Case No.: 15-827

In The Supreme Court of the United States

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

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

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

AMICI CURIAE BRIEF OF AUTISM SPEAKS AND THE PUBLIC INTEREST LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amicus Curiae Autism Speaks is the world's leading autism science and advocacy organization dedicated to increasing awareness and education about autism, funding research into the causes, prevention, treatments and cures, enforcing state and federal rights and protections for individuals with autism and advocating for the needs of individuals with autism and their families. Autism Speaks is deeply familiar with the special education challenges faced by children with autism and their families, and the special teaching approaches proven effective to enable children with autism to learn and to generalize skills across a variety of settings and have the opportunity to lead functional, independent lives.

Amicus Curiae The Public Interest Law Center is a not-for-profit public interest law firm that has successfully advanced the rights of children with disabilities to a quality public education since its founding in 1969. The Law Center's seminal lawsuit, *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*, established the rights of children

[1] Pursuant to Supreme Court Rule 37.6, no party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of *Amici Curiae*'s intention to file this brief more than 10 days before it was due. The parties have consented to the filing of this brief in letters on file with the Clerk's office.

with disabilities to a public education and led to the federal Education for All Handicapped Children Act, the precursor to the Individuals with Disabilities Education Act ("IDEA"). Since then the Law Center has represented clients in hundreds of other important IDEA cases throughout the country, including cases on behalf of children with autism.

This case concerns the IDEA, 20 U.S.C. § 1400 et seq., which provides special education services to approximately 6.4 million school-aged children with disabilities in the United States. *Amici* have a strong interest in having this Court resolve the split in the courts of appeals over the proper educational standard for children with disabilities under the IDEA. *Amici* are concerned that the just-above-trivial educational standard adopted by the Tenth Circuit below, and by other courts of appeals, is not reasonably calculated to meet the educational needs of children with disabilities, and therefore impairs their access to an education and opportunity for independence and self-sufficiency.

SUMMARY OF ARGUMENT

The IDEA requires public schools to provide children with disabilities a "free appropriate public education" ("FAPE"). Instrumental to achieving the IDEA's goal is an "individualized education program" ("IEP"). An IEP is an educational blueprint for each child with disabilities which

includes, *inter alia*, a statement of measurable annual goals and how the child's progress towards those goals will be assessed.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court held that each IEP must be reasonably calculated to confer an educational benefit, but expressly declined to define the appropriate level of educational benefit. Since *Rowley*, the courts of appeals have become badly divided over this issue. Some circuits require a substantial educational benefit (often described as a "meaningful" one) while others (including the Tenth Circuit) require only a just-above-trivial educational benefit. Cert. Pet. at 9-14. For several reasons, review is necessary to resolve the conflict over an issue of paramount importance to children with disabilities, their parents, and their school districts.

First, it is axiomatic that the standard for educational benefits under the IDEA for a child with disabilities should not depend on which federal appellate jurisdiction his school district happens to be located in. Nonetheless, cases indicate that children with autism and other disabilities in jurisdictions that have adopted the just-above-trivial standard have demonstrably worse educational prospects than children in jurisdictions that have adopted the substantial benefit standard. For example, as compared with courts in the substantial benefit jurisdictions, courts in the just-above-trivial jurisdictions are less

receptive to the arguments of parents of a child with autism that the child's IEP should include proven evidence-based interventions such as Applied Behavior Analysis ("ABA"), which has been shown to be effective in improving the learning ability of children with autism.

Second, a uniform national standard for a FAPE will allow for better predictability of litigation outcomes by school districts and parents and thus lead to earlier resolutions of disputes over IEPs. This will reduce the time and money spent on litigation by school districts that could better be spent on special education and allow parents to devote more of their hard-pressed emotional and financial resources to the support of their children with disabilities. A uniform standard will also avoid the current unseemly educational disparity that children in just-above-trivial jurisdictions receive less educational access under the IDEA than children with comparable disabilities in substantial benefit jurisdictions.

Third, the need to resolve the circuit split is especially pressing because of the rapidly expanding scope and nature of disabilities presented by children served under the IDEA. The enrollment in the IDEA of children with autism disorders, for example, has increased twenty-five fold since 1992. And, developments in evidence-based interventions and assistive technologies since *Rowley* can substantially enlarge the access of children with disabilities to a meaningful

education fostering independent, productive lives consistent with society's evolved notions of the rights and capabilities of children with disabilities. Children in circuits that allow IEPs to be calculated to achieve a just-above-trivial standard may not realize the full benefit of these tools. Far from serving as a floor of opportunity, this standard erects a ceiling on their future at tremendous cost to themselves and society.

Finally, resolution of the circuit split is necessary to give meaning to the IDEA amendments enacted since *Rowley* was decided thirty-four years ago. The amendments support the substantial benefit standard rejected by the Tenth Circuit. Among other changes to the IDEA, Congress recognized the need to have high expectations for children with disabilities and the importance of assistive technology. Congress emphasized that IEPs should prepare children with disabilities for further education, employment and independent living, ambitious objectives that were not present in the IDEA when first enacted in 1975. Review is necessary because the just-above-trivial standard is incompatible with those goals.

ARGUMENT

I. The Level of Substantive Educational Benefit Under the IDEA Profoundly Affects Access to Education for Many Children With Disabilities

A. The Tenth Circuit's Adoption of the Just-Above-Trivial Standard Permitted a School District to Leave Unaddressed the Severely Dysfunctional Classroom Behavior of a Child With Autism

This case and others cited below illustrate how the education of a child with disabilities can be dramatically affected by the level of educational benefit sought to be achieved by the child's IEP.

Petitioner Endrew F. ("Drew") was diagnosed with autism at age two. Pet. App. 3a. Autism is a complex and pervasive neuro-developmental disorder.[2] In general, its characteristics are impaired social interactions and communication and "repetitive activities . . ., resistance to environmental change or change in daily routines, and unusual responses to sensory experiences." 2004 IDEA

[2] Autism is one condition in a spectrum of other pervasive developmental disorders, collectively called Autism Spectrum Disorder, or ASD. The fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* adopts this diagnostic terminology, which is used by this brief. *See* Am. Psychiatric Ass'n, *Autism Spectrum Disorder* (2013), http://www.dsm5.org/Documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf.

Regulations, codified at 34 C.F.R. § 300.8(c)(1)(i). In its more severe forms, individuals with autism may exhibit aggressive or self-injurious behaviors. Connie Anderson, *New Research on Children with ASD and Aggression,* Kennedy Krieger Inst. (2011).[3]

Drew's autism posed significant challenges. It affected his "cognitive functioning, language and reading skills, and his social and adaptive abilities." Pet. App. 3a. Drew attended Douglas County, Colorado schools from preschool through the fourth grade, during which he received special education services. *Id.* 3a-4a. After what the Tenth Circuit termed an "especially rocky fourth-grade year" – Drew "hit things, screamed, ran away from school, and twice removed his clothing and [went] to the bathroom on the floor of the classroom" – Drew's parents withdrew him from the school and placed him in a private school that specialized in educating children with autism. *Id.* 4a, 12a.

Drew's special education in the Douglas County schools differed significantly from the private school because the latter provided Drew with ABA, an evidence-based intervention that the most authoritative voices in American pediatrics have found effective for children with autism.[4] *See infra*

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[3] Available at http://www.iancommunity.org/cs/simons_simplex_community/aggression_and_asd.

[4] ABA is "the process of systematically applying interventions based upon the principles of learning theory to improve socially significant behaviors to a meaningful degree, and to

Part III. Indeed, the private school's annual education report for Drew noted his remarkable behavioral progress under ABA and recommended: "[c]ontinued one-to-one support from staff members certified in the use of ABA techniques for managing behavior. *Drew has made great behavioral gains over the past school year* and so his current school support team should continue with supports they have in place." Tenth Circuit Joint Appendix ("CA10 Jt. App.") Vol. IV p. 198 (emphasis added). For example, according to his senior teacher, he made a "huge jump" in "not engag[ing] in target behaviors," in "us[ing] the bathroom," and in overcoming phobias so that "he doesn't scream or run in the other direction." *Id.* Vol. II pp. 133-35. Most critically, Drew was able to "attune to what's being done" in the classroom, "increase his math skills," "complete verbal word problems that are functional," and "interact with his teachers and peers." *Id.* pp. 132-33.

Nonetheless, applying the just-above-trivial standard, the Tenth Circuit rejected the parents' argument that the school district had failed to address Drew's educationally debilitating but clearly remediable behaviors and rejected their request for reimbursement of the private school tuition under 20 U.S.C. § 1412(10)(C)(ii) (providing for reimbursement of private school costs when the school district fails to

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demonstrate that the interventions employed are responsible for the improvement in behavior." Center for Autism and Related Disorders, http://www.centerforautism.com/aba-therapy.aspx.

make a FAPE available in a timely manner). Pet. App. 23a-26a. At the same time, the Tenth Circuit candidly acknowledged that even under the lesser standard this was a "close case." *Id.* 23a. Thus, had the Tenth Circuit applied the substantial benefit standard, Drew's IEP, without ABA, likely would have been found insufficient to afford Drew access to a FAPE.[5]

B. The Level of Substantive Educational Benefit Can Have Dramatic Consequences for the Ability of Children With Disabilities to Access an Education

In a disturbing pattern, other courts in jurisdictions using the just-above-trivial standard have found that children with autism received a FAPE based on low or even ambiguous goals that excluded evidence-based interventions such as ABA. *See, e.g.*, *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1032 (8th Cir. 2000) (finding that

[5] In the Douglas County schools, Drew moved up to subsequent grades each year, but the objectives, measuring criteria, and annual goals contained within each subsequent IEP demonstrate that this "progress" was, at best, just-above-trivial. For example, Drew's IEP for the 2007-08 school year provides for several short-term objectives such as "Drew will make eye contact with peers and teachers with minimal prompting" and "Drew will learn his classmates' names." CA10 Jt. App. Vol. III pp. 147, 158. The following year, Drew "graduated" to the third grade, yet the same short-term objectives remained in his IEP for the 2008-09 school year, underscoring his lack of meaningful progress. *Id.* p. 202. Finally, although dropped from the 2009-10 IEP, Drew's 2010-11 IEP again provided that "Drew will demonstrate knowledge of peers' names . . . ." *Id.* p. 272.

district's IEP for a kindergarten child with autism met the just-above-trivial standard, rather than parents' requested Lovaas (ABA) program under which the student's "verbal skills improved");[6] *Z.F. v. South Harrison Cmty. Sch. Dist.*, No. 404CV0073DFHWGH, 2005 WL 2373729, *8, **10-11 (S.D. Ind. Sept. 1, 2005) (applying the just-above-trivial standard to uphold portion of an IEP that failed to list any academic goals and that would "eliminate the district's support for [the child's] at-home ABA instruction, [and] sharply curtail [his] access to ABA teaching methods in the classroom setting" despite the ABA instruction having been "appropriate and effective."); *see also*, *K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 679 F. Supp. 2d 1046, 1054 (N.D. Cal. 2009) (under just-above-trivial standard, upholding admin-

[6] "Lovaas" refers to the ABA intervention program developed at UCLA under the direction of Dr. O. Ivar Lovaas. http://www.lovaas.com. In 1987, Dr. Lovaas published a landmark research study showing 90% of subject children with autism substantially improved when utilizing ABA, compared to the control group, and close to half attained a normal IQ and tested within the normal range on adaptive and social skills. Ole Ivar Lovaas, *Behavioral treatment and normal educational and intellectual functioning in young autistic children*, 55 J. CONSULTING & CLINICAL PSYCHOLOGY 1, 6 (1987). A 1993 study showed that these same children had maintained their skills into early adolescence and could succeed in life without costly special education and residential services. John Jay McEachin, et al., *Long-term outcome for children with autism who received early intensive behavioral treatment*, 97 AM. J. MENTAL RETARDATION 4, 359-372 (1993).

istrative law judge's determination that child making slow and incomplete progress on district's IEP goals was not capable of making any further progress, and thus had received a FAPE, despite expert testimony that ABA intervention would allow for "a better potential for progress").

By contrast, in jurisdictions that apply a substantial benefit standard, a student with autism has materially better prospects for receiving interventions that can be vital to his access to an education. *See, e.g.*, *New Milford Bd. of Educ. v. C.R.*, 431 Fed. Appx. 157, 160 (3d Cir. 2011) (holding that the district's IEP did not meet the substantial benefit standard due to its failure to provide an after-school ABA program for a student with autism whose "behaviors were not only detrimental to his home life, but also interfered with his learning"); *Blake C. ex rel. Tina F. v. Dep't of Educ., Haw.*, 593 F. Supp. 2d 1199, 1207-13 (D. Haw. 2009) (reversing hearing officer's finding that the district's IEP, under which the student made minimal progress, satisfied the just-above-trivial standard, and instead finding that under the substantial benefit standard, the parents were entitled to reimbursement for private placement at Pacific Autism Center, a school dedicated to research-based services using ABA for special needs children with autism);[7] *Woods v. Northport Pub. Sch.*, 487 Fed. Appx. 968, 975, 978 (6th Cir. 2012) (holding that district's IEP did not

[7] *See* https://www.autismspeaks.org/resource/pacific-autism-center.

meet the meaningful benefit standard because, although the student with autism made "some progress during his second-grade year[,]" it was not "*meaningful* in light of [his] potential," and ordered 768 hours of one-to-one compensatory education with a tutor qualified to teach children with autism) (emphasis in original); *see also*, *T.H. v. Bd. of Educ. of Palatin Cmty. Consol. Sch. Dist. 15*, 55 F. Supp. 2d 830, 843 (N.D. Ill. 1999) (before Seventh Circuit adopted lesser standard, court held under the substantial benefit standard that school's IEP did not provide opportunity for a "meaningful access to education" and ordered reimbursement of parent's 38-hour ABA/DTT program).[8]

This disparity in educational access, however, is not limited to children with autism. Children with a wide range of disabilities continue to fall further behind their peers as a result of the just-above-trivial benefit standard, which lowers the school district's obligation to, and expectations for, such children. *See*, *e.g.*, *K.E. ex rel. K.E. v. Independent School Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011) (upholding under just-above-trivial standard the district court's finding that the IEP for a child with bipolar disorder and fetal alcohol syndrome was sufficient despite acknowledging

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[8] DTT, or discrete trial training, is a style of ABA teaching that "uses a series of trials to teach each step of a desired behavior or response." Centers for Disease Control and Prevention ("CDC"), *Autism Spectrum Disorder (ASD) Treatment*, http://www.cdc.gov/ncbddd/autism/treatment.html

that her test results "do not demonstrate the level of growth that is typical for children of her grade level"; dissent, applying the "meaningful benefit" standard, would have reversed because child's academic progress in the relevant period was "trivial"); *J.L. v. Mercer Island Sch. Dist.*, No. C06-494MJP, 2010 WL 3947373, at *1, *8 (W.D. Wash. Oct. 6, 2010) (on remand from Ninth Circuit to apply the just-above-trivial standard, district court upheld IEP for child with learning disabilities even though the district court had previously rejected it under the substantial benefit standard because the IEP had remained "essentially unchanged" from the year before, under it the student continued to "fall[] further behind her classmates,"[9] and by contrast now was making "remarkable progress" at private placement).

In comparison, under the substantial benefit standard, school districts have higher expectations and accordingly provide more support for children with various disabilities. *See*, *e.g.*, *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 247 (3d Cir. 1999) (employing substantial benefit standard to reverse district court decision that had used the just-above-trivial standard to uphold school's IEP for a child with a learning disability in reading and writing; upon remand to apply the higher standard, the district court concluded that the school district

[9] *J.L. v. Mercer Island Sch. Dist.*, No. C06-494P, 2006 WL 3628033, at *1 (W.D. Wash. Dec. 8, 2006).

was not providing a FAPE);[10] *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 172, 184-85 (3d. Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (holding that although the district's consultative physical therapy to "a child with severe mental and physical impairments" conferred some benefit in that less regression might occur, under the heightened substantial benefit standard, such benefit may not be sufficient, especially in light of the child's dramatic improvement under direct physical therapy); *Day v. Radnor Tp. Sch. Dist.*, Civ. A. No. 92-3764, 1993 WL 34761 at *1, *3 (E.D. Penn. Feb. 8, 1993) *and* 1993 WL 95506 at *2 (Mar. 31, 1993) (stating that, although the parties did not dispute that a "severely retarded and multiply handicapped" child would make some progress at day school, under the substantial benefit standard the child was entitled to attend a residential school where she had made "significant progress").

The pattern in these cases indicates that the conflict among the courts of appeals over the substantive level of educational benefit has added a factor – the federal appellate jurisdiction where the child goes to school – that should have no place in

[10] Lester Aron, Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Education After Rowley?, 39 SUFFOLK U. L. REV. 1, 9, n.61 (2005) (citing unpublished decision: *Ridgewood Bd. of Educ. v. N.E. ex rel M.E.,* No. 97-02039 (D.N.J. Apr. 17, 2000)).

evaluating and meeting the needs of children with disabilities under the IDEA.[11]

II. Children With Disabilities, Their Parents and School Districts Will Benefit From a Clearly Defined Level of Educational Benefit Under the IDEA

The resolution of the appropriate standard for a FAPE is important to countless numbers of children with disabilities, their parents, and their educators. A uniform national standard will afford parents and school districts better predictability of litigation outcomes, which will allow them to reach an early consensus on the IEP for a child with disabilities. In turn, this will reduce the time and money spent on litigation by school districts that could better be spent on the education of children with disabilities. *See generally* Perry A. Zirkel &

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[11] A majority of children with disabilities served by the IDEA are disadvantaged because they go to school in federal appellate jurisdictions that have not adopted the substantial benefit standard. Thus, only about 19% of children with disabilities are in jurisdictions that apply the substantial benefit standard compared with approximately 40% in jurisdictions that apply the just-above-trivial standard. The remaining children are in jurisdictions that appear to apply the just-above-trivial standard or are internally conflicted or have not endorsed a specific level of review. *Compare* U.S. Dep't of Education, Office of Special Education and Rehabilitative Services, *37th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, 223 (Dec. 2015) (state by state table), http://www2.ed.gov/about/reports/annual/osep/2015/parts-b-c/37th-arc-for-idea.pdf *with* Cert. Pet. at 9-14.

James Newcomer, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999) (finding a marked increase in litigation from 1975 to 1995); Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. LAW REP. 1 (2011) (finding a steady, rather dramatic increase from 1970s through 2010).

For parents of children with autism, as well as other disabilities, predictability of litigation outcomes could avoid the stress of a lawsuit in their already overburdened lives. *See* Jane Gross, *For Families of Autistic, the Fight for Ordinary*, N.Y. TIMES, Oct. 22, 2004, at A1 (raising children with autism is "a relentless, labor-intensive and harrowing task, overwhelmingly performed by mothers, that tests the strength of marriages, the resilience of siblings and the endurance of the women themselves, autism educators and medical professionals say"). *See generally* Laura A. Schieve, et al., *The Relationship Between Autism and Parenting Stress*, 119 PEDIATRICS S1, S114, S115, S121 (2007).

Finally, a uniform standard will serve those parents without other educational prospects for their child and without the resources to litigate, and will at least mitigate, if not eliminate, the undesirable jurisdiction-dependent nature of an IDEA education.[12] At the same time, it will end the

[12] One study found that almost 25% of children with disabilities are living in poverty, compared with 16% of children

unseemly conflict among the courts of appeals in an area of supreme importance to the nation and its children with disabilities.

III. Review Is Warranted Given the Dramatic Increase In the Diagnoses of Children With Autism and Other Disabilities, and Developments Post-*Rowley* of Effective Classroom Interventions and Assistive Technology

As demonstrated by the IDEA case law, the just-above-trivial standard lowers educational expectations for the ever increasing number of children with autism disorders and other disabilities served by the IDEA. A standard that lowers expectations is especially undesirable because, since *Rowley*, new interventions and remarkable assistive technologies have dramatically expanded the ability of these children to access an education.

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in the general population. *See* Mary Wagner, et al., Special Education Elementary Longitudinal Study: The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households, at 28 (2002), http://files.eric.ed.gov/fulltext/ED475794.pdf. While this case involves a claim for reimbursement for tuition at a private school, the standard for judging whether Drew received a FAPE applies to a challenge to an IEP by, for example, impoverished parents of a child who remains in the public school. See generally *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009).

A. The Increase in the Diagnosis of Autism Spectrum Disorders and Other Disabilities

Overall, the number of children with disabilities served by the IDEA has grown rapidly. In 1976-77, the IDEA served 3.69 million children with disabilities. By 2012-13, that number was more than 6.4 million. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics (2014) ("NCES Statistics").[13] Within that population, the number of children with ASD has grown even more rapidly.[14]

Since 2000, the estimated total number of American children diagnosed with ASD has increased from one in every 150 children in 2002 to one in every 68 in 2010, a 123% increase over just eight years. Centers for Disease Control and Prevention ("CDC"), *Prevalence of Autism Spectrum Disorder Among Children Aged 8 Years — Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2010*, 63 MORBIDITY & MORTALITY WKLY. REP. 2, 8 (March 28, 2014). For boys, the number is as high as 1 in every 42. *Id.*[15]

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[13] Available at http://nces.ed.gov/programs/digest/d14/tables/dt14_204.30.asp.

[14] Autism was added to the IDEA's list of covered disabilities in 1990. 20 U.S.C. § 1401.

[15] The estimates are based on "information collected from the health and special education (if available) records of children who were 8 years old and lived in areas of Alabama, Arizona, Arkansas, Colorado, Georgia, Maryland, Missouri, New

Correspondingly, the number of children receiving special education services for ASD under the IDEA has risen steeply. In 1992-93, shortly after the Department of Education began collecting statistics, approximately 20,000 children were classified as autistic under the IDEA. *Special Education: Children With Autism*, U.S. Government Accountability Office (Jan. 2005) at 17.[16] By 2002-03, that number had risen to 137,000 children. NCES Statistics, *supra* at 12 (citing 2002-03 statistics). By 2012-13, the number had risen to 498,000 children – an almost twenty-five fold increase since 1992-93. *Id.*

B. Applied Behavior Analysis Is an Evidence Based, Effective Intervention for ASD

The 2004 amendments to the IDEA require schools to use instructional practices and interventions "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). For children with ASD, public health agencies and leading child and mental health organizations have endorsed ABA based on such research.[17] *See*, *e.g.*, CDC, *Autism Spectrum Disorder*

Jersey, North Carolina, Utah, and Wisconsin in 2010." CDC, *10 Things to Know About New Autism Data* (Mar. 31, 2014), http://www.cdc.gov/features/dsautismdata/index.html.

[16] Available at http://www.gao.gov/assets/250/245066.pdf.

[17] ABA became widely accepted post-*Rowley* after several successful research studies in the late 1980s and early 1990s. Koenig M. Gerenser, *SLP-ABA: Collaborating to support*

(ASD) (Feb. 24, 2015)[18] ("ABA has become widely accepted among health care professionals"); U.S. Dep't of Health & Human Servs. et al., *Mental Health: A Report of the Surgeon General*, 163-64 (1999) ("Thirty years of research demonstrated the efficacy of applied behavioral methods . . ."); [19] Scott M. Myers, Chris Plauché Johnson, the Council on Children With Disabilities, *Management of Children With Autism Spectrum Disorders*, 120 PEDIATRICS 5 (Nov. 2007) ("[t]he effectiveness of ABA-based intervention in ASDs has been well documented through 5 decades of research by using single-subject methodology and in controlled studies of comprehensive early behavioral intervention programs in university and community settings.") (footnotes omitted). Relevant to the education of children with ASD, a 2011 review of twenty-seven studies published in peer-reviewed literature demonstrated that this intervention was effective for improving language, cognitive skills, and reducing anxiety and aggression in children with ASD. Geraldine Dawson & Karen Burner, *Behavioral interventions in children and adolescents with autism spectrum*

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individuals with communication impairments, 1 J. OF SPEECH & LANGUAGE PATHOLOGY – APPLIED BEHAVIOR ANALYSIS 1, 3-4 (2006); *see also* n.6, *supra* at 7.

[18] Available at http://www.cdc.gov/ncbddd/autism/treatment.html.

[19] Available at http://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf.

disorder: a review of recent findings, 23 CURR. OPIN. PEDIATR. 6, 616-20 (2011).

C. Assistive Technologies That Did Not Exist When *Rowley* Was Decided Offer Children With Disabilities Greater Access to an Education

In 1997, the IDEA was amended to require IEP support teams to consider the assistive technology needs of all children with disabilities. 20 U.S.C. § 1414(d)(3)(B)(v).[20] Assistive technology helps children with disabilities in myriad ways that could not have been anticipated when *Rowley* was decided. For example, with respect to socio-behavioral impairments, such as autism, a software application called Mind Reader teaches children social skills by helping them to recognize facial expressions and emotions in others. Sara (Beth) Cardwell Foreman, Doctoral Dissertation, *Assistive Technologies used by Students With Asperger's Syndrome to Improve Performance in the General Education Classroom,* at 22 (2014).[21]

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[20] The IDEA defines an "assistive technology device" as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A).

[21] Available at http://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1007& context=gscis_etd.

For children with physical disabilities, "technology can give access to learning opportunities previously closed to them. E-readers help students turn book pages without applying dexterity, and voice adaptive software can help students answer questions without needing to write." Kris Zorigian & Jennifer Job, *How do special education students benefit from technology?*, LEARN NC, UNC-Chapel Hill School of Education (2010).[22]

Other technologies include "alphabet eye gaze frames allowing children to 'point' to letters with their eyes, onscreen keyboards that are controlled by switches, and electronic flipcharts." *Id.* For visually-impaired students, screen reader software can read aloud information from e-books and web-pages, while refreshable braille peripheral devices can actively translate that information into braille. Assistive Training Online Project, Sch. of Pub. Health and Health Professions, SUNY-Buffalo, *Reading & Computing*.[23]

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[22] Available at http://www.learnnc.org/lp/pages/6917.

[23] Available at http://atto.buffalo.edu/registered/ATBasics/Populations/Blind/reading.php.

IV. Since *Rowley* Was Decided 34 Years Ago, Congress Has Enacted Amendments to the IDEA and Related Legislation That Support the Substantial Benefit Standard Rejected by the Tenth Circuit

Review is warranted because of the dynamic changes to the IDEA and national policy for educating children with disabilities since *Rowley* was decided in 1982.[24] *See generally*, U.S. Dep't of Educ., Office of Special Educ. and Rehab. Servs., *Thirty-five Years of Progress in Educating Children With Disabilities Through IDEA*, 6 (2010) ("DOE Report").[25] As *Rowley* noted, at that time "federal support for education of the handicapped [was] a fairly recent development," and therefore Congress passed the IDEA "primarily to make public education *available* to handicapped children." 458 U.S. at 191-92 (emphasis added). Further, the words "assistive technologies" did not appear in the original statute, and autism was not a covered IDEA disability. (As noted earlier, it was only added to the list of IDEA covered disabilities in 1990).

In 1994, Congress began moving away from access-based education and towards outcomes-based education with the enactment of the Goals 2000:

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[24] The IDEA was enacted as the Education of All Handicapped Children Act, Pub. L. 94-142, until renamed in 1990. Pub L. 101-476.

[25] Available at https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf.

Educate America Act, 20 U.S.C. 5801 et seq. The Act established a framework for meeting National Education Goals by "establishing valid and reliable mechanisms for . . . assisting in the development and certification of high-quality assessment measures that reflect the internationally competitive content and student performance standards." 20 U.S.C. § 5801(4). One goal stressed increasing school "partnerships" with parents to "promot[e] the social, emotional and academic growth of children," including "children with disabilities." *Id.* § 5812(8)(A), § 5812(8)(B)(i).

In 1997, when it reauthorized the IDEA, Congress updated the goals and nature of an appropriate education under the IDEA through amendments that required the design of IEPs to "meet their [children with disabilities] unique needs" and prepare them for "further education, employment, and independent living[.]" 20 U.S.C. § 1400(d)(1)(A). And, as noted earlier, Congress recognized the potential of assistive technologies "to maximize accessibility [to the classroom] for children with disabilities." 20 U.S.C. § 1400(c)(5)(H); *see also* § 1414(d)(3)(B)(v). Thus, referring to 1997 amendments to the IDEA, this Court observed, "[a]fter examining the States' progress under IDEA, Congress found in 1997 that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services." *Forest Grove Sch. Dist.*, 557 U.S. at 239-240.

In 2001, Congress enacted the No Child Left Behind Act ("NCLB"). The NCLB was enacted to assure that "all children" obtain "a high-quality education" so that they can "at a minimum, [achieve] proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301. The "high quality education" standard expressly applied to children with disabilities. *Id.* § 6301(2). Indeed, the NCLB requires that State assessment systems be designed "to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged." *Id.* § 6301(6).[26]

In 2004 Congress again amended and reauthorized the IDEA, finding that "[a]lmost 30 years of research and experience" has shown that education of children with disabilities can be made more effective by having high expectations and ensuring their access to the classroom to "the maximum extent feasible." 20 U.S.C. § 1400(c)(5)(A)(i). The importance of high expectations was further emphasized by the mandate

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[26] The Department of Education, the agency responsible for administering both the IDEA and the NCLB, recognized the complementary nature of the two statutes by stating that "IDEA legislation should complement, support, and expand on the ESEA [Elementary and Secondary Education Act, reauthorized as NCLB] provisions that address the education of all children and not be viewed in isolation or as the sole legislative provision supporting children with disabilities." DOE Report at 12.

that schools produce progress reports for children with disabilities commensurate with the same frequency as they produce those reports for children without disabilities. *Id.;* § 1414(d)(1)(A)(i)(III); U.S. Dep't of Educ., Dear Colleague Letter: Clarification of FAPE and Alignment with State Academic Standards 1 (Nov. 16, 2015) http://1.usa.gov/1MkxyAE (children with disabilities should be given "rigorous academic standards," emphasizing the importance of having "high expectations" for them in 2015).

In 2009, state leaders, including governors and state commissioners of education from 48 states, two territories and the District of Columbia, developed the Common Core State Standards Initiative ("CCSS") that created common, college and career ready standards in mathematics and English language arts. *See* CCSS, *Frequently Asked Questions*.[27] These standards, which apply to children with disabilities in kindergarten through 12th grade,[28] "outline what a student should know and be able to do at the end of each grade," and "were created to ensure that all students graduate from

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[27] Available at http://www.corestandards.org/about-the standards/frequently-asked-questions/.

[28] *See* http://www.corestandards.org/wp-content/uploads/Application-to-Students-with-Disabilities-again-for-merge1.pdf ("These common standards provide a historic opportunity to improve access to rigorous academic content standards for students with disabilities.").

high school with the skills and knowledge necessary to succeed in college, career, and life . . . ." *Id.*, *About the Standards*.[29] Over 40 states and territories have adopted the CCSS. *Id.*

While restating and raising the goals of an IDEA education Congress did not alter the definition of a FAPE. But that definition does not address the level of educational benefit that an IEP must seek to attain. And, as *Rowley* observed, "[l]ike many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent." *Rowley*, 458 U.S. at 188. This case presents the Court with the opportunity to complete that "quest" in light of the amendments to the IDEA and the NCLB, which demand high educational expectations and require that public schools prepare children with disabilities for further education, employment and independent living. Those Congressional goals cannot be reconciled with the just-above-trivial standard endorsed by the Tenth Circuit below.

[29] Available at http://www.corestandards.org/about-the-standards/.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court grant the petition for a *writ of certiorari*.

Respectfully Submitted,

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