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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), does not condone schools' providing children with disabilities a "merely more than de minimis" educational benefit. That standard appears nowhere in this Court's opinion. And for all of the School District's bluster regarding the Spending Clause, the School District ultimately uses the same interpretive method to construe the IDEA that petitioner uses. Like petitioner, the School District starts with the text, then consults the statute's purposes and structure, neither of which the School District asserts is unclear. Finally, the School District evaluates the administrability of competing rules. In the end, therefore, the only real dispute is whose position embodies a correct reading of the Act.

Petitioner's does. The words "appropriate public education" in the FAPE requirement signal a transmission of academic proficiency and valuable skills for participating in a complex society. That meaning is crystallized in the IDEA's objectives and FAPE-implementing provisions—most notably, the rules governing IEPs and requiring testing and accountability keyed to grade-level curriculum. Taken together, these objectives and rules dictate that schools must afford children with disabilities substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society.

The School District concedes that these same statutory provisions inform the FAPE requirement, relying on them to show that schools typically will seek educational success for children with disabilities. But the School District tries to strip

these FAPE-implementing rules of their private enforceability by labeling them as mere "procedural" directives. They are not. They are the core of the substantive obligation the Act imposes, the bridge to the meaningful public education guaranteed to every child with a disability. Accordingly, the IDEA's FAPE-implementing provisions cannot be satisfied by simply "think[ing] about" giving a child instruction and skills to succeed in the general curriculum and outside the classroom (Resp. Br. 40), but then adopting an IEP designed to deliver far less: only a barely-more-than-trivial educational benefit.

The "substantially equal opportunity" standard also is more workable than the School District's test. It gives due weight to schools' educational expertise and measures their actions against readily available benchmarks in each school's general curriculum. As the School District and its amici implicitly acknowledge, the "substantially equal opportunity" standard also captures what IEP teams generally are already doing on the ground. By contrast, the School District's "merely more than de minimis" standard is untethered to any objective criteria. The meager expectations it transmits are at odds with what educators themselves say they understand their roles to be. It therefore makes no sense to anchor IEP meetings across the country (or resolution of any dispute that ensues) to that standard.

ARGUMENT

I. *Rowley* does not support a "merely more than de minimis" benefit standard.

Echoing its position at the certiorari stage, the School District begins by asserting that "*Rowley* held that the IDEA does not impose *any* substantive

standard prescribing the level of education to be accorded children with disabilities." Resp. Br. 14 (internal quotation marks and citation omitted; emphasis added); *accord* Supp. BIO 9. But the School District quickly abandons that position, conceding on the next page that *Rowley* held that the IDEA "requires States to offer services sufficient to permit a child to benefit from special education." Resp. Br. 15 (internal quotation marks and citation omitted; emphasis removed).

To define that level of "benefit," the School District assembles various quotations from *Rowley* to contend that the IDEA imposes a "some benefit" standard—which the School District defines as a requirement "to provide a benefit that is 'more than de minimis.'" Resp. Br. 15 38 (quoting Pet. App. 16a). This argument misreads *Rowley*, particularly in light of the IDEA's 1997 and 2004 amendments.

1. *Rowley* nowhere says school districts satisfy the IDEA so long as they provide a "merely more than de minimis" educational benefit. And only once does it use the phrase "some educational benefit." *See* 458 U.S. at 200. That single turn of phrase does not support the School District's position, let alone establish a "definitive[]" construction of the IDEA. Resp. Br. 13.

The "some educational benefit" phrase appears at the beginning of a subsection of *Rowley* confirming that the FAPE requirement imposes more than just a set of procedures. "Implicit in the congressional purpose of providing access to a 'free appropriate public education,'" this Court explained, "is the requirement that the education to which access is provided be sufficient to confer some educational

benefit upon the handicapped child." *Rowley*, 458 U.S. at 200. But, as the Court immediately made clear, this reference to "some benefit" was not meant to settle the standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." *Id.* at 202. Amy Rowley was receiving an education allowing her to "perform[] above average in the regular classrooms of a public school system," so the Court "confin[ed] [its] analysis to that situation" and held she had received a FAPE. *Id.*; *see also id.* ("We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.").

Viewed in context, therefore, *Rowley*'s reference to "some educational benefit" simply declares that a child with a disability is entitled to an education from which the child will profit. It does not establish a "merely more than de minimis" benefit as the Act's substantive command. To the contrary, *Rowley* explains that whatever exactly a FAPE might require, it "should be reasonably calculated to enable" children such as Amy Rowley, who are being educated in regular classrooms, "to achieve passing marks and advance from grade to grade." 458 U.S. at 204. Providing a "merely more than de minimis" educational benefit will seldom enable a child to achieve grade-level competency and thus pass from grade to grade. Petr. Br. 30-31; U.S. Br. 34.

Nor can the School District's standard be squared with *Rowley*'s insistence that the IDEA requires "access to public education" to be "meaningful." 458 U.S. at 192. In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court explained—in

language almost identical to *Rowley*—that the Rehabilitation Act of 1973 requires states to provide "meaningful access to the benefit" involved. *Id.* at 301. The federal government and lower courts have understood this explanation to require states to "afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement" as persons without disabilities. 45 C.F.R. § 84.4(b)(2); *see Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (surveying case law and agreeing with other circuits adopting that standard). Neither this Court nor any other has suggested that "meaningful access" in that context allows states to provide "merely more than de minimis" benefits. The same should be true here.

The School District's only response is that the IDEA's "meaningful access" demand applies solely to providing "related services"—such as interpretive services designed to enable a child to spend more time in the mainstream classroom—not to instruction itself. Resp. Br. 21-22. But, as *Rowley* makes clear, the "meaningful access" requirement applies generally to the Act's "substantive educational standard" for FAPE. 458 U.S. at 192; *see also* 34 C.F.R. § 300.39(b)(3)(ii) (schools must "ensure *access* of the child *to the general curriculum*, so that the child can meet the educational standards . . . that apply to all children") (emphasis added). And the School District does not, and cannot, claim a just-above-trivial benefit provides a substantively "meaningful" education.

2. The 1997 and 2004 amendments to the IDEA cement this analysis. The *Rowley* opinion—grounding

itself in the flexible statutory term "appropriate"—makes clear that educational programs for children with disabilities "should be formulated in accordance with the requirements of the Act" and consistent with "the goal[s] of the Act." *Rowley*, 458 U.S. at 198, 203-04 (quotation marks and citation omitted). The Act's FAPE-implementing requirements and overall goals, as augmented by the 1997 and 2004 amendments, dictate that aiming for a "merely more than de minimis" educational benefit is impermissible. *See* Petr. Br. 36-40; Br. of Nat'l Ass'n of State Directors of Special Educ. 6-12; Br. of Nat'l Disability Rights Network 21-35. The Act, in its current form, requires schools to provide children with disabilities with opportunities substantially equal to those they provide to all other students so that they can achieve academic success, attain self-sufficiency, and contribute to society. Petr. Br. 40-43.

Faced with the 1997 and 2004 amendments' undeniably "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) (quotation marks and citation omitted), the School District is tellingly circumspect. It ignores *Rowley*'s directive to construe the substantive FAPE requirement in harmony with the IDEA's implementing provisions and objectives. And the School District implicitly accepts this Court's case law instructing that when Congress uses the term "appropriate," the term draws meaning from the legislation's purposes and provisions as a whole. Resp. Br. 32 (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983)). The School District also implicitly accepts that the meaning of "appropriate" evolves as

other requirements of the statute evolve. Resp. Br. 33 (citing *West v. Gibson*, 527 U.S. 212 (1999)); *see also* Petr. Br. 19, 35-36 (discussing *Ruckelshaus* and *West*).

To be sure, the School District contends that, even after the 1997 and 2004 amendments, the IDEA's implementing provisions and objectives do not imbue the FAPE requirement with the meaning petitioner ascribes to them. Resp. Br. 23, 33. Petitioner will respond to that argument momentarily. But for now, it suffices to pin down that insofar as the 1997 and 2004 amendments impose substantive requirements at odds with a "merely more than de minimis" standard, *Rowley* cannot be read to require that test here.

Congress's amendments to the IDEA similarly answer the School District's argument that the IDEA cannot impose the "substantially equal opportunity" test because *Rowley* "reject[ed] any standard based on equality of opportunity," Resp. Br. 18. *Rowley* held merely that the Act does not require "*strict* equality of opportunity." 458 U.S. at 198 (emphasis added); *see also* Petr. Br. 42. In any event, following the enactment of the Americans with Disabilities Act of 1990, the plain language of the Act now declares a "national policy of *ensuring equality of opportunity*, full participation, independent living, and economic self-sufficiency for individuals with disabilities" that requires "[i]mproving educational results for children with disabilities." Pub. L. No. 105-17, § 601(c)(1), (3), 111 Stat. 37, 38-39 (1997) (now codified at 20 U.S.C. § 1400(c)(1)) (emphasis added); *see also* Br. of Nat'l Disability Rights Network 15-16 (elaborating linkage between the ADA and the IDEA's amendments). And

the 1997 and 2004 amendments—unlike the original version of the IDEA—require schools to strive to educate, test, and prepare children with disabilities for post-secondary-school living consistent with the opportunities provided to their peers without disabilities. Petr. Br. 36-40. These amendments demonstrate that a "free appropriate public education" should be calibrated to provide substantially equal opportunities, not a modicum of educational "benefit."

II. The Spending Clause does not support a "merely more than de minimis" standard.

1. The School District criticizes petitioner for omitting explicit reference to the Spending Clause, and it infuses its brief with the rhetoric of the clear-notice rule. But the School District analyzes the IDEA's FAPE requirement using the same method as petitioner. The School District starts with the statutory definition. *Compare* Resp. Br. 28-29, 37-38, *with* Petr. Br. 16-19, 41. It then turns to "the statute's structure and purpose"—just as petitioner does—and claims its substantive standard "flows from" those sources. *Compare* Resp. Br. 37-51, *with* Petr. Br. 19-29, 40-43. Indeed, when push comes to shove, the School District acknowledges that the Act's provisions for crafting IEPs directly and explicitly inform the FAPE requirement—again, just as petitioner maintains. *Compare* Resp. Br. 46-47, *with* Petr. Br. 21-24.

This agreement on methodology is as it should be. As noted above, *Rowley* looked to all of these sources, as well as the Act's legislative history, and indicated they all provided adequate notice to states receiving IDEA funds. *See supra* at 6; *see also*

Rowley, 458 U.S. at 204 n.26 (disregarding only "isolated statements in the legislative history" that contravened the IDEA's "language and the balance of its legislative history"). Subsequent IDEA cases have done so as well. *See, e.g.*, *Forest Grove*, 557 U.S. at 244-46 (rejecting school district's reading of IDEA because it was "at odds with . . . [t]he express purpose of the Act" and its implementing provisions).

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), on which the School District relies (Resp. Br. 35), conducted the same sort of analysis. *Pennhurst* concerned whether a federal statute imposed a legally enforceable obligation to provide appropriate treatment to individuals with developmental disabilities. The Court held that the statute did "no more than express a congressional *preference* for certain kinds of treatment." 451 U.S. at 19 (emphasis added). But the Court reached that conclusion—just as it has in other Spending Clause cases—by consulting the "language and structure," history, and "purposes of the Act." *See id.* at 18. And here, the IDEA indisputably imposes a legally enforceable obligation to provide a FAPE; the question is simply how the Act's language, structure, history, and purposes define that substantive obligation.[1]

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[1] Because the statutory analysis in this case is the same regardless of whether the Spending Clause applies, this Court need not decide whether the IDEA rests independently on Congress' power to legislate under "§ 5 of the Fourteenth Amendment." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305 (2006) (Ginsburg, J., concurring in part and concurring in the judgment). A strong argument exists that it

2. That leaves the School District's contention that the Spending Clause can require no more than a "merely more than de minimis" educational benefit because the higher standards advanced by petitioner, the United States, and some amici use different language from one another. Resp. Br. 27. This is like arguing that the various formulations this Court has used over the years to describe the "probable cause" standard, *see Ornelas v. United States*, 517 U.S. 690, 695-96 (1996), tells magistrates nothing more than that they may not issue warrants based on trifling evidence of wrongdoing. In other words, the School District's argument is nonsense.

Petitioner and the United States agree that a school district must offer far more than a benefit that is just above trivial. And they agree that a school must aim for grade-level competence for students who are in the regular classroom. They further agree that schools must offer a comparably rigorous program for students who are either too far behind to benefit fully from grade-level instruction without instruction on prerequisite skills or have such serious disabilities that an alternative benchmark is required. *See* Petr. Br. 43-48; U.S. Br. 23-27.

Variations in the precise terminology necessary to capture these fundamental areas of agreement do not permit this Court to ratchet the IDEA's substantive mandate all the way down to a "merely more than de minimis" standard. "In accepting IDEA

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does. *See id.*; *Rowley*, 458 U.S. at 198 (noting that the IDEA is designed to enforce the states' obligation "to provide equal protection of the laws") (quotation marks and citation omitted).

funding, States expressly agree to provide a [free appropriate public education] to all children with disabilities." *Forest Grove*, 557 U.S. at 246. And the IDEA's text, statutory objectives, and FAPE-implementing provisions inform what is and is not "appropriate" under the Act. The only real issue is whether petitioner's articulation (or the Government's substantially similar articulation) of what those sources dictate is correct, or whether the School District's alternative interpretation of those sources is accurate. We now turn to that issue.

III. The IDEA's text, purposes, and implementing provisions require much more than a just-above-trivial educational benefit.

Try as it might, the School District is unable to ground its "merely more than de minimis" standard in the text, purposes, or structure of the IDEA.

1. *Text.* The School District claims that the IDEA requires nothing more than a "merely more than de minimis" educational benefit because the Act mandates that children with disabilities receive "special education and related services," 20 U.S.C. § 1401(9), and "related services" are defined as things "required to assist a child with a disability *to benefit* from special education," *id.* § 1401(26) (quoted in part at Resp. Br. 37 (emphasis added by School District)).

The School District's reasoning is misguided. The IDEA's "related services" definition is distinct from the overall statutory requirement that schools provide a certain "level of education." *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999). And even in that definition, "benefit" is used as a verb, not a noun. "Related services" are merely

various *means*—things like "transportation," hearing aids, and iPads, 20 U.S.C. § 1401(26)—allowing children to benefit from the education the IDEA requires, not the education itself.

This brings us back to the original requirement to provide "an appropriate . . . education . . . in conformity with [an IEP]." 20 U.S.C. § 1401(9)(C)-(D). The word "education" signals not some minor benefit, but a comprehensive inculcation of skills necessary to prepare children to live in, and contribute to, society. Petr. Br. 17-19. The words "appropriate" and "in conformity with [an IEP]" direct us to "other sources" to complete the definition of the Act's substantive requirement, *Ruckelshaus*, 463 U.S. at 683—specifically, the purposes of the IDEA and its FAPE-implementing requirements.

2. *Purpose.* The School District acknowledges there is "no doubt that Congress wanted to improve educational results and replace low expectations with high ones." Resp. Br. 48. Beyond that, the School District has little to say about the IDEA's goal of ensuring all children receive an "effective[]" education, 20 U.S.C. § 1400(d)(4), and Congress's related finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities," *id.* § 1400(c)(1); *see also id.* § 1400(d)(1); Petr. Br. 20 (citing cases explaining that statutory purposes and findings imbue an operative term such as "appropriate" with meaning).

This is not surprising. No reasonable official charged with educating children could think that a

statute with these objectives allows schools to seek just-above-trivial educational advancement. Indeed, as the School District's amici make clear, no school official does think that. *See, e.g.*, Br. of Nat'l School Boards Ass'n 16-17.

3. *Structure.* The IDEA's FAPE-implementing provisions confirm that the Act requires far more than a just-above-trivial benefit. The School District acknowledges these provisions are "finely reticulated," "exacting," and "systemic." Resp. Br. 38-39; *see also* Br. of AASA, Sch. Superintendents Ass'n 15 (these provisions "make[] clear . . . that school districts *must* aim high"). In other words, there is no fair-notice problem here. But the School District says the provisions are irrelevant to the "substantive standard" the IDEA imposes because they are purely "procedural." Resp. Br. 38-39. So long as the team crafting an IEP "think[s] about," "focus[es] on," or "keep[s] in mind" the provisions governing IEPs, the school necessarily provides a FAPE regardless of what the school actually tries to teach the child in the classroom. *Id.* at 40; *see also id.* at 41 (these provisions "compel[]" only "informed deliberation").

Not so. The FAPE-implementing provisions clearly impose substantive obligations. To begin, the Act says that a FAPE must be "provided in conformity with the individualized education program required under section 1414(d)." 20 U.S.C. § 1401(9)(D). The IEP program, in turn, requires an IEP to "include[]":

- "measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum";

- a summary of the "special education and related services[,] . . . based on peer-reviewed research to the extent practicable," that will enable the child "to be involved in and make progress in the general education curriculum";
- "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments" applicable to all students (or, in the case of a child with a serious disability, an appropriate "alternate" assessment);
- beginning "when the child is 16," "postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills."

Id. § 1414(d)(1)(A)(i)(II), (IV), (VI), (VIII). Finally, "[t]he local educational agency shall ensure" that the IEP is reviewed and "revise[d]" "periodically," "as appropriate to address any lack of expected progress toward the annual goals and in the general education curriculum." *Id.* § 1414(d)(4)(A).

None of these requirements can be satisfied, as the School District would have it, simply by an IEP team's "think[ing] about" Section 1414(d)'s requirements. The IDEA and its FAPE-implementing provisions compel schools to put substantive goals directly in IEPs—goals keyed to the general curriculum. *See* U.S. Br. 18-19, 31-32. The statute then requires schools to provide education "in conformity" with those goals, 20 U.S.C. § 1401(9)(D), and to revise IEPs as necessary to stay on track. If a

school fails to do so, a child can obtain relief on the "substantive ground[]" that the school has denied him a FAPE, or otherwise "caused a deprivation of educational benefits" the IDEA guarantees. 20 U.S.C. § 1415(f)(3)(E)(i), (ii)(I), (ii)(III).

When pressed, the School District and its amici ultimately admit as much. Under a process-only view of the IEP requirements, it would be perfectly fine for an IEP team to provide specialized services to a child for only certain subjects, so long as the IEP team thought seriously about providing the child such services for every subject. It likewise would be acceptable, under a process-only view, for a school to refuse a parent's request to provide a readily available, peer-reviewed alternative to an outdated service currently giving a child only a minimal benefit, so long as the IEP team discussed the existence of the IDEA's preference for services based on peer-reviewed research. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Yet, confronted with scenarios like these, the School District says that "the statute plainly prohibit[s]" such outcomes. Resp. Br. 46-47. Its amici agree. *See, e.g.*, Br. of AASA, Sch. Superintendents Ass'n 19 ("To maintain conformity with the IDEA and ESEA, then, educators simply cannot . . . aim to barely clear the bar by seeking minimal benefit and limited progress for students with disabilities.").

If the School District and its amici are right about that (and petitioner and the United States agree that they are), then the School District cannot also be right that the FAPE-implementing provisions do nothing more than "set[] up a process of reasoned decisionmaking," Resp. Br. 42. These "finely

reticulated" provisions inform the IDEA's "substantive" obligation to provide "sufficient educational benefits to satisfy the requirements of the Act." *Rowley*, 458 U.S. at 202, 205-06; *see also* Petr. Br. 33 (citing other case law).

IV. The "substantially equal opportunity" standard best meets the administrative needs of the Act's stakeholders.

1. The School District attacks the workability of the "substantially equal opportunity" standard. Resp. Br. 51-54, 58-59. But that standard outperforms the School District's standard on every metric.

a. The "substantially equal opportunity" standard is plainly less "vague and amorphous," Resp. Br. 51 (quotation marks omitted), than the School District's "some benefit" standard. All agree that the most important decision makers here are the IEP teams that craft individual IEPs. The "substantially equal opportunity" standard gives those teams a set of readily identifiable benchmarks. As the IDEA directs, the standard tells IEP teams that they should set goals aimed at achieving the educational targets in the school's "general education curriculum"—the reference point that establishes what all children are expected to learn and be able to do at each grade level. 20 U.S.C. § 1414(d)(1)(A)(i)(II); *see also id.* § 1414(d)(1)(B)(ii) (mandating, for this reason, that the IEP team include at least one "regular education teacher"). In *Rowley*'s words, the school must aim, to the extent practicable, to provide a child with a disability with an education "reasonably calculated to enable the child to achieve

passing marks" in that curriculum "and advance from grade to grade." 458 U.S. at 204.[2]

In the "relatively small number" of cases that generate litigation, U.S. Br. 28; *see also* Petr. Br. 4, courts easily can follow these guideposts as well. Courts have ample experience administering tests very much like the "substantially equal opportunity" standard. As noted above, the federal government and federal appellate courts have concluded that the Rehabilitation Act requires states to abide by a test along these lines. *See supra* at 4-5. Federal courts of appeals also have applied a similar test in cases under Title III of the ADA, which requires states to ensure that people with disabilities have "full and equal enjoyment" of public accommodations, including schools. 42 U.S.C. § 12182(a). *See, e.g.*, *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012).

By contrast, it is hard to think of a more "vague and amorphous" standard than the one the School

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[2] The School District claims confusion over where to look to find the "general education curriculum" that serves as the point of comparison here. Resp. Br. 53. But the School District's own "Guaranteed and Viable Curriculum" is posted online and describes in great detail "what students need to know and be able to do." Douglas County Sch. Dist., *GVC*, https://www.dcsdk12.org/world-class-education/gvcs##. This is typical. A school's general education curriculum is usually developed at the district level and must comport with "the standards of the State educational agency." 20 U.S.C. § 1401(9)(B) (FAPE definition); *see also id.* § 1412(a)(1), (a)(11) (requiring local practices for educating children with disabilities to satisfy statewide standards).

District promotes to encapsulate the "merely more than de minimis" test: "some benefit." That standard is not tied to any guidepost, and the word "some" is about as nebulous as any in the English language. *See* Petr. Br. 31. The only way the "some benefit" standard could provide any real guidance would be if it meant simply that IEPs need not try to achieve anything at all because the IDEA is really just a procedural law. But, after initially gesturing in that direction, *see* Resp. Br. 14, the School District assiduously denies this is its position, *see id.* 46-47. It is at pains to the last page of its brief to emphasize that courts must "tailor their analysis to the individualized circumstances of each case" and "discern the difference between *some* benefit and a benefit that is merely *de minimis*," *id.* 59. How IEP teams and courts can reliably do that, with no substantive touchstones to guide them, is left unsaid.

b. The "substantially equal opportunity" standard also does a better job than the School District's standard of keeping courts from "substitut[ing] their own notions of sound educational policy for those of the school authorities," *Rowley*, 458 U.S. at 206. Because the "substantially equal opportunity" standard measures a school's efforts to educate a child with a disability against the methodologies and goals the school district has already set respecting other children, courts do not have to decide what pedagogies or educational objectives are suitable or proper. Nor do courts have to determine the best way to pursue those pedagogies and objectives with respect to a particular child with a disability. *See* Petr. Br. 49 (noting that the question presented here is distinct from whether courts should defer to school officials' determinations). If litigation

arises, courts need only determine—using traditional tools used to evaluate equality claims—whether the school's actions were "reasonably calculated," *Rowley*, 458 U.S. at 204, to provide opportunities to the child with a disability equivalent to those it affords to other children in the school district.

On the other hand, the School District's "some benefit" test offers judges no guidance regarding what educational practices a school should be implementing or what post-secondary goals it should be pursuing. Even peer-reviewed research—which, as noted above, each child's IEP must be "based on" wherever practicable, 20 U.S.C. § 1414(d)(1)(A)(i)(IV)—is apparently not a necessary compass. *See supra* at 13-15. Faced with such an undefined playing field, courts would have no choice but to decide for themselves what educational practices and objectives *they* think are needed to provide a "more than de minimis" educational "benefit."

c. The "substantially equal opportunity" standard, in contrast to the "merely more than de minimis" test, tracks what most schools are already generally doing for students in the real world. *See* Br. of Nat'l Ass'n of State Directors of Special Educ. 6-12; Br. of Former Officials of the U.S. Dep't of Educ. 10-25; Br. of Disability Rights Orgs. & Public Interest Ctrs. 28-38. Even if educational officials do not use petitioner's precise terminology, most of them "are already aiming high." Br. of AASA, Sch. Superintendents Ass'n 4. Moreover, experience has shown that "setting high expectations for students with disabilities . . . , in fact, *works*." Br. of Nat'l Ass'n of State Directors of Special Educ. 11; *see also*

Br. of Nat'l School Boards Ass'n 6-7, 16-17 (special education programs aiming above "a 'more than de minimis' legal standard" have been "successful").

The School District counters that the "merely more than de minimis" standard has been "on the books" in the Tenth Circuit and certain other jurisdictions "for decades." Resp. Br. 58. True enough. But even in those jurisdictions, not one organization or educational official appearing here claims to aim for that meager standard. To the contrary, the National Association of State Directors of Special Education reports that "all" its members providing information have "expressed their belief that a standard more meaningful than just-above-trivial is the norm today." Br. of Nat'l Ass'n of State Directors of Special Educ. 9. The National Association of School Boards likewise reports that "IEP teams are *not* basing their recommendations on the goal of meeting a 'more than *de minimis*' legal standard." Br. of Nat'l School Boards Ass'n 17 (emphasis added).

That educators—even when given the chance—say they decline to aim as low as the School District says the law allows speaks volumes about the School District's test. This Court should not now christen a just-above-trivial standard simply to bail out a school, such as respondent, that plainly fell short of its IDEA obligations. Doing so would only invite more schools to do the same.

2. Although the question presented asks only what the proper standard is, the School District also challenges petitioner to apply the "substantially equal opportunity" standard to the facts of this case. Resp. Br. 54-56. That is a strange demand. The School District does not claim its efforts satisfied

petitioner's standard. Furthermore, this Court is one "of review, not of first view." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). So even if the parties actually disagreed over whether the School District satisfied the "substantially equal opportunity" test, this Court's "ordinary practice" would be to remand so the lower courts could reconsider petitioner's claim "under the proper standard," *id.*

Be that as it may, we briefly explain how the School District fell short of its statutory obligations in dealing with Drew's educational needs. First and foremost, the School District should not have kept trying to educate Drew through instructional practices that obviously were not working. *See* Petr. Br. 8-10. When the academic goals in IEPs stay the same year after year, it is clear that new strategies are needed. In addition, the School District should have conducted a behavioral assessment to identify the sources of the specific behaviors that interfered with Drew's ability to function at school and to help the IEP team select interventions to directly address them. As the Department of Education's commentary to its regulations explains, "a failure to . . . address [behaviors impeding learning] in developing and implementing the child's IEP" constitutes "a denial of FAPE." 34 C.F.R. pt. 300, app. A, § IV, at 115.

Looking forward, the School District should have established academic goals for Drew as close as reasonably possible to the grade-level goals for other students in the school. The School District also should have assessed his aptitude for self-sufficiency and participating in social activities outside of school.

Based on those assessments, the School District should have offered Drew an IEP and educational and related services designed to meet those goals. The School District was not required to adopt any one specific educational practice or behavioral therapy. Educators and other experts can reasonably disagree on specific courses of action. But the IDEA did not permit the School District simply to propose a fifth-grade IEP that "was similar in all material respects to Drew's past IEPs" that had so obviously and woefully failed. Pet. App. 15a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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