No. 15-827

IN THE
Supreme Court of the United States

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

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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INTRODUCTION

The United States has filed a brief recommending that this Court grant the petition and reverse the Tenth Circuit for repeating what this Court and at least eight other circuit courts have said for decades: The IDEA sets forth extensive *procedural* requirements designed to provide disabled children with access to a free appropriate public education (FAPE). To the extent the Act subjects the States to any *substantive* standard, it calls for no more than a rational-basis-type review to ensure that the education to which access is provided is reasonably calculated to confer more than a *de minimis* educational benefit.

The Government argues (at 8) that this case implicates an "entrenched and acknowledged" circuit split. But the split is shallow; only the Third Circuit has consistently applied a purportedly more demanding "meaningful benefit" standard. And it is undeveloped; the Government can only speculate whether the choice of standard would be outcome-determinative in this (or any other) case because the Third Circuit has never clearly explained what distinguishes "more than *de minimis*" from "meaningful" benefits. That makes this case an exceptionally poor vehicle to decide the question if the Court were inclined to address it.

In any event, the Government's argument conflicts with this Court's precedent and the statutory text. The IDEA contains *no* "substantive standard prescribing the level of education to be accorded handicapped children." *Bd. of Educ. of Hendrick Hudson Cen. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 189 (1982). It was not intended to "displace the primacy of States in the field of education." *Id.* at 208. Rather, "Congress sought primarily to make public education *available* to handicapped children." *Id.* at 192 (emphasis added). Thus, for over thirty years, this Court has held that if a State provides a program "reasonably calculated to enable the child to receive educational benefits," then it "has complied with the obligations imposed by Congress and the courts can require no more." *Id.* at 206-207. That is why the vast majority of circuits have upheld individualized education plans (IEPs) reasonably calculated "to confer *some* educational benefit." *Id.* at 200 (emphasis added).

The Government contends (at 19) that the IDEA demands something "more robust." It argues (at 13-

14) that access to a public education is not meaningful unless the benefit provided by that education is "meaningful," as well. But that is not what Congress said in the IDEA. *See Rowley*, 458 U.S. at 189 (finding *any* substantive standard "[n]oticeably absent" from the Act). And that makes it hard to reconcile the Government's approach with Congress's reliance on the Spending Clause to pass the Act. This Court has held that States cannot be bound by conditions they have not accepted "'voluntarily and knowingly.'" *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 295-296 (2006) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). And "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" *Id.* It is hard to imagine how the States can be expected to divine a standard that not even the Federal Government can spell out.

Nor is the Government's "meaningful benefit" standard necessary. The IDEA achieves its aims through "elaborate and highly specific procedural safeguards," *Rowley*, 458 U.S. at 205, which mandate individualized consideration of each child's unique needs. There is no evidence to support the Government's insinuation (at 13 and 20-21) that children with disabilities in the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, or Eleventh Circuits suffer from inferior opportunities. Educators in those forty-two States are no less dedicated to ensuring that their schools offer supportive and nurturing learning environments for children with disabilities than their counterparts in the Third Circuit.

ARGUMENT

I. THE ASSERTED SPLIT IS SHALLOW AND UNDEVELOPED

1. In the three decades since *Rowley*, nine different federal courts of appeals have read that case the same way. Those courts have held that a State provides a FAPE when it allows a child with a disability to receive a non-trivial benefit from her public education.[*]

A few decisions have used the phrase "meaningful benefit" to describe the *Rowley* standard. But most appear to agree with the Fourth Circuit that "[u]sing 'meaningful,' as the Court also did in *Rowley*, [i]s simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress." *O.S.* v. *Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *see also Rockwall Indep. Sch. Dist.* v. *M.C.*, 816 F.3d 329, 338 (5th Cir. 2016) ("[T]he educational benefit cannot be a mere modicum or *de minim*[*i*]*s* * * * . In short, the educational benefit * * * must be 'meaningful.' ")

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[*] *See, e.g.*, *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34 (1st Cir. 2012); *P. ex rel. Mr. & Mrs. P.* v. *Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008); *O.S.* v. *Fairfax Cty., Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015); *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997), *cert. denied,* 522 U.S. 1047 (1998); *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 n.3 (7th Cir. 2002); *K.E. ex rel. K.E.* v. *Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011); *J.L.* v. *Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (9th Cir. 2009); *cf. Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied,* 555 U.S. 1173 (2009); *JSK ex rel. JK* v. *Hendry Cty. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir. 1991).

(internal quotation marks omitted); *D.B. ex rel. Elizabeth B.* v. *Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012) (similar). As the Ninth Circuit put it, "'educational benefit,' 'some educational benefit' or a 'meaningful' educational benefit * * * all * * * refer to the same standard." *J.L.* v. *Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (9th Cir. 2009).

2. The United States contends (at 10) that the Third and Sixth Circuits have gone farther. But that is far from clear. The split with the Sixth Circuit is dubious at best. It is true that the Sixth Circuit approvingly cited some Third Circuit cases applying a "meaningful" benefit standard in *Deal* v. *Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2004), *cert. denied,* 546 U.S. 936 (2005). But it has never mentioned that standard in a published opinion since. Indeed, when *Deal* returned to the Sixth Circuit after remand, the court emphasized that its earlier opinion "stated the general rule that 'a school district is only required to provide educational programming that is reasonably calculated to enable the child to derive more than *de minimis* educational benefit.'" *See Deal* v. *Hamilton Cty. Dep't of Educ.*, 258 F. App'x 863, 865 (6th Cir. 2008) (per curiam) (quoting *Deal*, 392 F.3d at 861). And the sole (unpublished) decision in the decade since to even mention the "meaningful" standard appears to understand that term to mean simply more than "trivial." *See Woods* v. *Northport Pub. Sch.*, 487 F. App'x 968, 974-975 (6th Cir. 2012); *Nack ex rel. Nack* v. *Orange City Sch. Dist.*, 454 F.3d 604, 614 (6th Cir. 2006) ("[T]he IDEA does not guarantee success—it only requires a school to provide sufficient specialized services so that the student benefits from his education." (internal quotation marks

omitted)). The Sixth Circuit has thus quietly rejoined the ranks of those courts that use "meaningful" "as simply another way to characterize the requirement that an IEP must provide a child with more than minimal, trivial progress." *O.S.*, 804 F.3d at 359.

If the split with the Sixth Circuit is doubtful, the split with the Third Circuit is far from clear. That court has held that "the provision of merely more than a trivial educational benefit does not meet" its "meaningful benefit requirement." *T.R.* v. *Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) (brackets and internal quotation marks omitted). That *sounds* more rigorous than the majority view. But there is no way to know for sure because the Third Circuit has never had occasion to explain what kinds of record facts establish that a benefit is sufficient. And until it does so, there is no way of telling whether the purported difference in the standards constitutes a true split.

Despite the lack of guidance from the Third Circuit, the Government asserts (at 20) that the choice of standard "can" be outcome-determinative. But the only example the Government identifies is a case in which the Third Circuit *vacated* a district court decision for applying a different standard. *See* U.S. Br. 20 (citing *Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 243 (3d Cir. 1999)). Vacatur says nothing about whether the choice of standard would have affected the merits, and the court's opinion does not speculate either way. *Cf., e.g.*, *T.R.*, 205 F.3d at 577 (affirming district court that applied a "nontrivial benefit" standard on grounds the record showed the IEP "amply satisfie[d] the somewhat more stringent 'meaningful benefit' test"). Thus,

while it is true that the Tenth Circuit called this a "close case," Pet. App. 23a, the Government has not identified any reason to believe that applying the Third Circuit's something-more-than-non-trivial standard would have yielded a result different from the majority, non-trivial standard.

3. That basic difficulty may be why the Court has denied petitions for certiorari presenting the question here at least three times since *Rowley* was decided, including in a case from the Tenth Circuit. *See Thompson R2-J Sch. Dist.* v. *Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009); *Deal*, 392 F.3d 840, *cert. denied*, 546 U.S. 936 (2005); *Polk* v. *Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

If the Court is interested in this issue, it should await a case in which the Third Circuit reverses a district court for misapplying the "meaningful benefit" standard. A case in that posture—unlike the decision below—might prompt the Third Circuit to give some content to its rule and provide the Court with a factual record on which it could assess the impact of that standard and whether it comports with *Rowley* and the statute.

II. THE DECISION BELOW WAS CORRECT

Relying on *Thompson*—a decision this Court chose not to review just seven years ago—the Tenth Circuit reiterated that a State provides a FAPE when it offers specialized instruction and related services reasonably calculated to provide "some educational benefit," defined as "more than [a] *de minimis*" benefit. Pet. App. 16a. That standard is compelled by *Rowley* and the statutory text.

1. Congress enacted the IDEA to ensure that children with disabilities in participating States receive a "free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). To that end, the IDEA sets forth comprehensive "procedures" that States, school districts, and educators must follow in developing an IEP. *Rowley*, 458 U.S. at 205-206. Among other things, educators must conduct a "full and individual initial evaluation" of the child and her developmental needs. 20 U.S.C. § 1414(a)(1)(A). They must set "measurable annual goals * * * designed to * * * enable the child to be involved in and make progress in the general educational curriculum." *Id.* § 1414(d)(1)(A)(i)(II). And they must identify the services that will allow the child "to advance appropriately toward attaining the annual goals," and "to be educated and participate with other children with disabilities and nondisabled children in [various] activities." *Id.* § 1414(d)(1)(A)(i)(IV). Together, the IDEA's procedural requirements ensure that a child's "access to public education" is "meaningful." *Rowley*, 458 U.S. at 192.

The statute contained similar requirements at the time *Rowley* was decided, *see id.* at 182-183, and it was against the backdrop of these procedural protections that the Court in *Rowley* considered whether States must meet "some additional *substantive* standard." *Id.* at 190 (emphasis added). The Court observed that any such standard is "[n]oticeably absent from the language of the statute." *Id.* at 189. And it concluded that the statute's structure and history demonstrate Congress's "conviction that adequate compliance with the *procedures* prescribed would in most cases assure much if not all of what Congress wished in the way of *substantive* content in

an IEP." *Id.* at 206 (emphases added). The Court nevertheless concluded that an IEP ought "to confer *some* educational benefit upon the handicapped child"—a standard not met when it provides "*no* benefit." *Id.* at 200-201 (emphases added); *see also id.* at 207.

That is not to say that it is "perfectly fine to aim low." U.S. Br. 19. That an IEP is *substantively* adequate when it is reasonably calculated to provide a benefit does not mean that educators "set out[] to provide educational benefits * * * that are barely more than trivial," *id.* at 18, any more than the Administrative Procedure Act's "arbitrary" and "capricious" standard means that an agency sets out to render decisions that are barely more than rational. 5 U.S.C. § 706(2)(A). Like the Administrative Procedure Act, the IDEA achieves Congress's goals through its *procedures*. And those procedures ensure that educators *do* aim high when they develop an IEP in collaboration with the child's parents. *See, e.g.*, 20 U.S.C. § 1414(d)(1)(A). What the statute does not do is permit courts to second-guess the *substance* of those educational decisions by requiring a "particular outcome" or "level of education." *Rowley*, 458 U.S. at 192.

2. The Government nevertheless argues (at 14) that the IDEA does just that, by requiring courts to ensure that an IEP provides benefits "meaningful in light of the child's potential and the IDEA's stated purposes." There is no basis for that standard in the statute.

The Government tries (at 14) to ground its standard in the "ordinary meaning of 'appropriate.' " But that term was in the IDEA when this Court re-

marked that "[n]oticeably absent from the language of the statute is *any* substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189 (emphasis added). And the Court flatly rejected the Government's reliance on the word "appropriate" then, too. *See id.* at 197 n.21. Instead, consistent with the statute's focus on procedures, the Court found that the legislative history of the Act "unmistakably disclose[s]" Congress' understanding that "an 'appropriate education' is provided when personalized educational services are provided." *Id.* at 197; *see* 20 U.S.C. § 1401(9)(D) (defining a FAPE to include "individualized" "special education and related services").

The Government's arguments from the statute's structure and purpose are similarly misplaced. The Government contends (at 15) that "Congress would not have instructed States to develop each child's IEP with such a clear focus on promoting measureable annual progress" if "all it wanted to require was that States provide some degree of educational benefit that is barely more than trivial." But this Court rejected just that kind of reasoning when it found "nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself." *Rowley*, 458 U.S. at 206.

The Government mistakenly suggests (at 14-15) that a "literal" reading of the more-than-*de-minimis* standard would allow a school to offer assistive technology to a hearing-impaired child in just one

class, so long as the child made progress in that class. To the extent the Government's hypothetical posits an IEP that arbitrarily fails to provide for services a child needs in order to participate in some portion of the curriculum, it would violate the Americans with Disabilities Act, which requires that recipients of federal funds provide disabled students with an opportunity equal to that of non-disabled students to participate in and benefit from educational programs. 34 C.F.R. § 104.4(b)(1)(ii); *id.* § 104.4(b)(2); *see* 42 U.S.C. § 12102(1), (2)(a); *id.* § 12132. A court confronting such an IEP would thus not need to reach the question here.

3. After advancing a position incompatible with *Rowley*, the Government contends (at 17) that it is the Tenth Circuit's standard that conflicts with that decision by failing to require "any consideration of how" a more than *de minimis* "benefit compares to the child's capabilities and potential." Once again, that misunderstands the IDEA's requirements. An IEP's substantive adequacy is always gauged in relation to *individualized* goals based on an *individualized* assessment of a student's needs. The question answered by the Tenth Circuit was not whether the IDEA entitles a child to an education tailored to her needs—it clearly does. *See, e.g.*, 20 U.S.C. § 1414(d)(3) (mandating consideration of "the academic, developmental, and functional needs of the child" in formulating an IEP). The question is whether a State has satisfied its substantive obligations if the IEP it offers provides a child more than a *de minimis* educational benefit. Under *Rowley* the answer is yes: "[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, * * * the

child is receiving a 'free appropriate public education' as defined by the Act." 458 U.S. at 189.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 2016