No. 15-827

IN THE

Supreme Court of the United States

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

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

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

BRIEF FOR PETITIONER

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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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BRIEF FOR PETITIONER

Petitioner Endrew F. respectfully requests that this Court reverse 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 App. 27a, is unpublished but is available at 2014 WL 4548439.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 App. 59a, is also unpublished.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. The petition for a writ of certiorari was filed on December 22, 2015, and granted on September 29, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Individuals with Disabilities Education Act (IDEA or "the Act"), 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), 1412(a)(1)(A). This free and appropriate public education must be "provided in conformity with the individualized education

program," or IEP, "required under" the IDEA. *Id.* § 1401(9)(D).

Other relevant provisions of the IDEA are included in the joint appendix, J.A. 21-111.

STATEMENT OF THE CASE

A. Legal background

1. Several decades ago, concerned that children with disabilities often were not receiving proper education in public schools, Congress conducted an investigation. It found that such children sometimes "did not receive appropriate educational services" while others "were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2)(A), (B). Still other children with disabilities "were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting H.R. Rep. No. 94-332, at 2 (1975)); *see also Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982); Edwin W. Martin et al., *The Legislative and Litigation History of Special Education,* 6 Special Educ. Students Disabilities 25, 26-28 (1996).

These findings gave reason for alarm. Their "long range implications" were that "public agencies and taxpayers w[ould] spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle." S. Rep. No. 94-168, at 9 (1975); *see also Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) (not receiving an education imposes an "inestimable toll" on society as well as "the social, economic, intellectual, and psychological wellbeing of the

individual."). Yet "[w]ith proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, at 9.

To address this situation, Congress in 1975 passed the Education for All Handicapped Children Act – now known as the Individuals With Disabilities Education Act, or IDEA. In order to receive federal funding for special education services, the IDEA requires states to "identi[fy], locat[e], and evaluat[e]" students who may need special education. 20 U.S.C. § 1412(a)(3). Once children with disabilities are identified and evaluated, the Act then requires local schools to provide them a "free appropriate public education" (FAPE). *Id.* § 1412(a)(1)(A).

The IDEA defines a FAPE (somewhat circularly) as "special education and related services" that are (A) provided 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) (emphasis added).

The "centerpiece of the statute's education delivery system for disabled children" is the individualized education program, or IEP. *Honig*, 484 U.S. at 311. Each IEP is created by an "IEP team" comprised of the child's parents or guardian, the child's teachers, and other qualified personnel able to "provide, or supervise the provision of, specially

designed instruction to meet the unique needs of" the child. 20 U.S.C. § 1414(d)(1)(B)(iv)(I). The "IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing 20 U.S.C. § 1414(d)(1)(A)).

2. Congress recognized that parents and educators will occasionally disagree on the content of an IEP or whether it has provided their child with a FAPE. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). The IDEA requires that parents be afforded an opportunity to resolve these differences informally, including through mediation. 20 U.S.C. § 1415(d)(2)(E), (e). These informal means often are sufficient to resolve any concerns. *See* Consortium for Appropriate Dispute Resolution in Special Education, *IDEA Dispute Resolution Data Summary for: U.S. and Outlying Areas 2004-05 to 2013-14*, at 4 (Sept. 2015).[1] But when that is not possible, either the school district or the parents may request a "due process hearing" before a hearing officer at a local or state educational agency. 20 U.S.C. § 1415(f).

Most requests for due process hearings are withdrawn, dismissed, or resolved without an actual hearing. *See IDEA Dispute Resolution Data, supra*, at 12. But when the matter goes to a full hearing, the hearing officer decides whether the school district has

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[1] http://www.directionservice.org/cadre/pdf/2013-14%20DR%20Data%20Summary%20US%20&%20Outlying%20Areas.pdf.

met the statute's requirements, principally whether it has provided the student with a FAPE. 20 U.S.C. § 1415(b)(3), (f)(3)(E). Aggrieved parties may appeal to a state or federal court, *id.* § 1415(*i*)(2)(A), which "shall grant such relief as the court determines is appropriate," *id.* § 1415(*i*)(2)(C)(iii). This relief may require placing the child in a regular or a special classroom, awarding "compensatory" special education services to make up for past inadequacies, or reimbursing parents for tuition payments to a private school while the public school was failing to provide a FAPE. *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993); *see* 20 U.S.C. § 1412(a)(10)(C)(ii).

3. In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court considered the Act's requirement to provide a FAPE. The Court held that schools are not required to "maximize" the potential of children with disabilities. *Id.* at 189-90, 200. At the same time, this Court noted that schools must provide educational services designed to deliver "some educational benefit" and "formulated in accordance with the requirements of the Act." *Id.* at 200, 203-04. As the IDEA then stood, that meant "providing personalized instruction with sufficient support services to permit [a disabled] child to benefit educationally from that instruction" and "to achieve passing marks and advance from grade to grade." *Id.* at 203-04. By affording children with disabilities access to public education, this Court explained, Congress meant to provide enough "substantive" educational benefit "to make such access meaningful." *Id.* at 192; *see also id.* at 202 (school district discharged its duty to provide a FAPE by providing "substantial specialized educational instruction and related services").

4. While the 1975 Act made significant progress in terms of educating children with disabilities, Congress determined after surveying the post-*Rowley* landscape that more needed to be done to "improv[e] the quality of services and transitional results or outcomes obtained by [such] students." S. Rep. No. 104-275, at 14 (1996); *see also* S. Rep. No. 108-185, at 6 (2003). Accordingly, Congress enhanced the IDEA – first in 1997 and again in 2004. *See* Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

The purpose of these amendments was "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)). In doing so, Congress stopped short of demanding any particular outcomes for students with disabilities. But Congress insisted that school districts abandon the "low expectations" many had been setting for such students and instead strive to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1), (4).

a. The 1997 amendments heightened the requirements for IEPs. For instance, Congress required that IEPs include "measurable" goals as well as descriptions of how those goals should be evaluated, so that progress, or lack thereof, could be ascertained and documented. Pub. L. No. 105-17, § 101, 11 Stat. 37, 84 (1997). Congress required educators to reevaluate students' overall education annually, considering present levels of performance,

educational needs, and "whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general curriculum." Pub. L. No. 105-17, § 101, 111 Stat. 37, 83 (1997).

The 1997 amendments further require that, beginning when a student reaches age 16, the student's IEP include a plan for services to enable students with disabilities to transition to life after high school. Pub. L. No. 105-17, § 101, 111 Stat. 37, 84-85 (1997). They did so to "promote movement from school to post-school activities, including post-secondary education, vocational training, integrated employment, . . . continuing adult education, adult services, independent living, or community participation." Pub. L. No. 105-17, § 101, 111 Stat. 37, 46 (1997).

b. In 2004, Congress further strengthened the IDEA's commitment to high academic expectations for students with disabilities. The 2004 amendments aligned the IDEA's IEP requirements with the challenging academic standards and testing requirements of the Elementary and Secondary Education Act, which generally requires that the States' academic expectations and assessments for students with disabilities be the same as those for students without disabilities. *See generally* 20 U.S.C. § 1412(a)(15), (16).

In addition, IEPs now must include not only the transition services required by the 1997 amendments but also "appropriate measurable postsecondary goals," such as employment, higher education, and

independent living. Pub. L. No. 108-446, § 101, 118 Stat. 2708, 2709 (2004). Along the same lines, the 2004 amendments removed a requirement that IEPs include short-term goals because evidence showed that they "distract from the real purpose of special education, which is to ensure that all children and youth with disabilities achieve high educational outcomes and are prepared to participate fully in the social and economic fabric of their communities." S. Rep. No. 108-185, at 28-29 (2003).

B. Factual and procedural background

1. Petitioner Endrew F. (Drew) was diagnosed with autism at age two. Pet. App. 3a. Autism is a neuro-developmental disorder that can impair social and communicative skills and cause an individual to engage in "repetitive activities, . . . resist[] environmental change or change in daily routines, and [have] unusual responses to sensory experiences." 34 C.F.R. § 300.8(c)(1)(i) (IDEA regulation). In Drew's case, autism impairs his "cognitive functioning, language and reading skills, and his social and adaptive abilities." Pet. App. 3a. Because autism is one of the disabilities categorically covered by the IDEA (and because Colorado, the state where he lives, has elected to accept IDEA funds), Drew is entitled to the Act's protections. *See* 20 U.S.C. § 1401(3)(A).

Drew attended public schools in respondent Douglas County School District from preschool through fourth grade and received an IEP from the school district each year. Pet. App. 3a-4a. Drew's IEP goals included functional goals alongside traditional academic goals. For instance, Drew's third grade IEP stated that "Drew will make and maintain eye contact with peers and adults" and "will indicate the

time shown" on an analog clock. Supp. J.A. 59sa, 67sa. Yet the School District never implemented any plan for helping Drew manage his autism-related behavioral and adaptive struggles.

While in school, therefore, Drew experienced growing behavioral and adaptive difficulties. He had frequent outbursts and suffered from fixations that caused him to disrupt neighboring classrooms and sometimes to crawl over students to get to things, such as a timer. Drew was also gripped by extreme fear of flies and spills, and public restrooms, which made it nearly impossible for him to go to the bathroom at school. Pet. App. 31a, 61a, 73a.

Drew's "behavioral issues interfered with his ability to learn." Pet. App. 56a. Yet the School District's special education teacher claimed to be "unable to discern" any way to prevent his disability-related challenges from impeding his educational progress. *See id.* 56a-57a. Consequently, as Drew grew older, the School District postponed the majority of his academic goals from one year to the next or abandoned them altogether. *See id.* 76a.

The vast majority of Drew's IEP goals for fourth grade were "continued," that is, not achieved. *See* Supp. J.A. 92sa-108sa. Furthermore, Drew was regressing in several areas, including the skills needed to prepare him for an independent life. *Id.* 92a (goal of retelling a passage deemed "no longer appropriate"); *id.* 100sa (regressing in goal of learning division with numbers ranging from 0-5). He was generally unable to express the cause of his feelings to others, *id.* 140sa, to learn his peers' names, *id.* 141sa, or to put on a coat, *see* CA10 J.A. vol. 5, at 196-97.

Drew's negative behaviors – without receiving any coping mechanisms or therapies from his school – intensified. He struggled with self-harming behaviors like head banging. On at least two occasions, he ran away from school unattended. Pet. App. 66a-67a. When he was brought back to school, he became so agitated that he took off his clothing and relieved himself on the floor. *Id.*

The School District's IEP for Drew's fifth grade year had fewer goals than in previous years. And the goals it contained were "the same or similar" to those goals from previous years. Pet. App. 76a; *see also id.* 15a (fifth grade IEP was "similar in all material respects to Drew's past IEPs"). For instance, for the third consecutive year, the IEP included the goal of learning multiplication for single-digit numbers. *See* Supp. J.A. 67sa, 99sa, 135sa.

2. Drew's parents rejected Drew's fifth grade IEP as ineffective and placed him in a private school that specializes in educating children with autism.

The new school immediately recognized that, for Drew to make academic progress, his behavior problems had to be addressed. The school instituted a behavioral intervention plan addressing Drew's particular needs. Supp. J.A. 198sa-200sa. The plan identified each of Drew's problematic "target" behaviors and proposed a specific strategy to deal with them. *Id.* 198sa-199sa. Drew then received applied behavior analysis, *id.* 210sa-217sa, a therapeutic program "the most authoritative voices in American pediatrics have found effective for children with autism," Cert. Br. of Autism Speaks 7. For instance, to increase Drew's ability to tolerate feared items such as flies, teachers in the new school

systematically exposed Drew to the items while providing positive reinforcements aimed at improving Drew's tolerance for each item. Supp. J.A. 199sa.

The new school also ordered a speech therapy consultation. Supp. J.A. 204sa. Based on the consultant's recommendations, Drew was provided regular speech therapy to improve his speaking skills. *Id.* 226a.

The new school enhanced Drew's academic goals as well. Gone were the days in which Drew's IEP goals were largely repeated year after year, with little effort at improvement. In math, for example, Drew's goals went from mastering multiplication through the "threes" table to mastery though the "twelves" table. Supp. J.A. 222sa. Similarly, upon entering the school, Drew was able to do no more than distinguish the proper use of addition and subtraction signs, but his new IEP sought significant improvement, explaining that, with "systematic teaching," Drew would "complete word problems using addition, subtraction, and multiplication." *Id.* And though Drew could identify time on an analog clock only by the hour and half hour, Drew's new IEP expected him, in the coming year, to identify time on a variety of clocks "to the minute." *Id.* 223sa.

Drew immediately made significant "academic, social and behavioral progress." Pet. App. 29a. Less than four months after transferring to the new school, Drew "quickly mastered multiplication," CA10 J.A. vol. 7, at 92, learned to type over 17 words per minute, *id.* vol. 4, at 165, and began identifying emotions in himself and others, *id.* vol. 4, at 161. Within six months, Drew had overcome his fear of public restrooms and the frequency and severity of

his behavioral outbursts were greatly reduced, which, in turn, allowed him to progress academically. *See id.* vol. 4, at 154.

3. Drew's parents filed an IDEA due process complaint in 2012, maintaining that the School District's IEP for his fifth grade year had denied him a FAPE. They pointed to Drew's serious behavioral decline during his attendance at the District's school, to the fact that Drew had made "little to no progress" academically, and to the IEP itself, which included mostly the same objectives as previous years and abandoned other goals. Pet. App. 15a, 76a. Drew's parents sought reimbursement for the tuition at his new school. *Id.* 59a-60a.

The hearing officer sided with the School District. She determined that the District had provided Drew with a FAPE because Drew had received "some" educational benefit while enrolled in public school. Pet. App. 72a.

4. Having exhausted his administrative remedies, Drew, through his parents, filed an IDEA suit in the U.S. District Court for the District of Colorado. The district 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." Pet. App. 36a (citation omitted). Viewing the case through that lens, the district court agreed with the hearing officer that the School District had provided a FAPE to Drew because it had enrolled him in classes and enabled him to make "minimal progress" on some of his IEP goals. *Id.* 49a.

5. The Tenth Circuit affirmed. As relevant here, the court of appeals adhered to its holding in a 1996 case that a school district discharges its FAPE obligation so long as it aims to provide a "merely . . . more than *de minimis*" educational "benefit." Pet. App. 16a (quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). Even under this "merely more than de minimis" test, the Tenth Circuit observed that this was "without question a close case." *Id.* 23a. But because the School District had aimed for just-above-trivial academic progress, the Tenth Circuit held that the School District's proposed fifth grade IEP was "substantively adequate." *Id.*

SUMMARY OF ARGUMENT

I. The Tenth Circuit erred in assessing the substantive adequacy of the School District's actions against a "merely more than de minimis benefit" standard. The IDEA charges schools with providing an "appropriate public education" to children with disabilities. This directive – informed by other provisions of the statute and societal norms – means striving to transmit the "necessary tools" to "prepare [children with disabilities] for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3). What is more, the IDEA demands "equality of opportunity." *Id.* § 1400(c)(1). Schools must set academic goals for students with disabilities commensurate with the targets for the student body as a whole and generally measure their progress against the same challenging benchmarks. Providing a child with a disability with a "merely more than de minimis" educational benefit offers little hope of meeting those objectives.

The Tenth Circuit's standard also contravenes this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982). *Rowley* explained that the FAPE requirement, as it then existed, required schools to provide services necessary to make access to public education "meaningful" – that is, to "enable the child to achieve passing marks and advance from grade to grade." *Id.* at 192, 204. An educational benefit that is barely more than trivial cannot discharge that duty.

Rowley also makes clear that the IDEA's mandate to provide an "appropriate" education requires accounting for the Act's expressed objectives and implementing provisions. Yet the Tenth Circuit's standard ignores the 1997 and 2004 amendments to the IDEA, which significantly enhanced the Act's commitments to equality of opportunity and measurable educational results and expressly told schools to shun "low expectations," 20 U.S.C. § 1400(c)(4). Once those amendments are integrated into the analysis, it is beyond debate that a "merely more than de minimis" benefit does not provide a FAPE.

II. The most accurate understanding of the IDEA's FAPE requirement is that it obligates schools to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society. This construction of the words "appropriate education" tracks the Act's directive to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." At the same time, the qualifier "substantially" recognizes that seeking grade-level achievement is not always possible for

children with especially significant cognitive impairments or who have fallen seriously behind their peers.

The "substantially equal opportunity" standard is also eminently workable. Decades of scientific research show that, with proper assistance, children with disabilities generally can perform at the same level as their peers without disabilities. The Department of Education agrees and has instructed school districts accordingly.

Finally, the "substantially equal opportunity" standard leaves school officials ample leeway to craft the particulars of educational programs to meet each child's needs, while protecting the inherent dignity and worth of every child. Educators need not guarantee – much less accomplish – any particular outcomes. But they must set the same kinds of high goals for children with disabilities as they set for their other students. Nothing less than such substantially equal treatment can achieve the IDEA's goals of full participation in the classroom and integration in society.

ARGUMENT

I. The Tenth Circuit's "merely more than de minimis" benefit standard defies the IDEA's directive to provide a "free appropriate public education."

The Tenth Circuit held that a school district provides a child with a disability a "free appropriate public education" if it seeks to provide the child educational benefits that barely exceed de minimis. Pet. App. 16a-23a. This ruling cannot be reconciled with the IDEA's text, purposes, or structure, all of

which require school districts to strive, wherever possible, for much greater academic achievement. Nor is the Tenth Circuit's standard consistent with *Board of Education v. Rowley*, 458 U.S. 176 (1982).

A. The Tenth Circuit's standard is incompatible with the IDEA's text.

1. We begin with the most directly relevant text. *See, e.g.*, *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). The IDEA requires States to provide children with disabilities a "free *appropriate* public *education*." 20 U.S.C. § 1412(a)(1)(A) (emphasis added). The statute's definition of FAPE, in turn, emphasizes that the special education afforded to such children must include "an *appropriate* preschool, elementary, or secondary school *education* in the State involved." *Id.* §1401(9)(C) (emphasis added).

"Appropriate" means "specially suitable: fit, proper." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (quoting *Webster's Third International Dictionary* (1961)). "Suitable," in turn, means "well fitted for the purpose." *Oxford American Dictionary of Current Meaning* 813 (1999). And the IDEA's purposes – discussed in greater detail in the next section – include "ensur[ing] the effectiveness of efforts to educate children with disabilities," providing children with disabilities the "necessary tools to improve educational results," and "prepar[ing] them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3), (4).

No one, much less the parents and educators who together craft each child's IEP, could properly view an IEP aimed at "merely . . . more than *de minimis*" educational achievement, Pet. App. 16a (quotation marks and citation omitted), as one calculated to

accomplish those purposes. Something is considered de minimis when it is "trifling," "negligible," or "so insignificant that a court may overlook it," *Black's Law Dictionary* (10th ed. 2014) – that is, "[t]oo trivial or minor to merit consideration." *English Oxford Living Dictionaries* (2016).[2] Thus, an IEP that seeks an educational "benefit" that is "merely more than de minimis" is one that aims for educational achievement that barely exceeds the trivial.

As the United States has explained, "[n]o parent or educator in America" would view that standard as an acceptable goal for educating children with disabilities. U.S. Cert. Br. 14. The standard, for instance, would tolerate an IEP that sought a student's minimal achievement in reading without seeking any achievement at all in math – or in targeting just a few multiplication tables or rules of grammar, even where the student is capable of learning more. Or it would tolerate providing a sign language interpreter for one hour of the day but not other periods where it would be equally beneficial. It is hard to fathom how such actions would be "appropriate."

2. This conclusion is bolstered by considering the statutory term that "appropriate" is modifying: "public education." *See, e.g.*, *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (proper understanding of statutory terms are often crystallized by neighboring terms); Singer & Singer, 2A *Statutes and Statutory Construction* § 47:16 (7th ed. 2014). Mandating an "education" is different from, demanding, say, mere

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[2] https://en.oxforddictionaries.com/definition/us/de_minimis.

"access to schools" or "accommodations in classrooms." In society's view, public education is a profound endeavor – an essential building block for democratic citizenship and for socialization, as well as a key determinant of a child's future economic well-being and independence. *See* William J. Reese, *America's Public Schools* 215-19 (2011).

This understanding of public education is deeply rooted in this Court's precedents, which "have consistently recognized the importance of education to the professional and personal development of the individual." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 437 (1993) (Blackmun, J., concurring); *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (stressing "the importance of public education in maintaining our basic institutions" and "on the life of the child"). "[E]ducation," the Court has explained, "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler*, 457 U.S. at 221. It "prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). And it is "the principal instrument [of state and local government] in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

This Court's understanding of the role of education comports with the contemporary "common understanding" of that term. *Perrin v. United States*, 444 U.S. 37, 45 (1979); *see also, e.g., Bond v. United States*, 134 S. Ct. 2077, 2090 (2014) (common understanding of statutory term provides guidance);

Rousey v. Jacoway, 544 U.S. 320, 326 (2005) (same). "Education" today is understood to denote preparation for living a useful, fulfilling, and independent life in a complex world. Thus, for instance, a leading organization that emerged from the 1996 National Education Summit of a bipartisan group of governors and corporate leaders describes "education" as targeted at "ensuring all students graduate from high school 'college and career ready,' or, in other words, fully prepared academically for any and all opportunities they choose to pursue." Achieve, Inc., *Our Agenda*, http://www.achieve.org/ college-and-career-ready-agenda.

In light of this robust understanding of "education," the IDEA's insistence on an "appropriate *education*" signals that schools must seek educational attainment for their students with disabilities that is well beyond just-above-trivial. Schools must provide students with disabilities substantial opportunities designed to allow them to succeed academically and to lead meaningful and economically productive lives.

B. The Tenth Circuit's standard thwarts the IDEA's express purposes.

When this Court construes a statutory phrase, it "look[s] not only to the particular statutory language, but also to the design of the statute as a whole and to its object and policy." *Neguise v. Holder*, 555 U.S. 511, 519 (2009) (quotation marks and citation omitted). This is particularly important when interpreting the word "appropriate," which necessarily "requires references to other sources" to determine what the thing it modifies "should be 'specially suitable,' 'fit,' or 'proper' *for*." *Ruckelshaus*, 463 U.S. at 683.

Identifying the object and policy of a statute is sometimes difficult. But here, it "requires no guesswork to ascertain Congress' intent regarding" the IDEA, "for Congress included a detailed statement of the statute's purposes" and detailed legislative findings. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2233 (2014) (internal citations and quotation marks omitted); *see also, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 744 (2014) (affording substantial weight to express congressional findings in determining statutory meaning); *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 751 (2012) (same).

Congress has declared that the IDEA is designed to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). In other words, the purpose of requiring school districts to provide a "free appropriate public education" is "to improve educational results for children with disabilities" and to prepare them "for further education, employment, and independent living." *Id.* § 1400(d)(1)(A), (3). Those purposes are built on express congressional findings – some dating back to the original Act – that despite "advance[s]" in teacher training and instructional methods, the educational needs of children with disabilities were "not [previously] being fully met" and that many children with disabilities were not "receiv[ing] appropriate educational services which would enable them to have full equality of opportunity." Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 (1975) (codified in substantially identical form at 20 U.S.C. § 1400(d)(1)(A), (4)).

It defies belief that a statute designed to "ensure equal opportunity" and the "effectiveness" of the states' special educational efforts would also authorize states to seek just-above-trivial educational advancement for children with disabilities. A statute that seeks to provide "equality of opportunity" for children with disabilities would not give educators license to seek barely more than educational benefits the law would regard as de minimis.

C. The Tenth Circuit's standard cannot be reconciled with the IDEA's FAPE-implementing provisions.

In addition to considering a statutory phrase's text and purpose, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012) (quotation marks and citation omitted). Indeed, "[i]t is necessary and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013); *see also, e.g., Holloway v. United States*, 526 U.S. 1, 6 (1999). And this Court has stressed the importance of this precept when construing the IDEA, explaining that a "proper interpretation of the Act requires a consideration of the entire statutory scheme." *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 523 (2007).

Applying this basic interpretive principle, the Tenth Circuit's "merely more than de minimis" standard is irreconcilable with various IDEA provisions that implement the FAPE requirement.

1. The "primary vehicle for implementing" the IDEA's "enforceable substantive right to public education . . . is the 'individualized educational program,'" or IEP. *Honig v. Doe*, 484 U.S. 305, 310-11 (1988). As explained earlier, an IEP is an annual plan "which the [Act] mandates for each disabled child." *Id.* at 311. Crafted by educators in collaboration with parents, it sets each child's educational goals and objectives for the coming academic year. *See* 20 U.S.C. § 1414(d).

This statutory link between a child's IEP and the provision of a FAPE is fundamental to the IDEA's operation. It originates in the Act's definition of FAPE, which requires "that special education be provided *in conformity with the individualized education program* required under" the Act. 20 U.S.C. § 1401(9)(D) (emphasis added). The Act's particular IEP requirements, therefore, "provide reliable insight into what level of education Congress would have deemed 'appropriate' for purposes of the FAPE requirement." U.S. Cert. Br. 15.

An IEP must include a statement of the child's "present levels of achievement," including how "the child's disability affects the child's involvement and progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa); *see also* 34 C.F.R. § 300.320(a)(1)(i) (making clear "general education curriculum" for children with disabilities is "the same curriculum as for nondisabled students"). An IEP must have "a statement of annual goals, including academic and functional goals, designed to . . . enable the child to be involved in and make progress in the general education curriculum" and "meet each of the child's other educational needs." 20 U.S.C.

§ 1414(d)(1)(A)(i)(II)(aa), (bb). It must also contain a "description of how the child's progress meeting the[se] annual goals . . . will be measured" and when periodic reports will be issued "on the progress the child is making toward meeting the annual goals." *Id.* § 1414(d)(1)(A)(i)(III). Thus, the IEP must reflect the results of an annual assessment of the child's academic status, *see id.*, and then, against that baseline, it measures the child's ability to "make progress" – that is, to attain greater achievement – year after year. *Id.* § 1414(d)(1)(A)(i)(II)(aa).

As the United States has explained, Congress would not have trained its attention "on promoting measurable annual progress" through the IEP, "if at the end of the day" it believed that schools had to provide only "some degree of educational benefit that is barely more than trivial." U.S. Cert. Br. 15.

That is not all. An IEP also must contain a statement of the particular special education and related services that will be provided to the child, "based on peer-reviewed research to the extent practicable," as well as an explanation of "program modifications or supports for school personnel that will be provided for the child – to advance appropriately toward attaining the [child's] annual goals." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). It would not be worth the candle to demand that educators invest the effort required to justify an IEP's educational goals with peer-reviewed research, or the expense needed to provide support for school personnel in meeting each child's annual goals, if minimal educational attainment was all that the IDEA demanded.

Finally, for children aged 16 and older, each IEP must include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment" and "the transition services needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa), (bb). This requirement envisions children with disabilities as fully engaged, valuable members of their communities, emerging from public school ready for college, other further training, productive employment, and independent living – just like their peers without disabilities. This IEP requirement is incompatible with a view of FAPE that seeks only just-above-trivial educational benefit. A child with a disability, who for a dozen or more years has struggled with IEPs aimed at a "merely more than de minimis" educational benefit, could not possibly be poised to achieve the post-high school goals envisioned by the IDEA.

2. The Tenth Circuit's standard is also incompatible with the IDEA's focus on *individualized* educational services. Various provisions of the Act – beginning, as just explained, with the requirement of drafting an "*individualized* education program" for each child, 20 U.S.C. § 1414(d) (emphasis added) – demand that school districts provide an education "in relation to each child's potential." *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 578 (3d Cir. 2000) (Alito, J.); *see also, e.g.*, 20 U.S.C. § 1400(d)(1)(A) (education provided to children with disabilities must be "designed to meet their unique needs"); *Rowley*, 458 U.S. at 203 (FAPE must be "personalized"). Because "logic dictates that the benefit 'must be gauged in relation to a child's potential,' [o]nly by considering an individual child's

capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (citation omitted).

When a child is fully capable with proper assistance of achieving at a high level, it could hardly be thought "appropriate" to seek for that child a "merely more than de minimis" educational benefit. Doing so would squander that child's potential, in derogation of the IDEA's objective of enabling children with disabilities to obtain educational services "designed to meet their unique needs" that enable them to meet "high expectations" and the "developmental goals" applicable to all children, 20 U.S.C. §§ 1400(c)(1), (5) & (d)(1)(A).

3. Other key provisions of the IDEA further underscore the Tenth Circuit's erroneous understanding of the FAPE requirement. In crafting its plan for implementing the Act, each state "must establish[] a goal of providing *full* educational opportunity to all children with disabilities." 20 U.S.C. § 1412(a)(2) (emphasis added). The states must "establish goals for the performance of children with disabilities" that "promote the [express] purposes of this chapter." *Id.* § 1412(a)(15)(A)(i). These goals include ensuring that schools "improve educational results for children with disabilities" and that children with disabilities are prepared "for further education, employment, and independent living." *Id.* § 1400(d)(1)(A), (3); *see supra* 20-21 (discussing express statutory purposes).

To these ends, the IDEA requires that, to the extent possible, "[a]ll children with disabilities are

included in all general State and districtwide assessment programs, including assessments described under" the Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 1412(a)(16)(A) (incorporating ESEA requirements codified at 20 U.S.C. § 6311(b)). ESEA, in turn, requires States to employ "*challenging* academic standards and academic assessments . . . that will be used by the State, its local educational agencies, and its schools." 20 U.S.C. § 6311(b)(1)(A) (emphasis added). In doing so, each state "must demonstrate" that its "challenging academic standards" are "aligned with the entrance requirements" for the state's public colleges and universities. *Id.* § 6311(b)(1)(D)(i).

Under ESEA, states must implement their challenging standards for students with disabilities through "a set of high-quality student academic assessments" in math, reading or language arts, and science, 20 U.S.C. § 6311(b)(2)(A), administered to students regularly from third through twelfth grade, *id.* § 6311(b)(2)(B)(v). These tests must "involve multiple up-to-date measures of student academic achievement, including *measures that assess higher-order thinking skills and understanding*." *Id.* § 6311(b)(2)(B)(vi) (emphasis added).

Moreover, the assessments ESEA contemplates must be administered to "all students," 20 U.S.C. § 6311(b)(2)(B)(vii)(I) – that is, to those with and without disabilities. In this regard, Congress specifically required that children served under the IDEA be provided "appropriate accommodations" necessary to measure their academic achievement in relation to the challenging academic standards. *Id.* § 6311(b)(2)(B)(vii)(II) (citing 20 U.S.C. § 1401(3)).

Where children have serious cognitive disabilities, ESEA authorizes states to "adopt alternate academic achievement standards." 20 U.S.C. § 6311(b)(1)(E)(i)(I), (II). But even those assessments must be "aligned with [ESEA's] challenging State academic content standards," and "promote access to the general education curriculum" available to all students. *Id.* Moreover, these alternative standards "must reflect professional judgment as to *the highest possible standards achievable* by" students with significant cognitive disabilities. *Id.* § 6311(b)(1)(E)(i)(III) (emphasis added). Expressly cross-referencing the IDEA, ESEA requires that these alternative academic achievement standards be used "for each [affected] student" and be "designated in" each student's IEP. *Id.* § 6311(b)(1)(E)(i)(IV) (citing 20 U.S.C. § 1414(d)(3)). Finally, these alternative standards must be "aligned to ensure" that a student who meets these high standards "is on track to pursue postsecondary education or employment" consistent with the federal Rehabilitation Act. *Id.* § 6311(b)(1)(E)(i)(V) (citing Pub. L. No. 93-112, 87 Stat. 355 (1973)).[3]

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[3] The principal purpose of the Rehabilitation Act is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C § 701(b)(1). As particularly relevant here, the Rehabilitation Act seeks "to ensure, to the greatest extent possible, that youth with disabilities and students with disabilities who are transitioning from receipt of special education services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.) . . . have opportunities for postsecondary success." 29 U.S.C. § 701(b)(5).

Congress linked the IDEA with ESEA's insistence on challenging academic standards and assessments for a reason: It determined that "too many children in special education classes [were being] left behind academically," H.R. Rep. No. 108-77, at 83 (2003), so, wherever possible, it wanted children with disabilities to be held to the same standards as all other children. Congress recognized that, although "the underlying premise of the [IDEA] was to educate children in a manner equal to their nondisabled peers," it was necessary to "shift from process accountability" to accountability concerning "substantive performance of students with disabilities." S. Rep. No. 108-185, at 46 (2003). By "align[ing] the IDEA with the accountability system established under" ESEA, Congress sought to "ensure that all children, including children with disabilities, are held to high academic achievement standards" and that schools seek adequate yearly progress of all students. *Id.* at 17-18.[4]

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[4] For other legislative history showing that IDEA's incorporation of ESEA's standards was intended to hold children with disabilities to high levels of academic achievement, see H.R. Rep. No. 108-77, at 78, 96-97, 108-111, 120, 130; S. Rep. No. 108-185, at 2-3, 4-6, 28-29 (2003); 103 Cong. Rec. H3458 (Apr. 30, 2003) (statement of Rep. Sessions); 150 Cong. Rec. H10010-11, H10019-20 (Nov. 19, 2004) (statement of Rep. Boehner); 150 Cong. Rec. H10014 (Nov. 19, 2004) (statement of Rep. Castle); 150 Cong. Rec. H10016-17 (Nov. 19, 2004) (statement of Rep. Ehlers); 150 Cong. Rec. S11654 (Nov. 19, 2004) (statement of Sen. Gregg); 150 Cong. Rec. S11656 (Nov. 19, 2004) (statement of Sen. Dodd); 150 Cong. Rec. S11658-59 (Nov. 19, 2004) (statement of Sen. Bingaman).

The Tenth Circuit's adherence to the just-above-trivial standard runs headlong into the IDEA's and ESEA's demands for academic accountability and achievement. If the Tenth Circuit were correct that IEPs can be aimed at providing educational benefits that barely exceeded the trivial, it would make no sense for the IDEA to require IEPs to seek, wherever possible, academic accountability through "challenging State academic content standards," 20 U.S.C. § 1412(a)(16)(C)(ii)(I), and exacting academic assessments, *id.* § 6311(b)(2). Nor would the statute insist, even for students with the most serious cognitive disabilities, that states adopt "academic achievement standards" based on "the highest possible standards achievable by such students." *Id.* § 6311(b)(1)(E)(i)(III). But the IDEA *does* make those demands, thus showing it does not tolerate the meager educational aims the Tenth Circuit has ascribed to it.

D. The Tenth Circuit's standard misapprehends this Court's decision in *Rowley*.

The Tenth Circuit's "merely more than de minimis" benefit test contravenes *Board of Education v. Rowley*, 458 U.S. 176 (1982). Nothing in the Court's opinion says that school districts can satisfy the IDEA by providing just-above-trivial, or "merely more than de minimis," educational benefits to children with disabilities. To the contrary, the opinion indicates schools must aim much higher, and subsequent amendments to the IDEA solidify that demand.

1. *Rowley* involved a deaf child who was "remarkably well-adjusted," "perform[ing] better

than the average child in her class," and "advancing easily from grade to grade." 458 U.S. at 185 (quoting district court findings). She argued that, even though she was "receiving substantial specialized instruction and related services," she was not receiving a FAPE because her school district was not giving her "a potential-maximizing education." *Id.* at 197 n.21, 202; *accord id.* at 198-99.

This Court rejected that argument. *See Rowley*, 458 U.S. at 200. Nothing in the IDEA requires schools to aim for higher levels of achievement for children with disabilities than for children without disabilities. And public schools do not typically offer educational services designed to "maximize" the potential of every child without a disability. *Id.* at 199.

At the same time, the Court emphasized that the IDEA requires schools to provide children with disabilities more than simply "access" to their classrooms and other facilities. 458 U.S. at 201. The statute requires schools to supply enough "substantive educational" benefit "to make such access *meaningful*." *Id.* at 192 (emphasis added). Access that is "meaningful" is access that is infused with "significance, purpose, or value," *Webster's Unabridged Dictionary* 1191 (Random House 2d ed. 1998) – or, as the Court put it later in the opinion, an education "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."458 U.S. at 204; *see also id.* at 203 ("Children who graduate from our public schools are considered by our society to have been 'educated' at least to the grade level they have completed.").

Providing a "meaningful" education that includes "personalized instruction and related services," 458 U.S. at 192, 203, requires conferring much more than a just-above-trivial benefit for children with disabilities. Indeed, the just-above-trivial-benefit standard used by the Tenth Circuit is practically the opposite of making access to public education "meaningful."

2.a. The Tenth Circuit has embraced a "merely more than de minimis" standard premised on a statement elsewhere in *Rowley* that the Act was intended to confer "*some* educational benefit" on children with disabilities. Pet. App. 16a (quoting *Rowley*, 458 U.S. at 200) (emphasis added by Tenth Circuit); *see also O.S. v. Fairfax County Sch. Bd.*, 804 F.3d 354, 359 (4th Cir. 2015) (same). That approach is misguided.

To be sure, the word "some," read in isolation, *occasionally* means a slight amount. (Even when signifying a certain amount, though, the word usually connotes more than a negligible level.) But that is not the way in which *Rowley* used the term. Read in the full context of this Court's decision, *Rowley*'s statement that schools must provide "some" benefit simply notes that the IDEA imposes not just procedural demands but also a *substantive* obligation to provide "specialized instruction and related services." 458 U.S. at 201. The Court did not use the word "some" to pinpoint the level of that substantive obligation – that is, exactly "*when* handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Id.* at 202 (emphasis added).

When the Court turned to that question, it said that it was not attempting "to establish any one test for determining the adequacy of educational benefits." *Rowley*, 458 U.S. at 202. But the Court did make clear that the FAPE requirement, as it then existed, required schools to provide the services necessary to make access to public education "meaningful" and to "enable the child to achieve passing marks and advance from grade to grade." *Id.* at 192, 204. As just explained, that target is considerably higher than what the "merely more than de minimis" standard permits. A student might well receive more than a de minimis amount of educational benefit without being positioned for advancement to the next grade.

b. The School District advances an even emptier reading of *Rowley* than does the court of appeals. According to the School District, *Rowley* holds that "the IDEA achieves Congress's goals through its *procedures*" only and prohibits courts from "second-guess[ing] the *substance* of [schools'] educational decisions by requiring a 'particular . . . level of education.'" Resp. Supp. Br. 9 (quoting *Rowley*, 458 U.S. at 192). Likening the IDEA to the Administrative Procedure Act's arbitrary-and-capricious standard of judicial review, the School District further claims that the IDEA's supposedly exclusive focus on procedures is all that is needed to "ensure" that educators "aim high" when they craft IEPs. *Id.*

This argument blinks reality on several levels. First, *Rowley* repeatedly says that the FAPE requirement imposes a *substantive* duty on school districts to educate children with disabilities. *See* 458 U.S. at 206 (noting that the IDEA has "a substantive

standard"); *id.* at 205 (the Act has "substantive admonitions"). Lest there be any doubt, this Court has expressly repeated the point three times since *Rowley*. In *Smith v. Robinson*, 468 U.S. 992, 1010 (1984), the Court declared outright that "the Act establishes an enforceable substantive right to a free appropriate public education." In *Honig v. Doe*, 484 U.S. 305, 310 (1988), the Court explained that the IDEA "confers upon disabled students an enforceable substantive right to public education." And in *Winkelman v. Parma City School District*, 550 U.S. 516, 531-32 (2007), the Court held that that the IDEA authorizes parents to sue on their children's behalf over "the substantive inadequacy of their child's education."

That the Act's FAPE obligation requires school districts to seek a substantive level of educational attainment is evident, too, in the Act's provisions conferring decisional authority on "due process" hearing officers. Those provisions state that "in general," hearing officers' decisions "shall be made on *substantive* grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added); *see also id.* § 1415(f)(3)(E)(ii) (allowing relief when school district "caused a deprivation of educational benefits").

Second, the School District's analogy to the Administrative Procedure Act is inapt. That law, as its name indicates, governs *procedure*; indeed, the provision on which the School District relies establishes only a standard for *judicial review* of agency action. *See* Resp. Supp. Br. 9 (citing 5 U.S.C. § 706(2)(A)). By contrast, the FAPE requirement is a

substantive, on-the-ground requirement imposed on school districts in locating and evaluating eligible children, crafting and revising IEPs, and providing children with disabilities with special education and related services. *Id.* §§ 1412(a)(3), (4), (7) & 1414. Indeed, the first obligation that the Act imposes on states is to ensure that a "free appropriate public education is available to all children with disabilities residing in the State." *Id.* § 1412(a)(1)(A).

Third, contrary to the School District's assertion, a procedures-only conception of the IDEA would fail to "ensure" that school districts aim for a high level of academic achievement. This case proves the point. The courts below acknowledged that Drew's progress had been "minimal," Pet. App. 49a (district court), and that his fifth grade IEP "was similar in all material respects to [his] past IEPs," *id.* 15a (court of appeals). Indeed, the Tenth Circuit characterized it as a "close case" whether the School District had aimed even for more than merely trivial achievement. *Id.* 23a. Yet the Tenth Circuit blessed the School District's decision about what to offer Drew. That is another way of saying that the School District aimed low, and that doing so was good enough.

It may well be, as the School District maintains, that schools often will aim high. And when they do, disputes over the FAPE requirement generally will be avoided. But neither *Rowley* nor anything in the IDEA itself lets schools off the hook if they, like the School District here, view FAPE as merely a procedural guarantee that authorizes them to seek just-above-trivial substantive advancement for children with disabilities.

3. The Tenth Circuit's "merely more than de minimis" standard, originally adopted in 1996, also contravenes *Rowley* because it ignores the subsequent amendments to the IDEA. *See* Pet. App. 16a (citing *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996)). *Rowley* instructs that the personalized instruction and related services that constitute a FAPE "should be formulated in accordance with the requirements of the Act" and consonant with "the goal[s] of the Act." 458 U.S. at 198, 203-04 (quotation marks and citation omitted). And insofar as Congress enhanced the IDEA's requirements and goals in 1997 and 2004, the statute's command to provide an "appropriate" education demands recalibration to account for those enhancements.

Another decision involving the statutory term "appropriate" demonstrates why this is so. In *West v. Gibson*, 527 U.S. 212 (1999), this Court considered whether Title VII allows the EEOC to award the remedy of compensatory damages. The statute, as originally enacted in 1972, gave the EEOC the authority to enforce it "through *appropriate* remedies." *Id.* at 217 (emphasis in original) (quoting 42 U.S.C. § 2000e-16(b)). In 1991, without touching that provision, Congress amended Title VII to permit a "complaining party" for the first time to "recover compensatory damages." *Id.* at 215 (quoting 42 U.S.C. § 1981a(a)(1)).

This Court explained that "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West*, 527 U.S. at 218. That being so, the

Court held that when Congress used the term "appropriate," it "d[id] not freeze the scope" of permissible remedies in time. *Id.* Rather, "[t]he meaning of the word 'appropriate' permit[ted] its scope to expand to include Title VII remedies that were not appropriate before 1991, but in light of legal change are appropriate now." *Id.*; *see also Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (statutory term "appropriate" "naturally and traditionally includes consideration of all the relevant factors" (quotation marks and citation omitted)); *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) ("appropriate" is "inherently context dependent").

The same logic applies here. Petitioner disputes that the Tenth Circuit's "merely more than de minimis" standard is faithful to the IDEA as originally enacted or is a fair reading of *Rowley*. But whatever the precise substantive demand of an "appropriate" education was then, the 1997 and 2004 amendments significantly strengthened the IDEA's mandate and heightened its emphasis on striving for equality of opportunity. *See supra* 6-8; *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1213 n.3 (9th Cir. 2008) (The amendments "represented a significant shift in the focus from the disability education system prior to 1997."); *Deal*, 392 F.3d at 864 (same); Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 126 Educ. L. Rep. 1, 17 (1998) (same).[5] Those amendments,

[5] Numerous other commentators have made the same observation. *See* Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & Educ. 367, 377-79 (2008); Scott

which responded to "[a]lmost 30 years of research and experience" under the Act, 20 U.S.C. § 1400(c)(5), make clear beyond a shadow of a doubt that a school district that seeks a just-above-trivial educational benefit has not provided a FAPE.

In particular, Congress found in 1997 that "the implementation of this Act ha[d] been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." Pub. L. No. 105-17, § 101, 111 Stat. 37, 39 (2007) (codified as amended at 20 U.S.C. § 1400(c)(4)). The 1997 amendments, therefore, instructed school districts that their provision of FAPEs "can be made more effective by . . . having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible." *Id.* (codified as amended at 20 U.S.C. § 1400(c)(5)).

The amended objectives of the IDEA reflect these extensive post-*Rowley* findings, derived from decades of on-the-ground experience. In 1997, Congress declared for the first time: "Disability is a natural part of the human experience and *in no way* diminishes the right of individuals to participate in or contribute to society." Pub. L. No. 105-17, § 101, 111 Stat. 37, 38 (1997) (codified at 20 U.S.C. § 1400(c)(1)) (emphasis added). Therefore, among the amendments' express purposes is to ensure that

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F. Johnson, *Reexamining* Rowley*: A New Focus on Special Education Law*, 2003 BYU Educ. & L.J. 561, 585; Mitchell L. Yell et al., *Reflections on the 25th Anniversary of the U.S. Supreme Court's Decision in* Board of Education v. Rowley, Focus on Exceptional Children 1, 9 (May 2007).

children with disabilities – just like all other children – obtain an education that prepares them "for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A)).[6]

To that end, the 1997 amendments "place[d] 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 amendments required, among other things, that states for the first time include children with disabilities in general state and districtwide assessment programs. *See* 20 U.S.C. § 1412(a)(16). The amendments further sought to enable children with disabilities "to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children" so that they are "prepared to lead productive, independent, adult lives, to the maximum extent possible." Pub. L. No. 105-17, § 101, 111 Stat. 37, 39 (1997) (codified as amended at 20 U.S.C. § 1400(c)(5)(A)).[7]

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[6] The 1997 amendments' findings and purposes came on the heels of those in the American with Disabilities Act of 1990 (ADA), which ushered in "a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments." *Bd of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Kennedy, J., concurring); *see also* 42 U.S.C. § 12101 (findings and purposes of ADA).

[7] In 1997, Congress also enacted what is now subchapter IV of the Act, 20 U.S.C. § 1450 *et seq.*, establishing grant programs for states seeking to enhance their "systems for providing educational, early intervention, and transitional services . . . to

The 2004 amendments further refined and elevated the IDEA's concept of an "appropriate public education." These amendments instruct that a FAPE should prepare children with disabilities for post-secondary education as well as for employment and independent living. *See* Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2648-49 (2004) (codified at 20 U.S.C. § 1400(d)(1)(A)). Consistent with this directive, the Act for the first time required that, beginning at age 16, each IEP describe "appropriate measurable postsecondary goals" for the child's training, education, employment, and independent living skills and "the transition services . . . needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII). And in harmony with a new congressional finding that education for children with disabilities "can be made more effective" by employing the "improvement efforts" established under ESEA, *id.* § 1400(c)(5)(C), Congress required children served by the IDEA to be held accountable under ESEA's challenging academic standards and periodic assessments, *id.* § 1412(a)(16); *see supra* 26-28.

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improve results for children with disabilities." Pub. L. No. 105-17, § 101, 111 Stat. 37, 124 (1997) (codified as amended at 20 U.S.C. § 1451(a)). In passing this subchapter, Congress found that "[a]n effective educational system serving students with disabilities should . . . maintain high academic achievement standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that all children with disabilities have the opportunity to achieve those standards and goals." 20 U.S.C. § 1450(4)(A).

None of these enhanced objectives can be achieved under the Tenth Circuit's pre-amendments standard. Nor would it make any sense to establish high expectations for children with disabilities and to administer the same challenging assessments given to other students if all schools had to do was to seek a merely more than de minimis educational benefit. Schools would be setting up children with disabilities to fail.

II. A FAPE is an education that seeks to provide children with disabilities with substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society.

The free and appropriate public education that the IDEA requires is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities. This standard flows directly from the same sources that demonstrate that the Tenth Circuit's decision is wrong: the IDEA's text, declared purposes, and structure. It also is eminently workable.

A. This standard flows directly from the IDEA's text, purposes, and structure.

1. The most accurate understanding of the IDEA's FAPE requirement is that it obligates schools to provide children with disabilities with substantially equal opportunities to achieve academic

success, attain self-sufficiency, and contribute to society.[8]

This "substantially equal opportunity" standard correctly describes the FAPE requirement because, as petitioner has explained, the IDEA's language indicates that an "appropriate public education" is something of considerable importance and value. *See supra* 30-31. In particular, a FAPE must be aimed at improving educational results on par with a school's student body as a whole. 20 U.S.C. § 1412(a)(1)(A). Furthermore, a school must strive, to the extent feasible, to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1); *see also* 20 U.S.C. § 1400(d)(1) (IDEA enacted "to ensure that all children with disabilities have available to them a free appropriate public education that . . . prepare[s] them for further education, employment, and independent living").

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[8] Reflecting the nomenclature used in the lower courts, the petition maintained that the FAPE requirement compels schools to provide a "substantial educational *benefit*." Pet. 21 (emphasis added). At the same time, this Court has explained that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). For that reason, and to provide better forward-looking guidance to school officials and parents who draft IEPs on the front lines, we believe it would be useful for the legal standard to be more fully informative. We therefore now describe the FAPE standard as requiring schools to provide children with disabilities "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society."

At the same time, the qualifier "substantially" accounts for the fact that the IDEA does not demand "*strict* equality of opportunity or services." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) (emphasis added). In circumstances involving students with "the most significant cognitive disabilities," states have leeway to "adopt alternative academic achievement standards." 20 U.S.C. § 6311(b)(1)(E)(i). Those standards, as elaborated above, still must be "aligned with [ESEA's] challenging State academic content standards," "promote access to the general education curriculum" available to all students, and be aimed at preparing students for "postsecondary education or employment." *Id.*; *see also supra* 26-28. But the IDEA recognizes that it is "appropriate" in this setting to adjust expectations for achievement.

2. The IDEA's provisions that implement the FAPE requirement also dictate the "substantially equal opportunity" standard. In particular, the Act demands that each child's IEP measure annual educational gains to enable her to "make progress in the general education curriculum," 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa), (bb), and, for children aged 16 or older, set measurable goals and provide appropriate services to enable the child to transition to post-secondary education, training, and employment, *see id.* § 1414(d)(1)(A)(i)(VIII); *see also supra* 39-40. The IDEA also requires that children with disabilities be held to the same "challenging academic content standards" and "academic achievement standards" as children without disabilities. 20 U.S.C. § 1412(a)(16)(C)(ii)(I) (incorporating the provisions of the Elementary and Secondary Education Act at 20 U.S.C. § 6311(b)); *see supra* 26-28.

These provisions show not only that the IDEA precludes a just-above-trivial FAPE standard, but that when the statute required schools to provide children with disabilities with a free and appropriate public education, it is focused on something much more. It wanted to ensure that children with disabilities would receive IEPs designed to provide them with substantially equal educational opportunities to those enjoyed by their peers without disabilities.

3. The "substantially equal opportunity" standard also comports with this Court's decision in *Rowley*. That decision characterizes an "appropriate public education" as one that provides "meaningful" educational access to the public schools – that is, education infused with significance, purpose, and value. *See supra* 30-31. And this Court held that the school district there had provided Amy Rowley with a FAPE because it had delivered "*substantial* specialized instruction and related services" that were "reasonably calculated to enable [her] to achieve passing marks and advance from grade to grade." 458 U.S. at 202, 204 (emphasis added). Finally, *Rowley* requires a FAPE to align with the IDEA's objectives and IEP-implementing requirements, and the post-*Rowley* amendments to the IDEA make clear that schools cannot meet those demands by providing children anything less than substantially equal opportunities to succeed. *See supra* 35-40.

B. This standard is eminently workable.

1. While the IDEA's goals are ambitious, they are achievable. Categorized by disability, the largest group of children served by the IDEA – roughly 40% – are those with learning disabilities. U.S. Dep't of

Educ., *37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Act* 36 (2015) ("37th Annual Report").[9] Children with learning disabilities often have a language skill impairment that "may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations." 34 C.F.R. § 300.8(c)(10). But with the right help, they can thrive academically and leave school as "self-determined young people." Michael Wehmeyer & Michelle Schwartz, *Self-Determination and Positive Adult Outcomes*, 63 Exceptional Children 245, 253 (1997). Indeed, research shows that many grow up to become "highly successful adults" who contribute "handsomely to society." Paul J. Gerber, Rick Ginsberg, and Henry B. Reiff, *Identifying Alterable Patterns in Employment Success for Highly Successful Adults with Learning Disabilities*, 25 J. Learning Disabilities 475, 486 (1992).

Take, for example, children with dyslexia. Dyslexia is a language-based disability that can impair reading fluency and comprehension, writing, spelling, and even speech. Absent intervention, the disability can hamper a child's ability to absorb and process information and to progress from grade to grade. But with proper personalized instruction and tools as simple as iPads, children with dyslexia typically achieve at the same levels as others in their classes. *See, e.g.*, Sally E. Shaywitz et al., *The Education of Dyslexic Children from Childhood to*

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[9] http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf.

Young Adulthood, 59 Ann. Rev. Psychology 451 (2008).

Other children served by the IDEA have orthopedic and other health conditions, such as heart conditions, leukemia, and sickle cell anemia. *See* 34 C.F.R. § 300.8(c)(8), (9). With the provision of specialized services and assistive technology, these conditions do not prevent them from participating and thriving in their schools' academic programs. *See Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 888-95 (1984); 37th Annual Report, at 36 (13.8% of children served by the IDEA have "[o]ther health impairments" including various physical disabilities). So, too, for many children with autism, who comprise more than eight percent of children served by the IDEA. *See* 37th Annual Report, *supra*, at 36. Like Drew, children with autism often flourish in school with proper special education services. *See* Cert. Br. of Autism Speaks 7-8, 19-22.

In light of these realities and the IDEA's expressed desire to advance "our national policy in ensuring equality of opportunity," 20 U.S.C. § 1400(c)(1), the "substantially equal opportunity" standard generally requires schools to seek grade-level achievement for children with disabilities (as schools do for children without disabilities) through IEPs reasonably calculated to that end. After all, the IDEA requires children with disabilities to be integrated into the general education curriculum, which, by definition, strives for grade-level achievement wherever possible. *See, e.g.*, 20 U.S.C. § 6311(b)(2)(B)(ii) (challenging academic assessments for children with and without disabilities must assess

whether "the student is performing *at the student's grade level*" (emphasis added)).

2. The Department of Education – whose Office of Special Education Programs Congress has charged with "administering and carrying out" the IDEA, 20 U.S.C. § 1402(a) – agrees. The Department's regulations explain that schools must adapt instruction to ensure "that [a child with a disability] can meet the educational standards" that "apply to *all* children." 34 C.F.R. § 300.39(b)(3) (emphasis added).

In a recent guidance document addressed to state and local education officials regarding the meaning of FAPE, the Department elaborated on this directive. "Research has demonstrated," the Department explained, "that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided." U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015) ("Dear Colleague Letter"), http://1.usa.gov/1MkxyAE. Generally speaking, therefore, "IEP goals must be aligned with grade-level content standards for all children with disabilities." *Id.* This emphasis on grade-level achievement means that children with disabilities must "receive high-quality instruction that will give them the opportunity to meet the State's challenging academic achievement standards and prepare them for college, careers and independence." *Id.* at 4.

3. Finally, the "substantially equal opportunity" standard has the flexibility necessary to be administered effectively on the ground.

a. As we have emphasized, the free appropriate public education required by the IDEA must be "tailored to the unique needs of" children with disabilities through each child's IEP. *Rowley*, 458 U.S. at 181; *see also supra* 24-25. Accordingly, the "substantially equal opportunity" standard does not require school districts to provide identical services to all children, even those who share the same or similar disabilities. The particular personalities, needs, and capabilities of each child determine what sorts of educational and related services are "appropriate."

Similarly, the Department of Education has explained that "there is a very small number of children with the most significant cognitive disabilities" for whom seeking grade-level achievement is unrealistic. Dear Colleague Letter, *supra*, at 5. For these students, performance may be measured against alternative achievement standards, so long as they are "clearly related to grade-level content." *Id.* Although "annual IEP goals for these children [must] reflect high expectations," their academic goals "may be restricted in scope or complexity or take the form of introductory or pre-requisite skills." *Id.*; *see also supra* 27-28.[10]

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[10] The Department of Education's understanding that only "a very small number" of children with disabilities have the most significant cognitive disabilities is fully consistent with Congress's expectations. *See* 20 U.S.C. § 6311(b)(2)(D)(i)(I)

Likewise, when a child who has fallen behind by several grade levels on certain educational goals, it might be unrealistic (and, thus, not statutorily required) for an IEP to seek immediate elevation to grade level with respect to those goals. *See* Dear Colleague Letter, *supra*, at 5-6. This could occur, for instance, if the child's disability created unusual difficulties in one facet of knowledge acquisition. *See id.* (providing example). It would be consistent with the "substantially equal opportunity" standard to take a more measured approach to educational advancement in that type of situation, just as it might for a student without disabilities who has fallen behind significantly. Of course, if children with disabilities begin their education in a school operating under the proper FAPE standard, it is less likely that they will fall behind in the first place.

In sum, precisely because every child's needs are different, and because the IDEA designates parents and educators, working together, to craft each child's IEP, 20 U.S.C. § 1414(d)(1)(B), the "substantially equal opportunity" standard does not usurp the role of educators or parents in tailoring particular special education services to particular situations.

b. In the infrequent situations where FAPE disputes result in lawsuits, *see supra* at 4, the "substantially equal opportunity" formula similarly avoids inviting courts to presume they have more educational expertise than school districts.

(States must ensure that, for each subject-matter assessment, no more than one percent of the total number of students assessed use alternative assessments).

In *Rowley*, this Court explained that the IDEA should not be construed as a license for courts "to substitute their own notions of sound educational policy for those of the school authorities which they review." 458 U.S. at 206. Accordingly, the federal courts assess the adequacy of IEPs under a system of "modified de novo" review, which gives "due weight" to school districts' expertise and administrative findings. *S.H. v. State-Operated Sch. Dist.*, 336 F.3d 260, 270 (3d Cir. 2003) (collecting and agreeing with law of other circuits); *see also* Pet. App. 6a-7a.

The standard of review courts should apply when assessing the adequacy of IEPs is not at issue here. The "substantially equal opportunity" test simply describes the level of education schools must strive to deliver. Once that legal requirement is established, courts can continue to use the modified de novo standard of review that prevails in the lower courts – or whatever other standard is most fitting – to resolve the disputes over whether school districts have discharged their duty to provide a substantially equal opportunity to succeed.

c. Lastly, it bears emphasis that providing a child a FAPE "is not guaranteed to produce any particular outcome" for any particular child, S. Rep. No. 94-168, at 11 (1975), any more (or any less) than educational outcomes can be guaranteed for children without disabilities. *See Rowley*, 458 U.S. at 210-11 (Blackmun, J., concurring in the judgment). Rather, providing a FAPE is about the public schools' obligation to implement the IDEA's "goal of providing full educational *opportunity* to all children with disabilities." 20 U.S.C. § 1412(a)(2) (emphasis added).

While the FAPE requirement does not promise particular results, it does require an IEP that is reasonably calculated to provide a child with a disability a substantially equal opportunity to succeed. And when the schools aim high, they are much more likely to land high, which is what Congress sought when it conditioned funding for special education on the states' undertaking an obligation to provide children with disabilities a free appropriate public education.

CONCLUSION

The judgment of the court of appeals should be reversed. Because the School District provided educational instruction and related services that barely satisfied a "merely more than de minimis" standard, *see* Pet. App. 23a, it follows that the School District failed to provide petitioner a FAPE. At a minimum, the case should be remanded for application of the correct FAPE standard.

Respectfully submitted,

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