No. 15-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Endrew F. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

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 App. 27a) is unpublished but is available at 2014 WL 4548439.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 App. 59a) is also unpublished.

JURISDICTION

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

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, public schools must provide children with disabilities a "free appropriate public education." The key mechanism by which schools meet this requirement is the individualized education program, or IEP. Each IEP must be reasonably calculated to confer an educational benefit on the child. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

Since the Court first described this requirement over thirty years ago, federal courts of appeals have become intractably divided over the level of educational benefit the Act demands. Some courts, including the Tenth Circuit below, hold that an IEP satisfies the Act if it provides a child with a just-above-trivial educational benefit, while others hold that the Act requires a heightened educational benefit. Resolving the conflict among the circuits will ensure that millions of children with disabilities receive a consistent level of education, while providing parents and educators much-needed guidance regarding their rights and obligations.

A. Legal Background

1. In 1972, aware that children with disabilities often were not afforded access to public schools, Congress conducted an investigation. It found that most children with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (alteration in original) (quoting H.R. Rep. No. 94-332, at 2 (1975)); *see also* Edwin W. Martin et al., *The*

Legislative and Litigation History of Special Education, The Future of Children (Spring 1996), at 25, 26-28.

As a result, in 1975, Congress passed the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). It later amended and renamed the law the Individuals with Disabilities Education Act (IDEA or "the Act"). Pub. L. No. 101-476, 104 Stat. 1103 (1990). Since then, Congress has amended and reauthorized the IDEA twice – in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

Under the Act, states provide children with disabilities a free appropriate public education (FAPE) in exchange for federal funds for special education programs. *Rowley*, 458 U.S. at 775.[1] To provide a FAPE, parents and public school educators collaborate to create annual IEPs "tailored to the unique needs" of each child with a disability. *Id.* at 181; *see also* 20 U.S.C. § 1414(b)(4), (d)(1)(B); 34 C.F.R. § 300.327.

Congress recognized, however, that "this cooperative approach would not always produce a

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[1] The Act defines a "free appropriate public education" as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(9).

consensus." *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). To resolve disputes, the IDEA authorizes administrative and judicial review. 20 U.S.C. § 1415(f), (i)(2)(A). Either the school district or the child's parents may request a "due process hearing" and present the dispute to a hearing officer at a local or state education agency. 20 U.S.C. § 1415(f)(1)(A); *see Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005). The hearing officer then decides whether the school district has met the Act's requirements, including whether it has provided the student with a FAPE. 20 U.S.C. § 1415(b)(6), (f)(1)(A).

An aggrieved party may seek review of the agency decision in state or federal court, which "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). When parents place their child in a private school at their expense, the IDEA entitles the parents to tuition reimbursement if the school district has failed to provide a FAPE and the private school provides the child with an education that is proper under the Act. *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *see* 20 U.S.C. § 1412(a)(10)(C)(ii).

2. a. This Court first examined the Act in 1982 in *Rowley*, 458 U.S. 176. There, the Court held that, to provide a FAPE, the Act does not require schools to maximize the potential of children with disabilities, *id.* at 189-90, because Congress had not intended to achieve "strict equality of opportunity or services" between children with and without disabilities, *id.* at 198. At the same time, the Court recognized that a child's IEP must be reasonably calculated to enable the child to receive educational benefit, *id.*

at 206-07, and thus acknowledged that an education that confers no educational benefit on children with disabilities could not fulfill the Act's goal of affording them access to public schools. But the Court expressly declined to specify what the level of benefit should be. *Id.* at 202.

b. Since *Rowley*, Congress has amended and reauthorized the IDEA twice – in 1997 and in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The 1997 amendments elevated the IDEA's goals from guaranteeing access to public education to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In service of these goals, the amendments added specific requirements for schools, such as the inclusion of students with disabilities in statewide educational assessments. *Id.* § 1412(a)(16). The previous version of the Act, Congress explained, had been "successful in ensuring children with disabilities . . . access to a free appropriate public education." *Id.* § 1400(c)(3). Yet implementation had been "impeded by low expectations and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." *Id.* § 1400(c)(4). Thus, the 1997 amendments sought "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)).

The 2004 amendments further increased goals for educating children with disabilities by requiring,

for example, that IEPs describe services for children over age fifteen that assist them in transitioning to post-secondary education, employment, and – as appropriate – independent living. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII).

B. Factual Background

Petitioner Endrew F. (Drew) was diagnosed at age two with autism, Pet. App. 3a, which affects eight percent of all children served by the IDEA.[2] Autism impairs Drew's "cognitive functioning, language and reading skills, and his social and adaptive abilities." *Id.* Because autism is one of the disabilities categorically covered by the IDEA, Drew is entitled to the Act's protections. 20 U.S.C. § 1401(3)(A).

Drew attended public school in respondent Douglas County (Colorado) School District from preschool through fourth grade and received an IEP from the school district each year. Pet. App. 3a-4a. In second and third grade, Drew began experiencing behavioral problems in school, such as yelling, crying, and dropping to the floor. *Id.* 63a-64a. These problems became more frequent and severe in fourth grade. *Id.* 66a-67a. Drew engaged in self-harming behaviors, such as head banging, and he regularly had to be removed from the classroom. *Id.* 61a, 66a. On at least two occasions, he ran away from school, and when he returned, he grew so agitated that he took off his clothing. *Id.* 66a-67a.

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[2] Nat'l Ctr. for Educ. Statistics, Digest of Educ. Statistics, *Table 204.30: Children 3 to 21 Years Old Served Under IDEA* (2013), http://1.usa.gov/14ddX3M.

The parties agree that Drew's "behavioral issues interfered with his ability to learn." Pet. App. 56a, 73a. And the district court recognized the school district's "inability to manage [his] escalating behavioral issues." *Id.* 58a. Moreover, Drew made "minimal progress" towards the goals listed on his fourth-grade IEP. *Id.* 49a. For example, that IEP stated that Drew "will learn his multiplication facts 6-10," which was updated in his proposed fifth-grade IEP to "he will learn his multiplication facts 6-12." *Id.* 50a.

Following Drew's behavioral deterioration and lack of academic progress, his parents rejected the IEP proposed for his fifth-grade year because it was mostly unchanged from the ineffective fourth-grade IEP. Pet. App. 4a, 15a. Given the school's failure to address Drew's needs, his parents notified the school district that they were withdrawing him from the public school and would be seeking tuition reimbursement. *Id.* 68a-69a. They then placed Drew in a private school that specializes in educating children with autism. *Id.* 4a. The parties agree that Drew's placement at his new school was appropriate under the Act, *id.* 5a, and that he has made "academic, social and behavioral progress" there, *id.* 29a.

C. Proceedings Below

1. Drew's parents filed a due process complaint in 2012 seeking reimbursement for the tuition at his new school. Pet. App. 59a-60a. They maintained that the IEP for Drew's fifth-grade year denied him a FAPE because it was not reasonably calculated to provide him with an educational benefit. *Id.* 15a, 76a. They pointed to his behavioral decline and to

the IEP itself, which included objectives very similar to those in past IEPs, on which he had made "little to no progress." *Id.* Reasoning that the IDEA is only "designed to provide a floor" of educational quality, *id.* 77a, the hearing officer determined that the school district had provided Drew with a FAPE because he had received "some" educational benefit while enrolled in the public school, *id.* 72a.

2. Drew's parents filed suit under the IDEA in the U.S. District Court for the District of Colorado, basing jurisdiction on 20 U.S.C. § 1415(i)(2)(A) and 28 U.S.C. § 1331. The district court agreed with the hearing officer. Pet. App. 27a-28a. The court reasoned that the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* 36a. The court thus found that because the administrative record showed some evidence of "minimal progress" on some of Drew's IEP goals, the school district had provided Drew a FAPE. *Id.* 49a.

The Tenth Circuit affirmed. In addressing the level of educational benefit required for a FAPE, Pet. App. 15a, the court held that an IEP must be reasonably calculated to guarantee "some" educational benefit, which it interpreted to be any educational benefit that is "more than *de minimis*," *id.* 16a (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009)). The Tenth Circuit acknowledged that "[s]everal circuits have adopted a higher standard." Pet. App. 17a. But it expressly rejected those holdings, reasoning that this Court's decision in *Rowley* required a lower standard.

Id. 16a-17a. In the Tenth Circuit's view, *Rowley*'s use of the phrase "some educational benefit" to describe what the IDEA requires pinpointed the precise level of benefit required, rather than simply serving as a placeholder for the issue the Court expressly declined to reach: "establish[ing] any one test for determining the adequacy of educational benefits." 458 U.S. at 202.

Applying its "more than *de minimis*" test to the facts here, the Tenth Circuit observed that this was "without question a close case." Pet. App. 23a. But the Tenth Circuit held that Drew's IEP was "substantively adequate" because he had made just-above-trivial academic progress. *Id.*

3. Petitioner sought rehearing and rehearing en banc. The Tenth Circuit denied these requests. Pet. App. 86a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are in disarray over the level of educational benefit that school districts must confer on children with disabilities to provide them with a free appropriate public education under the IDEA. This Court should use this case – which cleanly presents the legal issue on a well-developed set of facts – to resolve the conflict over this important question.

I. The Courts Of Appeals Are In Disarray Over The Level Of Educational Benefit That School Districts Must Provide Under The IDEA.

In *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982), this Court expressly declined "to establish any one test for determining the adequacy of

educational benefits conferred." And while *Rowley* explained that Congress intended to confer "some educational benefit" on children with disabilities, *id.* at 200, it also explained that Congress intended to make "access meaningful," *id.* at 192. Lower courts have since latched on to the terms "some" and "meaningful" from *Rowley* to establish standards of educational benefit that conflict with one another.

Two circuits hold that IEPs must be calculated to confer on students with disabilities a substantial educational benefit, which they refer to as a "meaningful educational benefit." Five other circuits expressly acknowledge their disagreement with this higher standard and hold that *Rowley* requires only a just-above-trivial educational benefit. Three circuits appear to apply the just-above-trivial standard but have not expressly rejected the higher standard. The Ninth Circuit is internally conflicted, with different panels aligning themselves with opposite sides of the circuit split. The D.C. Circuit has not described the required level of benefit.

A. The Conflict

1. *Substantial Benefit.* For over twenty-five years, the Third Circuit consistently has held that IEPs must be calculated to provide a meaningful educational benefit to children with disabilities, explaining that to provide "merely more than a trivial educational benefit does not meet the meaningful benefit requirement." *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006) (internal quotation marks omitted); *accord T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 & n.2 (3d Cir. 2000) (Alito, J.) (expressly rejecting the "more than trivial benefit" standard); *Polk v. Cent. Susquehanna Intermediate*

Unit 16, 853 F.2d 171, 178-85 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

The Sixth Circuit expressly agrees with the Third Circuit that the IDEA requires a heightened educational benefit. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 862-63 (6th Cir. 2004) (citing several Third Circuit cases), *cert. denied*, 546 U.S. 936 (2005). In *Deal*, the Sixth Circuit observed that "[n]othing in *Rowley* precludes the setting of a higher standard than the provision of 'some' or 'any' educational benefit," *id.* at 863, as long as that standard does not require schools to maximize each child's potential, *id.* at 862. It then went on to explain that, particularly in light of the 1997 amendments, the IDEA aims to enable children with disabilities "to lead productive, independent, adult lives, to the maximum extent possible." *Id.* at 864 (quoting 1997 version of the IDEA).[3] The Sixth Circuit thus adopted a standard demanding substantial educational progress because schools "providing no more than *some* educational benefit could not possibly hope to attain" Congress's goals. *Id.*

2. *Just-Above-Trivial Benefit.*

a. Five courts of appeals have expressly rejected a higher standard, as adopted by the Third and Sixth Circuits, and hold that, under the IDEA, school districts need only provide "some" educational benefit

[3] This portion of the IDEA quoted in *Deal* now appears in substantially identical form in 20 U.S.C. § 1400(c)(5)(A)(ii).

– a standard met when an IEP is calculated to confer a just-above-trivial benefit.

The Tenth Circuit's decision below is illustrative. It held that "the educational benefit mandated by IDEA must merely be 'more than de minimis.'" Pet. App. 16a-17a (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009)); *see also Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008). In so holding, it "explicitly rejected" the "Third Circuit's heightened 'meaningful benefit' standard." Pet. App. 19a.

The Fourth Circuit agrees. It recognizes that "[s]ome courts do explicitly hold that the IDEA as amended requires school districts to meet a heightened standard." *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) (citing *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008)). But the Fourth Circuit's own "standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial." *Id.* at 360.

The First Circuit likewise requires only that educational benefits be just above trivial. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012); *see also Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 23-24 (1st Cir. 2008). It has rejected the argument that the 1997 IDEA amendments raised the standard. *Lessard*, 518 F.3d at 27-28; *see also* Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After* Rowley*?*,

39 Suffolk U.L. Rev. 1, 14-15 (2005) (describing the First Circuit as "steadfastly refus[ing] to apply" the higher standard).

The Seventh and Eleventh Circuits have also expressly rejected the "more stringent test" that prevails in the Third and Sixth Circuits, *Todd v. Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002), and have held that a student who makes just more than trivial progress has received a FAPE. *M.B. ex rel. Berns v. Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011); *see also JSK by and through JK v. Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991) (rejecting a heightened benefit standard and noting that "[w]hile a trifle might not represent adequate benefits," "some benefit" is all that is required) (internal quotation marks omitted)).

b. Three other courts of appeals appear to apply the just-above-trivial standard but without expressly rejecting a higher standard.

The Second Circuit holds that the IDEA is satisfied when an IEP is reasonably calculated to produce "more than only trivial advancement." *P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008) (internal quotation marks omitted).

Although the Fifth Circuit has stated that "the educational benefit that an IEP is designed to achieve must be 'meaningful,'" *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997) (citing *Polk*, 853 F.2d at 182), *cert. denied*, 522 U.S. 1047 (1998), it has clarified that this simply precludes an IEP that would produce a "mere

modicum or *de minimis*" educational benefit. *Id.* (internal quotation marks omitted).

The Eighth Circuit likewise has held that a student who "enjoyed more than what [the court] would consider 'slight' or 'de minimis' academic progress" was not denied an educational benefit. *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011).

3. *Other Circuits.* The Ninth Circuit is internally conflicted, embracing different ends of the circuit split on different occasions. It has twice applied a heightened benefit standard. *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 852 (9th Cir. 2014); *N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1212-13 (9th Cir. 2008). The Ninth Circuit in *Hellgate* expressly aligned itself with the Sixth Circuit, holding that the 1997 amendments enhanced schools' obligations under the Act by requiring them to do more than simply "open the door" to children with disabilities. 541 F.3d at 1212-13 & n.3 (quoting *Rowley*, 458 U.S. at 192). But in *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2009), the Ninth Circuit disagreed with *Hellgate* and adopted the lower standard, holding that Congress did not "abrogate[]" *Rowley* in 1997. *Id.* at 951 & nn.9-10; *accord Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1057 & n.2 (9th Cir. 2012).

The D.C. Circuit has not endorsed a specific level of benefit. Instead, it only echoes *Rowley*, holding that an IEP must be reasonably calculated to ensure "educational benefits." *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015); *see also Boose v. Dist. of Columbia*, 786 F.3d 1054, 1056 (D.C. Cir. 2015).

B. The Circuit Split Is Ripe For Resolution.

The question presented has had sufficient time to percolate in the forty years since the passage of the original Act and in the decades since the enactment of key amendments in 1997 and 2004. Nearly every court of appeals has weighed in on the issue.

The answer to the question presented depends in part on an interpretation of this Court's decision in *Rowley*, making it unlikely that lower courts will resolve their disagreement without guidance from this Court. Several courts have interpreted *Rowley* to prescribe a lower standard and have refused to hold – absent direction from this Court – that the IDEA requires more. *See, e.g.*, *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 358-60 (4th Cir. 2015); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 27-28 (1st Cir. 2008).

Moreover, without this Court's intervention, the educational benefit to which a child with a disability is entitled will continue to depend on the state in which he or she lives. Now, for instance, a child with autism is entitled to only a just-above-trivial educational benefit in New York, which would be insufficient to satisfy the IDEA just across the border in the New Jersey suburbs of New York City.

II. The Question Presented Is Important To Students With Disabilities, Their Families, And Schools.

Parents and educators together create 6.5 million IEPs annually, and each of these IEPs must comport with the FAPE standard. Nat'l Ctr. for Educ. Statistics, Digest of Educ. Statistics, *Table 204.30: Children 3 to 21 Years Old Served Under IDEA*

(2013), http://1.usa.gov/14ddX3M. To develop and administer these IEPs, all parties need certainty about their rights and obligations under the IDEA.

A. An Inconsistent Standard Is Untenable For All Parties.

Being the parent of a child with a disability involves serious emotional and practical challenges, and the process of developing an IEP is demanding. It involves collaboration to determine appropriate educational services, periodic student assessments, IEP team meetings, and, on occasion, dispute resolution. But every stage of the process is improved when parents have clarity about the educational benefit to which their child is entitled. With greater certainty, parents can better collaborate with the school and better advocate for their children. Moreover, in the rare circumstance where parents must consider placing their child in a different school – a decision with grave emotional and financial consequences – certainty is essential. Parents should be able to calculate the risk of unilateral action if they believe their child is not benefitting from his or her education. This Court can reduce the difficulty of the calculation by answering the question presented.

Similarly, school administrators "require a consistent objective standard" to efficiently provide education to children with disabilities. Amicus Brief for Nat'l Sch. Bds. Ass'n et al., *Deal v. Hamilton Cty. Dep't. of Educ.* (No. 05-55), 2005 WL 2176860, at *4 (2005). For this reason, the National School Boards Association and the American Association of School Administrators, representing "nearly 15,000 local school districts" and "over 14,000 local school system leaders," urged this Court to resolve the question

presented a decade ago. *Id.* at *1, *4. These amici recognized that a consistent standard would aid officials "on the front lines" in "provid[ing] the best education possible to all children in their care." *Id.* at *1, *3; *see also* Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE Under IDEA?*, 79 Exceptional Children 497, 497 (2013).

B. Deciding The FAPE Standard Will Make An Important Difference In Educating Children With Disabilities.

The substantial educational benefit standard, as adopted by the Third and Sixth Circuits, differs significantly in effect from the just-above-trivial standard followed by the Tenth Circuit below and other courts of appeals. The Tenth Circuit suggested that the difference between the standards may be largely semantic. Pet. App. 17a n.8. To be sure, some courts occasionally have used the terms "meaningful benefit" and "some benefit" to describe the same standard. *See D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012); *Hjortness ex rel. Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065 (7th Cir. 2007); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 814 (8th Cir. 2011) (Bye, J., dissenting). But lower-court rulings demonstrate that the substantial benefit standard and the just-above-trivial standard have "produced vastly different results for students with disabilities." Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & Educ. 25, 25 (2012).

For example, in *J.L. v. Mercer Island School District*, 592 F.3d 938 (9th Cir. 2009), the district court had initially applied a heightened standard and held that the school district had denied a FAPE to the child in question. *Id.* at 946. The Ninth Circuit disagreed, holding that the district court was wrong to apply a heightened standard. *Id.* at 950-51. On remand, the district court reversed its previous decision and held that, under the lower standard, the school district had provided the child a FAPE. *J.L. v. Mercer Island Sch. Dist.*, No. C06-494MJP, 2010 WL 3947373, at *8 (W.D. Wash. Oct. 6, 2010).

Similarly, in *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238 (3d Cir. 1999), the Third Circuit ruled that the district court was wrong to apply the lower standard and remanded the case for further proceedings, indicating that it believed the outcome could change under the higher standard. *Id.* at 247-48; *accord Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184-86 (3d Cir. 1988) (holding that under the correct, higher standard summary judgment for school district could not be affirmed), *cert. denied*, 488 U.S. 1030 (1989).

Drew's case also illustrates that the difference between the standards will affect case outcomes. Directly after recounting the evidence and ruling for the school district under the lower standard, the court of appeals remarked that Drew's was "without question a close case." Pet. App. 23a. The Tenth Circuit thus likely would have reached a different result had anything more than a just-above-trivial benefit been required.

C. This Court Regularly Grants Review To Clarify The IDEA.

Since *Rowley*, this Court has recognized the IDEA's importance by repeatedly providing guidance on its proper operation. *See, e.g.*, *Winkelman ex rel. Winkelman v. Parma Cty. Sch. Dist.*, 550 U.S. 516 (2007) (parents' right to prosecute IDEA claims on their own behalf); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (entitlement to expert fees); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (burden of proof in administrative hearings); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (entitlement to certain services for children with disabilities); *Honig v. Doe*, 484 U.S. 305 (1988) (breadth of provision authorizing child to "stay put" pending resolution of placement dispute).

On several occasions, this Court has also addressed issues related to tuition reimbursement under the IDEA. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). Because whether the school district has provided a FAPE determines a parent's entitlement to tuition reimbursement, *see Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985), these decisions will be more accurately and uniformly applied if the Court resolves the question presented.

III. This Case Is An Excellent Vehicle For Resolving The Question Presented.

This case presents an ideal vehicle for this Court to resolve the circuit split and provide lower courts with guidance in applying the IDEA.

1. The Tenth Circuit's decision is final, and resolution of the question presented will likely be outcome determinative. If the Court holds that the Tenth Circuit applied the proper standard, Drew's case is over. On the other hand, it is unlikely that Drew's IEP would have satisfied the higher, substantial educational benefit standard. As noted earlier, the Tenth Circuit stated that whether Drew received even a nontrivial benefit was a "close case," Pet. App. 23a, presumably because his fifth-grade IEP was nearly identical in substance to his fourth-grade IEP, *id.* 50a, and his fourth grade IEP had abandoned many of Drew's prior educational objectives due to his lack of progress, *id.* 44a.

If this Court determines a higher standard applies, it could decide whether Drew's fifth-grade IEP met that standard on facts already fully developed below – as it did in *Rowley* – or it could remand to allow the lower courts to apply the new standard.

2. By contrast, the two petitions for certiorari raising the proper standard for FAPE that the Court has received in the past decade were poor vehicles for review. *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005), involved a non-final decision, *id.* at 865, and respondent had won below on other grounds that could have provided all the relief to which he was entitled, *id.* at 859-61. *See* Brief in Opposition, *Hamilton Cty. Dep't. of Educ. v. Deal* (No. 05-55), 2005 WL 2204186, at *29-30 & n.13 (2005). And in *Thompson R2-J Sch. District v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009), the Tenth Circuit did not even

contemplate choosing between different standards of educational benefit. *Id.* at 1150-52.

IV. The Tenth Circuit Erred In Adopting A Just-Above-Trivial Standard.

The IDEA seeks to provide children with genuine access to public education. To meet this goal, school districts must provide a substantial educational benefit to children with disabilities, as the Third and Sixth Circuits have held. School districts that provide only a just-above-trivial benefit cannot achieve this objective.

1. The IDEA requires that children with disabilities be provided a "free appropriate public education." 20 U.S.C. § 1401(9). The meaning of the word "appropriate" is naturally informed by the Act's more particular requirements and purposes. In 1982, as noted, this Court expressly declined to decide what level of educational benefit the Act requires. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982). At the same time, the Court recognized that the Act demands not only creation of IEPs and simple access to public schools for children with disabilities, but also that IEPs provide enough substantive educational benefit "to make such access meaningful." *Id.* at 192.

What is more, the Act has evolved significantly since its enactment. With the 1997 amendments, Congress acknowledged that prior versions of the Act had succeeded in "ensuring children with disabilities and the families of such children access to a free appropriate public education." 20 U.S.C. § 1400(c)(3). But Congress recognized that education of children with disabilities continued to be "impeded by low

expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning." *Id.* § 1400(c)(4).

As a result, the 1997 amendments shifted the Act's focus from simply guaranteeing access to education to "ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). This Court has expressly recognized this "greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, p. 5 (1997)).

Consistent with this shift, the 1997 and 2004 amendments added several requirements to help children with disabilities succeed in school and beyond. For example, schools must produce progress reports for children with disabilities with the same frequency as they issue report cards for students without disabilities and must document both "academic achievement and functional performance." 20 U.S.C. § 1414(d)(1)(A)(i)(III), (VI)(aa) (added in 2004). Schools must include students with disabilities in statewide assessments that apply to students without disabilities unless they can justify the decision to give students with disabilities alternative assessments. *Id.* §§ 1412(a)(16) (added in 1997), 1414(d)(1)(A)(i)(VI)(bb) (added in 2004). Services also must be based on peer-reviewed research whenever practicable. *Id.* § 1414(d)(1)(A)(i)(IV) (added in 2004). And, for children over age fifteen, IEPs must describe the transition services necessary to prepare them for

post-secondary education, employment, and – as appropriate – independent living. *Id.* § 1414(d)(1)(A)(i)(VIII) (added in 2004).

Since 1997, the Department of Education has issued regulations interpreting these requirements. For instance, the Department requires schools to adapt instruction to ensure "that the child can meet the educational standards" that "apply to *all* children" – both those with disabilities and those without. 34 C.F.R. § 300.39(b)(3) (emphasis added). In addition, schools must provide students "an equal opportunity for participation" in extracurricular services and activities, which include athletics, clubs, and student employment. *Id.* § 300.107 (2015).

Moreover, in a recent "Dear Colleague" letter, the Department of Education urged state and local education agencies to ensure "that all children, including children with disabilities, are held to rigorous academic standards and high expectations." U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015), http://1.usa.gov/1MkxyAE. Specifically, the letter expressed concern that low expectations – especially in the form of below grade-level content standards – are impeding the success of children with disabilities. *Id.* Applying equal standards to all children, the Department said, will promote "high-quality instruction" for children with disabilities and "prepare them for college, careers and independence." *Id.* at 3-4.

The Tenth Circuit's just-above-trivial standard is inconsistent with these goals and perpetuates the "low expectations" for children with disabilities that

Congress has found impedes their progress. 20 U.S.C. § 1400(c)(4). The IDEA requires that IEPs be calculated to provide a substantial educational benefit to children with disabilities – not just a non-trivial benefit – to achieve the IDEA's goals of equality of opportunity, full participation, and improved student performance. *See Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005); *see also N.B. v. Hellgate Elementary Sch. Dist. ex rel. Bd. of Dirs.*, 541 F.3d 1202, 1213 nn.2-3 (9th Cir. 2008).

2. *Rowley* is consistent with a substantial educational benefit standard.

In *Rowley*, this Court held that the Education for All Handicapped Children Act did not require the school district to provide a deaf student with sign language interpreter services, given that she was "perform[ing] better than the average child in her class," was "advancing easily from grade to grade," was "remarkably well-adjusted," 458 U.S. at 185 (quoting district court findings), and interacted and communicated well with her classmates, *id.* at 185, 210.

Understood in this context, the Court held that a standard requiring school districts to maximize a child's potential – which had been applied by the courts below – was not supported by the Act. *Rowley*, 458 U.S. at 189-90. But it also recognized that an education that confers no benefit at all cannot be sufficient. *Id.* at 200-01. Thus, the Court's statement that the Act demands "some educational benefit," *id.* at 200 – pointed to by some courts of appeals as support for a lower standard – did not prescribe a required amount of benefit. It only restated the

Court's determination that a child must actually receive a "*benefit* from special education," rather than none at all. *Id.* at 201. Thus, the situation here, post-*Rowley*, is similar to a situation in which the Court has held simply that a person is entitled to substantive legal protection and left open the question of what level of protection is appropriate.[4]

Indeed, as noted above, *Rowley* itself was not attempting "to establish any one test for determining the adequacy of educational benefits." 458 U.S. at 202. It "confine[d its] analysis" to the situation before it, in which a child was already "performing above average in the regular classrooms." *Id.* For these reasons, courts of appeals that maintain a just-above-trivial standard because they interpret *Rowley* as specifying this standard are incorrect.

Finally, although *Rowley* declined to interpret the Act as requiring equality of educational opportunity for children with disabilities, 458 U.S. at 198-99, lower courts' attempts to read this view as supporting the lower standard have since been foreclosed by Congress. The IDEA now seeks to ensure "equality of opportunity" for children with disabilities. 20 U.S.C. § 1400(c)(1). That express

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[4] *See, e.g., United States v. Jones*, 132 S. Ct. 945, 954 (2015) (holding that the Government's placement on a vehicle of a GPS device is a Fourth Amendment "search," but leaving open the question whether probable cause and a warrant are required); *cf. Heller v. Doe*, 509 U.S. 312, 319 (1993) (deciding equal protection challenge to a statutory classification under rational-basis review, but leaving open the question whether the classification is subject to heightened scrutiny because the issue was not properly presented).

statutory goal underscores the conclusion that a school district cannot provide children with disabilities a free appropriate public education unless it seeks to provide them with a substantial educational benefit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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