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 THE COALITION OF TEXANS WITH DISABILITIES, DECODING DYSLEXIA AND DON'TDISMYABILITIES, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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.

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Respectfully submitted,

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