

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   ENDREW F., A MINOR, BY AND THROUGH :

4   HIS PARENTS AND NEXT FRIENDS, :

5   JOSEPH F. AND JENNIFER F., :

6                   Petitioner                   :   No. 15-827

7                   v.                               :

8   DOUGLAS COUNTY SCHOOL                   :

9   DISTRICT RE-1,                               :

10                   Respondent.                   :

11   - - - - - x

12                               Washington, D.C.

13                               Wednesday, January 11, 2017

14                   The above-entitled matter came on for oral  
15   argument before the Supreme Court of the United States  
16   at 10:04 a.m.

17   APPEARANCES:

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19       of the Petitioner.

20   IRV GORNSTEIN, ESQ., Counselor to the Solicitor  
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22       for United States, as amicus curiae, supporting the  
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25       of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 this -- this morning in Case No. 15-827, Endrew F. v.  
5 Douglas County School District.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

9 MR. FISHER: Mr. Chief Justice, and may it  
10 please the Court:

11 The IDEA does not permit a school district  
12 to provide a child with a disability a barely more than  
13 de minimis educational benefit. Rather, what the Act  
14 requires is for the school to provide instruction and  
15 related services to the child that are reasonably  
16 calculated to provide substantially equal educational  
17 opportunities.

18 The school district's primary response to  
19 our argument is that the standard I just described to  
20 you does not appear anywhere in the operative text of  
21 the IDEA. But let me get right to --

22 CHIEF JUSTICE ROBERTS: Well, it also -- it  
23 also didn't appear anywhere in the original petition,  
24 did it? I'm looking at Footnote 8 in your -- your  
25 opening brief where you note that substantial

1 educational benefit was the standard that was discussed  
2 in the petition and then a significantly different one  
3 in your -- your opening brief.

4 MR. FISHER: Well, Mr. Chief Justice, we  
5 don't intend it to be significantly different. What we  
6 do intend, as we describe in that footnote, is to give  
7 more detail as to how the standard works. I'd say --

8 JUSTICE GINSBURG: The standard -- the  
9 standard you're asking us to adopt, substantially equal  
10 opportunity, that does appear someplace. It appears in  
11 Justice Blackmun's concurring opinion in Rowley, and the  
12 court itself did not adopt that formulation, did not  
13 adopt substantially equal opportunity. So you're asking  
14 us to adopt a standard that the majority already had  
15 before it and didn't adopt.

16 MR. FISHER: Justice Ginsburg, yes, Justice  
17 Blackmun proposed a standard similar to the one that we  
18 offered the Court today, but that was 1982. And  
19 Congress has amended the IDEA twice, in 1997 and in  
20 2004. And in the findings and purposes, it now  
21 describes the way the Act works with exactly the words  
22 I'm giving you: Equal educational opportunity.

23 CHIEF JUSTICE ROBERTS: Well, that raises a  
24 concern under the Spending Clause. I mean, the Spending  
25 Clause operations are pretty clear. The Federal

1 government proposes a deal to the States. If the States  
2 want the money, they have to agree to these provisions.  
3 And now you're saying that the content of those  
4 provisions, though, is changed by new legislation.

5 And I just wonder whether that puts some  
6 strain on the idea that the States have agreed to these  
7 provisions when they accepted the offer under the  
8 Spending Clause.

9 MR. FISHER: No, I don't think it does. I  
10 think it's critical to get to the text for exactly the  
11 reason you say, Mr. Chief Justice.

12 We know from Rowley that there's a  
13 substantive guarantee in the IDEA, and we know from  
14 Rowley, even in 1982, the way the Act was put together,  
15 that that substantive guarantee must track the way that  
16 the IEP provisions -- the individual educational program  
17 provisions work. That's at page 203 and 204 of Rowley.

18 So to get to the text and exactly what the  
19 State agrees to, you start with the FAPE definition, the  
20 definition for free appropriate public education. We  
21 all agree on that. Sub D of that definition says that  
22 the school has to provide an education, quote, "in  
23 conformity with the IEP plan."

24 Then, to understand what that means, again,  
25 this is straight out of Rowley and straight out of the

1 text, you turn to what the IEP provisions provide, and  
2 those are laid out at pages 52A and 53A of the  
3 government's appendix.

4 And, in a nutshell, what they say over and  
5 over again is that standards, generally speaking, for  
6 children with disabilities should be aimed at the  
7 general educational curriculum. So what you do is you  
8 start with the general educational curriculum that  
9 applies to all kids, then you identify the child's  
10 disability and how it impacts that child's ability to  
11 participate and progress in that general educational  
12 curriculum.

13 CHIEF JUSTICE ROBERTS: How does that work?

14 MR. FISHER: Then --

15 CHIEF JUSTICE ROBERTS: I'm sorry. How does  
16 that work with students whose disabilities generally  
17 wouldn't allow them in -- in their own -- with their own  
18 potential to follow the general educational curriculum?  
19 I understand how it worked in Rowley --

20 MR. FISHER: Right.

21 CHIEF JUSTICE ROBERTS: -- where we were  
22 dealing with someone with a particular disability, but  
23 one that was rather readily and easily addressed.

24 MR. FISHER: Uh-huh.

25 CHIEF JUSTICE ROBERTS: Here you have a very

1 different context. I mean, you would not say that the  
2 goal here, would you, was to progress consistent with  
3 the general educational curriculum?

4 MR. FISHER: Most likely not all the way up  
5 to grade level in this case, Mr. Chief Justice. But  
6 that question, just as you asked me earlier, is  
7 expressly answered in the statute.

8 So on page 52A, on the bottom of 52A in sub  
9 CC, what this -- what the IEP provisions say is that for  
10 children with disabilities who take alternate  
11 assessments aligned to alternate achievement standards,  
12 a description of benchmarks or short-term objectives are  
13 appropriate. And then the rest of the IEP provisions  
14 describe how you set those goals to meet those alternate  
15 achievement standards.

16 Now, what the Congress is referring to --  
17 and let me just emphasize as I go through these  
18 statutory provisions, these are all from 2004, much  
19 postdating Rowley.

20 What Congress is referring to with respect  
21 to alternate achievement standards are laid out at page  
22 79A of the government's appendix. These are the  
23 amendments to the ESEA that Congress enacted in the No  
24 Child Left Behind Act and that have been aligned with  
25 the IDEA. So if you look at page 79A, there are four

1 subdivisions -- or five, I'm sorry -- five subdivisions  
2 that describe what you do for the child,  
3 Mr. Chief Justice, that you were asking about. And  
4 perhaps the most important is -- are sub 3 and sub 4.

5 So if -- if you'll permit, because the text  
6 is so important, I'll read them to you.

7 Sub 3 says that the standards in this  
8 situation must, quote, "reflect professional judgment as  
9 to the highest possible standards achievable by such  
10 students."

11 And then what sub 4 does to complete the  
12 circle and make absolutely clear to the States and  
13 everybody else that this is required, it says those  
14 standards must, quote, "be designated in the  
15 individualized education program developed under the  
16 IDEA."

17 So the question you asked is expressly  
18 answered in the text. It is expressly answered in the  
19 IDEA. And so to bring me back to our standard,  
20 "substantial educational opportunity" are the words  
21 Congress used in the findings and purposes to  
22 encapsulate what is required by these IEPs.

23 JUSTICE KENNEDY: I suppose -- I suppose  
24 it's implicit in your standards and in some of the  
25 provisions you read that what we're talking about is the

1 word "reasonable" that we see throughout the law.

2 Do -- do you see any -- any function for  
3 that word and, in addition, as part of what reasonable  
4 is, is there any place to discuss the cost that the --  
5 would -- would be incurred for, say, severely disabled  
6 students?

7 MR. FISHER: Let me answer both  
8 reasonableness first and cost second.

9 So reasonableness, yes, is an essential  
10 feature of the Act. And in Rowley itself, the Court  
11 said that the plan that the -- that the IEP team puts  
12 together needs to be, quote, "reasonably calculated to  
13 achieve the level of educational benefit that should be  
14 guaranteed."

15 So, if you go into court -- or actually  
16 here, you don't start in court; you start with a hearing  
17 officer. And if there's going to be a dispute, what a  
18 parent has to show is that the plan the school adopted  
19 was one that no reasonable educator would have adopted.  
20 And so reasonableness is an important part of the --  
21 of -- of the way a court would look at it, the hearing  
22 officer, and indeed the IEP teams.

23 Now, with specific reference to cost, let me  
24 say three things about cost, Justice Kennedy. First of  
25 all, the vast, vast majority of IEPs and programs put

1 together under the statute don't cost much at all. They  
2 involve things like providing braille textbooks,  
3 providing an iPad, providing some specialized  
4 instruction by a -- by a staff member who's already on  
5 staff.

6           There are going to be some extreme cases,  
7 and the Court saw one several years ago in the Garrett  
8 F. case, which involved a situation where a child with a  
9 ventilator needed full-time nursing services, and the  
10 Court quite clearly said that even there, where the  
11 school district was saying that was going to cost 30 to  
12 \$40,000, the Act does not permit cost to trump what the  
13 Act otherwise requires.

14           And the reason why, Justice Kennedy, is  
15 because Congress expressly thought about this. All the  
16 way back to the 1975 Act what Congress said is this:  
17 Yes, it costs money and that's why it's spending cause  
18 legislation and that's why we're giving money to the  
19 States, but it is cheaper to provide services to  
20 somebody while they are being educated than it is to pay  
21 out of the public fisc for the rest of that person's  
22 life than make up for the deficit that a bad education  
23 provided.

24           JUSTICE GINSBURG: Mr. -- Mr. Fisher, the  
25 tab here is -- is at \$70,000 tuition?

1                   MR. FISHER: Well, Justice Ginsburg, at the  
2     time this case was litigated, it was more like \$40,000  
3     in the private school. Currently, it is closer to the  
4     number you described. But the tab to put the child in  
5     private school -- remember, the school district had an  
6     opportunity come -- to come forward with -- with a  
7     proper IEP plan to provide Drew with a FAPE, and it  
8     simply --

9                   JUSTICE KENNEDY: And in your -- in your  
10    position, what -- in your view, what should have been  
11    done for this student?

12                  MR. FISHER: The first and most important  
13    thing that should have been done is what's known as a  
14    behavioral assessment should have taken place to figure  
15    out why Drew's behaviors were so dramatically  
16    interfering with his education. That's something that  
17    every reasonable educator would have done; all the  
18    peer-reviewed research say it's vital. It's the very  
19    first thing that the private school did in this  
20    situation. And if you look at the plans that are laid  
21    out in the supplemental Joint Appendix, that was never  
22    done.

23                  And what's -- what's particularly striking,  
24    Justice Kennedy, is that even after Drew was really, in  
25    an emergency situation in the spring of his fourth grade

1 year, put into private school, the parents came back to  
2 the school district again six months later in November  
3 and said now that we see he's progressing, now that  
4 they've done a behavioral analysis, what will you do,  
5 because we actually would like to have him educated in  
6 the public schools. And it's amazing that all they did  
7 was offer -- and this is at pages 182 and 183 -- the  
8 exact same failed behavioral plan that they had been  
9 using in the fourth grade.

10 JUSTICE GINSBURG: Weren't they going to --  
11 what -- the -- the conference that the parents didn't  
12 attend, they had scheduled a conference, and I thought a  
13 behavioral expert was part of that conference.

14 MR. FISHER: So there were two conferences,  
15 Justice Ginsburg. There was a first one in April of  
16 Drew's fourth grade year that the same old plan was  
17 presented with no experts.

18 They then offered to have another conference  
19 a month later in May, and what the parents decided at  
20 that point is things had reached such a critical and  
21 emergency stage, that Drew was falling so far behind,  
22 they had to put him in a private school, so they did not  
23 attend that meeting.

24 But, Justice Ginsburg, what my friend on the  
25 other side leaves out of his brief is that what I just

1 described, which is the parents did return in the fall  
2 once Drew had been stabilized and did offer to meet with  
3 the school district. The school district brought no  
4 autism expert to that meeting, and the plan that they  
5 proposed to deal with his behavior is verbatim the same  
6 plan that they had offered back in the fourth grade.

7 And so at that point, the -- the parents had  
8 no choice reasonably but to leave Drew in private school  
9 and to seek remedies under the Act. And there are going  
10 to be -- and I think this returns me to Justice  
11 Kennedy's question about cost. We recognized, and  
12 Congress recognized, and this Court recognized in  
13 Burlington, that there are going to be rare extreme  
14 circumstances where children are going to be put into a  
15 private school or otherwise need significant  
16 resources --

17 JUSTICE BREYER: Why didn't the -- why  
18 didn't the -- the statement that an IEP, what it has to  
19 do is it has to, based on peer-reviewed research, when  
20 practicable, will -- will be provided to the child to  
21 advance appropriately towards attaining the annual goals  
22 to make progress in the general education curriculum and  
23 so forth. So you've just described if the situation is  
24 that, wouldn't that have been violated? Or if they  
25 wrote the IEP that way, wouldn't you be able to go to

1 court and say, look, there is their IEP and they didn't  
2 live up to it?

3 So you already have two arguments under the  
4 statute, and the problem that's working in my mind is if  
5 we suddenly adopt a new standard, all over the country  
6 we'll have judges and lawyers and -- and -- and people  
7 interpreting it differently and -- and -- so why isn't  
8 the present situation sufficient?

9 MR. FISHER: Yeah.

10 JUSTICE BREYER: Besides having nine people  
11 who don't know -- I mean, at least speaking for  
12 myself -- don't know that much about it, creating a new  
13 standard out of legal materials which are at a distance  
14 from the people, the children and the parents, who need  
15 help.

16 MR. FISHER: So I think the critical reason  
17 why the Court in Rowley itself gestured towards needing  
18 the need for a overall standard that encapsulates the  
19 Act and the reason why we ask for it here today is that  
20 you will find in every brief in this case -- our  
21 brief --

22 JUSTICE BREYER: Uh-huh.

23 MR. FISHER: -- the red brief, their amicus  
24 briefs -- everyone agrees that school districts, I  
25 believe -- this is at page 29 and 47 of my friend's

1 brief. They agree that the IEP provisions have to be  
2 followed. Everybody agrees that. The difficulty is, is  
3 that it just doesn't happen.

4 JUSTICE BREYER: Well, I'm sorry if it  
5 doesn't happen. What are we supposed to do to make it  
6 happen? I mean, you have a statute that certainly seems  
7 to say that and you have a system for enforcement. And  
8 how does us suddenly using this word "equal" -- you  
9 know, the word "equal" has history from a lot of  
10 different areas of law. And -- and what do you do with  
11 a wide range of -- of disabilities, a huge range in  
12 individual students and -- and -- do you see what I  
13 foresee?

14 MR. FISHER: Yes. I --

15 JUSTICE BREYER: I foresee taking the money  
16 that ought to go to the children and spending it on  
17 lawsuits and lawyers and all kinds of things that are  
18 extraneous. That is what's actually bothering me.

19 MR. FISHER: Right. So let -- let me  
20 address -- say a word more about why we need a standard,  
21 and then I'll say something about the lawsuits question  
22 that you raised.

23 So, first, we need a standard because the  
24 Act -- it's best to encapsulate what the IEP provisions  
25 required. If you don't like the word "equal," I'm

1     seemingly giving you the word that Congress used when it  
2     amended the Act, and that very much -- this Court said  
3     very much the same thing in Rowley when it said, in the  
4     general situation, a child's plan should be tailored to  
5     allow her to advance from grade to grade.

6                     Now, if you don't want to use the word  
7     "equal," here's what we would suggest, Justice Breyer:  
8     You can say, as a general rule, the IEP provisions and,  
9     therefore, the FAPE requirement of the Act, demands a  
10    level of educational services designed to allow the  
11    child to progress from grade to grade in the general  
12    curriculum.

13                    JUSTICE BREYER: Well, suppose we have a  
14    child who is a handicapped child, there's a range of  
15    people, and they can't do much for them, but they can do  
16    something for them. And if they can do something for  
17    them, do it.

18                    MR. FISHER: Uh-huh.

19                    JUSTICE BREYER: But if you, say, measure  
20    that in terms of their ability to progress from grade to  
21    grade, maybe some will; some won't. And how does that  
22    -- it seems to me the word "appropriate" tried to  
23    recognize that. And -- and do you want to recognize  
24    that? I mean, you can't ask for more than is reasonable  
25    for them to do. So -- so what -- what words do we use?

1           MR. FISHER: At bottom, we agree that  
2     there's flexibility in the Act to accommodate each  
3     child's individual potential and needs.

4           But if I could just give a full answer to  
5     your question, we think that it would be fine if the  
6     Court just said the IEP should be tailored to achieve in  
7     a general educational curriculum at grade level for most  
8     kids. And when that is not possible, Justice Breyer,  
9     and this goes back to Mr. Chief Justice's question, you  
10    would go to the alternate achievement standards  
11    according to the language I described to you at page  
12    79(a), and that is all straight out of the text of the  
13    Act. It's a more complicated --

14           JUSTICE KAGAN: How so --

15           MR. FISHER: -- way of putting it.

16           JUSTICE ALITO: It makes a big difference  
17    whether you take the word "equal" out though. What  
18    you've just said takes the word "equal" out of the  
19    standard.

20           MR. FISHER: Well, it might --

21           JUSTICE ALITO: Isn't that --

22           MR. FISHER: It might be, Justice Alito, I'm  
23    describing what it means to provide an equal educational  
24    opportunity. If you don't think that I'm actually --

25           JUSTICE ALITO: Well, I understand what an

1 equal outcome would be, but I don't understand what an  
2 equal opportunity means when an equal outcome is not  
3 practical.

4 MR. FISHER: What it means is that you give  
5 the -- so when you're dealing with a child who cannot  
6 get to grade level -- I think that's what you're  
7 asking -- what it means -- and this is in a 2005  
8 guidance document by the Department of Education -- what  
9 it means is you're giving children with disabilities  
10 equally challenging curriculum on the academic side and  
11 in terms of their functional and -- functional and  
12 developmental goals.

13 JUSTICE KAGAN: But for those --

14 MR. FISHER: The standard -- I would just  
15 say the standard is highest possible standards  
16 achievable directly in the text of the statute.

17 JUSTICE KAGAN: But for those of us who have  
18 some feeling that the word "equality" is a poor fit for  
19 this statute and its focus on individuation --

20 MR. FISHER: Uh-huh.

21 JUSTICE KAGAN: -- what would you say to  
22 those of us? How would you describe what you think is  
23 required without focusing on equality?

24 MR. FISHER: I would say just what the Court  
25 said in Rowley for the -- for the typical child with a

1 disability who can achieve at grade level, which is the  
2 standard that the school district has to try to meet, is  
3 progress in the general educational curriculum --

4 JUSTICE GINSBURG: But we're dealing here --

5 MR. FISHER: -- at grade level.

6 JUSTICE GINSBURG: We're dealing here with a  
7 child who --

8 MR. FISHER: And then -- and then dealing  
9 with a child who's not going to get there equally  
10 challenging or, Justice Kagan, I would say alternate  
11 achievement benchmarks, to use exactly the words in the  
12 standards, that are the highest possible achievable by  
13 the student. Those are the exact words at page 79(a) of  
14 the -- of the -- of the statute.

15 If I could reserve the remainder of my time,  
16 please.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 Mr. Gornstein.

19 ORAL ARGUMENT OF IRV GORNSTEIN

20 FOR UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONER

22 MR. GORNSTEIN: Mr. Chief Justice, and may  
23 it please the Court:

24 The requirement of a free appropriate public  
25 education is not satisfied by the program that aims at

1 barely more than de minimis progress. What it requires  
2 instead is a program that is aimed at significant  
3 educational progress in light of the child's  
4 circumstances. What that --

5 JUSTICE GINSBURG: How does that differ --  
6 how does your formulation differ from the one we were  
7 just offered by Mr. Fisher?

8 MR. GORNSTEIN: So I think we would take the  
9 same position with respect to Amy and similar students.  
10 It's grade-level competence for students who are in the  
11 regular classroom or in the general curriculum.

12 CHIEF JUSTICE ROBERTS: We're talking about  
13 somebody for whom I think you'd agree that that standard  
14 doesn't apply.

15 MR. GORNSTEIN: Right. And so that is where  
16 we have a slight area of disagreement. We would say  
17 significant progress towards grade-level standards, not  
18 as close as possible to grade-level standards.

19 JUSTICE SOTOMAYOR: How about "meaningful"  
20 instead of "significant"?

21 MR. GORNSTEIN: So we are not committed to  
22 any one particular terminology. We think that  
23 "significant" is synonymous with "meaningful." It's  
24 synonymous with progress that's -- reasonably can be  
25 expected.

1 JUSTICE KENNEDY: "Meaningful" --

2 MR. GORNSTEIN: It's progress --

3 JUSTICE KENNEDY: "Meaningful" was a word  
4 used in Rowley.

5 MR. GORNSTEIN: Yes, it was used in Rowley.  
6 And the only reason I would -- of all the terms -- and  
7 I -- and I would give you one more, which is  
8 "appropriate." In light of the child's circumstances,  
9 progress that's appropriate.

10 The only one I would urge you away from  
11 actually is "meaningful." And the reason is that it has  
12 baggage in various courts of appeals. It means  
13 different things to different courts, and it has been  
14 applied in different ways by different courts. So I  
15 would urge you to pick -- although we think that  
16 captures what we're saying --

17 JUSTICE KAGAN: So we should come up with  
18 our own that can then be applied in different ways in  
19 different courts.

20 (Laughter.)

21 MR. GORNSTEIN: Well, I think the most  
22 important thing for you to say is that this is not a  
23 barely more than de minimis standard, and it's not a  
24 maximization standard. What it is, is -- and I would  
25 leave it to you to choose any of those adjectives that

1     --

2                   JUSTICE BREYER:  The problem is you say  
3     leave it to us.  You represent the Department of  
4     Education here.  They at least have experience with it  
5     and we have far less.  And so, obviously, I'm relying  
6     and must rely upon people who have connection with  
7     expertise.  And I don't want to do something that uses  
8     words that has effects that I have no idea.

9                   MR. GORNSTEIN:  So we --

10                  JUSTICE BREYER:  So I go back to look at two  
11     words.  The IEP is filled with the word "progress."  
12     There's several.  So the word "progress" seems like  
13     something that should be there.

14                  MR. GORNSTEIN:  Yes.

15                  JUSTICE BREYER:  And then the other word --

16                  MR. GORNSTEIN:  I would agree with that.

17                  JUSTICE BREYER:  -- that goes -- goes -- you  
18     see a lot is "appropriate."  Now, you've taken that word  
19     "appropriate" and spelled it out in light of the  
20     student's particular needs and abilities.  I think  
21     that's what you're doing with "appropriate."

22                  MR. GORNSTEIN:  Yes.

23                  JUSTICE BREYER:  And if we stick  
24     "appropriate" in that sentence somewhere so it's  
25     significant and appropriate, does that matter?

1                   MR. GORNSTEIN: That happen -- we are happy  
2 with that. One of the formulations we --

3                   JUSTICE BREYER: You looked into this and  
4 you don't --

5                   MR. GORNSTEIN: Yes.

6                   JUSTICE BREYER: -- see anything wrong with  
7 sticking in the word "appropriate"?

8                   MR. GORNSTEIN: We do not.

9                   JUSTICE BREYER: Okay. Now -- now, the  
10 other thing I looked at in yours is you say the  
11 school -- "requires school districts to provide." And  
12 when I see "requires school districts to provide," I  
13 begin to think everybody is going to start suing about  
14 whether they did provide.

15                  MR. GORNSTEIN: No, no.

16                  JUSTICE BREYER: So I'm thinking, well,  
17 maybe it should be something like they are reasonably  
18 calculated to provide.

19                  MR. GORNSTEIN: That's actually -- we agree  
20 with that. That is what Rowley said, and that is what  
21 the standard -- that's what it means to require. It's a  
22 program that is reasonably calculated to -- to make  
23 significant --

24                  JUSTICE SOTOMAYOR: What does that --

25                  MR. GORNSTEIN: -- educational --

1 JUSTICE SOTOMAYOR: For all of us --

2 MR. GORNSTEIN: -- progress in light of the  
3 child's circumstances.

4 JUSTICE SOTOMAYOR: For all of us who might  
5 be a little slow --

6 MR. GORNSTEIN: Yes.

7 JUSTICE SOTOMAYOR: -- now tell me what the  
8 new standard you're proposing is.

9 MR. GORNSTEIN: So --

10 JUSTICE SOTOMAYOR: And I don't mean to be  
11 buying into your --

12 MR. GORNSTEIN: So --

13 JUSTICE SOTOMAYOR: -- adversary's position.  
14 I do think the Act provides enough to set a clear  
15 standard. But the words are what we're trying to -- to  
16 come to that would be less confusing to everyone.

17 MR. GORNSTEIN: So one formulation that I  
18 think that would be consistent with what we are saying  
19 is reasonably calculated to make progress that is  
20 appropriate in light of the child's circumstances.

21 CHIEF JUSTICE ROBERTS: So how does that  
22 actually work in -- in practice? I mean, I understand  
23 in the Rowley standard, you're dealing with someone who  
24 has a disability that is readily addressed so that they  
25 can keep track with grade progress. But if you're out

1 of that realm where that is not a realistic goal in  
2 light of the child's potential, how do you decide what  
3 it is? You're sitting -- you're sitting down at the  
4 meeting, and how do you decide --

5 MR. GORNSTEIN: All right. So you -- what  
6 the -- the IEP provisions tell you where to start. You  
7 look at the -- where the child currently is in terms of  
8 academic performance, what are their present levels of  
9 achievement. Then you examine the disability and you  
10 ask to what extent has this impeding progress in the  
11 general curriculum. And then what you do is you  
12 basically make an estimate --

13 CHIEF JUSTICE ROBERTS: Is there somebody at  
14 that meeting? I mean, you have the parents --

15 MR. GORNSTEIN: You have expert -- you have  
16 educational experts who will say, make an estimate of  
17 how much progress towards grade level standards that  
18 child can make in light of where they are now and the --  
19 the nature of the disability.

20 CHIEF JUSTICE ROBERTS: Maybe there's still  
21 time to grade level standards. I would think in many  
22 situations those would largely be irrelevant.

23 MR. GORNSTEIN: So here's what we mean by  
24 that, Mr. Chief Justice. You start with the grade level  
25 standards, but then you see the building blocks that are

1 missing underneath those grade level standards, and you  
2 set those out. So if you can't multiply and you can't  
3 add, and multiplication is the standard, maybe you need  
4 to learn how to add first. So you set forth what are  
5 the building blocks that the child is missing.

6 CHIEF JUSTICE ROBERTS: Everybody -- I say  
7 everybody. I assume everybody needs to learn how to add  
8 before they learn how to multiply.

9 And -- and the basis of my concern is that  
10 it seems to me that even though you have a lot of --  
11 maybe because you have a lot of different adjectives to  
12 describe the standard, that there's really nothing  
13 concrete there. And when you're asking the courts to  
14 undertake judicial review, it's not clear to me exactly  
15 what they're supposed to do.

16 MR. GORNSTEIN: So -- so again, it's  
17 appropriate in light of the circumstances. And we think  
18 that this is just what most school boards are already  
19 doing. And I agree that the concern is with court  
20 enforcement of the standard, and the risk of court  
21 over-involvement in educational decisions. But the  
22 response to is that is not to adopt a barely more than  
23 de minimis standard that nobody purports to apply, but  
24 it's to say that the court's role is limited to ensuring  
25 that the State's program for progress or appropriate

1 progress is based on reasonable educational judgments.

2 JUSTICE ALITO: Do you agree with Mr. Fisher  
3 that cost has no place in this calculation? No matter  
4 how expensive it would be and no matter what the impact  
5 in, let's say, a poor school district would be on the  
6 general student population, cost can't be considered?  
7 And do you think in the real world, school boards are  
8 disregarding costs entirely?

9 MR. GORNSTEIN: So they're definitely not  
10 disregarding costs entirely, because there could be two  
11 different programs, both of which are reasonable, and  
12 they would take into account costs, surely, in deciding  
13 which of those reasonable programs to adopt.

14 But more generally, I would say the answer  
15 is no in the usual case. And -- and from Cedar Rapids,  
16 that's -- what the Court said is you consider cost in  
17 deciding what the standard should be in the first place,  
18 but cost can't define what the standards are.

19 And that makes sense to me in -- in light of  
20 the way you look at this statute. Congress obviously  
21 knew, when it passed this law, that there were going to  
22 be some significant expenses associated with some kids,  
23 and that's why it gave money and made it an opt-in  
24 program. So at the very least, it seems to me, Cedar  
25 Rapids and the structure of the statute tell you that in

1 the usual case it can't be cost, but --

2 JUSTICE ALITO: Do you -- do you know what  
3 percentage of the funds that are spent by school  
4 districts for this program are paid by the Federal  
5 government?

6 MR. GORNSTEIN: I think it's a relatively --  
7 I think it's like 15 percent or something like that.

8 JUSTICE ALITO: Federal government pays 15  
9 percent?

10 MR. GORNSTEIN: I think it's something like  
11 that. I could be -- I could be corrected, and maybe my  
12 -- my -- but the point of it is they realized that they  
13 were going to give money and they made it an open-ended  
14 choice for the school district. So if the school --

15 JUSTICE KENNEDY: But -- but do you think  
16 that costs should be measured against the possible  
17 results to be achieved?

18 MR. GORNSTEIN: So not in the usual case. I  
19 think Congress took costs off the table in the usual  
20 case. I think in the extreme case, you would do exactly  
21 what you're talking about. You would say for very  
22 little gain for extreme cost, no.

23 JUSTICE BREYER: Not appropriate. Is  
24 that --

25 MR. GORNSTEIN: Not appropriate. Yes.

1 So --

2 JUSTICE SOTOMAYOR: That's not the case in  
3 this case.

4 MR. GORNSTEIN: No. No. The -- the school  
5 district in this case hasn't raised a cost defense. And  
6 so --

7 JUSTICE SOTOMAYOR: And -- and more  
8 importantly, the cost gave significant progress.

9 MR. GORNSTEIN: The cost did give -- I'm  
10 sorry?

11 JUSTICE SOTOMAYOR: The cost of the private  
12 education resulted in significant --

13 MR. GORNSTEIN: It -- it did result in  
14 significant progress.

15 Now, I'm not sure you would -- you -- the --  
16 the benchmark is what is to be achieved in a private  
17 school. I think as long as the school district's plan  
18 makes significant progress or appropriate progress  
19 towards grade level in light of the child's  
20 circumstances, that's all you have to do.

21 JUSTICE SOTOMAYOR: Well, here, even by the  
22 Tenth Circuit's admission, this was barely de minimis  
23 progress.

24 MR. GORNSTEIN: So I think what they -- the  
25 court of appeals said is -- the only thing it said is

1     there was a free, appropriate public education because  
2     Drew had made minimum progress on some of his goals in  
3     the prior years, and that's clearly not enough to meet  
4     the standard that we're talking about.

5                     If the Court has no further questions.

6                     CHIEF JUSTICE ROBERTS: Thank you, counsel.

7                     Mr. Katyal.

8                     ORAL ARGUMENT OF NEAL K. KATYAL

9                     ON BEHALF OF THE RESPONDENT

10                    MR. KATYAL: Thank you, Mr. Chief Justice,  
11     and may it please the Court:

12                    To prevail, my friends have to overcome  
13     three different things. First, they must overcome the  
14     Spending Clause, which requires that any standard be  
15     imposed unambiguously.

16                    Second, they must overcome Rowley, which  
17     found far from a clear statement that the statute was  
18     noticeably absent on a substantive standard for the  
19     level of education, including any standard based on  
20     equality.

21                    And third, they must overcome the fact that  
22     with each amendment to the IDEA, Congress has reaffirmed  
23     its faith in the procedural protections and systemic  
24     requirements without touching the statute's substantive  
25     standard.

1                   They have to --

2                   JUSTICE GINSBURG: What did you -- what we  
3                   were told by Mr. Fisher, I think he was referring to 79A  
4                   of the government's appendix.

5                   MR. KATYAL: So he has two different  
6                   arguments, Justice Ginsburg, about -- about the changes  
7                   to the amendments. We think neither of them is going to  
8                   come close.

9                   First of all, nothing is unambiguous as the  
10                  Spending Clause requires. These are changes to the  
11                  procedural protections in 1414(d), and an -- and an  
12                  additional goal found in 1400. None of that comes close  
13                  to this.

14                  And I think the best barometer of this is  
15                  that it's taken until Mr. Fisher's creativity for any  
16                  court, really, to even entertain the notion that the '97  
17                  or 2004 amendments changed the standard. He has not a  
18                  single case to cite that supports this idea.

19                  In all of the --

20                  JUSTICE KENNEDY: But the procedural  
21                  standards certainly are the measure by which a court can  
22                  determine whether or not the procedures were adequate.

23                  MR. KATYAL: Absolutely, Justice Kennedy.  
24                  We agree.

25                  JUSTICE KENNEDY: Then why doesn't that

1 automatically make these part of the standards?

2 MR. KATYAL: We -- we do think it makes them  
3 part of the standards. It just makes them part of the  
4 procedural standards. That is to say, we agree with  
5 them that in 1997 and 2004, Congress really changed the  
6 IDEA in a significant way. The question is --

7 JUSTICE KENNEDY: Well, do you agree that  
8 the procedures have to meet these standards?

9 MR. KATYAL: Absolutely. Absolutely. And  
10 so to the extent the procedures are met, to the extent  
11 that the --

12 JUSTICE KENNEDY: Then I don't understand  
13 your disagreement with Mr. Fisher.

14 MR. KATYAL: Well, it's -- it's very large.  
15 That is, we think that these are -- a procedural  
16 checklist, and it's a detailed and exhaustive one, to be  
17 sure, Justice Kennedy, after --

18 JUSTICE KENNEDY: But -- but are -- are not  
19 the procedures subject to judicial review to see that  
20 the procedures were followed?

21 MR. KATYAL: Absolutely, Justice Kennedy.  
22 We agree with that. That's actually the way -- that's  
23 what Congress had in mind, the idea that you've got to  
24 go through the checklist, you can look at the checklist  
25 here. It's very detailed and extensive, the

1 supplemental appendix, pages 131 to 142. And so long as  
2 the Court has considered those things -- excuse me -- so  
3 long as the IEP process has considered those things --

4 JUSTICE KAGAN: But the procedures, as I'm  
5 sure you'll agree, is geared towards something. It's  
6 geared towards the provision of a free appropriate  
7 public education.

8 Then the Act, what it does, is it sets up --  
9 this is why I -- I guess I -- I -- I can't readily agree  
10 with your understanding of it's all procedures and we  
11 just have to make sure the procedures are followed,  
12 because what the Act does is it sets up an  
13 administrative process. And it says when you have  
14 disagreements about the provision of a -- of a FAPE, you  
15 go to this administrative process.

16 And what does the hearing officer do? I'm  
17 going to just read you, subject to another exception, "A  
18 decision made by a hearing officer shall be made on  
19 substantive grounds based on a determination of whether  
20 the child received a free appropriate public education."

21 MR. KATYAL: Correct.

22 JUSTICE KAGAN: So that's what the dispute  
23 is ultimately going to be about. It might be about some  
24 procedures along the way, and maybe it will be solved  
25 just by saying follow the right procedures, but often

1 not. Often, what the hearing officer is told to do,  
2 shall do, is to decide on substantive grounds whether a  
3 child has received a free appropriate public education.

4 MR. KATYAL: Justice Kagan, we don't  
5 disagree with a lot of what you said. That is to say  
6 that we do think -- and Rowley is very clear on this --  
7 that there is a substantive standard in the IDEA. It's  
8 just a "some benefit" standard, not -- and there's nine  
9 different standards now that we've heard just in the  
10 last half hour, which I'll walk you through in a minute,  
11 but that the Petitioner and the government are saying,  
12 so it's some benefit.

13 We do think there's substantive review.  
14 That's what that provision is about. And by the way,  
15 that provision also says there can be procedural review  
16 on a harmless error.

17 JUSTICE KAGAN: But your substantive  
18 standard is so low, is so easy to meet, and then you  
19 justify that. You say, don't worry about it because  
20 it's all in the process.

21 But this provision, the idea of what a  
22 hearing officer is supposed to do, and then what a court  
23 is supposed to do, says it's not all in the process.  
24 There is a question of whether a student is receiving a  
25 -- a FAPE.

1                   MR. KATYAL: So we disagree in two different  
2    respects. Number one, the experience for 34 years since  
3    Rowley, almost every circuit, both the government and  
4    Petitioner agree, whether it's Eighth or Tenth Circuit,  
5    have been applying the -- the some benefit standard, and  
6    that it had bite. Indeed, their own reply brief at page  
7    19 admits and says, look, actually schools are doing  
8    fine.

9                   So to the extent that you're concerned about  
10   some really low standard in the courts, that's actually  
11   not what's materializing, and you will get case after  
12   case on this ASA brief at page 24. So it's three cases  
13   using the some benefit standard just from this year.  
14   Judge Colloton's opinion in CB. There's case after case  
15   saying this is not some, you know, totally minor  
16   standard, it is the standard that Rowley said.

17                  CHIEF JUSTICE ROBERTS: It says "some  
18   benefit," but you're -- you're reading it as saying  
19   "some benefit," and the other side is reading it as  
20   saying "some benefit," and you know that --

21                  (Laughter.)

22                  CHIEF JUSTICE ROBERTS: And it makes a  
23   difference. And I -- one reason I think that it -- it's  
24   problematic for you is because Rowley just doesn't say  
25   "some benefit." It tells you what it is. And it's

1 enough benefit to keep track with grade progress. And  
2 if that's what the standard is, that's certainly more  
3 than -- you know, slightly more than de minimis.

4 And, now, obviously, we -- we -- you can't  
5 take that actual substantive standard and apply it in a  
6 case such as this, but it does seem to indicate that  
7 there is a substantive standard and it's not just some  
8 benefit.

9 MR. KATYAL: Well, our position is Rowley  
10 doesn't say that it's got to be grade-level progress.  
11 Rather, it says that you've got the -- the word  
12 "appropriate" -- this is footnote 21 -- reflects --

13 CHIEF JUSTICE ROBERTS: The -- the --

14 MR. KATYAL: -- reflects, quote, "Its  
15 recognition that some settings simply are not suitable  
16 environments for the participation of some handicapped  
17 children," not as a term of art which concisely  
18 expresses the standard found by the lower court's  
19 equality standard. That is to say, I think, you can --  
20 there -- there are lots of different ways of trying to  
21 understand what the statute means, but Rowley said the  
22 way for the Court to understand it is Spending Clause  
23 legislation. That is, the State entered into a contract  
24 and they need to know the terms of the deal, and to the  
25 extent there's any ambiguity, I think Rowley was very

1 clear in saying it is just some benefit, and that is a  
2 natural thing it follows from the kind of presumption  
3 against de minimis --

4 JUSTICE GINSBURG: You don't think "some  
5 benefit" is ambiguous?

6 MR. KATYAL: Well, I think that there's a  
7 little bit of ambiguity in that, but I think it's a lot  
8 easier to administer that question because the  
9 question -- you know, Justice Ginsburg, let's just say,  
10 this is the way ordinary English works.

11 If I have a duty to benefit you, Justice  
12 Ginsburg, if I give you no benefit, I think courts can  
13 easily review that. I've given you no benefit, I've  
14 fallen down on my duty. Now, if I've given you some  
15 benefit, I've met my duty to benefit you, but I think  
16 that --

17 JUSTICE GINSBURG: But I think it doesn't  
18 say it's more than de minimis.

19 MR. KATYAL: Exactly, but that can't be --

20 JUSTICE GINSBURG: So what is it?

21 MR. KATYAL: That can't be -- just to finish  
22 that -- that -- that thought. It can't be that the  
23 standard is, if I benefit you significantly, that's the  
24 standard; or if I benefit you equally with your  
25 colleagues or something like that. That's all adding

1 words to the statute that aren't there.

2 JUSTICE BREYER: Where is it? As I see one  
3 way of looking at what we're doing, two things have  
4 occurred. One, Rowley itself is somewhat ambiguous. It  
5 doesn't -- it deliberately doesn't say how much, and  
6 that's why you get the ambiguity.

7 The second thing that happens is the statute  
8 is amended. So what we're doing is going back and  
9 looking at those somewhat ambiguous words in Rowley in  
10 light of a statute that was amended.

11 Now, when you look at the statute that was  
12 amended in the IEP, you do see in at least two and maybe  
13 more places that that IEP is designed to be a statement  
14 that will produce -- meet the child's needs to enable  
15 the child to be involved in and make progress in the  
16 general education, and then further, advance  
17 appropriately towards an -- annual goals to make  
18 progress in the general education.

19 So now what the SG has done is go back, take  
20 those words, "make progress," and put them in a phrase  
21 which, in fact, I think with not much modification says,  
22 look, let's read what Rowley said in light of these  
23 additional words, "make progress," which are statutory  
24 words, while taking account of great differences by  
25 using words like "appropriately in light of the

1 student's particular needs and abilities," and those all  
2 come from the statute.

3 MR. KATYAL: So, Justice Breyer, three  
4 things. Number one is we don't agree that Rowley itself  
5 is ambiguous as it's been interpreted for 34 years.  
6 Indeed, they can't cite any cases showing that there's  
7 any problem. Indeed, their reply brief admits at page  
8 19, things are working just fine. So the idea that  
9 there's, like, some need for this Court to get involved  
10 and clarify Rowley, I think, you know, there's no case  
11 law or anything to support that.

12 Second, the idea that the amendments somehow  
13 changed the game, I think, is not nearly enough to be  
14 the clear statement that Pennhurst requires. I mean,  
15 this isn't just elephants being hided -- hided in mouse  
16 holes. This is elephants being hidden in romanette  
17 mouse holes. I mean, this is -- you know, just listen  
18 to the things that he had to point to. It's subsection  
19 D4, romanette ii, and things like that, none of which --

20 JUSTICE GINSBURG: But would you agree with  
21 at least the courts should say that the formulation more  
22 than de minimis sets the level too low, and that's --  
23 that's the formula that was used at levels here.

24 MR. KATYAL: And, Justice Ginsburg, we  
25 disagree with that. We think more than de minimis,

1     which is what almost every circuit is using right now,  
2     has worked and it follows naturally from the some  
3     benefit language in Rowley.

4                     Now, you might disagree --

5                     JUSTICE GINSBURG:   So you're -- you're  
6     equating some benefit to more than --

7                     MR. KATYAL:   More than de minimis.  We think  
8     it means the same thing, and we think there's a long  
9     history of experience with this showing that it's  
10    working.

11                    And to return, Justice Breyer, to a point  
12    that you had made before.  It's that there's some  
13    concern about the standard.  That's really got to be up  
14    to Congress.  If this Court were to change the standard,  
15    you know, it would invite all sorts of litigation.

16                    And just look at what Mr. Fisher said.  As  
17    the Chief Justice started, he -- first his petition  
18    started with a substantial equal opportunity standard,  
19    then it became in its merits brief an equal opportunity  
20    standard, then in the beginning of his oral argument it  
21    was, quote, "tailored to achieve at grade level what" --

22                    CHIEF JUSTICE ROBERTS:  But, Mr. Katyal,  
23    let's say -- let's say that during the school year, the  
24    school districts -- district sends someone to work with  
25    the particular student in this case, and they send her

1     there for two weeks, you know, she goes around. And  
2     that's it. And that's all they do. That's some  
3     benefit. Better to have the person there for two weeks  
4     than not at all, but you wouldn't say that satisfies the  
5     statute.

6                 MR. KATYAL: It does not. As our brief  
7     explains there is two different provisions in the  
8     statute, 1414(b)(r) and (c)(5)(A), which explain that  
9     the benefit from special education must be, quote,  
10    "continuous." And Cedar Rapids actually said that.  
11    So --

12                CHIEF JUSTICE ROBERTS: Okay. So -- and  
13    just change the hypothetical. She's there five minutes  
14    a day.

15                MR. KATYAL: And -- and -- and, you know,  
16    five minutes a day, I think, wouldn't meet the  
17    de minimis standard. That is -- that is, that itself is  
18    not a significant -- that -- that is not a word --

19                CHIEF JUSTICE ROBERTS: Well, I guess it  
20    depends on whether somebody can tell us at some point  
21    whether it's beneficial. And yet, I think most people  
22    would agree that it -- well, I mean, are you saying that  
23    the -- the judicial review is supposed to be whether  
24    that's de minimis or more than de minimis, and they're  
25    supposed to say, well, a half hour is -- is -- is good,

1 it's not de minimis, but that's all you have to do?

2 MR. KATYAL: Mr. Chief Justice, I'm saying  
3 two different things. One is yes, ultimately, if we got  
4 there, that it would flunk substantive de minimis  
5 review, but you wouldn't get there. Congress's whole  
6 judgment here was to put the emphasis on procedural  
7 protections in the Act, and they bolstered them in '97  
8 and 2004. And as long as they could shine a light by  
9 creating an IEP team process where they trusted teachers  
10 and they trusted parents who are highly incentivized to  
11 come together --

12 CHIEF JUSTICE ROBERTS: Yeah, but you're  
13 putting a lot -- you're assuming that the procedural  
14 process will yield significant results. What if they do  
15 the whole thing? Yeah, we have a hearing. Everybody  
16 comes in. We bring the expert in and the expert says,  
17 well, you need to have somebody there six hours of the  
18 day to help the child learn, and they say, okay,  
19 that's -- that's the procedure, we listen to you. In  
20 fact, we're only going to have somebody there a half  
21 hour a day.

22 MR. KATYAL: I -- I am assuming that it is  
23 in general going to work, which is what Rowley itself  
24 said at page 206 of its opinion. That -- that was  
25 Congress's judgment.

1                   Now, I agree, you can give me a hypothetical  
2   which says that in some case the procedures aren't going  
3   to work and there's going to be a bad result. No system  
4   is perfect, not even a judicial system, as the error  
5   correction rules of this Court recognize.

6                   I think the -- the question for the Court is  
7   should you kind of re-jigger the statute and impose a  
8   new standard, particularly in the context --

9                   CHIEF JUSTICE ROBERTS: It's not exact --

10                  JUSTICE KENNEDY: You'll have to excuse me,  
11   I'm not sure I understood your answer to the Chief  
12   Justice.

13                  He -- he had a hypothetical where you have  
14   the hearing, the hearing makes a recommendation,  
15   recommendation not followed. What result?

16                  MR. KATYAL: If the recommend --

17                  JUSTICE KENNEDY: And -- and then I thought  
18   I heard you say, well, the procedure we followed, that's  
19   good enough.

20                  MR. KATYAL: If -- if -- I might have  
21   misunderstood. I thought there was a five minutes of  
22   services thing.

23                  If it's not followed, everyone agrees  
24   there's judicial review of that. The IEP is essentially  
25   a contract. Our brief cites the provision which says

1     that you can come in and enforce the IEP. I don't think  
2     there's any disagreement about that.

3                 I understood the hypothetical to be about  
4     some really low level of benefit. And our point is,  
5     Rowley says there is a some benefit standard. That has  
6     been interpreted in court after court to actually have  
7     bite. The ASA brief cites the -- three cases just in  
8     the last year alone about that.

9                 The question is, in Spending Clause context,  
10    do you want to actually impose something new? I mean,  
11    Mr. Gornstein gave you three different new standards,  
12    starting with his cert petition and then -- and then his  
13    merits brief taking a different view.

14                JUSTICE SOTOMAYOR: So where do you get  
15    "some benefit" from?

16                MR. KATYAL: I get it from Rowley itself at  
17    page 200 which says that --

18                JUSTICE SOTOMAYOR: What do you do with  
19    "meaningful" --

20                MR. KATYAL: So "meaningful" --

21                JUSTICE SOTOMAYOR: -- that was in Rowley  
22    itself?

23                MR. KATYAL: So "meaningful" was not  
24    actually in Rowley. The Court there just mentioned  
25    "meaningful" once only to say that it can't be more than

1 meaningful. It didn't adopt that as a standard. There  
2 is some baggage, as Mr. Gornstein says, but the really  
3 important baggage is actually what this Court said in  
4 Cedar Rapids, which is that meaningful access doesn't  
5 require a particular level of education.

6 JUSTICE BREYER: All right.

7 MR. KATYAL: So that's what we have --

8 JUSTICE BREYER: That's what we have -- we  
9 have now. We have the words you've mentioned. They are  
10 in old cases. As was just pointed out, those words  
11 "some" -- what is it? "Some" -- "some" -- "some  
12 benefit."

13 MR. KATYAL: "Some benefit."

14 JUSTICE BREYER: You could say some benefit  
15 or you could say some benefit.

16 MR. KATYAL: Yeah.

17 JUSTICE BREYER: All right. Now, that's an  
18 ambiguity.

19 MR. KATYAL: Yes.

20 JUSTICE BREYER: And as you pointed out,  
21 most courts have interpreted what I think is the correct  
22 thing, they said benefit. Okay? And you say there is  
23 really no problem. Okay? There is really no problem.  
24 But there still is a problem with the language in a  
25 handful of courts. And now we have an IEP statute which

1 again and again and again looks to progress.

2 So why is it making something up out of  
3 whole cloth --

4 MR. KATYAL: Well, first --

5 JUSTICE BREYER: -- simply to take that word  
6 from the IEP, which is enforceable anyway, and say, look  
7 at these two words of ambiguity, and we think we should  
8 interpret them in light of the IEP requirements, which  
9 are pretty close to what the SG suggests?

10 MR. KATYAL: But, Justice Breyer, I don't  
11 think that there was some problem in the lower courts.  
12 They're not citing cases that show that there's some  
13 parade of horrors akin to the hypotheticals --

14 JUSTICE BREYER: Uh-huh.

15 MR. KATYAL: -- that we've heard. And  
16 Congress's judgment was that the procedural protections  
17 will do a lot at the front end to avoid that problem.  
18 There might be some situation at the back end, but  
19 that's where the system -- systemic requirements of the  
20 IDEA No Child Left Behind are so important. Because  
21 what they say is that the Department of Education can  
22 cut off funds, can redirect funds, can require annual  
23 reports, all sorts of things happening.

24 And, indeed, annual reports have been  
25 required since 2004 to Congress. Congress has never

1 changed the statute in the way they want, a substantive  
2 standard change. You know, and -- and, again, their own  
3 reply brief at page 19 and the SG's brief admits the  
4 standard is generally working. Teachers are teaching to  
5 the top.

6 JUSTICE ALITO: What is frustrating about  
7 this case and about this statute is that we have a  
8 blizzard of words. And if you --

9 MR. KATYAL: Right.

10 JUSTICE ALITO: -- read them literally, it's  
11 not clear to me that they mean anything different.

12 Now, "progress" benefit. Yeah, I don't see  
13 how you can have a benefit unless you're making some  
14 progress.

15 "Significant," "meaningful," they're  
16 synonyms. If something is significant or meaningful,  
17 it's more than de minimis. And if it's more than de  
18 minimis, you could say it's significant. It's something  
19 that you note. So it's really -- I mean, what everybody  
20 seems to be looking for is the word that has just the  
21 right nuance to express this thought.

22 MR. KATYAL: Well, we think that you should  
23 look to what Rowley did here, which is to say the word  
24 is "some benefit." And that actually follows from the  
25 text of the statute itself. There is a long

1 presumption, Justice Alito, against de minimis, starting  
 2 with Wrigley, which this Court said applies to all  
 3 statutes. So we think our standard comes from the text,  
 4 but there is no canon about significance or quality or  
 5 anything like that.

6 JUSTICE ALITO: What is the difference  
 7 between "some benefit" and "significant"?

8 MR. KATYAL: I think it's quite large; that  
 9 is, you know -- you know, I think it's straightforward.  
 10 So, you know, basically, I think, you know, if -- if the  
 11 Court is to ask whether there is some benefit, as I was  
 12 saying to Justice Ginsburg in my hypothetical, you know,  
 13 that's a pretty easy question, is, have I benefited?  
 14 Has the school district benefited? But once we start  
 15 getting beyond that to "significant," the Court has to  
 16 ask both: Was there some benefit and then was that  
 17 benefit significant? And I can imagine --

18 CHIEF JUSTICE ROBERTS: It didn't just  
 19 say --

20 MR. KATYAL: -- a variety of views about  
 21 what is significant.

22 CHIEF JUSTICE ROBERTS: It didn't just say  
 23 "some benefit." It said that that benefit would  
 24 normally allow the -- a student with the disability to  
 25 keep up with his peers in a different grade.

1                   Now, as soon as they say that, you  
2    appreciate that you're dealing with more than just some  
3    benefit. I mean, that's a significant benefit. Well --

4                   (Laughter.)

5                   CHIEF JUSTICE ROBERTS: Significant --  
6    "significant," "meaningful," whatever. It's more than  
7    simply de minimis. It suggests that you can't just look  
8    at something and say, aha, here, that was helpful, that  
9    was helpful, because it's -- the whole package has got  
10   to be helpful enough to allow the student to keep up  
11   with his peers.

12                  MR. KATYAL: Mr. Chief Justice, I don't  
13   think that's what Rowley said when it used grade to  
14   grade. I think that all the -- the grade to grade was  
15   just to say, procedurally, they've got to consider that  
16   and make sure that, for example, a high school kid isn't  
17   put in first grade. But I don't think that's part of  
18   the test. And several times Rowley rejected this idea  
19   that there's any sort of level-of-education test.

20                  JUSTICE KAGAN: Well, how does your  
21   position, Mr. Katyal -- you have a passage in your brief  
22   on page 47 which says, "An IEP must have the goal of  
23   advancing a child in the general education curriculum  
24   and, to the extent possible, enable her to be educated  
25   in the school's regular classes."

1                   And, to me, that sounds exactly like what  
2     the chief justice just said, that an IEP has to be  
3     reasonably calculated to do those things. And if it's  
4     not, then relief follows.

5                   MR. KATYAL: So I think, again, it's just a  
6     procedural guarantee that they have to think about and  
7     consider grade-level progress. It does not mean sort of  
8     substantive standard --

9                   JUSTICE KAGAN: That's wrong. This is not  
10    just a procedural guarantee. Yes, the IDEA has lots of  
11    procedures in it, but they're all geared towards a  
12    particular substantive result. And it's that  
13    substantive result that's the focus of the -- both the  
14    administrative process and then judicial review of what  
15    comes out of the administrative process.

16                  MR. KATYAL: But I don't think so, Justice  
17    Kagan. I think all that those standards say is what an  
18    IEP must address, not how an IEP must deal with them.  
19    And so if you look -- and I think the Second Circuit  
20    recently, in a case called LO v. New York City just a  
21    couple of months ago, decided -- basically went through  
22    this and said the 1414 standards like that are  
23    checklist. You've got to consider grade-level progress  
24    and things like that.

25                  JUSTICE KAGAN: But if we --

1 MR. KATYAL: But you wouldn't --

2 JUSTICE KAGAN: -- consider all of them and  
3 we do none of them, that's just fine?

4 MR. KATYAL: That's -- well, the Congress's  
5 judgment was the process -- and this is something that  
6 happens in NEPA --

7 JUSTICE KENNEDY: So your answer to Justice  
8 Kagan is yes. If you consider everything but do  
9 nothing, that's okay.

10 MR. KATYAL: No. Because there's still --  
11 if you do nothing, then you haven't provided any  
12 benefit. And so there is still some substantive bite in  
13 the standard of Rowley itself. What we're saying is, in  
14 the context of Spending Clause legislation, you can't do  
15 more than that and require something significant.

16 And the reason, Justice Kennedy, is once you  
17 start going into significance, as the amici briefs point  
18 out, education is the most -- one of the more contested  
19 areas in our society. Parents have been known to  
20 disagree. There is more acronyms about lawsuits about  
21 this newfangled theory or that newfangled theory or 30  
22 hours versus 35 hours being significant. And you get  
23 into a huge morass.

24 What Rowley said citing San Antonio v.  
25 Rodriguez is that that kind of thing in the educational

1 context is not where Federal generalist courts should  
2 be.

3 Now, I suppose you could say maybe that's  
4 not the right policy. Maybe, you know, this is  
5 something that should happen. Courts should get  
6 involved in this. That's really got to be a judgment  
7 for Congress to make, and it's got to be something they  
8 say clearly in the context of Spending Clause  
9 legislation. Rowley expressly said the Pennhurst  
10 principle applies to this provision of the statute.  
11 This is core legislation, core -- a core requirement of  
12 the statute, and they are imposing any number of  
13 different standards.

14 And so I understand that there is some  
15 policy concerns among -- among the Court, even if  
16 they're not shared by the -- my friends on the other  
17 side, because they disclaim them. But to the extent  
18 there are those policy concerns, that's really got to be  
19 something that Congress deals with.

20 JUSTICE ALITO: And what I'm --

21 JUSTICE GINSBURG: One -- one aspect of --  
22 of your position is you say yes, there is a substantive  
23 standard, some benefit. And then you, in the course of  
24 your argument, said some, as interpreted by most courts,  
25 has bite. But then you say de minimis is enough -- more

1     than de minimis is enough.

2                   MR. KATYAL:   Correct.

3                   JUSTICE GINSBURG:   So some with bite and  
4     more than de minimis don't sound like equivalence to me.

5                   MR. KATYAL:   I think they are, and I think  
6     that's what the -- circuit after circuit has said, which  
7     is that some educational benefit, the language at page  
8     200, means more -- more than de minimis.   And so -- and,  
9     you know, I think there is a whole variety of cases that  
10    have interpreted this.

11                   And, Justice Ginsburg, even this Court has  
12    actually had one of them.   In Florence v. Carter, that  
13    came from a circuit which had a "more than merely de  
14    minimis" standard.   The Court there found that the IEP  
15    substantively didn't meet the protections of the "some  
16    benefit" or "merely more than de minimis" standard.

17                   JUSTICE BREYER:   We get that -- I mean, how  
18    does this actually work?   I thought there is a statute  
19    in 1414 before that, it says you have to, school  
20    district, write an IEP.   Then it says what an IEP is.  
21    And one of the things it says an IEP is, is it is a  
22    statement of the services, et cetera, based on peer  
23    review stuff that will be provided for the child to  
24    advance appropriately and to make progress in the  
25    general education curriculum.

1                   Now, suppose the school district writes a  
2     statement called an IEP, but it does not show that the  
3     child is likely to advance. Can't they go to the  
4     administrative thing and then go to court and say to the  
5     judge, look, they didn't write what they were required  
6     to write?

7                   MR. KATYAL: Absolutely. So --

8                   JUSTICE BREYER: Okay.

9                   MR. KATYAL: -- if there is a statement, the  
10    key word --

11                  JUSTICE BREYER: So they have to write  
12    something that's minimally --

13                  MR. KATYAL: -- is statement.

14                  JUSTICE BREYER: Now, let's suppose they  
15    write it, but they don't do it.

16                  MR. KATYAL: Yes.

17                  JUSTICE BREYER: Now, isn't there something  
18    saying you have to follow the IEP?

19                  MR. KATYAL: Correct.

20                  JUSTICE BREYER: And so, again, they go to  
21    court?

22                  MR. KATYAL: Correct. But what there is  
23    not --

24                  JUSTICE BREYER: And what they -- again they  
25    say they didn't follow the IEP?

1                   MR. KATYAL: Correct, Justice Breyer. But  
2 what there is not is something in 1414 which says that  
3 they've got to provide a significant benefit or an equal  
4 benefit --

5                   JUSTICE BREYER: But they do have to provide  
6 something that makes progress in the general education  
7 curriculum and --

8                   MR. KATYAL: They have to follow the  
9 checklist that is a statement --

10                  JUSTICE BREYER: -- and advance  
11 appropriately --

12                  MR. KATYAL: Yes. There must be a  
13 statement --

14                  JUSTICE BREYER: -- towards a --

15                  MR. KATYAL: -- yes.

16                  I think everyone agrees you don't look at  
17 outcomes or anything like that. So it's -- it's just a  
18 procedural requirement --

19                  JUSTICE BREYER: It's procedurally  
20 calculated.

21                  MR. KATYAL: It's just the same as Rowley.  
22 Rowley -- you know, we're not saying anything different  
23 than what Rowley said.

24                  JUSTICE BREYER: I don't know. I would say  
25 if you take Rowley as meaning -- hmm, or whatever those

1 two words were, what, beneficial? What's the one before  
2 "beneficial"?

3 JUSTICE KENNEDY: Some -- some benefit.

4 MR. KATYAL: Some educational benefit.

5 JUSTICE BREYER: Some educational benefit.

6 If you say "some," this is inconsistent with Rowley.

7 MR. KATYAL: Well, I don't think so. I  
8 think it's got to be some educational benefit designed  
9 to get the general education curriculum or --

10 JUSTICE KAGAN: Mr. Katyal --

11 JUSTICE KENNEDY: Mr. Katyal, are there --  
12 in the wake of the many years this Act has been enforced  
13 and these many individual meetings, have there been  
14 documented areas of consensus as to certain standards,  
15 certain methodologies, certain systems that work and  
16 certain that don't? And do the courts, in reviewing  
17 these proceedings, ever refer to those?

18 MR. KATYAL: So I think that's where the  
19 amici briefs are so important, because they show -- say  
20 that education isn't really one of those areas. I mean,  
21 you know, people disagree about the most simple things  
22 about educational philosophy.

23 JUSTICE KENNEDY: So we've gone -- so we've  
24 gone nowhere.

25 MR. KATYAL: Well, I don't think we've gone

1 nowhere, but I think that worry is to thrust courts into  
2 the business of deciding which philosophy is  
3 appropriate.

4 And take Firefly, for --

5 JUSTICE KENNEDY: So you say that there is  
6 generally no consensus as to appropriate methodologies  
7 for, say, a hearing-impaired student, an autistic  
8 student. No agreement on that?

9 MR. KATYAL: I don't mean to say that  
10 there's no agreement. I am -- I do mean to say that the  
11 amici briefs and the case law recognizes that there is a  
12 lot of disagreement. And Rowley itself says this,  
13 picking up on San Antonio v. Rodriguez, that the  
14 Congress's judgment was not to thrust courts into these  
15 really highly, very difficult considerations.

16 And if I could just give you one example,  
17 talking about Justice Sotomayor, your indication of  
18 Firefly. So eventually right, that, you know, once Drew  
19 went to Firefly, there was progress that was made. But  
20 there was also a lot that was given up.

21 I mean, one of the core purposes of the IDEA  
22 is mainstreaming. And of course, Firefly is not a  
23 mainstream school. So yes, there were some behavioral  
24 problems that were addressed by the private placement --

25 JUSTICE KAGAN: Mr. Katyal, can you go back

1 to Justice Ginsburg's question that I'm a bit confused  
2 of -- about for the same reason.

3 You said something like, well, this -- this  
4 standard is -- is being applied with bite. So I'm just  
5 wondering, do you favor a standard with bite?

6 MR. KATYAL: We favor the standard that  
7 Rowley said, which lower courts have done for 34 years,  
8 which does have --

9 JUSTICE KAGAN: Do you favor a standard with  
10 bite?

11 MR. KATYAL: It does have some bite. It  
12 does. We're not trying to --

13 JUSTICE KAGAN: Would that be "some bite" or  
14 "somebite"?

15 (Laughter.)

16 MR. KATYAL: It is some educational benefit.  
17 That's the language of Rowley. And if you disagree with  
18 it, Congress can change it.

19 JUSTICE KAGAN: Well, again, if somebody  
20 said to you, write a statute with -- write a standard  
21 with bite, I doubt you would come up with the words  
22 "more than merely de minimis."

23 MR. KATYAL: Well, but again, I think,  
24 Justice Kagan, Congress's bite, the substantive bite is  
25 only at the back end. It's a small feature in a much

1 bigger statute.

2 Congress's judgment was --

3 JUSTICE KAGAN: But the back end is what  
4 this case is all about.

5 MR. KATYAL: I understand that.

6 JUSTICE KAGAN: We are at the back end.

7 MR. KATYAL: But -- but, Justice Kagan,  
8 don't take the policy concerns about the hypotheticals  
9 and other things to try and re-jigger the back end.

10 Congress's handiwork was to say it's the  
11 procedural protections shining a light, the IEP process  
12 with highly incentivized teachers and -- teachers and  
13 parents that's generally going to yield the right  
14 result. That's what Rowley itself said at page 206.

15 JUSTICE ALITO: We're going to have to use  
16 musical notation to -- and not just words -- to express  
17 the -- the idea that seems to be emerging. All right.

18 Would you say -- I'll ask the same thing of  
19 Mr. Fisher if he has a chance to address it.

20 If -- if we were to look at what the lower  
21 courts have been doing -- we don't see very many of  
22 these cases, the lower courts see a lot of them. If we  
23 looked at what they have been doing in general, would  
24 you say that they are doing -- that they are applying  
25 the statute appropriately and consistent with correct

1 interpretation?

2 MR. KATYAL: I would. Ten circuits are  
3 applying the more than de minimis standard. It's  
4 working. Sometimes it has some bite. But to change it,  
5 as Justice Breyer was indicating to my friend, is --  
6 with eight million potential IEPs, is to invite massive  
7 amounts of litigation.

8 JUSTICE ALITO: That sounds very harsh.  
9 What's the origin of this phrase, "more than de  
10 minimis"? Who thought this up?

11 MR. KATYAL: Well, it goes back to Latin.  
12 And so again, we, you know --

13 JUSTICE ALITO: I know where "de minimis"  
14 comes from.

15 (Laughter.)

16 MR. KATYAL: No, no, no. No. The -- the --  
17 no. The -- the presumption against trifles, you know.  
18 It's -- Justice Scalia invokes it why and folks in the  
19 Wrigley case. It's an old formulation.

20 JUSTICE ALITO: But who -- who decided to  
21 apply it here in this context?

22 MR. KATYAL: Well, I think the Court in --  
23 in Rowley, then Justice Rehnquist's opinion, invoked  
24 that by talking about some benefit. And Wrigley says  
25 that is a presumption that applies to all statutes.

1 And look --

2 JUSTICE GINSBURG: Who -- who put the term,  
3 "more than merely de minimis"? That's the formula that  
4 we're -- that you are espousing.

5 MR. KATYAL: Yes. We --

6 JUSTICE KAGAN: And de minimis is not  
7 enough, you know. It's "merely de minimis."

8 (Laughter.)

9 JUSTICE GINSBURG: And it's not in Rowley.  
10 So where does it -- who invented it?

11 MR. KATYAL: Well, I think that it came  
12 directly from the circuits right after Rowley. But all  
13 we are saying is "some benefit" means the more than de  
14 minimis test. That's the way court after court has  
15 interpreted it. It's worked well. This Court shouldn't  
16 renege on that.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Two minutes, Mr. Fisher.

19 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

20 ON BEHALF OF THE PETITIONER

21 MR. FISHER: Three points, Your Honors. Two  
22 about the statute, and one about the practicalities.

23 First, as to the statute, the word  
24 "procedural" has been used by my friend to describe the  
25 IEP provisions. But whenever pressed, even he admits

1 that the IEP provisions are enforceable in the way  
 2 Justice Breyer described, which is the plan has to meet  
 3 the requirements of 1414(d). And if the services on the  
 4 ground don't meet the requirements in the plan, they're  
 5 enforceable. That's at page 47A of his brief and  
 6 throughout the others --

7 JUSTICE SOTOMAYOR: Answer Justice Alito's  
 8 question. What's the practice today?

9 MR. FISHER: Pardon me?

10 JUSTICE SOTOMAYOR: What's the practice  
 11 today? Do most courts use the "more than de minimis"  
 12 standard?

13 MR. FISHER: Yes. That is the formula in  
 14 most of the circuits. That brings me to an important  
 15 question on the ground, and if I'll circle back to my  
 16 other statutory point.

17 JUSTICE ALITO: Before -- putting aside -- I  
 18 don't want -- I'll take 10 seconds. Putting aside the  
 19 words, are the outcomes appropriate, or do you think the  
 20 lower courts need a kick?

21 MR. FISHER: I think they need a kick. I  
 22 think the outcomes are quite scattered. I think the  
 23 only reason why you get some favorable outcomes is  
 24 because even the courts themselves don't believe barely  
 25 more than de minimis.

1                   But I think you have a disjoint. And my  
2 friend keeps pointing to the amicus briefs. I think  
3 educators are, by and large, following the plan -- I'm  
4 sorry -- the -- the standard we propose and the  
5 solicitor general imposes.

6                   The No Child Left Behind Act in 2004 was a  
7 very important, revolutionary, bipartisan policy change.  
8 And so educators on the ground are aiming high, as they  
9 put it. The city's brief says we are aiming to maximize  
10 the benefit for our students. And so you have a  
11 disjoint between what educators are doing and the  
12 courts. And the reason they need a kick is because the  
13 very, very, very, very, very rare case that makes it  
14 into the court system is not being properly reviewed.

15                  And that leaves the last point I want to  
16 respond to, which is the fact that Congress left us  
17 alone after Rowley. What the Court has said in Rowley  
18 and in Honig and in other cases is the IEP rules are,  
19 quote, "the centerpiece of the Act." They're the  
20 centerpiece for how the education delivery services are  
21 put forward.

22                  If you look at page 182 of Rowley, the IEP  
23 provisions were quite hollow. They didn't have any  
24 benchmarks at all. That has dramatically changed. They  
25 now have the general educational curriculum benchmarks

1 Justice Breyer has been referring to, and we repeatedly  
2 refer to in our brief, and I think, Mr. Chief Justice,  
3 you agree cannot be met under their standard.

4 And then that leaves the last little piece  
5 of the puzzle here, which is this child who cannot get  
6 up to grade level standards. We give you an  
7 answer-direct question that is directly in the text of  
8 the Act, just as my friend demands. Alternative  
9 achievement benchmarks at the bottom of 52A is what is  
10 required. And that takes you to 79A, which gives you  
11 the exact statutory formula.

12 So if you want to use that formula, combined  
13 with general educational curriculum at grade level, we  
14 think that would be a proper answer to the question  
15 presented in this case.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 The case is submitted.

18 (Whereupon, at 11:05 a.m., the case in the  
19 above-entitled matter was submitted.)

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