), 1412(a)(1)(A), 1414(d)(1)(A). Petitioner sued respondent, alleging that respondent had failed to provide him with a FAPE. The state administrative law judge and the federal district court rejected that claim on the ground that petitioner had been able to obtain "some" benefit from his public education. Pet. App. 27a-28a,

51a, 72a, 85a. The court of appeals affirmed, holding that "the educational benefit mandated by IDEA must merely be more than *de minimis*" and that the benefit provided here satisfied that standard. Pet. App. 16a (citations and internal quotation marks omitted).

1. The IDEA (formerly known as the Education of the Handicapped Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). The statute's stated purpose is "to ensure that all children with disabilities have available to them a free 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." 20 U.S.C. 1400(d)(1)(A). The IDEA pursues that objective by requiring States receiving IDEA funds to provide a FAPE to every eligible child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A). This Court has described the FAPE requirement as embodying Congress's "ambitious objective" in promoting educational opportunities for such children. *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368 (1985) (*Burlington*).

a. The IDEA defines FAPE to mean "special education and related services" that

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;

> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of [Title 20 of the United States Code].

20 U.S.C. 1401(9).

This Court has explained that the "individualized education program" (IEP) referenced in Subsection (D) of the FAPE definition operates as the "centerpiece" of the IDEA's scheme for providing children with disabilities with a FAPE. *Honig* v. *Doe*, 484 U.S. 305, 311 (1988); see 20 U.S.C. 1401(9)(D). An IEP must comply with specific statutory requirements and establish a special education program to meet the "unique needs" of each child. *Ibid.*; 20 U.S.C. 1414(d)(1)(A); 34 C.F.R. 300.22, 300.34, 300.39, and 300.320. That program must be designed to allow the child to "advance appropriately toward attaining the annual goals [set forth in the IEP]," "to be involved in and make progress in the general education curriculum," "to participate in extracurricular and other nonacademic activities," and "to be educated and participate with other children with disabilities and nondisabled children in [various] activities." 20 U.S.C. 1414(d)(1)(A)(i)(IV). The IDEA generally contemplates that each child's education "will be provided where possible in regular public schools, * * * but the Act also provides for placement in private schools at public expense where this is not possible." *Burlington*, 471 U.S. at 369; see 20 U.S.C. 1412(a)(10)(B).

In *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176, 207 (1982), the Court held that an IEP must be "reasona-

bly calculated to enable the child to receive educational benefits." The Court elaborated that the education a child receives must confer "some educational benefit" and that the benefit must be sufficient to provide each child with "access" to education that is "meaningful." *Id.* at 192, 200. In light of the "infinite variations" in the capabilities of different children with different disabilities, however, the Court declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202.

b. The IDEA requires school districts to work collaboratively with parents to formulate the IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *Burlington*, 471 U.S. at 368-369.

Parents who are not satisfied with an IEP, or with other related matters, must first notify the school district of their complaint. See 20 U.S.C. 1415(b)(6) and (7). If the dispute cannot be resolved through established procedures, the parents may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A)-(B). The losing party may then seek judicial review of a final administrative decision in either state or federal district court. 20 U.S.C. 1415(i)(2)(A). The court receives the records of the administrative proceedings, and it may hear additional evidence before rendering

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[1] See *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B)(i), (d)(3)(A)(ii), (d)(3)(D), (d)(4)(A)(ii)(III) and (e), 1415(b)(1), (b)(3)-(5) and (f)(3)(E)(ii)(II).

its decision. 20 U.S.C. 1415(i)(2)(C). In adjudicating the case, the court must give "due weight" to the result of the state administrative proceedings. *Rowley*, 458 U.S. at 206.

2. Petitioner Endrew F. is a child with attention deficit/hyperactivity disorder and autism. Pet. App. 3a. Petitioner's autism "affects his cognitive functioning, language and reading skills, and his social and adaptive abilities," including his ability to communicate his needs and emotions. *Ibid.*; see *id.* at 28a. As a child with autism, petitioner is eligible for protection under the IDEA. 20 U.S.C. 1401(3); Pet. 6; Br. in Opp. 1.

Petitioner attended public school in respondent Douglas County School District from preschool through fourth grade. Pet. App. 3a-4a. Pursuant to the IDEA, he received a special education program through an IEP for each school year. *Ibid.* In the spring of 2010—near the end of petitioner's fourth-grade year—petitioner's parents met with respondent to discuss petitioner's proposed IEP for the following year. *Ibid.*; Br. in Opp. 2. Petitioner's parents believed that petitioner's fourth-grade IEP had produced no meaningful educational progress, and they rejected respondent's proposed fifth-grade IEP on the grounds that it was largely unchanged from the previous IEP. Pet. App. 4a, 15a. In May 2010, petitioner's parents withdrew petitioner from the public school system and placed him in a private school specializing in educating children with autism. *Id.* at 4a; Br. in Opp. 2. Petitioner has been able to "mak[e] academic, social and behavioral progress" at his new school. Pet. App. 29a.

In 2012, petitioner filed a due-process IDEA complaint with the Colorado Department of Education. Pet. App. 59a. The complaint asserted that respondent had denied him a FAPE within the public school system. *Id.* at 4a, 60a. Petitioner sought reimbursement for his tuition at the private school, pursuant to 20 U.S.C. 1412(a)(10)(C)(ii). *Id.* at 4a; see *Burlington*, 471 U.S. at 369.

After receiving evidence and conducting a three-day hearing, a Colorado administrative law judge (ALJ) ruled in favor of respondent and denied petitioner's request for reimbursement. Pet. App. 59a-85a. Relying on *Rowley*, the ALJ stated that a school district need only develop and implement an IEP that provides a child "*some* educational benefit" in order to comply with the IDEA. *Id.* at 75a (emphasis added). That standard was satisfied, the ALJ concluded, because petitioner had "made some academic progress" while enrolled in respondent's public school system. *Id.* at 84a-85a.

3. Petitioner sued respondent under the IDEA in the United States District Court for the District of Colorado, raising the same basic claim that respondent had denied him a FAPE. Pet. App. 4a. The district court upheld the Colorado ALJ's ruling in respondent's favor. *Id.* at 28a.

Like the ALJ, the district court relied on *Rowley* in holding that the IDEA requires States only to provide "some educational benefit." Pet. App. 36a. Based on evidence that petitioner has made "at the least, minimal progress," *id.* at 49a, the court concluded that petitioner had received all that the Act requires. *Id.* at 51a.

4. The Tenth Circuit affirmed. Pet. App. 1a-26a. It stated that *Rowley* merely requires "some educational benefit." *Id.* at 16a. The court further explained that under its longstanding interpretation of *Rowley*, "the educational benefit mandated by IDEA must *merely be more than de minimis*." *Id.* at 16a (emphasis added; citations and internal quotation marks omitted) (citing circuit precedent).

The court of appeals expressly stated that its "merely * * * more than *de minimis*" standard directly conflicts with the approach taken by other circuits, including the Third and Sixth Circuits. Pet. App. 16a-17a (citations and internal quotation marks omitted). The court described those circuits as "hav[ing] adopted a higher standard"—requiring a "*meaningful* educational benefit"—that promises children "a higher measure of achievement." *Id.* at 17a (emphasis added; citations omitted).

The court of appeals then applied its standard and concluded that "there are sufficient indications of [petitioner's] past progress to find the IEP rejected by the parents substantively adequate under our prevailing standard." Pet. App. 23a. The court acknowledged, however, that "[t]his is without question a close case," and the court did not address whether respondent would prevail under the "higher standard" adopted by other circuits. *Id.* at 17a, 23a.[2]

DISCUSSION

This Court should grant certiorari and overturn the Tenth Circuit's erroneous holding that States must provide children with disabilities educational benefits that are "merely * * * more than *de minimis*" in

[2] The court of appeals denied rehearing en banc. Pet. App. 86a.

order to comply with the IDEA. Pet. App. 16a (citations and internal quotation marks omitted). That interpretation of the IDEA—which is shared by at least five other courts of appeals—directly conflicts with the published decisions of the Third and Sixth Circuits, both of which have rejected the "more than *de minimis*" test in favor of a more robust standard. The Tenth Circuit's approach is not consistent with the text, structure, or purpose of the IDEA; it conflicts with important aspects of this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982); and it has the effect of depriving children with disabilities of the benefits Congress has granted them by law. The question presented is important and recurring, and this case is an appropriate vehicle for this Court to resolve the conflict in the circuits on the scope of the FAPE requirement. The petition for a writ of certiorari should therefore be granted.

A. There Is An Entrenched And Acknowledged Circuit Conflict On The Question Presented

The central issue raised by the petition is the degree of educational benefit that States must provide to children with disabilities in order to satisfy the IDEA's FAPE requirement. In *Rowley*, this Court declined to establish a single test for such benefits, emphasizing the different capabilities of different children with different disabilities. 458 U.S. at 202. The Court nonetheless concluded that States are required to provide "some" educational benefits and that those benefits must be sufficient to provide each child with "meaningful" access to education. *Id.* at 192, 200.

The courts of appeals are intractably divided over what *Rowley*'s interpretation of the FAPE standard

requires. Whereas at least six circuits adopt some version of the "merely * * * more than *de minimis*" test that the Tenth Circuit applied here, two circuits apply a more robust standard that requires a greater degree of educational benefit. This Court should grant review to resolve the split of authority.

1. In this case, the Tenth Circuit rejected petitioner's IDEA claim based on its longstanding view that a FAPE requires States to provide "some" educational benefit that is "merely * * * more than *de minimis*." Pet. App. 16a (citations and internal quotation marks omitted). At least five other courts of appeals—including the Second, Fourth, Seventh, Eighth, and Eleventh Circuits—apply essentially the same standard.[3] In those circuits, a school district can satisfy the

[3] See, *e.g.*, *Doe* v. *East Lyme Bd. of Educ.*, 790 F.3d 440, 450 (2d Cir. 2015) ("To be substantively adequate, an IEP * * * must be likely to produce progress that is more than trivial advancement.") (citation and internal quotation marks omitted), cert. denied, 136 S. Ct. 2022 (2016); *O.S.* v. *Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) ("[A] school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services."); *M.B.* v. *Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011) (requiring IEP that is likely to produce educational progress, "not regression or trivial educational advancement") (citations and internal quotation marks omitted); *Todd* v. *Duneland School Corp.*, 299 F.3d 899, 906 n.3 (7th Cir. 2002) (approving district court's use of a "more than mere trivial educational benefit" test); *K.E.* v. *Independent Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011) (requiring "some educational benefit" and holding that standard was satisfied because child "enjoyed more than what we would consider slight or de minimis academic progress") (internal quotation marks omitted); *JSK* v. *Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1572-1573 (11th Cir. 1991) (requiring merely "some" benefit

IDEA's FAPE requirement by providing educational benefits that are just barely more than trivial.[4]

The Third and Sixth Circuits have expressly rejected that approach in favor of a more robust FAPE standard. In *Ridgewood Board of Education* v. *N.E.*, 172 F.3d 238 (1999) (*Ridgewood*), the Third Circuit held that an IEP must provide "significant learning and meaningful benefit." *Id.* at 247 (internal quotation marks omitted). The court stressed that "the benefit must be gauged in relation to a child's potential." *Ibid.* (citation and internal quotation marks omitted). Most importantly, the court emphasized that "[t]he provision of merely more than a trivial educational benefit" is *not* enough to satisfy the FAPE standard. *Ibid.* (internal quotation marks omitted). In subsequent cases, the Third Circuit has reaffirmed *Ridgewood*'s analysis, including its rejection of the view that providing "merely more than a trivial educational benefit" satisfies the FAPE re-

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and indicating that "a trifle [of benefit] might not" satisfy that standard).

[4] The First and Fifth Circuits have likewise stated that a FAPE requires more than simply a "trivial" or "*de minimis*" benefit, while also noting that the benefit or access provided must be "meaningful." See, *e.g.*, *D.B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *Rockwall Indep. Sch. Dist.* v. *M.C.*, 816 F.3d 329, 338 (5th Cir. 2016). It is not clear, however, whether those circuits would hold that the provision of anything beyond a trivial benefit necessarily means that the education provided is "meaningful" and thus satisfies the FAPE standard. If so, the governing legal standard in those circuits approximates the standard applied by the Second, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits. Different panels of the Ninth Circuit have disagreed with one another over the correct legal standard. Compare *J.L.* v. *Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (2010), with *N.B.* v. *Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1212-1213 (2008); see Pet. 14.

quirement. *T.R.* v. *Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (*Kingwood*) (Alito, J.); see *L.E.* v. *Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006) (*Ramsey*).

The Sixth Circuit adopted the Third Circuit's test in *Deal* v. *Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), cert. denied, 546 U.S. 936 (2005). There, the Sixth Circuit agreed with the Third Circuit's "meaningful educational benefit" standard, and it also agreed with the Third Circuit that "a mere finding that an IEP had provided more than a trivial educational benefit [i]s insufficient." *Id.* at 862 (citation and internal quotation marks omitted). The Sixth Circuit further observed that (1) "[i]n evaluating whether an educational benefit is meaningful, logic dictates that the benefit must be gauged in relation to a child's potential," and (2) "courts should heed" Congress's desire "not to set unduly low expectations for disabled children." *Id.* at 864 (citation and internal quotation marks omitted).

Notably, several courts of appeals adopting the less demanding "more than trivial" or "more than *de minimis*" standard have acknowledged the inter-circuit disagreement over the proper interpretation of the IDEA's FAPE requirement.[5] Indeed, the Tenth Circuit in this case expressly conceded that the Third and Sixth Circuits' "meaningful educational benefit" test reflected a "higher standard" that "promis[es] disa-

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[5] See, *e.g.*, Pet. App. 16a-18a (asserting split between Tenth Circuit, on the one hand, and Third, Fifth, and Sixth Circuits, on the other); *O.S.*, 804 F.3d at 359-360 (noting different standards applied by First, Fourth, Ninth, and Tenth Circuits); *Todd*, 299 F.3d at 905 n.3 (noting split between Third and Seventh Circuits).

bled children a higher measure of achievement" than its own test. Pet. App. 17a.

2. Respondent's efforts (Br. in Opp. 10-25) to minimize or deny the split are not persuasive.

First, respondent correctly points out (Br. in Opp. 10-12) that every circuit adheres to this Court's broad statement in *Rowley* that an IEP must be "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207. But the agreement on that general point does not change the fact that the courts of appeals are intractably divided over whether that standard is satisfied when the educational benefits provided are barely more than *de minimis*. As discussed above, while many courts of appeals interpret *Rowley* to embrace the barely more than *de minimis* standard, the Third and Sixth Circuits expressly reject that interpretation of *Rowley* and understand the IDEA to require more.

Respondent also errs in contending (Br. in Opp. 12) that the circuit split is over "adjectives" that do not reflect "different standards." It is true that some courts of appeals have used the terms "some" and "meaningful" interchangeably. But the relevant conflict is not between courts that use the term "some" and those that use the term "meaningful." It is between the courts that hold that the IDEA requires the benefit to be merely more than "trivial" or "*de minimis*," and the courts that unambiguously reject that test in favor of a more robust standard. *Ibid.* That is a difference in legal standards, not adjectives.

When it comes down to it, respondent all but concedes the conflict. Respondent acknowledges (Br. in Opp. 19-20) that some courts, including the Tenth Circuit, embrace the merely more than *de minimis*

standard. Respondent also acknowledges (*id.* at 21-22) that Third and Sixth Circuit decisions have affirmatively rejected that standard as insufficient to satisfy the FAPE requirement. Respondent does appear to imply (*ibid.*) that the Third Circuit in *Ramsey* retreated from its decisions in *Ridgewood* and *Kingwood*. And respondent also says (*id.* at 23) that "time has worn the edges off [the Sixth Circuit's decision in] *Deal*." But *Ramsey* expressly reaffirmed that "the provision of merely more than a trivial education benefit" does not meet the requirements of the IDEA. 435 F.3d at 390 (citations and internal quotation marks deleted). And respondent cites no Sixth Circuit case departing from *Deal*'s equally emphatic rejection of the barely more than *de minimis* standard.

In short, the split of authority on the question presented is real, and only this Court can resolve it. There is no justification for providing children with disabilities different degrees of protection under federal law depending on where they happen to live. This Court should clarify the proper FAPE analysis and establish a uniform standard to guide courts, state educational agencies, and parents across the country.

B. The Tenth Circuit's "Merely * * * More Than *De Minimis*" Standard Is Erroneous

The Tenth Circuit's view that a State can satisfy the IDEA's FAPE requirement by providing children with disabilities educational benefits that are "merely * * * more than *de minimis*" is mistaken. Pet. App. 16a (citations and internal quotation marks omitted). That interpretation is not consistent with the IDEA's text or structure, with this Court's analysis in *Rowley*, or with Congress's stated purposes. This Court should hold that States must provide children with

disabilities educational benefits that are meaningful in light of the child's potential and the IDEA's stated purposes. Merely aiming for non-trivial progress is not sufficient.

1. The Tenth Circuit's standard does not square with the IDEA's requirement that the education provided be "appropriate." See 20 U.S.C. 1412(a)(1)(A) (requiring States to provide a "free *appropriate* public education") (emphasis added); see also 20 U.S.C. 1401(9)(C) (defining FAPE to require "an *appropriate* preschool, elementary school, or secondary school education in the State involved"). Standard dictionaries define "appropriate" to mean "specially suitable," "fit," or "proper," *Webster's Third New International Dictionary* 106 (1993) (capitalization omitted), or "suitable or proper in the circumstances," *The New Oxford American Dictionary* 76 (2d ed. 2005).

The "merely * * * more than *de minimis*" test is not compatible with the ordinary meaning of "appropriate." No parent or educator in America would say that a child has received an "appropriate" or a "specially suitable" or "proper" education "in the circumstances" when all the child has received are benefits that are barely more than trivial. That is particularly true when a child is capable of achieving much more.

Taken to its logical conclusion, the "merely * * * more than *de minimis*" test could lead to results that Congress plainly did not intend when it required an "appropriate" education. Consider a child whose hearing is impaired and requires assistive technology (such as an amplification device) in order to understand her teachers' instruction. See 20 U.S.C. 1414(d)(3)(B)(iv) and (v). If the school provides the device in the child's social studies class—but refuses

to do so for her math, reading, and science classes—the child may well make progress on her IEP goals in social studies, even while attaining no educational benefit whatsoever in any other subject. It would be absurd to describe the child's overall education as being "appropriate" for that child. Yet, under a literal understanding of the "merely * * * more than *de minimis*" test, the child would have received just that.

2. The structure of the IDEA likewise undermines the Tenth Circuit's approach. Most importantly, 20 U.S.C. 1414(d) makes clear that the IEP must be carefully tailored to the particular needs and abilities of each child, see 20 U.S.C. 1414(d)(1)(A)(i)(I), and it requires a clear statement of "measurable annual goals" in light of those needs and abilities, 20 U.S.C. 1414(d)(1)(A)(i)(II). Section 1414(d) also requires special education and related services to enable each child "to advance appropriately toward attaining the annual goals." 20 U.S.C. 1414(d)(1)(A)(i)(IV).

Section 1414(d)'s description of the IEP's requirements cannot be reconciled with the Tenth Circuit's "merely * * * more than *de minimis*" standard. Congress would not have instructed States to develop each child's IEP with such a clear focus on promoting measureable annual progress—gauged in light of the particular needs and capabilities of each child—if at the end of the day all it wanted to require was that States provide some degree of educational benefit that is barely more than trivial. The IDEA's IEP provisions provide reliable insight into what level of education Congress would have deemed "appropriate" for purposes of the FAPE requirement.[6] Indeed, Con-

[6] See generally, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 286 (2011) (looking to statutory context to determine what relief is "appropri-

gress expressly requires a FAPE to be "provided in conformity with the [IEP] required under [S]ection 1414(d)." 20 U.S.C. 1401(9)(D).

3. The Tenth Circuit's "merely * * * more than *de minimis*" standard also conflicts with the Court's analysis in *Rowley*. *Rowley* makes clear that States must provide children with "some" benefits so that access to education is actually "meaningful." 458 U.S. 192, 200. In isolation, "some" benefits could conceivably mean benefits that are anything more than nothing or its legal equivalent of *de minimis*. But the term "meaningful access" cannot bear that meaning. See, *e.g.*, *Merriam-Webster's Collegiate Dictionary* 769 (11th ed. 2005) (defining "meaningful" as "significant"); *The New Oxford American Dictionary* 1052 ("having a serious, important, or useful quality or purpose"). Thus, when *Rowley* indicated that that "some" benefits must be provided to ensure "access" to education that is "meaningful," it could not have meant that the benefits could be barely more than *de minimis*. 458 U.S. 192, 200. Only "meaningful" or "significant" benefits can afford such "meaningful" access.

The Tenth Circuit's test also contradicts *Rowley*'s emphasis on the "dramatically" different capabilities of different children with different disabilities. 458 U.S. at 202. *Rowley* cited those different capabilities

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ate" under 42 U.S.C. 2000cc-2(a); *West* v. *Gibson*, 527 U.S. 212, 217-218 (1999) (holding that meaning of term "appropriate" depends on statutory context); see also *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015) (explaining that "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors") (citation and quotation marks omitted).

in explaining why it was declining "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* The Tenth Circuit's test focuses only on whether the child has attained some degree of non-trivial benefit, and it does not require any consideration of how that benefit compares to the child's capabilities and potential. In doing so, the test departs from the child-specific analysis envisioned by *Rowley*.

4. Finally, in deciding what constitutes an "appropriate" education, Congress's stated purposes must be taken into account. See *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239-245 (2009) (emphasizing that IDEA must be interpreted in light of its "remedial purpose"); see also *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (holding that what constitutes "appropriate" relief in IDEA district court action must be determined "in light of the purpose of the [IDEA]"). The "merely * * * more than *de minimis*" standard undermines Congress's purposes.

Congress expressly stated that the IDEA's "purposes" include "ensur[ing] the effectiveness of[] efforts to educate children with disabilities" and providing such children with a FAPE that would "meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A) and (4). It further explained that the IDEA was targeted to "[i]mproving educational results for children with disabilities" and thereby helping to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency" for such individuals. 20 U.S.C. 1400(c)(1). Congress also emphasized the importance of setting

"high expectations"—and avoiding "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5). These robust statements of congressional intent are not consistent with the Tenth Circuit's minimalist interpretation of the FAPE requirement.

Indeed, if school districts provide benefits that are barely more than *de minimis*, it would make the accomplishment of Congress's stated purposes nearly impossible. No reasonable school district sets out to provide educational benefits to its non-disabled children that are barely more than trivial. Providing children with disabilities such limited benefits would therefore deprive them of any semblance of "equality of opportunity." 20 U.S.C. 1400(c)(1). If all that is provided are just above *de minimis* benefits, it is hard to imagine that disabled children will be prepared for "further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A). And rather than promote "higher expectations," the barely more than *de minimis* standard expressly *lowers* expectations.

That does not mean the IDEA requires States to "maximize each child's potential," *Rowley*, 458 U.S. at 198. Nor does it mean that States must "achieve strict equality of opportunity or services." *Ibid.* But given Congress's stated purposes, States must do more than provide merely more than *de minimis* benefits.

4. For the reasons noted above, this Court should reject the Tenth Circuit's "merely * * * more than *de minimis*" interpretation of the FAPE requirement. Instead, the Court should make clear that the IDEA—as interpreted by *Rowley*—ultimately requires States to provide children with disabilities access to educational benefits that are meaningful in light of the

child's potential and the purposes of the Act. See 20 U.S.C. 1412(a)(1)(A); *Rowley*, 458 U.S. at 192. In applying that standard, courts must grant "due weight" to the child-specific decisions made by State educational agencies and educators. *Rowley*, 458 U.S. at 206; see also *id.* at 207 ("[C]ourts must be careful to avoid imposing their view of preferable educational methods upon the States.").

C. The Question Presented Is Important And Recurring, And The Court Should Resolve It In This Case

The degree of educational benefit contemplated by the IDEA's FAPE requirement presents a fundamental question of federal education law. This Court has explained that the FAPE requirement is the statutory mandate "most fundamental" to the IDEA and that "[t]he adequacy of the [child's] educational program is, after all, the central issue" in IDEA litigation. *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 530, 532 (2007); see 20 U.S.C. 1415(f)(3)(E). How a school district must satisfy its obligation to provide a FAPE frequently arises, both in litigation (as the circuit conflict described above establishes) and in everyday decisions made by educators and parents in developing IEPs for children with disabilities.

The question whether the IDEA requires benefits that are barely more than *de minimis* or instead imposes a more robust standard is also one of great practical significance. If school districts are told that a FAPE requires merely that they provide children with disabilities with educational benefits that are "more than trivial" or "more than *de minimis*"—*i.e.*, if they are told that it is perfectly fine to aim low—they are less likely to offer the same educational opportunities than if they are told that children with disabilities

must receive "meaningful" benefits in light of each child's potential and the IDEA's stated goals. As a practical matter, the choice of legal standard is likely to shape the conduct and choices of educators and parents when developing IEPs for children with disabilities.

The choice of standard can also be outcome-determinative when a school district's decision is subject to judicial review. The Third Circuit's decision in *Ridgewood*, *supra*, provides an example. There, the court of appeals overturned the district court's decision in favor of the school district because the lower court had applied the erroneous "more than a trivial educational benefit" standard. *Ridgewood*, 172 F.3d at 243 (vacating and remanding the district court's decision on that basis).

The Tenth Circuit's decision in this case further illustrates that the choice of standard can make a difference. Here, the court of appeals emphasized that "[t]his is without question a close case" under its less-demanding "merely * * * more than *de minimis*" test. Pet. App. 16a, 23a (citations and internal quotation marks omitted). The Tenth Circuit's acknowledgment of the closeness of the case offers good reason to believe that the outcome may well have been different under the "higher standard" that the court acknowledged is applied by other circuits. *Id.* at 17a. The same will undoubtedly be true in other cases.

Finally, if petitioner and the government are correct, students across the country are being denied the "meaningful" educational benefits to which they are entitled by law. This Court should grant review to decide the proper legal standard for determining the required level of benefit States must provide and vin-

dicate Congress's sustained effort to promote opportunities for children with disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 15-827

IN THE
Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF 118 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amici are 118 current and former members of Congress who have a strong interest in ensuring the Individuals with Disabilities Education Act ("IDEA"), formerly named the Education for All Handicapped Children Act of 1975 ("EHA"), is interpreted correctly. A complete list of *amici* is provided in the Appendix to this brief, and it includes current and former ranking members and chairs of the House and Senate committees responsible for drafting and amending the IDEA, as well as other members who participated in the drafting or enactment of the IDEA and its amendments. Among them are:

- Patty Murray, *Ranking Member of the Senate Committee on Health, Education, Labor, and Pensions, and Ranking Member of the Senate Subcommittee on Labor, Health and Human Services, Education, and Related Agencies Appropriations*
- Robert C. "Bobby" Scott, *Ranking Member of the House Committee on Education and the Workforce*
- Tom Harkin, *Former Chairman of the Senate Committee on Health, Education, Labor, and*

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made such a monetary contribution. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

Pensions, and Former Chairman of the Senate Subcommittee on Labor, Health and Human Services, Education, and Related Agencies Appropriations

- George Miller, *Former Chairman of the House Committee on Education and Labor*

Amici are intimately familiar with Congress's intent in crafting the "free appropriate public education" provision, and are uniquely situated to provide insight into the purpose of the IDEA and Congress's goal to ensure that students with disabilities have access to a meaningful public education.

Respondent argues that the IDEA's requirement that States provide a "free appropriate public education" ("FAPE") to students with disabilities is satisfied by providing educational benefits that are merely "more than *de minimis*." That is a vanishingly low standard, and it runs contrary to Congress's intentions at every step of the decades-long legislative process that culminated in the IDEA as it exists today. Rather, as *amici* explain, Congress considered the lack of meaningful public education for students with disabilities to be a problem of the highest order, and required States to take substantial steps to ameliorate that problem—not merely to provide students with benefits amounting to little more than nothing, as Respondent contends. From the outset, by passing the EHA, Congress intended the requirement that States provide an "appropriate" education to mean one that meaningfully benefits the student. Every subsequent amendment to the statute not only reaffirmed that mandate but also further strengthened and heightened

expectations of substantive academic achievement for these students. Accordingly, *amici* urge that the judgment below be reversed and remanded.

SUMMARY OF ARGUMENT

1. Congress passed the EHA to ensure that students with disabilities receive meaningful education benefits in school. Prior to the passage of the EHA, millions of children with disabilities effectively were denied an education in public schools in this country—either because they received little to no education in the classroom, or because they were shut out of schools altogether. Congress enacted the EHA in response to this unacceptable situation.

Congress was clear that the purpose of the EHA was to provide students with disabilities with a public education that is both "appropriate" and "emphasizes special education and related services designed to meet their unique needs." Pub. L. 94-142, sec. 3(a), § 601(c), 89 Stat. 773, 775. The EHA's legislative history is replete with descriptions of the law as requiring States to provide "full educational services" and "maximum benefits" to students with disabilities, to help them achieve their "maximum potential." The legislative history also emphasizes the need to ensure that children with disabilities receive sufficient educational benefits to become independent and integrated in their communities as adults. Respondent's argument that the statute requires nothing more than just-above-trivial educational benefits for students with disabilities is a clear departure from both the plain meaning of the statute and its legislative history.

2. In subsequent amendments to the statute, Congress repeatedly reaffirmed its intent to provide equal educational opportunity to students with disabilities—and clearly and consistently raised the standards for educating these students. In the 1990 amendments to the EHA (which renamed the law the IDEA), Congress conferred additional educational benefits on students to ensure that they would be equipped to meet their "full potential" as adults.

Congress went even further in the 1997 and 2004 amendments to raise the expectations and requirements for the education of students with disabilities. Recognizing that many students with disabilities continued to fail to meet their full academic potential, Congress sharpened its focus on the *quality* of education offered to students with disabilities as well as the attainment of educational *results* by students with disabilities. Importantly, these amendments systematically raised the expectations for the provision of material educational benefits to students with disabilities—including, for example, by requiring that their education be in general classrooms to the maximum extent possible, focusing on substantive educational improvement, and increasing accountability. As with earlier versions of the statute, numerous statements from Senators and Representatives at the time demonstrate Congress's clear purpose: to ensure that students with disabilities receive the educational benefits they need to achieve economic self-sufficiency, independent living, full participation, and equal opportunities in adulthood.

3. Respondent's interpretation of the IDEA, which would allow States to fulfill their duties under the statute by providing educational benefits that are simply "more than *de minimis*," would render the IDEA a hollow procedural formality. The standard advocated by Respondent could be satisfied without meaningfully improving educational outcomes for students with disabilities. Such a reading would frustrate Congress's clearly expressed intent and must be rejected.

Congress did not expend the time and effort to create a legislative scheme—and then repeatedly refine that scheme over a thirty-year period—to accomplish next to nothing. Nor did it intend for the IDEA's promises to students with disabilities to be illusory. To the contrary, the text and structure of the statute, together with its legislative history, make clear that Congress intended the EHA and the IDEA to reject the historic practice of ignoring students with disabilities' educational potential, provide meaningful educational benefits for students with disabilities and—significantly—raise the expectations and requirements for their educational outcomes.

ARGUMENT

I. Congress passed the EHA to ensure that students with disabilities would receive meaningful educational benefits from the nation's public schools.

Prior to the passage of the EHA, many children with disabilities were denied an education in our country's public schools. In some cases, these students were separated from their peers and segregated into classrooms for students with disabilities, where they received virtually no educational benefits. In other instances, these students were assigned to mainstream classrooms without the tools they needed to improve academically. Some were excluded from public schools altogether. Congress was first alerted to the scope of the problem in 1966, when an ad hoc Subcommittee on the House Education and Labor Committee reported that "only about one-third of the approximately 5.5 million handicapped children were being provided an appropriate special education," and that federal programs directed at them "were minimal, fractionated, uncoordinated, and frequently given a low priority in the education community." H.R. Rep. No. 94-332, at 2 (1975). The EHA itself acknowledged that "the special educational needs of [children with disabilities] are not being fully met," noting that "more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity." Pub. L. No. 94-142, sec. 3(a), § 601(b)(2)–(3), 89 Stat. at 774.

Congress passed the EHA to address the widespread educational neglect of students with disabilities by

ensuring that they received meaningful access to, and meaningful educational benefits from, public schools. Congress stated in the EHA's Statement of Findings and Purpose that the statute was drafted to ensure that all students with disabilities "have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Pub. L. No. 94-142, sec. 3(a), § 601(c), 89 Stat. at 775. The EHA in turn defines a FAPE to mean "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [the statute]." Pub. L. No. 94-142, sec. 4(a)(4), § 602(18), 89 Stat. at 775.

As the statute makes clear, Congress did not merely guarantee that children with disabilities would be allowed to physically attend public schools, but also required that these children would receive an "appropriate" education designed to ensure that each student could learn and make meaningful progress. Consistent with this mandate, Congress imposed significant requirements on States receiving federal funding under the EHA—including that such States adopt policies and procedures to establish "a goal of providing full educational opportunity to all handicapped children." Pub. L. No. 94-142, sec. 5(a), § 612(2)(A), 89 Stat. at 780.

Indeed, as we discuss below, in floor statements, speeches, and House and Senate Reports, members of Congress repeatedly described the educational goals under the statute as ensuring that students with disabilities reach their "maximum potential," attain "full educational opportunities," and receive a "maximum benefit." To be sure, Congress recognized that the EHA was not guaranteed to produce any specific outcome for children with disabilities. *See* H.R. Rep. No. 94-332, at 14; S. Rep. No. 94-168, at 11, *as reprinted in* 1975 U.S.C.C.A.N. at 1435; *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982). But Congress's expressly stated intent to provide full opportunities for students with disabilities shows that the near *de minimis* standard Respondent advocates is incorrect.[2]

The sections of the legislative history that discuss the EHA's funding provisions are representative of Congress's intent in passing the EHA. The Report of the Senate Committee on Labor and Public Welfare first notes that Title VI, Part B of the Elementary and Secondary Education Amendments of 1974, a predecessor to the EHA, "greatly increased the

[2] Contrary to the suggestion of the majority opinion in *Rowley*, 458 U.S. at 204 n.26, terms such as "maximum potential," "full educational opportunities," and "maximum benefit" are not mere isolated statements in the legislative history. Rather, these terms are used throughout the legislative history to explain and expound on important substantive provisions of the statute. Notwithstanding this misreading of the legislative history, however, *Rowley* correctly recognized that Congress intended to ensure that students have "meaningful" access to public schools, and not merely minimal access. *Id.* at 192.

authorizations" of federal funding so that the States "would be able to meet the mandate set forth in this legislation . . . to establish a policy of providing *full educational opportunities* for all handicapped children." S. Rep. No. 94-168, at 6 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1430 (emphasis added).

The Senate Report reveals that Congress worked to improve the educational opportunities offered to students with disabilities so that "many would be able to become productive citizens, contributing to society," and to "increase their independence, thus reducing their dependence on society." *Id.* at 9, *as reprinted in* 1975 U.S.C.C.A.N. at 1433. The House Report is to the same effect: it expresses the hope that "[w]ith proper educational services many . . . handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society." H.R. Rep. No. 94-332, at 11. Congress emphasized these same goals in subsequent amendments to the EHA. *See, e.g.*, S. Rep. No. 98-191, at 28 (1983). Likewise, approximately ten years after the passage of the EHA, Senator John Kerry noted that the statute presented students with disabilities with "an opportunity to achieve a new independence and become active in the mainstream of daily American life in a way that 10 years ago seemed like a mere dream." 132 Cong. Rec. 12,924 (1986). Congress thus plainly intended that students would benefit from their education sufficiently to prepare them to enter the workforce and achieve self-sufficiency—and not that they would simply be pushed through the school system without any expectation that they would learn.

The 1975 Senate Report further explains that the intent of the EHA was "to establish in law a comprehensive mechanism which will insure that those provisions [of the Elementary and Secondary Amendments] . . . are expanded and will result in *maximum benefits* to handicapped children and their families." S. Rep. No. 94-168, at 6, *as reprinted in* 1975 U.S.C.C.A.N. at 1430 (emphasis added). Similarly, the Senate Report states that the goal of the eligibility provisions for federal assistance under the EHA was to "assure that *full educational opportunities* are available" to students with disabilities. *Id.* at 3, *as reprinted in* 1975 U.S.C.C.A.N. at 1427 (emphasis added). The House Report echoes the goal of providing "free, *full educational opportunities*" for students with disabilities, emphasizing that the intent of the authorization provision of the EHA was "to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress will result in *maximum benefits* for handicapped children and their families." H.R. Rep. No. 94-332, at 5 (1975) (emphasis added).

Congress's substantive goal of improving educational outcomes for students with disabilities is further evident in discussions of the EHA's procedural protections. For example, the EHA required each local educational agency to develop an individualized education program ("IEP") for every student covered by the statute. In describing the purpose for this requirement, the House Report notes that Congress was responding in part to a "fundamental tenet[]" that "each

child requires an educational plan that is tailored to achieve his or her *maximum potential*." H.R. Rep. No. 94-332, at 13 (emphasis added); *see also id.* at 19 (emphasizing that the IEP will achieve one of the two "fundamental goals" of requiring an educational plan "tailored to achieve [a student's] *maximum potential*"). Similarly, EHA cosponsor Senator Bob Dole explained that the purpose of the IEP requirement was to ensure that there would be a "*meaningful* plan" for the student's benefit. 121 Cong. Rec. 19,500 (1975) (emphasis added).

In sum, although the EHA did not guarantee any particular outcome for students with disabilities, Congress's clear intent in the legislation was to provide full opportunities and benefits for students with disabilities, and not merely borderline *de minimis* ones.

II. Through the IDEA and its subsequent amendments, Congress has consistently and clearly raised expectations for the quality of education provided to students with disabilities.

The 1990 amendments to the EHA, which renamed the statute the IDEA, heralded Congress's shift in focus from providing access to equal educational opportunities for students with disabilities to conferring even greater material benefits, with the ultimate goal of "ensuring that children with disabilities grow up to meet their full potential as productive citizens." 135 Cong. Rec. 29,832–33 (1989) (statement of Sen. Harkin). Congress continued to expand the scope of the IDEA with additional amendments in 1997 and 2004, further bolstering the statute's requirements and expectations

with respect to the education of students with disabilities. Each of these amendments illustrates Congress's continued commitment to providing meaningful educational benefits to students with disabilities, in addition to a stronger emphasis on maximizing the full potential of each student.

A. 1990 Amendments

With carefully considered adjustments to terminology and enhancements to targeted programs, in the 1990 amendments Congress renewed its commitment to raising the substantive quality of education for students with disabilities, with the intent of bettering students' educational outcomes.

Congress's focus on improving the quality of education and outcomes for students with disabilities is abundantly evident in the House Report, which candidly recognized that still more support for students with disabilities was necessary to achieve Congress's goal of providing meaningful educational opportunities:

> Today the education of students with disabilities is at a crossroads. The focus over the past 14 years in educating students with disabilities has been on processes and procedures related to special education with access to public education as the goal. The time has come to shift the focus to quality and student outcomes. Simply assuring that services are present or placing students with disabilities into general classrooms is no longer good enough.

H.R. Rep. No. 101-544, at 30 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1723, 1753 (quoting *The Education of Students with Disabilities: Where Do We Stand?* at 1). Heeding this call, the House Committee on Education and Labor declared that additional federal support was required to "assist States in producing, managing, accessing, and utilizing knowledge for program improvement needed to assure that children with disabilities reach their full potential." *Id.* at 24, 30–31, *as reprinted in* 1990 U.S.C.C.A.N. at 1746, 1753 (referring specifically to funding necessary "to expand the current emphasis on evaluation by including program content for the purpose of achieving program improvements" under § 618, which was amended "to focus on data collection, evaluation, implementation studies, special studies, and preparation of an annual report"). As noted by Senator Harkin, such measures were introduced in response to demands from the public to improve the quality of instruction for students—which he described as the "repeated plea that more be done to disseminate and translate research findings into classroom practice." 136 Cong. Rec. 27,031 (1990).

1. The 1990 amendments clearly rejected a passive approach to educating students with disabilities, in which it was considered sufficient simply to shepherd these students through school with little heed to whether they were making significant progress. Instead, Congress envisioned educational programs for students with disabilities that culminate, to the extent possible, in the skills and knowledge that these students can put to use far beyond the classroom. *See, e.g.*, H.R. Rep. No. 101-544, at 9, *as reprinted in* 1990 U.S.C.C.A.N.

at 1731–32 ("Although not fully responsible for ensuring an appropriate entrance into the adult world, school systems must do more to address the transition of special education students into adulthood."). The House Report focused on the application beyond schooling of the material benefits that students with disabilities garner through their education. For instance, the 1990 amendments added a requirement that the IEP contain a statement of "transitional services," to bridge the gap between schooling and post-education life, as well as an expectation that schools "develop such activities within an outcome-oriented process, thus enhancing a young adult's chances to achieve an adequate level of self-care, independence, self-sufficiency, and community integration." *Id.* at 10, *as reprinted in* 1990 U.S.C.C.A.N. at 1732.

Tellingly, the Committee envisioned the transition to post-education life as critical to ensuring the overall value of the educational opportunities guaranteed under the statute. Again describing programs to facilitate transition, the Committee decried the plight of students with disabilities who, having completed their education, "have no jobs, further training, or programs available to them," some of whom are "forced to linger at home, with literally nothing to do." *Id.* at 37, *as reprinted in* 1990 U.S.C.C.A.N. at 1760. "Years of valuable special education are wasted in such situations," the Committee warned, adding that "[m]ost importantly, human potential and hope are needlessly destroyed." *Id.* Congress thus recognized the importance of providing students with disabilities with meaningful instruction to

ready them for their later transition to post-education life.

2. The 1990 amendments also introduced new statutory provisions regarding the use of "assistive technologies" to improve the education of students with disabilities, which speaks to the same Congressional focus on enhancing the substantive educational benefit conferred by the statute. As existing technologies advanced and new ones came to the fore, Congress sought to harness their power to boost the material benefits available to students with disabilities through education. Accordingly, far from settling for the educational tools existing in 1975, Congress aimed to shepherd the law into the last decade of a century defined by light-speed technological progress. As Senator Harkin put it, the 1990 amendments were to be "responsive to . . . research findings, and new technological advances . . . promis[ing] to enhance the learning capacity of students." 136 Cong. Rec. 27,031 (1990).

In serving these goals, Congress defined assistive devices broadly to include "any item, piece of equipment, or product system . . . used to increase, maintain, or improve functional capabilities of individuals with disabilities." Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, sec. 101(g), § 602(a)(25), 104 Stat. 1103, 1104. Furthermore, these were to be supplemented by assistive technology services, including "any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device." *Id.*, sec. 101(h), § 602(a)(26), 104 Stat. at 1104. The Committee

emphasized that these new tools were introduced with the goal of improving the quality of education that students with disabilities receive. Congress aimed for nothing less than to "*redefine* an 'appropriate placement in the least restrictive environment' and allow greater independence and productivity." H.R. Rep. No. 101-544 at 8, *as reprinted in* 1990 U.S.C.C.A.N. at 1730 (emphasis added).[3]

Taken together, the push to incorporate assistive technologies and emphasis on preparation for the workplace demonstrate that, as the statute took deeper root in its second and third decades, Congress intended to ensure material educational benefits and concrete outcomes for students with disabilities. As emphasized by Senator Harkin, "discretionary programs of the Education of the Handicapped Act have a long history of responding to the educational needs of children with disabilities . . . keeping our Nation's special education system on the cutting edge." 135 Cong. Rec. 29,832 (1989).

B. 1997 Amendments

The IDEA Improvement Act of 1997, Pub. L. No. 105-17, 111 Stat. 37, is further proof of Congress's intent

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[3] This focus on access to technology was echoed by an emphasis of the importance of providing access to media, which was presumably seen as an increasingly important component of educational programs of all types as the decades wore on. For instance, the Committee noted that it had "long supported the greatest possible use of media by persons with disabilities to allow them equal access to America's telecommunications services," services that grew in number and potential use over the years. H.R. Rep. No. 101-544 at 51, *as reprinted in* 1975 U.S.C.C.A.N. at 1774.

to strengthen the IDEA's impact by placing a greater emphasis on educational outcomes for students with disabilities. The 1997 amendments were passed with overwhelming bipartisan and bicameral support[4] after a congressional evaluation found that "educational achievement and post-school outcomes for children with disabilities remain less than satisfactory." S. Rep. No. 104-275, at 14 (1996). Although children's access to education had dramatically improved under prior versions of the IDEA, children with disabilities were still failing courses at a disproportionately high rate and were twice as likely to drop out of school when compared with other students. Indeed, in testimony before the Committee on Labor and Human Resources, Dr. Brian McNulty explained: "Too often we in education have limited our expectations for children with disabilities. . . . These low expectations result in low performance and dismal results." S. Rep. No. 104-275, at 17. Congress thus determined that "the promise of the law [had] not been fulfilled," and sought to revise the IDEA to ensure not merely access to education, but also a "*quality* public education" for all children with disabilities. H.R. Rep. No. 105-95, at 84–85 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 81–82 (emphasis added).

1. The 1997 amendments implemented several "substantive, important changes" to the IDEA, 143 Cong. Rec. 7923 (1997) (statement of Sen. Coats), further confirming Congress's intent to ensure that students

[4] The 1997 Amendments received 420 affirmative votes in the house with only three negatives (143 Cong. Rec. 8046 (1997)), and ninety-eight affirmative votes in the Senate with only one negative (143 Cong. Rec. 8188 (1997)).

with disabilities receive meaningful educational benefits rather than those that merely border on the *de minimis*. In particular, the 1997 amendments further shifted the focus of the IDEA from an emphasis on ensuring educational *access* to an emphasis on improving individual student *results*.[5] As Congressman Frank Riggs, one of the Amendment's cosponsors, explained:

> [W]e are changing the focus of the bill by raising expectations for the educational achievement for all students, especially those with learning disabilities. States under the legislation must establish goals for the performance of children with disabilities and develop indicators to judge their progress. A child's individualized educational program, otherwise known as an IEP, will focus on *meaningful* and *measurable* annual goals.

143 Cong. Rec. 8012 (1997) (statement of Rep. Riggs) (emphasis added). Similarly, Senator Frist explained that the goal of the amendment was to "shift[] the

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[5] *See* H.R. Rep. No. 105-95 at 82, *as reprinted in* 1997 U.S.C.C.A.N. at 79 ("The purposes of the . . . Amendments of 1997 [include] promot[ing] improved educational results for children with disabilities through . . . educational experiences that prepare them for later educational challenges and employment."); *id.* at 84, *as reprinted in* 1997 U.S.C.C.A.N. at 81 ("This review and authorization of the IDEA is needed to move to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement."); *id.* at 263 ("Improving educational results for children with disabilities is an essential element of [this] national policy.").

emphasis of the IDEA from simply providing access to schools to helping schools help children with disabilities achieve true educational results." *Id.* at 7866.

The Committee on Economic and Educational Opportunities similarly acknowledged this shift in focus, explaining that "[t]he purpose of this act is to . . . educate better children with disabilities and increase the educational opportunities available to these children, focusing on academic achievement, by placing an emphasis on what is best educationally instead of paperwork." H.R. Rep. No. 104-614, at 1 (1996); *see also id.* at 3 ("This Committee believes that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education.").

2. Thus, the goals of the amendments to the IDEA were to implement "high expectations for [special education] children" and to "ensur[e] their access in the general curriculum *to the maximum extent possible*." IDEA Amendments of 1997, Pub. L. No. 105-17, sec. 101, § 601(c)(5)(A), 111 Stat. 37, 39 (emphasis added); *see also* 143 Cong. Rec. 7939 (1997) (statement of Sen. Mikulski) ("Decades of research have shown that educating children with disabilities is successful by having high expectations of special education students.").

To achieve these goals, Congress expanded the definition of children with disabilities, Pub. L. No. 105-17, sec. 101, § 602(3), 111 Stat. at 42–43, forbade the expulsion or lengthy suspension of such students, *id.*, § 615(k)(1)(A), 111 Stat. at 93–94, and required greater participation of students with disabilities in the general classroom setting, *id.*, § 602(29), 111 Stat. at 46; *see also*

S. Rep. No. 104-275 at 49–52. Senator Tom Harkin, a cosponsor of the 1997 amendments, explained that the purpose of these revisions was to ensure that children with disabilities "have the support they need so that they can become fully self-sufficient, productive, loyal American citizens in their adulthood." 143 Cong. Rec. 7927 (1997).

Further, for the first time, Congress insisted that students with disabilities receive an education grounded in the same general curriculum as that followed by their peers. The 1997 amendments required States to "establish[] goals for the performance of children with disabilities . . . that . . . are consistent, to the maximum extent appropriate, with other goals and standards for children established by the State," Pub. L. No. 105-17, sec. 101, § 612(a)(16)(A), 111 Stat. at 67, and to include students with disabilities "in general State and district-wide assessment programs, with appropriate accommodations, where necessary," *id.* § 612(a)(17)(A), 111 Stat. at 67. Members of Congress repeatedly emphasized the importance of ensuring more favorable outcomes for students through their inclusion in general classrooms and lessons. For example, a report prepared by the Committee on Economic and Educational Opportunities explained that "[t]he law creates a presumption that children with disabilities will be educated in regular classes" to "ensure that children's special education plans are in addition to the general education curriculum, not separate from it," and that "[t]he purpose of the IEP is to tailor the education to the child; not tailor the child to the education." H.R. Rep. No. 104-614, at 7, 14. Floor testimony echoed these

sentiments. For example, as Senator Harkin stated during hearings on the reauthorization, "the single most important principle addressed in [this amendment] is improving results for disabled children by ensuring their access to the general curriculum and general educational reforms." 143 Cong. Rec. 7859 (1997). Respondent's argument that the statute calls for little more than a *de minimis* benefit to students with disabilities is inconsistent with these statements of Congress's goals.

3. The new IEP requirements are the clearest manifestation of the goal that every child should receive a substantive education in school. As Congress's summary of the IEP changes emphasizes, almost all of the modifications to IEPs effectuated by the 1997 amendments require substantive improvements to individual students' education. *See* S. Rep. No. 104-275 at 49–52. For example, the amendments: (1) replace "'annual goals'" with "'*measurable* annual objectives' related to . . . enabling the child to *progress*"; (2) require "a statement of how the *progress* of the child toward measurable annual objectives will be measured"; (3) require indicators of progress to be "individualized for each child and include observable performance criteria" including "criteria for mastery" and a target date for mastery; and (4) require the child's IEP team to revise the IEP to address "continued progress or lack of expected progress" and to ensure that "the anticipated educational needs of the child" are being met. *Id.*at 50–51 (emphasis added).

Congress's intent in making these significant changes to the IEP processes was to ensure that IEPs "place[] greater emphasis on educational *results*" and to

"ensur[e] that each eligible child, as appropriate, has the opportunity to *progress* in the general education curriculum." S. Rep. No. 104-275, at 50 (emphasis added). The amendments' explicit focus on substantive educational improvement shows that Congress intended the new IEPs to help students achieve substantial educational progress rather than merely attain some trivial or *de minimis* educational benefit.

The Report of the House Committee on Economic and Educational Opportunities regarding the need to address the communication skills of students with disabilities are illustrative. The Committee explains that "[s]pecial attention should be given to communication. . . . The ability of any child to communicate is at the heart of the ability to learn in school and ultimately to be a productive, participating member of the community." H.R. Rep. No. 104-614, at 15. The Committee gives the example of services required for blind students, "intend[ing] to move from having the burden of proof on the parents to prove that a [blind] child will use Braille, to a system in which schools will be expected to provide Braille services and would need to explain on IEP when they would not." *Id.* Ultimately, the House Report makes clear that "[t]he legislation established that goals must be measurable and relate directly to the child's educational needs." *Id.* Focusing on the individualized needs of each student, the Committee adds that "[i]t is not appropriate to have 'group goals' which every child in a particular school's special education program must have on his or her IEP. Every child is different and unique and therefore will have goals which are unique to that child." *Id.*

4. Congress also required students with disabilities to participate in state-wide assessment programs to monitor their educational achievements. Pub. L. No. 105-17, sec. 101, § 612(a)(17)(A), 111 Stat. at 67. These enhanced testing requirements would have made little sense if Congress had been satisfied with providing students merely just-above-trivial educational benefits. Rather, they were designed to ensure that the "unique needs" of each child are met and that the child is being adequately prepared for "employment and independent living." *Id.* § 601(d)(1)(A), 111 Stat. at 42. Thus, although Congress did not alter the wording of the definition of FAPE when it amended the IDEA in 1997, the content of the amendments as a whole underscores Congress's stated purpose to take the "next step" in providing education to disabled children by "improv[ing] and increas[ing] their educational *achievement*." H.R. Rep. No. 105-95, at 84, *as reprinted in* 1997 U.S.C.C.A.N. at 81 (emphasis added); *see also* 143 Cong. Rec. 8012 (1997) (statement of Rep. Riggs) ("States under the [1997 amendments] must establish goals for the performance of children with disabilities and develop indicators to judge their progress. A child's individualized educational program, otherwise known as an IEP, will focus on meaningful and measurable annual goals.").

5. Finally, in addition to increasing the substantive requirements and goals for students with disabilities, the 1997 amendments introduced a new layer of "procedural safeguards" for students and parents, Pub. L. No. 105-17, sec. 101, § 615, 111 Stat. at 88–99, which require state and local education agencies to provide an

option for mediation whenever a parent makes a request for a procedural due process hearing under the IDEA, *id.* § 615(e), 111 Stat. at 90–91. Congress also continued to require parents to exhaust administrative remedies before seeking relief in a state or federal court. *Id.* § 615(i)(2), 111 Stat. at 92. But as the House and Senate reports make clear, the mediation and exhaustion requirements were not meant to replace the statute's substantive goals with procedural ones. Rather, the procedural requirements were intended to help parents and schools achieve the Act's substantive goals "quickly[,] effectively, and at less cost," S. Rep. No. 104-275, at 53, and to do so in a way that "foster[s] a partnership to resolve problems." H.R. Rep. No. 105-95, at 105, *as reprinted in* 1997 U.S.C.C.A.N. at 103; S. Rep. No. 105-17, at 25 (1997). Indeed, the structure of the 1997 amendment also evinces Congress's intent to provide both substantive and procedural guarantees for students with disabilities, as one change in the amendment is that it "gather[s] all state and local agency requirements into single respective sections . . . and place[s] all procedural safeguards requirements in one section." H.R. Rep. No. 104-614, at 4.

In sum, with the 1997 amendments Congress intended to expand the extent of the meaningful educational benefits received by students with disabilities, in part by ensuring that these students were able to participate in the general curriculum "to the maximum extent possible." Pub. L. No. 105-17, sec. 101, § 601(c)(5)(A), 111 Stat. at 39. Respondent's interpretation of the IDEA as granting students with disabilities only just more than trivial educational

benefits, rather than mandating substantial educational progress, is inconsistent with the manifest purpose and stated intent of the 1997 amendments.

C. 2004 Amendments

Congress further elevated the expectations and requirements for educational services provided by States to students with disabilities with the 2004 amendments to the IDEA. These amendments required a higher degree of both substantive, material benefits to students with disabilities and procedural recourse for obtaining those benefits. In discussions regarding the amendments, members of Congress from across the political spectrum reaffirmed the intent to provide high-quality, substantive education for students with disabilities. Representative Boehner explained that, with the 2004 amendments, Congress had "one fundamental goal in mind[:] to improve the educational results for students with disabilities." 150 Cong. Rec. 24,295 (2004). He further stated that students with disabilities "deserve the same high quality teachers, and the same focus on their academic results" as their peers. *Id.* at 24,296. As Senator Reed explained, "[t]he legislation also enhances existing IDEA personnel preparation programs . . . to improve results for students with disabilities." 150 Cong. Rec. 24,276 (2004). Providing students with disabilities "the support they need to reach their full potential" was always a goal of the IDEA. *Id.* at 24,278 (statement of Sen. Enzi). The 2004 amendments "held[] States and school districts accountable for the academic and functional achievements of students with disabilities," which helped to "expand[] services to students with disabilities

in many ways." *Id.* at 24,280 (statement of Sen. Bingaman).

In the Senate Committee on Health, Education, Labor, and Pensions' 2003 report, the Committee noted that its first purpose in enacting these amendments was "[p]roviding a performance-driven framework for accountability to ensure that children with disabilities receive a [FAPE]." S. Rep. No. 108-185, at 5 (2003). The 2003 House Report from the Committee on Education and the Workforce emphasized "the importance of holding high standards for children with disabilities" and of "ensur[ing] that children with disabilities are able . . . to become integrated into the mainstream of American society." H.R. Rep. No. 108-77, at 86 (2003). Importantly, the Senate Report cited approvingly the President's Commission on Excellence in Special Education, specifically the Commission's recommendation to "[f]ocus on results—not on process." S. Rep. No. 108-185, at 4.

Both the Senate and the House Reports also point to the broader legislative framework around the time of the 2004 amendments to demonstrate Congress's commitment to providing educational outcomes—namely through the No Child Left Behind Act ("NCLB") of 2001, Pub. L. No. 107-110, 115 Stat. 1425, which amended the Elementary and Secondary Education Act ("ESEA"). Since the passage of the NCLB, the ESEA mandates standards-based assessments of students in schools, working to ensure that each student meets certain benchmarks by the time he or she completes each grade. The 2004 amendments seek to bring the IDEA in line with these goals of the

ESEA, particularly regarding a unified system of accountability in school districts. As the Senate Report explained: "NCLB established a rigorous accountability system . . . to ensure that all children, including children with disabilities, *are held to high academic achievement standards*. . . . Th[is] bill carefully aligns the IDEA with the accountability system established under NCLB to ensure that there is one unified system of accountability." S. Rep. No. 108-185, at 17–18 (emphasis added); *see also id.* at 18 ("Section 612(a)(15) maintains the requirement that States must establish performance goals and indicators for children with disabilities, but revises the language to align with provisions of the NCLB involving adequate yearly progress."). The House Report concurred on this point: "H.R. 1350 is centered around the following principles for reform: Increasing accountability and *improving education results for students with disabilities*." H.R. Rep. No. 108-77, at 83 (emphasis added). The Committee continued, "Currently, the Act places too much emphasis on compliance with complicated rules, and not enough emphasis on ensuring that academic results are being delivered for children with special needs. As a result of misplaced emphasis, too many children in special education classes have been left behind academically." *Id.*

Ultimately, the ESEA and the IDEA both work to "improve the academic achievement of special education students," 150 Cong. Rec. 24,291 (2004) (statement of Rep. McGovern), so that students with disabilities can "fully utilize their gifts," *id.* (statement of Rep. Sessions). Representative Castle furthered this point:

"Now, more than ever, in the spirit of No Child Left Behind, we must make sure that children with disabilities are given access to an education that maximizes their unique abilities and gives them the tools to be successful, productive members of our communities." *Id.* at 24,299. Respondent's "more than *de minimis*" standard is directly contrary to Congress's demonstrated intent to maximize the potential of students with disabilities, hold them to high academic standards, and improve their educational results to allow them to be productive members of society.

Notably, the first thirty-four pages of the Senate Report speak entirely to substantive reasons to require meaningful educational outcomes for students with disabilities. For instance, the report discusses the necessity of academic achievement for students with disabilities, S. Rep. No. 108-185, at 17–18, and of having students with disabilities participate in assessments, *id.* at 18; but it is not until page thirty-five that the Report even mentions procedural safeguards. Accordingly, like the legislative history of prior amendments, the legislative history of the 2004 amendments demonstrates that Congress intended the IDEA to provide procedural safeguards *and* ensure meaningful educational outcomes for students with disabilities.

III. Respondent's position would frustrate Congress's intent.

By contending that any educational benefit "just above *de minimis*" satisfies the requirements of the IDEA, Respondent asks this Court to adopt a drastically lower standard than the meaningful educational benefit that Congress intended to enable students with

disabilities to attain their full potential. The text, structure, and legislative history discussed above conclusively demonstrate that Congress did not enact the IDEA to be a hollow formality.

Rather, Congress enacted the IDEA to solve the real and serious problem of under-education of students with disabilities. Over a more than thirty-year period, Congress repeatedly enhanced the requirements of the statute, to increase the material educational benefits provided to students (and in turn, required from public schools) under the statute. At every turn, the legislative history demonstrates Congress's focus on ensuring that students with disabilities receive a meaningful education and are well-equipped for adult life after school. It strains credulity to think that Congress would have expended the time and effort to enact and amend this statute merely to give each student with a disability any "just above de *minimis*" educational benefit. Respondent's proffered interpretation of the statute is wholly inconsistent with Congress's clear intent in passing and repeatedly reauthorizing the IDEA, and thus should be rejected.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the judgment below should be reversed and the case remanded.

Respectfully submitted,

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APPENDIX

The Members of Congress participating in the *amici* are:

Current and Former United States Senators

Harry Reid
Tammy Baldwin
Michael F. Bennet
Richard Blumenthal
Cory A. Booker
Barbara Boxer
Sherrod Brown
Maria Cantwell
Benjamin L. Cardin
Robert P. Casey, Jr.
Al Franken
Tom Harkin
Mazie K. Hirono
Tim Kaine
Joe Manchin, III
Edward J. Markey
Jeffrey A. Merkley
Barbara A. Mikulski
Christopher S. Murphy
Patty Murray
Jack Reed
Bernard Sanders
Jeanne Shaheen
Mark R. Warner
Sheldon Whitehouse
Ron Wyden

Current and Former Members of the U.S. House of Representatives

Nancy Pelosi
Steny H. Hoyer
Alma S. Adams
Joyce Beatty
Xavier Becerra
Donald S. Beyer, Jr.
Suzanne Bonamici
Robert A. Brady
Julia Brownley
G. K. Butterfield
Tony Cárdenas
Andre Carson
Matt Cartwright
Kathy Castor
Joaquin Castro
Judy Chu

Katherine Clark
Yvette D. Clarke
William Lacy Clay
Steve Cohen
John Conyers, Jr.
Joe Courtney
Joseph Crowley
Elijah E. Cummings
Danny K. Davis
Susan Davis
Mark DeSaulnier
Debbie Dingell
Mike Doyle
Tammy Duckworth
Donna F. Edwards
Keith Ellison
Anna G. Eshoo
Sam Farr
Marcia L. Fudge
Alan Grayson
Raul Grijalva
Luis V. Gutierrez
Colleen Hanabusa
Alcee L. Hastings
Ruben Hinojosa
Eleanor Holmes Norton
Mike Honda
Jared Huffman
Shelia Jackson-Lee
Hakeem Jeffries
Eddie Bernice Johnson
Henry C. "Hank"
Johnson, Jr.
William R. Keating
Dan Kildee
James R. Langevin
Brenda L. Lawrence
Barbara Lee
Sander M. Levin
John Lewis
Ted Lieu
Dave Loebsack
Zoe Lofgren
Alan Lowenthal
Stephen Lynch
Carolyn Maloney
Sean Patrick Maloney
Betty McCollum
James P. McGovern
Gregory W. Meeks
Grace Meng
George Miller
Gwen Moore
Jerrold Nadler
Richard M. Nolan
Donald Norcross
Bill Pascrell, Jr.
Ed Perlmutter
Jared Polis
Cedric L. Richmond
Lucille Roybal-Allard
Tim Ryan
Gregorio Kilili Camacho
Sablan
Linda T. Sánchez
Janice D. Schakowsky

Robert C. "Bobby" Scott
José E. Serrano
Jackie Speier
Mark Takano
Paul D. Tonko
Chris Van Hollen
Juan Vargas
Nydia M. Velázquez
Debbie Wasserman Schultz
Bonnie Watson Coleman
Peter Welch
Frederica Wilson

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR ADVOCATES FOR CHILDREN OF NEW YORK, CHILDREN'S LAW CENTER, INC., CONNECTICUT PARENT ADVOCACY CENTER, EQUIP FOR EQUALITY, THE LEGAL AID SOCIETY, LEGAL SERVICES NYC, NATIONAL CENTER FOR YOUTH LAW, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, NEW YORK LEGAL ASSISTANCE GROUP, PARTNERSHIP FOR CHILDREN'S RIGHTS, AND STATEWIDE PARENT ADVOCACY NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES, REGULATIONS, AND LEGISLATIVE AUTHORITIES

INTEREST OF AMICI CURIAE

Amici curiae are advocacy and legal-services organizations committed to protecting the rights of children with disabilities to receive a quality education in public schools.[1]

For over forty years, Advocates for Children of New York (AFC) has worked with low-income families to secure quality public education services for their children, including children with disabilities. AFC provides a range of direct services, including advocacy for students and families in individual cases, and also pursues institutional reform of educational policies and practices through advocacy and litigation. AFC routinely advocates for the rights of children and their families under the Individuals with Disabilities Education Act (IDEA) and therefore has a strong interest in the proper interpretation of the IDEA.

The Children's Law Center, Inc. (CLC) is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for children and advocating for systemic and societal change. For over 27 years, CLC has worked in the field of special education to ensure that all youth, regardless of race, ethnicity, gender, sexual orientation, economic status or disability, have access to education programming which provides meaningful benefit. Each year, CLC represents hundreds of students with

[1] Both parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

disabilities in ensuring that their rights under the IDEA are protected. To this end, CLC has a strong interest in ensuring that all students with disabilities receive an education appropriate to meet their unique needs.

Connecticut Parent Advocacy Center (CPAC) is Connecticut's federally-funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. CPAC's mission is to empower and support families, and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society. CPAC provides training and technical assistance to thousands of parents and professionals each year, on issues such as special education, school reform, rights of homeless and immigrant children, bilingual services, discipline and positive behavioral supports, parent involvement, and parent-professional collaboration.

Equip for Equality (EFE) is an independent, non-profit, civil rights organization for people with disabilities which administers the Protection and Advocacy System in the State of Illinois. EFE provides information, referral, self-advocacy assistance, and legal representation to people with disabilities throughout the State. One of EFE's primary areas of focus is the rights of children with disabilities. Every year, EFE assists approximately 1,500 children with disabilities seeking legal assistance in disputes with school districts. Specifically, EFE provides systemic and individual legal services to students with disabilities who are not receiving a free appropriate

public education as guaranteed by the IDEA. As a result, EFE has a strong interest in the proper interpretation of the IDEA.

The Legal Aid Society of New York City is the nation's oldest and largest provider of legal services to low-income families and individuals. Each year, the Society provides legal assistance in some 300,000 legal matters involving civil, criminal, and juvenile rights. A significant number of the Society's clients are children with disabilities, who struggle to obtain the educational services they need in order to be prepared for further education, employment, and independent living. The Society also provides extensive advocacy for adults with disabilities, many of whom did not receive adequate special education services as children and are now suffering lifelong consequences. The Society therefore has a significant interest in ensuring that students with disabilities have access to appropriate educational services under the IDEA.

Legal Services NYC (LSNYC) is one of the largest law firms for low income people in New York City, with 18 community-based offices and numerous outreach sites located throughout each of the City's five boroughs. LSNYC serves over 70,000 New Yorkers annually through a number of specialized practices, including disability advocacy and education rights. LSNYC regularly engages in litigation, advocacy, and education on behalf of public school students and their families related to the IDEA.

National Center for Youth Law (NCYL) is a private, non-profit organization that uses the law to help children in need nation-wide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the

resources, support, and opportunities necessary for healthy and productive lives. NCYL provides representation to children and youth in cases that have a broad impact and has represented many children with disabilities in litigation and class administrative complaints to ensure their access to appropriate and non-discriminatory services. NCYL engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL pilots collaborative reforms with state and local jurisdictions across the nation to improve educational outcomes of children in the foster care and juvenile justice systems, with a particular focus on improving education for system-involved children with disabilities.

New York Lawyers for the Public Interest, Inc. (NYLPI) is a public interest law office founded in 1976 which, through its Disability Justice program and partnerships with community groups, advocates for the rights of persons with disabilities in New York. On both an individual and systemic basis, NYLPI represents low-income parents and their children with disabilities to ensure the children receive the free appropriate public education (FAPE) guaranteed by the IDEA, Section 504 of the Rehabilitation Act and state and local laws.

The New York Legal Assistance Group (NYLAG) is a not-for-profit law firm founded in 1990 to provide free civil legal services to low income New Yorkers who would otherwise be unable to afford or receive legal assistance. NYLAG assists the poor and near poor in New York City in accessing legal rights of vital importance. NYLAG's clients include, among others, seniors, immigrants, victims of domestic violence, Holocaust survivors, and at-risk children. With regard

to children, NYLAG represents them in special education cases and SSI appeals.

Partnership for Children's Rights (PFCR) is a nonprofit organization that provides free legal services to disabled children from low-income families throughout New York City in the area of special education. PFCR's mission is to ensure that each disabled child receives an appropriate education under the IDEA and a meaningful opportunity for self-sufficiency in adulthood.

The Statewide Parent Advocacy Network (SPAN) is New Jersey's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. SPAN's mission is to empower and support families, and inform and involve professionals and others interested in the healthy development and education of children and youth with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society. SPAN provides training and technical assistance to thousands of parents and professionals each year, on issues such as special education, school reform, rights of homeless and immigrant children, bilingual services, discipline and positive behavioral supports, parent involvement, and parent-professional collaboration.

SUMMARY OF ARGUMENT

In opposing certiorari, respondent contended that the Individuals with Disabilities Education Act (IDEA) relies almost exclusively on procedural requirements to meet Congress's goal of ensuring that students with disabilities receive a free appropriate public education.

Supp. Br. 1. Respondent abjures the notion that the IDEA imposes any substantive requirement at all on the education provided to students with disabilities, except for a requirement "that the education to which access is provided is reasonably calculated to confer more than a *de minimis* educational benefit." *Id.*

Respondent's position is at odds with this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982), with Congress's subsequent amendments to the IDEA, and with common sense. In enacting and amending the IDEA, Congress elaborated a comprehensive scheme for ensuring that students with disabilities have an equal opportunity to succeed in the classroom, to "meet developmental goals," and to "be prepared to lead productive and independent adult lives, to the maximum extent possible." 20 U.S.C. § 1400(c)(5)(A)(i)-(ii). It would be surpassingly odd for Congress to legislate in the service of such ambitious goals, only to have local school districts fulfill their statutory obligations by developing individualized educational programs (IEPs) that check off the requisite procedural steps but confer barely any educational benefits on students with disabilities.

In arguing to the contrary, respondent relies heavily on the notion that this Court's decision in *Rowley* forecloses any substantive definition of what makes a free public education "appropriate," beyond the meaningless requirement imposed by the Tenth Circuit. Not so. *Rowley* recognizes that the requirement of a "free appropriate public education" must have some substantive meaning given Congress's desire to guarantee "meaningful" access to an education for children with disabilities. 458 U.S. at 192. And although the Court declined to answer the question of

how to determine "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the" IDEA, *id.* at 202, Congress stepped into the breach, clarifying in subsequent amendments that the IDEA's purpose is "to ensure that all children with disabilities have available to them a free 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," 20 U.S.C. § 1400(d)(1)(A). The amendments thus make clear that an education supplies the necessary degree of benefit when the IEP is reasonably tailored "to meet the[] unique needs" of each student with a disability "and prepare [the student] for further education, employment, and independent living." *Id.*

Forswearing any substantive guidance from the statute, respondent theorizes that the IDEA's procedural provisions will sufficiently ensure that children with disabilities receive an appropriate education. But as the experiences of amici and their clients have shown, adherence to procedures alone does not ensure that students receive an education appropriate to meet their unique needs. Moreover, it is amici's experience that school districts, administrative hearing officers, and ultimately courts need more guidance on what constitutes the requisite educational benefit under *Rowley*.

Congress enacted and amended the IDEA because local educational authorities often lacked the understanding, ability, or will to meet the individualized needs of students with disabilities. Respondent's position assumes that Congress responded to those deficiencies by announcing ambitious goals for students with disabilities but

entrusting fulfillment of those goals to a procedural scheme alone. The Court should instead assume Congress intended that its high expectations be carried into effect, by ensuring that IEPs are substantively adequate to meet students' educational needs, not just that they are promulgated in accordance with a set of procedures and provide a "more than *de minimis*" degree of benefit.

ARGUMENT

I. THE IDEA GUARANTEES MEANINGFUL ACCESS TO EDUCATION

A. Congress Has Set Demanding Standards For The Education Of Students With Disabilities

In enacting and amending the IDEA, Congress has set the goal of ensuring that students with disabilities have an equal chance to succeed in leading productive and independent lives.

Congress's most recent findings—associated with the 1997 and 2004 amendments to the IDEA—establish that the statute aims not just to grant students with disabilities *access* to public school classrooms but to enable them to succeed there, to the maximum extent possible. Congress determined that although prior versions of the IDEA had "been successful in ensuring children with disabilities … access to a free appropriate public education," the statute's implementation had "been impeded by low expectations." 20 U.S.C. § 1400(c)(3)-(4). It observed that during the three decades since the enactment of the IDEA's predecessor, the Education for All Handicapped Children Act of 1975, "research and experience ha[ve] demonstrated that the education of children with disabilities can be made more effective by … having

high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." *Id.* § 1400(c)(5). Congress found that students with disabilities are capable of "meet[ing] developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children," and that they should "be prepared to lead productive and independent adult lives, to the maximum extent possible." *Id.* § 1400(c)(5)(A)(i)-(ii).

Consistent with these findings, Congress has specified that one of the IDEA's purposes is "to ensure that all children with disabilities have available to them a free 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." 20 U.S.C. § 1400(d)(1)(A). Congress has also declared a "national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1).

It is inconceivable, given Congress's findings and its exposition of the ambitions of the IDEA, that the "free appropriate public education" Congress meant to guarantee, 20 U.S.C. § 1412(a)(1)(A), was one providing just barely more than a *de minimis* benefit to students with disabilities. Rather, Congress has prescribed that public schools must give students with disabilities an education that is substantially equal—in its rigorous demands and high expectations—to the one received by all other students.

B. *Rowley* Reserved The Question Of What Constitutes Meaningful Access To Education, But Congress Has Since Answered It

The Tenth Circuit's precedents—and respondent's position at the certiorari stage—rest on the notion that any genuine substantive requirement of an "appropriate" education is foreclosed by this Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). But *Rowley* does not support, let alone compel, that crabbed reading. Rather, *Rowley* recognizes that the requirement of a "free appropriate public education" must have some substantive meaning given Congress's desire to guarantee "meaningful" access to an education for children with disabilities. *Id.* at 192.

In *Rowley*, the Court addressed a challenge to an IEP for Amy Rowley, a first-grade student with a hearing impairment. 458 U.S. at 184-186. Amy's parents asked the school district to provide a sign-language interpreter in each of her classes. *Id.* at 184. Instead, the IEP provided for her to use a hearing aid and receive periodic instruction from a tutor and a speech therapist. *Id.*

The district court ruled in favor of Amy's parents. The court found that Amy was "'a remarkably well-adjusted child,'" who "interact[ed] and communicate[d] well with her classmates and ha[d] 'developed an extraordinary rapport' with her teachers." 458 U.S. at 185. Amy was, in fact, "'perform[ing] better than the average child in her class and [was] advancing easily from grade to grade.'" *Id.* Nonetheless, the district court determined that she was not receiving a "'free appropriate public education'" because she could "'understand[] considerably less of what goes on in

class than she could if she were not deaf' and thus '[was] not learning as much, or performing as well academically, as she would without her handicap.'" *Id.* The Second Circuit embraced that analysis. *Id.* at 186.

This Court rejected the lower courts' conclusions that in enacting the IDEA, Congress intended "to achieve strict equality of opportunity or services" between students with and without disabilities. 458 U.S. at 198. Looking to "the *language* of the statute," the Court found no "substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189 (emphasis added).

The Court's analysis did not end with the language of the statute, however. Rather, the Court proceeded to examine other indicia of the IDEA's meaning. And in doing so, it recognized that the requirement of a "free appropriate public education" must have some substantive meaning.

First, the Court opined that in seeking "to make public education available to handicapped children," Congress must have intended "to make such access meaningful." 458 U.S. at 192. In the Court's view, Congress did not intend to "impose upon the States any *greater* substantive educational standard than" that. *Id.* (emphasis added). But the requirement of "meaningful" access to an education is itself a substantive threshold. The Court recognized, for example, that "furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement." *Id.* at 198-199.

Second, the Court held that "the congressional purpose of providing access to a 'free appropriate public education'" implies "the requirement that the

education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." 458 U.S. at 200. "It would do little good," the Court recognized, "for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education." *Id.* at 200-201.

The *Rowley* Court left open the question of how to determine "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the" IDEA. 458 U.S. at 202. But it did so simply because resolving that question was unnecessary, in a case in which the student with disabilities was "receiving substantial specialized instruction and related services" and was "performing above average in the regular classrooms of a public school system." *Id.*; *see Polk* v. *Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988) ("*Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a 'mainstreamed' classroom."); *see also Deal* v. *Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 863 (6th Cir. 2004) (same).

Fortunately, Congress's post-*Rowley* amendments to the IDEA have answered the question reserved by the *Rowley* Court: What degree of "educational benefit" is required for a student with a disability to have "meaningful access" to a free public education? Congress has stated that one of the amended IDEA's purposes is "to ensure that all children with disabilities have available to them a free 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." 20 U.S.C. § 1400(d)(1)(A).

Congress has thus directly indicated what sort of "free appropriate public education" it regards as supplying the requisite educational benefit—namely, one that is reasonably tailored "to meet the[] unique needs" of students with disabilities "and prepare them for further education, employment, and independent living." *Id.*

Moreover, whereas the *Rowley* Court found no "congressional intent to achieve *strict* equality of opportunity or services" between students with disabilities and those without, 458 U.S. at 198 (emphasis added), Congress has since declared a "national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities," 20 U.S.C. § 1400(c)(1).

The Tenth Circuit's standard—under which an IEP is substantively adequate so long as the educational benefit it provides is "more than *de minimis*," Pet. App. 16a (internal quotation marks omitted)—is irreconcilable with Congress's articulation of what the IDEA is meant to achieve. As the Sixth Circuit has observed, "states providing no more than *some* educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress." *Deal*, 392 F.3d at 864.

II. ADHERENCE TO IDEA PROCEDURES CANNOT GUARANTEE MEANINGFUL ACCESS TO EDUCATION

Respondent argues that "the IDEA's procedural requirements ensure that a child's access to public education is meaningful." Supp. Br. 8 (internal quotation marks omitted). That is incorrect. The experiences of children with disabilities, their families, and their advocates have shown that the procedures

specified by the IDEA, while critical to protecting the rights of children with disabilities and their parents, cannot by themselves guarantee that children with disabilities will receive the education to which the statute entitles them. Procedures are only as meaningful as the substantive objectives that they are employed to promote. To ensure that access to education is meaningful, and substantially equal among students with and without disabilities, the IDEA's procedural protections must be coupled with substantive requirements that exceed the Tenth Circuit's meaningless formulation.

A. The IDEA's Procedural Requirements Provide No Substantive Protection To Students With Disabilities

The IDEA provides an extensive procedural framework for assessing the needs of a child with disabilities, developing an appropriate IEP, and ensuring that the IEP functions as intended. In the absence of meaningful substantive requirements, however, even the most careful adherence to those procedures cannot ensure that children with disabilities have access to the education that Congress envisioned. Congress did not prescribe procedure for the sake of procedure; it crafted the IDEA's procedural framework in the service of a substantive requirement that states provide children with disabilities access to an education that will "prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The IDEA's procedures must be understood as means to achieving this purpose, not as ends in themselves.

The first set of procedures focuses on the assessment of the educational needs of children with

suspected disabilities. The statute requires an initial evaluation using "a variety of assessment tools" to determine whether the child has a disability and how to shape the IEP in order to "enabl[e] the child to be involved in and progress in the general education curriculum." 20 U.S.C. § 1414(b)(2)(A). The IEP team must review evaluations and information provided by the child's parents and teachers and identify and obtain any additional necessary information. *Id.* § 1414(c)(1). Once the assessment is completed, the same statutorily defined "team of qualified professionals," together with the child's parents, must determine the educational needs of the child. *Id.* § 1414(b)(4)(A).

The IDEA next prescribes procedures for developing an IEP that will meet the child's needs. The IDEA requires every IEP to include various elements: a description of the child's level of academic performance, a set of annual goals designed to meet the child's disability-related needs, an explanation of how progress towards these annual goals will be measured, a statement of the services that will be provided to the child, and a projected date for services to begin. 20 U.S.C. § 1414(d)(1)(A)(i). If the child will not participate with children without disabilities in a general-education classroom or will require accommodations for statewide or districtwide assessments, the IEP must explain the extent of the nonparticipation or accommodation. *Id.* § 1414(d)(1)(A)(i)(V)-(VI). And beginning with the school year in which the child turns 16, the IEP must include "appropriate measurable postsecondary goals" for enabling the child to transition from high school into further education or independent living. *Id.* § 1414(d)(1)(A)(i)(VIII)(aa).

In developing the IEP, the IEP team must consider "the strengths of the child," "the concerns of the parents," "the results of the initial … or most recent evaluation of the child," and "the academic, developmental, and functional needs of the child." 20 U.S.C. § 1414(d)(3)(A)(ii)-(iv). The team must also consider "positive behavioral interventions" for children with behavior that interferes with learning, the language needs of children with limited English proficiency, the special communication needs of children with visual or auditory impairments, and the use of assistive technology if appropriate. *Id.* § 1414(d)(3)(B).

The final set of procedures is meant to ensure that the IEP is functioning as intended. The IEP must be reviewed at least annually and revised as appropriate to address any issues that may arise. 20 U.S.C. § 1414(d)(4)(A). Parents must be provided the opportunity to review records relating to their child and must receive written notice before any significant change is made to their child's education. *Id.* § 1415(b)(1), (3). And if parents are dissatisfied with their child's IEP or the treatment their child is receiving, they have the right to a due process hearing before an impartial hearing officer. *Id.* § 1415(f). A party aggrieved by the hearing officer's decision ultimately may resort to state or federal courts. *Id.* § 1415(g), (i)(2).

These procedures are indisputably detailed. But in arguing that the procedures themselves do the work of achieving Congress's purposes for the IDEA, respondent profoundly misses the point. Like procedures of all kinds, the IDEA's procedures are only means by which the people implementing them work toward a substantive goal. If the Tenth Circuit were

correct that the IDEA's only substantive requirement is for students with disabilities to achieve "more than *de minimis*" results, then that is the only outcome the procedures will in turn promote. That is the standard by which the IEP team will be compelled to determine the child's educational needs, 20 U.S.C. § 1414(b)(4)(A); the standard by which the child's educational goals must be determined, *id.* § 1414(d)(1)(A)(i); and—importantly—the standard by which a hearing officer reviewing the IEP will determine "whether the child received a free appropriate public education," *id.* § 1415(f)(3)(E)(i). An IEP would comply with the IDEA under this view so long as it were adopted using the proper procedures, even if the plan proved to be all but completely ineffective.

Indeed, respondent concedes that the consequence of its interpretation is that the IDEA poses no bar to an IEP under which a school district "offer[s] assistive technology to a hearing-impaired child in just one class, so long as the child made progress in that class." Supp. Br. 10-11. Respondent suggests that such an IEP would violate the Americans with Disabilities Act (ADA). Supp. Br. 11. But even if that were true, it is hardly a satisfying answer to why the IDEA should be construed to allow such an absurd result. That is particularly so for amici and their clients—generally poor parents seeking to protect their children's rights in the labyrinthine administrative and court proceedings for review of IDEA claims. The notion that parents would need to pursue a school's failure to fulfill its IEP goals in an IDEA proceeding, and separately pursue the school's failure to provide accommodations for the same disability in a proceeding brought under the ADA, is preposterous. Aside from the potential exhaustion issues, *c.f. Fry* v. *Napoleon*

Community Schools, No. 15-497 (argued Oct. 31, 2016), the ADA imposes different obligations and affords different defenses than the IDEA. In the hypothetical posited by the government and addressed by respondent, for example, the school district could escape any ADA liability by demonstrating that the provision of assistive technology in every class "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. The IDEA allows no such defense.

Respondent argues that courts are not permitted "to second-guess the *substance* of … educational decisions" made by an IEP team "by requiring a 'particular outcome' or 'level of education.'" Supp. Br. 9. But when Congress legislates toward particular ends, it rarely does so on a wing and a prayer, stating the objective without actually mandating that it be carried out. The Court should not presume Congress acted so cavalierly in enacting and amending the IDEA, particularly in view of the basic statutory command that educators pursue the substantive objective of providing an education reasonably tailored "to meet the[] unique needs" of students with disabilities "and prepare them for further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A).[2] That result would be inconsistent with Congress's concern that "low expectations" not be permitted to hold back

[2] Indeed, in introducing the Conference Report for the amended IDEA, Senator Gregg described the amendments as "shift[ing] focus away from compliance with burdensome and confusing rules, and plac[ing] a renewed emphasis on our most fundamental concern[,] making sure that children with disabilities receive a quality education." 150 Cong. Rec. S11,653, S11,654 (daily ed. Nov. 19, 2004).

children with disabilities, *id.* § 1400(c)(4)—a clear indication that Congress recognized the role of strong federal standards in ensuring that school districts provide sufficient education to children with disabilities.

Respondent attempts to analogize the IDEA to the Administrative Procedure Act (APA), on the theory that both statutes "achieve[] Congress's goals through [their] *procedures*." Supp. Br. 9. But that analogy, far from supporting respondent's position, highlights its weakness. The APA alone does not achieve Congress's goals; rather, it provides mechanisms for guiding and correcting agencies as they carry out the purposes specified in substantive law by Congress. *See Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2011) (agency action "must be tied" to the purposes of the law). And when agencies fail to act in a manner reasonably calculated to promote Congress's purposes, courts can and do overturn their actions for contravening or misinterpreting the underlying substantive law. *See, e.g.*, *id.* at 490 (overturning Board of Immigration Appeals interpretation "unmoored from the purposes and concerns of the immigration laws"); *Massachusetts* v. *EPA*, 549 U.S. 497, 528 (2007) (holding that the Clean Air Act barred EPA's argument that it could not regulate greenhouse gas emissions from automobiles).

Unlike the APA, the IDEA's procedures do not implement some other congressional objective manifest in some other statute; those procedures implement the same statute's substantive objectives. In the IDEA, as in the statutes that federal agencies are charged with implementing, Congress has specified the purpose that it wants carried out: Congress wants school districts to give students with disabilities an education that is "designed to meet their unique needs and prepare them

for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). IEPs that fail to pursue that purpose are just as unlawful as agency actions that fail to pursue the substantive goals Congress has set. Respondent's position—that Congress had no interest in the results achieved by an IEP, so long as the requisite procedures were followed—is as untenable as the notion that a court reviewing a regulation under the APA need not look to the statute being administered so long as the regulation was issued through notice-and-comment rulemaking. That is not how the APA functions, and it should not be how the IDEA functions.

B. The Courts' Implementation Of The IDEA Demonstrates The Ineffectiveness Of Relying On Procedural Protections Alone

Respondent claims that the IDEA's procedures "ensure that educators *do* aim high when they develop an IEP in collaboration with the child's parents." Supp. Br. 9. Unfortunately, the "more than *de minimis*" standard adopted by the Tenth Circuit and other courts has resulted in children with disabilities being denied the services they need to obtain a meaningful education. Congress surely did not intend to construct a statute that acknowledges the government's "responsibility to provide an equal educational opportunity for all individuals," 20 U.S.C. § 1400(c)(7), and promises "to ensure that the rights of children with disabilities and parents of such children are protected," *id.* § 1400(d)(1)(B), but fails to actually keep those promises. The caselaw shows how fealty to IDEA's procedural requirements often fails to advance the statute's ambitious substantive aims.

Consider Luke P., a child with autism, on whose case the Tenth Circuit relied in rejecting Endrew F.'s appeal. Pet. App. 3a, 16a, 19a, 21a (citing *Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143 (10th Cir. 2008)). Luke began receiving special-education services in kindergarten, after being diagnosed with autism at the age of two. During kindergarten and first grade, he achieved many of his IEP goals and made significant progress, but he began to demonstrate problems with applying skills learned in the classroom to non-classroom environments. 540 F.3d at 1145-1146. Luke transferred to another public school in the second grade, and continued to make some progress, but his behavioral challenges increased. He refused to sleep in a bed, woke up frequently throughout the night, and "developed a habit of intentionally spreading his nighttime bowel movements around his bedroom." *Id.* at 1146.

After an occupational therapist determined that "since transferring … Luke had apparently regressed in certain respects," 540 F.3d at 1146, Luke's parents determined that he required residential treatment tailored to students with autism. The school district insisted that Luke could receive an adequate education in his current placement, in spite of the behaviors he was exhibiting. Luke's parents subsequently sought a due process hearing under the IDEA, and the impartial hearing officer agreed with them that the district's proposed IEP was inadequate. *Id.* at 1147. This determination was upheld on administrative appeal by an administrative law judge who noted that Luke "'was unable to transfer any of his learned skills and use them in environments outside of school.'" *Id.* After the school district brought suit in federal court, the district court agreed with the hearing officer and the ALJ that

the IEP was insufficient because "'whatever educational progress Luke made … was meaningless if there was no strategy to ensure those skills would be transferred outside of the school environment.'" *Id.* at 1154.

The Tenth Circuit reversed. Like respondent, the Tenth Circuit viewed the IDEA as establishing "procedures to guarantee disabled students access and opportunity, not substantive outcomes." 540 F.3d at 1151. The remainder of the court's analysis followed from the premise that compliance with the IDEA's procedural requirements sufficed, irrespective of the substantive quality of the child's educational development. Because Luke had been making "some progress"—even though that progress was minimal and, as noted by the district court, "'meaningless'"—the court determined that it was "constrained" to disagree with the district court, the ALJ, and the hearing officer. *Id.* at 1154-1155. Rather, the court held, "[t]he fact that … Luke *was* making some educational progress and had an IEP reasonably calculated to ensure that progress continued [was] sufficient to indicate compliance," regardless of how minimal that progress was. *Id.* at 1154.

Or consider Endrew F., the petitioner in this case. As the petitioner's brief explains (at 8-12), the IEP that respondent offered Endrew and his parents may have complied in every respect with the IDEA's procedural requirements—but even if it did, it was plainly inadequate to provide Endrew with meaningful access to the classroom and a substantially equal opportunity for an education. Respondent's paean to procedure rings particularly hollow given respondent's own failure to live up to its lofty claims about how

procedural compliance will necessarily ensure good educational outcomes.

So long as courts refuse to apply a meaningful substantive standard in reviewing the adequacy of IEPs, the procedures required by the IDEA will be inadequate to protect the rights of children with disabilities to receive an education. This Court should clarify that the IDEA requires more.

III. THE COURT SHOULD ARTICULATE AS DETAILED A STANDARD AS POSSIBLE

In the mine run of cases, the IDEA is implemented by the IEP team (composed of educators and parents) and by state administrative officers, who hear challenges to the adequacy of the IEP. Those parties need express direction from this Court as they fulfill their statutory responsibilities to guarantee meaningful access to education for students with disabilities. The Court would do little to clarify the law if it were simply to reject the Tenth Circuit's standard of a "more than *de minimis*" benefit in favor of a "meaningful benefit" standard, without giving content to the definition of a "meaningful benefit" as suggested above. That is particularly so because, among other things, the Circuits have used the phrase "meaningful benefit" in different ways.

The Third and Sixth Circuits correctly regard a "meaningful" educational benefit as one that exceeds the Tenth Circuit's low threshold. *See, e.g.*, *Ridgewood Bd. of Educ.* v. *N.E.*, 172 F.3d 238, 247 (3d Cir. 1999) ("[t]he provision of merely 'more than a trivial educational benefit' does not meet" the Circuit's "'significant learning' and 'meaningful benefit'" standards), *superseded by statute on other grounds as*

recognized by P.P. ex rel. Michael P. v. *W. Chester Area Sch. Dist.*, 585 F.3d 727, 730 (3d Cir. 2009); *Deal*, 392 F.3d at 862-864 (similar). Other Circuits, however, have equated the "meaningful benefit" standard with the Tenth Circuit's. *See, e.g.*, *Rockwall Indep. Sch. Dist.* v. *M.C. ex rel. M.C.*, 816 F.3d 329, 338 (5th Cir. 2016) (contrasting a "meaningful" benefit with one that is "'a mere modicum or *de minimus*'"); *O.S. ex rel. Michael S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) ("Using 'meaningful' … was simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress."); *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012) ("[T]he IDEA calls for more than a trivial educational benefit, in line with the intent of Congress to establish a 'federal basic floor of meaningful, beneficial educational opportunity.'"). Even within each Circuit, the courts have differing interpretations of the level of progress that reaches an educational benefit.

Parents and school administrators require as much clarity as possible in making the difficult choices involved in educating students with disabilities. Parents must understand the governing standard in order to advocate for their children. The clarity of the standard is particularly important when parents must make the difficult choice to pull their child out of a public school and enroll the child in a private school—a choice that can be financially devastating if a court ultimately holds, as the lower courts did in this case, that the public school was providing a "free appropriate public education." School administrators likewise cannot properly fulfill their obligations under the IDEA unless they understand what educational benefits they are obligated to provide.

The Court should therefore hold, consistent with *Rowley* and with Congress's subsequent amendments to the IDEA, that a public education is substantively "appropriate" if it is reasonably tailored "to meet the[] unique needs" of students with disabilities "and prepare them for further education, employment, and independent living," 20 U.S.C. § 1400(d)(1)(A).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, CHILDREN AND ADULTS WITH ATTENTION-DEFICIT/HYPERACTIVITY DISORDER, AND THE CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

Page(s)

Other Authorities

Page(s)

Page(s)

STATEMENT OF INTEREST OF *AMICI CURIAE*

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates.[1] COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not represent children but provides resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400 *et seq.* COPPA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA").

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[1] Both parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or their counsel made a monetary contribution to the preparation or submission of this brief.

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under the IDEA and other educational policies. Indeed, the soul of the IDEA is its codified goal that "all children with disabilities have available to them a free 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 . . . ." 20 U.S.C. § 1400(d)(1)(A).

Through its work with parent, advocate, and attorney members across the United States, COPAA understands the real world importance of an universally applicable, clearly defined legal standard, consistent with the intent and purpose of the IDEA, concerning the educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the IDEA, the question before the Court in this case.

Children and Adults with Attention-Deficit/ Hyperactivity Disorder ("CHADD"), a 501(c)(3) not-for-profit organization, is the largest national organization representing children and adults with attention-deficit/hyperactivity disorder. Founded

in 1987, CHADD currently has approximately 10,000 individual members and 2,000 professional members. CHADD works to ensure that the rights of students with disabilities under the IDEA, Section 504 and the ADA are protected through legislative advocacy, training and public awareness. CHADD is dedicated to ensuring that students covered by the IDEA receive a free 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 . . . ." 20 U.S.C. § 1400(d)(1)(A).

The California Association for Parent-Child Advocacy ("CAPCA") is a volunteer-based organization engaging in legislative and policy advocacy on matters of concern to students with disabilities in California. Members of CAPCA participate as professionals and/or as family members of students with disabilities, in Individualized Education Program meetings, resolution sessions, mediations, due process hearings and appeals throughout California. CAPCA was founded in 2003 when parents and advocates came together to resist proposals in the California legislature to drastically shorten the statute of limitations in special education cases and to impose other restrictions on the exercise of parental and student rights.

SUMMARY OF THE ARGUMENT

This Court has been asked to decide: "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with a free and appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*." The Respondent proposes that this Court adopt the lax and vague standard that school districts need only confer "more than *de minimis* educational benefit" in order to meet the IDEA's requirements, Supplemental Brief in Opposition to Petition for Writ of Certiorari for Respondent at 1, *Endrew F. v. Douglas County School District Re-1*, No. 15-827 (Sept. 6, 2016), but this standard is contrary to the plain language of the IDEA, its legislative history, and this Court's decision in *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982). More importantly it stands at odds with the achievement driven educational policies that have replaced the access approach to educational policy that this Court perceived in *Rowley*.

In 1975, gross disparities in access to educational programming and school campuses for students with disabilities prompted Congress to enact the Education for All Handicapped Children Act ("EHA"), Pub. L. No. 94-142, 89 Stat. 773, to guarantee that children with disabilities obtain a "free appropriate public education." Just seven years later, in 1982, this Court considered, *inter alia*: "What is meant by the Act's requirement of a 'free

appropriate public education'?" *Rowley*, 458 U.S. at 186. Against the historical backdrop of an educational policy that focused on children with disabilities obtaining access to public school campuses and receiving any education, whatsoever, this Court "conclude[d] that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201.

However, since this Court issued its decision in *Rowley*, educational policy has steadily shifted away from framing educational benefits for children with disabilities (and others) in terms of access to education and focusing, instead, on standardized academic achievement to progress. Thus, any effort to quantify the amount of educational benefits required by the Act, in light of *Rowley*'s "basic floor of opportunity" approach is analogous to forcing an access-driven peg into, what is now, an achievement-based hole. The result of which is that courts have attempted to craft convoluted and often meaningless standards to determine whether a school district has conferred an educational benefit upon a child with disabilities. This effort has caused entirely inconsistent outcomes across the United States.

Because of the significant intervening legal, policy, and educational developments since *Rowley*, *Amici* propose the following standard: A child "benefits from" instruction when the services target all areas of educational need in order to ensure achieve-

ment consistent with non-disabled peers in the general education curriculum so as to enable students to be prepared for post-school activities.

Once a parent challenging his or her child's individualized education program has demonstrated the child has failed to progress commensurately with nondisabled peers in the general education curriculum, the court's inquiry then shifts to determining whether the school district's most recent assessments and evaluations, initial individualized education program planning, and recalculation in light of lack of expected progress has all occurred pursuant to the requirements laid out in 20 United States Code Section 1414, as discussed below. Because Congress intended this country's education policy to further the ultimate goals of learning and close achievement gaps between all students in that high-expectations general education curriculum, departures from either the rate of learning on a particular campus, from the overall content expected to be mastered, or the focus in the general education at all must be justified by the assessments, data, and planning Congress established for understanding how educational decisions were to be made for each individual student.

ARGUMENT

I. *Rowley* Instructs Federal Courts to Consider and Adhere to Federal Education Policy in Construing IDEA's Obligations

This Court decided *Rowley* only seven years after Congress determined that students had a right to be educated in public school settings regardless of their disability status, Pub. L. No. 94-142, 89 Stat. 773 (1975), and only five years after the clarifying regulations were finalized in 1977, Education of Handicapped Children: Implementation of Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42474 (1977). The *Rowley* decision also came on the heels of the racial desegregation efforts across the country, *see e.g.*, *Morgan v. Hennigan*, 379 F. Supp. 410, 482–83 (D. Mass. 1974) (ordering desegregation of the Boston Public School Systems) *supplemented in Morgan v. Kerrigani*, 388 F. Supp. 581 (D. Mass. 1975); *see also Milliken v. Bradley,* 418 U.S. 717 (1974) (addressing desegregation plans in Detroit). Given this backdrop and the focus on access to schools for all children across the country, it is unsurprising that this Court concluded in *Rowley* that "[w]e would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts." 458 U.S. at 190, n.11.

Rowley emphasized that courts must look to federal policy, as well as the explicit definition in the IDEA, to ascertain the substantive rights conferred by the Act. Specifically, this Court stated, "[w]e are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define 'free appropriate public education' . . . ." *Id.* at 187.

Rowley goes on to state: "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189. The "other items from the definitional checklist" require that instruction and services: (i) "be provided at public expense and under public supervision"; (ii) "meet the State's educational standards"; (iii) "approximate the grade levels used in State's regular education"; and (iv) "comport with the child's IEP." *Id.*

Following *Rowley,* federal courts have employed a variety of adjectives—"some," "minimal," "meaningful,"—and the phrase "more than *de minimis*," in attempts to quantify how much educational benefit an individualized education program ("IEP") need confer upon a child to provide a free appropriate public education ("FAPE") under the IDEA. *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) (noting that the Fourth Circuit's

"standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial . . . "); *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011) (agreeing that a student who makes just more than trivial progress has received a FAPE); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2d Cir. 1997) (describing that a state IEP must be reasonably calculated to provide some "meaningful" benefit (citing *Rowley*, 458 U.S. at 192)); *JSK by and through JK v. Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572–73 (11th Cir. 1991) ("[w]hile a trifle might not represent adequate benefits," some benefit is all that is required) (internal quotation marks omitted).

However, these adjectives generate the misconception that the IDEA requires a set, quantifiable amount of educational benefits for all children with disabilities when, in fact, the educational benefit required by the IDEA will vary from child to child because the IDEA also requires that programs and services must be "individually tailored" and "reasonably calculated" in light of the specific student's unique needs. As discussed more fully in the next section, the standards articulated by federal courts, in attempting to quantify the amount of educational benefit an IEP must provide, fail to take into account changes in the law, as well as changes in federal educational policy. Accordingly, pursuant to the IDEA, to the extent that the students are not making progress in the general edu-

cation curriculum commensurate with their non-disabled peers, educational benefit inquiry must be addressed in light of the students' unique needs as reflected in recent evaluations and data available to the IEP teams.

II. The Legal and Educational Policy Landscape Has Changed Since *Rowley*

The history of education in the United States has come a long way since *Rowley*, and the context of educational entitlements during the 1970s through the 1980s were very different from what they are today. The 1975 statute had ended the exclusion of large numbers of children with disabilities from public school, but since the early 1980s, Congress has determined that mere access to education is not enough. Public education policy agenda and statute after statute has established a substantive and achievement-driven basic floor of educational opportunity which ***all*** students, not just students with disabilities, must reach.

Shortly after this Court decided *Rowley*, educational policy changed from addressing integration and access to addressing educational results. In 1984, the Carl D. Perkins Vocational and Technical Education Act, Pub. L. No. 98-524, 98 Stat. 2437 (current version at 20 U.S.C. § 2301 *et seq*. (2006)), was passed with the goal of increasing vocational-technical education in the United States. In line with the shifting focus to outcomes, in 1990, eight years after *Rowley*, Congress reauthorized the IDEA—the successor to Pub. L. No. 94-142—and

added requirements that transition services be included in IEPs so as to prepare students for post-secondary life. *See* Pub. L. No. 101–476, 104 Stat. 1103, 1103–04 (1990) (amending 20 U.S.C. § 1401(a)(19) to read "[t]he term 'transition services' means a coordinated set of activities for a student, designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment) . . . ").

The shift from an access-driven to a results-oriented educational agenda continued in the 1990s through the 2000s. In 1993, Massachusetts enacted the Massachusetts Education Reform Act, which created standardized tests as a measure of student achievement and progress towards general education curriculum measures. Mass. Gen. Laws ch. 69, §§ 1D-1G (1993). In 1994, President Clinton signed into law a reauthorization of the Elementary and Secondary Education Act of 1965, now referred to as the Improving America's Schools Act ("IASA"), with provisions for increased funding for education of students with higher needs (bilingual and immigrant education), and a focus on preparing students to "meet high academic standards in order to succeed." Richard W. Riley, *The Improving America's Schools Act of 1994*, *Reauthorization of Elementary and Secondary Education Act*, U.S. Dep't of Educ., at 4 (Sept. 1995), https://www2.ed.gov/offices/OESE/archives/legislation/ESEA/brochure/iasa-bro.html.

In 2001, Congress and President George W. Bush built on the IASA's focus on a core of challenging state standards and expanded on Massachusetts's efforts, resulting in the No Child Left Behind Act ("NCLB") being signed into law on January 8, 2002. *See* Pub. L. No. 107-110, 115 Stat. 1425 (2002) (current version at 20 U.S.C. § 6301 *et seq*. (2015)). The NCLB had the overarching purpose of ensuring "that all children [receive] a fair, equal, and significant opportunity to obtain a high-quality education" and to close educational achievement gaps. Pub. L. No. 107-110, 115 Stat. 1425, 1439–40 (2002). Academic accountability was the cornerstone of NCLB, which asked schools to develop educational programming so as to ensure that each student reached at a minimum, proficiency, on challenging State academic achievement standards and state academic assessments. *Id*. Moreover, NCLB specifically called for our educational system to:

> (1) ensur[e] that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement;
>
> (2) meet[] the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, ***children***

> ***with disabilities,*** Indian children, neglected or delinquent children, and young children in need of reading assistance; . . .
>
> (4) hold[] schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education.

Id. (emphasis added).

In 2004, after aligning the basic floor of educational expectations with the "high-quality education" standards in NCLB, Congress reauthorized the IDEA again, strengthening the systems for developing student programs and evaluating progress. Pub. L. No. 108-446, 118 Stat. 2647 (2004) (current version at 20 U.S.C. § 1400 *et seq.* (2015)).

Borrowing on the ideas and maxims in NCLB, Congress wrote that:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmen-

> tal goals and, ***to the maximum extent possible, the challenging expectations that have been established for all children***; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible . . .

Pub. L. No. 108-446, 118 Stat. 2647, 2649 (2004) (current version at 20 U.S.C. § 1400(c)(5)(A) (2015)) (emphasis added).

The Senate Report accompanying the 2004 reauthorization of the IDEA also provided that "[f]or most students with disabilities, many of their IEP goals would likely conform to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB." S. Rep. No. 108-185, at 29 (2003); s*ee also* Pub. L. No. 108-446, 118 Stat. 2647, 2708 (current version at 20 U.S.C. § 1414(d)(1)(A)(IV) (2015)) (explaining that to achieve the IDEA's goals, the statute requires that an IEP provide such special education, related services, and supports necessary to: "advance appropriately toward attaining the annual goals . . . [and] ***to be involved in and make progress in the general education curriculum*** . . . .") (emphasis added).

The Analysis of Comments and Changes accompanying the 2006 IDEA Part B regulations also explained that "§ 300.320(a)(1)(i) clarifies that the general education curriculum means the same curriculum as all other children. Therefore, an IEP

that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards." *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, Final Rule, 71 Fed. Reg. 46540, 46662 (Aug. 14, 2006).[2] Indeed, researchers have documented the success of an approach that provides access to general education standards for students with disabilities. *See* Ginevra Courtade, et al., *Seven Reasons to Promote Standards-Based Instruction for Students with Severe Disabilities: A Reply to Ayres, Lowrey, Douglas, & Sievers (2011)*,

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[2] *See also* U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., *OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, at 1 (Nov. 16, 2015), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf ("To help make certain that children with disabilities are held to high expectations and have ***meaningful*** access to a State's academic content standards . . . [and] to clarify that an [IEP] for an eligible child with a disability under the [IDEA] must be aligned with the State's academic content standards for the grade in which the child is enrolled.") (emphasis added); *Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities,* Final Rule, 80 Fed. Reg. 50773, 50773–74 (Aug. 21, 2015) (describing how States are "no longer authorize[d] . . . to define modified academic achievement standards . . . for eligible students with disabilities" because "[s]ince these regulations went into effect, additional research has demonstrated that students with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.") *Id.* (footnote omitted).

47(1) Educ. & Training in Autism & Developmental Disabilities 3, 3–5 (2012).[3]

The most recent iterations of the IDEA continued Congress's policy of shifting from an access-driven to an achievement-based educational agenda, and were ***absolutely intended*** to align with the shifting educational agenda, set forth in NCLB, of "high-quality education" based on "academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials . . . aligned with challenging State academic standards." Pub. L. No. 107-110, 115 Stat. 1425, 1439 (current version at 20 U.S.C. § 6301(1) (2015)).

In fact, the most recent iteration of our education policy, the Every Student Succeeds Act ("ESSA"), specifically contemplates coordination with the IDEA, 20 U.S.C. § 6311(a)(1)(B) (2015), and expects students with disabilities would meet the same standards as their non-disabled peers except for in cases of "students with the most significant cogni-

[3] "Through [the IDEA] policies, the expectation for students with significant cognitive disabilities has evolved from simply participating in assessment; to the documented achievement of adequate yearly progress in reading, math, and science; to the expectation that these assessments document achievement with clear links to state grade-level content standards, even when applying alternate achievement standards for this population." Diane M. Browder, et al., *Creating Access to the General Curriculum with Links to Grade-Level Content for Students with Significant Cognitive Disabilities: An Explication of the Concept*, 41 J. Special Educ. 2, 2 (2007).

tive disabilities." 20 U.S.C. § 6311(b)(2)(D) (intending to ensure that no more than 1% of the total number of students in a State may be assessed using alternate assessments in any subject). Indeed, the New York Times recently noted that early intervention and education in the mainstream, which includes a focus on academic achievement, required by IDEA, has contributed to the growing numbers of students with autism entering college, with opportunities that "could not have been imagined had they been born even a decade earlier." Jan Hoffman, *Helping Autistic Students Navigate Life on Campus*, N.Y. Times, Nov. 20, 2016, at A1.

III. IDEA Imposes Specific Obligations on School Districts and the School District Failed to Comply with These Obligations in this Case

A. IDEA Contains Substantive Requirements for Appropriate Programming

This Court's decision in *Rowley* requires "personalized instruction" with "sufficient supportive services." 458 U.S. at 189. The only way to determine whether the IEP meets these requirements is to analyze whether a school district has complied with ***all*** of the substantive obligations created by the IDEA.

1. School Districts Must Evaluate Children in All Areas of Suspected Disability and Use the Evaluation as the Foundation for Developing a Program and Goals

The IDEA provides that all students, suspected of having a disability as well as those already determined to be IDEA-eligible, have to be evaluated upon suspicion of disability, and subsequently no less than once every three years. 20 U.S.C. § 1414(a) (2015). These evaluations must assess the child in "all areas of suspected disability." *Id.* § 1414(b)(3)(B). Evaluations must provide "relevant information that directly assists persons in determining the educational needs of the child . . . ." *Id.* § 1414 (b)(3)(C). Indeed, the Act and its implementing regulations require school districts, in developing a child's IEP, to consider the most recent evaluative data of the child, *see id.* § 1414(c)(1)(A); 34 C.F.R. § 300.324(a)(1)(iii) (2016), and evaluations are considered a foundation for the IEP. *See* 20 U.S.C. § 1414 (b), (d).

The Second Circuit recently held that:

> The purpose of the requirement is to ensure that a [school district], in formulating a student's IEP, provides the student with services narrowly tailored to his or her particular educational needs based on actual and recent evaluative data from the student's education providers, so that the developed IEP will reasonably enable the

> child to receive the educational benefits to which he or she is entitled by law.

L.O. v. N.Y.C. Dep't of Educ., 822 F.3d 95, 111 (2d Cir. 2016).

2. School Districts Must Develop Measurable Goals to Address the Student's Disability-Related Needs that Ensure Progress in the General Education Curriculum

School Districts must develop measurable goals designed to address disability-related needs so as to enable the student to be involved in and ***make progress in*** the general education curriculum. 20 U.S.C. § 1414(d)(1)(A)(i)(II) (emphasis added). For many children, that means creating high, yet achievable, goals in line with grade-level general education curriculum so as to meet the State academic content standards, 20 U.S.C. § 1401(9), even if that requires presenting grade-level content in a modified way. *See OSERS Dear Colleague Letter on Free and Appropriate Public Education (FAPE)*, *supra* note 2, at 6–7.

The IEP team may, after careful consideration of all evaluative data, determine that the child needs goals aligned with alternate standards. In such a case, the goals must align with the State's grade-level content standards for students in the general education curriculum.

3. IDEA Explicitly Requires Course Correction if a Child Is Not Making Progress

The clearest indication of how procedural compliance with the requirements of the IDEA does not, alone, demonstrate a student has received educational benefit can be found in the obligation that school districts continually update assessment and data collection, and then update the IEP to ensure that a student's progress and goals adhere as closely as possible to the high-quality general education academic standards. Congress realized, at various points of reauthorization, that the planning and initial offering of a particular educational program and course of study would not always lead to a program that would enable the student to make adequate educational progress. As such, the IDEA requires that the school district make changes in the goals or the services in the IEP to enable the student to make progress. 20 U.S.C. § 1414(c)(1)(B)(i), (d)(4)–(5)(A); 34 C.F.R. § 300.324. Thus, IDEA mandates that the IEP Team a ddress "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate . . . ." 20 U.S.C. § 1414(d)(4)(ii)(I).[4]

[4] As part of their obligation to monitor local school districts, several states have adopted a formal Educational Benefit Review ("EBR") protocol that carefully examines whether students have made expected annual progress, and, if not, whether sufficient educational services were provided. *See* Kimberly A. Mearman, *Educational Benefit Review Process*: *A*

B. The Tenth Circuit Failed to Apply These Standards Appropriately to *Endrew F.*

Had the Tenth Circuit in *Endrew F. v. Douglas County School District Re-1*, measured Endrew's

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Reflective Process to Examine the Quality of IEPs, State Educ. Res. Ctr. of Conn., at 3, http://www.ctserc.org/assets/documents/news/2013/serc-edbenefit.pdf (last visited Nov. 18, 2016); Penn. Dep't of Educ., *Educational Benefit Review (EBR)*, 2 Special Education Leader 1, 2-3 (August 1, 2014), http://pattan.net-website.s3.amazonaws.com/images/2014/09/26/LDR_2_1_EBR0814.pdf; California Dep't of Educ., Special Educ. Div., *Special Education Self-Review: Instructions and Forms Manual*, at 21-24 (revised October 14, 2013), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwilrK3ClbbQAhUrj1QKHfTDCagQFgggMAA&url=ftp%3A%2F%2Fftp.cde.ca.gov%2Fsp%2Fse%2Fds%2F2013-14%2520SESR%2F2013-14%2520SESR%2520Instruction%2520Manual.doc&usg=AFQjCNEQ9QmUiayeedclTWITerb-WdGmhmA. Indeed, EBR protocols are designed to determine whether students' IEPs offered educational benefits by evaluating whether the IEPs complied with the explicit substantive requirements of IDEA cited herein. This EBR protocol thus recognizes the relationship between good educational programs and expected student progress; students are more likely to make good progress in good educational programs than in bad ones. Focusing on whether the student made any progress at all on any goal, as the Tenth Circuit did here, ignores the school district's responsibility to assist students with disabilities in making appropriate annual yearly progress on all educational goals, and instead results in lowering expectations and providing lesser services for students who do not make adequate progress, rather than improving their educational programs so that the students can make good progress.

("Drew") educational program against IDEA's specific requirements, it would have determined that the IEP failed to target all areas of educational need. Additionally, Drew made no progress in a number of educational and functional goals, and his behaviors escalated over a two-year period to the point that his behaviors were a substantial impediment to any educational progress. *See Endrew F.*, 798 F.3d 1329, 1335–37 (10th Cir. 2015). Had the Tenth Circuit evaluated Drew's educational program against IDEA's specific requirements, it would have determined that the school district failed to make any changes to Drew's program reasonably calculated to address these behavioral problems.

When behavior is "a central component" of a child's disability, and the IEP fails to address the "significant behavioral issues," that deficiency alone may render an IEP substantively inadequate. *Bd. of Educ. of Evanston-Skokie Cmnty. Consol. Sch. Dist. 6J v. Risen*, No. 12 C 5073, 2013 U.S. Dist. LEXIS 88575, at *57 (N.D. Ill. June 25, 2013). An IEP's failure to provide a Functional Behavioral Assessment (FBA)[5] and a Behavioral Intervention

[5] Functional Behavioral Assessment (FBA) is a results-oriented approach to behaviors, closely examining the function that the behavior serves for the individual, typically through observation and data collection, developing a hypothesis of the purpose the behavior serves and then working to replace the challenging behavior with more appropriate behaviors or skills. For example, for some individuals who have communication disabilities, challenging behaviors serve

Plan (BIP) to address behaviors impeding learning may itself constitute the denial of a FAPE. *P. v. Wissahickon Sch. Dist.*, No. 05-5196, 2007 U.S. Dist. LEXIS 44945, at *28–29, *34–35 (E.D. Pa. June 20, 2007) (ordering reimbursement of tuition where failure to create a BIP constituted denial of a FAPE), *aff'd in part, rev'd in part on other grounds,* 310 F. App'x 552 (3d Cir. 2009); *see also Danielle G. v. N.Y.C. Dep't of Educ.*, No. 06-CV-2152 (CBA), 2008 WL 3286579, at *10–12, *15 (E.D.N.Y. Aug. 7, 2008) (reversing findings of IHO and SRO and holding that an IEP's failure to include an FBA and BIP, among other deficiencies, deprived the student of a FAPE). This principle is supported by the official commentary to the federal regulations, which expressly states, "a failure to . . . consider and address [behaviors impeding learning] in developing and implementing the child's IEP would constitute a denial of [a] FAPE to the child." 34 C.F.R. Pt. 300, app. A, § IV, at 115.

In short, Drew's program did not comply with the IDEA because the IEP team failed initially to target all areas of educational need in designing the program. The IEP team compounded this error when it failed to recognize, and correct, the deficiencies in Drew's program. Consequently, the

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the function of communication and teaching the student better methods of communication can successfully address the challenging behaviors. *See* V. Mark Durand, *Using Functional Communication Training as an Intervention for the Challenging Behavior of Students with Severe Disabilities* (May 1993), http://eric.ed.gov/?id=ED359697.

school district failed to provide Drew services addressing all areas of his educational need, thus failing to ensure achievement in the general education curriculum consistent with his peers without disabilities. This deprivation amounted to a denial of a free appropriate public education.

CONCLUSION

In the more than 40 years since Congress passed the EHA and the nearly 35 years since this Court decided *Rowley*, in recognition that mere physical "access" to education had been achieved for children with disabilities, numerous amendments to the Act and other educational laws have shifted educational policy away from mere "access" to the schoolroom and towards the goal of standardized academic achievement and progress for all children with disabilities. Consistent with that goal, *Amici* therefore urge the Court to hold that an IEP confers educational benefit when the school district complies with IDEA's substantive obligations in order to target all areas of a student's educational needs to ensure achievement in the general educational curriculum consistent with his or her peers without disabilities. The importance of this universally applicable, clearly defined legal standard, consistent with the intent and purpose of the IDEA and federal educational policy cannot be gainsaid. A free appropriate public education that confers educational benefits consistent with this standard will enable children with disabilities to attend college, graduate school or professional school, obtain

vocational training, obtain employment, and gain self-sufficiency, *i.e.* become productive citizens. *Amici* respectfully request that the Court reverse the judgment of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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November 21, 2016

No. 15-827

In The Supreme Court of the United States

ENDREW F., a minor, by and through his parents and next friends, JOSEPH F. and JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* DELAWARE, MASSACHUSETTS, AND NEW MEXICO IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*

The level of educational benefit required by the Individuals with Disabilities Education Act profoundly affects the quality of the education children with disabilities receive. *Amici* have a compelling interest in ensuring that children who require special education and related services receive a free appropriate public education that helps them fulfill their potential and prepares them for the future. *Amici* implore this Court to find that the highest level of educational benefit for children with disabilities currently recognized by federal courts of appeal is the correct level for all of the nation's children with disabilities in order to ensure that the IDEA's ideals of equality of opportunity, full participation, independent living, and economic self-sufficiency are fulfilled.

STATEMENT

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, provides federal money to assist states in educating children with disabilities. To qualify for this program of federal assistance, a state must demonstrate, through a detailed plan submitted for federal approval, that it has policies and procedures in effect that assure all eligible children the right to a free appropriate public education ("FAPE") tailored to the unique needs of each child by means of an individualized education program ("IEP"). *See* 20 U.S.C. § 1412(a)(2), (4). In 1982, this Court

determined that every IEP must be reasonably calculated to ensure a child receiving special education and related services acquires an educational benefit but expressly declined to define the appropriate level of educational benefit required. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203-04 (1982). Since that time, some courts of appeal, like the Tenth Circuit here, have interpreted the *Rowley* decision to require only that special education services provide "more than a *de minimis*" educational benefit. Other courts of appeal, such as the Third and Sixth Circuits, have interpreted *Rowley* to require a showing that a child's IEP provides "meaningful" benefit before finding the child's education appropriate under the IDEA.

SUMMARY OF ARGUMENT

The question before this Court – whether a special education student's IEP must be tailored to provide meaningful educational benefit or just more than *de minimis* benefit – has been characterized by the Respondent as an academic debate of semantics. Br. in Opp'n to Pet. for a Writ of Cert. 12. This characterization highlights the underlying disjunction between the intent of Congress and the decision of the Tenth Circuit in this matter. For the *Amici* and their constituencies, the issue in this case is anything but semantics. Rather, it goes straight to the heart of IDEA's guarantee that children who receive special education services will receive a free *appropriate* public education from the schools in their communities. The language chosen

by the Court in this case will be interpreted and reinterpreted throughout the country and, ultimately, filter down to the training every special education diagnostician receives, affecting every student who receives special education and related services. If the standard of the IDEA in fact requires only more than *de minimis* progress, as the 10th Circuit held, then as a nation we have not assuaged Congress' expressed concern in 1975 that children with disabilities in the United States are "sitting idly in regular classrooms awaiting the time when they [are] old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (quoting H.R. REP. NO. 94-332, at 2 (1975)). As discussed in Section I below, since this Court decided *Rowley*, the Individuals with Disabilities Education Act Amendments of 1997 and Individuals with Disabilities Education Improvement Act of 2004 have clarified Congress' intent to define a free appropriate public education as requiring meaningful educational benefit. Indeed, it defies common sense to suggest that Congress would impose such procedural and record-keeping requirements for no reason other than to ensure what could be trivial progress. The procedural requirements created by the amendments to the IDEA must be a means to an end. Congress has never stated that merely more than *de minimis* educational benefit is the goal, and the Court should not superimpose such a low standard in direct contradiction to congressional intent. The *Amici*, like all states, have been on notice of Congress' intended heightened standard for almost two decades. As explained in Section II below, the meaningful educational

benefit standard is in the best interest of children receiving special education and related services and is not cost prohibitive. In fact, early intervention with the express goal of obtaining meaningful educational benefit has been shown time and again to benefit children receiving special education and related services, fostering the creation of productive, self-sufficient members of society.

ARGUMENT

I. FOR ALMOST TWO DECADES, STATES HAVE BEEN ON NOTICE THAT A CHILD WITH A DISABILITY IS PROVIDED A FREE AND APPROPRIATE EDUCATION WHEN THE CHILD'S INDIVIDUALIZED EDUCATION PROGRAM CONFERS MEANINGFUL EDUCATIONAL BENEFIT

Under the IDEA, a state may elect to submit a plan that sets forth policies and procedures for ensuring that certain conditions are met in order to be eligible for federal assistance for educating children with disabilities. The state's policies and procedures must reflect that all children with disabilities who reside in the state will be provided a free appropriate public education in addition to the goal of providing full educational opportunity to all children with disabilities. 20 U.S.C. § 1412(a)(1)-(2).

In *Rowley*, the Court reviewed the legislative history of IDEA's predecessor, the Education for All

Handicapped Children Act of 1975 ("EHCA"). The Court found that FAPE under the EHCA "consist[ed] of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from that instruction." 458 U.S. at 188-89. The Court noted that the statutory definition of FAPE includes an "individualized educational program" and that an IEP is the "means" by which FAPE is tailored to each child. *Id.* at 181, 188. The Court held that a state satisfies the FAPE requirement "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

When the Court issued the decision in *Rowley*, the focus of federal legislation was to ensure that children with disabilities had access to an education. The Court noted that the EHCA "represent[ed] an ambitious federal effort to promote the education of handicapped children, and 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." 458 U.S. at 180 (quoting H.R. REP. NO. 94-332, at 2 (1975)). The Court also noted that "Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were 'excluded entirely from the public school system' and more than half were receiving an inappropriate education." *Id.* at 189 (quoting 89 Stat.

774). Accordingly, the Court found that "Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education." *Id.* at 200.

Eight years after the *Rowley* decision, Congress refined the stated purpose of the EHCA. In 1990, Congress replaced the term "handicapped children" with "children with disabilities" and changed the name of the EHCA to the IDEA. Education of the Handicapped Act Amendments of 1990, S. 1824, 101st Cong. (1990).

Then, in 1997, Congress amended the IDEA. During the hearings on prospective amendments, one member of Congress stated, "We must ensure the opportunity for children with disabilities to obtain a quality education." *Revision of Special Education Programs*, *Hearing on H.R. 5 Before the Subcomm. on Early Childhood, Youth and Families of the H. Comm. on Education & the Workforce*, 105th Cong. (1997) (opening statement of the Honorable Frank Riggs). Congress ultimately found that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." Individuals with Disabilities Education Act Amendments of 1997, H.R. 5, 105th Congress, § 1400(c)(1) (1997). Additionally, Congress found that since its enactment in 1975, the IDEA "ha[d] been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results

for children with disabilities." *Id.* at § 1400(c)(3). However, Congress also found that implementation of the IDEA "ha[d] been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Id.* at § 1400(c)(4).

One purpose of the 1997 amendments, which continues to remain in place today, was "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." *Id.* at § 1400(d)(1)(A). Congress emphasized that more than twenty years of research and experience showed that having high expectations for children with disabilities make their education more effective. *Id.* at § 1400(c)(5)(A).

To that end, Congress expanded the required components of an "individualized educational program" that were noted by the Court in the *Rowley* decision. *See Rowley*, 458 U.S. at 182 (quoting 20 U.S.C. § 1401(19) (1975)). Although an "individualized educational program" under the IDEA helped to ensure that children with disabilities had access to an education, the 1997 amendments helped to ensure children with disabilities also received meaningful benefit from their education by means of that individualized education program. Specifically, the statement of a child's present levels of educational performance now included: "(I) how the child's disability affects the child's involvement; or (II) for preschool children, as appropriate, how

the disability affects the child's participation in appropriate activities." 20 U.S.C. § 1400(d)(1)(A)(i). Congress also specified that the goals' statement had to include "measurable" goals, including "benchmarks or short-term objectives related to – (I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and (II) meeting each of the child's other educational needs that result from the child's disability." *Id.* at § 1400(d)(1)(A)(ii).

Congress added six components that were not required when *Rowley* was decided, including "a statement of the special education and related services and supplementary aids and services to be provided for the child – (I) to advance appropriately toward attaining the annual goals; (II) to be involved and progress in the general curriculum . . . and to participate in extracurricular and other nonacademic activities; and (III) to be educated and participate with other children with disabilities and nondisabled children in [such activities]." *Id.* at § 1400(d)(1)(A)(iii). Relatedly, the IEP had to specify how the child's progress toward these annual goals would be measured. *Id.* at § 1400(d)(1)(A)(viii)(I). Another added component was an explanation of the extent to which a child with a disability would not participate with nondisabled children in a regular class and in nonacademic activities. *Id.* at § 1400(d)(1)(A)(iv). Congress also required a statement concerning any individual modifications in order for a child to participate in State or district assessments, or a statement that a child would not participate in any such

assessments and specific information as to how the child would be assessed. *Id.* at § 1400(d)(1)(A)(v)(I) – (II). The remaining additional components included statements concerning transition services that were updated annually, and how the child's parents would be informed of the child's progress. *Id.* at § 1400(d)(1)(A)(vii), (viii)(II).

When Congress amended the IDEA again in 2004, it specified additional components to an IEP, including a statement on a child's academic and functional performance. *See* Individuals with Disabilities Education Improvement Act of 2004, H.R. 1350, 108th Congress, § 1414(d)(1)(A)(i) (2004).

Since the IDEA's enactment in 1975, States have been on notice that an IEP is the means by which they provide FAPE to children with disabilities. States that have chosen to submit a plan under the IDEA have been on notice since 1997 that Congress was concerned with how the IDEA was implemented and that, as a result, Congress amended the IEP requirements that existed at the time of the *Rowley* decision to ensure that each child with a disability receive meaningful educational benefit. Effective with the 1997 amendments, an IEP outlined goals that were "measurable" and special education and related services and supplementary aids and services that would help children with disabilities achieve their respective goals. Any contention that Congress intended children with disabilities to show merely *de minimis* benefit contravenes the amendments to the means by which FAPE is achieved.

II. ADOPTION OF THE MEANINGFUL EDUCATIONAL BENEFIT STANDARD IS IN THE BEST INTEREST OF OUR NATION'S CHILDREN WITH DISABILITIES

A. The Meaningful Educational Benefit Standard Is the True and Accurate Embodiment of *Rowley* and Congressional Intent

Courts of appeal holding that an IEP must be reasonably calculated to provide merely more than *de minimis* educational benefit for children requiring special education and related services have provided a significant disservice to many of the nation's children. This low standard evolved from an extremely narrow reading of the Court's decision over thirty years ago in a case involving a very unique child, not indicative of many children requiring special education and related services today[1], and inapposite to Petitioner's educational experience in the instant case.

In *Rowley*, the Court was presented with and expressly confined its analysis to "a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classroom of a public school system." 458 U.S. at 202. In the context of that fact

[1] *See* OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., 37TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 140-143 (2015) (charting the percentage of students served under the IDEA by educational environment and state under the categories of emotional disturbance and intellectual disabilities).

pattern, the Court held that a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. The Court expressly noted that "the evidence firmly establishes that Amy [Rowley] is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." *Id.* at 209-10. The development of the "merely more than *de minimis*" standard arises from the Court's statement that individualized services must be sufficient to provide every eligible child with "some" educational benefit. *See Endrew F. v. Douglas Cnty. Sch. Dist.*, 2014 WL 4548439, at *4 (10th Cir. Sept. 15, 2014) (citing *Rowley*, 458 U.S. at 200).

Aggrandizing the word "some" – in a decision involving a child whose academic performance was better than the average child in her class – that only more than *de minimis* educational benefit is required from special education and related services short changes every special education student not blessed with Amy Rowley's cognitive capabilities. As the Third Circuit recognized, "the facts of the [*Rowley*] case (including Amy Rowley's quite substantial benefit from her education) did not force the Court to confront squarely the fact that Congress cared about the quality of special education." *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (3d Cir. 1988) (parenthetical in original).

Indeed, although "the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children," it need not follow that *Rowley* determined Congressional intent was to limit the applicable standard to merely more than *de minimis* educational benefit. 458 U.S. at 198 (internal quotation marks and citation omitted). As noted in *Polk*:

> [t]he [Education for All Handicapped Children Act's] sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise – the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens. 853 F.2d at 181-82 (citing H.R. REP. NO. 332, at 11 (1975)).

Congress' express goal of fostering personal independence in those children served by the IDEA does not require catastrophic injury to a State's fisc. It occasions the opposite. A myopic hyperfocus on the immediate fiscal impact of providing the kind of education required by IDEA necessarily ignores the length, breadth, and

depth of the fiscal benefit each State receives from assisting in the creation of a member of its community who has been imbued with the kind of education that permits a self-sufficient, productive life. The recognition that early intervention geared toward teaching self-sufficiency inures to the benefit of society as a whole exemplifies the fallacy behind requiring educational benefit that is merely more than *de minimis*.[2]

B. All Children Who Receive Special Education Services Under the IDEA Deserve Meaningful Educational Benefits

The strongest case for a meaningful educational benefit standard cannot be stated any more directly than this: "[L]ow expectations can lead to children with disabilities receiving less challenging instruction . . . and thereby not learning what they need to succeed at the grade in which they are enrolled." OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: CLARIFICATION OF FAPE AND ALIGNMENT WITH STATE ACADEMIC STANDARDS, at 1 (Nov. 16, 2015). Moreover, "[r]esearch has demonstrated that children with disabilities . . . can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and

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[2] *See, e.g.*, J. K. Torgesen, *Avoiding the Devastating Downward Spiral: The Evidence that Early Intervention Prevents Reading Failure*, AM. EDUCATOR 28, at 6-19 (2004) (detailing the progression of educational development compromises that flow from delayed early reading skills in kindergarteners and first graders).

supports are provided." *Id.* (citing Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities, 80 Fed. Reg. 50773-01 (Aug. 21, 2015) (to be codified at 34 C.F.R. pts. 200 & 300)). Implementation of the IDEA has been nonetheless "impeded by low expectations" in complete disregard for the "almost 30 years of research and experience [demonstrating] that the education of children with disabilities can be made more effective by having high expectations for such children. . . ." 20 U.S.C. § 1400(c)(5)(A). Requiring an IEP to be reasonably calculated merely to provide more than *de minimis* educational benefit directly contradicts the purpose of the the IDEA. Those courts of appeal embracing this low standard for academic progress are failing children with disabilities in their circuits, denying the existence of the children's capabilities, and ignoring the government's obligation to help these children achieve their full potential.

The instant action exemplifies the inadequacy of the merely more than *de minimis* standard and the disservice that is done to children with disabilities when too little educational progress is expected and an inability to attain success as an adult is presumed. Here, the Tenth Circuit found that despite the fact that Petitioner's IEP contained identical goals year after year, he was receiving more than a *de minimis* educational benefit. *Endrew F.*, 2014 WL 4548439, at *2, *4. Noting that this was, however, a "close case" even under that standard, the Tenth Circuit decision makes clear that had Petitioner resided elsewhere in the

country, in a circuit that has adopted the meaningful benefit standard, his meager educational progress would not have been found appropriate.

Concerned with the widening achievement gap for students with disabilities and in order to fulfill the IDEA's ideals of equality of opportunity, full participation, independent living, and economic self-sufficiency for students with disabilities, the United States Department of Education ("the Department") implemented Results-Driven Accountability ("RDA"), which "shift[ed] the Department's accountability efforts from a primary emphasis on compliance to a framework that focuses on improved results for students with disabilities." U.S. DEP'T OF EDUC., JOINT LETTER EXPLAINING THE RDA FRAMEWORK, at 1 (May 21, 2014). RDA "minimizes State burden and duplication of effort" and "encourages States to direct their resources where they can have the greatest positive impact on outcomes." OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., RESULTS-DRIVEN ACCOUNTABILITY CORE PRINCIPLES.

Each State develops and implements a State Systemic Improvement Plan ("SSIP") as part of its State Performance Plan and Annual Performance Report under IDEA. The Department created and currently funds the National Center for Systemic Improvement ("NCSI") to provide customized and differentiated technical assistance to each State as it transforms its system to improve outcomes for students with disabilities. Simply stated, the Department has recognized

the need to hold educators accountable for the educational progress of students receiving special education and related services, and has objectively moved away from the concept that inclusion and access is sufficient. Recognizing each State is presented with unique circumstances, the Department has allocated funding that enable States to maximize their own resources and reduce their burden. A judicially created nationwide standard of merely more than *de minimis* educational progress runs counter to the intent of Congress and the implementation that is already occurring.

C. The Meaningful Educational Benefit Standard Is Not Cost Prohibitive

Since its inception in 1975, the IDEA has recognized that "penny dear, pound wise" programs for children who require special education and related services benefit society in the long run as early interventions provide long-term cost savings. *See, e.g.*, J.W. Jacobson et al., "*Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children with Autism*," 13 BEHAV. INTERVENTIONS 201 (1998) (estimating societal savings over the life of a person with autism of between $1.6 and $2.8 million per person with autism if intervention is widespread, early and effective). Indeed, the Department's Pre-Elementary Education Longitudinal Study assessed almost 3,000 preschoolers who received special education services in school year 2003-04 and found that approximately 16 percent stopped receiving those services each year over a two-year period because they no

longer required special education services. OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, 2 (Nov. 2010).

The instant matter involves a question of tuition reimbursement; however, this is not indicative of the majority of special education actions filed each year, nor representative of the needs and desires of an overwhelming majority of parents of students receiving special education and related services.[3] Tuition dependent placements are expensive and, consequently, more likely to be litigated by parents. They are not, however, exclusively the issue before this Court. That is, "meaningful benefit" does not *per se* require placement in a non-public tuition requiring institution and the Court should view skeptically any contention that adopting the "meaningful benefit" standard will result in an overwhelming onslaught of tuition reimbursement demands on the public school system.[4]

In 2008, IDEA-reported data indicated that "95 percent of all students with disabilities were educated in their local neighborhood schools." OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., at 2, *supra* at 14-15. In 2014,

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[3] The Court has recognized that "the incident of private-school placement at public expense is quite small." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (citation omitted).

[4] Terry Jean Seligmann, *Sliding Doors: The Rowley Decision, Interpretation of Special Education Law, and What Might Have Been*, 41 J.L. & EDUC. 71, 90 (Jan. 2012) (discussing that districts may, consistent with *Rowley*, choose the appropriate educational approach or methodology that is the least expensive).

only 1.4% of students ages 6 through 21 served under the IDEA were enrolled by their parents in private schools. OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 137 (2016). There is a wide array of services to which a student may be entitled in the public school setting.[5] As the Court recognized in *Rowley*, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. at 208. The Court further stated, "Once a court determines that the Act's requirements have been met, questions of methodology are for resolution by the States." *Id.* at 197. Simply stated, a holding that an appropriate education must contain demonstrative meaningful educational benefit is not a *carte blanche* endorsement of private school tuition reimbursement from the fisc.

[5] For examples of the range of services offered under an IEP, see 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 (2010).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 15-827

IN THE
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ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
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DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

This brief is submitted with the consent of the parties[1] on behalf of the National Education Association (NEA) as *amicus curiae* in support of the Petitioner, Endrew F.

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a strong and longstanding commitment to equal educational opportunity for students with disabilities. The NEA Representative Assembly, NEA's highest governing body, has adopted numerous resolutions to increase the support provided to children with disabilities. For example, NEA Resolution B-34 ("Education for All Students with Disabilities") urges, among other measures, that "[s]tudent placement must be based on individual needs rather than on available space, funding, or local philosophy of a school district." Furthermore, NEA Resolution B-31 ("Alternative Programs for At-Risk and/or Students with Special Needs") "recommends early access to intervening services" that "emphasize a broad range of approaches for addressing students' differing behavioral patterns, interests, needs, cultural backgrounds, and learning styles." As recently as 2016, the NEA Representative Assembly adopted New Business

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Item 3 to "bring[] special education reform to the forefront, by collecting . . . the personal stories and experiences of educators, parents, and students to highlight the detrimental impact that inadequate funding and resources ha[ve] on the achievement of students with disabilities in our schools."

INTRODUCTION AND SUMMARY OF ARGUMENT

As an organization that represents millions of educators, including special education teachers and paraeducators, *amicus* understands the gravity of failing to provide students with disabilities an "appropriate education." *Amicus* submits this brief in support of Petitioner, Endrew F., to emphasize that providing students with disabilities the opportunity to succeed academically is a moral and professional obligation of the educator community. This obligation cannot be fulfilled solely through the procedural protections in the Individuals with Disabilities Education Act (IDEA); the IDEA imposes a substantive education obligation that is higher than the slightly-more-than-nothing standard prescribed by the Tenth Circuit Court of Appeals.

First, the Tenth Circuit's standard that an appropriate education must merely provide "some" educational benefit that is more than *de minimis* is contradicted by both educators' and Congress' understanding of the original IDEA, and subsequent amendments thereto. In 1975, educators concluded that an appropriate education was nothing less than one which harnessed disabled students' abilities to their fullest extent. Thereafter, when Congress acknowledged

that the IDEA had successfully achieved *access* to a public education, educators reiterated their commitment to achieve high quality outcomes for all students, including those with disabilities. On this front, educators and Congress were in agreement, and the new IDEA emphasized improving concrete, academic results for students with disabilities. This united focus on improved educational achievement for students with disabilities is irreconcilable with a standard that requires only slightly above the barest educational progress.

Second, aiming for a student with a disability to achieve only "some" progress is contrary to educational best practices. The Tenth Circuit's minimal educational standard is a proclamation to aim low, when best practices dictate that students with disabilities best learn when they aim high. Furthermore, such a standard ignores the necessity of behavioral interventions for students with disabilities, and ignores the diversity of needs and abilities within the disability population itself.

ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, proclaims that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1). To that end, the IDEA requires that public schools that receive federal funds for special education services must provide students with certain disabilities

a "free appropriate public education." 20 U.S.C. §§ 1401(9), 1412(a)(1)(A).

The Tenth Circuit below held that the "free appropriate public education" to which covered students are substantively entitled under the IDEA is provided so long as a student obtains "more than [a] *de minimis*" educational benefit. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338–39 (10th Cir. 2015) (citations and quotation marks omitted). In opposing *certiorari*, the Respondent contends that this next-to-*de minimis* standard is adequate to carry out the objectives of the IDEA, in part because individual educators will be "no less dedicated to ensuring that their schools offer supportive and nurturing learning environments for children with disabilities" than they wound be under a more meaningful substantive standard. Resp't's Suppl. Br. Opp'n Cert. at 3.

It is no doubt impossible to overstate the dedication and commitment of our nation's educators to their students—and, in particular, to their students with disabilities. Still, the Respondent's argument is wrong. The Tenth Circuit's standard is incompatible with both the text and purpose of the IDEA, with educators' understanding of those objectives, and with educational practice for students with disabilities.

A. The Tenth Circuit's Standard Is Incompatible with the "Free Appropriate Public Education" that the Text and Purpose of the IDEA Guarantee

The IDEA, through its original enactment and subsequent amendments, makes plain that an "appropriate public education" necessitates more than providing

only "some" educational benefit. Providing students with disabilities with only a modicum of an educational benefit is antithetical not only to Congress' vision of equity and empowerment for students with disabilities, but also to educators' vision of the same.

1. When Congress considered the Education for All Handicapped Children Act (EAHCA) more than four decades ago, it sought to address the concern that many children with disabilities were not receiving an adequate education through the nation's public schools. In particular, Congress found that children with disabilities frequently did not receive "appropriate educational services" and that, in some cases, such students "were excluded entirely from the public school system . . . ." 20 U.S.C. § 1400(c)(2)(A), (B). The schools' shortcomings in educating these students had "long range implications": not only were these students prevented from fulfilling their full capacities, but the missed educational opportunity meant that "public agencies and taxpayers w[ould] spend billions of dollars over the lifetimes of these individuals to maintain [them] as dependents . . . ." S. Rep. No. 94-168, at 9 (1975).

Faced with that stark reality, Congress understood that a federal statute providing for "proper education services" to students with disabilities meant that "many [of these students] would be able to become productive citizens, contributing to society . . . ." *Id.* Educators who supported the EAHCA understood that the very purpose of such federal legislation was to impose a substantive standard as to the type of educational opportunities that must be provided for students with disabilities.

For example, in the 1975 hearings preceding the EAHCA, the Director of the Department of Legislation in the American Federation of Teachers (AFT), and a former teacher himself, testified that "[w]hat we need is to get handicapped children and people full opportunity for *an education to the extent of their ability* and try to get them [to be] self-supporting . . . ." Education for All Handicapped Children Act of 1975: Hearing on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Pub. Welfare, 94th Cong. 329 (1975) (statement of Carl J. Megel, Director of Department of Legislation, American Federation of Teachers, AFL-CIO) (emphasis added). The AFT anticipated that this "legislation . . . would *guarantee* the right of every handicapped child in the United States to *an education to the extent of his capacities* and to the extent possible to prepare him for gainful employment in accordance with his abilities." *Id.* at 332 (emphasis added). The then president of the National Education Association (NEA) expressed a similar hope for the EAHCA's passage, emphasizing the need to develop and disseminate "promising teaching practices" for the benefit of students with disabilities. *Id.* at 351 (statement of James A. Harris, President, National Education Association). Congress espoused the same goals: "The intent [of] S. 6 is to . . . insure that [the EAHCA] . . . will result in maximum benefits to handicapped children and their families." S. Rep. No. 94-168, at 6. This conception of the statute as a mandate to educate children with disabilities "to the extent of [their] capacities" cannot be squared with the notion that any educational benefit, no matter how trivial, is sufficient to comply with the statute.

2. That becomes especially apparent from subsequent amendments to the IDEA in 1997 and 2004. *Compare* Pub. L. No. 94-142, 89 Stat. 773 (1975) (EAHCA) *with* Pub. L. No. 105-17, 111 Stat. 37 (1997) (IDEA 1997 amendments); Pub. L. No. 108-446, 118 Stat. 2647 (2004) (IDEA 2004 amendments). In 1997, Congress found that the IDEA had "successful[ly] . . . ensur[ed] children with disabilities . . . *access* to a free appropriate public education . . . ." Pub L. No. 105-17, § 101, 111 Stat. 37, 39 (codified as amended at 20 U.S.C. § 1400(c)(3)) (emphasis added). But access alone was insufficient in Congress' view. A bipartisan Senate report regarding the 1997 amendments concluded "that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a *quality* public education." S. Rep. No. 105-17, at 1–3 (1997) (emphasis added); *see also id.* at 3 (discussing how amendments to the IDEA were "needed . . . to improve and increase [the] educational achievement" of children with disabilities); S. Rep. No. 104-275, at 14 (1996) (recognizing that more needed to be done to "improv[e] the quality of services received . . . and transitional results or outcomes obtained by [such] students").

In concrete terms, the 1997 amendments strengthened the requirements for the individual education programs (or IEPs) mandated by the IDEA by, among other things, requiring the inclusion of "measurable" education goals that would be tracked regularly and—as students approached adulthood—a plan for services to enable those students with disabilities to transition to "post-school activities, including post-secondary education, vocational training, integrated employment, . . . continuing and adult education, adult ser-

vices, independent living, or community participation . . . .” Pub. L. No. 105-17, 111 Stat. 37, 46 (1997).

Educators’ experiences were critical to this new congressional focus on raising the level of achievement for students with disabilities through the 1997 amendments. In the lead up to the amendment, Congress heard from educational researchers explaining “the restructuring of public education . . . [to] a new paradigm shift . . . [towards a] *quality* [education] for *all* children” that had been embraced by educators. Reauthorization of the Individuals with Disabilities Education Act (IDEA): Hearing Before the Subcomm. on Select Educ. and Civil Rights of the H. Comm. on Educ. and Labor, 103d Cong. 86 (1994) (statement of Dorothy Kerzner Lipsky and Alan Gartner, National Center on Educational Restructuring and Inclusion) (emphasis added).

3. The 2004 amendments to the IDEA furthered this focus on academic achievement by establishing in the Act high expectations for students with disabilities. This renewed focus was due, in part, to testimony from educators on the pressing need to reduce the paperwork required to comply with the IDEA, while simultaneously increasing academic expectations for students with disabilities. *See* Special Education: Is IDEA Working as Congress Intended?: Hearing Before the H. Comm. on Gov’t Reform, 107th Cong. 307–08 (2001) (statement of Ed Amundson, Chair, National Education Association’s Caucus for Educators of Exceptional Children) (“In effect, educators have made a real commitment and received additional training to teach special needs students; however, they find themselves filling in the boxes . . .

[more than they are] filling in the kids."). In anticipation of the 2004 amendments, educators reiterated their commitment to "providing the best possible education to all students, including those with disabilities." *Id.* at 311.

The 2004 amendments embraced this commitment from educators to "support[] high-quality, intensive preservice preparation and professional development . . . to improve the academic achievement and functional performance of children with disabilities . . . to the maximum extent possible." Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2649–50 (codified as amended at 20 U.S.C. § 1400(c)(5)(E)). In particular, the amendments included congressional findings that education for children with disabilities "can be made more effective" by employing the "improvement efforts" established by the Elementary and Secondary Education Act (ESEA). 20 U.S.C. § 1400(c)(5)(C). To that end, Congress aligned the IDEA's IEP requirements with ESEA's academic standards and testing requirements, thereby requiring that the States' academic expectations for students with disabilities be the same as those for students without disabilities. *Id.* § 1412(a)(16).

4. The Tenth Circuit's more-than-*de minimis* standard simply cannot be reconciled with the text or purpose of the IDEA as it has been outlined here. Ultimately, Congress agreed with educators' predominant view that the IDEA and its amendments must embody a substantive guarantee of an educational benefit. The IDEA seeks to achieve "equality of opportunity" for disabled students, 20 U.S.C. § 1400(c)(1), and is meant to provide disabled children with the

"necessary tools" to "prepare for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3). The Tenth Circuit's minimal view of the educational benefit that must be provided all but ensures that those objectives will never be met for some disabled students.

B. The Tenth Circuit's Standard Is Incompatible with Educational Best Practices.

The Tenth Circuit's standard for an "appropriate education" is also incompatible with the current consensus on best practices for educating students both with and without disabilities. This Court "must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954). The "full development" of educational pedagogy emphasizes: maintaining high academic expectations regardless of a student's purported disabilities, differentiating material to be accessible to students at all levels, and creating early behavioral interventions as a necessary component of academic achievement.

1. "Meeting children where they are is essential, but no good teacher simply leaves them there." Nat'l Ass'n for the Educ. of Young Child., *Position Statement: Developmentally Appropriate Practice in Early Childhood Programs Serving Children from Birth through Age 8*, at 10 (2009) ("NAEYC, *Developmentally Appropriate Practice*"), https://www.naeyc.org/files/naeyc/file/positions/position%20statement%20Web.pdf. Even for students in preschool, "having high expectations for all children is

essential." *Id.* at 12. Indeed, teachers' expectations about children's abilities can have either profound or devastating consequences. *See* Ulrich Boser et al., Ctr. for Am. Progress, *The Power of the Pygmalion Effect: Teacher Expectations Strongly Predict College Completion* (2014) ("Boser et al."), https://www.americanprogress.org/issues/education/reports/2014/10/06/96806/the-power-of-the-pygmalion-effect/ (teacher expectations can powerfully predict student achievement); Alix Spiegel, *Teachers' Expectations Can Influence How Students Perform*, NAT'L PUB. RADIO (Sept. 17, 2012, 3:36 AM) ("Spiegel, *Teachers' Expectations*"), http://www.npr.org/sections/health-shots/2012/09/18/161159263/teachers-expectations-can-influence-how-students-perform (finding that when teachers were led to believe a student had a higher IQ, that student's IQ subsequently rose).

For students with disabilities, low expectations create a self-fulfilling prophecy of academic failure, even where special education supports are in place. *See* Laudan Aron & Pamela Loprest, *Disability and the Education System*, 22 FUTURE OF CHILD. 97, 111 (Spring 2012). Setting a standard that is "merely more than *de minimis*" would fix in the IDEA—the primary federal statute aimed at increasing educational access and opportunity for disabled students—low expectations for students with disabilities, despite ample evidence that even the act of conveying high expectations to students creates educational progress. *See* Boser et al., *supra*; Spiegel, *Teachers' Expectations*, *supra*; *see also* Michael Yudin, *Higher Expectations to Better Outcomes for Children with Disabilities*, HOMEROOM: THE OFFICIAL BLOG OF THE U.S. DEP'T OF EDUC. (June 25, 2014), http://blog.ed.gov/2014/06/higher-expectations-

to-better-outcomes-for-children-with-disabilities/ ("Too often, students' educational opportunities are limited by low expectations.").

2. In addition to high expectations, educators agree that differentiating content in order to effectively convey material to students at every level is critical for academic progress. Differentiation means that educators instruct children according to not just what would be appropriate for their grade level, but also as to what would be appropriate for children's "own strengths, needs, and interests[,]" which account for "enormous variation among children of the same chronological age." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 11; *see also* Toni A. Sondergeld & Robert A. Schultz, *Science*, *Standards*, *and Differentiation*, 31 GIFTED CHILD TODAY 34, 35 (2008) ("Differentiation provides students with opportunities to approach curriculum from their strengths, as varied as these might be. From this firm footing, limitations can be addressed without developing negative perceptions of self-ability or self-worth."). This method of instruction also is called "scaffolding," which "provid[es] the support or assistance that allows the child to succeed at [a certain] task," and then further allows that child to "go on to use the skill independently in a variety of contexts . . . ." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 15. Scaffolding and differentiation serve to benefit both general education and special education students. *See* Nat'l Educ. Ass'n Educ. Policy & Practice Dep't, *Universal Design for Learning (UDL): Making Learning Accessible and Engaging for All Students (PB23)*, at 1 (2008),

www.nea.org/assets/docs/PB23_UDL08.pdf (discussing Universal Design for Learning, a form of differentiated instruction which was developed for students with disabilities but "is a research-based framework . . . to provide ALL students with equal opportunities to learn") (emphasis in original).[2]

The Tenth Circuit's low standard for educational progress fails to account for varying needs and abilities within the special education population itself. Take, for example, the population of students with a disability who are also gifted, sometimes called "twice-exceptional students."[3] *See* Sarah D. Sparks, *Studies Shed Light on 'Twice Exceptional' Students*, EDUC. WEEK (May 9, 2012) ("Sparks, *'Twice Exceptional' Students*"), http://www.edweek.org/ew/articles/2012/05/08/30gifted.h31.html?tkn=PVWFDRZv62bLKAdNRPRfGOfkavzwUOCHZ0Zw&cmp=ENL-EU-NEWS1. Under the Tenth Circuit's standard, if a gifted and dyslexic child were making "some academic progress" in, for instance, science, but not reading, a court could find that such a child received an appropriate education even if her academic potential indicated that she could make enormous gains across all subject areas beyond her current grade

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[2] The IDEA also encourages the use of universal design in schools. *See* 20 U.S.C. § 1474(b)(2) (awarding grants for activities based on universal design principles).

[3] In 2004, the IDEA for the first time recognized this group's inclusion in the population of students with disabilities. *See* Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2796 (codified as amended at 20 U.S.C. § 1481(d)(3)(J)) (grants should give priority to projects that address "children who are gifted and talented").

level.[4] *Endrew F.*, 798 F.3d at 1342. Satisfying barely-above-the-minimum requirements for such a student has especially far-reaching consequences in early elementary education: "Research continues to confirm the greater efficacy of early action—and in some cases, intensive intervention—as compared with remediation and other 'too little' or 'too late' approaches." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 6; *see also* Sparks, *'Twice Exceptional' Students*, *supra* ("If we . . . neglect the other kinds of skills [that twice-exceptional students] may have a propensity toward, we may actually be shaping the brains of these kids . . . and miss the opportunity to develop other skills they may manifest . . . .") (quoting a social science expert on the topic).

Petitioner's case is telling in this respect, where his academic problems appear to have become more pronounced in second grade, gradually deteriorating from grade to grade thereafter. *See Endrew F.*, 798 F.3d at 1333, 1341 (describing Petitioner's fourth grade as "an especially rocky" year). The Tenth Circuit's standard fails to account for the diversity within the special education population, effectively ig-

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[4] In Petitioner's case, for example, the District Court found it acceptable that some of Petitioner's "objectives carried over from year to year, and [that] some [were] only slightly modified"—essentially permitting Petitioner to fall wholly behind grade-level expectations. *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, No. 12–cv–2620–LTB, 2014 WL 4548439, at *9 (D. Colo. Sept. 15, 2014), *aff'd*, 798 F.3d 1329 (10th Cir. 2015). Petitioner's actual academic potential became evident when, in his private placement, he had either "mastered . . . the draft IEP objectives" or was on track to master them within two months of his enrollment. *Id.* at *7.

nores best practices to differentiate academic material for students like Petitioner, and would set the bar for the substantive educational benefit required so low as to ensure that IDEA compliance would not need to meet the educational needs of disabled students.[5]

3. Finally, the Tenth Circuit's standard ignores educators' consensus that meaningful academic gains for students who exhibit behavioral and socio-emotional difficulties are nearly impossible without proper interventions and supports—particularly in a child's early years. In ruling against Petitioner, the Tenth Circuit mistakenly concluded that behavioral interventions essentially were not a substantive component of an appropriate education. *See Endrew F.*, 798 F.3d at 1342 n.12. This conclusion exhibits a fundamental misunderstanding of child development. A child's academic needs and her behavioral needs are inseparable. While a child's behavioral problems inevitably cause underachievement, it is now also clear that academic struggles often cause behavioral problems as well, creating a vicious cycle of behavioral and academic lapses. *See* Robert F. Putnam et al., *Academic Achievement and the Implementation of School-Wide Behavior Support*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS NEWSL.,

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[5] To be sure, many educators and school districts will go far beyond the minimal substantive mandate required. Of course, they will as they have always done so. But that is no argument against setting the substantive standard for the education required by the IDEA at a more than minimal level, any more than would be the argument that there is no need for a higher minimum wage because most employers pay more than the current minimum wage.

VOL. 3:1, at 2 (2016), https://www.pbis.org/Common/Cms/Documents/Newsletter/Volume3%20Issue1.pdf ("As the student's literacy skills do not keep pace with those of peers, academic tasks become more aversive, and problem behaviors that lead to escape from these tasks become more likely."); Lisa Trei, *Academic Performance and Social Behavior in Elementary School Are Connected, New Study Shows*, STAN. NEWS SERV. (Feb. 15, 2006), http://news.stanford.edu/pr/2006/pr-children-021506.html ("Children's social behavior can promote or undermine their learning, and their academic performance may have implications for their social behavior."). Like early interventions for learning disabilities, tackling behavioral problems early in a child's schooling—and continuing such interventions throughout—is critical to her success. *See* NAEYC, *Developmentally Appropriate Practice*, *supra*, at 7 ("Of course, children's social, emotional, and behavioral adjustment is important in its own right, both in and out of the classroom. But it now appears that some variables in these domains also relate to and predict school success."); *see generally* Nat'l Educ. Ass'n Educ. Policy & Practice Dep't, *Positive Behavioral Interventions and Supports: A Multi-tiered Framework that Works for Every Student (PB41A)* (2014), http://www.nea.org/assets/docs/PB41A-Positive_Behavioral_Interventions-Final.pdf.

The Tenth Circuit's standard for an "appropriate education" is so distant from current best practices in both general education and special education curricula as to be an anachronism. The IDEA has recognized the importance of using research-based methods to inform educating students with disabilities; it is important that this Court do so as well. *See* 20 U.S.C.

§ 1400(c)(4) (IDEA "has been impeded by . . . an insufficient focus on applying replicable research on proven methods of teaching and learning for students with disabilities"). The substantive standard of educational benefit required by the IDEA must be set in line with the purpose and structure of the IDEA, and evolving practice as to the most effective manner to reach the IDEA's stated goal of "[i]mproving educational results for children with disabilities" in order to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

CONCLUSION

For the foregoing reasons, *amicus* NEA respectfully requests that the ruling below be reversed.

Respectfully submitted,

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No. 15-827

In The
Supreme Court of the United States

ENDREW F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR NATIONAL DISABILITY RIGHTS NETWORK, ET AL. AS AMICI CURIAE SUPPORTING PETITIONER

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November 21, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

Amici curiae are forty-four organizations that are made up of, represent, and advocate for the rights of Americans with disabilities.[1] For decades, amici have been involved in administrative proceedings, litigation, and policy advocacy to promote the civil rights of people with disabilities, including the educational rights of disabled students.

In particular, in the nearly thirty-five years since this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), amici have supported a series of legislative changes, in and out of the educational sphere, in which Congress has expanded the civil rights of people with disabilities. The central piece of legislation marking the shift to robust guarantees of disability rights is, of course, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.

Congress also adopted a series of amendments to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.—most notably in 1997 and 2004—which brought that statute in line with the emerging civil rights of people with disabilities. Those amendments strengthened the obligation to provide a free appropriate public education (FAPE) to all children with disabilities. They reject

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[1] No party or counsel for a party authored this brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed letters with the Clerk granting blanket consent to the filing of amicus briefs.

the notion that, as the Tenth Circuit held, schools can satisfy the statute simply by providing "merely * * * 'more than *de minimis*'" educational benefit to students with disabilities. Pet. App. 16a (citation omitted). The amendments to the IDEA, together with Congress's inclusion of students with disabilities in the national commitment to standards-based education under the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 6301 et seq., have been part of a comprehensive congressional effort to "[i]nclud[e] individuals with disabilities among people who count in composing 'We the People.'" *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

This is the first case since *Rowley* in which the Court will squarely address the substantive content of a State's obligation under the IDEA to ensure a "free appropriate public education" for students with disabilities. Amici submit this brief to assist the Court in deciding the question presented on the basis of all of the relevant legal developments since its decision in *Rowley*.

Amici curiae are as follows:

The **National Disability Rights Network** (NDRN) is the nonprofit membership association of Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies in the United States. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the Nation's largest provider of legal-based advocacy services for persons with disabilities.

The **Advocacy Institute** was established in 2000 as a not-for-profit organization. In its fifteen years of operation, the Institute has provided close to 100 hours of web-based training for advocates and attorneys working on behalf of children with disabilities and their families, as well as extensive information and resources on many IDEA-related issues.

Advocates for Justice and Education, Inc. (AJE) is the federally designated Parent Training Information Center for the District of Columbia pursuant to 20 U.S.C. § 1482. As its mission, AJE seeks to empower families, youth, and the community to be effective advocates to ensure that children and youth, particularly those who have special needs, receive access to appropriate education and health services.

African Caribbean American Parents of Children with Disabilities, Inc. (AFCAMP) is a federally funded Community Parent Resource Center pursuant to 20 U.S.C. § 1482. Located in Hartford, Connecticut, AFCAMP's mission is to educate, empower, and engage parents and the community to improve quality of life for children with special needs and others at risk of education inequity or system involvement.

The **American Association on Intellectual and Developmental Disabilities** (AAIDD) (formerly named the American Association on Mental Retardation), founded in 1876, is the Nation's oldest and largest organization of professionals in the field of intellectual disability. Through its professional journals, conferences, and book publishing, AAIDD

works diligently to advance scientific understanding of intellectual disability.

The **American Diabetes Association** (Association) is a nationwide, nonprofit, voluntary health organization founded in 1940 made up of persons with diabetes, healthcare professionals who treat persons with diabetes, research scientists, and other concerned individuals. The Association's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The **American Foundation for the Blind** (AFB), the Nation's leading nonprofit champion for people with vision loss to which Helen Keller devoted more than four decades of her extraordinary life, advocates for the rights, needs, and independence of children, working-age adults, and seniors who are blind, visually impaired, or deafblind.

The Arc of the United States (The Arc), founded in 1950, is the Nation's largest community-based organization of and for people with intellectual and developmental disabilities (I/DD). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes.

The Arc of Colorado is the Colorado state affiliate of The Arc of the United States and is dedicated

to supporting and advocating for people with I/DD throughout the state of Colorado.

The Arc Michigan is a Michigan organization that has worked for more than sixty years to ensure that people with developmental disabilities are valued in order that they and their families can participate fully in and contribute to their community.

The **Association of University Centers on Disabilities** is a nonprofit membership association of 130 university centers and programs in each of the fifty States and six Territories. AUCD members conduct research, create innovative programs, prepare professionals to serve and support people with disabilities and their families, and disseminate information about best practices in disability programming, including educational instruction from preschool to postsecondary education.

The **Autism Society of America** is the Nation's leading grassroots autism organization. It was founded in 1965 and exists to improve the lives of all affected by autism spectrum disorder (ASD). It does this by increasing public awareness and helping with the day-to-day issues faced by people on the spectrum and their families. Through its strong national network of affiliates, it has been a thought leader on numerous pieces of state and federal legislation.

The **Autistic Self Advocacy Network** (ASAN) is a national, private, nonprofit organization run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities.

The **Center for Public Representation** is a public-interest legal-advocacy organization that has advocated for the rights of and represented people with disabilities for more than forty years. The Center has litigated systemic cases on behalf of people with disabilities in more than twenty States and authored amicus briefs regarding the constitutional and statutory rights of persons with disabilities.

The **Civil Rights Education and Enforcement Center** (CREEC) is a Denver-based national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC promotes this mission through education, outreach, and individual and impact litigation.

Disability Rights California is a nonprofit California organization that protects the human, legal, and service rights of adults and children with disabilities. It is the California agency designated under state and federal law to represent the rights of persons with disabilities.

The **Disability Studies Program of the University of California at Berkeley** works to understand the meaning and effects of disability socially, legally, politically, and culturally. Our research and teaching seek to eliminate barriers to full social inclusion and advance the civil and human rights of people with disabilities.

Easterseals provides opportunities for more than 1.5 million people of all ages with a range of disabilities to achieve their full potential. From child-development centers to physical rehabilitation, job

training, and caregiver support, Easterseals offers assistance to people with disabilities, caregivers, veterans, and seniors through a network of seventy-five affiliates.

The **Education Law Center–PA** (ELC) is a nonprofit legal-advocacy organization dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, trainings, and policy advocacy, ELC advances the rights of vulnerable children, including children with disabilities, children living in poverty, children of color, children in the foster-care and juvenile-justice systems, English-language learners, LGBTQ students, and children experiencing homelessness.

The **Equal Justice Society** (EJS) is a national legal organization focused on restoring constitutional safeguards against discrimination. EJS works to restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, by combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies.

Exceptional Children's Assistance Center (ECAC) is North Carolina's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. ECAC's mission is committed to improving the lives and education of *all* children through a special emphasis on children with disabilities and special healthcare needs.

The **Faculty Coalition for Disability Rights** is a 501c(4) organization advocating for disability rights at the University of California, Berkeley.

With membership drawn from all faculty ranks, the Coalition's mission is to advance the civil rights of people with disabilities on our campus so that they may enjoy full and equal participation in all aspects of the university.

The **Federation for Children with Special Needs** (FCSN) is the federally funded Parent Training and Information Center for Massachusetts. FCSN's mission is to empower and support families and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society.

The **Learning Disabilities Association of America**, with a membership of over 5,000 individuals with learning disabilities, their families, and educators and researchers, is a consumer-led and -driven organization. Its vision and mission are to have learning disabilities universally understood and effectively addressed, create opportunities for success for all individuals affected by learning disabilities, and reduce the incidence of learning disabilities in future generations.

The **Learning Disabilities Association of Hawai'i** is a nonprofit organization serving children and their families across the Hawaiian Islands, and the U.S.-affiliated Pacific Islands. It is our mission to enhance educational, work, and life opportunities for children and youth with, or at risk of, disabilities by empowering them and their families through

screening, identification, information, training, and mentoring, and by public outreach and advocacy.

The **Long Island Advocacy Center (LIAC)** is a nonprofit organization that represents the legal rights of students and individuals with disabilities. LIAC is familiar with the special education challenges faced by children with disabilities and their families and the teaching approaches proven effective to enable children with disabilities to achieve State-level standards and have the opportunity to graduate high school and go on to college, jobs, and independent living.

Maine Parent Federation's Statewide Parent Information Network (SPIN) is the Parent Training and Information Center, as well as the Family Two Family program for the Health and Rehabilitation Services Administration. It is a nonprofit, grant-funded agency that assists families with children who have special health-care needs to navigate all circumstances they may encounter.

Matrix Parent Network and Resource Center is a Parent Training and Information Center based in Northern California that has provided information, training, and support to families of children with disabilities for more than thirty years.

Mental Health America (MHA), formerly the National Mental Health Association, is a national membership organization composed of individuals with lived experience of mental illnesses and their family members and advocates. The Nation's oldest and leading community-based nonprofit mental health organization, MHA has more than 200 affili-

ates dedicated to improving the mental health of all Americans.

The **National Association of Councils on Developmental Disabilities** (NACDD) is the national nonprofit membership association for the Councils on Developmental Disabilities located in every State and Territory. The Councils are authorized under federal law to engage in advocacy, capacity-building, and systems-change activities that ensure that individuals with developmental disabilities and their families have access to needed community services, individualized supports, and other assistance that promotes self-determination, independence, productivity, and integration and inclusion in community life.

The **National Alliance on Mental Illness** (NAMI) is the Nation's largest grassroots mental-health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI advocates for access to services, treatment, support, and research and is steadfast in its commitment to raising awareness and building a community of hope for individuals living with mental illnesses across the lifespan, including students.

The **National Center for Learning Disabilities** (NCLD) is a parent-founded and parent-led nonprofit organization. NCLD's mission is to improve the lives of the one in five children and adults nationwide with learning and attention issues—by empowering parents and young adults and advocating for equal rights and opportunities.

The **National Coalition for Mental Health Recovery** (NCMHR) is a private, nonprofit organiza-

tion comprised of organizations across the country that represent people diagnosed with psychiatric disabilities who are recovering or have recovered from mental-health conditions. NCMHR's mission is to ensure that individuals with psychiatric disabilities have a major voice in the development and implementation of health care, mental health, and social policies at the state and national levels, empowering people to recover and lead a full life in the community.

The **National Council for Independent Living** (NCIL) is America's oldest cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents thousands of organizations and individuals from every State and Territory, including Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the rights of people with disabilities throughout the United States.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms.

Founded in 1973, the **National Down Syndrome Congress** is the leading national resource for advocacy, support, and information for anyone touched by or seeking to learn about Down syndrome, from the moment of a prenatal diagnosis through adulthood. A member-sustained, 501(c)(3) organization, repre-

senting the approximately 350,000 people in the United States with Down syndrome and their families, our programs provide individuals with Down syndrome the opportunities and respect they deserve so they can live the life of their choosing.

The **National Federation of the Blind**, a District of Columbia nonprofit corporation, is the oldest and largest membership organization of blind people in the United States, with a membership of over 50,000. Most of the members of the organization are blind people, including many blind children. In addition, we represent a significant population of parents of blind children, some of whom are sighted and some of whom are blind.

Parents Helping Parents (PHP) is a nonprofit, parent-run, family-resource center that has supported families of children with special needs in the Bay Area of California for more than forty years. PHP's mission is to help children and adults with special needs receive the support and services they need to reach their full potential by providing information, training, and resources to build strong families and improve systems of care.

Perkins School for the Blind is a progressive, multi-faceted organization committed to improving the lives of people with blindness and deafblindness all around the world. The Perkins mission is to prepare children and young adults who are blind with the education, confidence, and skills they need to realize their full potential.

Starbridge is one of two federally funded Parent Training and Information Centers in New York State. Starbridge's mission is to partner with people

who have disabilities, their families, and others who support them to realize fulfilling possibilities in education, employment, health, and community living and to transform communities to include everyone.

Statewide Parent Advocacy Network (SPAN) is New Jersey's federally funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. SPAN's mission is to empower and support families and inform and involve professionals and others interested in the healthy development and education of children and youth, with the goal of ensuring that all children and youth, including those with disabilities, receive the services needed to become productive, contributing members of their communities and our society.

Support for Families is a parent-run nonprofit organization that supports families of children with any kind of disability or special health-care need. Support for Families is familiar with the special education challenges faced by children with disabilities and their families.

Team of Advocates for Special Kids (TASK) is a nonprofit organization that educates and empowers people with disabilities and their families. TASK specializes in special-education support and provide referrals to other agencies when needed. TASK provides information, training, and resources so that parents gain the knowledge and confidence to help themselves and their child.

THRIVE Center is a federally funded Community Parent Resource Center whose mission is to inform and empower all families, particularly low-income and culturally and linguistically diverse fam-

ilies, to be advocates for their children with disabilities, from birth through age twenty-six, and to achieve meaningful participation in their schools and communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the nearly thirty-five years since the Court decided *Rowley*, much has changed in the public's—and the law's—understanding of disability. In particular, the passage of the ADA eight years after *Rowley*, along with that statute's subsequent amendments and implementing regulations, have dramatically altered the legal and social status of children and adults with disabilities. No longer are disabled persons "out of sight and out of mind." Congress specifically recognized that people with disabilities should enjoy the right to "fully participate in all aspects of society" and that the law should "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for all disabled people. 42 U.S.C. § 12101(a)(1), (7). As a result of the ADA and other statutes, people with disabilities now ride buses, use the public streets, attend schools and universities, and work in jobs in the mainstream economy. Because education prepares children for future adult roles, educational expectations for disabled children now anticipate higher education, employment, and independent living, rather than a life of dependence and institutionalization.

Since 1990, successive amendments to the IDEA have brought it into line with the post-ADA view of people with disabilities. The IDEA now states that "[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society." 20 U.S.C. § 1400(c)(1). Congress specifically designed the IDEA amendments to "[i]mprov[e] educational results for children with disabilities [as] an essential

element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency." Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17 § 101, 111 Stat. 37, 38 (1997) (new § 601(c)(1)). Over the same period, amendments to the Elementary and Secondary Education Act—amendments that refer to and are referenced by the IDEA—have adopted a model of standards-based education for all students and have specifically included disabled students in that model.

In the decision under review, the Tenth Circuit failed to give due credit to the narrow reach of the *Rowley* decision and failed to consider the changes in the IDEA since the *Rowley* decision. *Rowley* addressed an unusual set of facts, and the Court expressly limited its analysis to those facts. Nothing in the *Rowley* Court's decision purported to adopt a general standard that would apply across the diverse array of fact settings that IDEA cases present. Further, the amendments to the statute since *Rowley* have decisively answered the Court's concern that the IDEA did not set forth a substantive rule governing the education that students with disabilities must receive. Those amendments incorporate the IDEA into the federal statutory policy of standards-based education for all children. They make clear that a school district's educational interventions must seek to enable a child with a disability to meet the standards the district applies to all children, at least absent a specific justification tied to the unique needs of the child. Congress's move to standards-based education, combined with the specific language of the amendments to the IDEA, make the Tenth

Circuit's merely-more-than-*de-minimis* standard untenable.

ARGUMENT

A. *Rowley* Addressed a Narrow, Unusual Fact Setting and Explicitly Declined to Set Forth a Comprehensive FAPE Standard Extending Beyond That Setting

Until the grant of certiorari here, *Rowley* was the only case in which this Court had addressed the substantive content of schools' obligations to provide an "appropriate" education under the IDEA. *Rowley* came before this Court in 1982, just a few years after Congress first required participating States to provide a "free appropriate public education" to disabled children. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(c), 89 Stat. 773, 775 (1975).

Because the *Rowley* decision depended crucially on the facts before the Court, it is appropriate to begin by reviewing those facts. Amy Rowley, an elementary school student, was deaf, though she had "minimal residual hearing and [was] an excellent lipreader." *Rowley*, 458 U.S. at 184. She received her education in the regular classroom along with her nondisabled classmates. *See ibid.* Rowley's parents requested that her school provide a sign-language interpreter for her first-grade class. *See ibid.* But the school district instead gave Rowley "an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities." *Ibid.* It also pulled her out of class to "receive instruction from a tutor for the deaf for one hour each day and

from a speech therapist for three hours each week." *Ibid.*

The district court found that, even without a sign-language interpreter, Rowley "perform[ed] better than the average child in her class and [was] advancing easily from grade to grade." *Id.* at 185 (internal quotation marks omitted). The Court also found that Rowley was "'a remarkably well-adjusted child' who interact[ed] and communicate[d] well with her classmates and ha[d] 'developed an extraordinary rapport' with her teachers." *Ibid.* (quoting district court's findings).

The facts of *Rowley* were thus distinctive—and not at all representative of the full range of cases to which the IDEA, by its terms, applies. The case involved a high-achieving student who, although not reaching her full potential, was doing better than most of her nondisabled peers—even without the educational interventions that her parents argued were appropriate. The case also involved a dispute regarding what this Court believed to be a broad question of educational policy left to the States: whether oral instruction or sign language was "the best method for educating the deaf, a question long debated among scholars." *Id.* at 207 n.29.[2]

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[2] Under the current version of the IDEA, schools must, "in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." 20

(Footnote continued on following page)

This Court explicitly tied its decision in *Rowley* to the distinctive facts of the case. The Court recognized that the statute "requires participating States to educate a wide spectrum of handicapped children," who may have a wide range of different abilities and needs for services and supports. *Id.* at 202. It thus expressly declined to "attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* Rather, the Court explicitly "confine[d] [its] analysis" to the situation of "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." *Ibid.* In that situation, the Court explained, a student's receipt of good marks and advancement from grade to grade is "an important factor" in determining whether the child has received a free appropriate public education. *Id.* at 203. But, the Court emphasized, even that factor was not conclusive:

> We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration

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U.S.C. § 1414(d)(3)(B)(iv). That provision might well alter the result in *Rowley* if the case arose today, though this case does not present that question.

> accorded by the Furnace Woods school administrators, to be dispositive.

Id. at 203 n.25. The *Rowley* Court could hardly have been clearer: Its holding turned on the case's particular facts.

Because of those distinctive facts, the *Rowley* Court phrased most of its key legal statements in the negative. It rejected various maximalist claims regarding the scope of a State's obligations, but it did not embrace any overarching standard for determining what constitutes an "appropriate" education. The Court observed that Congress had not provided a "comprehensive statutory definition of the phrase 'free appropriate public education.'" *Id.* at 190 n.11. The Court said that "[w]hatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." *Id.* at 197 n.21; *see also id.* at 200 (rejecting a standard that would have required the State "to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children"). However, the Court also disclaimed any effort to adopt a comprehensive standard for determining when a State had satisfied its obligation to provide a free appropriate public education. *See id.* at 202.

B. Post-*Rowley* Amendments to the IDEA Make Clear That a FAPE Must Provide the Child with the Specialized Instruction and Services Which Allow the Child the Opportunity to Meet the Standards the School District Applies to All Children

In the years since *Rowley*, Congress has not been silent. To the contrary, it has repeatedly amended the IDEA. Where the *Rowley* Court found that Congress had not adopted language providing a "substantive standard prescribing the level of education to be accorded handicapped children," *id.* at 189, the post-*Rowley* amendments have progressively expanded States' substantive obligations under the statute. These amendments make clear that a school district's educational interventions must provide a child with a disability an equal opportunity to meet the standards the district applies to all children. Any deviation from that universal standard must be tied to the unique needs of the child. The Tenth Circuit's merely-more-than-*de-minimis* test therefore falls far short of the requirements that Congress has imposed since *Rowley*.

1. The 1997 amendments

In 1997, fifteen years after *Rowley*, Congress reauthorized the IDEA and made substantial amendments. Many of those amendments focused specifically on enhancing the substantive obligations of school districts to provide a free appropriate public education. Those amendments responded directly to *Rowley* by removing many of the key underpinnings of that decision.

The response to *Rowley* is evident from the new findings Congress added to the text of the IDEA. "Because [they are] included in the [statute's] text," these findings "give[] content to the [statute's] terms." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). In *Rowley*, the Court had described Congress as having aimed "primarily to make public education available to handicapped children." 458 U.S. at 192. "But in seeking to provide such access to public education," the Court said, "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Ibid.* The findings included in the 1997 amendments to the IDEA state that the statute had largely succeeded in achieving that "access" goal. Congress found that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this Act has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." Pub. L. No. 105-17 § 101, 111 Stat. at 39 (new § 601(c)(3)).

But Congress went on to state that the law had not yet achieved its substantive, rather than its access, goals: "However, the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Ibid.* (new § 601(c)(4)). Congress also emphasized that since the statute's original enactment in 1975, "[o]ver 20 years of research and experience ha[d] demonstrated that the education of children with disabilities can be made more effective

by," among other things: (1) "having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible" and (2) supporting professional development so that teachers can enable children to "meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children" as well as to "be prepared to lead productive, independent, adult lives, to the maximum extent possible." *Ibid.* (new § 601(c)(5)(A), (E)). By using the phrase "maximum extent possible" *three times* in this provision, Congress clearly communicated its rejection of a minimal benefit standard.

Congress's 1997 findings thus added a new focus on ensuring that disabled children would not just have the chance to go to public school, but that they would have an equal opportunity to participate "in the general curriculum to the maximum extent possible." *Ibid.*[3] Congress underscored its new substantive focus—and its emphasis on high expectations—by amending the statement of purposes that appears in the statutory text. As originally enacted in 1975,

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[3] The legislative history of the 1997 amendments further underscores Congress's effort to move from the goal of access "to the next step of providing special education and related services to children with disabilities: to improve and increase their educational achievement." S. Rep. 105-17, at 2-3 (1997). The Senate Report stated that, with the statute's access goals having been largely achieved, "the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Id.* at 3.

the statute provided that "the purpose of this Act" was "to assure that all handicapped children have available to them * * * a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Pub. L. No. 94-142 § 3(c), 89 Stat. at 775. The 1997 amendments described the statute's purpose in more robust terms, as aiming "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs *and prepare them for employment and independent living*." Pub. L. No. 105-17 § 101, 111 Stat. at 42 (new § 601(d)(1)(A)) (emphasis added).

The 1997 amendments were not limited to changing the statute's findings and purposes. Congress also made significant changes to the IDEA's operative provisions. These changes, too, responded directly to *Rowley*. Although Congress did not substantively alter the statutory provision that defines "free appropriate public education," *see id.* § 101, 111 Stat. at 44 (new § 602(8)), it made significant changes to the key component of the FAPE definition—the statute's requirements regarding the content of an "individualized education program" (IEP). As *Rowley* recognized, 458 U.S. at 181-82, the IEP requirement gives substance to the statutory command to provide a free appropriate public education. That remains true to this day. *See* 20 U.S.C. § 1401(9) ("free appropriate public education" means special education and related services that, *inter alia*, "are provided in conformity with the individualized education program required under section 1414(d) of this title").

At the time the Court decided *Rowley*, the provision describing what schools must include in an IEP spoke in essentially procedural terms:

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Rowley, 458 U.S. at 182 (quoting 20 U.S.C. § 1401(19) (1982)). Based in large part on the limited substantive content of this provision, the Court concluded "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." *Id.* at 206.

The 1997 amendments extensively revised the requirements for what must be included in an IEP. These new requirements specifically focused on ensuring that children with disabilities could participate and progress in the general education curriculum. Thus, instead of merely stating that the IEP should describe "the extent to which" the child "will be able to participate in regular educational programs"—as the former provision did—the new

provision affirmatively required the IEP to provide goals for "meeting the child's needs that result from the child's disability to enable the child *to be involved in and progress in the general curriculum*." Pub. L. No. 105-17 § 101, 111 Stat. at 84 (new § 614(d)(1)(A)(ii)(I)) (emphasis added). The new provision also required the IEP to set forth "the special education and related services," "supplementary aids and services," and "program modifications or supports" that the school would provide to enable the child "to be involved and progress in the general curriculum." *Ibid.* (new § 614(d)(1)(A)(iii)(II)). Finally, the new provision required that the annual review of a child's IEP "revise[] the IEP as appropriate to address," among other things, "any lack of expected progress toward the annual goals and in the general curriculum." *Id.* § 101, 111 Stat. at 87 (new § 614(d)(4)(A)(ii)(I)).

These changes to the required IEP contents reflect an equal-opportunity approach consistent with the developments in disability law since *Rowley*.[4] The objective is to remove barriers and provide individualized services and supports that enable the student not only to access but to achieve in the general curriculum. And these *substantive* changes mesh perfectly with, and add a layer of content to, the statute's requirements for the IEP *process*. The 1997

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[4] For "an overview of Federal civil rights laws that ensure equal opportunity for people with disabilities," *see* Disability Rights Section, U.S. Dep't of Justice, A Guide to Disability Rights Laws (July 2009), available at https://www.ada.gov/cguide.htm.

amendments set forth the steps involved in this process, starting with comprehensive assessments in all areas of suspected disability, a review of present levels, development of specific goals and services, an examination of any barriers to participation, and an evidence-based system for the evaluation of progress. *See* Pub. L. No. 105-17 § 101, 111 Stat. at 83-85 (new § 614(d)). (The current version of these provisions appears at 20 U.S.C. § 1414(d).) If the IEP services and adaptations are delivered with fidelity, the student has an equal opportunity to achieve in the general curriculum, as well as in other areas such as functional, social, and communication goals. By setting forth the steps to remove barriers and develop individualized services, the amended IEP provisions address the *Rowley* Court's concern about applying an equal opportunity standard by allowing the team to consider the "myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." *Rowley*, 458 U.S. at 198.

By focusing on participation—and progress—in the general curriculum, these new statutory provisions highlighted Congress's intent to ensure that children with disabilities would receive the same educational opportunities, and be judged by the same educational standards, as nondisabled children. Another amendment Congress made in 1997 underscores this point. That amendment required states to "establish[] goals for the performance of children with disabilities in the State." Pub. L. No. 105-17 § 101, 111 Stat. at 67 (new § 612(a)(16)). Congress provided that those goals must be "consistent, to the maximum extent appropriate, with other goals and

standards for children established by the State." *Id.* (new § 612(a)(16)(A)(ii)). Congress also required States to include children with disabilities in the same "general State and district-wide assessment programs" as nondisabled students, "with appropriate accommodations, where necessary." *Id.* (new § 612(a)(17)). Parent-resource centers and parent-training and information centers were created to help children with disabilities "to meet developmental goals and, to the maximum extent possible, those challenging standards that have been established for all children" and "to be prepared to lead productive independent adult lives, to the maximum extent possible." *Id.* (new § 683(a)(1)-(2)).[5]

2. The 2004 amendments aligned special and general education standards and accountability

In 2004, Congress reauthorized the IDEA once again. And once again, it added provisions that emphasized the robust substantive obligations that it intended to impose on States. Congress retained the statutory findings that the law had largely succeeded in achieving its access goal but that implementation had been impeded by low expectations. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446 § 101, 118 Stat. 2647, 2649 (2004) (codified at 20 U.S.C. § 1400(c)(3), (4)). To address the continuing concerns, Congress amended—

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[5] "[C]hallenging standards" was later amended to "challenging academic achievement goals." 20 U.S.C. §§ 1471(b)(1), 1472(a)(1).

and ratcheted up—its prior finding regarding the high expectations schools should entertain.

Congress now declared that "[a]lmost 30 years of research and experience ha[d] demonstrated that the education of children with disabilities can be made more effective by," among other things, "having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to" meet, "to the maximum extent possible, the challenging expectations that have been established for all children," as well as to "be prepared to lead productive and independent adult lives, to the maximum extent possible." *Ibid.* (codified at 20 U.S.C. § 1400(c)(5)(A)). The use of the words "maximum extent possible" defies a "more than *de minimus*" standard. Congress also found that the education of children with disabilities would be more effective if implementation of the IDEA were "coordinat[ed]" with more general "school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965." *Ibid.* (codified at 20 U.S.C. § 1400(c)(5)(C)). By including children with disabilities in those broader efforts, Congress found, States can "ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent." *Ibid.* To advance this objective, Congress amended the statutory purposes to provide that the free appropriate public education should be designed to prepare students with disabilities "for further education, employment, and independent living." *Id.* § 101, 118 Stat. at 2651 (codified at 20 U.S.C. § 1400(d)(1)(A)).

The Senate Report on the 2004 amendments underscored these findings. The report emphasized that the original IDEA's access goal had largely been achieved: "Today the school house door is open." S. Rep. No. 108-185, at 6 (2003). Thus, the committee explained that its "focus during this reauthorization is on the quality of education children are receiving under the law." *Ibid.* The purpose of the amendments, the committee declared, was "to improve educational results for children with disabilities by * * * [p]roviding a performance-driven framework for accountability." *Id.* at 5.

In their operative provisions, too, the 2004 amendments emphasized that children with disabilities should, to the extent possible, receive the same educational opportunities, and be judged by the same educational standards, as nondisabled children.[6] The amendments required that "[s]tate rules, regulations, and policies * * * support and facilitate local

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[6] These expectations are based on a better understanding of the abilities and potential of students with disabilities. Across the Nation, 8.7% of elementary and secondary students have disabilities. U.S. Dep't of Educ., 38th Annual Report to Congress on the Implementation of the IDEA, Ex. 18 (2016). Of these students, about 90% have the same cognitive abilities as their peers without disabilities and are capable of achieving the same academic standards. Only 7% are classified as intellectually disabled. *Id.* at Ex. 20. And the Centers for Disease Control estimates that only about 38% of students with autism (or 3.2% of students with disabilities) also have intellectual disabilities. Ctrs. for Disease Control & Prevention, Prevalence of Autism Spectrum Disorders (2012). Provided adequate education, many students with intellectual disabilities are going to college, working in the community, and living independently.

educational agency and school-level system improvement designed to enable children with disabilities to meet the challenging State student academic achievement standards." Pub. L. No. 108-446 § 101, 118 Stat. at 2661 (amended § 608(b), codified at 20 U.S.C. § 1407(b)). States are required to establish a "goal of providing full educational opportunity to all children with disabilities." *Id.* § 101, 118 Stat. at 2677 (amended § 612(a)(2), codified at 20 U.S.C. § 1412(a)(2)). The amendments required states to ensure that "[a]ll children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act of 1965, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs." *Id.* (amended § 612(a)(16)(A), codified at 20 U.S.C. § 1412(a)(16)(A)). The amendments required that any alternate assessments for students with disabilities be "aligned with the State's challenging academic content standards and challenging student academic achievement standards." *Id.* § 101, 118 Stat. at 2687 (codified at 20 U.S.C. § 1412(a)(16)(C)(ii)(I)). In addition, they provided that "if the State has adopted alternate academic achievement standards permitted under the regulations promulgated to carry out section 1111(b)(1) of the Elementary and Secondary Education Act of 1965," the alternate assessments must "measure the achievement of children with disabilities against those standards." *Ibid.* (codified at 20 U.S.C. § 1412(a)(16)(C)(ii)(II)).

At the time Congress adopted the 2004 IDEA amendments, the then-current version of the ESEA was the No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002). Like the IDEA as amended, NCLB also sought to promote equal educational opportunity. Congress described NCLB's purpose as ensuring "that all children have a fair, *equal*, and significant *opportunity* to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." *Id.* § 101, 115 Stat. at 1439 (adding the then-current version of § 1001) (emphases added). The statute required States to demonstrate that they had "adopted challenging academic content standards and challenging student academic achievement standards," and that those standards would "appl[y] to all schools and children in the State," including disabled students. *Id.* § 101, 115 Stat. at 1444-45 (adding § 1111(b)(1)(A), (B)). To facilitate this goal, it required states to provide for "reasonable adaptations and accommodations for students with disabilities" where that was "necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards." *Id.* § 101, 115 Stat. at 1450-51 (adding § 1111(b)(3)(C)(ix)(II)).

As is evident from the text of the 2004 IDEA amendments, Congress sought in those amendments to "[a]lign[] the IDEA's accountability system with NCLB," an effort Congress thought "essential to ensuring that children with disabilities have the chance to learn and succeed academically." H.R. Rep. No. 108-77, at 83 (2003). The House Report ex-

plained that the "bill carefully aligns the IDEA with the accountability system established under the No Child Left Behind Act to ensure that there is one unified system of accountability for States, local educational agencies, and schools." *Id.* at 96. The report underscored the effort to move beyond the access goal of the original version of the IDEA by emphasizing that the amendments would "enhance[] the IDEA by improving education results for children with disabilities." *Id.* at 130.

In recent amendments to the ESEA, Congress modified the relevant NCLB provisions while retaining their basic structure and the same high academic standards for students with disabilities as for all students. *See* Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, 1823 (2015) (codified at 20 U.S.C. § 6311(b)). The ESSA continues to require States to adopt "challenging academic content standards and aligned academic achievement standards" that "apply to all public schools and public school students in the State" and "include the same knowledge, skills, and levels of achievement expected of all public school students in the State." 20 U.S.C. § 6311(b)(1)(A), (B). ESSA also requires that these standards be "aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards." *Id.* § 6311(b)(1)(D).

While the statute now permits States, "through a documented and validated standards-setting process," to "adopt alternate academic achievement standards for students with the most significant cognitive disabilities," *id.* § 6311(b)(1)(E)(i), those alter-

nate standards must be "aligned with the challenging State academic content standards," "promote access to the general education curriculum, consistent with the [IDEA]," "reflect professional judgment as to the highest possible standards achievable by such students," be designated in a student's IEP, and be "aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of" the Rehabilitation Act. *Ibid.*

The ESSA specifically amended the IDEA to incorporate these new provisions, thus establishing expectations for state academic standards that are significantly more challenging than prior law. *See id.* § 1412(a)(16)(C). Indeed, ESSA's amendments to IDEA added numerous references to students with disabilities meeting "challenging academic achievement goals that have been established for all children." *E.g.*, *id.* §§ 1454(a)(1)(B), 1454(b)(1)(B)-(C), 1464(b)(2)(A), 1470, 1472(b)(1), 1472(a)(1).

The ESSA also permits a state to "provide for alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards" for "students with the most significant cognitive disabilities," but no more than one percent of the students in the State may receive these alternate assessments. *Id.* § 6311(b)(2)(D)(i), (i)(I). States may provide for these alternate assessments if the State "promotes, *consistent with the Individuals with Disabilities Education Act* * * *, the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum." *Id.* § 6311(b)(2)(D)(i)(III) (em-

phasis added). And the State cannot "preclude a student with the most significant cognitive disabilities who takes an alternate assessment based on alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma." *Id.* § 6311(b)(2)(D)(i)(VII).

After the 1997 and 2004 IDEA amendments, and the amendments to the ESEA that they incorporated by reference, it can no longer be said that the IDEA lacks a "substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189. As it has been amended, the IDEA requires States to seek to ensure that children with disabilities have an equal opportunity to "be involved in and make progress in the general education curriculum," *id.* § 1414(d)(1)(A)(i)(II)(aa), and that they can meet the "challenging State academic content standards" applied to all students in the state, *id.* § 1412(a)(16)(C)(ii)(I). Although the statute's current provisions contemplate that some disabled students may need to have proficiency measured using alternate academic achievement standards, the States must promote the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum. *See id.* § 6311(b)(2)(D)(i)(III). These robust substantive requirements instantiate the "high expectations" for disabled children that Congress demanded. *Id.* § 1400(c)(5)(A). They also directly conflict with the minimal "more than *de minimis*" standard applied by the Tenth Circuit.

3. The Department of Education's interpretation

The Department of Education, which administers the IDEA, *see id.* § 1402(a), has adopted regulations that endorse this understanding of the statute's substantive standards. Because the Department has been granted express regulatory authority, *see id.* § 1406, these regulations are entitled to deference. *See City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-92 (1984).

The Department has repeatedly recognized that Congress's successive enactments have expanded schools' obligations. When it adopted new IDEA regulations in 1999, the Department specifically noted that "the 1997 amendments place greater emphasis on a results-oriented approach related to improving educational results for disabled children than was true under prior law." *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 Fed. Reg. 12,406-01, 12,538 (Mar. 12, 1999). The Department concluded that the IDEA Amendments included "provisions that tie IEP goals and objectives to the regular education curriculum (section 614(d)(1)(A)), establish performance goals and indicators for children with disabilities consistent with those that a State establishes for nondisabled children (section 612(a)(16)), and require the participation of children with disabilities in the same general State and district-wide assessments as nondisabled students (section 612(a)(17))." *Id.* at 12,600-01.

Similarly, when it adopted regulations to implement NCLB, the Department explained that the new statute "sought to correct" the problem of low expectations for disabled students "by requiring each State to develop grade-level academic content and achievement standards that it expects all students—including students with disabilities—to meet, and by holding schools and LEAs responsible for all students meeting those standards." *Title I—Improving the Academic Achievement of the Disadvantaged*, 67 Fed. Reg. 71,710, 71,741 (Dec. 2, 2002). In issuing later NCLB regulations, the Department sought to implement Congressional intent "that schools are held accountable for the educational progress of students with the most significant cognitive disabilities, just as schools are held accountable for the educational results of all other students with disabilities and students without disabilities." *Title I—Improving the Academic Achievement of the Disadvantaged*, 68 Fed. Reg. 68,698, 68,698 (Dec. 9, 2003).

Notably, the Department's regulations specifically incorporate the post-*Rowley* statutory changes into the definition of "special education"—one of the components of the "free appropriate public education" that the IDEA demands that States provide to children with disabilities. *See* 20 U.S.C. § 1401(9). The regulations define "special education" as instruction that, among other things, "adapt[s], as appropriate to the needs of an eligible child," educational "content, methodology, or delivery of instruction," to both "address the unique needs of the child" and "ensure access of the child to the general curriculum, *so that the child can meet the educational standards within*

the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3) (emphasis added).

Under the Department's regulations, a school district must aim to ensure that a disabled child has access to the general curriculum and can meet the educational standards that apply to all students. The Department's regulations define "general education curriculum" as "the same curriculum as for nondisabled children." *Id.* § 300.320(a)(1)(i). Indeed, in adopting regulations implementing the 2004 amendments to the IDEA, the Department explained: "As the term 'general education curriculum' is used throughout the Act and in these regulations, the clear implication is that there is an education curriculum that is applicable to all children and that this curriculum is based on the State's academic content standards." *Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46,540-01, 46,579 (Aug. 14, 2006). The Department also emphasized that the ESEA and IDEA are aligned in focusing "on the attainment of State-approved grade-level standards for *all* children." *Id.* at 46,652 (emphasis added). Thus, although aspects of instruction might have to be modified to meet the child's unique needs, the regulations impose a robust substantive requirement on the education that the district must provide to students with disabilities.

As the Department explained its interpretation in 2015, "[r]eading the IDEA and ESEA requirements together, it is incumbent upon States and school districts to ensure that the IEPs of students with disabilities who are being assessed against grade-level academic achievement standards include content and

instruction that gives these students the opportunity to gain the knowledge and skills necessary for them to meet those challenging standards." *Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities*, 80 Fed. Reg. 50,773-01, 50,780 (Aug. 21, 2015). Later that year, the Department elaborated in a guidance document that "an IEP for a child with a disability, regardless of the nature or severity of the disability," must be "designed to give the child access to the general education curriculum based on a State's academic content standards for the grade in which the child is enrolled" and must "include[] instruction and supports that will prepare the child for success in college and careers." Letter from Michael Yudin, Assistant Sec'y & Melody Musgrove, Dir. of Office of Special Educ. Programs, U.S. Dep't of Educ., Office of Special Educ. & Rehab. Servs. (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. The merely-more-than-*de-minimis* standard applied by the Tenth Circuit is flatly inconsistent with the Department's own interpretation.[7]

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[7] The educational methods and technologies involved in teaching children with even the most significant disabilities have developed over the years alongside the statutory and administrative changes we highlight in this brief. The field has developed a body of evidence-based approaches that can enable the overwhelming majority of students with disabilities to meet challenging state standards. *See generally* Thomas Hehir, New Directions in Special Education (2005).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE COALITION OF TEXANS WITH DISABILITIES, DECODING DYSLEXIA AND DON'TDISMYABILITIES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

Page

Statutes and Other Authorities

Page

Cited Authorities

Page

INTEREST OF THE *AMICI CURIAE*

Amicus Curiae the Coalition of Texans with Disabilities[1] is the oldest and largest consumer driven cross-disability organization in Texas and provides advocacy and public policy leadership throughout Texas. Formed in 1978, the Coalition promotes full inclusion of students with disabilities in all aspects of society. The Coalition works in communications, education, housing, and employment on behalf of Texans with a wide variety of disabilities, including physical impairments, deafness, intellectual disabilities, autism and others. It is keenly aware that thousands of Texas children with disabilities grow up to be Texas adults with disabilities who need jobs, housing and a good standard of living. The Coalition's interest in this brief is based upon its strong belief in the IDEA's promise to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

Amici Curiae Decoding Dyslexia is a network of parent-led grassroots organizations in all fifty states concerned with the limited access to educational interventions for students with dyslexia within the public education system. The organizations aim to raise dyslexia awareness, empower families to support their children and inform policy-makers on best practices to identify, remediate and support students with dyslexia. Three of

1. No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the amicus curiae, its members, or its counsel, made such a monetary contribution to the preparation or submission of this brief.

these organizations are within the Fifth Circuit and have a special interest in this litigation because of that Court's reliance on the *Cypress-Fairbanks* standard. Decoding Dyslexia Texas is interested in the present case because of the many children in Texas whose education has been marginalized by the state's implementation of the IDEA and aspires to ensure that children with dyslexia and other disabilities receive the instruction they need to be successful in school and life. Decoding Dyslexia Louisiana wants to ensure the Court understands that holding schools accountable for special education at a "less than trivial" level is failing Louisiana's bright and capable students. Decoding Dyslexia Mississippi wishes to emphasize the extreme need for a meaningful program of education for children with dyslexia and ADHD, many of whom are bright and even gifted but who are not provided the research-driven instruction they need to succeed in school and, ultimately, life.

Amicus Curiae Don'tDismyAbilities, Inc. is a non-profit organization based in Texas. Its mission is to identify, develop, and employ strategies that make positive impacts for individuals with disabilities, their families and their neighborhoods through community education, advocacy and ADA-related actions. Founded in 2015, Don'tDismyAbilities, Inc. advocates for children with disabilities through educational advocacy and supports strategies to help them find success at school instead of placing them in the "school-to-prison pipeline." The organization serves clients of school age throughout the State of Texas. Don'tDismyAbilities interest in this case is based upon its fundamental commitment to children with disabilities receiving a quality education in Texas schools.

SUMMARY OF ARGUMENT

The educational lives of children with disabilities who live in Texas, Mississippi and Louisiana are uniquely impacted by an outdated legal standard known as the *Cypress Fairbanks v. Michael F.* four-factor standard. *Cypress-Fairbanks Independent School Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) cert denied 522 U.S. 1047 (1998). Amici believe that this Court should clarify that any substantive standard must be consistent with today's IDEA and must dovetail with its procedural requirements. Amici propose an approach ensuring: 1) full and comprehensive evaluations and present levels of performance so as to result in individualized planning; 2) annual measurable goals (and, when required, short-term objectives) that address all of the child's areas of need as set forth in the present levels of performance; 3) provision of special education and related services to remediate each identified area of need via specialized instruction; 4) use of research-based methodologies to the extent practicable; and 5) sufficient modifications, accommodations, and technologies offered to allow the student to progress in the regular curriculum, at grade level, in spite of the deficits due to disability, while the deficits are being remediated.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE ACT

In 1975, Congress enacted the Education for All Handicapped Children Act (EAHCA), the predecessor to the Individuals with Disabilities Education Improvement Act (IDEA 2004). Pub. L. 94-142 at 89 Stat. 773. The EAHCA stated that its purpose was "to assure that all

handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and ensure the effectiveness of efforts to educate handicapped children." 89 Stat. 775.

In 1982, this Court decided *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley,* 458 U.S. 176 (1982), its first foray into the murky world of the "free appropriate public education" or FAPE. The Rowleys contended that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." 458 U.S. at 198. The lower courts apparently concurred, holding that "the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Id.*, at 200.

In dissent, Justice White, joined by Justices Brennan and Marshall, argued that "[t]he legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children." 458 U.S. at 214. The dissent stated that "[t]he basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible." *Id.*, at 215. Justice Blackmun, concurring in the judgment, explained that "Congress

unambiguously stated that it intended to 'take a more active role under its responsibility for equal protection of the law to guarantee that handicapped children are provided equal educational opportunity.' S. Rep. No. 94-168, p. 9 (1975) (emphasis added). . . the question here is not, as the court says, whether Amy Rowley's individualized education program was 'reasonably calculated to enable her to receive educational benefits,' measured in part by whether or not she 'achieves passing marks and advances from grade to grade.' Rather, the question is whether Amy's program, viewed as a whole, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy's achievement of any particular educational outcome." *Id.*, at 210.

The *Rowley* majority, however, believed "that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.' " 458 U.S. at 196. Thus,

> [t]he District Court and the Court of Appeals [] erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather,

> Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

Id. The Court then found "that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.*, at 200.

Subsequent amendments to the Act, and clarifications by the United States Department of Education, better identified the children to be served as understanding of educational disabilities improved. One important change to the law was the inclusion of specific different disabilities not previously recognized in the original EHA or EAHCA. Here, Endrew F. was diagnosed with autism at age two and with attention deficit hyperactivity disorder (ADHD) a year later. *Endrew F.,* 798 F.3d at 1333. Autism "means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i).

When this Court decided *Rowley,* in 1982, autism was not yet a disability category within the statute and ADHD was not expressly acknowledged as a basis for eligibility for services. Congress did not add the definition of autism to the list of disabilities in the Act until the 1990 reauthorization. 20 U.S.C. § 1401(3)(A), 104 Stat. 1103; compare 89 Stat. 774, 84 Stat. 175. Autism is now described

at 34 C.F.R. § 300.8(c)(1)(i). In 1991, the United States Department of Education issued a policy memorandum that a child with ADHD could be served under various categories, including a specific learning disability, emotional disturbance or other health impairment. *Letter to Williams,* 21 IDELR 73 (OSEP 1994). In 1997, ADHD was added to the regulatory definition of other health impairment. 34 C.F.R. § 300.8(c)(9). Thus, when this Court considered *Rowley,* the two primary disabilities Endrew F. experiences on a daily basis were not even recognized within the law.

In 1997, Congress made other important substantive changes. The legislative history reveals that Congress found that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities[]" and that "the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." 111 Stat. 39, presently codified at 20 U.S.C. § 1400(c)(3) & (4). A standard that only requires an eligible child's programming to be reasonably calculated to bestow "some educational benefit" on the child thus runs counter to the intent of Congress in 1997.

As part of the 1997 reauthorization, Congress also found that "[o]ver 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by [] having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible" and by "supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them [] . . . to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and . . . to be prepared to lead productive, independent, adult lives, to the maximum extent possible[.]" 11 Stat. 40, presently codified at 20 U.S.C. § 1400(c)(5)(A) & (E).

The 1997 amendment thus evidences congressional intent to move beyond *Rowley*'s focus on access over equality of opportunity, and to increase the level of benefit provided by the Act. The Tenth Circuit's standard in this case, merely requiring "more than *de minimis*" benefit, runs entirely counter to the congressional findings in the current IDEA, and represents exactly the sort of "low expectations" Congress found was impeding the implementation of its purpose in enacting IDEA. See *Endrew F. v. Douglas County School Dist. Re-1,* 798 F.3d 1329, 1338 (10th Cir. 2015); and 20 U.S.C. § 1400(c)(4) (low expectations).

Congress went even further seven years later. The 2004 reauthorization includes the requirement that "the special education and related services and supplementary aids and services" be "based on peer-reviewed research to the extent practicable[.]" 20 U.S.C. § 1414(d)(1)(A)(i)

(IV). Congress found that implementation of IDEA "has been impeded by the failure of schools to apply replicable research on proven methods of teaching and learning." IDEA 2004 includes numerous references to "scientifically based instructional practices" and "research based interventions." In describing permissible uses of federal funds, IDEA 2004 includes "providing professional development to special and regular education teachers who teach children with disabilities based on scientifically based research to improve educational instruction." 20 U.S.C. § 1411(e)(2)(C)(xi). The child's IEP must include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). In determining whether a child has a specific learning disability, IDEA 2004 describes a process by which the IEP team "may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation [process.]" 20 U.S.C. § 1414(b)(6)(B). This language in IDEA 2004 creates new requirements for schools to use scientific research-based instructional practices and interventions, if such research exists. Congress' goal was to ensure equality of opportunity, full participation, independent living and economic self-sufficiency. 20 U.S.C. § 1400(c)(1), (4).

As one educational commentator explained:

> The inclusion of this terminology may prove to be significant to future courts when interpreting the FAPE mandate because the law directs IEP teams, when developing a student's IEP, to base the special education services to be provided on

> reliable evidence that the program or service works. To comply with this new requirement, therefore, special education teachers should use interventions that empirical research has proven to be successful in teaching behavioral and academic skills to students with disabilities.

Jean B. Crockett & Mitchell L. Yell, *Without Data All We Have Are Assumptions: Revisiting the Meaning of a Free Appropriate Public Education,* 37 J.L. & Educ. 381, 388 (2008), cited in Mark Weber, *Common-Law Interpretation of Appropriate Education: The Road Not Taken in Rowley,* 41 J.L. & Educ. 95 (January, 2012), n. 152.

II. THE FIFTH CIRCUIT'S CYPRESS-FAIRBANKS STANDARD

Shortly after the 1997 reauthorization, the Fifth Circuit issued a decision in *Cypress-Fairbanks Independent School Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997) cert denied 522 U.S. 1047 (1998). The *Michael F.* court adopted a four-factor test, namely whether

(1) the program is individualized on the basis of the student's assessment and performance;

(2) the program is administered in the least restrictive environment;

(3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and

(4) positive academic and non-academic benefits are demonstrated.

> 118 F.3d at 253. The four-factor test was adopted by the Fifth Circuit and mandated as the way that hearing officers, district courts and the Circuit itself are to determine whether a student has received a free appropriate public education. The four factors are mostly an attempt to explain the statute's substantive standard and thus, are presumably unrelated to the procedural requirements of the IDEA. The district court accepted these factors as dispositive based upon the expert testimony in the underlying hearing of a single educator, albeit one with considerable experience in the development of educational programs for disabled children.

Id., at 253.

In *Richardson Indep. Sch. Dist. v. Michael Z,* 580 F.3d 286 (5th Cir. 2009), five years after the 2004 IDEA was in place, the Fifth Circuit noted that it had "never specified precisely how [the *Michael F.*] factors must be weighed." 580 F.3d at 293. Ignoring the 2004 amendments and relying on *Rowley,* the Fifth Circuit held that "IDEA does not require a school district to maximize a disabled child's potential. . . , [but, r]ather, it requires that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." 580 F.3d at 294 (internal quotation marks and citation omitted). In *Michael Z.,* the student only received "minimal educational benefits" during the previous school year, leading to a denial of a free appropriate public education when the school district recommended that same program for the following school year. The court

acknowledged that "absent a few isolated instances of arguable academic success, overall [the student] failed to make meaningful academic progress in the 2003–2004 school year." *Id.*, at 295. At different points, then, *Michael Z.* employs the terms "some educational benefit," more than "minimal educational benefits" and "meaningful academic progress" interchangeably. 580 F.3d at 294 (some), 295 (meaningful, minimal); see also *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.,* 328 F.3d 804, 808–09 (5th Cir. 2003) ("The free appropriate public education proffered in an IEP need not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him to benefit from the instruction. The IDEA guarantees only a basic floor of opportunity, consisting of specialized instruction and related services which are individually designed to provide educational benefit. This educational benefit cannot be a mere modicum or *de minimis,* but must be meaningful and likely to produce progress.") (internal quotation marks and footnotes omitted).

At present, then, the Fifth Circuit, totally ignoring the 1997 amendments and the 2004 amendments of the IDEA, provides little to no concrete guidance to district courts and administrative law judges, not to mention parents and school districts, as to the substantive analysis of whether an individualized education program provides a free appropriate public education. (Notably, the *Endrew F.* court incorrectly identified the Fifth Circuit as one of three circuit that have "adopted a higher standard—requiring a 'meaningful educational benefit.' " 798 F.3d at 1339.) Development of a more concrete, measurable

standard, other than "meaningful," will aid all interested parties and decision-makers in fulfilling the purpose of the Act.

III. CONFORMING THE STANDARD FOR AN APPROPRIATE EDUCATION WITH THE INTENT AND LANGUAGE OF THE IDEA—A STANDARD OF QUALITY FOSTERING INDEPENDENCE, NOT JUST ACCESS

In contrast to *Cypress-Fairbanks,* in *Polk v. Central Susquehanna Intermediate Unit 16,* 853 F.2d 171 (3rd Cir. 1988), the Third Circuit recognized that the Act's "sponsors stressed the importance of teaching skills that would foster personal independence" in order to foster "dignity for handicapped children" and to realize "long-term financial savings of early education and assistance for handicapped children." 853 F.2d 181. "A chief selling point of the Act was that although it is penny dear, it is pound wise—the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens." *Id.*, at 181–182. The Third Circuit found "that the emphasis on self-sufficiency indicates in some respect the quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom—enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society." *Id.,* at 182.

The *Polk* court rejected an approach essentially identical to that employed by the Tenth Circuit in *Endrew*

F., stating that "[u]nder the district court's approach, carried to its logical extreme, [the student] would be entitled to no physical therapy because his occupational therapy offers him 'some benefit.' " 853 F.2d at 184. Clearly, for a student's programming to pass muster under the Third Circuit's standard, it must address more than just one area of need.

The Sixth Circuit has also described a higher standard. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004). The *Deal* court found that "[n]othing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit; indeed, the legislative history cited in *Rowley* provides strong support for a higher standard in a case such as this, where the difference in level of education provided can mean the difference between self-sufficiency and a life of dependence." *Id.*, at 863. Thus, "states providing no more than some educational benefit could not possibly hope to attain the lofty goals proclaimed by Congress." *Id.*, at 864. The Sixth Circuit also cautioned that "[l]eft to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole." *Id.*, at 864–865. That expense includes relegating children with disabilities to a lifetime of failure.

Policy makers have coined the term "school-to-prison pipeline," referring to the progression of students from school discipline to adult incarceration. See, e.g., *Texas' School-to-Prison Pipeline,* Texas Appleseed 2007.[2]

2. https://www.texasappleseed.org/sites/default/files/01-STPPReport2007.pdf

According to the U.S. Department of Education Office for Civil Rights (OCR), "[s]tudents with disabilities are more than twice as likely to receive an out-of-school suspension (13%) than students without disabilities (6%). In contrast, English learners do not receive out-of-school suspensions at disproportionately high rates (7% suspension rate, compared to 10% of student enrollment)." *Civil Rights Data Collection Data Snapshot: School Discipline,* Issue Brief No. 1 (March 2014). "Students with disabilities (served by IDEA) represent a quarter of students arrested and referred to law enforcement, even though they are only 12% of the overall student population." *Id.*

According to the Department of Justice, about 32% of prison and jail inmates report having a disability, versus 11% in the general population. Bronson, Berzofsky, *Disabilities Among Prison and Jail Inmates, 2011–12,* U.S. Department of Justice, Office of Justice Programs (December 2015). Cognitive disabilities were the most frequently reported. *Id.*, at 3.

According to the National Council on Disability, "[i]f schools provided FAPE to students with disabilities, suspensions would be the exception rather than the rule to deal with nonconforming behavior. Failing grades and lack of educational success can lead to behaviors that result in suspension." National Council on Disabilities, *Breaking the School-to-Prison Pipeline for Students with Disabilities,* June 18, 2015, at 27. A robust and concrete standard for "meaningful benefit," allowing students with disabilities to acquire the skills necessary for independent living consistent with the purpose of the IDEA, will help to end the school-to-prison pipeline.

IV. A STANDARD CONFORMING TO TODAY'S IDEA

The standard proposed by amici correlates to today's statutory definition of an individualized education program (IEP) set forth in IDEA 2004, namely (1) a statement of the child's present levels of performance, (2) measurable annual goals, (3) a description of how progress toward goals will be measured and reported, (4) special education and related services to be provided, (5) an explanation of the extent to which the child will not be educated in regular classes, (6) individual accommodations for testing. 20 U.S.C. § 1414(d)(1)(A)(i). This standard will impart substantial benefit to students with disabilities, fostering the purpose of IDEA 2004.

Assessment of Needs. The IEP development process described in the IDEA begins with a requirement that "the child is assessed in all areas of suspected disability[.]" 20 U.S.C. § 1414(b)(3)(B). It further requires the use of "assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided" and, upon completion of assessments, "the determination of . . . the educational needs of the child shall be made by a team of qualified professionals and the parent of the child[.]" 20 U.S.C. § 1414(b)(3)(C) & § 1414(b)(4)(A).

On the basis of the team's review of "existing evaluation data on the child[,]" including "evaluations and information provided by the parents of the child[,]" "current classroom-based, local, or State assessments, and classroom-based observations[,]" and "observations by teachers and related services providers[,]" the team shall

determine "the present levels of academic achievement and related developmental needs of the child[.]" 20 U.S.C. § 1414(b)(4)(B). The team must also determine "whether the child needs special education and related services" and "whether any additions or modifications to the special education and related services are needed to enable the child to meet the *measurable* annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum." 20 U.S.C. § 1414(b)(4)(B)(iii) & (iv) (emphasis added). Evaluation of the child in all suspected areas of disability is critical to individualized educational planning and correlates to the procedural requirement that a child be evaluated in all areas of suspected disability and that the result of evaluations be used to determine the educational needs of the child. 20 U.S.C. § 1414(b)(3)(B), 1414(b)(3)(C) & 1414(b)(4)(A).

Measurable Goals to Meet Needs. A second component of substantive adequacy of the IEP should be whether measurable annual goals (and, when required, short-term objectives) address all areas of need set forth in the present levels of performance. Notably, the original version of the Education for the Handicapped Act did not require "measurable" goals but spoke only of annual goals and short-term objectives; subsequently, Congress added the term "measurable." Public Law 94-142, 89 Stat. 773, Sec. 4(a) amending Section 602 of the Act (20 U.S.C. § 1402), ¶ 19 (November 29, 1975). Today's IDEA requires measurable goals and more. Various courts have acknowledged that, regardless of the child's disability, goals for improved skills must be written in objectively measurable terms. At least two circuits, and a number of district courts, have insisted, based upon the requirement

of "measurable" goals, that school districts ensure that the child's IEP includes measurable goals that can be and are regularly measured.

For example, in *Bend-Lapine v. K.H.,* 43 IDELR 191, 234 Fed. App'x 508 (9th Cir. 2007), a hearing officer, and later the district court, found that the following types of descriptions were not a present level of performance: the child had behaviors resulting in short-term suspensions, had been physically aggressive, had difficulty maintaining friendship. The hearing officer, and later the district court, concluded that such statements were insufficient to determine an accurate baseline of the child's behaviors affected by her disability, as the IEP lacked any measurable level of problematic behaviors, numbers of suspensions, and how and in what settings the child had been verbally aggressive. The hearing officer, and later the district court, concluded that the IEP did not meet the requirements of an annual goal with benchmarks or measurable short-term objectives on reviewing certain goals. One goal was that K.H. will exhibit appropriate work ethic and behaviors in school and home 90% of the time and another said that K.H. "will apply decision, and problem solving techniques 90% of the time." The Ninth Circuit affirmed the lower court's conclusion that these goals contained ambiguous terms, and were unmeasurable and thus failed to comply with the IDEA. See also *B.H. v. West Clermont Board of Education,* 2011 WL 1575591 (S.D. Ohio 2011) (district denied appropriate education by using a behavior-intervention point system that was not shown to have a scientific basis and was inconsistently applied). District Court Judge Timothy Burgess, reviewing the education of a child in Anchorage, Alaska explained that where a child's goals were either not met

and simply eliminated from the IEP or "watered down" iterations of prior goals, and where the district failed to have any standardized means to measure the child's progress, the child regressed and was nearly retained. *Anchorage School District v. D.K.,* 54 IDELR 28, 3:08-cv-00031, 2009 U.S. Dist. LEXIS 125319, at *1 (D.Ak. 2009). Judge Burgess reasoned that the child had been denied a free appropriate public education because the IEP goals were vague and not measurable and the child was not progressing.

The Sixth Circuit has agreed that, because the evaluation of a student's progress is so closely tied to the student's IEP goals, the district must ensure that the goals included in each IEP are "clear and objectively measurable." *Kuszewski v. Chippewa Valley Schs.,* 34 IDELR 59 (E.D. Mich. 2001) aff'd 38 IDELR 63 (6th Cir. 2003). As a state-level administrative officer has noted, IEP goals should pass the stranger test, namely, if a stranger can implement it and measure using it and determine progress, then the IEP goal is appropriate. *Mason City Cmt. Sch. Dist.,* 46 IDELR 148 (SEA IA 2006); *Bridges v. Spartanburg County Sch. Dist. Two,* 57 IDELR 128 (D.S.C. 2011) (goals must be objectively measurable, such as the use of percentages tied to the completion of discrete tasks to measure student progress). A finding that a child's goals are vague or immeasurable generally leads to a ruling that the district denied FAPE. See, e.g., *Independent Sch. Dist. No. 701 v. J.T,* 45 IDELR 92 (D.Minn. 2006) (an IEP's statement that a student would "improve his functional academic skills from a level of not completing assignments independently to a level of being able to read, write and do basic math skills independently" was too vague to permit measurement of

the student's progress); *Anchorage Sch. Dist.*, 51 IDELR 230 (SEA AK 2008) aff'd 54 IDELR 29 (D.Alaska 2009) (finding by IHO that the lack of clear, measurable goals in a child's IEP precluded an objective measurement of the child's progress).

Furthermore, are the goals "S.M.A.R.T"; namely, are they specific, measurable, attainable, relevant and time-related? See Doran, Miller, Cunningham, "There's a S.M.A.R.T. way to write management's goals and objectives," *Management Review,* (vol. 70, issue 11, 1981); and see Telfer, D.M. (2011). *Moving your numbers: Five districts share how they used assessment and accountability to increase performance for students with disabilities as part of district-wide improvement.* Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes, at 21. This correlates with the procedural requirement that an IEP include "a statement of *measurable* annual goals, including academic and functional goals, designed to [] meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and [] meet each of the child's other educational needs that result from the child's disability[.]" 20 U.S.C. *§* 1414(d)(1)(A)(i)(II) (emphasis added).

Thus, the Court should also clarify, consistent with footnote 25 of the *Rowley* decision, and with at least two circuits and various district courts, that measurement of a child's progress and receipt of a free appropriate public education cannot be primarily by classroom grades alone (especially modified grades). The Court should soundly reject the Fifth Circuit's erroneous view in *Klein Independent School District v. Hovem,* 690 F.3d 390 (5th

Cir. 2012), relying upon *Cypress-Fairbanks,* that passing grades are "good enough." Rather, the child's progress should be based upon whether the child's IEP contains measurable annual goals and the child's progress toward those goals is objectively measured. The Court should reject, as Judge Stewart did, dissenting in *Hovem,* that the purpose of the IDEA is simply "social promotion." *Id.*, at 408 ("Clearly, social promotion of disabled students in the general curriculum, even if well-meaning, is inadequate to meet this mandate, both according to our established precedents and the plain language of the IDEA"). Notably, in *Rowley,* this Court noted that the child involved was performing above average in a regular education classroom. *Rowley,* 458 U.S. at 202–203. Grades are subjective by nature, and the teacher's use of them is not based upon peer-reviewed research, especially when the child is being educated primarily in a special education classroom. The Third Circuit has explained in *D.S. v. Bayonne,* 602 F.3d 553, at 567–568, (3rd Cir. 2010) that a child was denied a free appropriate public education despite "A's" in a special education classroom.

Special Education and provided in each area of identified need and Related Services that are Research-Based. A third component the Court must address is whether special education and related services provided to remediate each identified area of need via specialized instruction, and, fourth, whether research-based methodologies are being prescribed by the IEP "to the extent practicable[]"? 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Clearly Congress, in stressing the importance of "the special education and related services and supplementary aids and services" being "based on peer-reviewed research to the extent practicable[,]" intended that the

child's needs, as identified by evaluations, be addressed through research-based methods. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). A program can hardly be "reasonably calculated" to impart substantial benefit if it fails to employ available methods that are based upon peer-reviewed research.

The Court should instruct the lower courts to include as a factor whether or not peer-reviewed research is available and if so, whether it is used by the school district to instruct the child so that children with disabilities receive an education that is consistent with the IDEA's mandate of measurability and peer-reviewed research, if available. Such research is often available and it is practicable to use it. "Peer-reviewed research" generally refers to research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. 71 F.R. 46664 (but declining to adopt a more specific definition). Peer-reviewed research establishes that, for children with autism, the use of Applied Behavioral Analysis ("ABA") can improve their communication, academics and social skills; ABA can be provided in school. Ronald Leaf, Ph.D., Mitchell Taubman, Ph.D., & John McEachin, Ph.D., "It's Time for School! Building Quality ABA Educational Programs for Students with Autism Spectrum Disorders" (2008 Autism Partnership). Some Texas hearing officers have recognized the importance of ABA and ordered that it be provided. *Silsbee Indep. Sch. Dist.,* Tx Case 268-59-0709; *Tyler Sch. Dist.,* Tx Case 347-59-0812; *Beaumont Sch. Dist.,* Tx Case 296-59-0710; *Beaumont Sch. Dist.,* Tx Case 205-53-0413; *T.T. v. Beaumont Sch. Dist.,* Tx Case 162-SE-0214. The Fifth Circuit, however, has never addressed the importance of peer-reviewed research, such

as ABA services for children with autism, and has never formulated a requirement that IEPs specify research-based methods.

Similarly, research-based approaches are available for children with learning disabilities or dyslexia. Louisa C. Moats, Karen E. Dakin and R. Malatesha Joshi, "Expert Perspectives on Interventions for Reading: A Collection of Best Practice Articles from the International Dyslexia Association," (2012 International Dyslexia Association). More peer-reviewed research about the hallmarks of strong reading programs to help children with ADHD and dyslexia improve reading skills emerged three years after *Cypress-Fairbanks,* after the National Reading Panel released its findings in April of 2000. See "Report of the National Reading Panel, Teaching Children to Read: An Evidence-Based Assessment of the Scientific Research Literature on Reading and Its Implications for Reading Instruction," www.nichd.nih.gov. Experts on the Reading Panel explained that for reading programs to be effective they must include such elements as phonemic awareness, phonics taught systemically and explicitly, spelling, sight words, and others. Shaywitz, at 208–210; and see, e.g., *E.S. v. Independent School District No. 196,* 135 F.3d 566, n. 3 (8th Cir. 1998) (noting one type of reading instruction, Orton-Gillingham, is an approach to teaching children with learning disabilities but declining to order same). *Cypress-Fairbanks* does not require that peer-reviewed research-based programs be offered to children with dyslexia when practicable.

Likewise, we currently have an improved understanding in how to provide positive behavioral supports for children with ADHD, some of whom have behavioral problems.

Technical training and assistance is available to schools to increase their ability to establish effective behavioral supports for children with disabilities, including those with ADHD. This Court affirmed the need for districts to provide behavioral services for children in 1988 in *Honig v. Doe.* In August of 2016, the United States Department of Education, Office of Special Education Programs (OSEP) and the Office of Special Education and Rehabilitation Services (OSERS) issued a Dear Colleague Letter to the states recognizing that students on IEPs may need changes and improvements to their programs to address behavioral issues. *Dear Colleague Letter,* 68 IDELR 176 (OSEP/OSERS, August 1, 2016). In the 2004 amendments, Congress mandated that IEP teams consider the child's need for behavioral services. 20 U.S.C. *§* 1414(d)(3)(B)(i); 34 C.F.R. *§* 300.324(a)(2)(i) (in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior). But again, the *Cypress-Fairbanks* analysis is devoid of this factor and does not indicate how the reviewing court is to determine whether the IEP is providing such services.

While the *Cypress-Fairbanks* standard includes a "non-academic" component, it has not kept pace with two key indicators of that standard. Research is also more readily available concerning bullying than it was prior to 2004. We now have a better understanding of bullying; we know that if a child with disabilities is bullied, it impacts his learning and as such may cause a denial of a FAPE. At least three circuits, but not the Fifth, have explained that bullying can result in a denial of a free appropriate public education. *Shore Regional High School Board of Education v. P.S.,* 41 IDELR 234 (3rd Cir. 2004); *M.L.*

v. Federal Way School District, 394 F.3d 634 (9th Cir. 2005); *Board of Education of Skokie School District 68,* 24 IDELR 1039 (7th Cir. 1996); *T.K. and S.K. v. New York City Department of Education,* 116 LRP 2393 (2nd Cir. 2016). The United States Department of Education has issued opinion letters cautioning school districts to protect children with disabilities from bullying. *Dear Colleague Letter,* 61 IDELR 263 (OSERS/OSEP 2013); *Dear Colleague Letter,* 64 IDELR 115 (OSERS/OSEP 2014).

Rowley was decided in 1982, before the advent of the Internet, and during the infancy of assistive technology. Now, technology is a part of our everyday lives and it is a part of the IDEA. 20 U.S.C. *§* 1401(1), (2), and 1414(d)(3)(B)(v); 34 C.F.R. *§* 300.5, 34 C.F.R. *§* 300.6; 300.324(a)(2)(V). Peer-reviewed research on the use of assistive technology is now available. See Autism Speaks Amicus Brief on Petition for Certiorari, at 21–22.

Following the 2004 reauthorization of IDEA, the new regulations also included specific references that IEP teams had to specifically discuss how students with disabilities could participate in extracurricular and other nonacademic activities. 20 U.S.C. *§* 1412(a)(1); 34 C.F.R. *§* 300.107 provides: "Each public agency must take steps . . . to provide nonacademic and extracurricular services and activities . . . to afford children with disabilities an equal opportunity for participation in those services and activities." See also *Dear Colleague Letter,* 60 IDELR 67 (OCR 2013). A review of the research and the statutory and regulatory changes leaves no doubt that all of this peer reviewed research about ABA, reading programs for children with dyslexia, behavioral programs for children

with ADHD, assistive technology, bullying research and information about extra-curricular activities is available research necessary for schools to use when creating programs for children with the disabilities and is uniquely, specifically and clearly tied to the IDEA's statutory dictates that schools use "peer-reviewed research, if available."

Learning while remediating. Finally, fifth, are sufficient modifications, accommodations, and technologies offered to allow the student to progress in the regular curriculum, at grade level, in spite of the deficits due to disability, while the deficits are being remediated? A guidance memorandum from the U.S. Department of Education illustrates how a FAPE could be delivered to a child with a specific reading disability:

> For example, after reviewing recent evaluation data for a sixth grade child with a specific learning disability, the IEP Team determines that the child is reading four grade levels below his current grade; however, his listening comprehension is on grade level. The child's general education teacher and special education teacher also note that when materials are read aloud to the child he is able to understand grade-level content. Based on these present levels of performance and the child's individual strengths and weaknesses, the IEP Team determines he should receive specialized instruction to improve his reading fluency. Based on the child's rate of growth during the previous school year, the IEP Team estimates that with appropriate specialized instruction

> the child could achieve an increase of at least 1.5 grade levels in reading fluency. To ensure the child can learn material based on sixth grade content standards (e.g., science and history content), the IEP Team determines the child should receive modifications for all grade-level reading assignments. His reading assignments would be based on sixth grade content but would be shortened to assist with reading fatigue resulting from his disability. In addition, he would be provided with audio text books and electronic versions of longer reading assignments that he can access through synthetic speech. With this specialized instruction and these support services, the IEP would be designed to enable the child to be involved and make progress in the general education curriculum based on the State's sixth grade content standards, while still addressing the child's needs based on the child's present levels of performance.

Dear Colleague Letter, U.S. Department of Education, (OSERS November 16, 2015). This example program is reasonably calculated to allow a child to make progress in the sixth-grade regular curriculum, through program modifications and assistive technology, while making progress in remediating his deficits in reading, through specialized instruction.

Application of the Tenth Circuit's standard to this example child would permit programming that completely ignores the student's improving reading in a measurable way, so long as the child can make "some progress"

toward learning a single academic subject at grade level through the use of modifications or accommodations and sit through the sixth grade science and history classes. The student's programming could focus on ensuring the student makes progress in a relative areas of strength (for example, math) while completely neglecting the student's deficit areas. The IDEA requires instruction that meets the child's disability-related needs to facilitate access to the general education curriculum, and to remediate other deficits arising from the disability. 20 U.S.C. *§* 1414(d)(1)(A)(i)(II)

The Court should adopt a substantive standard for FAPE effectively addressing the following inquiries:

1. Has the child been evaluated in all suspected area of disability and do the present levels of performance reflect the results of all evaluations so as to result in individualized planning?

2. Do the annual goals (and, when required, short-term objectives) address all areas of need set forth in the present levels of performance?

3. Are special education and related services provided to remediate each identified area of need via specialized instruction?

4. Are research-based methodologies being prescribed by the IEP to the extent practicable?

5. Are sufficient modifications, accommodations, and technologies offered to allow the student to progress in the regular curriculum, at grade level,

in spite of the deficits due to disability, while the deficits are being remediated through specialized instruction?

Once a court has answered these questions, it may inquire whether the services are being delivered in the least restrictive environment. See, e.g., *Oberti v. Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3rd Cir. 1993) (two-pronged test for least restrictive environment).

CONCLUSION

Based on the foregoing, amici curiae respectfully request that the Court reverse the decision of the Tenth Circuit and remand for further proceedings consistent with the guidelines suggested in this brief and ensuring that children with disabilities in the Fifth Circuit are no longer subject to the outdated *Cypress-Fairbanks v. Michael F.* standard.

Dated: Auburn, New York November 21, 2016

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No. 15-827

In the Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Individuals with Disabilities Education Act provides federal funds to States that agree to make available a "free appropriate public education" (FAPE) to every eligible child with a disability. 20 U.S.C. 1401(9), 1412(a)(1)(A). The question presented is whether the "educational benefit" provided by a school district must be "merely * * * more than *de minimis*" in order to satisfy the FAPE requirement. Pet. App. 16a (citations and internal quotation marks omitted).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This case involves the core requirement of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, that States receiving special-education grants from the federal government make available a "free appropriate public education" to eligible children with disabilities. 20 U.S.C. 1401(9), 1412(a)(1)(A). The United States has a substantial interest in ensuring that IDEA funds are spent in a manner consistent with that statute. In addition, the Department of Education is responsible for administering the IDEA and has promulgated regulations and policy guidance regarding its implementation. 20 U.S.C. 1406(a) and (d)-(f), 1417(a)(1); see 34 C.F.R. Pt. 300. At this Court's invitation, the United States

filed a brief at the petition stage urging the Court to grant certiorari and vacate the decision below.

STATEMENT

This case requires the Court to determine the degree of educational benefit that States must provide to eligible children with disabilities under the IDEA. The court of appeals held that the IDEA is satisfied so long as schools offer such children educational benefits that are "merely * * * more than *de minimis*." Pet. App. 16a (citations and internal quotation marks omitted). Applying that standard, the court rejected petitioner's claim that respondent had deprived him of his rights under the IDEA. *Id.* at 25a-26a, 36a, 49a, 51a.

1. The IDEA (formerly known as the Education of the Handicapped Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). The statute's stated purpose is "to ensure that all children with disabilities have available to them a free 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." 20 U.S.C. 1400(d)(1)(A).

The IDEA achieves that purpose by establishing an "enforceable substantive right to public education." *Honig* v. *Doe*, 484 U.S. 305, 310 (1988); see *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). Specifically, the IDEA requires States receiving IDEA funds to make a "free appropriate public education" (FAPE) available to every eligible child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A). The FAPE requirement embodies Congress's "ambitious objective"

of promoting educational opportunities for such children. *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368 (1985) (*Burlington*). The proper interpretation of that requirement is the subject of the question presented in this case.

a. The IDEA defines FAPE to mean "special education and related services" that

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of [Title 20 of the United States Code].

20 U.S.C. 1401(9).

The IDEA defines the "special education" component of the FAPE requirement as "specially designed instruction * * * to meet the unique needs of a child with a disability." 20 U.S.C. 1401(29). The Department of Education has promulgated regulations defining "specially designed instruction" to mean "adapting" educational methods to "address the unique needs of the child that result from the child's disability" and to help the child "meet the educational standards * * * that apply to all children." 34 C.F.R. 300.39(b)(3) (emphasis omitted).

The "individualized education program" (IEP) referenced in Subsection (D) of the FAPE definition is

the "centerpiece" of the IDEA's scheme for providing children with disabilities with a FAPE. *Honig*, 484 U.S. at 311; see 20 U.S.C. 1401(9)(D). An IEP must comply with specific statutory requirements and establish a special education program tailored to each child's "unique needs." 20 U.S.C. 1401(29); see 20 U.S.C. 1401(9)(D), 1414(d)(1)(A); 34 C.F.R. 300.22, 300.34, 300.39, and 300.320.

In *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982) (*Rowley*), this Court held that an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. Although the Court declined "to establish any one test" for assessing the "adequacy" of such benefits, it made clear that the FAPE requirement obligates States to provide each eligible child with "access" to education that is "*meaningful*." *Id.* at 192, 200, 202 (emphasis added).

b. The IDEA requires school districts to work collaboratively with parents to formulate the IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *Burlington*, 471 U.S. at 368-369.

If parents are unable to resolve a dispute with their school district, they may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A) and (B); see 20 U.S.C. 1415(b)(6) and (7). The losing party may then seek

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[1] See, *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B)(i), (d)(3)(A)(ii), (d)(3)(D), (d)(4)(A)(ii)(III), and (e), 1415(b)(1), (3)-(5), and (f)(3)(E)(ii)(II).

judicial review of a final administrative decision in either state or federal district court. 20 U.S.C. 1415(i)(2)(A). In adjudicating the case, the court must give "due weight" to the result of the state administrative proceedings. *Rowley*, 458 U.S. at 206.

2. Petitioner Endrew F. is a child with attention-deficit/hyperactivity disorder and autism. Pet. App. 3a. Petitioner's autism "affects his cognitive functioning, language and reading skills, and his social and adaptive abilities," including his ability to communicate his needs and emotions. *Ibid.*; see *id.* at 28a. As a child with autism, petitioner is eligible for a special education program under the IDEA. 20 U.S.C. 1401(3); Br. in Opp. 1; Pet. 6.

Petitioner attended public school in respondent Douglas County School District from preschool through fourth grade. Pet. App. 3a-4a. Pursuant to the IDEA, he received a special education program through an IEP for each school year. *Id.* at 4a. In May 2010, petitioner's parents withdrew him from the public school system following a dispute with respondent over the content of his fifth-grade IEP. *Id.* at 3a-4a, 15a; Br. in Opp. 2. Petitioner's parents enrolled petitioner in a private school, where he has made "academic, social and behavioral progress." Pet. App. 29a.

In 2012, petitioner filed a due-process IDEA complaint with the Colorado Department of Education. Pet. App. 59a. The complaint asserted that respondent had denied him a FAPE within the public school system. *Id.* at 4a, 60a. Petitioner sought reimbursement for his private-school tuition. *Id.* at 4a; see 20 U.S.C. 1412(a)(10)(C)(ii) (authorizing reimbursement as remedy for FAPE violation); *Burlington*, 471 U.S.

at 369. A Colorado hearing officer conducted a three-day hearing and ruled in respondent's favor, concluding that petitioner had "made some academic progress" while enrolled in respondent's public school system. Pet. App. 84a-85a; see *id.* at 59a-85a.

3. Petitioner sued respondent under the IDEA in federal district court, claiming that respondent had denied him a FAPE. Pet. App. 4a. That court upheld the hearing officer's decision. *Id.* at 27a-58a. The court held that the IDEA requires States to provide only "some educational benefit." *Id.* at 36a. Based on evidence that petitioner had made "at the least, minimal progress" in public school, *id.* at 49a, the court concluded that petitioner had received all the Act requires, *id.* at 51a.

4. The Tenth Circuit affirmed. Pet. App. 1a-26a. It interpreted *Rowley* to hold that the IDEA requires States to provide "some educational benefit" that "must *merely be more than de minimis*." *Id.* at 16a (emphasis added; citations and internal quotation marks omitted). The court concluded that respondent's IEP for petitioner was adequate under that minimal standard. *Id.* at 23a. The court acknowledged, however, that even under the "merely * * * more than *de minimis*" test, "[t]his is without question a close case." *Id.* at 17a, 23a.

SUMMARY OF ARGUMENT

The Tenth Circuit rejected petitioner's claim based on its view that States can comply with the IDEA by providing educational benefits that are "merely * * * more than *de minimis*." Pet. App. 16a (citations and internal quotation marks omitted). That holding is wrong. The IDEA requires States to give eligible children with disabilities an opportunity to make sig-

nificant educational progress, taking account of the child's unique circumstances. This Court should vacate the decision below and remand the case for application of the correct standard.

A. This Court first interpreted the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). There, the Court recognized that the IDEA guarantees children with disabilities an enforceable, substantive right to an appropriate education. *Id.* at 200-204, 206-207. The Court declined to establish a bright-line test defining the content of the substantive FAPE requirement. *Id.* at 202. But it did explain that States must provide each eligible child with "meaningful" access to education. *Id.* at 192.

Rowley's "meaningful" access requirement is most sensibly understood to obligate States to offer each eligible child an opportunity to make significant educational progress, in light of his particular needs and capabilities. 458 U.S. at 192. Without the opportunity to make such progress, access to education cannot be "meaningful" under any reasonable understanding of that term. That conclusion is strongly reinforced by *Rowley*'s statement that a child in the general education classroom must receive an IEP that is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 204.

B. A requirement of significant educational progress is also the standard that is most consistent with the text, structure, and purpose of the IDEA. As a textual matter, Congress obligated participating States to provide eligible children an education that is "*appropriate*." 20 U.S.C. 1412(a)(1)(A) (emphasis added). The IDEA's IEP provisions expressly require

schools to assess each child's capabilities, identify ambitious goals, develop a detailed plan to achieve those goals, and use measurement tools to assess progress along the way. See 20 U.S.C. 1414(d). Those elaborate procedures make sense only if Congress envisioned an "appropriate" education as one giving such children an opportunity to make significant educational progress.

The IDEA's stated purposes confirm that conclusion. Congress was explicit that the IDEA would set "high expectations" for children with disabilities and "prepare" them "for further education, employment, and independent living." 20 U.S.C. 1400(c)(5)(A) and (d)(1)(A). Those goals would not be attainable unless a child is entitled to an opportunity for significant educational progress. Congress's sustained legislative engagement with respect to the IDEA over the past two decades, with its increased emphasis on educational achievement, provides further support for a robust significant educational opportunity standard. So do the Department of Education's regulations and guidance, which require schools to give all children with disabilities the opportunity to make appropriate progress toward mastering the knowledge and skills addressed in the same general curriculum taught to other children.

C. The significant progress standard is entirely workable. Schools can satisfy the FAPE requirement by assessing each child's needs and capabilities on an individualized basis, and then making reasonable educational judgments about the educational services that will help the child make significant progress toward attaining the goals identified by Congress. The significant educational progress standard is not a

license for courts to micromanage the reasonable judgments of educators or State hearing officers.

D. Whatever else the Court says about the substantive content of the FAPE requirement, it should reject the Tenth Circuit's "merely * * * more than *de minimis*" test. That test conflicts with the IDEA's mandate that States provide an education that is "appropriate." 20 U.S.C. 1412(a)(1)(A). No reasonable parent or teacher would think a child has received an "appropriate" education simply because he has received some benefit—however small—that is just barely more than trivial.

The Tenth Circuit's standard is also at odds with the IDEA's structure and purpose. Requiring only non-trivial progress is not consistent with the robust IEP-development process mandated by Congress. Nor does it square with Congress's stated goals. It is hard to imagine a legal standard that more directly contradicts Congress's purpose of embracing "high expectations"—and rejecting "low expectations"—than one that requires schools to provide educational benefits that are "merely * * * more than *de minimis*." 20 U.S.C. 1400(c)(4) and (5)(A).

ARGUMENT

THE IDEA REQUIRES STATES TO ENSURE THAT ELIGIBLE CHILDREN WITH DISABILITIES HAVE THE OPPORTUNITY TO MAKE SIGNIFICANT EDUCATIONAL PROGRESS

This Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982), is best read as establishing that the IDEA requires States to give eligible children with disabilities the opportunity to make significant educational progress in light of a child's capabilities

and potential. The text, structure, purpose, and history of the IDEA all support that interpretation.

The significant educational progress standard is ambitious, but realistic. For students who are fully integrated into the regular classroom, that standard generally requires school districts to offer eligible students an opportunity to master grade-level content. For other students, that standard requires schools to enable eligible children to make progress that is appropriate in light of their own particular needs and capabilities. But the core requirement of significant educational progress remains. Because the lower courts applied the wrong legal standard, this Court should vacate the decision below and remand the case for further proceedings.[2]

A. *Rowley*'s Holding That Access To Education Must Be "Meaningful" Requires An Opportunity For Children To Make Significant Educational Progress

In *Rowley*, this Court addressed whether—and to what extent—the IDEA provides children with disabilities an enforceable substantive right to a FAPE. The Court chose not to define the precise contours of that right. 458 U.S. at 202. Nonetheless, the Court made clear that the IDEA obligates States to provide eligible children with substantive educational benefits that are sufficient to make their "access" to education "meaningful." *Id.* at 192. Taken as a whole, *Rowley* is most sensibly understood to require States to provide

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[2] This brief uses the term "significant educational progress" to refer not only to a child's academic progress, but also to progress with respect to aspects of the child's functional development (behavioral, physical, emotional, etc.) that are—or should be—addressed in his IEP. See, *e.g.*, 20 U.S.C. 1400(c)(5), 1401(26)(a) and (34), 1414(d)(1)(A)(i)(I), (II), (VIII), and (3)(A)(iv).

children with the opportunity to make significant educational progress, in light of each child's unique circumstances.

1. The plaintiff in *Rowley* was a girl with a hearing impairment, Amy Rowley, whose parents wanted her school to provide "a qualified sign-language interpreter in all her academic classes." 458 U.S. at 184. Amy's IEP instead gave her other accommodations, including use of an FM hearing aid and eight hours of instruction each week from a tutor and speech therapist. *Ibid.* Amy was an "excellent" lipreader, and she thrived in elementary school even without the interpreter's assistance. *Ibid.* In particular, Amy was "remarkably well-adjusted"; she was able to "interact[] and communicate[] well with her classmates; she developed "an extraordinary rapport" with her teachers; and she was "achieving educationally, academically, and socially." *Id.* at 185 (citations omitted) (summarizing district court findings). Most notably, Amy "perform[ed] better than the average child in her class" and was "advancing easily from grade to grade." *Id.* at 185, 210 (citations omitted).

Amy sued her school district under the IDEA, alleging that the school's refusal to provide the sign-language interpreter denied her a FAPE. The district court ruled in her favor, holding that the FAPE requirement imposes a substantive obligation on States to provide each eligible child with "an opportunity to achieve [his or her] full potential commensurate with the opportunity provided to other children." *Rowley*, 458 U.S. at 185-186 (citation omitted). The Second Circuit affirmed that interpretation of the FAPE standard, and Amy defended it in this Court. *Ibid.*; see generally *id.* at 187-204 & n.26; U.S. Amicus Br. at

12-23, *Rowley*, *supra* (No. 80-1002) (largely endorsing district court's analysis).

The school district's primary argument for reversal was that the IDEA "did not create substantive individual rights to free appropriate public education," and that the FAPE requirement was merely an aspirational "goal." Pet. Br. at 28, 41, *Rowley*, *supra* (No. 80-1002). The district further argued that federal jurisdiction in IDEA cases is limited to assessing whether a school district has complied with the IDEA's procedural requirements. *Id.* at 33, 51.

2. The *Rowley* Court ultimately concluded that the school district had not violated the IDEA—and that Amy had obtained a FAPE—because Amy was receiving "substantial specialized instruction and related services," "performing above average in the regular classrooms" of her school, and "advancing easily from grade to grade." 458 U.S. at 202, 210 (citation omitted). In doing so, however, the Court rejected both parties' interpretations of the FAPE requirement.

Most fundamentally, the Court rejected the school district's argument that the IDEA does not create any individual, substantive right to a FAPE that is enforceable in court. *Rowley*, 458 U.S. at 200-204, 206-207. As the Court explained, courts analyzing an alleged FAPE violation must conduct a "twofold" inquiry. *Id.* at 206. "First," they must determine whether the State has "complied with the procedures" set forth in the IDEA. *Ibid.* "And second," courts must determine whether the child's IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207. The Court made clear

that the IDEA is satisfied only if *both* requirements—procedural *and* substantive—are met. *Id.* at 207.[3]

3. As to the content of the IDEA's substantive requirement, the *Rowley* Court acknowledged that the statutory text does not explicitly set forth "any substantive standard prescribing the level of education to be accorded handicapped children." 458 U.S. at 189. But the Court also concluded that "[i]mplicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. The Court therefore held that the IDEA provides a "basic floor of opportunity" that requires States to provide access to special education and related services "which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201.

The Court ultimately stated that it would not "attempt today to establish any one test for determining the [substantive] adequacy of educational benefits conferred upon all children by the Act." *Rowley*, 458 U.S. at 202. Nonetheless, the Court laid down three important markers that shed light on the content and application of the substantive FAPE standard.

First, the Court rejected Amy's argument that States must provide educational benefits sufficient to "maximize the potential of each handicapped child commensurate with the opportunity provided non-

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[3] This Court has since repeatedly cited *Rowley* for the proposition that the IDEA grants an "enforceable substantive right to public education" to eligible children with disabilities. *Honig* v. *Doe*, 484 U.S. 305, 310 (1988); see *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 531-532 (2007); *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984).

handicapped children." *Rowley*, 458 U.S. at 200; see *id.* at 197 n.21. It explained that Congress did not intend to achieve such "strict equality of opportunity or services," and it described the standard embraced by the lower courts as "unworkable" insofar as it required "impossible measurements and comparisons" between different children with different needs and abilities. *Id.* at 198.

Second, the Court made clear that the "substantive educational standard" embodied in the FAPE requirement ensures that each eligible child's "access" to public education is "*meaningful*." *Rowley*, 458 U.S. at 192 (emphasis added); see *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 73 (1999) (emphasizing *Rowley*'s "meaningful" access requirement); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891 (1984) (same). The Court later elaborated on that standard, noting that "if the child is being educated in the regular classrooms of the public school system," the child's IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204.

Third, the Court indicated that compliance with the FAPE requirement as to any individual child turns on a case-specific analysis of that child's unique needs and capabilities. The Court emphasized the "infinite variations" in the capabilities of different children with different disabilities, and it noted that "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end." *Rowley*, 458 U.S. at 202.

4. *Rowley*'s recognition that States must provide "meaningful" access to education is sensibly interpreted to require them to give eligible children the

opportunity to make significant educational progress. After all, *access to* education is only a means to obtaining the *benefits of* education. Access will only be meaningful if the benefit that results from that access is also meaningful.

In addition, standard dictionaries establish that "meaningful" and "significant" are synonyms.[4] When they are used to modify a phrase such as "access to public education," *Rowley*, 458 U.S. at 192, both adjectives make clear that the quality and degree of such access must be sufficient to allow the child to make important educational gains. *Rowley*'s statement that the IDEA requires "meaningful" access to education is thus best read as another way of saying that States must give children the opportunity to make significant educational progress.

That interpretation of *Rowley* is further supported by the Court's separate observation that the IEP for a child who is educated "in the regular classrooms of the public school system" should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 458 U.S. at 204.[5] That observation both confirms that the IDEA generally requires significant educational progress, and pro-

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[4] See, *e.g.*, *Merriam-Webster's Collegiate Dictionary* 769 (11th ed. 2003) (defining "meaningful" as "significant") (capitalization altered); 9 *The Oxford English Dictionary* 522 (2d ed. 1989) ("[f]ull of meaning" or "significant"); *Random House Webster's Unabridged Dictionary* 1191 (2d ed. 1998) ("full of meaning, significance, purpose, or value"); see also *The New Oxford American Dictionary* 1052 (2d ed. 2005) ("having a serious, important, or useful quality or purpose").

[5] The Court emphasized that the mere fact that a child advances from grade to grade does not necessarily establish that he has received a FAPE. *Rowley*, 458 U.S. at 203 n.25.

vides more concrete guidance on what that standard entails for eligible students who have the capacity to master grade-level content.

While *Rowley* does not provide comparable concrete guidance on what the IDEA requires for students who cannot be fully integrated into the general education classroom, it nonetheless makes clear that significant progress is also required for those children. Such children are subject to the same FAPE requirement, and they are therefore also entitled to "meaningful"—*i.e.*, significant—educational progress. The educational programs that these children receive will of course vary based on their particular disabilities and capabilities. Some children may be so far behind grade level in certain academic areas that significant educational progress will entail mastering the skills that are a necessary prerequisite for grade-level instruction. Others may have disabilities that are so severe that significant educational progress will entail specialized services geared toward learning more basic skills. See pp. 26-27, *infra* (providing examples). In all circumstances, however, *Rowley* requires States to implement an IEP that is reasonably calculated to enable the child to make progress that is significant in light of his own unique circumstances.

B. The IDEA Itself Confirms That States Must Offer Eligible Students The Opportunity To Make Significant Educational Progress

Even apart from *Rowley*, the text, structure, purpose, and history of the IDEA establish that States must give eligible children the opportunity to make significant educational progress.

1. The core textual command of the IDEA's FAPE requirement is that States make available to eligible

children a public education that is "*appropriate*." 20 U.S.C. 1412(a)(1)(A) (requiring States to provide a "free *appropriate* public education") (emphasis added); see 20 U.S.C. 1401(9)(C) (defining FAPE to require "an appropriate preschool, elementary school, or secondary school education in the State involved"). Standard dictionaries define "appropriate" to mean "specially suitable," "fit," or "proper," *Webster's Third New International Dictionary* 106 (1993) (*Webster's Third*) (capitalization altered), or "suitable or proper in the circumstances," *The New Oxford American Dictionary* 76 (2d ed. 2005) (*New Oxford*).

This Court has explained that "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015) (citation omitted). Precisely which factors are relevant turns on the particular statutory context in which that term arises. See *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (holding that what constitutes "appropriate" relief in IDEA district court action must be determined "in light of the purpose of the [IDEA]"); see also, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 286-287 (2011) (looking to statutory context and purpose to determine what relief is "appropriate" under 42 U.S.C. 2000cc-2(a)); *West* v. *Gibson*, 527 U.S. 212, 217-218 (1999) (holding that the meaning of "appropriate" depends on statutory context). Here, the text, purpose, and history of the IDEA establish that an education is "appropriate" when it provides the child with an opportunity to make significant progress in light of his capabilities.

2. The IDEA provisions describing the IEP development process envision that schools will offer children with disabilities the opportunity to make significant progress. See 20 U.S.C. 1414(d). Section 1414(d)(1)(A)(i)(I) first requires schools to assess "the child's present levels of academic achievement and functional performance," including "how the child's disability affects the child's involvement and progress in the general education curriculum." See 20 U.S.C. 1414(d)(3)(A). Section 1414(d)(1)(A)(i)(II) then requires schools to develop a clear statement of "measurable annual goals"—"including academic and functional goals"—in light of the child's needs and abilities. Those goals must be designed both (1) to "meet the child's needs that result from the child's disability to enable the child to * * * make progress in the general education curriculum," and (2) to "meet each of the child's other educational needs that result from the child's disability." 20 U.S.C. 1414(d)(1)(A)(i)(II).

The annual IEP goals are not merely hortatory: Schools must both describe how they will measure "the child's progress toward meeting" those academic and functional goals and establish a mechanism for providing parents with "periodic reports on th[at] progress." 20 U.S.C. 1414(d)(1)(A)(i)(III). Schools must also set forth, in detail, the way in which they will deliver special education and related services to ensure that the child is able to (1) "advance appropriately toward attaining the annual goals," (2) "be involved in and make progress in the general education curriculum," (3) "participate in extracurricular and other nonacademic activities," and (4) "be educated and participate with other children with disabilities and nondisabled children" in the activities described

in the IEP. 20 U.S.C. 1414(d)(1)(A)(i)(IV). And when a child exhibits a "lack of expected progress toward the annual goals and in the general curriculum," the IDEA requires schools to revise the IEP "as appropriate" to address the deficiency. 20 U.S.C. 1414(d)(4)(A)(ii).

Section 1414(d)'s IEP provisions provide clear insight into what level of education Congress has deemed "appropriate" for purposes of the FAPE requirement. See 20 U.S.C. 1401(9)(D) (requiring a FAPE to be "provided in conformity with the [IEP] required under [S]ection 1414(d)"). Congress would not have established procedures that are so elaborate and robust unless it intended to guarantee eligible children an opportunity to make significant educational progress in light of their respective capabilities.

3. Congress's stated purposes also support a significant educational progress standard. See *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 239-245 (2009) (emphasizing that IDEA must be interpreted in light of its "remedial purpose"); see also *Burlington*, 471 U.S. at 369 (looking to IDEA's "purpose" in determining what constitutes "appropriate" IDEA relief).

Congress expressly stated that the IDEA's "purposes" include "ensur[ing] the effectiveness of[] efforts to educate children with disabilities" and providing such children with a FAPE that will "meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A) and (4). It further explained that the IDEA is targeted to "[i]mproving educational results for children with disabilities" and thereby helping to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency" for

such individuals. 20 U.S.C. 1400(c)(1); see 20 U.S.C. 1412(a)(2) (requiring State goals to include "providing full educational opportunity to all children with disabilities"). Congress also emphasized the importance of setting "high expectations"—and avoiding "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5)(A).

Those purposes—all codified in the statutory text—reflect Congress's goal of ensuring that eligible children with disabilities have the opportunity to make significant educational progress at school. Without such progress, those children would be unable to attain further education, employment, or economic self-sufficiency. And denying them the chance to make such progress would undermine the goal of equal opportunity and ratify the "low expectations" that Congress unambiguously rejected. 20 U.S.C. 1400(c)(4).

4. Interpreting the IDEA to require an opportunity for significant educational progress is also consistent with Congress's repeated engagement with the IDEA over the past two decades. In 1982, the *Rowley* Court held that States must provide eligible children with "meaningful" access to education. 458 U.S. at 192. In 1997 and 2004, Congress twice enacted major legislation reauthorizing and modifying the IDEA in ways that reflect Congress's overarching desire to expand the educational rights of children with disabilities. See Individuals with Disabilities Education Improvement Act of 2004 (2004 IDEA Amendments), Pub. L. No. 108-446, 118 Stat. 2647; Individuals with Disabilities Education Act Amendments of 1997 (1997 IDEA Amendments), Pub. L. No. 105-17, 111 Stat. 37; see generally Pet. Br. 6-8.

Among other changes, the 1997 and 2004 IDEA Amendments established many of the findings, purposes, and IEP requirements discussed at length above.[6] By those changes, Congress sought "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove*, 557 U.S. at 239. (quoting S. Rep. No. 17, 105th Cong., 1st Sess. 3 (1997)); see S. Rep. No. 185, 108th Cong., 1st Sess. 1-2 (2003) (2003 Senate Report) (noting that purpose of amendments was to "strengthen implementation" of the IDEA, "shift the IDEA from a compliance-driven model to a performance-driven model," and generally "improv[e] the quality of education for children with disabilities"). As Congress itself indicated in both 1997 and 2004, its overriding goal was to replace "low expectations" with "high expectations."[7]

In addition, Congress has also aligned the IDEA with the substantial reform and accountability measures adopted in the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 6301 *et seq.*, as amended by the No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 15 Stat. 1425, and the Every Student Succeeds Act (2015) (ESSA), Pub. L. No. 114-95, 129 Stat. 1802. Congress amended the

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[6] See 2004 IDEA Amendments, §§ 601(c)(5)(A) and (d)(1)(A), 614(d)(1)(A)(i)(II) and (III), 118 Stat. 2649, 2651, 2708 (revising what is now 20 U.S.C. 1400(c)(5)(A) and (d)(1)(A), 1414(d)(1)(A)(i)(II) and (III)); 1997 IDEA Amendments, §§ 601(c)(1), (d)(1)(A) and (4), 614(d)(1)(A) and (4), 111 Stat. 38, 42, 83, 87 (revising what is now 20 U.S.C. 1400(c)(1), (d)(1)(A), and (4)(A), 1414(d)(1)(A) and (4)(A)); see generally pp. 18-20, *supra*.

[7] 2004 IDEA Amendments, § 601(c)(4) and (5)(A), 118 Stat. 2649; 1997 IDEA Amendments § 601(c)(4) and (5)(A), 111 Stat. 39.

IDEA—in 2004 and again in 2015—to establish "goals for the performance of children with disabilities" that "are the same as the State's long-term goals and measurements of interim progress for children with disabilities" under the ESEA. 20 U.S.C. 1412(a)(15)(A)(ii); see 20 U.S.C. 1412(a)(15)(B) (requiring States to "establish[] performance indicators" to assess such progress).

Congress's decision to link the IDEA to the ESEA is significant because the ESEA requires States to adopt "challenging academic content standards and aligned academic achievement standards" for *all* students in public schools—including children with disabilities. 20 U.S.C. 6311(b)(1); see 34 C.F.R. 200.1(a)-(c); see also 20 U.S.C. 6311(b)(1)(D)(i) (requiring those standards to be "aligned with the entrance requirements" for State's public colleges and universities). Separate standards can apply to children classified as having the most significant cognitive disabilities under certain circumstances, but only insofar as they "reflect professional judgment as to the highest possible standards achievable" by those children. 20 U.S.C. 6311(b)(1)(E)(i)(III); 34 C.F.R. 200.1(d).

The ESEA also requires States to carry out regular assessments measuring student progress under the applicable standards, and to establish "ambitious * * * long-term goals" for "improved * * * academic achievement" and high-school graduation rates. 20 U.S.C. 6311(b)(2) and (c)(4)(A). By linking the IDEA to the ESEA's accountability measures, Congress established a "unified system of accountability" to promote its purpose of "ensur[ing] that all children"—"including children with disabilities"—"are held to

high academic achievement standards." 2003 Senate Report 17-18.

Congress's repeated amendments to the IDEA in recent decades shed light on what counts as an "appropriate" education for purposes of the FAPE requirement. See *West*, 527 U.S. at 217-218 (holding that meaning of "appropriate" in 42 U.S.C. 2000e-16(b) is not "fr[o]ze[n]" in time and is properly informed by subsequent statutory amendments). At every step, Congress has reaffirmed and deepened its commitment to enhancing the substantive educational benefits available to children with disabilities. The IDEA's historical evolution thus confirms that an "appropriate" education is one that is reasonably calculated to allow a child with a disability to make significant educational progress.

5. Finally, requiring significant educational progress also comports with the Department of Education regulations implementing the IDEA. See *Rowley*, 458 U.S. at 186 n.8 (indicating that IDEA regulations are relevant source of "guidance" with respect to the FAPE requirement). Because the Department of Education is charged with enforcing the IDEA, its regulations are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See 20 U.S.C. 1406 (authorizing such regulations).

As noted above, the IDEA defines FAPE to include "special education," which includes "*specially designed instruction* * * * to meet the unique needs of a child with a disability." 20 U.S.C. 1401(29) (emphasis added). The Department of Education regulations define "specially designed instruction" to mean "adapting, as appropriate to the needs of an eligible child * * * , the content, methodology, or delivery of

instruction" so as "(i) [t]o address the unique needs of the child that result from the child's disability," and "(ii) [t]o ensure access of the child to the general curriculum, *so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children*." 34 C.F.R. 300.39(b)(3) (emphasis added).

Consistent with that regulation, the Department of Education has explained that it expects IEP goals to be "aligned with grade-level [academic] content standards for all children with disabilities." U.S. Dep't of Educ., Dear Colleague Letter 1 (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. At the same time, the Department has emphasized that such alignment does not replace the individualized decisionmaking required in the IEP process. *Id.* at 4. A school must therefore determine—on an "individualized" basis—how much progress toward grade-level standards a particular child can reasonably be expected to make each year, considering (among other factors) (1) the impact of the child's "specific disability," (2) the "special education instruction that has been provided to the child," (3) the child's "previous rate of academic growth," and (4) "whether the child is on track to achieve grade-level proficiency within the year." *Ibid.*

Ultimately, the Department has declared that "an IEP team should determine annual goals that are *ambitious* but *achievable*." Dear Colleague Letter 5 (emphasis added). That interpretation of the FAPE requirement tracks Congress's intent and supports the significant educational progress standard.

C. A Significant Educational Progress Standard Is Workable And Respects The Reasonable Judgment Of Schools And Hearing Officers

The IDEA's significant educational progress standard is readily administrable, and it pays due regard to the judgments of educational experts.

1. Requiring States to provide children with an opportunity to make significant educational progress does not impose a rigid, one-size-fits-all test that unduly restrains the discretion of educators. On the contrary, the standard is flexible and individualized, and it promotes the sort of commonsense educational judgments that schools and teachers generally make—with respect to all of their students—every day.

As explained above, the IDEA's robust procedural provisions require schools designing an IEP to meet with the child's parents, consider the child's unique needs and capabilities, determine what special education and related services will help the child learn, develop appropriate goals, and measure progress. See pp. 4, 18-19, *supra*. The significant educational progress standard protects children with disabilities by ensuring that the IEP development process is not an empty formality, but rather produces an educational plan that will actually advance Congress's goal of meaningfully enhancing the lives and opportunities of such children.

Schools must ultimately ensure that each child's IEP is tailored to his needs and reasonably calculated to provide him with an opportunity to make significant progress. The degree of progress that is required in each instance must reflect both (1) a fair assessment of the child's capabilities and potential, and (2) the

IDEA's overarching goals of preparing children with disabilities for "further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A).

Notably, the significant educational progress standard does not require States to "maximize each child's potential" or "achieve strict equality of opportunity or services." *Rowley*, 458 U.S. at 198 (rejecting these goals). But it does promote "high expectations" for children with disabilities—and it avoids "low expectations"—just as Congress intended. 20 U.S.C. 1400(c)(4) and (5)(A).

2. The straightforward and commonsense approach described above will undoubtedly result in different IEPs for different children with different capabilities. See *Rowley*, 458 U.S. at 202 (noting "infinite variations" in the educational benefits obtainable by such children). For example, a child with impaired vision may require special instruction in Braille, along with appropriately modified classroom materials, in order for her to be educated in the general education classroom and participate fully in the general education curriculum. See 20 U.S.C. 1414(d)(3)(B)(iii). For that child, significant educational progress might mean that she is able to attain the same degree of learning and academic achievement that is typical of her non-disabled classmates, such that she will "achieve passing marks," "advance from grade to grade," and eventually be in a position to pursue higher education. *Rowley*, 458 U.S. at 204.

Significant educational progress could mean something different, however, for a child whose learning disability leads him to read at four grade levels below his class peers. In that circumstance, the IEP team might reasonably conclude that an appropriate goal is

to close the reading gap by two levels through specialized reading instruction, while permitting the child to access some curricular content through a combination of audio text books and other electronic resources. Dear Colleague Letter 4-5 (offering similar example). That child could thereby receive a FAPE, even if the significant progress that he makes in reading still leaves him two levels behind his classmates at the end of the year.

Finally, a child with significant cognitive and other disabilities may need to receive much of his instruction outside of the general education classroom. Depending on the circumstances, significant progress for that student might encompass mastery of basic life skills—such as self-care, socialization, basic reading, and functional math (for example, counting money and telling time)—that could eventually enable the child to work and live independently.

In each of those cases, the hypothesized IEP reflects a reasonable determination—made by educators—of the degree of progress that the particular child can make in light of his particular disability and capability. In each case, that progress helps the child to master knowledge and develop essential skills, thereby advancing the underlying purposes of the IDEA. See 20 U.S.C. 1400(d)(1)(A) (noting Congress's goals of meeting "unique needs" of eligible children and preparing them for "further education, employment, and independent living").

3. The IDEA ensures that schools have the primary responsibility for consulting with parents and determining the degree of "ambitious but achievable" progress that is appropriate for each child with a disability. Dear Colleague Letter 5; see generally

pp. 3-4, 18-19, *supra*. In most cases, schools and parents will reach consensus on an IEP that is reasonably calculated to help the child learn and succeed. When schools and parents disagree, State hearing officers can adjudicate disputes and ensure that the IEP in fact provides the child with the opportunity to make significant progress. See pp. 4-5, *supra*.

In the relatively small number of IDEA cases that result in litigation, courts must grant "due weight" to the child-specific determinations made by hearing officers, *Rowley*, 458 U.S. at 206, and they should also respectfully consider the on-the-ground judgments of teachers and school administrators, see generally 20 U.S.C. 1414(d)(1)(B). The purpose of judicial review is not to have courts "impos[e] their view of preferable educational methods upon the States." *Rowley*, 458 U.S. at 207. Rather, its purpose is to ensure that the State decisionmakers have exercised reasonable educational judgment in concluding that a particular IEP will enable significant educational progress for the particular child at issue. Both the substantive FAPE standard and the standard of review respect the expertise of State educational officials, while also protecting the educational rights of children with disabilities.

D. The Tenth Circuit's "Merely * * * More Than *De Minimis*" Standard Is Erroneous

For the reasons explained above, the IDEA's FAPE requirement obligates States to give children with disabilities the opportunity to make significant educational progress. But even if the Court disagrees with that articulation of the substantive standard, one thing should be clear: The Tenth Circuit's "merely * * * more than *de minimis*" rule is wrong. Pet.

App. 16a (citations and internal quotation marks omitted). That standard is not consistent with the IDEA's text or purpose, and it harms children with disabilities by saddling them with low expectations in their most formative years. Whatever else the Court says about FAPE, it should hold that barely-more-than-trivial progress is not sufficient.

1. a. The Tenth Circuit's standard does not square with the IDEA's requirement that the education provided be "appropriate." 20 U.S.C. 1401(9)(C), 1412(a)(1)(A). As noted above, the ordinary meaning of "appropriate" is "specially suitable," "fit," or "proper," *Webster's Third* 106 (capitalization altered), or "suitable or proper in the circumstances," *New Oxford* 76.

The "merely * * * more than *de minimis*" test is incompatible with that ordinary meaning. No parent or educator in America would say that a child has received an "appropriate" or a "specially suitable" or "proper" education "in the circumstances" when all the child has received are benefits that are barely more than trivial. That is especially true when a child is capable of achieving much more.[8]

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[8] Respondent is wrong to argue (Supp. Br. in Opp. 10) that giving any substantive content to the word "appropriate" violates *Rowley*. To be sure, *Rowley* rejected the argument that the term "appropriate" is a "term of art which concisely expresses" the "potential-maximizing" interpretation embraced by the lower courts in that case. 458 U.S. at 197 n.21. But the Court expressly recognized that "appropriate" has both substantive *and* procedural components. *Ibid.* ("Congress used the word ["appropriate"] as much to describe the settings in which handicapped children should be educated *as to prescribe the substantive content* or supportive services of their education.") (emphasis added); see generally *id.* at 206-207 (requiring "twofold" substantive/

b. Three examples illustrate how the Tenth Circuit's "merely * * * more than de *minimis*" test violates the textual requirement that States provide an "appropriate" education.

First, consider a fourth-grader with cognitive disabilities who receives specialized educational programming for the first two months of the school year, during which she makes excellent progress. The school then cuts off the specialized services entirely, and she makes no additional progress for the remainder of the year. That child will undoubtedly have received *some* degree of more-than-trivial educational benefit during the short time she received specialized services. Under the Tenth Circuit's "merely * * * more than de *minimis*" test, that benefit would presumably satisfy the FAPE requirement. But no reasonable person would say that she received an "appropriate" education in any real sense of that word. 20 U.S.C. 1412(a)(1)(A).

Next imagine a middle-schooler whose autism results in both (1) a deficiency in his ability to read at grade level, and (2) a near-total inability to communicate with his peers in a school setting. For years, the school provides the child with specialized instruction to address the reading deficiency, but it does absolutely nothing to help the child improve his communication skills. The Tenth Circuit's standard would appear to be satisfied if the child makes any non-trivial improvement in reading—even though the school has ignored his communication problems and left him

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procedural FAPE inquiry). And the Court nowhere stated or implied that courts should ignore the term "appropriate" when conducting the FAPE inquiry in future cases.

entirely unprepared to succeed in high school and beyond.

Finally, consider a child who has a hearing impairment and requires assistive technology (such as an amplification device) in order to understand her teachers' instruction. See 20 U.S.C. 1401(1), 1414(d)(3)(B)(iv) and (v). If the child successfully employs the device in her social studies class—but her teachers refuse to use it in her math, reading, and science classes—the child may well make progress on her IEP goals in social studies, even while attaining no educational benefit whatsoever in any other subject.

In that circumstance, it would be absurd to describe the child's overall education as being "appropriate" for that child. Yet, under the "merely * * * more than *de minimis*" test, the child would nonetheless have received a FAPE. Notably, respondent does not deny that the Tenth Circuit would consider the FAPE requirement to be satisfied in these circumstances. See Supp. Br. in Opp. 10-11 (discussing this hypothetical). That concession lays bare the entirely illusory substantive protection offered by the Tenth Circuit's approach.

2. The IDEA's structure also undermines the "merely * * * more than *de minimis*" standard. As discussed in detail above, the IDEA makes clear that the IEP must be carefully tailored to the particular needs and abilities of each child, see 20 U.S.C. 1414(d)(1)(A)(i)(I), and it requires a clear statement of "measurable annual goals" in light of those needs and abilities, 20 U.S.C. 1414(d)(1)(A)(i)(II). Section 1414(d) also requires special education and related services to enable each child "to advance appropriately to-

ward attaining th[os]e annual goals." 20 U.S.C. 1414(d)(1)(A)(i)(IV); see pp. 18-19, *supra*.

Section 1414(d)'s description of the IEP requirements cannot be reconciled with the Tenth Circuit's approach. Congress would not have instructed States to develop each child's IEP with such a clear focus on promoting measureable annual progress—gauged in light of the particular needs and capabilities of each child—if all it wanted to require was that States provide some degree of educational benefit that is barely more than trivial.

3. Nor is the Tenth Circuit's standard consistent with Congress's purposes. As stated in the IDEA itself, those purposes include (1) "ensur[ing] the effectiveness" of education for children with disabilities; (2) "[i]mproving educational results for [such] children"; (3) promoting "equality of opportunity, full participation," and "economic self-sufficiency"; and (4) meeting the "unique needs" of children with disabilities and "prepar[ing] them for further education, employment, and independent living." 20 U.S.C. 1400(c)(1), (d)(1)(A), and (4). Congress also emphasized the need to set "high expectations"—and avoid "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5)(A).

Those statements of congressional intent are not consistent with the Tenth Circuit's minimalist interpretation of the FAPE requirement. Indeed, if school districts provide benefits that are barely more than *de minimis*, it would be nearly impossible to accomplish Congress's stated goals. No reasonable school district sets out to provide educational benefits to its nondisabled children that are barely more than trivial. Providing children with disabilities such limited bene-

fits would therefore deprive them of any semblance of "equality of opportunity." 20 U.S.C. 1400(c)(1). And if the school provides benefits that are just above *de minimis*, it is hard to imagine that disabled children will be prepared for "further education, employment, and independent living" or "economic self-sufficiency." 20 U.S.C. 1400(d)(1)(A). Rather than promote "high expectations," the Tenth Circuit's standard expressly *lowers* expectations. 20 U.S.C. 1400(c)(5).

4. Neither the Tenth Circuit nor respondent have offered a persuasive explanation of how the "merely * * * more than de *minimis*" rule comports with the IDEA's text, structure, or history. The court of appeals appeared to believe that this standard is compelled by *Rowley*, and respondent relied heavily on *Rowley* in defending that rule at the certiorari stage. Both are mistaken: *Rowley* offers no support for the Tenth Circuit's standard, and in fact the decision affirmatively undermines that court's approach.

a. Respondent and the Tenth Circuit emphasize *Rowley*'s statement that the IDEA requires States to provide children with "*some* educational benefit," 458 U.S. 200 (emphasis added), and they appear to conclude that the Court's use of the word "some" means that anything more than nothing (or its legal equivalent of *de minimis*) is sufficient. That is not a reasonable interpretation of what the *Rowley* Court meant.

Most importantly, the Court was explicit that States must provide children with disabilities "access" to education that is "meaningful." *Rowley*, 458 U.S. at 192. As explained above, such access is "meaningful" only if it gives children the opportunity to obtain benefits—or to make progress—that is meaningful. See pp. 14-16, *supra*.

The Court also expressly stated that when a child "is being educated in the regular classrooms of the public educational system," the child's IEP must be calculated to "*enable the child to achieve passing marks and advance from grade to grade*." *Rowley*, 458 U.S. 204 (emphasis added). The Court's explanation of how the FAPE requirement would apply in that circumstance makes clear that providing an educational benefit that is "merely * * * more than *de minimis*" does not suffice.

Respondent suggests that *Rowley*'s "meaningful" access requirement embraces no substantive standard at all, and merely requires compliance with the IDEA's procedural provisions. Supp. Br. in Opp. 8 ("Together, the IDEA's procedural requirements ensure that a child's 'access to public education' is 'meaningful.'") (quoting *Rowley*, 458 U.S. at 192). But that contradicts the very sentence in which the "meaningful" access requirement appears. 458 U.S. at 192. In that sentence, the Court expressly referred to the "meaningful" access requirement as a "*substantive educational standard*." *Ibid.* (emphasis added). Respondent's interpretation of *Rowley* makes sense only if the language of that decision is ignored.

b. The Tenth Circuit's test also cannot be reconciled with *Rowley*'s emphasis on the "dramatically" different capabilities of different children with different disabilities. 458 U.S. at 202. *Rowley* cited those different capabilities in explaining why it was declining "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* The Tenth Circuit's test focuses only on whether the child has attained some degree of non-trivial benefit, and it does

not require any consideration of how that benefit compares to the child's capabilities and potential. In doing so, the test departs from the child-specific analysis envisioned by *Rowley*.

Curiously, respondent agrees (Supp. Br. in Opp. 11) that "[a]n IEP's substantive adequacy" must "always [be] gauged in relation to *individualized* goals based on an *individualized* assessment of a student's needs." But respondent fails to explain how a "merely * * * more than *de minimis*" standard is actually consistent with that individualized approach. By its terms, the Tenth Circuit's test requires a binary inquiry into whether the child has been offered anything more than the legal equivalent of nothing. If so, then the FAPE requirement is automatically satisfied—regardless of whether the child is capable of achieving a lot more, a little more, or something in between. That sort of lowest-common-denominator, one-size-fits-all approach is not what Congress intended when it guaranteed eligible children the right to an "appropriate" education.

5. This Court's interpretation of the FAPE requirement will have practical, everyday consequences for the approximately 6.7 million children with disabilities who are covered by the IDEA.[9] The FAPE requirement is the statutory mandate "most fundamental" to the IDEA. *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 530 (2007). If school districts are told that the IDEA only requires them to provide eligible children with educational benefits that are

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[9] U.S. Dep't of Educ., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016* 250, http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html#download.

"merely * * * more than *de minimis*"—*i.e.*, if they are told that it is perfectly fine to aim low—they are less likely to offer the same educational opportunities than if they are told that they must give such children a chance to make significant progress.

As a practical matter, the legal standard will thus shape the conduct and choices of educators and parents when developing IEPs for children with disabilities. It will also guide hearing officers and courts adjudicating disputes between parents and schools, because the "[t]he adequacy of the [child's] educational program is" typically the "central issue" in IDEA litigation. *Winkelman*, 550 U.S. at 532; see 20 U.S.C. 1415(f)(3)(E).

The central role played by the FAPE requirement in the IDEA's scheme makes it especially important for this Court to reject the Tenth Circuit's "merely * * * more than *de minimis*" standard. That standard is—on its face—antithetical to Congress's goal of raising expectations for such children. For the reasons set forth above, the best way to vindicate the IDEA's text and purpose is to require schools to provide eligible children with an opportunity to make significant educational progress.

CONCLUSION

The court of appeals' decision should be vacated and the case should be remanded for assessment under the correct standard.

Respectfully submitted.

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APPENDIX

1. 20 U.S.C. 1400 provides:

Short title; findings; purposes

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because—

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C. 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and

unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with misla-

beling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free 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;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

2. 20 U.S.C. 1401 provides in pertinent part:

Definitions

Except as otherwise provided, in this chapter:

* * * * *

(3) Child with a disability

(A) In general

The term "child with a disability" means a child—

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

* * * * *

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

* * * * *

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

3. 20 U.S.C. 1406 provides:

Requirements for prescribing regulations

(a) In general

In carrying out the provisions of this chapter, the Secretary shall issue regulations under this chapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.

(b) Protections provided to children

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter that—

(1) violates or contradicts any provision of this chapter; or

(2) procedurally or substantively lessens the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects

the clear and unequivocal intent of Congress in legislation.

(c) Public comment period

The Secretary shall provide a public comment period of not less than 75 days on any regulation proposed under subchapter II or subchapter III on which an opportunity for public comment is otherwise required by law.

(d) Policy letters and statements

The Secretary may not issue policy letters or other statements (including letters or statements regarding issues of national significance) that—

(1) violate or contradict any provision of this chapter; or

(2) establish a rule that is required for compliance with, and eligibility under, this chapter without following the requirements of section 553 of title 5.

(e) Explanation and assurances

Any written response by the Secretary under subsection (d) regarding a policy, question, or interpretation under subchapter II shall include an explanation in the written response that—

(1) such response is provided as informal guidance and is not legally binding;

(2) when required, such response is issued in compliance with the requirements of section 553 of title 5; and

(3) such response represents the interpretation by the Department of Education of the applicable

statutory or regulatory requirements in the context of the specific facts presented.

(f) Correspondence from Department of Education describing interpretations of this chapter

(1) In general

The Secretary shall, on a quarterly basis, publish in the Federal Register, and widely disseminate to interested entities through various additional forms of communication, a list of correspondence from the Department of Education received by individuals during the previous quarter that describes the interpretations of the Department of Education of this chapter or the regulations implemented pursuant to this chapter.

(2) Additional information

For each item of correspondence published in a list under paragraph (1), the Secretary shall—

(A) identify the topic addressed by the correspondence and shall include such other summary information as the Secretary determines to be appropriate; and

(B) ensure that all such correspondence is issued, where applicable, in compliance with the requirements of section 553 of title 5.

4. 20 U.S.C. 1412(a) provides*:

State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children—

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

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* As amended by the Every Student Succeeds Act (2015) (ESSA), Pub. L. No. 114-95, §§ 9214(d)(2)(A), (B), and (C), 9215(ss)(3)(A)(i), (ii), (B)(i), and (ii), 129 Stat. 2164-2165, 2182.

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility—

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

(C) State flexibility

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disa-

bilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the

use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement

(i) In general

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

(ii) Assurance

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the pur-

poses of evaluation and placement of children with disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) Evaluation

Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

(8) Confidentiality

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

(9) Transition from subchapter III to preschool programs

Children participating in early intervention programs assisted under subchapter III, and who will participate in preschool programs assisted under this subchapter, experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(9) of this title. By the third birthday of such a child, an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) of this title, an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition plan-

ning conferences arranged by the designated lead agency under section 1435(a)(10) of this title.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find

process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of pa-

rentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including mate-

rials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agen-

cies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

(11) State educational agency responsible for general supervision

(A) In general

The State educational agency is responsible for ensuring that—

(i) the requirements of this subchapter are met;

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency—

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency; and

(iii) in carrying out this subchapter with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) Exception

Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this subchapter are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in

subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

(ii) Conditions and terms of reimbursement

The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

(iii) Interagency disputes

Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(iv) Coordination of services procedures

Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

(B) Obligation of public agency

(i) In general

If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsi-

bility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) of this title relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).

(ii) Reimbursement for services by public agency

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to

the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

(C) Special rule

The requirements of subparagraph (A) may be met through—

(i) State statute or regulation;

(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer and approved by the Secretary.

(13) Procedural requirements relating to local educational agency eligibility

The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this subchapter without first affording that agency reasonable notice and an opportunity for a hearing.

(14) Personnel qualifications

(A) In general

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and

trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(B) Related services personnel and paraprofessionals

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that—

(i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this subchapter to be used to assist in the provision of special education and related services under this subchapter to children with disabilities.

(C) Qualifications for special education teachers

The qualifications described in subparagraph (A) shall ensure that each person employed as a

special education teacher in the State who teaches elementary school, middle school, or secondary school—

(i) has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;

(ii) has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) holds at least a bachelor's degree..[1]

(D) Policy

In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special ed-

[1] So in original.

ucation and related services under this subchapter to children with disabilities.

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

(15) Performance goals and indicators

The State—

(A) has established goals for the performance of children with disabilities in the State that—

(i) promote the purposes of this chapter, as stated in section 1400(d) of this title;

(ii) are the same as the State's long-term goals and measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title;

(iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and

(iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title; and

(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 6311(h) of this title.

(16) Participation in assessments

(A) In general

All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 6311 of this title, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.

(B) Accommodation guidelines

The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.

(C) Alternate assessments

(i) In general

The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.

(ii) Requirements for alternate assessments

The guidelines under clause (i) shall provide for alternate assessments that—

(I) are aligned with the challenging State academic content standards under section 6311(b)(1) of this title and alternate academic achievement standards under section 6311(b)(1)(E) of this title; and

(II) if the State has adopted alternate academic achievement standards permitted under section 6311(b)(1)(E) of this title, measure the achievement of children with disabilities against those standards.

(iii) Conduct of alternate assessments

The State conducts the alternate assessments described in this subparagraph.

(D) Reports

The State educational agency (or, in the case of a districtwide assessment, the local education-

al agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(I).

(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(II).

(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

(E) Universal design

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and ad-

ministering any assessments under this paragraph.

(17) Supplementation of State, local, and other Federal funds

(A) Expenditures

Funds paid to a State under this subchapter will be expended in accordance with all the provisions of this subchapter.

(B) Prohibition against commingling

Funds paid to a State under this subchapter will not be commingled with State funds.

(C) Prohibition against supplantation and conditions for waiver by Secretary

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(18) Maintenance of State financial support

(A) In general

The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(B) Reduction of funds for failure to maintain support

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that—

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter.

(D) Subsequent years

If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(19) Public participation

Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(20) Rule of construction

In complying with paragraphs (17) and (18), a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation.

(21) State advisory panel

(A) In general

The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and

related services for children with disabilities in the State.

(B) Membership

Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including—

(i) parents of children with disabilities (ages birth through 26);

(ii) individuals with disabilities;

(iii) teachers;

(iv) representatives of institutions of higher education that prepare special education and related services personnel;

(v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);

(vi) administrators of programs for children with disabilities;

(vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(viii) representatives of private schools and public charter schools;

(ix) not less than 1 representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(x) a representative from the State child welfare agency responsible for foster care; and

(xi) representatives from the State juvenile and adult corrections agencies.

(C) Special rule

A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(D) Duties

The advisory panel shall—

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 1418 of this title;

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this subchapter; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

(22) Suspension and expulsion rates

(A) In general

The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

(i) among local educational agencies in the State; or

(ii) compared to such rates for nondisabled children within such agencies.

(B) Review and revision of policies

If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this chapter.

(23) Access to instructional materials

(A) In general

The State adopts the National Instructional Materials Accessibility Standard for the purpos-

es of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register.

(B) Rights of State educational agency

Nothing in this paragraph shall be construed to require any State educational agency to coordinate with the National Instructional Materials Access Center. If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(C) Preparation and delivery of files

If a State educational agency chooses to coordinate with the National Instructional Materials Access Center, not later than 2 years after December 3, 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to—

(i) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center electronic files containing the contents of the print instruc-

tional materials using the National Instructional Materials Accessibility Standard; or

(ii) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(D) Assistive technology

In carrying out this paragraph, the State educational agency, to the maximum extent possible, shall work collaboratively with the State agency responsible for assistive technology programs.

(E) Definitions

In this paragraph:

(i) National Instructional Materials Access Center

The term "National Instructional Materials Access Center" means the center established pursuant to section 1474(e) of this title.

(ii) National Instructional Materials Accessibility Standard

The term "National Instructional Materials Accessibility Standard" has the meaning given the term in section 1474(e)(3)(A) of this title.

(iii) Specialized formats

The term "specialized formats" has the meaning given the term in section 1474(e)(3)(D) of this title.

(24) Overidentification and disproportionality

The State has in effect, consistent with the purposes of this chapter and with section 1418(d) of this title, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title.

(25) Prohibition on mandatory medication

(A) In general

The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 1414 of this title, or receiving services under this chapter.

(B) Rule of construction

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).

5. 20 U.S.C. 1414 provides in pertinent part*:

Evaluations, eligibility determinations, individualized education programs, and educational placements

* * * * *

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

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* As amended by the ESSA, Pub. L. No. 114-95, § 9215(ss)(5), 129 Stat. 2182.

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) Determination of eligibility and educational need

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title, as such section was in effect on the day before December 10, 2015);

(B) lack of instruction in math; or

(C) limited English proficiency.

(6) Specific learning disabilities

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based interven-

tion as a part of the evaluation procedures described in paragraphs (2) and (3).

* * * * *

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results,

who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into

the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and

the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is—

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(C) Program for children who transfer school districts

(i) In general

(I) Transfer within the same State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency

shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(ii) Transmittal of records

To facilitate the transition for a child described in clause (i)—

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

(B) Consideration of special factors

The IEP Team shall—

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf

or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, 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.

(E) Consolidation of IEP Team meetings

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(F) Amendments

Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

(5) Multi-year IEP demonstration

(A) Pilot program

(i) Purpose

The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

(ii) Authorization

In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

(iii) Proposal

(I) In general

A State desiring to participate in the program under this paragraph shall submit a proposal to the Secretary at such time and in such manner as the Secretary may reasonably require.

(II) Content

The proposal shall include—

(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including—

(AA) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including—

(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(CC) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

(B) Report

Beginning 2 years after December 3, 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including—

(i) reducing—

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this subchapter;

(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

(C) Definition

In this paragraph, the term "natural transition points" means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from ele-

mentary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

(6) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(7) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(16) of this title and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).

(ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of such children's age, before such children will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections[1] 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(f) Alternative means of meeting participation

When conducting IEP team[2] meetings and placement meetings pursuant to this section, section 1415(e) of this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be capitalized.

6. 20 U.S.C. 1415(i) provides:

Procedural safeguards

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

7. 20 U.S.C. 6311 provides in pertinent part*:

State plans

(a) Filing for grants

(1) In general

For any State desiring to receive a grant under this part, the State educational agency shall file with the Secretary a plan that is—

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* As amended by the ESSA, Pub. L. No. 114-95, § 1005, 129 Stat. 1820.

(A) developed by the State educational agency with timely and meaningful consultation with the Governor, members of the State legislature and State board of education (if the State has a State board of education), local educational agencies (including those located in rural areas), representatives of Indian tribes located in the State, teachers, principals, other school leaders, charter school leaders (if the State has charter schools), specialized instructional support personnel, paraprofessionals, administrators, other staff, and parents; and

(B) is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the Rehabilitation Act of 1973 (20 U.S.C. 701 et seq.),[1] the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.), the Workforce Innovation and Opportunity Act (29 U.S.C. 3101 et seq.), the Head Start Act (42 U.S.C. 9831 et seq.), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858 et seq.),[2] the Education Sciences Reform Act of 2002 (20 U.S.C. 9501 et seq.), the Education[3] Technical Assistance Act of 2002 (20 U.S.C. 9601 et. seq.), the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9621 et seq.), the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.), and the Adult Ed-

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[1] So in original. Probably should be "(29 U.S.C. 701 et seq.),".

[2] So in original. Probably should be "9857 et seq.),".

[3] So in original. Probably should be "Educational".

ucation and Family Literacy Act (29 U.S.C. 3271 et seq.).

* * * * *

(b) Challenging academic standards and academic assessments

(1) Challenging State academic standards

(A) In general

Each State, in the plan it files under subsection (a), shall provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards (referred to in this chapter as "challenging State academic standards"), which achievement standards shall include not less than 3 levels of achievement, that will be used by the State, its local educational agencies, and its schools to carry out this part. A State shall not be required to submit such challenging State academic standards to the Secretary.

(B) Same standards

Except as provided in subparagraph (E), the standards required by subparagraph (A) shall—

(i) apply to all public schools and public school students in the State; and

(ii) with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State.

(C) Subjects

The State shall have such academic standards for mathematics, reading or language arts, and science, and may have such standards for any other subject determined by the State.

(D) Alignment

(i) In general

Each State shall demonstrate that the challenging State academic standards are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards

(ii) Rule of construction

Nothing in this chapter shall be construed to authorize public institutions of higher education to determine the specific challenging State academic standards required under this paragraph.

(E) Alternate academic achievement standards for students with the most significant cognitive disabilities

(i) In general

The State may, through a documented and validated standards-setting process, adopt alternate academic achievement standards for students with the most significant cognitive disabilities, provided those standards—

(I) are aligned with the challenging State academic content standards under subparagraph (A);

(II) promote access to the general education curriculum, consistent with the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.);

(III) reflect professional judgment as to the highest possible standards achievable by such students;

(IV) are designated in the individualized education program developed under section 614(d)(3) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(3)) for each such student as the academic achievement standards that will be used for the student; and

(V) are aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of Public Law 93-112 [29 U.S.C. 701 et seq.], as in effect on July 22, 2014.

(ii) Prohibition on any other alternate or modified academic achievement standards

A State shall not develop, or implement for use under this part, any alternate academic achievement standards for children with disabilities that are not alternate academic achievement standards that meet the requirements of clause (i).

(F) English language proficiency standards

Each State plan shall demonstrate that the State has adopted English language proficiency standards that—

(i) are derived from the 4 recognized domains of speaking, listening, reading, and writing;

(ii) address the different proficiency levels of English learners; and

(iii) are aligned with the challenging State academic standards.

(G) Prohibitions

(i) Standards review or approval

A State shall not be required to submit any standards developed under this subsection to the Secretary for review or approval.

(ii) Federal control

The Secretary shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State.

(H) Existing standards

Nothing in this part shall prohibit a State from revising, consistent with this section, any standards adopted under this part before or after December 10, 2015.

(2) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality student academic assessments in mathematics, reading or language arts, and science. The State retains the right to implement such assessments in any other subject chosen by the State.

(B) Requirements

The assessments under subparagraph (A) shall—

(i) except as provided in subparagraph (D), be—

(I) the same academic assessments used to measure the achievement of all public elementary school and secondary school students in the State; and

(II) administered to all public elementary school and secondary school students in the State;

(ii) be aligned with the challenging State academic standards, and provide coherent and timely information about student attainment of such standards and whether the student is performing at the student's grade level;

(iii) be used for purposes for which such assessments are valid and reliable, consistent with relevant, nationally recognized profes-

sional and technical testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information;

(iv) be of adequate technical quality for each purpose required under this chapter and consistent with the requirements of this section, the evidence of which shall be made public, including on the website of the State educational agency;

(v)(I) in the case of mathematics and reading or language arts, be administered—

(aa) in each of grades 3 through 8; and

(bb) at least once in grades 9 through 12;

(II) in the case of science, be administered not less than one time during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(c)(c) grades 10 through 12; and

(III) in the case of any other subject chosen by the State, be administered at the discretion of the State;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding, which may include

measures of student academic growth and may be partially delivered in the form of portfolios, projects, or extended performance tasks;

(vii) provide for—

(I) the participation in such assessments of all students;

(II) the appropriate accommodations, such as interoperability with, and ability to use, assistive technology, for children with disabilities (as defined in section 602(3) of the Individuals with Disabilities Education Act (20 U.S.C. 1401(3))), including students with the most significant cognitive disabilities, and students with a disability who are provided accommodations under an Act other than the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), necessary to measure the academic achievement of such children relative to the challenging State academic standards or alternate academic achievement standards described in paragraph (1)(E); and

(III) the inclusion of English learners, who shall be assessed in a valid and reliable manner and provided appropriate accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic

content areas, until such students have achieved English language proficiency, as determined under subparagraph (G);

(viii) at the State's discretion—

(I) be administered through a single summative assessment; or

(II) be administered through multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement or growth;

(ix) notwithstanding clause (vii)(III), provide for assessments (using tests in English) of reading or language arts of any student who has attended school in the United States (not including the Commonwealth of Puerto Rico) for 3 or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed 2 additional consecutive years, provided that such student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests

(written in English) of reading or language arts;

(x) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii), regarding achievement on such assessments that allow parents, teachers, principals, and other school leaders to understand and address the specific academic needs of students, and that are provided to parents, teachers, and school leaders, as soon as is practicable after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xi) enable results to be disaggregated within each State, local educational agency, and school by—

(I) each major racial and ethnic group;

(II) economically disadvantaged students as compared to students who are not economically disadvantaged;

(III) children with disabilities as compared to children without disabilities;

(IV) English proficiency status;

(V) gender; and

(VI) migrant status,

except that such disaggregation shall not be required in the case of a State, local educational agency, or a school in which the number of students in a subgroup is insufficient to

yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(xii) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, other school leaders, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items; and

(xiii) be developed, to the extent practicable, using the principles of universal design for learning.

(C) Exception for advanced mathematics in middle school

A State may exempt any 8th grade student from the assessment in mathematics described in subparagraph (B)(v)(I)(aa) if—

(i) such student takes the end-of-course assessment the State typically administers to meet the requirements of subparagraph (B)(v)(I)(bb) in mathematics;

(ii) such student's achievement on such end-of-course assessment is used for purposes of subsection (c)(4)(B)(i), in lieu of such student's achievement on the mathematics assessment required under subparagraph (B)(v)(I)(aa), and such student is counted as

participating in the assessment for purposes of subsection (c)(4)(B)(vi);[4] and

(iii) in high school, such student takes a mathematics assessment pursuant to subparagraph (B)(v)(I)(bb) that—

(I) is any end-of-course assessment or other assessment that is more advanced than the assessment taken by such student under clause (i) of this subparagraph; and

(II) shall be used to measure such student's academic achievement for purposes of subsection (c)(4)(B)(i).

(D) Alternate assessments for students with the most significant cognitive disabilities

(i) Alternate assessments aligned with alternate academic achievement standards

A State may provide for alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards described in paragraph (1)(E) for students with the most significant cognitive disabilities, if the State—

(I) consistent with clause (ii), ensures that, for each subject, the total number of students assessed in such subject using the alternate assessments does not exceed 1 percent of the total number of all students in the State who are assessed in such subject;

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[4] So in original. No subsec. (c)(4)(B)(vi) has been enacted.

(II) ensures that the parents of such students are clearly informed, as part of the process for developing the individualized education program (as defined in section 614(d)(1)(A) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(1)(A)))—

(aa) that their child's academic achievement will be measured based on such alternate standards; and

(bb) how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(III) promotes, consistent with the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum;

(IV) describes in the State plan the steps the State has taken to incorporate universal design for learning, to the extent feasible, in alternate assessments;

(V) describes in the State plan that general and special education teachers, and other appropriate staff—

(aa) know how to administer the alternate assessments; and

(bb) make appropriate use of accommodations for students with disabilities on all assessments required under this paragraph;

(VI) develops, disseminates information on, and promotes the use of appropriate accommodations to increase the number of students with significant cognitive disabilities—

(aa) participating in academic instruction and assessments for the grade level in which the student is enrolled; and

(bb) who are tested based on challenging State academic standards for the grade level in which the student is enrolled; and

(VII) does not preclude a student with the most significant cognitive disabilities who takes an alternate assessment based on alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma.

(ii) Special rules

(I) Responsibility under IDEA

Subject to the authority and requirements for the individualized education program team for a child with a disability under section 614(d)(1)(A)(i)(VI)(bb) of the Individuals with Disabilities Education Act

(20 U.S.C. 1414(d)(1)(A)(i)(VI)(bb)), such team, consistent with the guidelines established by the State and required under section 612(a)(16)(C) of such Act (20 U.S.C. 1412(c)(16)(C))[5] and clause (i)(II) of this subparagraph, shall determine when a child with a significant cognitive disability shall participate in an alternate assessment aligned with the alternate academic achievement standards.

(II) Prohibition on local cap

Nothing in this subparagraph shall be construed to permit the Secretary or a State educational agency to impose on any local educational agency a cap on the percentage of students administered an alternate assessment under this subparagraph, except that a local educational agency exceeding the cap applied to the State under clause (i)(I) shall submit information to the State educational agency justifying the need to exceed such cap.

(III) State support

A State shall provide appropriate oversight, as determined by the State, of any local educational agency that is required to submit information to the State under subclause (II).

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[5] So in original. Probably should be "(20 U.S.C. 1412(a)(16(C))".

(IV) Waiver authority

This subparagraph shall be subject to the waiver authority under section 7861 of this title.

(E) State authority

If a State educational agency provides evidence, which is satisfactory to the Secretary, that neither the State educational agency nor any other State government official, agency, or entity has sufficient authority, under State law, to adopt challenging State academic standards, and academic assessments aligned with such standards, which will be applicable to all students enrolled in the State's public elementary schools and secondary schools, then the State educational agency may meet the requirements of this subsection by—

(i) adopting academic standards and academic assessments that meet the requirements of this subsection, on a statewide basis, and limiting their applicability to students served under this part; or

(ii) adopting and implementing policies that ensure that each local educational agency in the State that receives grants under this part will adopt academic content and student academic achievement standards, and academic assessments aligned with such standards, which—

(I) meet all of the criteria in this subsection and any regulations regarding such

standards and assessments that the Secretary may publish; and

(II) are applicable to all students served by each such local educational agency.

(F) Language assessments

(i) In general

Each State plan shall identify the languages other than English that are present to a significant extent in the participating student population of the State and indicate the languages for which annual student academic assessments are not available and are needed.

(ii) Secretarial assistance

The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages, but shall not mandate a specific academic assessment or mode of instruction.

(G) Assessments of English language proficiency

(i) In general

Each State plan shall demonstrate that local educational agencies in the State will provide for an annual assessment of English proficiency of all English learners in the schools served by the State educational agency.

(ii) Alignment

The assessments described in clause (i) shall be aligned with the State's English language proficiency standards described in paragraph (1)(F).

(H) Locally-selected assessment

(i) In general

Nothing in this paragraph shall be construed to prohibit a local educational agency from administering a locally-selected assessment in lieu of the State-designed academic assessment under subclause (I)(bb) and subclause (II)(cc) of subparagraph (B)(v), if the local educational agency selects a nationally-recognized high school academic assessment that has been approved for use by the State as described in clause (iii) or (iv) of this subparagraph.

(ii) State technical criteria

To allow for State approval of nationally-recognized high school academic assessments that are available for local selection under clause (i), a State educational agency shall establish technical criteria to determine if any such assessment meets the requirements of clause (v).

(iii) State approval

If a State educational agency chooses to make a nationally-recognized high school assessment available for selection by a local educational agency under clause (i), which

has not already been approved under this clause, such State educational agency shall—

(I) conduct a review of the assessment to determine if such assessment meets or exceeds the technical criteria established by the State educational agency under clause (ii);

(II) submit evidence in accordance with subsection (a)(4) that demonstrates such assessment meets the requirements of clause (v); and

(III) after fulfilling the requirements of subclauses (I) and (II), approve such assessment for selection and use by any local educational agency that requests to use such assessment under clause (i).

(iv) Local educational agency option

(I) Local educational agency

If a local educational agency chooses to submit a nationally-recognized high school academic assessment to the State educational agency, subject to the approval process described in subclause (I) and subclause (II) of clause (iii) to determine if such assessment fulfills the requirements of clause (v), the State educational agency may approve the use of such assessment consistent with clause (i).

(II) State educational agency

Upon such approval, the State educational agency shall approve the use of such

assessment in any other local educational agency in the State that subsequently requests to use such assessment without repeating the process described in subclauses (I) and (II) of clause (iii).

(v) Requirements

To receive approval from the State educational agency under clause (iii), a locally-selected assessment shall—

(I) be aligned to the State's academic content standards under paragraph (1), address the depth and breadth of such standards, and be equivalent in its content coverage, difficulty, and quality to the State-designed assessments under this paragraph (and may be more rigorous in its content coverage and difficulty than such State-designed assessments);

(II) provide comparable, valid, and reliable data on academic achievement, as compared to the State-designed assessments, for all students and for each subgroup of students defined in subsection (c)(2), with results expressed in terms consistent with the State's academic achievement standards under paragraph (1), among all local educational agencies within the State;

(III) meet the requirements for the assessments under subparagraph (B) of this paragraph, including technical crite-

ria, except the requirement under clause (i) of such subparagraph; and

(IV) provide unbiased, rational, and consistent differentiation between schools within the State to meet the requirements of subsection (c).

(vi) Parental notification

A local educational agency shall notify the parents of high school students served by the local educational agency—

(I) of its request to the State educational agency for approval to administer a locally-selected assessment; and

(II) upon approval, and at the beginning of each subsequent school year during which the locally selected assessment will be administered, that the local educational agency will be administering a different assessment than the State-designed assessments under subclause (I)(bb) and subclause (II)(cc) of subparagraph (B)(v).

(I) Deferral

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, for 1 year for each year for which the amount appropriated for grants under part B is less than $369,100,000.

(J) Adaptive assessments

(i) In general

Subject to clause (ii), a State retains the right to develop and administer computer adaptive assessments as the assessments described in this paragraph, provided the computer adaptive assessments meet the requirements of this paragraph, except that—

(I) subparagraph (B)(i) shall not be interpreted to require that all students taking the computer adaptive assessment be administered the same assessment items; and

(II) such assessment—

(aa) shall measure, at a minimum, each student's academic proficiency based on the challenging State academic standards for the student's grade level and growth toward such standards; and

(bb) may measure the student's level of academic proficiency and growth using items above or below the student's grade level, including for use as part of a State's accountability system under subsection (c).

(ii) Students with the most significant cognitive disabilities and English learners

In developing and administering computer adaptive assessments—

(I) as the assessments allowed under subparagraph (D), a State shall ensure that such computer adaptive assessments—

(aa) meet the requirements of this paragraph, including subparagraph (D), except such assessments shall not be required to meet the requirements of clause (i)(II); and

(bb) assess the student's academic achievement to measure, in the subject being assessed, whether the student is performing at the student's grade level; and

(II) as the assessments required under subparagraph (G), a State shall ensure that such computer adaptive assessments—

(aa) meet the requirements of this paragraph, including subparagraph (G), except such assessment shall not be required to meet the requirements of clause (i)(II); and

(bb) assess the student's language proficiency, which may include growth towards such proficiency, in order to measure the student's acquisition of English.

(K) Rule of construction on parent rights

Nothing in this paragraph shall be construed as preempting a State or local law regarding the decision of a parent to not have the parent's child

participate in the academic assessments under this paragraph.

(L) Limitation on assessment time

Subject to Federal or State requirements related to assessments, evaluations, and accommodations, each State may, at the sole discretion of such State, set a target limit on the aggregate amount of time devoted to the administration of assessments for each grade, expressed as a percentage of annual instructional hours.

(3) Exception for recently arrived English learners

(A) Assessments

With respect to recently arrived English learners who have been enrolled in a school in one of the 50 States in the United States or the District of Columbia for less than 12 months, a State may choose to—

(i) exclude—

(I) such an English learner from one administration of the reading or language arts assessment required under paragraph (2); and

(II) such an English learner's results on any of the assessments required under paragraph (2)(B)(v)(I) or (2)(G) for the first year of the English learner's enrollment in such a school for the purposes of the State-determined accountability system under subsection (c); or

(ii)(I) assess, and report the performance of, such an English learner on the reading or language arts and mathematics assessments required under paragraph (2)(B)(v)(I) in each year of the student's enrollment in such a school; and

(II) for the purposes of the State-determined accountability system—

(aa) for the first year of the student's enrollment in such a school, exclude the results on the assessments described in subclause (I);

(bb) include a measure of student growth on the assessments described in subclause (I) in the second year of the student's enrollment in such a school; and

(cc) include proficiency on the assessments described in subclause (I) in the third year of the student's enrollment in such a school, and each succeeding year of such enrollment.

(B) English learner subgroup

With respect to a student previously identified as an English learner and for not more than 4 years after the student ceases to be identified as an English learner, a State may include the results of the student's assessments under paragraph (2)(B)(v)(I) within the English learner subgroup of the subgroups of students (as defined in subsection (c)(2)(D)) for the purposes of the State-determined accountability system.

* * * * *

8. 34 C.F.R. 200.1 provides in pertinent part:

State responsibilities for developing challenging academic standards.

(a) *Academic standards in general.* A State must develop challenging academic content and student academic achievement standards that will be used by the State, its local educational agencies (LEAs), and its schools to carry out subpart A of this part. These academic standards must—

(1) Be the same academic content and academic achievement standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under subpart A of this part, except as provided in paragraphs (d) and (e) of this section, which apply only to the State's academic achievement standards;

(2) Include the same knowledge and skills expected of all students and the same levels of achievement expected of all students, except as provided in paragraphs (d) and (e) of this section; and

(3) Include at least mathematics, reading/language arts, and, beginning in the 2005-2006 school year, science, and may include other subjects determined by the State.

(b) *Academic content standards.* (1) The challenging academic content standards required under paragraph (a) of this section must—

(i) Specify what all students are expected to know and be able to do;

(ii) Contain coherent and rigorous content; and

(iii) Encourage the teaching of advanced skills.

(2) A State's academic content standards may—

(i) Be grade specific; or,

(ii) Cover more than one grade if grade-level content expectations are provided for each of grades 3 through 8.

(3) At the high school level, the academic content standards must define the knowledge and skills that all high school students are expected to know and be able to do in at least reading/language arts, mathematics, and, beginning in the 2005-06 school year, science, irrespective of course titles or years completed.

(c) *Academic achievement standards.* (1) The challenging student academic achievement standards required under paragraph (a) of this section must—

(i) Be aligned with the State's academic content standards; and

(ii) Include the following components for each content area:

(A) Achievement levels that describe at least—

(1) Two levels of high achievement—proficient and advanced—that determine how well students are mastering the material in the State's academic content standards; and

(2) A third level of achievement—basic—to provide complete information about the progress of lower-

achieving students toward mastering the proficient and advanced levels of achievement.

(B) Descriptions of the competencies associated with each achievement level.

(C) Assessment scores ("cut scores") that differentiate among the achievement levels as specified in paragraph (c)(1)(ii)(A) of this section, and a description of the rationale and procedures used to determine each achievement level.

(2) A State must develop academic achievement standards for every grade and subject assessed, even if the State's academic content standards cover more than one grade.

(3) With respect to academic achievement standards in science, a State must develop—

(i) Achievement levels and descriptions no later than the 2005-06 school year; and

(ii) Assessment scores ("cut scores") after the State has developed its science assessments but no later than the 2007-08 school year.

(d) *Alternate academic achievement standards.* For students under section 602(3) of the Individuals with Disabilities Education Act with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards—

(1) Are aligned with the State's academic content standards;

(2) Promote access to the general curriculum; and

(3) Reflect professional judgment of the highest achievement standards possible.

* * * * *

9. 34 C.F.R. 300.39 provides:

Special education.

(a) *General.* (1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual special education terms defined.* The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not

preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education* means—

(i) The development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

No. 15-827

IN THE
Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FORMER OFFICIALS OF THE U.S. DEPARTMENT OF EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. Department of Education officials responsible for special education policy.

Amicus Dr. Thomas Hehir is the Silvana and Christopher Pascucci Professor of Practice in Learning Differences at the Harvard Graduate School of Education. Dr. Hehir served as the Director of the Office of Special Education Programs under President William J. Clinton and has extensive experience implementing school district-level special education plans with the Chicago and Boston public school systems.

Amicus Stephanie Smith Lee served as the Director of the Office of Special Education Programs under President George W. Bush from 2002 to 2005. She has more than 35 years of experience in disability, education, and employment policy, including serving in senior legislative staff positions for Members of the U.S. House of Representatives and the U.S. Senate and for the U.S. Senate Health, Education, Labor, and Pensions Committee. She has served as a Senate Republican Majority Leader appointee to the Ticket to Work and Work Incentives Advisory Panel, as a member of former Virginia Governor George Allen's Champion Schools Commission, and on other commissions. Since her daughter, Laura, was born with Down syndrome in 1982, Ms. Lee has organized and led many successful bipartisan, collaborative

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

efforts to improve special education and disability policy in Virginia and at the national level. She is currently the Postsecondary Education Consultant to the National Down Syndrome Congress and Chair of the National Coordinating Center Accreditation Workgroup, which is developing model accreditation program standards for higher education programs for students with intellectual disabilities.

Amicus Dr. Melody B. Musgrove is Co-Director of the Graduate Center for the Study of Early Learning and Associate Professor of Special Education at the University of Mississippi. Dr. Musgrove served as the Director of the Office of Special Education Programs under President Barack Obama and previously served as a classroom teacher, school administrator, district special education director, assistant superintendent, and State Director of Special Education for the Mississippi Department of Education.

Amicus Dr. Robert Pasternack currently serves as the Chief Executive Officer for Ensenar Educational Services, Inc. providing consultation to School Districts, State Departments of Education, and an array of companies serving Students with Disabilities across country. Dr. Pasternack also serves as the Chief Education Officer for Accelify, adding to his consultation with the aforementioned entities throughout the country. Dr. Pasternack served as the Assistant Secretary for the Office of Special Education and Rehabilitative Services under President George W. Bush, and in that capacity worked on the 2004 Reauthorization of IDEA. He served on the President's Commission on Excellence in Special Education; President's Mental Health Commission; and led the Federal Interagency Coordinating Committee during his tenure. During his 45 years in education, Dr. Pasternack has been a classroom teacher, Superintendent, and State Director of Special Education.

As the guardian for his brother with Down Syndrome, he has been an advocate for improving outcomes and results for Students with Disabilities and their families. Dr. Pasternack is a Nationally Certified School Psychologist, certified teacher, administrator, and educational diagnostician.

Amicus Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than 35 years of experience advocating for individuals with intellectual disabilities and their families and developing partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities.

Amicus Michael Yudin served as both the Assistant Secretary of the Office of Special Education and Rehabilitative Services and the Acting Assistant Secretary of the Office of Elementary and Secondary Education under President Barack Obama. In these capacities, Mr. Yudin helped implement both the Individuals with Disabilities Education Act ("IDEA") and the Elementary and Secondary Education Act of

1965, as amended. Prior to his work at the Department of Education, Mr. Yudin spent nine years in the United States Senate, where he worked for senior members of the Senate Health, Education, Labor, and Pensions Committee on education legislation, including the IDEA reauthorization of 2004 and the No Child Left Behind Act of 2001. With more than 25 years of experience in the executive and legislative branches of the federal government, Mr. Yudin has dedicated his career to advocating on behalf of educationally disadvantaged students and individuals with disabilities.

Amici have devoted their professional lives to working for the interests of students with disabilities. In various capacities, they have been responsible for both enforcing and complying with the statutory rights and obligations enacted by Congress for the benefit of students with disabilities and their families. Having been involved in the implementation of the federal statutes at issue in this case, and having led the Department's support of peer-reviewed research into effective approaches to educating students with disabilities, *amici* have a special interest in providing the Court with a perspective based on decades of practical experience.

Amici believe that the Tenth Circuit's "more-than-de-minimis" standard for evaluating the substantive adequacy of the "free appropriate public education" required under the IDEA is contrary to the terms of the statute and to this Court's precedent. Furthermore, the lower court's standard reflects a basic misconception regarding the efficacy of educational methods, behavioral interventions, and assistive technologies that allow students with disabilities to reach levels of achievement and proficiency comparable to all students. This brief seeks to provide a description

of these research-validated approaches and to explain that they offer an opportunity for students with disabilities to meet the State's generally applicable academic standards and to prepare them for post-secondary education, employment, and independent living, enabling them to become productive and contributing adults.

SUMMARY OF ARGUMENT

Over the decades since the Individuals with Disabilities Education Act ("IDEA") was first enacted, extensive research and practical experience have fostered the development of improved teaching methods, educational technology, and behavioral interventions that have improved the efficacy of education for millions of students with disabilities. It is thus both appropriate and realistic to set high expectations and high achievement goals for students with disabilities. Standardized test scores and other educational statistics show that progress is not only possible but happening now.

Students with disabilities have shown substantial gains in a variety of educational success metrics, though an achievement gap still persists between students with disabilities and their non-disabled peers. The achievement gap is being narrowed with the application of current research, most of which is sponsored by the Department of Education ("the Department"), showing how students with disabilities learn. That research, in turn, is informing the approaches and technologies used in the classroom. Intervention plans, behavioral-support strategies, and individualized approaches to teaching and learning, among other innovations in teaching, are showing documented results. Behavioral intervention strategies for students with autism spectrum disorder ("ASD"), such as petitioner here, also have shown that

students with ASD can thrive and achieve proficiency in the general education curriculum.

The proven effectiveness of these educational techniques should inform this Court's interpretation of the IDEA's central guarantee of a "free appropriate public education" ("FAPE") for all students, including students with disabilities. This Court last addressed the meaning of a "free appropriate public education" in 1982, *see Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), but the FAPE standard is not static or tied to teaching methods and expected educational outcomes from decades past. Rather, the FAPE standard must reflect current, and increasingly advancing, teaching methods and the same high expectations for students with disabilities that we have for all students.

Since this Court decided *Rowley* more than 30 years ago, federal education law has changed to keep pace with emerging knowledge and developments in educational praxis. In particular, in 1997 and 2004, Congress amended the IDEA to require public schools to set measurable goals in providing students with disabilities with access to – and enable them to be involved in and make progress in – the general education curriculum. These changes incorporate the standards-based reforms to public education advanced in the Elementary and Secondary Education Act of 1965 ("ESEA") and its reauthorization under the No Child Left Behind Act of 2001 ("NCLB"). Through these laws and associated regulations, Congress and the Department now recognize that we should reject the soft bigotry of low expectations and expect all children, including children with disabilities, to achieve academic success and leave school prepared for college or other postsecondary education, a career, and independence.

ARGUMENT

I. EDUCATION METHODS IN THE SPECIAL EDUCATION CONTEXT HAVE VASTLY IMPROVED SINCE *ROWLEY*

Since this Court decided *Rowley*, educators have developed and implemented more sophisticated methods of supporting the millions of students with disabilities to meet the high expectations that federal law has established for all children. These developments appropriately inform the courts' understanding of the meaning of an *appropriate* education for students with disabilities. No one would question that "appropriate" treatment for tuberculosis changed dramatically with the development of antibiotics. Given the improvements in teaching methods and assistive technologies, it is realistic and therefore appropriate to set high expectations and high achievement goals for students with disabilities.

A. Since *Rowley*, the Achievement Gap Has Narrowed, Although Students with Disabilities Still Lag Behind Non-Disabled Peers in Academic Achievement Metrics

Educational achievement metrics illustrate both the need for and promise of the IDEA. On the one hand, students with disabilities are reaching unprecedented levels of success.[2] The gap between the achievement of students with disabilities and students without disabilities is narrowing as public schools implement evidence-based approaches to

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[2] *See* American Institutes for Research, College & Career Readiness & Success Ctr., *Improving College and Career Readiness for Students with Disabilities* 2-3 (Mar. 2013) ("AIR, *Improving College and Career Readiness*"), http://www.ccrscenter.org/sites/default/files/Improving%20College%20and%20Career%20Readiness%20for%20Students%20with%20Disabilities.pdf.

supporting students with disabilities. At the same time, however, there is still a gap. When expectations for children with disabilities are set too low, they often receive less challenging instruction that reflects below-grade-level content standards, preventing them from learning what they need to learn to succeed at grade-level work. The effects of these low expectations are visible in academic achievement metrics.

Each year, millions of children with a variety of disabilities receive special education and services under the IDEA.[3] In 2014, more than seven million children received IDEA services.[4] Nearly six million were aged six to 21; this represents 8.7% of all such school-aged students.[5] The achievement gap between students with disabilities and other students persists across a variety of subject areas. In 2015,

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[3] A student may be found eligible for IDEA services because the student has an intellectual disability; is deaf or hard of hearing; has a speech or language impairment; a visual impairment, including blindness; an emotional disturbance; orthopedic impairments; an autism spectrum disorder ("ASD"); traumatic brain injury; other health impairments; specific learning disabilities; one or more developmental delays; or multiple disabilities. *See* 20 U.S.C. § 1401(3).

[4] *See* U.S. Dep't of Educ., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016*, at xxi-xxiv (Oct. 2016), http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf. Among students age six through 21, the most prevalent disability category was specific learning disabilities (39.2%), followed by speech or language impairments (17.6%), other health impairments (14.4%), ASD (8.6%), intellectual disability (7%), and emotional disturbance (5.9%); the incidence of ASD within this population increased by 100% between 2005 and 2014. *See id.* at xxiv-xxv, 37 & Ex. 20.

[5] *See id.* at xxiv.

on the National Assessment of Educational Progress ("NAEP"), the average reading score of twelfth-grade students with disabilities was almost 40 points lower (on a 500-point scale) than their counterparts without disabilities.[6] Similarly, the average mathematics score of twelfth-grade students with disabilities was more than 35 points lower than that of students without disabilities.[7]

Between 1990 and 2005, the percentage of students with disabilities who completed high school saw dramatic improvement – from 43% to 61%.[8] But the graduation rate for students with disabilities still lags well behind the average graduation rate for all students, which was 75.5% in 2009. (Since 2009, although graduation rates have continued to improve, the gap has widened: in the 2014-15 school year, the graduation rate for students with disabilities increased to 64.6%, while the graduation rate for all students reached 83.2%.[9])

Enrollment in postsecondary education tells a similar story: students with disabilities have made real and substantial gains, though they still lag behind their non-disabled peers. Between 1990 and 2005, the percentage of students with disabilities

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[6] *See* Nat'l Ctr. for Educ. Statistics, The Nation's Report Card: 2015 Mathematics & Reading at Grade 12, http://www.nationsreportcard.gov/reading_math_g12_2015/#reading/groups (last visited Nov. 17, 2016).

[7] *See id.*

[8] *See* AIR, *Improving College and Career Readiness*, *supra* note 2, at 2-3.

[9] *See* U.S. Dep't of Educ., ED Data Express: Data about elementary & secondary schools in the U.S., National Snapshot, http://eddataexpress.ed.gov/state-report.cfm?state=US&submit.x=42&submit.y=14 (last visited Nov. 17, 2016).

enrolling in any postsecondary program within four years of finishing high school has nearly doubled: from 26.3% to 45.6%.[10] The enrollment percentage for all students, meanwhile, grew from 54% to 62.6%.[11]

In some postsecondary settings, students with disabilities are now graduating at rates approaching and even exceeding general education students. For two-year college programs, for example, students with disabilities complete their programs at a rate of 41.3% compared to 22.4% of general population students.[12] For vocational, business, or technical programs, students with disabilities complete their programs at a rate of 56.7%, nearly as high as the 64.5% rate for all students.[13]

Yet, despite this progress, only 7.6% of students with disabilities attended four-year universities, compared with 29.2% of all students.[14] And, among those who enroll in four-year colleges, students with disabilities graduate less often: 34.2% versus 51.2% for all students.[15]

B. The Achievement Gap Is Narrowing As Schools Across the Country Implement Evidence-Based Teaching Methods

As the progress already achieved demonstrates, public schools are narrowing the achievement gap – an achievement gap that reflects in part the burden

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[10] *See* AIR, *Improving College and Career Readiness*, *supra* note 2, at 2.

[11] *See id.*

[12] *See id.* at 3.

[13] *See id.*

[14] *See id.*

[15] *See id.*

of low expectations for students with disabilities – by applying research-driven advances in educators' understanding about how students with disabilities learn.[16] That improved and improving understanding, in turn, informs the approaches and technologies commonly used in special education instruction and services today.[17]

1. Public schools regularly implement a multi-tiered systems of support to meet the academic and behavioral needs of all students, including students with disabilities.[18]

Using this approach, sometimes called Response to Intervention ("RTI"), schools provide high quality

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[16] The Department of Education funds such research through its National Center for Special Education Research, http://www.ies.ed.gov/ncser/.

[17] *See*, *e.g.*, Thomas E. Scruggs et al., *Do Special Education Interventions Improve Learning of Secondary Content? A Meta-Analysis*, 31 Remedial & Special Educ. 437-49 (2010) ("Scruggs") (meta-analysis of 70 independent studies investigating effects of special education interventions on student achievement found that students with disabilities made significant progress across different content areas and across different educational settings when they received systematic, explicit instruction; learning strategy instruction; and other evidence-based instructional strategies and supports), *cited in* Final Rule, *Improving the Academic Achievement of the Disadvantaged: Assistance to States for the Education of Children With Disabilities*, 80 Fed. Reg. 50,773, 50,774 (Aug. 21, 2015).

[18] *See* OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as "the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions"), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

core instruction that meets the needs of most students.[19] After identifying students who need additional support, including students with disabilities, schools provide evidence-based interventions of moderate to high intensity to address the individual learning challenges of each student.[20]

For example, public schools may employ intensive interventions to teach children with learning disabilities in reading, writing, and math. Such interventions are characterized by small group or one-on-one instruction, which can occur daily. These interventions feature explicit, systematic instruction address-

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[19] *See* U.S. Dep't of Educ., Office of Special Educ. Programs, A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA) at 2 (Jan. 21, 2011) ("OSEP Response") ("[m]any [school districts] have implemented successful RTI strategies"; among the core characteristics of such approaches is "high quality research-based instruction in [the] general education setting"), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf. *See generally* U.S. Dep't of Educ., Office of Special Educ. Programs, IDEAs That Work: Tiered Support, https://ccrs.osepideasthatwork.org/teachers-academic/tiered-support (last visited Nov. 17, 2016).

[20] *See*, *e.g.*, American Institutes for Research, Ctr. on Response to Intervention, RTI Glossary of Terms ("MTSS allows for the early identification of learning and behavioral challenges and timely intervention for students who are at risk for poor learning outcomes."), http://www.rti4success.org/resources/rti-glossary-terms#MTSS (last visited Nov. 17, 2016); OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as "the practice of providing high-quality instruction and interventions matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions"), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

ing critical elements associated with success – such as, for reading, concepts about print conventions, phonemic awareness, phonics, and fluency.[21] Schools adjust the intensity and nature of interventions depending on the student's responsiveness. Studies show that students with disabilities engaged in such interventions regularly show academic gains.[22] Schools screen students to determine which students need additional interventions; continually monitor the progress of all students; and make decisions

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[21] *See also Scruggs*, *supra* note 17 (examining evidence base for using mnemonic strategies, spatial organizers, classroom learning strategies, computer-assisted instruction, peer mediation, study aids, activity-oriented learning, and explicit instruction in teaching middle school and high school students with disabilities, and finding mean effect sizes indicating that the strategies had a large impact); Council for Exceptional Children, Div. for Learning Disabilities, *Intensive Interventions for Students With Learning Disabilities in the RTI Era* at 1 (Feb. 2014), http://s3.amazonaws.com/cmi-teaching-ld/assets/attachments/180/DLD_PP_1_IntensiveInst-2014.pdf?1395418397.

[22] *See Scruggs*, *supra* note 17; *see also* U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *Investment in Reading Research from Kindergarten through High School* at 1 (Oct. 2015) ("*Investment in Reading Research*"), https://ies.ed.gov/ncser/pdf/Reading_2015.pdf; U.S. Dep't of Educ., Inst. of Educ. Sciences, *Synthesis of IES-Funded Research on Mathematics: 2002-2013* (July 2016), http://ies.ed.gov/ncer/pubs/20162003/pdf/20162003.pdf; U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *What Have We Funded? A Summary of Mathematics Research* (Oct. 2015) ("*What Have We Funded?*"), https://ies.ed.gov/ncser/pdf/Math_2015.pdf. Citing a number of studies, the Department has noted that "low-achieving students with disabilities who struggle in reading and low-achieving students with disabilities who struggle in mathematics can successfully learn grade-level content when they have access to high-quality instruction." 80 Fed. Reg. at 50,777 (footnotes omitted).

about the effectiveness of both core instruction and targeted interventions based on student data.[23]

Public schools also implement supports for student behavior. Systems of behavioral supports such as schoolwide positive behavioral interventions and supports ("PBIS") involve setting universal behavioral expectations, and then using data to determine which students need additional behavioral supports.[24] Schools may employ more intensive strategies for groups of students who are exhibiting at-risk behaviors, and individualized services for students who continue to exhibit problematic behavior.[25] Research has shown that successful implementation of schoolwide PBIS

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[23] *See*, *e.g.*, OSEP Response, *supra* note 19, at 1-2.

[24] *See* OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Tier 3 Supports ("Positive behavior intervention and support is an application of a behaviorally-based systems approach . . . . Attention is focused on creating and sustaining Tier 1 (universal for ALL students), Tier 2 (targeted group support for SOME students), and Tier 3 (individual support for a FEW students) systems of support that improve lifestyle results (personal, health, social, family, work, recreation) for all children and youth by making problem behavior less effective, efficient, and relevant, and desired behavior more functional."), http://www.pbis.org/school/tier3supports (last visited Nov. 17, 2016); *id.*, Multi-tiered System of Support (MTSS) & PBIS ("Positive Behavioral Interventions and Supports (PBIS) is a process that is consistent with the core principles of MTSS."), http://www.pbis.org/school/mtss (last visited Nov. 17, 2016).

[25] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, *Effective Evidence-based Practices for Preventing and Addressing Bullying* at 2 (Enclosure to Aug. 20, 2013 Dear Colleague Letter on Bullying), http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf.

can be linked to improved academic outcomes among students.[26]

Such systems of instructional and behavioral supports effectively engages and supports all students in the school, including those with disabilities.[27]

2. Schools, including those that provide instructional and behavioral supports, are also guided by the principles of Universal Design for Learning ("UDL"), which focuses on individualizing approaches to teaching and learning.[28]

These principles acknowledge that all students, including students with disabilities, differ in how they comprehend information; how they express what they know; and how they are engaged in instruction.[29] In implementing UDL, teachers address the

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[26] *See* U.S. Dep't of Educ., Inst. of Educ. Sciences, *A Compendium of Social-Behavioral Research Funded by NCER and NCSER: 2002-2013*, at 99 (2016), http://ies.ed.gov/ncer/pubs/20162002/pdf/20162002.pdf.

[27] *See* Schoolwide Integrated Framework for Transformation, SWIFT Guide: Inclusive Academic Instruction ("Schools use multi-tiered instructional strategies [and] differentiation . . . to support instruction [for] all students, including those with the most extensive support needs. Academic and behavior supports are integrated within one multi-tiered system of support."), http://guide.swiftschools.org/multi-tiered-system-of-support/inclusive-academic-instruction (last visited Nov. 17, 2016).

[28] *See* Massachusetts Dep't of Elementary & Secondary Educ., The Massachusetts Tiered System of Supports (MTSS) (last updated Oct. 11, 2011) (explaining that schools implementing MTSS are guided by UDL principles), http://www.doe.mass.edu/sped/mtss.html (last visited Nov. 17, 2016); Nat'l Ctr. on Universal Design for Learning, What is UDL?, http://www.udlcenter.org/aboutudl/whatisudl (last visited Nov. 17, 2016).

[29] *See* Nat'l Ctr. on Universal Design for Learning, The Three Principles of UDL, http://www.udlcenter.org/aboutudl/whatisudl/3principles (last visited Nov. 17, 2016).

variability of student learning by implementing flexible goals, methods, materials, and assessments. Curriculum is customizable, and instruction is differentiated.[30]

UDL is an evidence-based strategy for implementing inclusive practice, meaning students with disabilities are included in classrooms with students without disabilities.[31] The Department has found that students with disabilities who spend most of their time in general education classes have higher test scores in reading and mathematics than students who spend most of their time in separate schools and classes.[32] The Department has also found that

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[30] *See* What is UDL?, *supra* note 28. Congress recognized the success of UDL as an approach to helping all students achieve proficiency, including students with disabilities, in the Every Student Succeeds Act of 2015 ("ESSA"), which reauthorized the ESEA and which requires States to develop academic assessments consistent with UDL, *see* 20 U.S.C. § 6311(b)(2)(B)(xiii), (b)(2)(D)(i)(IV), and requires schools providing federally funded comprehensive literacy instruction to incorporate UDL in the instruction, *see id.* § 6311(b)(2)(J). The ESSA takes its definition of UDL from that in the Higher Education Act of 1965, *see id.* § 1003(24) (defining UDL as "a scientifically valid framework for guiding educational practice that . . . provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and . . . reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities").

[31] *See*, *e.g.*, Massachusetts Dep't of Elementary & Secondary Educ., *Inclusive Practice in Massachusetts: Teacher preparation program overview of evidence-based best practices*, http://www.doe.mass.edu/edeval/guidebook/edprep/InclusivePractice.pdf (last visited Nov. 17, 2016).

[32] *See* Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal*

inclusion is associated with better postsecondary outcomes, including in employment, postsecondary education, and income.[33] Children with significant disabilities are now being included in general education settings in every State and school district in the country.

3. Educators now have many highly effective interventions that can help every student meet the state academic standards that apply to all students.[34] Teams developing individualized education programs ("IEPs") in public schools nationwide prescribe such interventions to students with disabilities as needed

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Study (SEELS) 24 (June 2004), http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf; Jose Blackorby et al., *What Makes a Difference? Influences on Outcomes for Students with Disabilities* 7-7 (Feb. 2007), http://www.seels.net/designdocs/SEELS_W1W3_FINAL.pdf.

[33] *See* Mary Wagner et al., *What Makes a Difference? Influences on Postschool Outcomes of Youth with Disabilities: The Third Comprehensive Report from the National Longitudinal Transition Study of Special Education Students* 4-8 to 4-9 & Table 4-5 (Dec. 1993), http://files.eric.ed.gov/fulltext/ED365085.pdf.

[34] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, Dear Colleague Letter on FAPE at 1 (Nov. 16, 2015) ("Dear Colleague Letter on FAPE") ("Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.") (citing 80 Fed. Reg. at 50,776), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. *See generally* Thomas Hehir, *New Directions in Special Education: Eliminating Ableism in Policy and Practice* 18-39 (2005) ("Hehir, *New Directions*"). The Department has sponsored research that has tested the effectiveness of many such interventions; evidence-based tools and supports for teachers and families are available at https://ccrs.osepideasthatwork.org/.

to provide a FAPE. For example, research has shown that, to meet state academic standards for reading and prepare for adult life, deaf children should learn to use manual language, such as American Sign Language ("ASL"), from infancy – even before learning to read.[35] Depending on the level of impairment, students with visual impairments should be taught Braille or should receive accommodations such as large-print text;[36] these approaches can be used along

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[35] *See* Hehir, *New Directions* at 18-39; *see also* Ronnie B. Wilbur, *The Use of ASL to Support the Development of English and Literacy*, 5 J. Deaf Stud. & Deaf Educ. 81, 98 (2000) ("The research reviewed here provides strong support for the use of ASL as a medium of communication before a child enters school and continuing into the classroom to develop cognition, socialization, and an age-appropriate knowledge base, as well as providing a basis for learning English and English literacy."), http://jdsde.oxfordjournals.org/content/5/1/81.full.pdf; Shirin D. Antia et al., *Academic Status and Progress of Deaf and Hard-of-Hearing Students in General Education Classrooms*, 14 J. Deaf Stud. & Deaf Educ. 293, 308 (2009) (study finding that "communication measures" including "language ability" but also "skills such as using an interpreter, communication assertiveness, communication repair, and the ability to match communication mode and register to one's audience" were "significantly correlated to math, reading, and language/writing achievement"), http://jdsde.oxfordjournals.org/content/14/3/293.full.pdf+html; U.S. Dep't of Justice & U.S. Dep't of Educ., *Meeting the Communication Needs of Students with Hearing, Vision, or Speech Disabilities* at 2 (Nov. 12, 2014) ("*Meeting Communication Needs*") (listing interventions for students who are deaf or hard of hearing, including exchange of written materials, interpreters, note takers, real-time computer-aided transcription services (such as CART), assistive listening systems, accessible electronic and information technology, and open and closed captioning), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-parent-201411.pdf.

[36] *See Meeting Communication Needs*, *supra* note 35, at 2 (listing interventions for students with visual disabilities, including readers, taped texts, audio recordings, Braille materials

with technologies such as audio-supported reading to help students achieve proficiency.[37] Students with visual impairments may need orientation and mobility ("O&M") services, such as learning to walk with a cane, to achieve independence.[38] And students with

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and refreshable Braille displays, accessible e-book readers, screen reading software, magnification software, optical readers, secondary optical programs, and large-print materials); *see also* U.S. Dep't of Educ., Office of Special Educ. Programs, Dear Colleague Letter on Braille at 1, 6 (June 19, 2013) (noting that the 1997 amendments required schools to consider whether a student with a visual impairment should receive instruction in Braille and the use of Braille, and that "Braille is a very effective reading and writing medium for many blind and visually impaired persons, and research has shown that knowledge of Braille provides numerous tangible and intangible benefits"), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/brailledcl-6-19-13.pdf.

[37] *See* Nat'l Ctr. on Accessible Educ. Materials, Audio-Supported Reading ("Audio-supported reading . . . allows a user to listen to a spoken version of text while looking at screen-displayed print or touching braille. . . . With sufficient practice, both braille readers and magnified print readers can greatly increase the rate at which they move through text using [audio-supported reading]."), http://aem.cast.org/navigating/audio-supported-reading.html#.WCIdMI-cG70 (last visited Nov. 17, 2016).

[38] The Department's IDEA regulation specifies orientation and mobility services as a related service a school must provide to a student with a disability when necessary to provide FAPE, and defines it as "services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community." 34 C.F.R. § 300.34(c)(7)(i). *See* Jennifer L. Cmar et al., Council for Exceptional Children, *The Role of the Orientation and Mobility Specialist in Public Schools* 1 (2015) (citing studies and stating that "O&M skills allow children to interact with and move through environments purposefully and independently, and they facilitate access to educational, vocational, social, and recreational

other disabilities may also benefit from assistive technology devices, which the IDEA defines as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities" of a student with a disability. 20 U.S.C. § 1401(1)(A). For example, students with learning disabilities, intellectual disabilities, autism, and other disabilities may benefit from assistive technologies such as taped books, e-book readers, or word processing "spell check" programs to access instruction and demonstrate mastery of material on writing assignments and assessments.[39]

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opportunities") (citations omitted), *available at* http://community.cec.sped.org/dvi/resourcesportal/positionpapers.

[39] *See* Hehir, *New Directions* at 27-35; *see also* Nat'l Ctr. on Accessible Educ. Materials, Understanding DAISY (Digital Accessible Information SYstem) (readers with learning disabilities may find digital talking books "easier and more enjoyable to read and use than a print-based text"), http://aem.cast.org/creating/understanding-daisy.html#.WCIr7I-cG70 (last visited Nov. 17, 2016); U.S. Dep't of Educ., Office for Civil Rights, Frequently Asked Questions About the June 29, 2010, Dear Colleague Letter at 2, 7 (May 26, 2011) (stating that e-book readers may be needed by students with learning disabilities in public elementary and secondary schools who have difficulty getting information from printed sources, and that they provide "greater functionality" than audio books), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf; Louise Spear-Swerling, LD Online, *Spelling and Students with Learning Disabilities* (Dec. 2005) (recommending that older students be taught to use a computer spell-checker, which "can be enormously helpful to struggling spellers and writers, especially in the later grades when the volume of writing increases greatly"), http://www.ldonline.org/spearswerling/Spelling_and_Students_with_Learning_Disabilities; Julia K. Landau et al., LD Online, *Examples of Accommodations from State Assessment Policies* (listing word processor spell-check function as example of "response

Taken together, these methods show that schools can enable students with disabilities to improve their academic performance significantly, as demonstrated by their substantial gains in recent years. Schools, in short, and in comparison to when *Rowley* was decided in 1982, now have a variety of increasingly advanced educational methods and tools at their disposal, including intensive interventions in early childhood; robust accommodations to achieve progress in the general education curriculum and minimize the need to modify that curriculum; testing accommodations that mirror instructional accommodations; increasing learning time; and raising expectations for what constitutes success. As a result, students with disabilities may be expected to become proficient in the grade-level curriculum and to meet state academic standards.[40]

4. Educators have developed many interventions for students with ASD who may, like petitioner here, have behavioral challenges.[41]

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accommodation" in state academic assessments), http://www.ldonline.org/article/6187 (last visited Nov. 17, 2016).

[40] *See* Hehir, *New Directions* at 136-44. States are also improving the accessibility of achievement test items, such as adjusting format characteristics or content, or making test items more accessible and understandable (including by reducing unimportant or extraneous details) to better measure students' progress in learning grade-level content. *See* 80 Fed. Reg. at 50,775.

[41] *See* U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Special Educ. Research, *Summary of Autism Spectrum Disorders Research* at 1 (Oct. 2015) ("*Autism Spectrum Disorders Research*") (noting that ASD symptoms may vary in severity and may include social communication and interaction deficits; restrictive and repetitive behaviors, interests, and activities; intellectual impairment; sensory sensitivity; attention and execu-

Although children with ASD are very diverse, each with different strengths and sometimes complex needs, many children with ASD engage in challenging behavior because they have not developed functional communication skills or been given the tools to communicate effectively. Functional communication training ("FCT") helps students with ASD learn to avoid or replace those challenging behaviors, leading to better education outcomes.[42] Such training involves a school-based team, including the student's parents, the student, teachers, administrative staff, and specialists, coming together to conduct a functional behavior assessment to determine the function of problem behavior.[43] The team then identifies a communicative response that serves the same function as the problem behavior, and determines how and

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tive functioning problems, motor difficulties, and behavior problems), http://ies.ed.gov/ncser/pdf/ASD_2015.pdf.

[42] *See id*. at 2 ("social and communication skill impairments are core symptoms of ASD"); Robert C. Pennington & G. Rich Mancil, *Functional Communication Training*, *in* Darlene E. Perner & Monica E. Delano, Council for Exceptional Children, *A Guide to Teaching Students With Autism Spectrum Disorders* ch. 5 (2013) ("Pennington & Mancil, *Functional Communication Training*").

[43] *See* Pennington & Mancil, *Functional Communication Training*, *supra* note 42; *see also* G. Richmond Mancil, *Functional Communication Training: A Review of the Literature Related to Children with Autism*, 41 Educ. & Training in Developmental Disabilities 213, 214 (2006) (defining "functional communication training" as assessing the function of a behavior through functional behavior assessments and then replacing the challenging behavior with a communicative response that serves the same function), http://daddcec.org/Portals/0/CEC/Autism_Disabilities/Research/Publications/Education_Training_Development_Disabilities/2006v41_Journals/ETDD_200609v41n3p213-224_Functional_Communication_Training_A_Review_Literature_Related.pdf.

when the student will be taught the replacement response, as part of a behavior intervention plan.[44]

Other evidence-based behavioral interventions for students with ASD include preteaching, prompting, and positively reinforcing desired behavior. Teachers or peer students may also model desired behavior, or redirect the student from destructive behavior. Students may learn prelinguistic strategies (such as holding a favorite object) or cognitive-linguistic strategies (such as learning to use specific vocabulary to describe one's emotional state) to more effectively self-regulate behavior.[45] Sometimes, it is simply a matter of offering a student an opportunity to regroup from overwhelming outside stimuli.[46]

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[44] *See* Mancil, *Functional Communication Training*, 41 Educ. & Training in Developmental Disabilities at 214 (after replacing challenging behavior with a functional communicative response, "[t]he final step in FCT involves ignoring the challenging behavior" and "prompting and acknowledging the use of the communicative response that replaces the challenging behavior"). The requirement that schools perform a functional behavioral assessment and develop or revise a behavior intervention plan when a student with a disability is repeatedly suspended, or suspended or expelled for more than 10 days, was included in the IDEA as part of the 1997 amendments. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 93-94 (codified as amended at 20 U.S.C. § 1415(k)(1)). And the Department has recently clarified that schools must implement such approaches where needed to provide FAPE. *See infra* Part II.B.3.

[45] *See* Barry M. Prizant, Ph.D., et al., *The SCERTS Model: A Transactional, Family-Centered Approach to Enhancing Communication and Socioemotional Abilities of Children With Autism Spectrum Disorder*, 16 Infants & Young Children 296-316 (2003), http://journals.lww.com/iycjournal/Abstract/2003/10000/The_SCERTS_Model__A_Transactional,_Family_Centered.4.aspx.

[46] *See* Pennington & Mancil, *Functional Communication Training*, *supra* note 42; *see also* Cleveland Clinic, Behavioral Inter-

Public schools are regularly prescribing such interventions from a robust array of behavioral and other interventions for students with ASD. As a result, such students are accessing the general education curriculum and improving their academic performance.[47]

Even for the small number of students with ASD who have significant cognitive disabilities, schools are expected to – and can – provide extensive, direct individualized instruction and support. For these students, as for other students with intellectual or developmental disabilities, research has demonstrated that comprehensive reading instruction, through programs that emphasize phonological awareness and phonics skills, produce better outcomes than instruction that provides sight words alone.[48] Other research demonstrates that teaching students with moderate and severe intellectual disabilities specific math problem-solving interventions helps them learn

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vention for Children with Autism, http://my.clevelandclinic.org/childrens-hospital/specialties-services/departments-centers/center-for-autism/behavioral-intervention-autism (last visited Nov. 17, 2016).

[47] *See Autism Spectrum Disorders Research*, *supra* note 41, at 2-10; *see also* Wendy Machalicek et al., *A Review of School-Based Instructional Interventions for Students with Autism Spectrum Disorders*, 2 Research in Autism Spectrum Disorders 395-416 (2008) (evaluating research indicating effective methods in teaching students with ASD academic skills, communication skills, functional life skills, play, and social skills), http://www.meadowscenter.org/files/resources/RASD-Machalicek-08.pdf.

[48] *See Investment in Reading Research*, *supra* note 22, at 4. Students with intellectual disabilities may need such instruction for 2-3 years longer than for typically developing students to achieve basic levels of literacy. *See id.* at 4-5.

grade-level content in math.[49] The goal for these students, as for all students with disabilities, is to achieve measurable gains within challenging, grade-level state academic content standards, so that they are on track to pursue postsecondary education or competitive, integrated employment.[50]

II. THE EVOLVING LEGAL AND REGULATORY CONTEXT REFLECTS ADVANCES IN INSTRUCTIONAL PRACTICES

Education experts agree that a "free appropriate public education" must be "appropriate" so that each student with a disability, in light of current methods of instruction, can achieve the same challenging academic standards as students without disabilities. Educational standards must reflect the same high expectations for students with disabilities that we have for all students. Statutory and regulatory developments over the last two decades reflect that consensus.

A. The IDEA Requires a "Free Appropriate Public Education"

1. The IDEA requires an education that is appropriate to meet the child's unique needs and prepare the child for further education, employment, and independent living, through individualized special education and related services. *See* 20 U.S.C. § 1400(d)(1)(A).

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[49] *See What Have We Funded*, *supra* note 22, at 3-4.

[50] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 4-5; Notice of Proposed Rulemaking, *Title I – Improving the Academic Achievement of the Disadvantaged: Academic Assessments*, 81 Fed. Reg. 44,928, 44,953 (July 11, 2016) (proposed ESSA regulation developed through negotiated rulemaking, defining "students with the most significant cognitive disabilities").

A "free appropriate public education" must include "special education and related services" that "meet the standards of the State educational agency," in "an appropriate preschool, elementary school, or secondary school education in the State involved," and be "provided in conformity with [an] individualized education program" or IEP. *Id.* § 1401(9)).

An IEP must state "measureable annual goals" designed to enable the child to "be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs that result from the child's disability." *Id.* § 1414(d)(1)(A)(i)(II). The State must provide "the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable" to attain those goals. *Id.* § 1414(d)(1)(A)(i)(IV).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability." *Id.* § 1401(29). The Department has clarified that "specially designed instruction" must ensure that the child has access to the general education curriculum, so that the child "can meet the educational standards within the jurisdiction . . . that apply to all children." 34 C.F.R. § 300.39(b)(3).

2. The last time the Court addressed the "free appropriate public education" standard was in *Rowley* in 1982. In *Rowley*, this Court wrote that "the 'basic floor of opportunity' provided by [a FAPE] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 458 U.S. at 201. The Court also clarified that the access to education must be "meaningful" and that a FAPE must be "personalized." *Id.* at 192,

202-03. The Court specifically noted that its holding should be limited to a student who, like Amy Rowley, meets grade-level expectations – and that it was not announcing a universal standard for educational attainment intended to prescribe what schools must do for all students with disabilities. *See id.* at 209-10 (noting that Amy Rowley "performs better than the average child in her class and is advancing easily from grade to grade").

B. The IDEA Has Changed in the 34 Years Since This Court Decided *Rowley*

The IDEA has changed since *Rowley*. Working in concert with the Department, Congress has made key amendments to the statute that further clarify the meaning of a FAPE for students with disabilities. In short, Congress has strengthened the statutory goal that children with disabilities achieve the same high standards as all children. To this end, Congress holds States and local school districts accountable, requiring them to support children with disabilities so that they can learn and become proficient in the grade-level academic content taught to all students. And Congress has indicated that educational and related services provided to students with disabilities should change and improve over time to incorporate new successful methods.

1. Congress's 1997 amendments to the IDEA added the requirement that students with disabilities have measurable goals that enable them to make progress in the general education curriculum. *See* Pub. L. No. 105-17, § 101, 11 Stat. 84 (IDEA § 614(d)(1)(A)(ii)). It also requires schools to describe how each student's progress toward those goals will be measured. *See id.*, 11 Stat. 85 (IDEA § 614(d)(1)(A)(viii)).

The 2004 amendments to the IDEA align the statute with the reauthorization of the Elementary and Secondary Education Act of 1965 ("ESEA") through the No Child Left Behind Act of 2001 ("NCLB"). As amended, the ESEA requires States to develop challenging academic content standards that apply to all students, and it established the expectation that all students, including students with disabilities, will be proficient under those standards. *See generally* 20 U.S.C. § 1412(a)(15), (16).

Most recently, the 2015 authorization of the ESEA through the Every Student Succeeds Act ("ESSA") retains the requirement that children with disabilities are held to the same challenging state academic content standards as are all students. *See id.* § 6311(b)(1). These standards must be aligned with the entrance requirements for public colleges and universities in each State. *See id.* § 6311(b)(1)(D)(i).[51]

2. Applying Congress's statutory framework, in recent years the Department has clarified how the IDEA must be aligned with the ESEA's high expectations for all students, including students with disabilities, and now holds States accountable for the achievement of students with disabilities.

The Department has clarified that, in order to provide a free appropriate public education, a student's IEP must be designed to enable the child to be involved in and make progress in the general education curriculum – the same curriculum for non-disabled children (based on the state academic

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[51] *See also* 20 U.S.C. § 6301 (ESSA's purpose is "to provide *all children* significant opportunity to receive *a fair, equitable, and high-quality education*, and to close educational achievement gaps") (emphases added).

content standards for the grade in which the child is enrolled).[52]

For all students with disabilities, schools must:

- Address the unique needs of the student related to the student's disability, by providing individualized special education and supportive related services;[53]
- Ensure the student's access to the general education curriculum (*i.e.*, the same curriculum as for non-disabled students), so that the student can meet the state academic standards that apply to all students in the State, for the grade in which the student is enrolled; and
- Prepare the student for college, career, and independence.[54]

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[52] *See* Dear Colleague Letter on FAPE, *supra* note 34 (summarizing the changes in the IDEA and the ESEA that support this statement of the law's requirements).

[53] In enacting the 2004 amendments to the IDEA, Congress acknowledged that, in addition to providing an education to students with disabilities that "conform[s] to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB," schools must also "include other goals that the IEP Team deemed appropriate for the student, such as life skills, self-advocacy, social skills, and desired post-school activities." S. Rep. No. 108-185, at 29 (2003), *quoted in* 80 Fed. Reg. at 50,779-80.

[54] As the Department has stated: "[P]ublic schools should prepare all children to be ready for college or the workforce. According to research . . . , nearly two-thirds of new jobs require some form of postsecondary education. Therefore, in order to compete in the 21st century, regardless of whether a student has a disability, some form of postsecondary training or education is increasingly important for the student to become a

For the very small number of students with the most significant cognitive disabilities, States may measure their performance against alternate academic achievement standards, which may vary in scope or complexity. But those standards still must be aligned with and clearly related to the State's grade-level content standards for the grade in which the student is enrolled. And the goal remains to put these students on track to pursue postsecondary education or competitive and integrated employment.[55]

In addition, for all students, where the student's academic performance is significantly below grade level, IEP goals should be ambitious but achievable. Thus, annual goals may not result in the child's achieving grade-level with a single year, but they should still be sufficiently ambitious to help close the gap.[56]

The Department has also clarified that – as the IDEA requires, *see* 20 U.S.C. § 1414(d)(3)(B)(i) – when a child's behavior impedes the child's learning or that of others, the IEP team must consider and,

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productive and contributing adult." 80 Fed. Reg. at 50,778 (citing Achieve, Inc., *The Future of the U.S. Workforce: Middle Skills Jobs and the Growing Importance of Post Secondary Education* (2012), http://www.achieve.org/files/MiddleSkillsJobs.pdf).

[55] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 4-5; *see also* Final Rule, *Title I – Improving the Academic Achievement of the Disadvantaged*, 68 Fed. Reg. 68,697, 68,704 (Dec. 9, 2003); 20 U.S.C. § 6311(b)(1)(E)(i) (authorizing States to adopt "alternate academic achievement standards," but requiring such alternate standards to be aligned with the State's "challenging . . . academic content standards" and to reflect "professional judgment as to the highest possible standards achievable by" students with most significant cognitive disabilities).

[56] *See* Dear Colleague Letter on FAPE, *supra* note 34, at 5.

when necessary, include in the IEP the use of positive behavioral interventions and supports, and other strategies, to address that behavior. The goal, here again, is to address problematic behavior so that the child can be involved in and make progress in the general education curriculum and meet the State's challenging academic standards for all students.[57]

3. States and school districts understand that they will be held accountable for educating students with disabilities so that they can meet state academic standards. In particular, the Department announced in May 2014 that States would be measured on the performance of students with disabilities on state academic assessments and graduation rates. States now use these metrics to identify gaps in performance and implement targeted, systematic interventions in school districts where students with disabilities are not meeting state academic standards.[58]

CONCLUSION

The judgment of the court of appeals should be reversed.

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[57] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehabilitative Services, Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities at 1, 4 (Aug. 1, 2016), http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf.

[58] *See* U.S. Dep't of Educ., Letter to Chief State School Officers at 1 (May 21, 2014), http://www2.ed.gov/about/offices/list/osers/osep/rda/050914rda-lette-to-chiefs-final.pdf.

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No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR SPECIAL EDUCATION IN CHARTER SCHOOLS AND NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, National Center for Special Education in Charter Schools ("NCSECS") and National Alliance for Public Charter Schools ("NAPCS") are national nonprofit organizations committed to ensuring that students with disabilities have equal access to public charter schools and that charter schools operate so that all students may succeed. NCSECS and NAPCS support the Petitioner's position that the Tenth Circuit decision should be reversed. *Amici* submit this brief because we find adoption of a higher standard is the most consistent with the charter school movement's emphasis on high expectations for all students and its commitment to serving students with disabilities enrolled in charter schools. NCSECS and NAPCS *Amici* also believe the experience of charter schools, reflected in research, sheds light on the issue before the Court.

Amicus curiae NCSECS is dedicated to ensuring that students with disabilities have equal access to public charter schools and that such schools are designed and operated to enable all students to succeed. NCSECS is based in New York City and was founded in 2013 by long-time special education and school reform advocates, Lauren Morando Rhim and Paul O'Neill.

NCSECS is the first organization to focus solely on working with states, charter authorizers, special

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[1] Pursuant to SUP. CT. R. 37.3(a), *Amici* certify that both parties have consented to the filing of this amicus brief. Pursuant to SUP. CT. R. 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than *Amici* or their counsel made such a monetary contribution.

education advocates, and charter school organizations to improve access and create dynamic learning opportunities for students with disabilities in charter schools. Despite the rapid growth of charter schools—the first charter school opened its doors in 1992 and enrollment now exceeds 2.5 million students in over 6,700 charter schools across the U.S.—criticism persists about equal access and robust services for the roughly 250,000 students with disabilities in charter schools.[2] In order to ensure that more students with learning differences succeed in charter schools, NCSECS conducts research; develops policy papers; brings the special education and charter school communities together; informs federal and state education policy; and undertakes targeted fieldwork.

Amicus Curiae NAPCS is the leading national organization committed to advancing the public charter school movement. NAPCS endeavors to increase the availability of high-quality charter schools as options for families, especially those families without access to high-quality traditional public education. NAPCS has developed model charter school legislation that has influenced statutes and regulations in many states, and supports research, publications, and advocacy furthering the charter school movement.

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[2] Lauren M. Rhim, Jessie J. Gumz, & Kelly Henderson, *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012.* National Center for Special Education in Charter Schools (2015), (accessed 11/6/2016); https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/567b0a3640667a31534e9152/1450904118101/crdc_full.pdf (accessed 11/6/2016).

SUMMARY OF ARGUMENT

Amici support reversal of the Tenth Circuit's decision here. The standard used by the Tenth Circuit is not aligned with the goal many charter schools have of setting high expectations and serving *all* students, including those with special needs. The charter school experience illustrates that use of the Tenth Circuit standard is not necessary to avoid undue costs. A more demanding standard can instead stimulate greater coordination amongst educational institutions and innovation.

Importantly, there is no evidence to suggest that the meaningful educational benefit standard used by the Third Circuit has resulted in undue costs for the states or that application of a "higher" standard will result in a greater number of IDEA disputes. Through its decision in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), ("*Rowley*"), this Court has given states needed tools for containing special education costs. Yet the "just-more-than-trivial-benefit" standard creates an adversarial context that may very well increase certain costs.

The Court should also reject Respondent's request to adopt the barely more than *de minimis* standard because it cannot be squared with a proper interpretation of the *Rowley* standard and its reading of a free appropriate public education ("FAPE").[3] This sanctions a vision of extraordinarily low expectations for students with disabilities and in that regard is

[3] *See* 20 U.S.C. §§ 1401(9) (definition of FAPE), 1414(a)(1)(A) (state obligation), 1413(a)(1) (local educational agency obligation to meet state obligations).

wholly inconsistent with a fair reading of the Individuals with Disabilities Education Act ("IDEA").[4]

For these reasons, the Court should reverse the Tenth Circuit decision and adopt a more robust standard.

ARGUMENT

I. CHARTER SCHOOLS EXPERIENCE DOES NOT SUPPORT ADOPTING THE JUST-MORE-THAN-TRIVIAL-BENEFIT STANDARD.

The development of public school choice laws and charter schools as public schools of choice has been widespread over the last few decades.[5] Throughout the country, public charter schools welcome students with disabilities and provide them with opportunities to reach their educational goals. In states where charter schools operate as part of a public school choice system, families can extend their school options beyond a single, geographically-zoned public school and choose a school from among a variety of schools with different approaches to education. In these communities, parents of students with disabilities can select among a range of educational methodologies—Core Knowledge, Montessori, Direct Instruction, Expeditionary Learning, "No Excuses" education, Multiple Intelligences approaches, and many others—to find a school that will advance their child's educational progress.

Charters may attract students with disabilities due to the school's curricular focus, educational program

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[4] 20 U.S.C. §§ 1401-1487.

[5] Forty-three states and the District of Columbia now have charter school laws. *See*, e.g., http://dashboard.publiccharters.org/Home/?p=Home#state (accessed 10/21/2016).

or a structure believed to benefit certain students (often those with mild/moderate disabilities). Other charters implement a whole-school design that is aimed at effectively addressing the specific needs students with disabilities have. In addition, other innovative charter schools specifically develop special education programs designed for students with more significant, even severe-to-profound, disabilities.[6] Regardless of type, by meeting the needs of students with disabilities through the school design itself, many public charter schools can reduce the need for specialized interventions and supports. When run well, these schools can provide high quality *special* education options.[7]

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[6] *See* Lauren M. Rhim, Jessie J. Gumz, & Kelly Henderson, *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012*. (2015), https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/567b0a3640667a31534e9152/1450904118101/crdc_full.pdf (accessed 11/6/2016); Lauren M. Rhim, Dana Brinson, & Joanne Jacobs, *Case Studies of Charter Innovation and Success* in Robin Lake, ed., UNIQUE SCHOOLS SERVING UNIQUE STUDENTS: CHARTER SCHOOLS AND CHILDREN WITH SPECIAL NEEDS (2010).

[7] A Massachusetts Institute of Technology study found students with disabilities in Boston charter schools to be outperforming comparable students in traditional public schools. Elizabeth Setren, SPECIAL EDUCATION AND ENGLISH LANGUAGE LEARNER STUDENTS IN BOSTON CHARTER SCHOOLS: IMPACT AND CLASSIFICATION (2015) ("Charter attendance boosts achievement similarly for special needs and non-special needs students. Charters also increase the likelihood that special needs students meet high school graduation requirements and earn a state merit scholarship. Even the most disadvantaged special needs students benefit from charter attendance.") (abstract), https://seii.mit.edu/research/study/special-education-and-english-language-learner-students-in-boston-charter-schools-impact-and-classification/ (accessed 10/23/2016). *See also* Center for Research on Educational Outcomes – Stanford University, URBAN CHARTER SCHOOL

Charter schools are founded upon the belief that individual schools should be able to design and deliver a program of instruction that sets high expectations for all of the students it serves and then be held accountable to meet those expectations. As a result, the majority of charter schools embrace an internal ethic (if not a formal commitment to the authorizer that approved their charter) of high expectations for all students. This public charter school ethic and commitment to meet the needs of all students is congruent with a more robust standard. Thus, adoption of the Third Circuit standard is entirely consistent with the charter school practice of giving due consideration to parental choice and working to meet the educational goals for all students.

The "just-more-than-trivial" standard pushed by Respondent, by contrast, is inconsistent with these charter school pillars. Consistent application of Petitioner's proposed standard will benefit students with disabilities in public charter schools for several reasons.

First, as noted above, the standard for FAPE should be aligned with the high expectations embraced as

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STUDY – REPORT ON 41 REGIONS (2015), at 17 ("Black and Hispanic students, students in poverty, English language learners, and students receiving special education services all see stronger growth in urban charters than their matched peers in urban TPS [traditional public schools]."), https://urbancharters.stanford.edu/download/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf (accessed 10/31/2016). We hasten to add that new and small charter schools often struggle with the demands of special education—and will likely continue to do so under any standard. Charter schools and school choice are not a panacea. They are policies that can be—and in a significant number of instances have been—articulated to good effect in this field.

foundational by the vast majority of charter schools. A clear standard from this Court will be applied consistently across all of the states in which charter school operate. And such a standard will facilitate the ability of charter schools to maintain a consistent commitment to setting high expectations for all students. Rather than choosing when to hold high expectations for children, all charter schools, like all other public schools, will consistently seek to do so, for all students.

Second, the capacity many charter schools have to best serve their students with disabilities will be enhanced under a standard reflecting higher expectations. In many states charter schools are part of a larger local education agency ("LEA") or school district.[8] The LEA bears the legal responsibility, and in most cases practical responsibility, for compliance with IDEA.[9] For those charter schools that must provide special education to their students based upon the services and/or financial support they receive from the LEA, a higher standard will enable charter schools to call upon the LEA for support.

Third, for those charter schools that serve as their own LEAs or that otherwise assume the responsibility of providing special education under IDEA, a standard reflecting high expectations should enhance existing incentives for charter schools to further innovate in order to best serve students with disabilities. Charter

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[8] *See* 20 U.S.C. § 1401(19)(A) (definition of LEA); C.R.S. § 22-20-103(1) (defining the "administrative unit[s]" responsible for providing special education).

[9] *See* n. 2, above. *See also* 20 U.S.C. § 1413(a)(5) (requiring comparability of service and funding for charter schools within an existing LEA).

schools will be motivated to share resources and spread the costs of serving their students while adhering to IDEA.

Finally, adoption of such a standard will likely prompt school leaders and parents to utilize all available resources to meet students' needs, including access to public charter schools whose educational focus or design may facilitate IDEA compliance. Charter schools can expand the tools a school district has available to fulfill a child's special education needs and reduce the cost and risk of unilateral placement. In so doing, and combined with a clear, more robust standard, placement in charter schools can increase the likelihood that appropriate individual education program ("IEP") goals are set and met, and reduce the likelihood that parents will resort to "due process."[10] The experience of charter schools supports the enhanced expectations expressed in the Third Circuit standard.

II. THE JUST-MORE-THAN-TRIVIAL-BENEFIT STANDARD SHOULD NOT BE ADOPTED BASED UPON CONCERNS WITH UNDUE FINANCIAL BURDEN OR INCREASED LIKELIHOOD OF LITIGATION.

In no case should cost serve as a basis for a school's failure to provide FAPE.[11] Yet, we also acknowledge

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[10] *See* Albert O. Hirschman, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (comparing mechanisms of "exit"—such as school choice—with those of "voice"—such as "due process" and litigation).

[11] *Florence Cty. Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 15 (1993) ("There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the

that a small number of students in special education require very costly services—under any standard this Court adopts. As charter schools are frequently smaller and sometimes newly founded educational institutions, sudden and extraordinary special education costs can present a financial challenge. However, while individual cases may pose challenges, there is no reason to believe that adoption of the just-more-than-trivial-benefit standard will bring decreased costs overall or lower rates of litigation. Such notions are not supported by available data or thoughtful analysis.

A. Application Of The Just-More-Than-Trivial-Benefit Standard Does Not Correlate With Decreased Education Spending.

State education spending data suggests that application of a higher standard does not drive overall increases in spending. Use of the just-more-than-trivial-benefit standard does not necessarily result in lower spending either. Any argument that implementation of a higher standard of educational benefit will dramatically increase costs incorrectly assumes that the failure to reach that standard invariably turns on the dollar amount spent to provide education. Instead, providing meaningful educational benefit may involve successful resolution of disputes over a student's educational needs, result in better use of existing

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child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate. . . .")

resources and spur innovation and employment of a greater variety of approaches to instruction.[12]

Charter schools offer strong evidence that innovation can lead to improved outcomes without unduly increasing cost. Charter schools, on average, operate with about 80% of the funding of traditional public schools.[13] Many of these schools have improved education for the children they serve through use of different educational approaches and without cost serving as the driving force.

In Chart 1, *Amici* compares a cross-section of states from two circuits on each side of the interpretive split at issue in this case. Looking at 2012 education spending data for those states in the Third and Sixth Circuits that operate under the meaningful benefit standard, we see that results are distributed rather evenly across the first, second, third, fourth and fifth quintile of spending on public education. In fact, only

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[12] *See United States v. Virginia*, 518 U.S. 515, 542 (1996) ("Education, to be sure, is not a 'one size fits all' business.").

[13] *See* Meagan Batdorff, Larry Maloney, Jay F. May, Sheree T. Speakman, Patrick J. Wolf, Albert Cheng, CHARTER SCHOOL FUNDING: INEQUALITY EXPANDS (2014), http://www.uaedreform.org/wp-content/uploads/charter-funding-inequity-expands.pdf (accessed 10/23/2016). Journalists and advocates often point to charter school access to private philanthropy as mitigating or overcoming gaps in tax-based funding. The study cited here found a persistent roughly-20% gap in funding from all sources, *including* philanthropic. *Id.*at p. 9 ("Findings for FY11 debunk the myth that charter schools received disproportionate funding from non-public sources, such as philanthropy. . . . Districts recorded more per pupil funding from other non-public sources than did charter schools, $571 to $552 per pupil, respectively.").

one of seven states subject to meaningful benefit standard appeared in the top quintile.[14]

At the same time, education spending data from the Second and Tenth Circuit states, where the just-more-than-trivial-benefit standard is applied, shows that four of the states sit in the *top* quintile for K-12 public education spending. The education funding levels for the remaining five states are spread over the third, fourth and fifth quintile. This data shows that application of the meaningful benefit standard does not correlate with higher education spending. If use of the meaningful benefit standard adds any overall education costs, that effect is small enough to be masked by other factors and is virtually invisible at the level of state per pupil expenditures. Indeed, on its face, the data suggests that the opposite is true; multiple states using the just-more-than-trivial-benefit standard appear to have *higher* spending. However, a more credible conclusion is that special education costs do not drive overall education spending patterns. Instead, they likely reflect significant

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[14] Appendix, Chart A shows state per pupil expenditures in 2012, ranked top to bottom, by quintile, for the seven Third and Sixth Circuit ("meaningful benefit") states and the nine Second and Tenth Circuit ("just-more-than-trivial" benefit) states. States in other circuits are listed by quintile following the chart**.** Direct data on special education expenditures are, unfortunately, badly dated. *See* Thomas Parrish, Jenifer Harr, Jean Wolman, Jennifer Anthony, Amy Merickel, and Phil Esra, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* (2004), http://www.csef-air.org/publications/csef/state/statepart2.pdf (accessed 10/31/2016). For a host of reasons, some noted by Parrish, et al., and including changes in spending patterns after 2008, this 1999-2000 data has almost no utility.

regional variations and unique state circumstances that have nothing to do with special education.

Like other educational bodies, particularly small rural school districts, a standard that brings higher expectations may require charter schools to develop new approaches to serving students with disabilities. But charter school policy is also relatively new and, with respect to special education, underdeveloped. Thus, we anticipate the attention given to this Court's decision will create opportunities to encourage state-level policy changes where needed, and increase the use of organizational flexibility and partnerships already permitted under IDEA.[15] Tools to assist the states with this task are available.[16]

B. The Just-More-Than-Trivial-Benefit Standard Is Not Correlated With Lower Risk of Litigation.

The application of the meaningful benefit standard has not correlated with increased litigation. Indeed, available evidence on the rate of IDEA disputes in different jurisdictions does not suggest a relationship with either of the standards for judging FAPE.[17] As

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[15] *See*, e.g., 20 U.S.C. 1411(e)(3) (creation of local risk pools authorized); 1413(e)(4) (authorization for educational services agencies to assume certain LEA obligations).

[16] *Amicus Curiae* NAPCS has developed and refined provisions of its "model law" intended to provide state policy-making bodies with paths for coordinating charter school policy with IDEA obligations. NAPCS, A MODEL LAW FOR SUPPORTING THE GROWTH OF HIGH QUALITY PUBLIC CHARTER SCHOOLS: SECOND EDITION (2016), http://www.publiccharters.org/wp-content/uploads/2016/10/2016ModelCharterSchoolLaw.pdf (accessed 10/27/2016), at pp. 63-66.

[17] Appendix, Chart B (comparing the same circuits examined in relation to cost in n.22 and Chart A for the rate of IDEA filings

with cost, jurisdictions on each side of the doctrinal divide include those with the highest and fewest number of disputes.

While there are certainly cases (and this is likely one) in which the parents' unilateral placement is more expensive than the District's proposed alternative, a case that is not resolved at the IEP meeting, not resolved in administrative "due process," not resolved at trial, not resolved in the circuit court of appeals, and makes its way to this Court is more likely to be an outlier than an exemplar.[18] Indeed, this case only reaches this Court because a split has developed and hardened, 34 years after the decision in *Rowley*, on an issue of law.

But if this Court resolves this matter with a clear restatement of the *Rowley* standard for educational benefit, it is not at all obvious that either of the proposed alternatives entails an inherently greater average cost, a greater range of issues, or some other potential for excessive cost or needless dispute in the run of future cases. Such consequences are unlikely, not least because the level-of-benefit question was never the primary aspect of *Rowley* giving states a reasonable ability to police the cost of special education and the disputatiousness of special education issues.

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per 10,000 students, by rank order). As with cost, this data reflects differences in standards for FAPE poorly or not-at-all.

[18] There is an additional constraint on cost associated with even this case. The parents here, if ultimately successful, are not entitled to be reimbursed what they have spent, but to recovery limited to the "reasonable" cost of the services secured to provide FAPE. *Florence Cty.,* 510 U.S. at 16.

Rowley offered two general cautions to lower courts that bear on cost and dispute resolution.[19] First, *Rowley* instructs that administrative "due process" decisions be given "due weight."[20] When dealing with a split in the circuits, the resulting issue of law defeats the dispute resolution function of giving weight to a trier of fact's findings. Once this Court resolves that split, it is likely that the vast majority of decisions on whether a student has received "meaningful" benefit (for example) will once again revert to being fact-driven and, if disputed, most often resolved at the lowest level.

The very lowest level of the IDEA process, of course, is the IEP meeting. And at IEP meetings the just-more-than-trivial-benefit standard has a perverse effect from both a cost and dispute resolution standpoint. This standard structures a conversation in which public officials trying to work through a difficult IEP are continuously tempted to inform parents about how little the school system is obligated to do for a child. This can be an accurate and even sympathetic restatement of applicable law, but it invariably sets parents' teeth on edge. The meaningful benefit standard more clearly invites, in contrast, a positive discussion of what the school and parents together can do to support a child's education. Neither standard is proof against disputes. But a legal frame of just-above-trivial benefit immediately risks an adversarial conversation. The meaningful benefit standard encourages a more collaborative framework. Given the millions of IEP meetings held every year, consistently

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[19] *See* III(A), below.

[20] *Rowley,* 458 U.S. at 206.

framing discussions in the collaborative terms anticipated by IDEA[21] should reduce and mitigate disputes with resulting avoidance of some costs.

Second, *Rowley* emphasized that courts were not to be in the business of prescribing state educational policy.[22] This concept tips the scales in favor of school authorities whenever they are carrying out reasonable State educational policies in ways otherwise consistent with IDEA. Again, given the split in the circuits at issue here, issues of state policy, if any, have no bearing: the issue is defining FAPE. Once this Court has spoken the field will presumably return to discussion of a unitary standard, with state educational policy coming into play when it is already clear IDEA has been followed.

Given these controls, the Court should not assume that higher overall cost or likelihood of litigation are strongly correlated with either standard argued in this case.

III. THE TENTH CIRCUIT STANDARD FOR FAPE IS INCONSISTENT WITH *ROWLEY*.

The "just-above-trivial" standard, does not correctly interpret *Rowley* and IDEA. Eight years after adoption of IDEA, this Court in Rowley took up its first IDEA case. Among other things Rowley addressed the degree of educational benefit required for students in special education to meet a core requirement of IDEA: the provision of a free appropriate public education. Different interpretations are also reflected in a split in certain

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[21] *See*, e.g., *Rowley,* 458 U.S. at 208-209.

[22] *Rowley*, 458 U.S. at 207-208.

federal courts of appeals—with variations, confusion or inconsistency in other circuits.

This brief is limited to the narrow argument that reversal of the Tenth Circuit decision is warranted. Thus, we will not duplicate the discussion in other briefs of all sources of reinforcement for that conclusion nor of possible further refinement or enhancement of the appropriate standard. *Amici* will here compare those circuits (notably the Third[23]) that have required a meaningful educational benefit (the meaningful benefit standard) and that have a more accurate fix on the meaning of *Rowley* with those circuits (here, the Tenth[24]) that only require educational progress that is just "more than *de minimis*" (the "just-more-than-trivial-benefit standard"). Looking narrowly at that comparison, it is clear that the just-more-than-trivial-benefit standard cannot be squared with *Rowley* itself.

A. Rowley.

The *Rowley* Court reviewed the first grade schooling of Amy Rowley, a student with a hearing impairment. The school district had provided Amy with substantial interventions (focused, in part, on an amplification system). Amy had passed first grade with above-average marks within the conventional grading system. Amy's parents sought the provision of a sign language interpreter for their daughter, contending that this would

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[23] *See Ridgewood Board of Education v. N.E.,* 172 F.3d 238, 247 (3rd Cir. 1999) ("significant learning and meaningful benefit . . . gauged in relation to a child's potential").

[24] *See Thompson R20J Sch. Dist. v. Luke P. ex rel Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)("merely * * * 'more than *de minimis*'" benefit sufficient)(quoting *Urban ex rel Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720. 727 (10th Cir. 1996)).

allow her to more fully realize her academic potential. The Court rejected the suggestion that every student achieving his or her full potential was a credible interpretation of FAPE.[25] It likewise found the concepts of literal "equality" in education and achieving self-sufficiency unhelpful.[26] The Court observed that both "equal" education and achieving self-sufficiency were likely to be too demanding a standard for some students with disabilities and too little for others.[27] Noting the long history of bitter debates in deaf education,[28] the Court declined to become enmeshed in pedagogical issues and found that the substantial interventions tailored to Amy's needs combined with Amy's above-average progress by general education standards constituted offering a free appropriate public education, or FAPE.

Although in *Rowley* the Court carefully "confine[d]" the analysis to a student "receiving substantial specialized instruction and related services . . . who is performing above average in the regular classrooms of

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[25] *Id.,* 458 U.S. at 199 (realization of the full potential of every child with a disability "further than Congress intended to go").

[26] *Rowley*, 458 U.S. at 198-201 & n.23.

[27] *Id.,* 458 U.S. at 198-99, 201 n.23.

[28] *See*, e.g., Oliver Sacks, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF (1990); Harlan Lane, WHEN THE MIND HEARS: A HISTORY OF THE DEAF (1988) (each recounting over a century of controversy in deaf education). We note that since 1982 advocates of robust use of sign language in deaf education have become critical of interpretation—advocated by the Rowleys as a form of access to sign language—as an instructional methodology. *See*, e.g., Elizabeth A. Winston, *An Interpreted Education: Inclusion or Exclusion?* in Robert Clover Johnson and Oscar P. Cohen, IMPLICATIONS AND COMPLICATIONS FOR DEAF STUDENTS OF THE FULL INCLUSION MOVEMENT, Gallaudet Research Institute Occasional Paper 94-2 (1994).

a public school system,"[29] the *Rowley* discussion has nonetheless been the touchstone for analysis of FAPE in a broad range of cases since 1982. The Court stated the core of its holding this way: "if the child is being educated in regular" education the IEP[30] should be calculated to "enable the child to achieve passing marks and advance from grade to grade."[31] In the course of discussing this holding the Court referred to both "meaningful" and "some" educational progress, giving rise to much discussion in the certiorari papers here.[32] But the Court's conclusion is not stated in these precise terms and is tolerably clear: for Amy Rowley FAPE was provided because she received substantial specialized services and her first grade education was a success. The ultimate outcome of "achiev[ing] passing marks and advanc[ing] from grade to grade" is, after all, intended to be graduation from high school with appropriate preparation for later life. And a student who graduates with the equivalent of traditional As, Bs and Cs—particularly one whose performance can be characterized as "above average"—can reasonably be regarded by objective observers as successful.

B. Applying *Rowley* To A Broad Range of Students.

Extending this analysis to address students whose progress is not well measured through the use of traditional marks, one could restate this part of the holding as requiring a plan anticipating educational progress

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[29] *Rowley,* 458 U.S. at 202.

[30] *See* 20 U.S.C. § 1414(d)(1)(A).

[31] *Rowley,* 458 U.S. at 204.

[32] *Compare Rowley*, 458 U.S. at 192 ("meaningful") *with Id.* at 200 ("some").

that, if achieved, would be regarded as successful advancement of that student, through that portion of their public school career. While this involves making some form of reference to expectations for the student that is, of course, exactly what is done in general education, exactly what the Court did in *Rowley*, and a necessary element of writing an always-future-oriented IEP. Further, *Rowley* rejected both sameness and self-sufficiency as standards because these would define expectations too high for some children *and too low for many others*. This observation—that certain demonstrable achievements could be "too low"—cannot be squared with a just-more-than-trivial-benefit standard. Finally, the Court underscored this very point by qualifying its own holding and cautioning that, for some students, even routinely advancing from grade to grade was not to be taken as "automatically" enough to satisfy FAPE.[33]

Rowley is all-but-synonymous with requiring meaningful educational progress as described by the Third Circuit. More important, *Rowley* is plainly incompatible with requiring just-more-than-trivial progress. To revert to reference to traditional marks, a "D" as opposed to an "F" or a "zero" signifies more than "trivial" progress. Indeed, an "F+"—were such a grade awarded—would signify something non-trivial. After all "+" and "-" are intended to convey a non-trivial message. But one cannot read *Rowley* and believe that a mix of Fs and Ds would have resulted in a ruling that Amy Rowley had enjoyed a free and appropriate public education. The Court's further caution that passing from grade to grade was quite significant but not a guarantor of FAPE makes this point with something approaching

[33] *Rowley,* 458 U.S. at 203 n. 25.

certainty: real progress, meaningful progress, a plan for education that could be reasonably viewed as successful—not optimal, not the same as everyone else's, but also not just-barely visible—is required.

On this point, an exchange in the certiorari papers here is telling. The Solicitor General proposed that the just-more-than-trivial-benefit standard could be met by providing necessary sensory access for a student with a hearing impairment in a single class, but denying the same service in other classes, precluding virtually all progress in those subjects.[34] This, clearly, would allow more-than-trivial progress (passing one class) yet be absurd—reflecting a practice we believe no district or school would even attempt. The Respondent's retort was that this *reductio ad absurdum* was incorrect because the Americans with Disabilities Act[35] ("ADA") would be violated by such a practice.[36] But the issue here is not whether the ADA—adopted 15 years after IDEA and eight years after *Rowley*—would preclude a ludicrous result, or even if anyone would propose or agree to such an IEP. The issue is whether the core concept of FAPE embedded in IDEA has *internal* integrity or is itself reduced to absurdity by the just-more-than-trivial-benefit standard. That the sophisticated Respondents here resorted to extrinsic sources illustrates that the just-more-than-trivial-benefit standard—unassisted by an ADA-based *deus*

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[34] *Endrew F. v. Douglas County Sch. Dist.,* Brief of the United States as Amicus Curiae at 14-15.

[35] 42 U.S.C. §§ 12101 – 12213.

[36] *Endrew F. v. Douglas County Sch. Dist.,* Supplemental Brief for Respondent at 11.

ex machina—defines FAPE in a manner that lacks internal integrity and is inconsistent with *Rowley*.

C. The Just-More-Than-Trivial-Benefit Standard Is Inconsistent with IDEA.

As this Court recently observed, "in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."[37] As *Rowley* recognized, IDEA was an ambitious effort to address the educational needs of students unjustifiably excluded from public education.[38] That fundamental purpose is not addressed by just-more-than-trivial progress. Just as this standard is inconsistent with *Rowley*, it is inconsistent with the IEP process itself. Requirements for an IEP include (among other things):

> (II) A statement of measurable annual goals, including academic and functional goals designed to—
>
> (aa) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and. . . .
>
> * * *
>
> (IV) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications

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[37] *King v. Burwell,* 576 U.S. __, ___ (2015), Slip Op. at 21.

[38] *Rowley,* 458 U.S. at 200-204.

> or supports for school personnel that will be provided to enable the child—
>
> (aa) To advance appropriately toward attaining the annual goals;
>
> (bb) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
>
> (cc) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section . . ..[39]

Though these are technically descriptions of process rather than substance, the implications of these details (and others) are palpable and inconsistent with a legislative plan to seek just-more-than-trivial progress. The legislative plan for FAPE as a cornerstone of IDEA was, as this Court plainly recognized in *Rowley,* an expectation that students with disabilities would receive a real education. That expectation is not respected by the just-more-than-trivial-benefit standard.

CONCLUSION

The just-more-than-trivial-benefit standard does not keep faith with *Rowley* or IDEA. Consistent application of a standard reflecting higher expectations will inure to the benefit of students with disabilities in all public charter schools. Moreover, there is no support for the notion that efforts to meet such a standard will radically increase education costs or rates of IDEA

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[39] 20 U.S.C. § 1414(d)(1)(A)(i).

litigation. Rejecting the just-more-than-trivial-benefit standard is consistent with IDEA itself, one of the single most successful school reform efforts in American history.

Respectfully submitted,

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November 21, 2016

APPENDIX

APPENDIX

CHART A: STATE PER PUPIL EXPENDITURES	Just More than Trivial Benefit	Meaningful Benefit
First Quintile	New York (2nd Cir.): $20,610; Connecticut (2nd Cir.): $17.745; Vermont (2nd Cir.): $16,988; Wyoming: $15,797 (10th Cir.).	New Jersey: $17,907 (3rd Cir.).
Second Quintile		Pennsylvania: $13,961 (3rd Cir.); Delaware: $13,938 (3rd Cir.); Ohio: $11,354 (6th Cir.).
Third Quintile	Kansas: $9,972 (10th Cir.).	Michigan: $11,110 (6th Cir).
Fourth Quintile	New Mexico: $9.734 (10th Cir.); Colorado: $8985 (10th Cir.).	Kentucky: $9.312 (6th Cir.).
Fifth Quintile	Oklahoma: $7,729 (10th Cir.); Utah: $6,500 (10th Cir.).	Tennessee: $8630 (6th Cir.).

First quintile: District of Columbia: $18,485; Alaska: $18,416; Massachusetts: $15,087; Rhode Island: $14,767; New Hampshire: $14,335.

Second quintile: Maryland: $14,003; Illinois: $13,077; Maine: $12,707; Hawaii: $12,458; North Dakota: $12,358; Nebraska: $11,726; Minnesota: $11,464.

Third quintile: West Virginia: $11,260; Wisconsin: $11,186; Montana: $11,017; Virginia: $10,973; Louisiana: $10,749; Iowa: $10,668; Washington: $10,202; Oregon: $9,945.

Fourth quintile: Missouri: $9,875; South Carolina: $9,732; Arkansas: $9,616; California: $9,595; Indiana: $9,548*;* Georgia: $9,202; Alabama: $9,028**.**

Fifth quintile: South Dakota: $8,881; Florida: $8,755; Texas: $8,593**;** North Carolina: $8,512; Nevada: $8,414; Mississippi: $8,263**;** Arizona: $7,528; Idaho: $6,621.

Source: United States Census Bureau, *Public School System Finances* (2014), https://www.census.gov/govs/school/, State Level Tables, Tab 8 (accessed 10/21/2016).

CHART B: RANK ORDER OF JURISDICTIONS BY IDEA FILINGS PER 10,000 STUDENTS, HIGHEST TO LOWEST	Just More than Trivial Benefit	Meaningful Benefit
First Quintile	New York (3) (2nd Cir); Connecticut (9) (2nd Cir).	Virgin Islands (4) (3rd Cir.); New Jersey (7) (3rd Cir).
Second Quintile	Vermont (13) (2nd Cir).	Pennsylvania (11) (3rd Cir.); Delaware (20) (3rd Cir).
Third Quintile	New Mexico (23) (10th Cir.).	Ohio (24) (6th Cir.); Tennessee (27) (6th Cir.).
Fourth Quintile	Kansas (37) (10th Cir.).	Michigan (36) (6th Cir.).
Fifth Quintile	Oklahoma (42) (10th Cir.); Colorado (43) (10th Cir.); Wyoming (47) (10th Cir.); Utah (51) (10th Cir.).	Kentucky (46) (6th Cir.).

First Quintile: District of Columbia (1); Puerto Rico (2); Hawaii (5); California (6); Massachusetts (8); Maryland (10).

Second Quintile: Virginia (12); Alabama (14); Nevada (15); Rhode Island (16); Maine (17); Illinois (18); Washington (19).

Third Quintile: Alaska (21); Texas (22); Missouri (25); Georgia (26); Arizona (28); Florida (29); Virginia (30).

Fourth Quintile: Indiana (31); Mississippi (32)(tie); Idaho (32) (tie); Oregon (34); West Virginia (35); Montana (38); North Carolina (39); Arkansas (40).

Fifth Quintile: Louisiana (41); Minnesota (44); Wisconsin (45); Iowa (48); South Dakota (49); South Carolina (50); Nebraska (52); North Dakota (53).

Source: Perry Zirkel, *Trends in Impartial Hearings Under the IDEA: A Follow-up Analysis,* West's Education Law Reporter, 303, (2014) 1 at 18 App. 3, https://perryzirkel.com/publications/#due (accessed 11/4/2016).

No. 15-827

In the Supreme Court of the United States

ENDREW F., A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT
FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION; CASE, THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION; THE ASSOCIATION OF SCHOOL BUSINESS OFFICIALS INTERNATIONAL; AND FIVE OTHER EDUCATIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*.?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici have a keen interest in this case because state and local education agencies bear "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). *Amici* represent local educational officials who serve on the front line of providing education services to all children attending public schools, including the nearly 7 million children with disabilities who account for between three and nine percent of total enrollment, depending on age.[2]

AASA, The School Superintendents Association (AASA), founded in 1865, is the professional organization for some 10,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school

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[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

[2] U.S. DEP'T OF EDUC., 38TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2016, 250 ("ANNUAL REPORT"), http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/38th-arc-for-idea.pdf. For children under age 3, 2.9% of students receive federal funding; for children ages 3-5, Part B funding accounted for 6.1% of total students in 2012; for children ages 6–21, the percentage was 8.7% in 2014. *Id.* at xxiii–xxiv.

system leaders. Throughout its more than 150 years, AASA has advocated for the highest quality public education for all students, and provided programing to develop and support school system leaders. AASA members advance the goals of public education and champion children's causes in their districts and nationwide.

CASE, the Council of Administrators of Special Education, is an international non-profit professional organization providing leadership and support to approximately 4200 members who are dedicated to enhancing the worth, dignity, potential, and uniqueness of students with disabilities. Its mission is to provide leadership and support to members by shaping policies and practices that impact the quality of education. The membership is comprised primarily of local school district administrators of special education programs. CASE is a division of the Council for Exceptional Children (CEC), which is the largest professional organization representing teachers, administrators, parents, and others concerned with the education of children with disabilities.

The Association of School Business Officials International (ASBO), founded in 1910, is an educational association that supports school business professionals who are dedicated and trustworthy stewards of taxpayers' investment in public education. Through its members and affiliates, ASBO International represents approximately 30,000 school business officials who manage educational resources effectively and efficiently to support student achievement.

The National Association of Elementary School Principals (NAESP) is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. The Association believes that the progress and well-being of the individual child must be at the forefront of all elementary and middle school planning and operations. As the representative of the nation's school leaders serving more than 33 million children in grades pre-kindergarten through 8, the Association serves as a leading advocate for children and youth, ensuring every student has access to educational opportunities, and promoting education as a matter of national priority.

The National Association of Secondary School Principals (NASSP) is the leading organization of and voice for middle and high school principals, assistant principals, and school leaders from across the United States and in over 35 countries around the world. Founded in 1916, NASSP's mission is to connect and engage school leaders through advocacy, research, education, and student programs.

The Association of Educational Service Agencies (AESA) is a professional organization serving over 500 regional educational service agencies (ESAs) in 45 states throughout the nation. AESA members reach over 80% of public school districts, over 83% of private schools, over 80% of certified teachers, more than 80% of non-certified school employees, and well over 80% of public and private school students. ESAs provide support services such as professional development, itinerant employees, technology support,

transportation support, and leadership development to their member districts.

The National Association of Federally Impacted Schools (NAFIS), established in 1973, is a nonprofit membership association that represents public school districts across the country that receive federal Impact Aid funding. NAFIS members are geographically and demographically diverse school districts—many educate a significant population of Native American and military-connected students. NAFIS advocates for, and offers professional development to, the administrators and school board members of federally-impacted school districts.

The National Rural Education Association (NREA) is the leading national organization providing advocacy to enhance educational opportunities for rural schools and their communities. NREA's mission is to provide a unified national voice to address the needs and concerns of rural education and communities. NREA believes that all citizens are entitled to the same quality education regardless of socio-economic background or geographic location.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici can attest that the country's educators are already aiming high. Such aspirations, shared by educators and parents alike, should not be conflated with the separate question of how courts should assess whether a free and appropriate public education has been provided, which turns on the role generalist judges should play in settling disputes about the

likelihood of success of an individualized education program built on complex methodological choices.

In *Rowley*, this Court already determined that a free and appropriate public education (FAPE) is offered when the education program "confer[s] some educational benefit." 458 U.S. at 200. Since then, Congress has amended the IDEA various times, and twice enacted major legislation reauthorizing and modifying the Act.[3] Yet it has left the definition of FAPE essentially unchanged.

Not only has Congress acquiesced in the *Rowley* standard through repeatedly declining to amend the FAPE definition, the 2004 standards that Congress enacted to guide determinations in administrative hearings, 20 U.S.C. § 1415(f)(3)(E), codified case law applying *Rowley* and reinforced the "some benefit" standard. Particularly because the IDEA is Spending Clause legislation where States must be on clear notice of the conditions attached to federal funding—funding which covers only a paltry portion of the cost of special education—courts should not engraft a new substantive standard.

Jettisoning *Rowley*'s "some benefit" standard will also be unworkable and counter-productive. There has not been, and will not be, a race to the bottom applying *Rowley*. Under the current framework, educators focus on working collaboratively with parents to craft a

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[3] *See* Individuals with Disabilities Education Improvement Act of 2004 (2004 IDEA Amendments), Pub. L. No. 108-446, 118 Stat. 2647; Individuals with Disabilities Education Act Amendments of 1997 (1997 IDEA Amendments), Pub. L. No. 105-17, 111 Stat. 37; *see generally* Pet. Br. 6–8.

uniquely-tailored "individualized education program" (IEP) in accordance with rigorous process-based standards set forth by Congress. These IEP procedures, now even more demanding and substantive than when *Rowley* was decided, ensure that educators set high goals for students with disabilities.

Under the governing standard, courts can readily check whether an IEP has been properly crafted in accordance with the detailed statutory criteria. Not so for a new and imprecise heightened standard created from whole cloth. As *Rowley* recognized and Congress later reinforced in § 1415(f)(3)(E), it is unworkable to have generalist hearing officers and judges who are untrained in educational methodologies second-guess the judgments of educational experts working daily with the student that the IEP is designed to support. Instead, the rational basis-type review adopted in *Rowley* and endorsed by Congress appropriately asks courts to assess only whether an IEP was reasonably calculated to enable the child to receive some educational benefit.

Imposing a heightened standard will not only require second-guessing by ill-equipped courts and measurement against markers that Congress never set, it will redirect resources from providing education services to fighting court battles. The irony, therefore, is that the "substantially equal opportunity" standard advocated for by Petitioner, but tellingly not the United States, will likely make things more unequal, by spurring litigation and favoring families with more resources that can better afford to litigate.

Ultimately, there is no warrant to reinvent the FAPE requirement. The IDEA, and the intertwined

substantive standards from other educational statutes that it incorporates, have never been more successful at delivering special education services and improving the performance of students with disabilities. Educators are already aiming high, courts are playing the role that Congress contemplated, the *Rowley* standard is working, and the judgment below should be affirmed.

ARGUMENT

I. UNDER IDEA'S MODEL OF COOPERATIVE FEDERALISM, ONLY CONGRESS CAN REDEFINE FAPE, AND CONGRESS HAS EMBRACED *ROWLEY*.

A. Because IDEA Is a Spending Clause Statute, Congress Must Speak Clearly to Impose New Obligations on the States.

The essential starting point for construing the IDEA, a Spending Clause statute, is that any conditions upon the receipt of federal funds must be set out "unambiguously." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). When Congress acts under its spending power, it generates legislation "much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

It defies credulity to think that the meaning of FAPE, a concept that permeates the statute and forms the core of "the educational programs IDEA directs school districts to provide," *Arlington*, 548 U.S. at 305 (Ginsburg, J., concurring), could be reinvented without express proclamation by Congress and agreement by

the States. Provision of FAPE is the single-most litigated aspect of the Act.[4] Congress could not and would not *sub silentio* change the rules of the game about this core concept.[5]

Sticking to the terms of the statutory bargain is all the more essential here because the federal government is not, and was never meant to be, an equal partner under the IDEA. Congress originally called for a federal contribution of 40% of the estimated additional costs of providing education services to students with disabilities. *See* Pub. L. No. 94-142, 89 Stat. 773; § 1401(a)(B)(v). But the federal government has yet to meet that already-less-than-equal goal and consistently contributes less than half of their authorized share through annual appropriations, resulting in a federal shortfall that has only increased over time.

In fiscal year 2014, IDEA federal funding covered a mere 16 percent of the estimated excess cost of educating children with disabilities; the roughly $18

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[4] *See* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education*," 28 J. OF NAT'L ASS'N OF ADMIN. L. JUDICIARY 397, 402 n.17 (2008).

[5] The centrality of FAPE to the statute is thus distinguishable from "lower key" provisions that members of this Court have questioned should be subject to the *Pennhurst* "clear notice" rule. *See, e.g., Arlington*, 548 U.S. at 305 (expert fee issue was "lower key" because it "concern[ed] not the educational programs IDEA directs school districts to provide, but 'the remedies available against a noncomplying [district].'") (Ginsburg, J. concurring in part and concurring in the judgment) (quoting *id*. at 317, Breyer, J., dissenting).

billion shortfall has been assumed by the States and local school districts.[6] Since 2009, the average federal share per child has remained stagnant, while average per pupil expenditure has risen about 1 percent per year. The result: a steadily declining federal contribution to the costs of educating students with special needs.[7] And since 1981, the only year that the federal contribution has ever reached the 40% statutory goal, the federal share has been less than half of the federal commitment.[8]

The IDEA is said to be a "model of cooperative federalism," *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). But it is hardly "cooperative" to unilaterally—and silently—impose a heightened FAPE standard upon the States, particularly when the federal government has proved unable to uphold its end of the funding bargain. The States never received the requisite clear notice (or any notice) of either of the newly-minted standards proposed by Petitioner or the United States. The proposed standards are at odds

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[6] IDEA Part B "full funding" for FY 2014 would have amounted to approximately $28.65 billion, about $17.17 billion more than was appropriated. *See* Clare McCann, *IDEA Funding*, EDCENTRAL, http://www.edcentral.org/edcyclopedia/individuals-with-disabilities-education-act-funding-distribution/.

[7] COMMITTEE FOR EDUCATION FUNDING, EDUCATION MATTERS: INVESTING IN AMERICA'S FUTURE 149, http://cef.org/wp-content/uploads/2015/03/2015FullBudgetBook-March-31.pdf.

[8] *Id.*; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-2, SPECIAL EDUCATION: MORE FLEXIBLE SPENDING REQUIREMENT COULD MITIGATE UNINTENDED CONSEQUENCES WHILE PROTECTING SERVICES 7 (2015).

with each other, unmoored from the statutory text, and have yet to be considered, much less adopted, by any appellate court. Only Congress can so rewrite the bargain struck under the IDEA, thereby affording States the choice to accept or decline any new terms.

B. *Rowley*'s "Some Benefit" Test Remains Good Law, and Was Endorsed by Congress in 2004 in Section 1415(f)(3)(E).

1. In *Rowley*, a case "present[ing] a question of statutory interpretation," 458 U.S. at 179, this Court grappled with the meaning of "free appropriate public education," the "principal substantive phrase used in the Act." 458 U.S. at 187. *Rowley*'s core holding, independent of its facts, was that a "free and appropriate public education" occurs "by providing [at public expense] personalized instruction [that comports with the IEP process] with sufficient support services to permit the child to benefit educationally from instruction." *Id.* at 203-204. The Court expressly declined to establish "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. Instead, the Court held that any inquiry into the provision of FAPE should be twofold: 1) whether the school district complied with IEP procedures; and 2) whether the IEP "developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207.

Despite the many changes to the IDEA since *Rowley* was decided in 1982, it is undisputed that Congress left the core definition of FAPE intact. *Compare* 20 U.S.C. § 1401(9), *with* Pub. L. No. 94-142, § 602(18), 89 Stat.

773, 775. And although the Act now reflects heightened aspirations and includes more accountability mechanisms, it remains the case today, as in 1982, that "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded to handicapped children." *Rowley*, 458 U.S. at 190. Equally true today, as well, is that there are "infinite variations" in the degree of educational "benefits obtainable by children" given the "wide spectrum" of varying needs that are eligible for services under the Act. *Id.* at 202.

2. *Stare decisis* arguments, *see* Resp. Br. 22-24, thus apply with special force, as Congress has left the key definition of FAPE unchanged despite repeated opportunities for revision. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts that statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009). And Congress has never amended the FAPE definition in response to *Rowley*, even as Congress has shown itself well-able to amend the IDEA when it wants to respond to this Court's rulings. *See* 20 U.S.C. § 1403 (providing a clear waiver of sovereign immunity after *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989), which held that Congress's intent in abrogating a State's immunity under a previous version of the Act was not sufficiently clear). *See also Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409-2410 (2015) (recognizing the strength of *stare decisis* in statutory rulings, especially when there is "long congressional acquiescence" in the holding at issue). This Court should reject arguments to either reinvent *Rowley*, rewrite the statute, or both.

Both Petitioner and the United States disclaim any intent to overrule *Rowley*, yet Petitioner's standard is indistinguishable from one that *Rowley* rejected,[9] while the United States reinterprets *Rowley* beyond recognition, parsing the case as if it were a statute, and eliding the critical statutory text. The definition of FAPE, and the absence of any prescribed substantive standard for children receiving federal funds under the Act, remain unchanged. *Rowley*'s holding turned on these core statutory characteristics and there is no warrant for jettisoning the "some benefit" rule.

3. Congressional support for the *Rowley* rule is manifest by more than mere acquiescence. In 2004, Congress added Section 1415(f)(3)(E) to the Act.[10] Meant to guide the hearing officers that conduct the first round of due process hearings,[11] the chosen language echoes and reinforces *Rowley*'s "some benefit" standard. The initial subsection provides that a determination of whether a child has received FAPE should be made on "substantive grounds." 20 U.S.C. § 1415(f)(3)(E)(i). Congress declined to specify any quantum of substantive attainment or requisite degree of progress. This is fully consistent with *Rowley*'s "some benefit" standard, as "some," in this context, means "being of an unspecified amount."[12]

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[9] *Rowley* expressly rejected a "commensurate opportunity" standard, 458 U.S. at 189–190. *See also* Resp. Br. 17–19.

[10] The complete provision is set forth in the appendix.

[11] *See* 20 U.S.C. §§ 1415(b)(6), 1415(f)(1), 1415(i)(2)(A), 1415(g).

[12] *See Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

In the second subsection, Congress reinforced core procedural protections, like the right of parents to participate in the decision-making process, providing that failure to comply would result in an automatic denial of FAPE, 20 U.S.C. § 1415(f)(3)(E)(ii)(II). But for other procedural errors, Congress again echoed *Rowley*, stating that FAPE is denied when a "deprivation of educational benefit" results. *Id.* § 1415(f)(3)(E)(ii)(III). This provision codified extant case law applying *Rowley* and developing a harmless error standard. *See, e.g., Burilovich v. Bd. of Educ.*, 208 F.3d 560, 565-566 (6th Cir. 2000) (applying *Rowley* "some benefit" rule, employing harmless error standard like § 1415(f)(3)(E) and collecting cases from other circuits); *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001); *Houston ISD v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

Nor is Petitioner's suggestion (Br. 34) that Section 1415(f)(3)(E) heightened the reviewing standard supported by the legislative history. The Senate Report clarifies that the "substantive grounds" requirement aimed to make review *less* intrusive, by avoiding denials of FAPE based on "a mere procedural technicality." S. Rep. 108-185 (2003) at 40.

In contrast to this explicit congressional endorsement of the *Rowley* standard in § 1415(f)(3)(E), there is no similar textual anchor for the standard proposed by Petitioner. Hortatory language in the statutory findings cannot supplant the unchanged FAPE definition, or the guideposts echoing *Rowley* in § 1415(f)(3)(E), particularly in the Spending Clause context where conditions must be stated clearly. *See Pennhurst*, 451 U.S. at 24 (concluding that statutory

finding provisions "were intended to be hortatory, not mandatory"). And the fact that the United States and Petitioner cannot agree on the proper standard is yet further proof that neither the "substantially equal opportunity" standard that Petitioner proposes, nor the "significant educational progress" standard urged by the United States, is mandated by the statute's text.

In sum, Congress has not authorized—and the States have not agreed—for courts to play any more intrusive a role in determining whether FAPE has been provided than already articulated in *Rowley*: is there a "basic floor of opportunity" that is reasonably calculated to yield "some educational benefit." 458 U.S. at 200.

II. THE IEP PROCESS AND OTHER FEDERAL STATUTES ALREADY ENSURE THAT SCHOOL DISTRICTS AIM HIGH; ASKING JUDGES TO SECOND-GUESS EDUCATORS' INFORMED DECISIONS WILL ONLY INCREASE LITIGATION AND INEQUALITY.

Suggestions by Petitioner, the United States, and some supporting *amici* that the *Rowley* standard condones a race to the bottom are baseless. As Justice Stevens recognized in his concurrence in *Schaffer*, "[w]e should presume that public school officials are properly performing their difficult responsibilities under this important statute." 546 U.S. at 62-63. Petitioner's assertion that maintaining the *Rowley* standard will encourage educators to "aim[] for educational achievement that barely exceeds the trivial" (Br. 17) wrongly conflates the inquiry that courts must undertake to determine whether a child has received

FAPE with the separate and distinct question of how school districts pursue statutory goals through compliance with the detailed procedures set forth in the Act.

Judicial deference to complex methodological choices does not encourage educators to aim low, it empowers them to aim high. *Rowley*'s non-intrusive standard allows multidisciplinary teams to craft the best options for the child at hand, without risk of being second-guessed by a hearing officer or judge who lacks the expertise to assess the comparative worth of different educational approaches. In fact, the IDEA makes clear, through rigorous procedural requirements, that school districts *must* aim high in assessing the needs of children with disabilities and in providing personalized special education services.

The notion that school districts commonly reject methods and approaches that could be helpful to a child under the guise that they are already "doing enough" not only presumes, without foundation, the worst about educators, it completely ignores the accountability measures emphasized in and enforced by the IDEA, and interwoven statutes like the Elementary and Secondary Education Act (ESEA). *See* Resp. Br. 7. The IDEA's distinct emphasis on stringent *process-based* protections ensures that individualized programs are "tailored to the unique needs" of each child, *Rowley*, 452 U.S. at 181, and seek "ambitious but achievable" educational benefits.[13]

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[13] U.S. Dep't of Educ., Dear Colleague Letter at 5 (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

Congress's consistent refusal to set any specific substantive marker against which FAPE should be measured confirms that compliance with congressionally-mandated processes and accountability mechanisms should, per *Rowley*, be the focus of judicial review. *See* § 1415(f)(3)(E)(ii). Extra-statutory and nebulous concepts of "substantial educational benefit" (as the petition for certiorari advocates), or "substantially equal opportunity" (as Petitioner now argues), or "significant educational progress" (urged by the United States) are all standards that courts are ill-equipped to evaluate or measure, and which, ultimately, will engender more litigation and more inequality, without necessarily improving educational outcomes.

A. The IEP Process Is Laden with Substantive Benchmarks and Ensures that Educators Aim High.

1. An Individualized Education Program, or IEP, forms the nucleus of the IDEA's guarantee of FAPE for children with disabilities. *See* 20 U.S.C. § 1401(9); § 1414(d)(1)(A). An IEP is "the centerpiece of the statute's education delivery system," *Honig v. Doe*, 484 U.S. 305, 311-312 (1988), and is the "modus operandi" of the Act, *Sch. Committee of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985).

An IEP is produced through an intensive collaborative effort by families and schools to assess and address a child's unique learning issues. *See* 20 U.S.C. § 1414(d). The IDEA prescribes "elaborate and highly specific procedural safeguards," *Rowley*, 458 U.S. at 205, that educators must follow in developing

an IEP—including measures directed at the substantive quality of the resulting plan. As Petitioner and the United States recognize, the rigors of the IEP process have only increased since *Rowley*. Pet. Br. 36-40; U.S. Br. 21.

For example, the IEP must articulate "measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general educational curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(II). The IEP must specify the special services to be provided to permit the child "to advance appropriately toward attaining the annual goals." *Id.* § 1414(d)(1)(A)(i)(IV).

Moreover, the programs, curricula, and services that schools offer each child must be based on "peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *see also id.* § 1400(c)(5)(E) (endorsing the use of "scientifically based instructional practices, to the maximum extent practicable"). Parents—integral members of the "IEP Team" that develops, reviews, and revises the program for a child, 20 U.S.C. § 1414(d)(1)(B)—can accept or reject the school's suggested educational practices from being incorporated into an IEP. The goal of the multidisciplinary IEP team is to ensure the greatest likelihood of success given the unique circumstances of each child.

The IDEA builds in other procedural mechanisms to confirm that the IEP is substantively sound and workable in practice. The child's progress is carefully monitored through periodic reports from the school district, 20 U.S.C. § 1414(d)(1)(A)(i)(III), and the IEP must be reviewed and, where necessary, revised at

least once a year to ensure that annual goals are being achieved, § 1414(d)(4)(A). And in the event a parent files a due process complaint, the statute and implementing regulations require the school district to convene a resolution meeting to try to solve problems without litigation. 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a).

These measures do much more than set forth meaningless procedural niceties. Rather, they work in concert to ensure that the IEP is substantively appropriate and "individually designed to provide educational benefit" to the child. *Rowley*, 458 U.S. at 201. Far from indicating that the *Rowley* "some benefit" standard is too low, these increased procedural protections and accountability measures reinforce *Rowley*'s central conclusion that compliance with the IEP process, itself, usually is enough to attain the desired substantive benefit. 458 U.S. at 206.

2. The IEP process, moreover—and the IDEA as a whole—does not operate within a vacuum. Congress has also legislated outside the IDEA to encourage States to adopt high standards for special education students. There is thus even less warrant to impose extra-statutory substantive requirements. As Petitioner points out at length (Br. 26–28), the IDEA works in conjunction with the Elementary and Secondary Education Act (ESEA), which requires States to adopt "challenging academic content standards and aligned academic achievement standards" for "all students," including those with disabilities. 20 U.S.C. §§ 6311(b)(1)(A)–(B), 6311(b)(2)(B)(vii)(I). While the ESEA permits the use of "alternate academic achievement standards for

students with the most significant cognitive difficulties," *id*. § 6311(b)(1)(E), even these are subject to the ESEA's "challenging State academic content standards," *id*. § 6311(b)(1)(E)(i)(I), and "must reflect professional judgment as to the highest possible standards achievable by" such students, *id*. § 6311(b)(1)(E)(i)(III). School districts are also subject to statewide accountability systems, which must consider the performance of students with disabilities compared to that of their non-disabled peers and require schools to address consistent underperformance of students with disabilities. *Id.* § 6311(c)(2)(C) (identifying children with disabilities as a "subgroup of students" for accountability purposes); *id*. § 6311(d)(2)(A)–(C) (requiring "targeted support and improvement" for schools in which "any subgroup of students is consistently underperforming"). *See also Resp*. Br. 6-7 (describing "systemic conditions" that States must satisfy to receive federal funding for education)

To maintain conformity with the IDEA and ESEA, then, educators simply cannot—contrary to Petitioner's suggestions—aim to barely clear the bar by seeking minimal benefit and limited progress for students with disabilities. Instead, the IEP process itself, bolstered by the ambitious goals and accountability mandated by the ESEA, purposefully bakes in rigorous and thoughtful consideration of each child's needs and holds school districts accountable for each child's progress. These mandates ensure that school districts and parents "aim high" while crafting the IEP, with clear goals tethered to state standards in place, but at the same time preserve the flexibility of educators to

make informed judgments about how best to help each student to succeed.

B. The *Rowley* Standard Properly Envisions a Judicial Check on Substantive Adequacy that Is Akin to Rational Basis Review.

1. The significant procedural requirements imposed by the IDEA naturally and intentionally spur the generation of meaningfully substantive education programs. *Rowley* is premised on "the importance Congress attached to these procedural safeguards," 458 U.S. at 205, and recognizes that any further evaluation of an IEP's substantive adequacy is properly limited to a rational basis-style review of assessing whether, on the whole, the program was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206–207. And as the cases detailed in Part III, *infra*, demonstrate, this standard is far from toothless.

Given the inter-circuit muddle regarding the proper formulation of the *Rowley* standard, *see* Pet. App. 17a-18a & n.8, this Court can clarify that *Rowley*'s "reasonably calculated to achieve some educational benefit" standard is a non-intrusive rational-basis-type check, already blessed by Congress in the criteria for hearing officers' decisions, not a newly-minted test that would disrupt the entire statutory scheme.[14]

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[14] Harping on the specific "merely more than de minimis" phrasing used sometimes by the Tenth Circuit elevates form over substance. *See e.g.*, *O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 358-359 (4th Cir. 2015) ("[W]e have never held 'some' educational benefit means only 'some minimal academic advancement, no matter how trivial.'").

Rowley's "reasonably calculated" language resembles the rational basis test used in other contexts where courts have recognized the impropriety of second-guessing substantive policy judgments that are better made by others. *See Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2033 (2012) (statute passes rational basis inspection when "reasonably related" to interests being served) (internal quotations and citations omitted). This non-intrusive inquiry makes sense because, like the legislative process, the development of an IEP can be messy and complex, often involving nuanced educational choices and compromises in service of attaining sometimes conflicting objectives that are exceedingly difficult for a court to appraise post hoc. There is no magical "right answer" for any given child or situation, no sure-fire methodology for teaching every child to read or do math or learn self-control. The *Rowley* standard lets generalist judges steer clear of making difficult choices between equally viable educational alternatives, while providing a substantive check that ensures educational benefit. *See* Part III, *infra.*

2. The U.S. Department of Education's What Works Clearinghouse—which "reviews the existing research on different programs, products, practices, and policies in education" to "provide educators with the information they need to make evidence-based decisions"—lists dozens of different instructional methodologies that "work" for various skills and learning problems. WWC: FIND WHAT WORKS! http://ies.ed.gov/ncee/Wwc/ (last visited Dec. 17, 2016). For literacy alone, the Clearinghouse catalogs 69 possible methodological interventions (all supported by "high-quality research") using a wide array of

intervention tools, including computer software, group instruction, and peer tutoring. *Id.*

Even established "best practices" do not guarantee the same results for each child, and are not uniformly carried out with the same fidelity for every student in every system, often due to factors outside a school's control, such as home environment or family situation. *Cf.* U.S. Dep't of Educ., Dear Colleague Letter at 6 ("[B]ecause the ways in which a child's disability affects his or her involvement and progress in the general education curriculum are highly individualized and fact-specific, the instruction and supports that may enable one child to achieve at grade-level may not necessarily be appropriate for another child with the same disability.") Each student's unique cognitive profile and learner characteristics, in other words, must be accounted for, and all while schools are obligated to meet many different learning standards, not focus only on a few isolated skills.

Autism spectrum disorder, to take one example, manifests itself in myriad presentations (*e.g.*, social communication impairments, atypical body movements, sensory challenges, behavioral problems, etc.), with symptoms that may change over time. *See* NAT'L AUTISM CTR., EVIDENCE-BASED PRACTICE AND AUTISM IN THE SCHOOLS: AN EDUCATOR'S GUIDE TO PROVIDING APPROPRIATE INTERVENTIONS TO STUDENTS WITH AUTISM SPECTRUM DISORDER 20–23 (2d ed. 2015).

Unsurprisingly, there are *many* research-based interventions that are appropriate to utilize with students with autism, from behavioral interventions to modeling to pivotal response training. *See id.* at 32–64 (summarizing fourteen different "established" evidence-

based interventions and identifying eighteen additional "emerging" interventions). Selecting and implementing the most appropriate interventions for a single child struggling with particular issues requires, among other things, careful consideration of that child's specific needs and history, ample understanding of each method and awareness of new research and findings, and ongoing "data collection" about what measures actually lead to student improvement. *See id.* at 66–94 (providing guidance on the selection, implementation, and assessment of interventions).

Professional judgment and experience are vital to such decisionmaking. Educators use their expertise, together with active input from parents—working against the statutorily-mandated IEP benchmarks—to make the best choices they can at the time to craft a specialized program that will most effectively address the unique needs of the student. School teams are best positioned to make recommendations for a student given that student's individual needs and learning profile, based on the team's expertise and experience of what has worked for their students and in their schools in the past. *Amici*'s members have seen countless instances where parents with initial misgivings about the school team's methodological choices end up more than satisfied with the results. These success stories, however, do not get litigated.

3. The standard at issue here comes into play only in the event of a disagreement that cannot be resolved, when a due process hearing is requested. 20 U.S.C. § 1415(f)(1)(A). And because procedural violations can alone be sufficient to deny FAPE, *Rowley*, 458 U.S. at 206, the standard has work to do only when a

procedurally-compliant IEP—*i.e.*, one that, *inter alia*, sets measurable goals designed to ensure progress in the general education curriculum—is nonetheless decried as insufficient.

It is one thing for generalist judges to review whether an IEP was reasonably calculated to result in some educational benefit. It is quite another for them to determine which of several instructional alternatives is likely to generate some undefined quantum of benefit over another. The *Rowley* standard is workable precisely because "[o]nce the determination is made that the IEP was adequate, that ends the inquiry. [Judges] need not consider whether other programs would be better." *Lt. T.B. ex rel. N.B. v. Warwick Sch. Comm.*, 361 F.3d 80, 86 (1st Cir. 2004) (citing *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948–949 (1st Cir.1991)). *Rowley* thus made clear that under the IDEA there is no entitlement to the "best" program and courts need not choose between two proven methodologies. *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade Cty., Fla.*, 437 F.3d 1085, 1102 (11th Cir. 2006) (citing *Rowley*, 458 U.S. at 204); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) ("*Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child.") (citations omitted).

Relieving judges of the impossible task of deciding which educational methodology might work best (when both alternatives work) makes sense. Because choosing between competing methodologies is not the

comparative advantage of generalist judges. Judges, in any context, "are not final because [they] are infallible, [but are only] infallible because [they] are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring). Yet under the inherently comparative standards proposed by Petitioner and the United States, generalist judges are given the last word on evaluating the likelihood of success of complex methodological choices.

In *Amici*'s view, asking administrative hearing officers or judges, who typically lack educational know-how, to determine which method of instruction is more likely to yield a subjectively-valued result undermines the very purpose of the multidisciplinary school teams and the IEP process itself, which is to create a structured and collaborative process steeped in knowledge and experience. "[M]ost issues that arise in hearings demand expertise concerning disability and education, not law." S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. OF THE NAT'L ASS'N OF ADMIN. L. JUDICIARY 544, 563 n.53 (2012). There is wide variation in the quality and type of hearing officers across the country, and "[m]any hearing officers are faced with the obligation to decide among proposals that they are not well trained to evaluate." *Id.* at 551.

Courts, as well, "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Rowley*, 458 U.S. at 208 (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). And "[c]ognizant that judges lack the on-the-ground expertise and experience of school administrators," this Court has

repeatedly "cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'" *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 686 (2010) (quoting *Rowley*, 458 U.S. at 206). Thus, when reviewing FAPE determinations, federal courts are typically mindful that they "lack 'the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.'" *T.K. v. N.Y. City Dep't of Educ.,* 810 F.3d 869, 875 (2d Cir. 2016) (quoting *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217, 240–241 (2d Cir. 2012)).

But that is exactly what the heightened review standard espoused by Petitioner invites hearing officers and federal courts to do: "resolve … difficult questions of educational policy." *Id.* Petitioner would have hearing officers and federal judges, in hindsight and without the benefit of experience and context, make judgments as to whether certain interventions should have been employed over others or which outcomes qualify as "meaningful" or "substantial" or "significant" enough.

Judges cannot make such qualitative calls without engaging in precisely the type of hindsight analysis that the circuits have roundly rejected. *E.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP is a snapshot, not a retrospective."); *O'Toole By & Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 701–702 (10th Cir. 1998) ("Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement."); *R.E. v. New*

York City Dep't of Educ., 694 F.3d 167, 186 (2d Cir. 2012) (collecting cases and adopting the "majority view that the IEP must be evaluated prospectively as of the time of its drafting."). Neither Petitioner nor the United States challenge this "snapshot rule," under which "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993).

Yet, under the standards urged by Petitioner and the United States, judges will inevitably be enticed into relying on "hindsight evidence" to unfairly second-guess well-intentioned multidisciplinary teams that exercised their best-informed judgment when crafting an IEP. In contrast, the "reasonably calculated to achieve some benefit" standard from *Rowley* is a fully adequate and workable substantive check that reflects the relative distribution of expertise between courts and educators, honors congressional intent, and respects the good faith efforts of educators while avoiding the risk of impermissible hindsight rulings.

"[E]ducation of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). The more "robust" substantive review standards proposed by Petitioner and the United States insist otherwise by asking generalist federal judges to unsuitably intrude upon the province of educators. Neither the statutory scheme of the IDEA nor this Court's precedent supports such a change.

C. Heightened Substantive Standards Are Unworkable and Counter-Productive.

Beyond the incongruity with principles of federalism, the IDEA's text, and this Court's decisions, the (many different) standards offered by Petitioner and its *amici* also fail more pragmatic tests. How could a court possibly apply them in practice, especially when they diverge from congressionally-mandated standards for hearing officers? Petitioner does not say. Nor does Petitioner address the likely systemic consequence of engrafting a heightened substantive standard onto the IDEA: increased inequality in special education, between the have-nots and the have-enoughs-to-litigate.

1. Tellingly, neither Petitioner nor the United States attempt to apply their proposed standards to the facts of this case. It thus remains a puzzle as to how judges are to apply the recommended standards—whether characterized as "substantial benefit" or "substantially equal opportunity," or "significant educational progress"—in evaluating an IEP. And it is simply unrealistic to assume that courts will have the time and capacity to fully assess whether a certain practice employed by a school district is providing a child with sufficient educational benefit (or opportunity) as compared to countless other potential approaches which were not pursued, often for good reason.

The murky and subjective nature of the alternative standards proposed—how meaningful is "meaningful"? "Substantially equal" to what? What constitutes sufficiently "significant" progress?—would leave educators in the dark as to what, exactly, an IEP must

do to survive judicial review. The *Rowley* standard, in contrast, defers to the expertise of educators and recognizes that the substantive goals of the IEP process are best ensured through enforcement of its clear procedural protections, subject only to a rational-basis type substantive check.

Imposition of a qualitative assessment beyond the test that Congress has mandated for hearing officers, moreover, is simply unworkable. Petitioner insists that the "standard of review courts should apply when assessing the adequacy of IEPs is not at issue here," Pet. Br. 49, because their test "simply describes the level of education schools must strive to deliver." *Id.* Yet judges review the administrative decisions of hearing officers. And Petitioner challenges neither the substantive review criteria used at administrative hearings, nor the governing standard of judicial review of administrative decisions.

Courts currently engage in an independent, but circumscribed, review, "more critical . . . than clear-error review but . . . well short of complete *de novo* review," of administrative decisions. *C.F. ex rel. R.F. v. N.Y.C. Dep't of Educ.,* 746 F.3d 68, 77 (2d Cir. 2014) (quotation marks omitted). They give "due weight" to the state proceedings, affording particular deference where "the state hearing officers' review has been thorough and careful." *M.H. v. N.Y.C. Dep't of Educ.,* 685 F.3d 217, 241 (2d Cir. 2012) (quotation marks omitted).

But how can courts give "due weight" to the decisions of hearing officers if they are applying an entirely different test in determining whether a child has received FAPE? If judges apply one standard, and

hearing officers another, deference to administrative rulings offers no aid to generalist judges who wish to avoid making hard educational choices under the standards proposed by Petitioner and the United States. The result would be not only "permi[ssion] simply to set state decisions at nought," *Rowley*, 458 U.S. at 206, but arguably a requirement to do so. Such intrusive review would surely frustrate the "very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP." *Id.*

2. That Petitioner and the United States only tell, but do not attempt to show, how their respective standards would be outcome-determinative here proves not only that their standards are unworkable, but also that imposition of a new subjectively assessed test by reviewing courts may not even affect educational outcomes. While the educational results are uncertain, the costs are not: Changing the standard will lead to more litigation, likely resulting in the lopsided allocation of already limited resources.

Thus, the "substantially equal opportunity" standard advocated for by Petitioner will, ironically, generate greater inequality, by spurring litigation and favoring families with more resources that can better afford to litigate. The "cost and complexity of a due process hearing hinder low- and middle-income parents from [participating in them]. IDEA's complex protocols and mandates disproportionately benefit wealthy, well-educated parents, who can deftly and aggressively navigate the due process system with the aid of private counsel and paid education experts." *See* SASHA PUDELSKI, AASA, RETHINKING SPECIAL EDUCATION DUE

PROCESS, 7 (April 2016).[15] Educational outcomes may suffer too, as school districts often opt to yield to litigious parents, even against their best judgment, simply to avoid the costs of litigating. *Id.* at 3 (discussing results of a survey of 200 randomly selected school superintendents).

School districts across the country are already struggling with litigation costs, "spend[ing] over $90 million per year in conflict resolution," and data from the most populated states indicate that the annual number of due process hearing requests continues to increase. *Id.* at 23. Changing the rules of the game and imposing a heightened fuzzy standard different from the standard Congress mandated for hearing officers will only increase incentives to litigate, as dissatisfied parties seek reversal in court under a new and malleable standard.

Fomenting litigation runs directly counter to congressional intent, as "Congress has repeatedly amended the Act to reduce its administration and litigation-related costs." *Schaffer*, 546 U.S. at 59 (describing, *inter alia*, the 2004 amendments adding mandatory "resolution sessions" in § 1415(f)(1)(B) and 1997 amendments mandating that States offer mediation in § 1415(e)). Accountability mechanisms added through the ESEA and its predecessors, moreover, offer alternatives to litigation to ensure that districts are getting desired results, like establishing a complex set of compliance indicators and related

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[15] *Available at* http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

penalties for school districts, including the potential loss of funding. PUDELSKI, RETHINKING SPECIAL EDUCATION DUE PROCESS, at 7; Resp. Br. 7-8.

In short, Congress wanted the ambitious goals set in 2004 to be achieved not through increased litigation, but by giving "[p]arents and schools . . . expanded opportunities to resolve their disagreements in positive and constructive ways." *See* 20 U.S.C. § 1400(c)(8). Increasing incentives to litigate by imposing an unworkable judicial standard different than the one Congress mandated for administrative hearings runs directly counter to Congress's intent.

III. THE "SOME BENEFIT" STANDARD IS WORKING TO ATTAIN THE IDEA'S GOALS.

As Congress's decision to leave the FAPE standard unchanged reflects, the *Rowley* standard is working. Never before have special education students been integrated so well, and achieved so much, as they have today. Petitioner and his *amici* offer no evidence to the contrary. Instead, they offer parade-of-horribles hypotheticals that they assume could occur unless this Court re-writes the IDEA to reject the *Rowley* standard. But a review of actual experience demonstrates that the courts faithfully applying *Rowley*'s "some benefit" standard are effective guardians against denials of FAPE. There is no reason for this Court to "fix" a system that not only is not broken, it is thriving.

1. The data belie any claim that the *Rowley* standard results in a race to the bottom by school districts, leading to low expectations and minimal

progress for students with disabilities in public schools. *See* Pet. Br. 17; U.S. Br. 30-31. *Rowley* has been in place for over three decades and has been faithfully applied by the overwhelming majority of the courts of appeals during that time. *See* Pet. for Certiorari 11-13 (collecting cases from the courts of appeals). Coupled with new mandates from the ESEA—as well as provisions of the IDEA distinct from the FAPE provision—the result has been a remarkable increase in educational opportunity and outcomes, not a race to the bottom. Under IDEA amendments and the intertwined statutory standards from the ESEA, the expectations for school districts to serve students with disabilities have never been higher.

Looking at just one important policy goal—integration or inclusion—students with disabilities are educated in integrated classrooms far more often than ever before. From 2005 through 2014, the percentage of students ages 6 through 21 served under IDEA who were educated inside a regular classroom environment for the vast majority of the day increased from 53.6% to 62.6%. ANNUAL REPORT, at 49. And those students are achieving good outcomes in ever higher numbers. Graduation rates are up over the same period—increasing from 54.4% to 66.1%, *id.* at 62—in an era of increasingly rigorous academic standards for graduation in many states. *See* Br. For Nat'l Ass'n of State Directors of Special Educ. as *Amicus Curiae* in Support of Neither Party 8 ("State Director *Amicus* Br.") (describing increasing standards and graduation rates for special education students from 2000 to the present). At the same time, dropout rates are down, decreasing from 28.3% to 18.5%. ANNUAL REPORT, at 62. These successes demonstrate

that the "nation's educators" have been "aim[ing] high *every day in the field*," which benefits not only special education students but entire school communities. State Director *Amicus* Br. 10. There is no need to implement a more stringent (and judicially intrusive) substantive FAPE standard when schools are already obligated to meet demanding achievement goals *and* their efforts are largely working.

2. The upward trajectory of special education in the country has occurred not *despite* the "some benefit" standard illuminated in *Rowley* but, at least in part, *because* of that standard. Courts faithfully applying *Rowley* have proved competent—and empowered—to identify and ameliorate situations where school districts have fallen short of what the IDEA guarantees, while still affording school districts the necessary flexibility to make difficult judgments about how best to provide educational benefits.

The real-world experience under *Rowley* is thus far from the educational malpractice hypotheticals that Petitioner and the United States put forward, tellingly without any evidence that any has ever occurred. *See* Pet. Br. 17; U.S. Br. 30-31. And the evidence is to the contrary. Courts are amply able to provide a safeguard against the dreadful examples posited by the other side. Thus, a district court operating in a circuit that applies *Rowley—i.e.*, does not impose a heightened substantive standard—recently held that a school district denied FAPE to a deaf high school student when it provided, but then removed, a speech-to-text transcription technology, leaving the student with only an often-malfunctioning amplification system as assistive technology. *See DeKalb Cty. Bd. of Educ. v.*

Manifold, No. 4:13-CV-901-VEH, 2015 WL 3752036, at *5-6 (N.D. Ala. June 16, 2015); *contra* U.S. Br. 30 (hypothesizing that "some benefit" standard would permit a school district to provide a service for two months and then remove it for the rest of the year).

Numerous examples show that courts provide an effective check without the aid of a heightened substantive standard. First, courts ensure the substantive adequacy of an IEP by enforcing the procedures that the IDEA demands. *See Rowley*, 458 U.S. at 206. Thus a district court in the Ninth Circuit, following the "some educational benefit" and "basic floor of opportunity" standard, rather than a heightened standard, concluded that a school district had failed to provide FAPE to a deaf student when it refused to discuss a referral to the California School for the Deaf, notwithstanding the school district's provision of the curriculum in sign language. *J.G. ex rel. Jiminez v. Baldwin Park Unified Sch. Dist.*, 78 F. Supp. 3d 1268, 1286, 1288-89 (C.D. Cal. 2016). Similarly, the Second Circuit upheld a district court's finding that a school district committed a procedural violation that denied FAPE when it refused to discuss whether bullying was impeding a student's ability to receive educational benefits, without deciding whether the IEP was also substantively invalid. *T.K.*, 810 F.3d at 876 & n.3.

Examples like these demonstrate that by enforcing the IDEA's procedural safeguards, courts are able to police against IEPs that disregard entire aspects of a student's disability or learning needs, contrary to the United States' hypotheticals, U.S. Br. 30. *See, e.g.*, *Brown v. D.C.,* 179 F. Supp. 3d 15, 29 (D.D.C. 2016)

(holding school district denied FAPE when it "failed to convene a meeting or incorporate the effects of plaintiff's recent shooting-related injuries when implementing his IEP").

Moreover, courts armed by *Rowley*'s "some benefit" standard have effectively guarded against substantive failures as well as procedural ones. When the evidence demonstrates that an IEP is not reasonably calculated to convey educational benefits, courts have not hesitated to require alternatives. *See, e.g.*, *C.D. v. New York City Dep't of Educ.*, No. 15-CV-2177(ARR)(JO), 2016 WL 3453649, *17 (E.D.N.Y. June 20, 2016) (rejecting community-school placement of a middle schooler with a speech-language impairment and epilepsy because the "record unmistakably shows that a community school recommendation was not conducive to the student's progress"); *J.L. v. Manteca Unified Sch. Dist.*, No. 2:14-01842 WBS EFB, 2016 WL 3277260, *8 (E.D. Cal. June 14, 2016) (applying "basic floor of opportunity" standard and holding that school district failed to provide FAPE to an autistic student when it provided only consultation and not "direct speech and language services"); *W.S. v. City Sch. Dist. of the City of New York*, No. 15 CV 3806-LTS, 2016 WL 2993208, *8 (S.D.N.Y. May 23, 2016) (holding school district's provision of a classroom setting with a certain staff ratio denied an autistic student FAPE even though that setting was "generally appropriate for students with autism," because no evidence indicated the student "was capable of making educational progress" in that environment); *S.C. v. Katonah-Lewisboro Cent. Sch. Dist.*, 175 F. Supp. 3d 237, 259 (S.D.N.Y. 2016) (finding district denied FAPE to a sixth grader with multiple disabilities when it offered

instruction in a 12-student classroom and record indicated the student "required a smaller class and one-to-one instruction").

Courts thus have not stood idly or powerlessly by under *Rowley*. Rather, the *Rowley* standard regularly provides courts workable tools to intervene when school districts fail, while preserving school districts' flexibility to continue to achieve ever higher measures of success for their special education students, and all students. There is no reason for the Court to alter a standard that Congress has left untouched, and that has allowed special education students to thrive for over 30 years.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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December 21, 2016

APPENDIX

APPENDIX

TABLE OF CONTENTS

20 U.S.C. § 1415(f)(3)(E) provides:

(E) DECISION OF HEARING OFFICER

(i) IN GENERAL – Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) PROCEDURAL ISSUES – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) RULE OF CONSTRUCTION – Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

No. 15-827

IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTORY AUTHORITIES

FEDERAL RULES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Council of the Great City Schools ("Council") is a coalition of 70 of the nation's largest urban public school systems, [2] and is the only national

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no persons other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

[2] Albuquerque Public Schools; Anchorage School District; Arlington Independent School District; Atlanta Public Schools; Austin Independent School District; Baltimore City Public Schools; Birmingham City Schools; Boston Public Schools; Bridgeport Public Schools; Broward County Public Schools; Buffalo Public Schools; Charleston County School District; Charlotte-Mecklenburg Schools; Chicago Public Schools; Cincinnati Public Schools; Clark County School District; Cleveland Metropolitan School District; Columbus City Schools; Dallas Independent School District; Dayton Public Schools; Denver Public Schools; Des Moines Public Schools; Detroit Public Schools Community District; District of Columbia Public Schools; Duval County Public Schools; El Paso Independent School District; Fort Worth Independent School District; Fresno Unified School District; Guilford County Schools; Hawaii State Department of Education; Hillsborough County School District; Houston Independent School District; Indianapolis Public Schools; Jackson Public Schools; Jefferson County Public Schools; Kansas City Public Schools; Long Beach Unified School District; Los Angeles Unified School District; Metropolitan Nashville Public Schools; Miami-Dade County Public Schools; Milwaukee Public Schools; Minneapolis Public Schools; New Orleans Public Schools; New York City Department of Education; Newark Public Schools; Norfolk Public Schools; Oakland Unified School District; Oklahoma City Public Schools; Omaha Public Schools; Orange County Public Schools; The School District of Palm Beach County; The School District of Philadelphia; Pinellas County Public Schools; Pittsburgh Public Schools; Portland Public Schools; Providence Public School

organization exclusively representing the needs of urban public schools. Founded in 1956 and incorporated in 1961, the Council serves as the national voice for urban educators and provides a forum to share best practices. The Council is composed of districts with enrollment greater than 35,000 students located in cities with a population exceeding 250,000. Districts located in the largest city of any state are also eligible for membership, based on urban characteristics. The Council's member districts have a combined enrollment of over 7.3 million students.

Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects. For the past two decades, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997 and the Individuals with Disabilities Education Improvement Act of 2004, as well as development of the attendant regulations promulgated by the Department of Education.

The Council has a strong interest in the outcome of this case, as its member districts implement over

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District; Richmond Public Schools; Rochester City School District; Sacramento City Unified School District; San Antonio Independent School District; San Diego Unified School District; San Francisco Unified School District; Santa Ana Unified School District; Seattle Public Schools; Shelby County Schools (formerly Memphis City Schools); St. Louis Public Schools; St. Paul Public Schools; Toledo Public Schools; Tulsa Public Schools; Wichita Public Schools.

1 million Individualized Educational Programs ("IEPs") on an annual basis. The Council and its members believe it is vitally important to protect the collaborative process through which these IEPs are developed and to promote the educational opportunity and achievement of all students—those with disabilities and those without. Maintaining the Court's workable interpretation of the statutory definition of a "free appropriate public education" ("FAPE") is critical to these goals.

SUMMARY OF ARGUMENT

While Congress has not changed the statutory definition of "free appropriate public education" ("FAPE") in the 34 years since *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982), the standard established by the Court continues to be an important part of the national effort to raise expectations and increase educational opportunities for students with disabilities.

By adding new requirements for IEPs, Congress has encouraged school districts to better serve students with disabilities. When reauthorizing IDEA in 1997, for example, Congress added various references to progress in the IEP requirements, including how the child's progress toward meeting annual goals will be measured, when periodic reports on the child's progress will be provided, and a statement of the special education-related services and supplemental aids and services to be used to enable the child to make progress in the general education curriculum. But, IDEA does not establish a private remedy for the failure to ensure any particular

educational outcome or to provide a specific degree of educational benefit for a student with a disability.

Rather, in a series of separate federal laws since *Rowley*, Congress has required states to establish systematic accountability for the educational outcomes of all students, including students with disabilities. As a result of these accountability systems, along with the strengthened IEP requirements from the 1997 and 2004 amendments to IDEA, educational opportunities for students with disabilities are better now than ever. This makes it unnecessary to change the *Rowley* inquiry, which asks whether an IEP, otherwise meeting all the statutory and regulatory requirements, is "reasonably calculated to enable the child to receive educational benefits[.]" 458 U.S. at 207.

The federal courts, moreover, are ill-equipped to ascertain what particular level of educational benefit is appropriate for individual students. Adopting petitioner's unworkable standard, which, contrary to *Rowley*, seeks to define a particular level of educational benefit required for all students with disabilities is unnecessary and ill advised, particularly in the face of the statutory changes that *have* been made by Congress. During the collaborative IEP process, parents and professional educators grapple together with many complex variables designed to ensure educational benefits are provided to students. These discussions take into consideration the nature and degree of each student's disability (or disabilities), the level of each student's prior academic achievement, and each state's distinct educational standards. In addition, these discussions address multiple other domains including

social, emotional, psychological, behavioral, as well as medical and health-related issues. In this context, attempting to determine whether a student would have "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8) (or whether the student was likely to make "significant educational progress" (Gov't Br. 7, 9)) would be an overwhelmingly complex and highly subjective judgment. Instead, consistent with Congress's decision in adopting and repeatedly amending IDEA, the courts should continue to guarantee that the increasingly demanding components of IEPs are in place and otherwise defer to professional educators' determinations of the level of educational benefits that one should anticipate for any particular child.

Across all of the circuits, regardless of the adjective used by appellate courts to describe "educational benefits," Council members strive to maximize the educational benefits provided to all students, including those with disabilities, and petitioners' proposed standard would redirect those efforts. Expanding a private remedy for parents of students with disabilities who are unsatisfied with the progress achieved by their children in public schools would undermine the school's role in IDEA's collaborative process. The result would be to increase both litigation and unilateral private placements. Both of these actions would divert significant resources from school districts' efforts to educate other students with disabilities and those without. Such a diversion is particularly problematic given that Congress has never lived up to its promise to fund 40 percent of the extra costs associated with

special education. As a result of this failure, the bulk of special education funding comes from state and local revenues, but those funding levels also have declined. Driving up private placements and encouraging litigation would harm the education of all students.

Litigating over the right amount of educational benefit to be expected for individual students with disabilities is not the best way to improve education. Rather, educators should be accountable for implementing IDEA's complex procedural requirements, including ongoing monitoring, to ensure that a disabled child's progress is adequate. And, they should be accountable for the educational outcomes of *all* students through mandatory state accountability systems.

For these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. The Existing Statutory Framework Appropriately Promotes Educational Opportunities for All Students, Including Students with Disabilities.

This is a statutory-interpretation case. Specifically, the Court is asked again to decide what Congress meant when it required the provision of a FAPE to children with disabilities. 20 U.S.C. § 1412(a)(1)(A). IDEA contains an express definition of FAPE:

> The term "free appropriate public education" means special education and related services that—

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

Moreover, this Court in *Rowley* has already interpreted Congress's multi-faceted definition of FAPE. That interpretation should control the outcome of this case. There is no reason to revisit *Rowley*, nor any justification for abandoning the Court's cogent statutory analysis.

A. "Free Appropriate Public Education" is a term expressly defined by Congress, and *Rowley* appropriately deferred to that congressional intent.

Faced with a strikingly similar issue and nearly identical request, this Court in *Rowley* declined the invitation to substitute its own definition of FAPE for the one adopted by Congress. The standard offered by petitioner here should fail for the same reasons.

1. In *Rowley*, this Court determined that Congress's express definition of FAPE controls. The student in *Rowley* offered a critique of Congress's definition of FAPE similar to petitioner's here, asserting "that the statutory definition is not 'functional' and thus 'offers judges no guidance in

their consideration of controversies involving "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education."'" *Rowley*, 458 U.S. at 187.

Rejecting this argument, the Court described itself as "loath to conclude that Congress failed to offer any assistance" in defining FAPE, especially when Congress explicitly defined the term in question. *Id.* Though the definition may tend "toward the cryptic rather than the comprehensive," "that is scarcely a reason for abandoning the quest for legislative intent." *Id.* at 188; *see also id.* ("Whether or not the definition is a 'functional' one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act."[3]).

The Court accurately described the statutory provision as a "definitional checklist," identifying the procedural items that must be accomplished to provide a FAPE. *Id.* at 189. The Court also confirmed that IDEA as a whole was enacted to improve *access* to education through the adoption of "*procedures* which would result in individualized consideration of and instruction for each child." *Id.* (internal quotation marks and citations omitted).

2. Petitioner's proposed standard here should be rejected for the same reasons as the proposed definition in *Rowley*.[4] As respondent explains in

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[3] This observation from the *Rowley* Court is particularly apt, in light of petitioner's description of the newly minted standard as "eminently workable." Pet. Br. 43.

[4] In fact, it is difficult to decipher any difference between petitioner's articulated standard of "substantially equal opportunity" and "commensurate with the opportunity provided

detail (at 27-37), petitioner's proposed standard ("substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 41 n.8) finds no support in IDEA's text, and certainly none in *Rowley*.

Trying to tie the new proposed standard to *Rowley*, petitioner asserts (at 43) that the articulation of "opportunities to achieve academic success, attain self-sufficiency, and contribute to society" somehow comports with *Rowley*'s statement about "meaningful" access.[5] This unsupported assertion, however, underscores that the use of any adjective or modifier to describe a specific level of educational benefit is inconsequential. No matter whether "some," "substantial," "meaningful," or

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other children," which was the standard rejected in *Rowley*, 458 U.S. at 198-200. The Court was appropriately critical of the word "equal," because it could, in some instances, deprive disabled children of necessary services and, in other instances, require more from districts than IDEA requires. *See id.* at 198-99 ("The theme of the Act is 'free appropriate public education,' a phrase which is too complex to be captured by the word 'equal' whether one is speaking of opportunities or services.").

[5] Reliance on *Rowley*'s use of the word "meaningful" is entirely misplaced. Indeed, that word appears only once in the entire majority opinion and, notably, it does not appear in the section of *Rowley* discussing the FAPE definition or standard. Instead, it appears in a discussion of the congressional intent behind IDEA—increasing access to education—in a sentence that explicitly recognizes that Congress *rejected* the imposition of a standard that would require a particular level of educational benefit. *Rowley*, 458 U.S. at 192 ("But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.").

another descriptor is discussed, petitioner fails to establish any difference in actual application. Furthermore, petitioner and the United States spend substantial effort trying to explain why each of their proposed new descriptors for "educational benefit" would best further their interests, even though the *Rowley* Court rejected the use of such a modifier in accordance with IDEA's text.

Instead, the Court prescribed a clear articulation of the test for evaluating an IEP: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures *reasonably calculated* to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07 (emphasis added and footnotes omitted). Petitioner overlooks "reasonably calculated" in favor of trying to inject a subjective adjective before "educational benefits" and, in doing so, inappropriately shifts the inquiry *away* from an IEP team's actions and *onto* a student's educational outcomes.

This Court should reject, for a second time, an attempt to judicially amend Congress's express definition of FAPE.

B. IEPs are created through an interactive process involving students, families, and professionals.

This Court's rejection in *Rowley* of a required level of educational benefit and its refusal to deviate from Congress's express definition of FAPE is also sound from a policy perspective because of IDEA's demanding IEP requirements. As "the centerpiece of the [IDEA's] education delivery system for disabled children," *Honig v. Doe*, 484 U.S. 305, 311 (1988), the

IEP is an interactive, evolving, and detailed process. As the Court recognized in *Rowley,* "[e]ntrusting a child's education to state and local agencies does not leave the child without protection." 458 U.S. at 208.

The "core of [IDEA] . . . is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *see also Rowley*, 458 U.S. at 205-06 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). As the Court stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 546 U.S. at 53. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d)(B); *Honig*, 484 U.S. at 311. This process now also takes place in the context of mandated state accountability systems that demand high expectations for students with disabilities, low-income students, as well as students from major racial and ethnic backgrounds. 20 U.S.C. § 6301.

IDEA's collaborative process also is dynamic rather than static. Parents are involved in the ongoing process of evaluating the implementation of the child's educational program and revising IEPs. Whenever parents believe, during a school year, that their child's IEP requires revision because of, for example, "any lack of expected progress" (based on periodic formal progress reports or other information) or "the child's anticipated needs," they may request that the IEP team convene and review the IEP and

consider revising it to meet the child's needs. 20 U.S.C. § 1414(d)(4)(A). Or the parents and the school district may agree to develop a written document amending the IEP during the school year without convening an IEP meeting. 20 U.S.C. § 1414(d)(3)(D). And at a minimum, the whole IEP team is required to meet at least annually, including the parents, formally reviewing whether the plan's goals are being achieved and revising the IEP as needed. 20 U.S.C. § 1414(d)(4)(A). The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3)-(4).

IDEA's emphasis on prompt cooperative solutions imposes obligations on school districts and parents alike to ensure their good-faith commitment to a truly collaborative process. Indeed, school districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. *See* 20 U.S.C. § 1412(a)(10)(B); *see also infra* Section III.B. (discussing private placement cost). School districts voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements, which occur when the collaborative process established by the Act is operating as it is intended.

C. Congress has strengthened the requirements for IEPs, thereby demanding higher expectations for students with disabilities in the 34 years since *Rowley*.

Petitioner points to several of IDEA's provisions concerning IEPs and acknowledges that these have

been amended to advance some of the same goals behind petitioner's proposed new definition of FAPE. *See, e.g.*, Pet. Br. 37-38, 42-43. These amendments, however, do not suggest that Congress expects the Court to change the definition of FAPE, but rather they indicate congressional intent to improve educational outcomes for students with disabilities through legislative enhancements to the IEP process. For example, when Congress reauthorized IDEA in 1997, it required the IEP to include provisions for measuring the student's progress toward annual goals, for establishing periodic progress reports, and for discussing the services to be used to assist the student with functioning in the general education curriculum. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 614, 111 Stat. 81 (1997) (codified at 20 U.S.C. § 1414). These amendments have allowed Congress to improve educational opportunities without creating the negative consequences risked by petitioner's approach (discussed *infra* Section III).

Moreover, it is undisputed that Congress repeatedly has chosen *not* to amend the actual definition of FAPE contained in IDEA when it made these other changes. Petitioner is thus wrong as a matter of statutory interpretation: "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see also Kucana v. Holder*, 558 U.S. 233, 249 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress

acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original)).

Judicial amendment of an express statutory definition is improper, especially when Congress amended several provisions of the same statute but chose to retain its original definition of the term at issue. Moreover, it is especially unnecessary here, since Congress has purposely used other amendments to the same statute to improve opportunities for students with disabilities.

D. Federal statutes, adopted since *Rowley*, require states and school districts to be accountable for the academic progress of all students, including students with disabilities.

In addition to strengthening the IEP process for students with disabilities, Congress has also raised the level of accountability that states and school districts have for the educational outcomes of all students. Congress accomplished this, not through changes in IDEA, but rather through a dramatic restructuring of the Elementary and Secondary Education Act ("ESEA"), the principal federal education program designed to improve the academic achievement of disadvantaged students. As the Court noted in *Rowley,* 458 U.S. at 179-80, it was through ESEA that Congress initially sought to address the needs of students with disabilities, before replacing a grant program under that statute with the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175, Part B, and ultimately IDEA. Again, in 2001, Congress sought to bolster educational opportunities provided under IDEA by new amendments to ESEA.

When ESEA was reauthorized through the No Child Left Behind Act of 2001 ("NCLB"), Congress mandated that states develop and implement accountability systems that included high standards for all students and annual assessments. Pub. L. No. 107-110, 115 Stat. 1425 (2002). Under NCLB, state accountability systems had to annually analyze progress for all students, but also for specified subgroups, including students with disabilities. *Id.* at 115 Stat. 1446. NCLB required that 95% of students be included in yearly assessments. *Id.* at 115 Stat. 1448. Moreover, students with disabilities had to be assessed using the same tests as other students, except for the 1% of students with the most significant cognitive disabilities for whom an alternate assessment could be used. 34 C.F.R. 200.13(c)(2). By requiring the same educational outcome expectations for all students, NCLB demanded that educators hold high expectations for students with disabilities.

In 2015, Congress amended the NCLB, reauthorizing ESEA through the Every Student Succeeds Act ("ESSA"). 20 U.S.C. § 6301. While ESSA made a number of changes to NCLB, principally shifting authority in several areas back to the states, it also maintained the key requirements that states have accountability systems that include annual testing, assess 95% of students, use the same assessments for students with disabilities, permit only 1% of students with the most significant cognitive disabilities to participate in alternate assessments (absent a federally approved state waiver), and report disaggregated data for subgroups, including students with disabilities. 20 U.S.C. § 6311(c)(4)(E)(ii)(I); 20 U.S.C. § 6311(b)(2)(B)(xi)(II);

see also 34 C.F.R. 200.104(b)(3) (promulgating the most recent regulations implementing ESSA's statutory directives).

Congress rejected the idea of setting a specific benefit or defining national educational standards for individual students, including students with disabilities, as the above provisions continue to ensure that educational-outcome expectations for all students must remain high.

Moreover, the *state* educational outcome standards required by NCLB and ESSA do not provide guarantees to individual students. Rather, they are used to direct state and federal resources toward the improvement of lower performing schools. As a result, the remedies available under both NCLB and ESSA are quite different than the private placements allowed under IDEA for a denial of FAPE. First, the remedies are systemic and not private. *See* 20 U.S.C. § 6573(a)(2). Unlike IDEA, NCLB and ESSA provide no private right of action. *See, e.g.*, *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 209-14 (3d Cir. 2008) (holding there is no private right of action under NCLB). Second, the remedies are designed to improve the public education offered to all students, rather than to provide an individual student with educational opportunities in a private-school setting. *Id*. The essential aim of both NCLB and ESSA is to require states and school districts to take action to improve the educational opportunities provided at schools where the educational outcomes of all students or students in particular subgroups (like students with disabilities) need improvement.

Thus, above and beyond the requirements of IDEA, these other federal laws require high expectations and enhanced services for all low performing students, including those with disabilities. Under NCLB in 2002 and now ESSA in 2015, state accountability systems shine a light on schools and programs that are successfully educating all students, but also reveal places where targeted interventions are needed and achievement must be improved.

II. Federal Courts Are Ill-Equipped to Second Guess the Complex Educational Judgments Made Through the IEP Process.

Education professionals are best situated to facilitate the complex collaborative process required to develop and refine effective IEPs.

A. The nature and degree of educational progress to be expected is highly variable because of differences among students, variations in state educational standards, and the number of relevant domains required to be evaluated.

The process of developing an IEP is by definition highly individualized and also complex. Therefore, it is not feasible for courts to quantify the precise amount of educational benefit or outcome that should be expected of every student.

First, every student is different, as is every student that is entitled to special education services. The nature and severity of each student's disability varies greatly. As this Court acknowledged, IDEA requires states and school districts "to educate a wide spectrum of . . . children, from the marginally

hearing-impaired" to students with severe cognitive impairments. *Rowley*, 458 U.S. at 202. The reasonable expectations for a student with a moderate disability may be dramatically different than those for a student with a more profound condition. As the Court noted, the "benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Id.* For some students with disabilities, it is reasonable to expect their academic progress will match or outpace their non-disabled peers. *Id.* at 185 (where a deaf child performed better than the average child in her class and was advancing easily from grade to grade). For others, great progress may entail accomplishing far more simple tasks, including "even the most simple self-maintenance skills." *Id.* at 202. Moreover, many students have multiple disabilities that affect their progress in differing ways. All of these factors are taken into account in the development of an IEP, and they make it impossible to establish a uniform, judicially-enforceable standard of required progress.

Students' progress is also monitored across multiple domains. The educational benefits provided under IDEA are not purely academic. To the contrary, IEP teams evaluate not just academic outcomes, but social, emotional, psychological, behavioral, medical, and health-related progress as well. Students may make great progress in some domains, while occasionally regressing in others. In some circumstances, improvements in non-academic areas form the foundation for future academic progress. The fact that school districts provide

educational benefits across a broad range of needs makes it even more difficult to define the level of "educational benefits" required. Indeed, the educational benefits provided under IDEA span many domains and are measured in many different ways. And, for some students, a "reasonably calculated" IEP may legitimately contemplate different levels of progress in different areas.

Even in the realm of purely academic progress, it would not be a simple matter for federal courts to assess the adequacy of the educational benefits provided. For example, every state has its own distinct academic standards. Different states also use different assessments. IEP teams, collaboratively with parents, determine the individual participation in alternate achievement standards and alternate assessments. Moreover, statewide standards and assessments are frequently changed. Indeed, since November 2014, at least 15 states have changed their assessment systems. *See* Julie Rowland Woods, *State Summative Assessments: 2015-16 school year*, Education Commission of the States, November 2015, *available at* http://www.ecs.org/ec-content/uploads/12141.pdf; *see also* Tonette Salazar, *50 Ways to Test: A look at state summative assessments in 2014-15*, Education Commission of The States, November 2014, *available at* http://www.ecs.org/clearinghouse/01/16/06/11606.pdf. Professional educators and parents are far more familiar with state and local standards and assessments and are better positioned to evaluate together a student's progress on an annual, or even more frequent, basis.

B. This court should follow its long history of deferring to educators' professional judgment.

Because of the extensive protections built into the IEP process and the complexity of educating students with disabilities, this Court in *Rowley* appropriately held that courts should defer to the judgment of professional educators about the degree of educational benefit that must be provided under IDEA. *Rowley*, 458 U.S. at 206 ("[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.").

The Court has repeatedly "cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Id.* at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. at 42).[6] The precise degree of educational benefits

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[6] The Court has recognized that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy . . . ."); *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint."); *see also Fisher v. Univ. of Texas at Austin*, 579 U.S. ____, 136 S. Ct. 2198, 2208 (2016) ("Once,

across multiple domains that is to be expected for individual students with a variety of disabilities operating under numerous shifting state education standards is clearly one such question.

III. Petitioner's Proposed Standard Is Not Only Inconsistent with Congress's Express Intent, But It Also Would Be Harmful to Students.

The Council, like all parties involved in this case, desires a result that provides the best possible outcomes for education of all students. Petitioner seeks that result by proposing a judicial amendment to a statutory definition that petitioner believes will alter litigation outcomes. The Council strongly believes, however, that educational outcomes for all students are best protected through the broad-based procedural and systematic protections found in the several federal statutes discussed above.

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however, a university gives a reasoned, principled explanation for its decision, deference must be given to the University's conclusion, based on its experience and expertise . . . ." (internal quotations and citations omitted)); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 707 (2010) (explaining that the Court was "[d]eferring broadly to the law school's judgment about the permissible limits of student debate."); *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) ("The Court defers to the Law School's educational judgment that diversity is essential to its educational mission. The Court's scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university's expertise.").

A. Petitioner proposes an unworkable standard that would require a subjective evaluation of educational outcomes.

Petitioner purports to accept the *Rowley* prohibition on reading an educational outcome guarantee into the definition of FAPE, Pet. Br. 49-50, yet the operational application of petitioner's proposed standard effectively mandates an impracticable inquiry into the specific educational outcomes expected of each student with a disability. The United States, in support of petitioners, even more blatantly proposes a standard that would require "significant educational progress" for students with disabilities. Gov't Br. at 7, 9.

The standards proposed by both petitioner and the United States would effectively require an unworkable judicial inquiry into whether every student with an IEP is making sufficient academic progress compared to his or her non-disabled peers. Indeed, petitioner discusses the level at which students with disabilities should be achieving, and highlights that a recent guidance document from the U.S. Department of Education encourages an "emphasis on grade-level achievement." *See* Pet. Br. 45-47.[7] Thus, despite petitioner's stated position of avoiding an analysis of educational outcomes, the practical application of either the standard proposed

[7] As discussed above, the Court in *Rowley* expressly rejected grade level achievement as a workable standard for all students with disabilities. *See supra* at 18.

by the United States or that proposed by petitioner would require such scrutiny.[8]

This Court's rejection of a very similar standard in *Rowley* also illustrates that petitioner's proposed standard would require such an unworkable analysis. As discussed, *supra* at 8 n.4, "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8) is strikingly similar to "commensurate with the opportunity provided other children." *Rowley*, 458 U.S. at 198. *Rowley* rejected that standard as unworkable. Petitioner's proposed standard here similarly would upend the IEP process and create an untenable situation for the educational professionals trying to develop appropriate strategies to help their students in the best ways possible.

B. Petitioner's standard would increase litigation and result in increased private placements, both of which are expensive.

Petitioner attempts to take a standard that this Court described as a "procedural checklist" and inject into it a subjective term, "substantially equal," thereby requiring a detailed analysis of the level of educational benefits in several areas that would be required for all students with disabilities. Such a standard invites litigation. Parents would now be told that they have a potential judicial remedy if they do not believe their child's IEP will provide him or her "with substantially equal opportunities to

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[8] As discussed *supra*, the *Rowley* Court was particularly critical of the word "equal" with respect to IEPs, making petitioner's recent decision to propose this standard even more curious. *Rowley*, 458 U.S. at 198-99.

achieve academic success, attain self-sufficiency and contribute to society." Pet. Br. 14. It is difficult to see how a court (or administrative law judge) will be able to efficiently adjudicate such claims, because petitioner's standard is highly subjective and complex. How is a court to define "substantially" or measure the opportunity for achieving academic success, self-sufficiency, or societal contribution?

The resulting likelihood of increased litigation and the likelihood of more protracted litigation are problematic. First, of course, such litigation imposes direct financial burdens on school districts. The dollars that districts must dedicate to litigation are dollars that could otherwise be used to provide additional services to all students, including the students with IEPs. Second, a dramatic increase in litigation risk has the corollary detriment of increased insurance premiums. Once again, no matter whether the financial costs are direct or indirect, increased litigation costs deplete the limited budgets through which districts provide services to all students. This is particularly unfortunate when there are other safeguards already in place that do a superior job protecting the rights of students with disabilities.

Moreover, in the event parents unilaterally elect to place their child in a private school at their own expense, the parents are entitled to reimbursement if the public school district is unable to provide a FAPE and the private school can provide an appropriate education. 20 U.S.C. § 1412(a)(10)(C). Thus, altering the definition of FAPE has a dramatic impact on the funds a district must expend to cover private education. Educational services provided to students with disabilities in a private setting cost a public

school district, on average, nearly five times what it costs to provide the services within-district. Jay G. Chambers et al., *What Are We Spending on Special Education Services in the United States, 1999-2000*, at 12 (updated June 2004), *available at* http://www.csef-air.org/publications/seep/national/advrpt1.pdf. Indeed, the most comprehensive study on this topic found that—in the year 2000—"special education spending on a school-aged student served in programs outside the public schools amounted to $26,440," including the cost of tuition. *Ibid.* "In contrast, special education spending on direct instruction and related services for school-aged students served within public schools amounted to $5,709 per pupil." *Ibid.*

Internal survey data from Council members for school year 2015-16 reflect even higher costs for private school placements. In the Los Angeles Unified School District, the second-largest school system in the nation with an enrollment of 557,632 students, the average per student annual cost for day program placements is $29,663. For the Chicago Public Schools, with 381,349 students, the average per student cost for such placements was even higher at $44,106. Comparatively, for Providence Public Schools, a smaller urban school district of 23,867 students, the average per student annual cost for day program placements is $41,371. And, the Anchorage School District, with a student population of 47,207, has a per-student annual cost for day program placements of $67,806. Despite vast differences in student enrollment, the highest out-of-district day program cost was $73,354 for Providence, $75,182 for Los Angeles, and $87,326 for Chicago.

The annual total cost of these placements is substantial. For example, this annual aggregate expenditure was $12.3 million in Providence and $93.4 million in Los Angeles. Out-of-district placements thus have a staggering financial impact on urban school systems across the country.

In part as a result of such placements, the total cost of special education constitutes a large portion of the overall budgets of urban public schools. For example, special education costs account for 18.5%, or $98.2 million, of the total annual operating budget in Des Moines Public Schools, 20.0%, or $1.5 billion, in Los Angeles, and 25.5%, or $568.2 million, in the Clark County School District (Las Vegas).

With approximately 13% of students nationwide served pursuant to IEPs, the costs associated with the dramatic change in the definition of FAPE proposed by petitioner would likely be astronomical. *See* National Center for Education Statistics, Children and Youth with Disabilities (last updated May 2016), http://nces.ed.gov/programs/coe/indicator_cgg.asp.

Increased unilateral private placements can be problematic for other reasons as well. For example, when students are placed in private institutions offering services to only students with disabilities, or to only students with a particular disability, such a placement may be in tension with Congress's explicit goal in IDEA to educate students with disabilities with their non-disabled peers in the least restrictive environment. *See* 20 U.S.C. § 1412(a)(5). *See also C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) ("It is common ground that the IDEA manifests a preference for

mainstreaming disabled children."); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (IDEA's "strong preference" that students with disabilities be educated in their least restrictive environment "gives rise to a presumption in favor of . . . placement in the public schools"). In some private placements, mainstreaming is simply not possible.

Once again, all of this cost risk and educational risk is unnecessary, because other forms of federal and state oversight regulate educational outcomes for all students. *See supra* Section I.D.

C. Petitioner's desired changes to the definition of FAPE come at a time when public education budgets are being severely cut, and IDEA has never been fully funded.

Petitioner's proposed change also comes at a time when districts across the nation face crippling budget cuts. Ever since the 2008 recession, public school districts have been under extraordinary pressure. In fact, "[a]t least 31 states provided less state funding per student in the 2014 school year . . . than in the 2008 school year." Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, Center on Budget & Policy Priorities, at 1 (Jan. 25, 2016), *available at* http://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf. Local government funding of public education fell over the same period. As of 2016, at least 25 states are still providing less "general" or "formula" funding (which is the primary source of state school funding) per student than in 2008. *Id.* "In seven states, the cuts exceed 10 percent." *Id.*

Petitioner's proposed standard is a financial load that public school district budgets simply cannot bear. As discussed above, it is telling that Congress never sought to amend the definition of FAPE to make private remedies more broadly available but instead enhanced IDEA's procedural requirements and safeguards for individual students and created systemic remedies under ESSA. It is also notable that this purposeful congressional *in*action on the FAPE definition coincides with Congress's decision not to fund IDEA at the intended level. Indeed, the statute calls for the federal government to fund up to 40% of the differential that public school districts incur providing services to students with disabilities. 20 U.S.C. § 1411(a)(2)(A)-(B). Congress has never funded that full amount, currently funding approximately 17% of the differential. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 448 (2012).

If Congress wishes to change the definition of FAPE in a way that dramatically increases the cost of special education, it will face significant public pressure to raise federal funding levels as well. Similarly, the Court, without the ability to increase such funding, should not adopt a costly definitional change that Congress has not.

D. The Court should allow educators to maintain their focus on efforts for student success, not on the avoidance of litigation.

IEPs are created through an interactive process among, *inter alia*, educators, parents, students, and health-care providers. Every one of these constitu-

ents is doing his or her best to improve the performance and opportunities for students with disabilities. Petitioner has not provided any evidence supporting the notion that individual educators—those developing IEP plans—aim to provide inferior outcomes to their students based on the circuit court jurisdiction in which they live. In fact, as respondent points out, there is no credible evidence that outcomes even vary between jurisdictions that allegedly apply different judicial standards. *See* Br. in Opp. 12-16.

What petitioner now proposes is to take Congress's enhanced procedural requirements and safeguards—something educators can readily apply—and turn them into an unworkable measure of whether they are providing "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8). As petitioner cannot provide an explanation as to how this term would be applied in litigation, it is unwise to force it upon educators.

A litigation remedy is not the solution to the "problems" petitioner perceives. Congress has never seen fit to change the definition of FAPE, and the Courts should not intervene to do so. *Rowley* provides cogent guidance on how to apply Congress's express language, and the Court should not waiver from *Rowley*. Educators should be allowed to preserve their primary mission of delivering educational services to all students rather than being diverted to implement the petitioner's new judicially created legal standard for a FAPE.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 15-827

In the Supreme Court of the United States

ENDREW F., A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT
FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

The Colorado State Board of Education is an elected body entrusted with the general supervision of Colorado's public schools pursuant to the State Constitution. COLO. CONST. Art. IX § 1(1). As part of its responsibilities, the Board creates statewide education policy, including by crafting rules for administering state special education programs. It is governed in part by Colorado's Exceptional Children's Educational Act, COLO. REV. STAT. §§ 22-20-101 to -206, and its accompanying rules, which both incorporate by reference and expand upon the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–82, and its implementing regulations. *See* 1 COLO. CODE REGS. § 301-8. The state rules also define the term Free Appropriate Public Education (FAPE) and specify IDEA-aligned requirements for the development and revision of Individualized Education Programs (IEPs). *Id*. § 301-8(2.19) & (4.03). Colorado special education law also includes requirements beyond those of IDEA.[1]

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[1] For example, Colorado requires that: 1) IEPs specify whether the child will achieve district, local, or charter school institute standards, or instead achieve individualized standards, COLO. REV. STAT. §22-20-108(4); 2) for a child who is visually impaired, the IEP team must consider specified factors and adopt a literacy modality plan, *id*. §22-20-108(4.5)(a); 3) for a child who is deaf, the IEP team must consider specified factors and address the child's communication needs, *id*. §22-20-108(4.7); 4) the IEP requirement for transition services begins when the child either is 15 years old or completes ninth grade, 1 COLO. CODE REGS. § 301-8(4.03)(6)(d)(i); and 5) the special education director or designee is not only a required IEP team member, but may not be excused from participation. *Id*. § 301-8(4.03)(5)(b).

The Colorado Department of Education is the state agency responsible for implementing state K-12 education efforts. *See generally* COLO. REV. STAT. § 24-14-115 (creating the Department); *id.* §§ 22-1-101 to 22-96-105 (Colorado Education Code). The Department operates under the leadership of the Board-appointed Commissioner of Education and serves as the State Educational Agency (SEA), as defined by 34 C.F.R. § 300.41, responsible for administering federally funded education programs in Colorado.

The Department's administration of IDEA has three main elements. First, the Department's Office of Special Education oversees statewide IDEA compliance. Its staff provides technical assistance to districts and charter schools, conducts professional development for teachers, and maintains a public website with information and resources for both families and educators.

Second, the Department handles disputes and complaints under IDEA. Through the Department's dispute resolution program, trained mediators facilitate meetings between schools and families with disabled children. The Department also has a complaints process as required under IDEA rules, 34 C.F.R. § 300.151.[2] Any organization or individual alleging a violation of IDEA Part B may file a complaint with the Department. State Complaints Officers—all of whom are licensed attorneys—review these complaints, conduct investigations as needed,

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[2] The Department's *State Level Complaint Procedures* were most recently revised in 2010 and are available at http://tinyurl.com/hp4ze9g.

and issue written decisions. If a school has substantially failed to comply with IDEA, the State Complaints Officer may direct remedial action and award appropriate remedies. 34 C.F.R. § 300.151(b).

Third, parents and school districts may request a due process hearing conducted by a Department administrative law judge. In a due process hearing, the parties present evidence and legal arguments, and the ALJ issues findings of fact and conclusions of law and may order remedies for any violations of IDEA. 34 C.F.R. § 300.511–515. Parties aggrieved by the decision of an ALJ may then challenge that decision by bringing a civil action in state or federal court. 34 C.F.R. § 300.516.

Given their responsibilities under both IDEA and Colorado law, the Board and the Department have a keen interest in the standard that courts use in evaluating the sufficiency of an IEP under the IDEA. *Amici* take seriously their central role in the federally funded, state-designed system of data-driven accountability and continuous school improvement. But that system should not be invoked to create a new standard for IEP development divorced from any language in the IDEA.

STATEMENT

This case involves two distinct yet interrelated legal frameworks for which the *amici* bear fiscal and administrative responsibility: the IDEA and the Elementary and Secondary Education Act (ESEA), 20 U.S.C. §§ 6301–7974. Both the IDEA and the ESEA are Spending Clause statutes. That is, in exchange for federal funds, the Department takes on supervision and oversight roles under terms specified by law. *See, e.g.*, 20 U.S.C. § 7842 (requirements regarding state and local plans and applications).

Both statutes have an important place in the legal architecture of public education, but they should not be conflated. At the heart of IDEA is the IEP: specialized educational programming designed to meet an individual student's needs. *See Honig v. Doe*, 484 U.S. 305, 310–11 (1988). In contrast, ESEA establishes a system for school accountability and improvement that seeks to raise the bar for all student groups. These two prongs of federal education policy are complementary: the IEP requirement ensures that schools meet the individualized needs of students with disabilities, while the school accountability system helps States provide targeted support to schools and districts on a data-driven basis. Petitioner blurs the line between these two distinct statutes by suggesting that amendments to ESEA altered the judicial review standard for individual FAPE claims under IDEA. Pet. Br. 28.

Background and evolution of the ESEA. The ESEA was signed into law in 1965 and is at the center of federal education policy. It is a funding statute that has been repeatedly reauthorized by Congress, sometimes with sweeping amendments. Over the years,

ESEA has evolved beyond its original emphasis on low-income students and communities into a roadmap for state-driven school improvement.

To receive federal funding under ESEA, States must craft and submit a Plan. 20 U.S.C. § 6311. Among other things, the State Plan allows for both data-driven school-by-school ratings and a demographic analysis of student performance based on a statewide assessment. Each State Plan must ensure that a number of different subgroups—including traditionally overlooked students such as racial minorities, special education students, English-language learners, and low-income populations—are making academic progress. The States must monitor the performance of each subgroup separately. For example, under ESEA, schools and districts must review results on annual tests both by the student population as a whole and by various "subgroups" of students, including students with disabilities. *Id*. § 6311(b)(2)(B)(xi).

Statewide accountability systems must be based on "academic content standards" that specify what students should know and be able to do. *Id.* § 6311(b); 34 C.F.R. § 200.1(b)(1)(i). States must also adopt "academic achievement standards" that are aligned with the content standards. 20 U.S.C. § 6311(b); 34 C.F.R. § 200.1(c)(1)(i). Tests must be aligned to those "challenging academic content standards and challenging student academic achievement standards," and those standards must apply to *all* schools and *all* children. 20 U.S.C. § 6311(b)(2)(B)(i).

The ESEA mandate for annual assessments that are aligned to challenging academic expectations grew out of the standards-based reform movement that took

hold in the 1980s and 1990s.[3] In 1994, that movement led to significant revision of the ESEA by the Improving America's Schools Act (IASA), Pub. L. No. 103-382, 108 Stat. 3518 (1994). The IASA's statement of purpose noted the "particularly great" needs of "children in our Nation's highest-poverty schools, children with limited English proficiency, children of migrant workers, children with disabilities, Indian children, children who are neglected or delinquent, and young children and their parents who are in need of family-literacy services." *Id.* § 1001(b)(3). All children, Congress declared, can master challenging content. *Id*. § 1001(c)(1). IASA therefore required math and language arts standards to be used as accountability measures in state tests. *Id*. § 1111(3).

The standards-based reform movement made its most visible mark with the 2001 reauthorization of ESEA, also known as the No Child Left Behind Act (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002).[4] As this Court noted in *Horne v. Flores*, NCLB sought to "raise the level of education nationwide" by, among

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[3] *See, e.g.*, Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter*? 53 VILL. L. REV. 297, 306 (2008).

[4] *See* Lauren B. Resnick et al., *Standards-Based Reform: A Powerful Idea Unmoored, in Improving on No Child Left Behind* 103 (Richard D. Kahlenberg ed., 2008) ("No Child Left Behind is the current expression of a twenty-year drive to use a 'standards strategy' to steer American education toward higher levels of achievement and greater equity."); *see also Broken Systems, Broken Duties: A New Theory For School Finance Litigation*, 94 MARQ. L. REV. 1195, 1197 (Summer 2001) (NCLB "brought the concept of standards-based reform to center stage").

other things, "requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards." 557 U.S. 433, 461 (2009). No longer could tepid expectations or poor progress for any subgroup be obscured by school-wide or district-wide averages. Instead, SEAs like the Department were tasked with reviewing disaggregated data to ensure that each subgroup is progressing towards proficiency. Pub. L. No. 107-110 § 1111(h)(1)(C). NCLB's original goal was that all students—including those in the various subgroups—would achieve proficiency by 2013-14, although that ambitious target was subsequently revised.[5]

ESEA thus evolved to function as a comprehensive, national, integrated school improvement system. When a State submits its Plan in exchange for ESEA funding, that Plan must coordinate the expectations of approximately a dozen federal statutes, including IDEA. 20 U.S.C. § 6311(a)(1)(B).[6] Under the changes

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[5] When it became clear that an overwhelming majority of school districts were not going to meet this goal, the United States Department of Education began to waive it in exchange for states agreeing to certain conditions. *See* Derek W. Black, *Federalizing Education by Waiver?* 68 VAND. L. REV. 607, 613–14 (2015).

[6] Other programs that must be coordinated in a State plan include: the Rehabilitation Act of 1973 (20 U.S.C. §§ 701 *et seq.*), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. §§ 2301 *et seq.*), the Workforce Innovation and Opportunity Act (29 U.S.C. §§ 3101 *et seq.*), the Head Start Act (42 U.S.C. §§ 9831 *et seq.*), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. §§ 9858 *et seq.*), the Education Sciences Reform Act of 2002 (20 U.S.C. §§ 9501 *et seq.*), the Education Technical Assistance Act

implemented through NCLB and successive legislation, federally funded educational programs are thus intended to raise the bar for *all* students and subgroups. The details of the process, however, are entrusted to the States.

Background and implementation of the IDEA. In contrast to ESEA's systemic focus, the primary goal of the IDEA is to provide a FAPE to individual students with disabilities. As this Court noted in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, at the time the Act was adopted, Congress found that nearly one million students with disabilities were excluded from public school outright, while over half of the nation's disabled students were "receiving an inappropriate education." 458 U.S. 176, 189 (1982) (citing 89 Stat. 774, note following § 1401). Thus, at its inception, IDEA was designed to provide access to the schoolhouse for students who were excluded outright, along with a basic floor of educational opportunity. *Id.* at 198–200. This access was then to be made meaningful through "specially designed instruction" and associated services. *Id*. at 201; *see also* 20 U.S.C. § 1401. The centerpiece of the IDEA's promise of a FAPE to students with disabilities is the IEP.

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of 2002 (20 U.S.C. §§ 9601 *et. seq.*), the National Assessment of Educational Progress Authorization Act (20 U.S.C. §§ 9621 *et seq.*), the McKinney-Vento Homeless Assistance Act (42 U.S.C. §§ 11301 *et seq.*), and the Adult Education and Family Literacy Act (29 U.S.C. §§ 3271 *et seq.*).

Prior to 1990, IDEA (then the Education of the Handicapped Act)[7] emphasized the right of individual students to educational access and appropriate services through an IEP. *See* Pub. L. No. 94-142 §3(c), 89 Stat. 773 ("It is the purpose of this Act to assure that all handicapped children have available to them within the time periods specified in section 612(2)(B), a free appropriate education which emphasizes special education and related services defined to meet their unique needs."). The 1975 Act mandated a written IEP for all disabled students with specific content requirements. It likewise obligated SEAs to establish "guaranteed procedural safeguards," including a complaint process and hearing rights. *Id.* § 615.

Subsequent amendments to IDEA not only expanded IEP requirements for individual students, but also added elements of standards-based reform and data-driven accountability. Many of those changes mirror the evolution of the ESEA's expectations for State Plans. In 1997, for example, Congress found that IDEA implementation had "been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). This language echoed Congressional findings in the 1994 ESEA reauthorization: "Research clearly shows that children, including low achieving children,

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[7] The Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773, was adopted in 1975. It was reauthorized in 1990, at which time it was renamed the Individuals with Disabilities Education Act. *See* Pub. L. No. 101-476, 104 Stat. 1142.

can succeed when expectations are high and all children are given the opportunity to learn challenging material." Improving America's Schools Act of 1994, Pub. L. No. 103-382 §1001, 108 Stat. 3518 (1994).

Building on the groundwork of IASA, the 1997 IDEA revisions added a requirement of performance goals and indicators, and required that students with disabilities be included in state assessments. IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240 (2007) (stating that the 1997 amendments were "intended to place greater emphasis on improving student performance") (quoting S. Rep. No. 105-17, at 5 (1997)).

The 2004 IDEA amendments again included both provisions designed to benefit individual students as well as revisions aligned with NCLB accountability. For individual students, among other things the 2004 amendments expanded the requirements for transition services.[8] To drive systemic change, IDEA 2004 provided for enhanced State efforts on "improving educational results and functional outcomes for all children with disabilities" and gave the United States Department of Education more enforcement options. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 616, 118 Stat.

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[8] Under IDEA 2004, the first IEP created after the child is sixteen must include post-secondary goals based on age-appropriate transition assessments and should identify the services the student needs to reach those goals. Individuals with Disabilities Education Improvement Act of 2004, 108 Pub. L. No. 446, 118 Stat. 2647 (2004) ("IDEA 2004").

2734–36 (2004). States receiving IDEA funds submit State Performance Plans (SPPs) to the United States Department of Education's Office of Special Education Programs (OSEP). 20 U.S.C. § 1416(b)(1)(A).

In July 2013, OSEP announced a change in which the SPP model would integrate outcomes data into the compliance monitoring that was the hallmark of SPP reporting. Starting in 2013-14, districts and BOCES[9] would receive both compliance scores (based on IDEA procedural compliance data) and outcome scores (based on assessment results). This system of "Results Driven Accountability" would include, for example, scores reflecting the percentage of students with disabilities who score at a basic level or above on the National Assessment of Educational Progress. The SPP must also include a State Systemic Improvement Plan (SSIP) that is specifically focused on improving achievement outcomes for students with disabilities.[10] Like ESEA,

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[9] Generally, primary responsibility for providing educational services to students with disabilities is entrusted to school districts, which function as Local Education Agencies under federal law. However, some smaller Colorado school districts have joined to create boards of cooperative education services (BOCES) that oversee and implement special education programs. Colorado uses the term "Administrative Unit" to refer to the legal entity (school district, BOCES, or state Charter School Institute) that bears fiscal and administrative responsibility for special education services. COLO. REV. STAT. §§22-20-103(1), 106(1).

[10] Colorado submitted its SSIP to the United States Department of Education in April of 2015. *See* Colo. Dep't of Educ., State Systemic Improvement Plan Phase 1 (April 1, 2015), http://tinyurl.com/hdnb9o6; *see also* Colo. Dep't of Educ., State Systemic Improvement Plan Phase 2 (April 1, 2016), http://tinyurl.com/zvrc87x.

IDEA thus now specifies certain requirements designed to drive systemic improvement at the State level.

In contrast to the substantial changes in data reporting, in the years since this Court decided *Rowley*, the statute's FAPE definition remains untouched, although Congress has expanded some procedural and substantive IEP requirements. *See, e.g.*, Resp. Br. 5. The evolution of IDEA thus reflects more than ever "the 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." *Rowley*, 458 U.S. at 206.

SUMMARY OF ARGUMENT

In an attempted end-run around *stare decisis*, Petitioner incorrectly suggests that the IDEA's definition of a FAPE was implicitly modified by the federal trend towards standards-based accountability. Petitioner blurs the lines between two distinct statutory functions by suggesting that amendments to ESEA altered the judicial review standard for individual FAPE claims under IDEA. There is a process to hold schools and districts responsible for failure to meet the expectations of standards-aligned accountability, but it is not through individual student IDEA litigation. Moreover, because IDEA is a funding statute, its conditions must be expressed unambiguously. The legislative history of amendments to ESEA and IDEA is now, just as it was in 1982, "too thin a reed on which to base an interpretation of the Act." *Id.* at 204 n.29.

Petitioner suggests that without judicial intervention, students with disabilities in Colorado and elsewhere in the Tenth Circuit will receive a lesser education than those in other places. Petitioner's charge ignores that the content of academic standards is entrusted to the States, and Colorado has adopted ambitious and comprehensive standards that are entitled to deference.

Petitioner and the Federal Government seek to revise this Court's requirement that an IEP be developed in accordance with the IDEA's procedural requirements and be "reasonably calculated to enable the child to receive educational benefits," *Id*. at 207, by inserting various adjectives. Neither proposal will fundamentally change the IEP process and content requirements, but each adds an ambiguity to IEP scrutiny that leaves the process fundamentally unworkable. Moreover, Petitioner's hindsight focus on educational outcomes to assess IEP sufficiency is misplaced. Determining whether an IEP is "reasonably calculated" is an *ex ante* judgment, not an *ex post* exercise. The *Rowley* standard should remain intact.

ARGUMENT

I. IDEA is part of a body of education funding statutes that work in concert, that can only impose duties unambiguously, and that entrust the details of implementation to the States.

A. The IDEA must be understood within the larger context of federal education policy.

The ESEA forms the core of federal education policy, but Congress has also passed a number of laws targeting student populations with particularized needs. Some of those laws have been incorporated directly into ESEA—for example, the 1968 Bilingual Education Act became Title VII of ESEA. Pub. L. No. 90-247 §§ 701–07, 81 Stat. 783 (1968). Other statutes are codified separately. In 1975, Congress adopted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), which later became the IDEA, Pub. L. No. 101-476, 104 Stat. 1103 (1990). Subtitle B of 1987's Stewart B. McKinney Homeless Assistance Act targets educational programming for homeless children. *See* Pub. L. No. 100-77, §§ 721–25, 101 Stat. 482, 525–28 (1987) (codified at 42 U.S.C. § 11431–35). State Educational Agencies like the Department must develop a State Plan that "coordinate[s]" the mandates of a number of federal statutes, including the IDEA. *See* 20 U.S.C. § 6311(a)(1)(B).

Petitioner cites the 2004 amendments to the IDEA as evidence for the claim that school district obligations to students with disabilities are different than they

were at the time this Court decided *Rowley*. Pet. Br. 39. This misunderstands the paradigm shift of NCLB.

Students with disabilities were but one of a number of subgroups who were underperforming (that is, "left behind") at the time NCLB was enacted and who Congress intended to assist. For example, English language learners were targeted by NCLB provisions that added the English Language Acquisition, Language Enhancement, and Academic Achievement Act to Title III of the ESEA. Pub. L. No. 107-110, §§ 3101–11, 115 Stat. 1425, 1609 (2002) (codified at 20 U.S.C. §§ 6811–94). Those provisions required States to ensure that such students "attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1) (2002). Other provisions likewise targeted "children and youth in local, tribal, and State institutions for neglected or delinquent children and youth" so that those students would "have the opportunity to meet the same challenging State academic standards" as their peers. Pub. L. No. 107-110, § 1401(a)(1), 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6421(a)(1)). Similar language was added regarding education for homeless children. *Id.* § 721 (requiring that State plans describe how homeless children "will be given the opportunity to meet the same challenging state academic standards all students are expected to meet").

Contrary to Petitioner's argument, the notion that the NCLB's standards-based accountability implicitly amended IDEA in ways not specified by Congress is untenable. NCLB raised standards, but the idea that

high standards and data-driven accountability mean something different for students with disabilities than for other subgroups cannot be reconciled with the letter or spirit of ESEA.

B. Courts cannot infer an amendment to IDEA; Congress must speak unambiguously.

IDEA is a funding statute rooted in "cooperative federalism." *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). It leaves to the States "the primary responsibility for developing and executing educational programs" for disabled students, although it "imposes significant requirements to be followed in the discharge of that responsibility." *Rowley*, 458 U.S. at 183. Because it is a funding statute, the Act cannot "impose [a] burden upon the States unless [Congress] does so unambiguously." *Id*. at 190 n.11.

Congress has not done so as to the IDEA. That statute defines a FAPE as "special education and related services that (A) have been provided at public expense under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)]." 20 U.S.C. § 1401(9). As this Court noted in *Rowley*, the definition functions "[a]lmost as a checklist for adequacy under the Act." 458 U.S. at 189.

That "checklist" has never been amended. This Court held in *Rowley* that any substantive standard describing the level of education required for disabled students was "[n]oticeably absent" from the statute. *Id.* Congress was presumed to be aware of this holding when it reauthorized and amended IDEA in 1997 and 2004. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Absent clear action by Congress, there is no basis for reading new terms into the statute.

Although Petitioner contends that post-*Rowley* amendments to IDEA gave rise to a substantive standard that did not exist when that case was decided, he cites no specific Congressional action in support of the argument. Rather, he suggests that an enhanced level of "educational benefits" is *implied* by the infusion of standards-based reform into ESEA. Pet. Br. 26–29. Such an implication—even if it existed—is insufficient under a federal funding statute. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (holding that IDEA did not "furnish[ ] clear notice" that one of the obligations of the Act "is the obligation to compensate prevailing parents for expert fees"); *Rowley*, 458 U.S. at 204 n.26.

This case thus meaningfully differs from *West v. Gibson*, 527 U.S. 212 (1999), which Petitioner cites for the proposition that amendments to 42 U.S.C. § 1981 implicitly gave the EEOC authority to award compensatory damages as an "appropriate" remedy under Title VII of the Civil Rights Act of 1964. Pet. Br.

35. Title VII is not a funding statute, but was adopted under Congress' Commerce Clause authority. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (concluding that the Commerce Clause provides Congress with authority to enact provisions of the Civil Rights Act of 1964). *Gibson* thus is of no relevance where Congress' exercise of authority is under the Spending Clause. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16–18 (1981) (explaining the difference between a civil rights statute enacted under § 5 of the Fourteenth Amendment and one reflecting the terms of a "contract" for the receipt of funds).

Nor can the Petitioner or the Federal Government properly find an implied amendment in carefully selected statements from legislative history. *See, e.g.*, Pet. Br. 28–29; U.S. Amicus Br. 21–23. Just as such statements were "too thin a reed on which to base interpretation of the Act" in 1982, *Rowley*, 458 U.S. at 204 n.26, they are insufficient here. Congress' clear choice to leave the statutory definition of a FAPE untouched speaks louder than the aspirational remarks of individual legislators.

C. Educational standards-setting is entrusted to State governments and managed through accountability systems, not lawsuits.

It is axiomatic that the details of educational policy are reserved to State governments under the Tenth Amendment, and public education is a state and local function, even when partially funded using federal funds that impose general conditions. The Federal Government contends that absent court intervention, Colorado school districts will essentially be "told that it is perfectly fine to aim low." U.S. Amicus Br. 36. But

it is the States, not Congress or the courts, that develop and implement specific standards. As this Court noted in *Rowley*, "Congress' intention was not that the Act displace the primacy of States in the field of education but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208.

Nor is there any evidence that Colorado or its school districts have "aimed low." *See* COLO. REV. STAT. § 22-7-1005 (requiring the Colorado Board of Education to "[e]nsure that [Colorado's] standards are comparable in scope, relevance, and rigor to the highest national and international standards that have been implemented successfully"). Likewise, the States supporting Petitioner as *amici* can set whatever standard they choose so long as it exceeds the floor set by federal law.

Throughout the evolution of standards-based education reform, Congress has expressed its conviction that state and local autonomy is an essential component of raising the bar for all student subgroups. The IASA, for example, declares that "[d]ecentralized decisionmaking is a key ingredient of systemic reform. Schools need the resources, flexibility, and authority to design and implement effective strategies for bringing their children to high levels of performance." Pub. L. No. 103-382 § 1001(c)(8).

This Court emphasized the same principle with regard to NCLB in *Horne v. Flores*:

> NCLB marked a dramatic shift in federal education policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local

> officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results. NCLB implements this approach by requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards.

557 U.S. at 461. And expanded local autonomy is the calling card of amendments reflected in 2015's Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111, 129 Stat. 1802 (2015).[11]

The conditions expressed by Congress in its various enactments emphasize IDEA's core purpose as an educational access statute, setting a floor of opportunity for a population with a history of exclusion from public education. Congressional expressions of intent regarding the use of federal funds—under IDEA, NCLB, and ESSA—reaffirm a commitment to state and local flexibility. The States should be trusted to fulfill the role that Congress has given them.

And Colorado has proven worthy of that trust. Colorado's commitment to high expectations for all students is not dependent on the legal standard for

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[11] *See* Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL'Y REV. 201, 242 (2016) ("ESSA represents a backlash against the substantial expansion of the federal role in education."); *see also* Jessica Bulman-Pozen, *Executive Federalism Comes To America*, 102 VA. L. REV. 953, 990 (June 2016) (stating that the ESSA "curbs federal executive supervision of state education policy going forward").

reviewing IEPs; rather, it is based on sound accountability systems designed to raise the bar for all student subgroups. To implement the goals of the ESEA and NCLB, SEAs like the Colorado Department of Education implement an accountability system that "grades" school districts and individual schools based on multiple metrics. The primary metric is academic achievement (both for all students and for each subgroup), as measured by proficiency on the annual assessment. Accountability systems also evaluate indicators such as high school graduation rates and the percentage of English language learners making progress in English proficiency. 20 U.S.C. § 6311(c)(4).[12] The State accountability system enables meaningful differentiation between schools "for all students and subgroups of students" and enables identification of any school "in which any subgroup of students is consistently underperforming." *Id*. § (c)(4)(C)(iii). It is through this accountability monitoring—not through individual student litigation—that States like Colorado ensure that schools and districts are raising the floor of educational opportunity for all subgroups, including students with disabilities. If students with disabilities are failing to achieve academically, this accountability process is designed to identify it.

If a State fails to comply with the ESEA's accountability requirements, the U.S. Department of Education has a range of enforcement options available to it. These include issuing a cease and desist order, 20

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[12] Amendments under the ESSA revised state accountability requirements in a number of respects, but left untouched the core mandates of high standards, regular assessments, and state-monitored accountability.

U.S.C. § 1234e, entering into a compliance agreement with the SEA, *id.* § 1234f, and suspending or withholding all or a portion of the State's Title I, Part A programmatic funds, *id.* § 1234d. The States have similar enforcement authority, including the ability to withhold a district's Title I, Part A funds. *See, e.g.*, *id.* § 1232c.

Specific to disabled students, the Department analyzes data disaggregated in a variety of ways, including by disability, by site, and even by grade, so that it can identify schools or districts in need of technical assistance. The Department provides guidance to schools in aligning IEPs with state academic content standards.[13] It is through this process that the State ensures that schools assist students with disabilities—and other student subgroups—to reach the high standards adopted under NCLB. Rather than promoting this goal, individual student litigation such as that proposed by Petitioner diverts scarce resources and places critical education policy decisions in the hands of judges instead of educators.

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[13] *See, e.g.*, Colo. Dep't of Educ., *Writing Standards-aligned Advanced Learning Plans (ALPs) and Individualized Education Programs (IEPs): A Supplemental Guidance Document for Designing Effective Formal Educational Plans* (Sept. 2014; Updated March 2016), http://tinyurl.com/hrdjxk7.

II. Petitioner and the Federal Government propose a standard that will impede collaboration between schools and families and that is fundamentally unworkable.

As other *amici* have noted, setting high expectations for students with disabilities has been determined to be in the best interests of students and communities, and is standard practice in 21st century education. *See* Nat'l Ass'n of State Dirs. Of Special Educ. *Amicus* Br. 6–7. But the question in this case is whether a specific *additional* obligation should be judicially grafted onto the IDEA; specifically, one that invites reviewing judges to second-guess educators using ambiguous terms. Because the proposed standard would interfere with collaboration between schools and families, and is unworkable, the Court should decline to add such a threshold.

A. The proposed standard of review threatens the school and family collaboration that is the hallmark of IEP development.

The IEP development process is designed to be a collaborative effort between schools and families. In *Schaffer v. Weast*, this Court cited the "cooperative process that [IDEA] establishes between parents and schools" as the "core of the statute." 546 U.S. at 53. Parents play a "significant role" in the process and function as formal members of the IEP team. *Id*. (citing 20 U.S.C. § 1414(d)(1)(B)). The cooperative process ends when parents pursue judicial intervention, and a precipitous trip to the courthouse "run[s] counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local educational agency work together to formulate an

individualized plan for each handicapped child's education." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

The legal framework for resolving special education disputes repeatedly emphasizes communication and consensus over litigation. SEAs like the Department must offer mediation services and have a complaints process. 20 U.S.C. § 1415(b)(5)–(6). The 2004 amendments to IDEA require districts to respond to parent complaints by providing a written description of the reasoning, options considered, and factors used in reaching an IEP decision. *Id.* § 1415(c)(2)(B)(i)(I). If a dispute thereafter develops, Congress has directed that any due process complaint notice must contain "a description of the nature of the problem" and "a proposed resolution of the problem to the extent known and available." *Id.* § 1415(b)(7)(A)(ii)(IV). Colorado's due process rules require that within fifteen days of receiving a parent's due process complaint, the Administrative Unit must convene a resolution meeting between parents and appropriate members of the IEP team. *See* Colo. Dep't of Educ., *State Level Complaint Procedures* at 2, http://tinyurl.com/hp4ze9g. "The purpose of the resolution meeting is for the parent of the child to discuss" the complaint so that the Administrative Unit can try to resolve it. 1 CODE COLO. REGS. § 301-8(7.5)(d)(1)(B).

Adjusting the standard as Petitioner and the Federal Government propose is unlikely to assist students but will most certainly increase litigation and discourage the family-school cooperation that is at the heart of the IDEA. A nebulous, aspirational articulation of a legal standard—especially one not

rooted in the language of the statute—invites families to believe that there are somehow greater remedial prospects at the courthouse than within the education system, and thereby discourages cooperation and collaboration.

B. The proposed standard is unworkable.

Colorado has nearly 900,000 public school students, approximately ten percent of whom are receiving special education services.[14] The suggestion that courts should judge the sufficiency of those students' IEPs based on nebulous modifiers and on an after-the-fact review of educational outcomes, rather than adherence to IDEA's statutory requirements, risks an increase in litigation and a breakdown in the collaborative process that is the hallmark of IDEA. Likewise, the legal standard suggested by the Petitioner would impair the ability of SEAs like the Department to resolve disputes at the mediation, state complaint, or due process hearing level.

1. The proposed standard is ambiguous.

The notion that an "appropriate" education for students with disabilities is one that provides "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 40, is laudable in purpose, yet unworkable as a legal standard. It would invite courts to "impos[e] their view of preferable educational

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[14] *See* Colo. Dep't. of Educ., *Colorado Education Facts and Figures* (Oct. 2016), http://tinyurl.com/hv3ag3n; Colo. Dep't. of Educ., *Students with Disabilities Birth-21* (2015), http://tinyurl.com/zpl8les.

methods" upon the States, in direct contravention of the principles articulated in *Rowley*. 458 U.S. at 207. Any proposed "heightened standard" for IEP development, without specific grounding in IDEA's tangible expectations, risks confusing those educators who work to develop IEPs every day. Worse still, it invites an explosion in special education litigation as lawyers and judges wrestle to define the boundaries of a judicially crafted statutory change.

Colorado has responsibilities to all students, including a variety of populations that have struggled to achieve. In fact, IDEA is not the only statute in which the State is tasked with providing a FAPE to an at-risk student subgroup. In the Stewart B. McKinney Homeless Assistance Act, Congress mandated that a FAPE be provided to homeless children:

> Each state educational agency shall ensure that each child of a homeless individual and each homeless youth has access to the same *free, appropriate public education*, including a public preschool education, as provided to other children and youths.

Pub. L. No. 100-77, § 721, 81 Stat. 783 (1987) (codified as amended at 42 U.S.C. § 11431) (emphasis added).

Unlike IDEA, the McKinney-Vento Act[15] does not provide a checklist definition of the term "free, appropriate public education." It also does not contain

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[15] The Act's name changed with a 2000 reauthorization. *See* McKinney-Vento Homeless Assistance Act, Pub. L. No. 106-400, 114 Stat. 1675 (2000).

an IEP process and related procedural safeguards, so that courts have not been called upon to interpret the term. In Colorado, the Board and the Department are responsible for creating State Plans that incorporate compliance with both IDEA and McKinney-Vento. Although the statutes are vastly different, the State of Colorado cannot administer them in such a way that suggests that the assurance of a FAPE for students with disabilities confers something greater than does a FAPE guarantee for a homeless student. In fact, if the Court changes the FAPE standard under IDEA, it risks upending the balance that Colorado has struck trying to meet the needs of all students.

Petitioner suggests that student expectations are exclusively defined by the legal standard for judicial review. Absent correction, he asserts, the IEPs of students with disabilities who live in the Tenth Circuit will be out of sync with ESEA's high expectations for all student groups. *See, e.g.*, Pet. Br. 29 ("The Tenth Circuit's adherence to the just-above-trivial standard runs headlong into the IDEA's and ESEA's demands for academic accountability and achievement."). Not so. Unlike the *Rowley* standard, which is based on the IDEA's text, neither Petitioner's nor the Federal Government's proposed standard derives from the statute—they would instead be entirely judicial creations. *See* Resp. Br. 49–51. Rather than a standard applied when teachers, specialists, and families join together to develop an IEP, Petitioner seeks to import from the outset the standard of review that a judge applies when the cooperative process of IEP development has already failed, when well-intentioned

families and caring educators have intractably locked horns. This Court should reject that invitation.

The revised standards of review proposed by the Petitioner and the Federal Government insert a level of ambiguity and subjectivity into the review of an IEP that will create uncertainty and invite litigation. Through its dispute resolution program, the Department can evaluate an IEP to see, for example, if it articulates challenging yet attainable goals and reflects a research-based pedagogy and individual services reasonably calculated to allow a student to "advance appropriately towards attaining [those goals]." *See* 20 U.S.C. § 1414(d)(1)(A)(i). It is far less likely that the Department can mediate a dispute as to whether an IEP "aims" to provide "substantially equal" opportunities," Pet. Br. 40 or "provides the child an opportunity to make significant progress in light of his capabilities," U.S. Amicus Br. 17.

Effective administration of the IDEA requires that the Department operate under an objective standard. Petitioner's proffered change in the baseline set by *Rowley* raises the substantial risk that an IEP that is fully compliant with IDEA's content requirements and "reasonably calculated" at its inception would nonetheless be labeled infirm upon judicial review—based on a subjective standard disconnected from the statute's plain language. An ambiguous review standard thus reinforces the notion that there may be something to be gained under a subjective standard applied at the courthouse that is not available from educators.

2. The legal sufficiency of an IEP should not be judged in hindsight based on outcomes.

Petitioner and the Federal Government invite judges to Monday-morning quarterback[16] the quality of an IEP based on the student's academic outcome, rather than on whether there was faithful adherence to a process that this Court recognized will "in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. Yet whether an IEP is "reasonably calculated" to provide educational benefit is an assessment that must be made at the time the IEP is created, based on the information available to the district at that time. Year-end achievement data for a particular student no more determines the adequacy of that year's IEP than does a surgical outcome determine whether an operating physician met the standard of care. And educational growth is a product of myriad factors, only some of which can be controlled or adjusted through an IEP.

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[16] Although Petitioner claims to recognize that the obligation to provide a FAPE is "not guaranteed to produce any particular outcome," Pet. Br. 49, it is *precisely* because the student in this case did not progress much that the sufficiency of his IEP is under attack. *Id.* at 34. Petitioner's *amici* States likewise misstate the standard, asserting that an IEP is judged by what it "confers," not by what it is "reasonably calculated" to confer. *See also* Del., Mass., & N.M. Amicus Br. 3–4 (complaining that if the *Rowley* standard "requires only more than *de minimis* ***progress*** … then as a nation we have not [addressed Congress' purpose in adopting IDEA]") (emphasis added).

This Court's review of the Equal Education Opportunities Act requirement that a State take "appropriate action" to overcome language barriers is instructive. In *Horne v. Flores*, this Court held that "subpar performance" was not enough to suggest that the State of Arizona had failed to take "appropriate action." 557 U.S. at 468 (holding that appropriate action "does not require the equalization of results between native and non-native speakers on tests administered only in English"). Likewise here, an after-the-fact review of educational outcome cannot dictate sufficiency of the IEP process.

For over 30 years, Congress has defined the education system's obligations to students with disabilities in terms of carefully crafted procedural and substantive requirements. Those provisions ensure that each student with disabilities is considered individually to ensure that the right goals are set and services arranged to allow that student to have the same chance to succeed as his peers. But even the best educational judgments can miss the mark, so the IDEA likewise requires that the school revisit the IEP at least annually. 20 U.S.C. § 1414(d)(4)(A). This cycle—plan, implement, assess, and revise—happens at a macro level through the ESEA State Plan and at a micro level in millions of IEP meetings all over the country. It is an iterative, collaborative process between schools and families.

The IEP team must review the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. The team must consider:

- Any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate;
- The results of any reevaluation;
- Information about the child provided to, or by, the parents; and
- The child's anticipated needs.

Id. That an IEP produces sub-optimal progress does not suggest that IDEA was violated,[17] but simply means that the annual review process will have to do its work.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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[17] Although this Court has not been called upon to directly address the question, the Circuit Courts uniformly recognize that the appropriateness of an IEP is judged prospectively, not retrospectively. *See*, *e.g., Roland M. v. Concord Sch. Comm*., 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."); *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 808 (8th Cir. 2010) (same); *see also Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) ("[W]e examine the adequacy of [the IEPs] at the time the plans were drafted."); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) (holding that an IEP must be judged prospectively from the time of its drafting); *R.E. v. N.Y.C. Dep't of Educ*., 694 F.3d 167, 185–86 (2d Cir. 2012) (same). This "at the time of drafting" approach is also consistent with this Court's expectation that an IEP be *reasonably calculated*.

Respectfully submitted,

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DECEMBER 2016

IN THE SUPREME COURT OF THE UNITED STATES

ENDREW F., A MINOR, BY AND THROUGH :
HIS PARENTS AND NEXT FRIENDS, :
JOSEPH F. AND JENNIFER F., :
Petitioner : No. 15-827
v. :
DOUGLAS COUNTY SCHOOL :
DISTRICT RE-1, :
Respondent. :

Washington, D.C.

Wednesday, January 11, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of the Petitioner.

IRV GORNSTEIN, ESQ., Counselor to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Petitioner.

NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this -- this morning in Case No. 15-827, Endrew F. v. Douglas County School District.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The IDEA does not permit a school district to provide a child with a disability a barely more than de minimis educational benefit. Rather, what the Act requires is for the school to provide instruction and related services to the child that are reasonably calculated to provide substantially equal educational opportunities.

The school district's primary response to our argument is that the standard I just described to you does not appear anywhere in the operative text of the IDEA. But let me get right to --

CHIEF JUSTICE ROBERTS: Well, it also -- it also didn't appear anywhere in the original petition, did it? I'm looking at Footnote 8 in your -- your opening brief where you note that substantial

educational benefit was the standard that was discussed in the petition and then a significantly different one in your -- your opening brief.

MR. FISHER: Well, Mr. Chief Justice, we don't intend it to be significantly different. What we do intend, as we describe in that footnote, is to give more detail as to how the standard works. I'd say --

JUSTICE GINSBURG: The standard -- the standard you're asking us to adopt, substantially equal opportunity, that does appear someplace. It appears in Justice Blackmun's concurring opinion in Rowley, and the court itself did not adopt that formulation, did not adopt substantially equal opportunity. So you're asking us to adopt a standard that the majority already had before it and didn't adopt.

MR. FISHER: Justice Ginsburg, yes, Justice Blackmun proposed a standard similar to the one that we offered the Court today, but that was 1982. And Congress has amended the IDEA twice, in 1997 and in 2004. And in the findings and purposes, it now describes the way the Act works with exactly the words I'm giving you: Equal educational opportunity.

CHIEF JUSTICE ROBERTS: Well, that raises a concern under the Spending Clause. I mean, the Spending Clause operations are pretty clear. The Federal

government proposes a deal to the States. If the States want the money, they have to agree to these provisions. And now you're saying that the content of those provisions, though, is changed by new legislation.

And I just wonder whether that puts some strain on the idea that the States have agreed to these provisions when they accepted the offer under the Spending Clause.

MR. FISHER: No, I don't think it does. I think it's critical to get to the text for exactly the reason you say, Mr. Chief Justice.

We know from Rowley that there's a substantive guarantee in the IDEA, and we know from Rowley, even in 1982, the way the Act was put together, that that substantive guarantee must track the way that the IEP provisions -- the individual educational program provisions work. That's at page 203 and 204 of Rowley.

So to get to the text and exactly what the State agrees to, you start with the FAPE definition, the definition for free appropriate public education. We all agree on that. Sub D of that definition says that the school has to provide an education, quote, "in conformity with the IEP plan."

Then, to understand what that means, again, this is straight out of Rowley and straight out of the

text, you turn to what the IEP provisions provide, and those are laid out at pages 52A and 53A of the government's appendix.

And, in a nutshell, what they say over and over again is that standards, generally speaking, for children with disabilities should be aimed at the general educational curriculum. So what you do is you start with the general educational curriculum that applies to all kids, then you identify the child's disability and how it impacts that child's ability to participate and progress in that general educational curriculum.

CHIEF JUSTICE ROBERTS: How does that work?

MR. FISHER: Then --

CHIEF JUSTICE ROBERTS: I'm sorry. How does that work with students whose disabilities generally wouldn't allow them in -- in their own -- with their own potential to follow the general educational curriculum? I understand how it worked in Rowley --

MR. FISHER: Right.

CHIEF JUSTICE ROBERTS: -- where we were dealing with someone with a particular disability, but one that was rather readily and easily addressed.

MR. FISHER: Uh-huh.

CHIEF JUSTICE ROBERTS: Here you have a very

different context. I mean, you would not say that the goal here, would you, was to progress consistent with the general educational curriculum?

MR. FISHER: Most likely not all the way up to grade level in this case, Mr. Chief Justice. But that question, just as you asked me earlier, is expressly answered in the statute.

So on page 52A, on the bottom of 52A in sub CC, what this -- what the IEP provisions say is that for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives are appropriate. And then the rest of the IEP provisions describe how you set those goals to meet those alternate achievement standards.

Now, what the Congress is referring to -- and let me just emphasize as I go through these statutory provisions, these are all from 2004, much postdating Rowley.

What Congress is referring to with respect to alternate achievement standards are laid out at page 79A of the government's appendix. These are the amendments to the ESEA that Congress enacted in the No Child Left Behind Act and that have been aligned with the IDEA. So if you look at page 79A, there are four

subdivisions -- or five, I'm sorry -- five subdivisions that describe what you do for the child, Mr. Chief Justice, that you were asking about. And perhaps the most important is -- are sub 3 and sub 4.

So if -- if you'll permit, because the text is so important, I'll read them to you.

Sub 3 says that the standards in this situation must, quote, "reflect professional judgment as to the highest possible standards achievable by such students."

And then what sub 4 does to complete the circle and make absolutely clear to the States and everybody else that this is required, it says those standards must, quote, "be designated in the individualized education program developed under the IDEA."

So the question you asked is expressly answered in the text. It is expressly answered in the IDEA. And so to bring me back to our standard, "substantial educational opportunity" are the words Congress used in the findings and purposes to encapsulate what is required by these IEPs.

JUSTICE KENNEDY: I suppose -- I suppose it's implicit in your standards and in some of the provisions you read that what we're talking about is the

word "reasonable" that we see throughout the law.

Do -- do you see any -- any function for that word and, in addition, as part of what reasonable is, is there any place to discuss the cost that the -- would -- would be incurred for, say, severely disabled students?

MR. FISHER: Let me answer both reasonableness first and cost second.

So reasonableness, yes, is an essential feature of the Act. And in Rowley itself, the Court said that the plan that the -- that the IEP team puts together needs to be, quote, "reasonably calculated to achieve the level of educational benefit that should be guaranteed."

So, if you go into court -- or actually here, you don't start in court; you start with a hearing officer. And if there's going to be a dispute, what a parent has to show is that the plan the school adopted was one that no reasonable educator would have adopted. And so reasonableness is an important part of the -- of -- of the way a court would look at it, the hearing officer, and indeed the IEP teams.

Now, with specific reference to cost, let me say three things about cost, Justice Kennedy. First of all, the vast, vast majority of IEPs and programs put

together under the statute don't cost much at all. They involve things like providing braille textbooks, providing an iPad, providing some specialized instruction by a -- by a staff member who's already on staff.

There are going to be some extreme cases, and the Court saw one several years ago in the Garrett F. case, which involved a situation where a child with a ventilator needed full-time nursing services, and the Court quite clearly said that even there, where the school district was saying that was going to cost 30 to $40,000, the Act does not permit cost to trump what the Act otherwise requires.

And the reason why, Justice Kennedy, is because Congress expressly thought about this. All the way back to the 1975 Act what Congress said is this: Yes, it costs money and that's why it's spending cause legislation and that's why we're giving money to the States, but it is cheaper to provide services to somebody while they are being educated than it is to pay out of the public fisc for the rest of that person's life than make up for the deficit that a bad education provided.

JUSTICE GINSBURG: Mr. -- Mr. Fisher, the tab here is -- is at $70,000 tuition?

MR. FISHER: Well, Justice Ginsburg, at the time this case was litigated, it was more like $40,000 in the private school. Currently, it is closer to the number you described. But the tab to put the child in private school -- remember, the school district had an opportunity come -- to come forward with -- with a proper IEP plan to provide Drew with a FAPE, and it simply --

JUSTICE KENNEDY: And in your -- in your position, what -- in your view, what should have been done for this student?

MR. FISHER: The first and most important thing that should have been done is what's known as a behavioral assessment should have taken place to figure out why Drew's behaviors were so dramatically interfering with his education. That's something that every reasonable educator would have done; all the peer-reviewed research say it's vital. It's the very first thing that the private school did in this situation. And if you look at the plans that are laid out in the supplemental Joint Appendix, that was never done.

And what's -- what's particularly striking, Justice Kennedy, is that even after Drew was really, in an emergency situation in the spring of his fourth grade

year, put into private school, the parents came back to the school district again six months later in November and said now that we see he's progressing, now that they've done a behavioral analysis, what will you do, because we actually would like to have him educated in the public schools. And it's amazing that all they did was offer -- and this is at pages 182 and 183 -- the exact same failed behavioral plan that they had been using in the fourth grade.

JUSTICE GINSBURG: Weren't they going to -- what -- the -- the conference that the parents didn't attend, they had scheduled a conference, and I thought a behavioral expert was part of that conference.

MR. FISHER: So there were two conferences, Justice Ginsburg. There was a first one in April of Drew's fourth grade year that the same old plan was presented with no experts.

They then offered to have another conference a month later in May, and what the parents decided at that point is things had reached such a critical and emergency stage, that Drew was falling so far behind, they had to put him in a private school, so they did not attend that meeting.

But, Justice Ginsburg, what my friend on the other side leaves out of his brief is that what I just

described, which is the parents did return in the fall once Drew had been stabilized and did offer to meet with the school district. The school district brought no autism expert to that meeting, and the plan that they proposed to deal with his behavior is verbatim the same plan that they had offered back in the fourth grade.

And so at that point, the -- the parents had no choice reasonably but to leave Drew in private school and to seek remedies under the Act. And there are going to be -- and I think this returns me to Justice Kennedy's question about cost. We recognized, and Congress recognized, and this Court recognized in Burlington, that there are going to be rare extreme circumstances where children are going to be put into a private school or otherwise need significant resources --

JUSTICE BREYER: Why didn't the -- why didn't the -- the statement that an IEP, what it has to do is it has to, based on peer-reviewed research, when practicable, will -- will be provided to the child to advance appropriately towards attaining the annual goals to make progress in the general education curriculum and so forth. So you've just described if the situation is that, wouldn't that have been violated? Or if they wrote the IEP that way, wouldn't you be able to go to

court and say, look, there is their IEP and they didn't live up to it?

So you already have two arguments under the statute, and the problem that's working in my mind is if we suddenly adopt a new standard, all over the country we'll have judges and lawyers and -- and -- and people interpreting it differently and -- and -- so why isn't the present situation sufficient?

MR. FISHER: Yeah.

JUSTICE BREYER: Besides having nine people who don't know -- I mean, at least speaking for myself -- don't know that much about it, creating a new standard out of legal materials which are at a distance from the people, the children and the parents, who need help.

MR. FISHER: So I think the critical reason why the Court in Rowley itself gestured towards needing the need for a overall standard that encapsulates the Act and the reason why we ask for it here today is that you will find in every brief in this case -- our brief --

JUSTICE BREYER: Uh-huh.

MR. FISHER: -- the red brief, their amicus briefs -- everyone agrees that school districts, I believe -- this is at page 29 and 47 of my friend's

brief. They agree that the IEP provisions have to be followed. Everybody agrees that. The difficulty is, is that it just doesn't happen.

JUSTICE BREYER: Well, I'm sorry if it doesn't happen. What are we supposed to do to make it happen? I mean, you have a statute that certainly seems to say that and you have a system for enforcement. And how does us suddenly using this word "equal" -- you know, the word "equal" has history from a lot of different areas of law. And -- and what do you do with a wide range of -- of disabilities, a huge range in individual students and -- and -- do you see what I foresee?

MR. FISHER: Yes. I --

JUSTICE BREYER: I foresee taking the money that ought to go to the children and spending it on lawsuits and lawyers and all kinds of things that are extraneous. That is what's actually bothering me.

MR. FISHER: Right. So let -- let me address -- say a word more about why we need a standard, and then I'll say something about the lawsuits question that you raised.

So, first, we need a standard because the Act -- it's best to encapsulate what the IEP provisions required. If you don't like the word "equal," I'm

seemingly giving you the word that Congress used when it amended the Act, and that very much -- this Court said very much the same thing in Rowley when it said, in the general situation, a child's plan should be tailored to allow her to advance from grade to grade.

Now, if you don't want to use the word "equal," here's what we would suggest, Justice Breyer: You can say, as a general rule, the IEP provisions and, therefore, the FAPE requirement of the Act, demands a level of educational services designed to allow the child to progress from grade to grade in the general curriculum.

JUSTICE BREYER: Well, suppose we have a child who is a handicapped child, there's a range of people, and they can't do much for them, but they can do something for them. And if they can do something for them, do it.

MR. FISHER: Uh-huh.

JUSTICE BREYER: But if you, say, measure that in terms of their ability to progress from grade to grade, maybe some will; some won't. And how does that -- it seems to me the word "appropriate" tried to recognize that. And -- and do you want to recognize that? I mean, you can't ask for more than is reasonable for them to do. So -- so what -- what words do we use?

MR. FISHER: At bottom, we agree that there's flexibility in the Act to accommodate each child's individual potential and needs.

But if I could just give a full answer to your question, we think that it would be fine if the Court just said the IEP should be tailored to achieve in a general educational curriculum at grade level for most kids. And when that is not possible, Justice Breyer, and this goes back to Mr. Chief Justice's question, you would go to the alternate achievement standards according to the language I described to you at page 79(a), and that is all straight out of the text of the Act. It's a more complicated --

JUSTICE KAGAN: How so --

MR. FISHER: -- way of putting it.

JUSTICE ALITO: It makes a big difference whether you take the word "equal" out though. What you've just said takes the word "equal" out of the standard.

MR. FISHER: Well, it might --

JUSTICE ALITO: Isn't that --

MR. FISHER: It might be, Justice Alito, I'm describing what it means to provide an equal educational opportunity. If you don't think that I'm actually --

JUSTICE ALITO: Well, I understand what an

equal outcome would be, but I don't understand what an equal opportunity means when an equal outcome is not practical.

MR. FISHER: What it means is that you give the -- so when you're dealing with a child who cannot get to grade level -- I think that's what you're asking -- what it means -- and this is in a 2005 guidance document by the Department of Education -- what it means is you're giving children with disabilities equally challenging curriculum on the academic side and in terms of their functional and -- functional and developmental goals.

JUSTICE KAGAN: But for those --

MR. FISHER: The standard -- I would just say the standard is highest possible standards achievable directly in the text of the statute.

JUSTICE KAGAN: But for those of us who have some feeling that the word "equality" is a poor fit for this statute and its focus on individuation --

MR. FISHER: Uh-huh.

JUSTICE KAGAN: -- what would you say to those of us? How would you describe what you think is required without focusing on equality?

MR. FISHER: I would say just what the Court said in Rowley for the -- for the typical child with a

disability who can achieve at grade level, which is the standard that the school district has to try to meet, is progress in the general educational curriculum --

JUSTICE GINSBURG: But we're dealing here --

MR. FISHER: -- at grade level.

JUSTICE GINSBURG: We're dealing here with a child who --

MR. FISHER: And then -- and then dealing with a child who's not going to get there equally challenging or, Justice Kagan, I would say alternate achievement benchmarks, to use exactly the words in the standards, that are the highest possible achievable by the student. Those are the exact words at page 79(a) of the -- of the -- of the statute.

If I could reserve the remainder of my time, please.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Gornstein.

ORAL ARGUMENT OF IRV GORNSTEIN

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. GORNSTEIN: Mr. Chief Justice, and may it please the Court:

The requirement of a free appropriate public education is not satisfied by the program that aims at

barely more than de minimis progress. What it requires instead is a program that is aimed at significant educational progress in light of the child's circumstances. What that --

JUSTICE GINSBURG: How does that differ -- how does your formulation differ from the one we were just offered by Mr. Fisher?

MR. GORNSTEIN: So I think we would take the same position with respect to Amy and similar students. It's grade-level competence for students who are in the regular classroom or in the general curriculum.

CHIEF JUSTICE ROBERTS: We're talking about somebody for whom I think you'd agree that that standard doesn't apply.

MR. GORNSTEIN: Right. And so that is where we have a slight area of disagreement. We would say significant progress towards grade-level standards, not as close as possible to grade-level standards.

JUSTICE SOTOMAYOR: How about "meaningful" instead of "significant"?

MR. GORNSTEIN: So we are not committed to any one particular terminology. We think that "significant" is synonymous with "meaningful." It's synonymous with progress that's -- reasonably can be expected.

JUSTICE KENNEDY: "Meaningful" --

MR. GORNSTEIN: It's progress --

JUSTICE KENNEDY: "Meaningful" was a word used in Rowley.

MR. GORNSTEIN: Yes, it was used in Rowley. And the only reason I would -- of all the terms -- and I -- and I would give you one more, which is "appropriate." In light of the child's circumstances, progress that's appropriate.

The only one I would urge you away from actually is "meaningful." And the reason is that it has baggage in various courts of appeals. It means different things to different courts, and it has been applied in different ways by different courts. So I would urge you to pick -- although we think that captures what we're saying --

JUSTICE KAGAN: So we should come up with our own that can then be applied in different ways in different courts.

(Laughter.)

MR. GORNSTEIN: Well, I think the most important thing for you to say is that this is not a barely more than de minimis standard, and it's not a maximization standard. What it is, is -- and I would leave it to you to choose any of those adjectives that

--

JUSTICE BREYER: The problem is you say leave it to us. You represent the Department of Education here. They at least have experience with it and we have far less. And so, obviously, I'm relying and must rely upon people who have connection with expertise. And I don't want to do something that uses words that has effects that I have no idea.

MR. GORNSTEIN: So we --

JUSTICE BREYER: So I go back to look at two words. The IEP is filled with the word "progress." There's several. So the word "progress" seems like something that should be there.

MR. GORNSTEIN: Yes.

JUSTICE BREYER: And then the other word --

MR. GORNSTEIN: I would agree with that.

JUSTICE BREYER: -- that goes -- goes -- you see a lot is "appropriate." Now, you've taken that word "appropriate" and spelled it out in light of the student's particular needs and abilities. I think that's what you're doing with "appropriate."

MR. GORNSTEIN: Yes.

JUSTICE BREYER: And if we stick "appropriate" in that sentence somewhere so it's significant and appropriate, does that matter?

MR. GORNSTEIN: That happen -- we are happy with that. One of the formulations we --

JUSTICE BREYER: You looked into this and you don't --

MR. GORNSTEIN: Yes.

JUSTICE BREYER: -- see anything wrong with sticking in the word "appropriate"?

MR. GORNSTEIN: We do not.

JUSTICE BREYER: Okay. Now -- now, the other thing I looked at in yours is you say the school -- "requires school districts to provide." And when I see "requires school districts to provide," I begin to think everybody is going to start suing about whether they did provide.

MR. GORNSTEIN: No, no.

JUSTICE BREYER: So I'm thinking, well, maybe it should be something like they are reasonably calculated to provide.

MR. GORNSTEIN: That's actually -- we agree with that. That is what Rowley said, and that is what the standard -- that's what it means to require. It's a program that is reasonably calculated to -- to make significant --

JUSTICE SOTOMAYOR: What does that --

MR. GORNSTEIN: -- educational --

JUSTICE SOTOMAYOR: For all of us --
MR. GORNSTEIN: -- progress in light of the child's circumstances.
JUSTICE SOTOMAYOR: For all of us who might be a little slow --
MR. GORNSTEIN: Yes.
JUSTICE SOTOMAYOR: -- now tell me what the new standard you're proposing is.
MR. GORNSTEIN: So --
JUSTICE SOTOMAYOR: And I don't mean to be buying into your --
MR. GORNSTEIN: So --
JUSTICE SOTOMAYOR: -- adversary's position. I do think the Act provides enough to set a clear standard. But the words are what we're trying to -- to come to that would be less confusing to everyone.
MR. GORNSTEIN: So one formulation that I think that would be consistent with what we are saying is reasonably calculated to make progress that is appropriate in light of the child's circumstances.
CHIEF JUSTICE ROBERTS: So how does that actually work in -- in practice? I mean, I understand in the Rowley standard, you're dealing with someone who has a disability that is readily addressed so that they can keep track with grade progress. But if you're out

of that realm where that is not a realistic goal in light of the child's potential, how do you decide what it is? You're sitting -- you're sitting down at the meeting, and how do you decide --

MR. GORNSTEIN: All right. So you -- what the -- the IEP provisions tell you where to start. You look at the -- where the child currently is in terms of academic performance, what are their present levels of achievement. Then you examine the disability and you ask to what extent has this impeding progress in the general curriculum. And then what you do is you basically make an estimate --

CHIEF JUSTICE ROBERTS: Is there somebody at that meeting? I mean, you have the parents --

MR. GORNSTEIN: You have expert -- you have educational experts who will say, make an estimate of how much progress towards grade level standards that child can make in light of where they are now and the -- the nature of the disability.

CHIEF JUSTICE ROBERTS: Maybe there's still time to grade level standards. I would think in many situations those would largely be irrelevant.

MR. GORNSTEIN: So here's what we mean by that, Mr. Chief Justice. You start with the grade level standards, but then you see the building blocks that are

missing underneath those grade level standards, and you set those out. So if you can't multiply and you can't add, and multiplication is the standard, maybe you need to learn how to add first. So you set forth what are the building blocks that the child is missing.

CHIEF JUSTICE ROBERTS: Everybody -- I say everybody. I assume everybody needs to learn how to add before they learn how to multiply.

And -- and the basis of my concern is that it seems to me that even though you have a lot of -- maybe because you have a lot of different adjectives to describe the standard, that there's really nothing concrete there. And when you're asking the courts to undertake judicial review, it's not clear to me exactly what they're supposed to do.

MR. GORNSTEIN: So -- so again, it's appropriate in light of the circumstances. And we think that this is just what most school boards are already doing. And I agree that the concern is with court enforcement of the standard, and the risk of court over-involvement in educational decisions. But the response to is that is not to adopt a barely more than de minimis standard that nobody purports to apply, but it's to say that the court's role is limited to ensuring that the State's program for progress or appropriate

progress is based on reasonable educational judgments.

JUSTICE ALITO: Do you agree with Mr. Fisher that cost has no place in this calculation? No matter how expensive it would be and no matter what the impact in, let's say, a poor school district would be on the general student population, cost can't be considered? And do you think in the real world, school boards are disregarding costs entirely?

MR. GORNSTEIN: So they're definitely not disregarding costs entirely, because there could be two different programs, both of which are reasonable, and they would take into account costs, surely, in deciding which of those reasonable programs to adopt.

But more generally, I would say the answer is no in the usual case. And -- and from Cedar Rapids, that's -- what the Court said is you consider cost in deciding what the standard should be in the first place, but cost can't define what the standards are.

And that makes sense to me in -- in light of the way you look at this statute. Congress obviously knew, when it passed this law, that there were going to be some significant expenses associated with some kids, and that's why it gave money and made it an opt-in program. So at the very least, it seems to me, Cedar Rapids and the structure of the statute tell you that in

the usual case it can't be cost, but --

JUSTICE ALITO: Do you -- do you know what percentage of the funds that are spent by school districts for this program are paid by the Federal government?

MR. GORNSTEIN: I think it's a relatively -- I think it's like 15 percent or something like that.

JUSTICE ALITO: Federal government pays 15 percent?

MR. GORNSTEIN: I think it's something like that. I could be -- I could be corrected, and maybe my -- my -- but the point of it is they realized that they were going to give money and they made it an open-ended choice for the school district. So if the school --

JUSTICE KENNEDY: But -- but do you think that costs should be measured against the possible results to be achieved?

MR. GORNSTEIN: So not in the usual case. I think Congress took costs off the table in the usual case. I think in the extreme case, you would do exactly what you're talking about. You would say for very little gain for extreme cost, no.

JUSTICE BREYER: Not appropriate. Is that --

MR. GORNSTEIN: Not appropriate. Yes.

So --

JUSTICE SOTOMAYOR: That's not the case in this case.

MR. GORNSTEIN: No. No. The -- the school district in this case hasn't raised a cost defense. And so --

JUSTICE SOTOMAYOR: And -- and more importantly, the cost gave significant progress.

MR. GORNSTEIN: The cost did give -- I'm sorry?

JUSTICE SOTOMAYOR: The cost of the private education resulted in significant --

MR. GORNSTEIN: It -- it did result in significant progress.

Now, I'm not sure you would -- you -- the -- the benchmark is what is to be achieved in a private school. I think as long as the school district's plan makes significant progress or appropriate progress towards grade level in light of the child's circumstances, that's all you have to do.

JUSTICE SOTOMAYOR: Well, here, even by the Tenth Circuit's admission, this was barely de minimis progress.

MR. GORNSTEIN: So I think what they -- the court of appeals said is -- the only thing it said is

there was a free, appropriate public education because Drew had made minimum progress on some of his goals in the prior years, and that's clearly not enough to meet the standard that we're talking about.

If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE RESPONDENT

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

To prevail, my friends have to overcome three different things. First, they must overcome the Spending Clause, which requires that any standard be imposed unambiguously.

Second, they most overcome Rowley, which found far from a clear statement that the statute was noticeably absent on a substantive standard for the level of education, including any standard based on equality.

And third, they must overcome the fact that with each amendment to the IDEA, Congress has reaffirmed its faith in the procedural protections and systemic requirements without touching the statute's substantive standard.

They have to --

JUSTICE GINSBURG: What did you -- what we were told by Mr. Fisher, I think he was referring to 79A of the government's appendix.

MR. KATYAL: So he has two different arguments, Justice Ginsburg, about -- about the changes to the amendments. We think neither of them is going to come close.

First of all, nothing is unambiguous as the Spending Clause requires. These are changes to the procedural protections in 1414(d), and an -- and an additional goal found in 1400. None of that comes close to this.

And I think the best barometer of this is that it's taken until Mr. Fisher's creativity for any court, really, to even entertain the notion that the '97 or 2004 amendments changed the standard. He has not a single case to cite that supports this idea.

In all of the --

JUSTICE KENNEDY: But the procedural standards certainly are the measure by which a court can determine whether or not the procedures were adequate.

MR. KATYAL: Absolutely, Justice Kennedy. We agree.

JUSTICE KENNEDY: Then why doesn't that

automatically make these part of the standards?

MR. KATYAL: We -- we do think it makes them part of the standards. It just makes them part of the procedural standards. That is to say, we agree with them that in 1997 and 2004, Congress really changed the IDEA in a significant way. The question is --

JUSTICE KENNEDY: Well, do you agree that the procedures have to meet these standards?

MR. KATYAL: Absolutely. Absolutely. And so to the extent the procedures are met, to the extent that the --

JUSTICE KENNEDY: Then I don't understand your disagreement with Mr. Fisher.

MR. KATYAL: Well, it's -- it's very large. That is, we think that these are -- a procedural checklist, and it's a detailed and exhaustive one, to be sure, Justice Kennedy, after --

JUSTICE KENNEDY: But -- but are -- are not the procedures subject to judicial review to see that the procedures were followed?

MR. KATYAL: Absolutely, Justice Kennedy. We agree with that. That's actually the way -- that's what Congress had in mind, the idea that you've got to go through the checklist, you can look at the checklist here. It's very detailed and extensive, the

supplemental appendix, pages 131 to 142. And so long as the Court has considered those things -- excuse me -- so long as the IEP process has considered those things --

JUSTICE KAGAN: But the procedures, as I'm sure you'll agree, is geared towards something. It's geared towards the provision of a free appropriate public education.

Then the Act, what it does, is it sets up -- this is why I -- I guess I -- I -- I can't readily agree with your understanding of it's all procedures and we just have to make sure the procedures are followed, because what the Act does is it sets up an administrative process. And it says when you have disagreements about the provision of a -- of a FAPE, you go to this administrative process.

And what does the hearing officer do? I'm going to just read you, subject to another exception, "A decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education."

MR. KATYAL: Correct.

JUSTICE KAGAN: So that's what the dispute is ultimately going to be about. It might be about some procedures along the way, and maybe it will be solved just by saying follow the right procedures, but often

not. Often, what the hearing officer is told to do, shall do, is to decide on substantive grounds whether a child has received a free appropriate public education.

MR. KATYAL: Justice Kagan, we don't disagree with a lot of what you said. That is to say that we do think -- and Rowley is very clear on this -- that there is a substantive standard in the IDEA. It's just a "some benefit" standard, not -- and there's nine different standards now that we've heard just in the last half hour, which I'll walk you through in a minute, but that the Petitioner and the government are saying, so it's some benefit.

We do think there's substantive review. That's what that provision is about. And by the way, that provision also says there can be procedural review on a harmless error.

JUSTICE KAGAN: But your substantive standard is so low, is so easy to meet, and then you justify that. You say, don't worry about it because it's all in the process.

But this provision, the idea of what a hearing officer is supposed to do, and then what a court is supposed to do, says it's not all in the process. There is a question of whether a student is receiving a -- a FAPE.

MR. KATYAL: So we disagree in two different respects. Number one, the experience for 34 years since Rowley, almost every circuit, both the government and Petitioner agree, whether it's Eighth or Tenth Circuit, have been applying the -- the some benefit standard, and that it had bite. Indeed, their own reply brief at page 19 admits and says, look, actually schools are doing fine.

So to the extent that you're concerned about some really low standard in the courts, that's actually not what's materializing, and you will get case after case on this ASA brief at page 24. So it's three cases using the some benefit standard just from this year. Judge Colloton's opinion in CB. There's case after case saying this is not some, you know, totally minor standard, it is the standard that Rowley said.

CHIEF JUSTICE ROBERTS: It says "some benefit," but you're -- you're reading it as saying "some benefit," and the other side is reading it as saying "some benefit," and you know that --

(Laughter.)

CHIEF JUSTICE ROBERTS: And it makes a difference. And I -- one reason I think that it -- it's problematic for you is because Rowley just doesn't say "some benefit." It tells you what it is. And it's

enough benefit to keep track with grade progress. And if that's what the standard is, that's certainly more than -- you know, slightly more than de minimis.

And, now, obviously, we -- we -- you can't take that actual substantive standard and apply it in a case such as this, but it does seem to indicate that there is a substantive standard and it's not just some benefit.

MR. KATYAL: Well, our position is Rowley doesn't say that it's got to be grade-level progress. Rather, it says that you've got the -- the word "appropriate" -- this is footnote 21 -- reflects --

CHIEF JUSTICE ROBERTS: The -- the --

MR. KATYAL: -- reflects, quote, "Its recognition that some settings simply are not suitable environments for the participation of some handicapped children," not as a term of art which concisely expresses the standard found by the lower court's equality standard. That is to say, I think, you can -- there -- there are lots of different ways of trying to understand what the statute means, but Rowley said the way for the Court to understand it is Spending Clause legislation. That is, the State entered into a contract and they need to know the terms of the deal, and to the extent there's any ambiguity, I think Rowley was very

clear in saying it is just some benefit, and that is a natural thing it follows from the kind of presumption against de minimis --

JUSTICE GINSBURG: You don't think "some benefit" is ambiguous?

MR. KATYAL: Well, I think that there's a little bit of ambiguity in that, but I think it's a lot easier to administer that question because the question -- you know, Justice Ginsburg, let's just say, this is the way ordinary English works.

If I have a duty to benefit you, Justice Ginsburg, if I give you no benefit, I think courts can easily review that. I've given you no benefit, I've fallen down on my duty. Now, if I've given you some benefit, I've met my duty to benefit you, but I think that --

JUSTICE GINSBURG: But I think it doesn't say it's more than de minimis.

MR. KATYAL: Exactly, but that can't be --

JUSTICE GINSBURG: So what is it?

MR. KATYAL: That can't be -- just to finish that -- that -- that thought. It can't be that the standard is, if I benefit you significantly, that's the standard; or if I benefit you equally with your colleagues or something like that. That's all adding

words to the statute that aren't there.

JUSTICE BREYER: Where is it? As I see one way of looking at what we're doing, two things have occurred. One, Rowley itself is somewhat ambiguous. It doesn't -- it deliberately doesn't say how much, and that's why you get the ambiguity.

The second thing that happens is the statute is amended. So what we're doing is going back and looking at those somewhat ambiguous words in Rowley in light of a statute that was amended.

Now, when you look at the statute that was amended in the IEP, you do see in at least two and maybe more places that that IEP is designed to be a statement that will produce -- meet the child's needs to enable the child to be involved in and make progress in the general education, and then further, advance appropriately towards an -- annual goals to make progress in the general education.

So now what the SG has done is go back, take those words, "make progress," and put them in a phrase which, in fact, I think with not much modification says, look, let's read what Rowley said in light of these additional words, "make progress," which are statutory words, while taking account of great differences by using words like "appropriately in light of the

student's particular needs and abilities," and those all come from the statute.

MR. KATYAL: So, Justice Breyer, three things. Number one is we don't agree that Rowley itself is ambiguous as it's been interpreted for 34 years. Indeed, they can't cite any cases showing that there's any problem. Indeed, their reply brief admits at page 19, things are working just fine. So the idea that there's, like, some need for this Court to get involved and clarify Rowley, I think, you know, there's no case law or anything to support that.

Second, the idea that the amendments somehow changed the game, I think, is not nearly enough to be the clear statement that Pennhurst requires. I mean, this isn't just elephants being hided -- hided in mouse holes. This is elephants being hidden in romanette mouse holes. I mean, this is -- you know, just listen to the things that he had to point to. It's subsection D4, romanette ii, and things like that, none of which --

JUSTICE GINSBURG: But would you agree with at least the courts should say that the formulation more than de minimis sets the level too low, and that's -- that's the formula that was used at levels here.

MR. KATYAL: And, Justice Ginsburg, we disagree with that. We think more than de minimis,

which is what almost every circuit is using right now, has worked and it follows naturally from the some benefit language in Rowley.

Now, you might disagree --

JUSTICE GINSBURG: So you're -- you're equating some benefit to more than --

MR. KATYAL: More than de minimis. We think it means the same thing, and we think there's a long history of experience with this showing that it's working.

And to return, Justice Breyer, to a point that you had made before. It's that there's some concern about the standard. That's really got to be up to Congress. If this Court were to change the standard, you know, it would invite all sorts of litigation.

And just look at what Mr. Fisher said. As the Chief Justice started, he -- first his petition started with a substantial equal opportunity standard, then it became in its merits brief an equal opportunity standard, then in the beginning of his oral argument it was, quote, "tailored to achieve at grade level what" --

CHIEF JUSTICE ROBERTS: But, Mr. Katyal, let's say -- let's say that during the school year, the school districts -- district sends someone to work with the particular student in this case, and they send her

there for two weeks, you know, she goes around. And that's it. And that's all they do. That's some benefit. Better to have the person there for two weeks than not at all, but you wouldn't say that satisfies the statute.

MR. KATYAL: It does not. As our brief explains there is two different provisions in the statute, 1414(b)(r) and (c)(5)(A), which explain that the benefit from special education must be, quote, "continuous." And Cedar Rapids actually said that. So --

CHIEF JUSTICE ROBERTS: Okay. So -- and just change the hypothetical. She's there five minutes a day.

MR. KATYAL: And -- and -- and, you know, five minutes a day, I think, wouldn't meet the de minimis standard. That is -- that is, that itself is not a significant -- that -- that is not a word --

CHIEF JUSTICE ROBERTS: Well, I guess it depends on whether somebody can tell us at some point whether it's beneficial. And yet, I think most people would agree that it -- well, I mean, are you saying that the -- the judicial review is supposed to be whether that's de minimis or more than de minimis, and they're supposed to say, well, a half hour is -- is -- is good,

it's not de minimis, but that's all you have to do?

MR. KATYAL: Mr. Chief Justice, I'm saying two different things. One is yes, ultimately, if we got there, that it would flunk substantive de minimis review, but you wouldn't get there. Congress's whole judgment here was to put the emphasis on procedural protections in the Act, and they bolstered them in '97 and 2004. And as long as they could shine a light by creating an IEP team process where they trusted teachers and they trusted parents who are highly incentivized to come together --

CHIEF JUSTICE ROBERTS: Yeah, but you're putting a lot -- you're assuming that the procedural process will yield significant results. What if they do the whole thing? Yeah, we have a hearing. Everybody comes in. We bring the expert in and the expert says, well, you need to have somebody there six hours of the day to help the child learn, and they say, okay, that's -- that's the procedure, we listen to you. In fact, we're only going to have somebody there a half hour a day.

MR. KATYAL: I -- I am assuming that it is in general going to work, which is what Rowley itself said at page 206 of its opinion. That -- that was Congress's judgment.

Now, I agree, you can give me a hypothetical which says that in some case the procedures aren't going to work and there's going to be a bad result. No system is perfect, not even a judicial system, as the error correction rules of this Court recognize.

I think the -- the question for the Court is should you kind of re-jigger the statute and impose a new standard, particularly in the context --

CHIEF JUSTICE ROBERTS: It's not exact --

JUSTICE KENNEDY: You'll have to excuse me, I'm not sure I understood your answer to the Chief Justice.

He -- he had a hypothetical where you have the hearing, the hearing makes a recommendation, recommendation not followed. What result?

MR. KATYAL: If the recommend --

JUSTICE KENNEDY: And -- and then I thought I heard you say, well, the procedure we followed, that's good enough.

MR. KATYAL: If -- if -- I might have misunderstood. I thought there was a five minutes of services thing.

If it's not followed, everyone agrees there's judicial review of that. The IEP is essentially a contract. Our brief cites the provision which says

that you can come in and enforce the IEP. I don't think there's any disagreement about that.

I understood the hypothetical to be about some really low level of benefit. And our point is, Rowley says there is a some benefit standard. That has been interpreted in court after court to actually have bite. The ASA brief cites the -- three cases just in the last year alone about that.

The question is, in Spending Clause context, do you want to actually impose something new? I mean, Mr. Gornstein gave you three different new standards, starting with his cert petition and then -- and then his merits brief taking a different view.

JUSTICE SOTOMAYOR: So where do you get "some benefit" from?

MR. KATYAL: I get it from Rowley itself at page 200 which says that --

JUSTICE SOTOMAYOR: What do you do with "meaningful" --

MR. KATYAL: So "meaningful" --

JUSTICE SOTOMAYOR: -- that was in Rowley itself?

MR. KATYAL: So "meaningful" was not actually in Rowley. The Court there just mentioned "meaningful" once only to say that it can't be more than

meaningful. It didn't adopt that as a standard. There is some baggage, as Mr. Gornstein says, but the really important baggage is actually what this Court said in Cedar Rapids, which is that meaningful access doesn't require a particular level of education.

JUSTICE BREYER: All right.

MR. KATYAL: So that's what we have --

JUSTICE BREYER: That's what we have -- we have now. We have the words you've mentioned. They are in old cases. As was just pointed out, those words "some" -- what is it? "Some" -- "some" -- "some benefit."

MR. KATYAL: "Some benefit."

JUSTICE BREYER: You could say some benefit or you could say some benefit.

MR. KATYAL: Yeah.

JUSTICE BREYER: All right. Now, that's an ambiguity.

MR. KATYAL: Yes.

JUSTICE BREYER: And as you pointed out, most courts have interpreted what I think is the correct thing, they said benefit. Okay? And you say there is really no problem. Okay? There is really no problem. But there still is a problem with the language in a handful of courts. And now we have an IEP statute which

again and again and again looks to progress.

So why is it making something up out of whole cloth --

MR. KATYAL: Well, first --

JUSTICE BREYER: -- simply to take that word from the IEP, which is enforceable anyway, and say, look at these two words of ambiguity, and we think we should interpret them in light of the IEP requirements, which are pretty close to what the SG suggests?

MR. KATYAL: But, Justice Breyer, I don't think that there was some problem in the lower courts. They're not citing cases that show that there's some parade of horribles akin to the hypotheticals --

JUSTICE BREYER: Uh-huh.

MR. KATYAL: -- that we've heard. And Congress's judgment was that the procedural protections will do a lot at the front end to avoid that problem. There might be some situation at the back end, but that's where the system -- systemic requirements of the IDEA No Child Left Behind are so important. Because what they say is that the Department of Education can cut off funds, can redirect funds, can require annual reports, all sorts of things happening.

And, indeed, annual reports have been required since 2004 to Congress. Congress has never

changed the statute in the way they want, a substantive standard change. You know, and -- and, again, their own reply brief at page 19 and the SG's brief admits the standard is generally working. Teachers are teaching to the top.

JUSTICE ALITO: What is frustrating about this case and about this statute is that we have a blizzard of words. And if you --

MR. KATYAL: Right.

JUSTICE ALITO: -- read them literally, it's not clear to me that they mean anything different.

Now, "progress" benefit. Yeah, I don't see how you can have a benefit unless you're making some progress.

"Significant," "meaningful," they're synonyms. If something is significant or meaningful, it's more than de minimis. And if it's more than de minimis, you could say it's significant. It's something that you note. So it's really -- I mean, what everybody seems to be looking for is the word that has just the right nuance to express this thought.

MR. KATYAL: Well, we think that you should look to what Rowley did here, which is to say the word is "some benefit." And that actually follows from the text of the statute itself. There is a long

presumption, Justice Alito, against de minimis, starting with Wrigley, which this Court said applies to all statutes. So we think our standard comes from the text, but there is no canon about significance or quality or anything like that.

JUSTICE ALITO: What is the difference between "some benefit" and "significant"?

MR. KATYAL: I think it's quite large; that is, you know -- you know, I think it's straightforward. So, you know, basically, I think, you know, if -- if the Court is to ask whether there is some benefit, as I was saying to Justice Ginsburg in my hypothetical, you know, that's a pretty easy question, is, have I benefited? Has the school district benefited? But once we start getting beyond that to "significant," the Court has to ask both: Was there some benefit and then was that benefit significant? And I can imagine --

CHIEF JUSTICE ROBERTS: It didn't just say --

MR. KATYAL: -- a variety of views about what is significant.

CHIEF JUSTICE ROBERTS: It didn't just say "some benefit." It said that that benefit would normally allow the -- a student with the disability to keep up with his peers in a different grade.

Now, as soon as they say that, you appreciate that you're dealing with more than just some benefit. I mean, that's a significant benefit. Well --

(Laughter.)

CHIEF JUSTICE ROBERTS: Significant -- "significant," "meaningful," whatever. It's more than simply de minimis. It suggests that you can't just look at something and say, aha, here, that was helpful, that was helpful, because it's -- the whole package has got to be helpful enough to allow the student to keep up with his peers.

MR. KATYAL: Mr. Chief Justice, I don't think that's what Rowley said when it used grade to grade. I think that all the -- the grade to grade was just to say, procedurally, they've got to consider that and make sure that, for example, a high school kid isn't put in first grade. But I don't think that's part of the test. And several times Rowley rejected this idea that there's any sort of level-of-education test.

JUSTICE KAGAN: Well, how does your position, Mr. Katyal -- you have a passage in your brief on page 47 which says, "An IEP must have the goal of advancing a child in the general education curriculum and, to the extent possible, enable her to be educated in the school's regular classes."

And, to me, that sounds exactly like what the chief justice just said, that an IEP has to be reasonably calculated to do those things. And if it's not, then relief follows.

MR. KATYAL: So I think, again, it's just a procedural guarantee that they have to think about and consider grade-level progress. It does not mean sort of substantive standard --

JUSTICE KAGAN: That's wrong. This is not just a procedural guarantee. Yes, the IDEA has lots of procedures in it, but they're all geared towards a particular substantive result. And it's that substantive result that's the focus of the -- both the administrative process and then judicial review of what comes out of the administrative process.

MR. KATYAL: But I don't think so, Justice Kagan. I think all that those standards say is what an IEP must address, not how an IEP must deal with them. And so if you look -- and I think the Second Circuit recently, in a case called LO v. New York City just a couple of months ago, decided -- basically went through this and said the 1414 standards like that are checklist. You've got to consider grade-level progress and things like that.

JUSTICE KAGAN: But if we --

MR. KATYAL: But you wouldn't --

JUSTICE KAGAN: -- consider all of them and we do none of them, that's just fine?

MR. KATYAL: That's -- well, the Congress's judgment was the process -- and this is something that happens in NEPA --

JUSTICE KENNEDY: So your answer to Justice Kagan is yes. If you consider everything but do nothing, that's okay.

MR. KATYAL: No. Because there's still -- if you do nothing, then you haven't provided any benefit. And so there is still some substantive bite in the standard of Rowley itself. What we're saying is, in the context of Spending Clause legislation, you can't do more than that and require something significant.

And the reason, Justice Kennedy, is once you start going into significance, as the amici briefs point out, education is the most -- one of the more contested areas in our society. Parents have been known to disagree. There is more acronyms about lawsuits about this newfangled theory or that newfangled theory or 30 hours versus 35 hours being significant. And you get into a huge morass.

What Rowley said citing San Antonio v. Rodriguez is that that kind of thing in the educational

context is not where Federal generalist courts should be.

Now, I suppose you could say maybe that's not the right policy. Maybe, you know, this is something that should happen. Courts should get involved in this. That's really got to be a judgment for Congress to make, and it's got to be something they say clearly in the context of Spending Clause legislation. Rowley expressly said the Pennhurst principle applies to this provision of the statute. This is core legislation, core -- a core requirement of the statute, and they are imposing any number of different standards.

And so I understand that there is some policy concerns among -- among the Court, even if they're not shared by the -- my friends on the other side, because they disclaim them. But to the extent there are those policy concerns, that's really got to be something that Congress deals with.

JUSTICE ALITO: And what I'm --

JUSTICE GINSBURG: One -- one aspect of -- of your position is you say yes, there is a substantive standard, some benefit. And then you, in the course of your argument, said some, as interpreted by most courts, has bite. But then you say de minimis is enough -- more

than de minimis is enough.

MR. KATYAL: Correct.

JUSTICE GINSBURG: So some with bite and more than de minimis don't sound like equivalence to me.

MR. KATYAL: I think they are, and I think that's what the -- circuit after circuit has said, which is that some educational benefit, the language at page 200, means more -- more than de minimis. And so -- and, you know, I think there is a whole variety of cases that have interpreted this.

And, Justice Ginsburg, even this Court has actually had one of them. In Florence v. Carter, that came from a circuit which had a "more than merely de minimis" standard. The Court there found that the IEP substantively didn't meet the protections of the "some benefit" or "merely more than de minimis" standard.

JUSTICE BREYER: We get that -- I mean, how does this actually work? I thought there is a statute in 1414 before that, it says you have to, school district, write an IEP. Then it says what an IEP is. And one of the things it says an IEP is, is it is a statement of the services, et cetera, based on peer review stuff that will be provided for the child to advance appropriately and to make progress in the general education curriculum.

Now, suppose the school district writes a statement called an IEP, but it does not show that the child is likely to advance. Can't they go to the administrative thing and then go to court and say to the judge, look, they didn't write what they were required to write?

MR. KATYAL: Absolutely. So --

JUSTICE BREYER: Okay.

MR. KATYAL: -- if there is a statement, the key word --

JUSTICE BREYER: So they have to write something that's minimally --

MR. KATYAL: -- is statement.

JUSTICE BREYER: Now, let's suppose they write it, but they don't do it.

MR. KATYAL: Yes.

JUSTICE BREYER: Now, isn't there something saying you have to follow the IEP?

MR. KATYAL: Correct.

JUSTICE BREYER: And so, again, they go to court?

MR. KATYAL: Correct. But what there is not --

JUSTICE BREYER: And what they -- again they say they didn't follow the IEP?

MR. KATYAL: Correct, Justice Breyer. But what there is not is something in 1414 which says that they've got to provide a significant benefit or an equal benefit --

JUSTICE BREYER: But they do have to provide something that makes progress in the general education curriculum and --

MR. KATYAL: They have to follow the checklist that is a statement --

JUSTICE BREYER: -- and advance appropriately --

MR. KATYAL: Yes. There must be a statement --

JUSTICE BREYER: -- towards a --

MR. KATYAL: -- yes.

I think everyone agrees you don't look at outcomes or anything like that. So it's -- it's just a procedural requirement --

JUSTICE BREYER: It's procedurally calculated.

MR. KATYAL: It's just the same as Rowley. Rowley -- you know, we're not saying anything different than what Rowley said.

JUSTICE BREYER: I don't know. I would say if you take Rowley as meaning -- hmm, or whatever those

two words were, what, beneficial? What's the one before "beneficial"?

JUSTICE KENNEDY: Some -- some benefit.

MR. KATYAL: Some educational benefit.

JUSTICE BREYER: Some educational benefit. If you say "some," this is inconsistent with Rowley.

MR. KATYAL: Well, I don't think so. I think it's got to be some educational benefit designed to get the general education curriculum or --

JUSTICE KAGAN: Mr. Katyal --

JUSTICE KENNEDY: Mr. Katyal, are there -- in the wake of the many years this Act has been enforced and these many individual meetings, have there been documented areas of consensus as to certain standards, certain methodologies, certain systems that work and certain that don't? And do the courts, in reviewing these proceedings, ever refer to those?

MR. KATYAL: So I think that's where the amici briefs are so important, because they show -- say that education isn't really one of those areas. I mean, you know, people disagree about the most simple things about educational philosophy.

JUSTICE KENNEDY: So we've gone -- so we've gone nowhere.

MR. KATYAL: Well, I don't think we've gone

nowhere, but I think that worry is to thrust courts into the business of deciding which philosophy is appropriate.

And take Firefly, for --

JUSTICE KENNEDY: So you say that there is generally no consensus as to appropriate methodologies for, say, a hearing-impaired student, an autistic student. No agreement on that?

MR. KATYAL: I don't mean to say that there's no agreement. I am -- I do mean to say that the amici briefs and the case law recognizes that there is a lot of disagreement. And Rowley itself says this, picking up on San Antonio v. Rodriguez, that the Congress's judgment was not to thrust courts into these really highly, very difficult considerations.

And if I could just give you one example, talking about Justice Sotomayor, your indication of Firefly. So eventually right, that, you know, once Drew went to Firefly, there was progress that was made. But there was also a lot that was given up.

I mean, one of the core purposes of the IDEA is mainstreaming. And of course, Firefly is not a mainstream school. So yes, there were some behavioral problems that were addressed by the private placement --

JUSTICE KAGAN: Mr. Katyal, can you go back

to Justice Ginsburg's question that I'm a bit confused of -- about for the same reason.

You said something like, well, this -- this standard is -- is being applied with bite. So I'm just wondering, do you favor a standard with bite?

MR. KATYAL: We favor the standard that Rowley said, which lower courts have done for 34 years, which does have --

JUSTICE KAGAN: Do you favor a standard with bite?

MR. KATYAL: It does have some bite. It does. We're not trying to --

JUSTICE KAGAN: Would that be "some bite" or "somebite"?

(Laughter.)

MR. KATYAL: It is some educational benefit. That's the language of Rowley. And if you disagree with it, Congress can change it.

JUSTICE KAGAN: Well, again, if somebody said to you, write a stature with -- write a standard with bite, I doubt you would come up with the words "more than merely de minimis."

MR. KATYAL: Well, but again, I think, Justice Kagan, Congress's bite, the substantive bite is only at the back end. It's a small feature in a much

bigger statute.

Congress's judgment was --

JUSTICE KAGAN: But the back end is what this case is all about.

MR. KATYAL: I understand that.

JUSTICE KAGAN: We are at the back end.

MR. KATYAL: But -- but, Justice Kagan, don't take the policy concerns about the hypotheticals and other things to try and re-jigger the back end.

Congress's handiwork was to say it's the procedural protections shining a light, the IEP process with highly incentivized teachers and -- teachers and parents that's generally going to yield the right result. That's what Rowley itself said at page 206.

JUSTICE ALITO: We're going to have to use musical notation to -- and not just words -- to express the -- the idea that seems to be emerging. All right.

Would you say -- I'll ask the same thing of Mr. Fisher if he has a chance to address it.

If -- if we were to look at what the lower courts have been doing -- we don't see very many of these cases, the lower courts see a lot of them. If we looked at what they have been doing in general, would you say that they are doing -- that they are applying the statute appropriately and consistent with correct

interpretation?

MR. KATYAL: I would. Ten circuits are applying the more than de minimis standard. It's working. Sometimes it has some bite. But to change it, as Justice Breyer was indicating to my friend, is -- with eight million potential IEPs, is to invite massive amounts of litigation.

JUSTICE ALITO: That sounds very harsh. What's the origin of this phrase, "more than de minimis"? Who thought this up?

MR. KATYAL: Well, it goes back to Latin. And so again, we, you know --

JUSTICE ALITO: I know where "de minimis" comes from.

(Laughter.)

MR. KATYAL: No, no, no. No. The -- the -- no. The -- the presumption against trifles, you know. It's -- Justice Scalia invokes it why and folks in the Wrigley case. It's an old formulation.

JUSTICE ALITO: But who -- who decided to apply it here in this context?

MR. KATYAL: Well, I think the Court in -- in Rowley, then Justice Rehnquist's opinion, invoked that by talking about some benefit. And Wrigley says that is a presumption that applies to all statutes.

And look --

JUSTICE GINSBURG: Who -- who put the term, "more than merely de minimis"? That's the formula that we're -- that you are espousing.

MR. KATYAL: Yes. We --

JUSTICE KAGAN: And de minimis is not enough, you know. It's "merely de minimis."

(Laughter.)

JUSTICE GINSBURG: And it's not in Rowley. So where does it -- who invented it?

MR. KATYAL: Well, I think that it came directly from the circuits right after Rowley. But all we are saying is "some benefit" means the more than de minimis test. That's the way court after court has interpreted it. It's worked well. This Court shouldn't renege on that.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Two minutes, Mr. Fisher.

REBUTTAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Three points, Your Honors. Two about the statute, and one about the practicalities.

First, as to the statute, the word "procedural" has been used by my friend to describe the IEP provisions. But whenever pressed, even he admits

that the IEP provisions are enforceable in the way Justice Breyer described, which is the plan has to meet the requirements of 1414(d). And if the services on the ground don't meet the requirements in the plan, they're enforceable. That's at page 47A of his brief and throughout the others --

JUSTICE SOTOMAYOR: Answer Justice Alito's question. What's the practice today?

MR. FISHER: Pardon me?

JUSTICE SOTOMAYOR: What's the practice today? Do most courts use the "more than de minimis" standard?

MR. FISHER: Yes. That is the formula in most of the circuits. That brings me to an important question on the ground, and if I'll circle back to my other statutory point.

JUSTICE ALITO: Before -- putting aside -- I don't want -- I'll take 10 seconds. Putting aside the words, are the outcomes appropriate, or do you think the lower courts need a kick?

MR. FISHER: I think they need a kick. I think the outcomes are quite scattered. I think the only reason why you get some favorable outcomes is because even the courts themselves don't believe barely more than de minimis.

But I think you have a disjoint. And my friend keeps pointing to the amicus briefs. I think educators are, by and large, following the plan -- I'm sorry -- the -- the standard we propose and the solicitor general imposes.

The No Child Left Behind Act in 2004 was a very important, revolutionary, bipartisan policy change. And so educators on the ground are aiming high, as they put it. The city's brief says we are aiming to maximize the benefit for our students. And so you have a disjoint between what educators are doing and the courts. And the reason they need a kick is because the very, very, very, very, very rare case that makes it into the court system is not being properly reviewed.

And that leaves the last point I want to respond to, which is the fact that Congress left us alone after Rowley. What the Court has said in Rowley and in Honig and in other cases is the IEP rules are, quote, "the centerpiece of the Act." They're the centerpiece for how the education delivery services are put forward.

If you look at page 182 of Rowley, the IEP provisions were quite hollow. They didn't have any benchmarks at all. That has dramatically changed. They now have the general educational curriculum benchmarks

Justice Breyer has been referring to, and we repeatedly refer to in our brief, and I think, Mr. Chief Justice, you agree cannot be met under their standard.

And then that leaves the last little piece of the puzzle here, which is this child who cannot get up to grade level standards. We give you an answer-direct question that is directly in the text of the Act, just as my friend demands. Alternative achievement benchmarks at the bottom of 52A is what is required. And that takes you to 79A, which gives you the exact statutory formula.

So if you want to use that formula, combined with general educational curriculum at grade level, we think that would be a proper answer to the question presented in this case.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)