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

MATTHEW P. DENN
Attorney General
STATE OF DELAWARE

AARON R. GOLDSTEIN
State Solicitor
PATRICIA A. DAVIS*
Deputy Attorney General
LAURA B. MAKRANSKY
Deputy Attorney General
DELAWARE DEPARTMENT OF JUSTICE
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400
PatriciaA.Davis@state.de.us

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MAURA HEALEY
Attorney General
COMMONWEALTH OF MASSACHUSETTS
One Ashburton Place
Boston, Massachusetts 02108

HECTOR H. BALDERAS
Attorney General
STATE OF NEW MEXICO
P.O. Box 1508
Santa Fe, New Mexico 87504

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

---

[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,

---

[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,

MATTHEW P. DENN
Attorney General
STATE OF DELAWARE
AARON R. GOLDSTEIN
State Solicitor
PATRICIA A. DAVIS*
Deputy Attorney General
LAURA B. MAKRANSKY
Deputy Attorney General
820 North French Street
Wilmington, Delaware 19801
(302) 577-8400

**Counsel of Record*

NOVEMBER 2016