

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ENDREW F., A MINOR, BY AND THROUGH :

4 HIS PARENTS AND NEXT FRIENDS, :

5 JOSEPH F. AND JENNIFER F., :

6 Petitioner : No. 15-827

7 v. :

8 DOUGLAS COUNTY SCHOOL :

9 DISTRICT RE-1, :

10 Respondent. :

11 - - - - - x

12 Washington, D.C.

13 Wednesday, January 11, 2017

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:04 a.m.

17 APPEARANCES:

18 JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf
19 of the Petitioner.

20 IRV GORNSTEIN, ESQ., Counselor to the Solicitor
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22 for United States, as amicus curiae, supporting the
23 Petitioner.

24 NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf
25 of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this -- this morning in Case No. 15-827, Endrew F. v.
5 Douglas County School District.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONER

9 MR. FISHER: Mr. Chief Justice, and may it
10 please the Court:

11 The IDEA does not permit a school district
12 to provide a child with a disability a barely more than
13 de minimis educational benefit. Rather, what the Act
14 requires is for the school to provide instruction and
15 related services to the child that are reasonably
16 calculated to provide substantially equal educational
17 opportunities.

18 The school district's primary response to
19 our argument is that the standard I just described to
20 you does not appear anywhere in the operative text of
21 the IDEA. But let me get right to --

22 CHIEF JUSTICE ROBERTS: Well, it also -- it
23 also didn't appear anywhere in the original petition,
24 did it? I'm looking at Footnote 8 in your -- your
25 opening brief where you note that substantial

1 educational benefit was the standard that was discussed
2 in the petition and then a significantly different one
3 in your -- your opening brief.

4 MR. FISHER: Well, Mr. Chief Justice, we
5 don't intend it to be significantly different. What we
6 do intend, as we describe in that footnote, is to give
7 more detail as to how the standard works. I'd say --

8 JUSTICE GINSBURG: The standard -- the
9 standard you're asking us to adopt, substantially equal
10 opportunity, that does appear someplace. It appears in
11 Justice Blackmun's concurring opinion in Rowley, and the
12 court itself did not adopt that formulation, did not
13 adopt substantially equal opportunity. So you're asking
14 us to adopt a standard that the majority already had
15 before it and didn't adopt.

16 MR. FISHER: Justice Ginsburg, yes, Justice
17 Blackmun proposed a standard similar to the one that we
18 offered the Court today, but that was 1982. And
19 Congress has amended the IDEA twice, in 1997 and in
20 2004. And in the findings and purposes, it now
21 describes the way the Act works with exactly the words
22 I'm giving you: Equal educational opportunity.

23 CHIEF JUSTICE ROBERTS: Well, that raises a
24 concern under the Spending Clause. I mean, the Spending
25 Clause operations are pretty clear. The Federal

1 government proposes a deal to the States. If the States
2 want the money, they have to agree to these provisions.
3 And now you're saying that the content of those
4 provisions, though, is changed by new legislation.

5 And I just wonder whether that puts some
6 strain on the idea that the States have agreed to these
7 provisions when they accepted the offer under the
8 Spending Clause.

9 MR. FISHER: No, I don't think it does. I
10 think it's critical to get to the text for exactly the
11 reason you say, Mr. Chief Justice.

12 We know from Rowley that there's a
13 substantive guarantee in the IDEA, and we know from
14 Rowley, even in 1982, the way the Act was put together,
15 that that substantive guarantee must track the way that
16 the IEP provisions -- the individual educational program
17 provisions work. That's at page 203 and 204 of Rowley.

18 So to get to the text and exactly what the
19 State agrees to, you start with the FAPE definition, the
20 definition for free appropriate public education. We
21 all agree on that. Sub D of that definition says that
22 the school has to provide an education, quote, "in
23 conformity with the IEP plan."

24 Then, to understand what that means, again,
25 this is straight out of Rowley and straight out of the

1 text, you turn to what the IEP provisions provide, and
2 those are laid out at pages 52A and 53A of the
3 government's appendix.

4 And, in a nutshell, what they say over and
5 over again is that standards, generally speaking, for
6 children with disabilities should be aimed at the
7 general educational curriculum. So what you do is you
8 start with the general educational curriculum that
9 applies to all kids, then you identify the child's
10 disability and how it impacts that child's ability to
11 participate and progress in that general educational
12 curriculum.

13 CHIEF JUSTICE ROBERTS: How does that work?

14 MR. FISHER: Then --

15 CHIEF JUSTICE ROBERTS: I'm sorry. How does
16 that work with students whose disabilities generally
17 wouldn't allow them in -- in their own -- with their own
18 potential to follow the general educational curriculum?
19 I understand how it worked in Rowley --

20 MR. FISHER: Right.

21 CHIEF JUSTICE ROBERTS: -- where we were
22 dealing with someone with a particular disability, but
23 one that was rather readily and easily addressed.

24 MR. FISHER: Uh-huh.

25 CHIEF JUSTICE ROBERTS: Here you have a very

1 different context. I mean, you would not say that the
2 goal here, would you, was to progress consistent with
3 the general educational curriculum?

4 MR. FISHER: Most likely not all the way up
5 to grade level in this case, Mr. Chief Justice. But
6 that question, just as you asked me earlier, is
7 expressly answered in the statute.

8 So on page 52A, on the bottom of 52A in sub
9 CC, what this -- what the IEP provisions say is that for
10 children with disabilities who take alternate
11 assessments aligned to alternate achievement standards,
12 a description of benchmarks or short-term objectives are
13 appropriate. And then the rest of the IEP provisions
14 describe how you set those goals to meet those alternate
15 achievement standards.

16 Now, what the Congress is referring to --
17 and let me just emphasize as I go through these
18 statutory provisions, these are all from 2004, much
19 postdating Rowley.

20 What Congress is referring to with respect
21 to alternate achievement standards are laid out at page
22 79A of the government's appendix. These are the
23 amendments to the ESEA that Congress enacted in the No
24 Child Left Behind Act and that have been aligned with
25 the IDEA. So if you look at page 79A, there are four

1 subdivisions -- or five, I'm sorry -- five subdivisions
2 that describe what you do for the child,
3 Mr. Chief Justice, that you were asking about. And
4 perhaps the most important is -- are sub 3 and sub 4.

5 So if -- if you'll permit, because the text
6 is so important, I'll read them to you.

7 Sub 3 says that the standards in this
8 situation must, quote, "reflect professional judgment as
9 to the highest possible standards achievable by such
10 students."

11 And then what sub 4 does to complete the
12 circle and make absolutely clear to the States and
13 everybody else that this is required, it says those
14 standards must, quote, "be designated in the
15 individualized education program developed under the
16 IDEA."

17 So the question you asked is expressly
18 answered in the text. It is expressly answered in the
19 IDEA. And so to bring me back to our standard,
20 "substantial educational opportunity" are the words
21 Congress used in the findings and purposes to
22 encapsulate what is required by these IEPs.

23 JUSTICE KENNEDY: I suppose -- I suppose
24 it's implicit in your standards and in some of the
25 provisions you read that what we're talking about is the

1 word "reasonable" that we see throughout the law.

2 Do -- do you see any -- any function for
3 that word and, in addition, as part of what reasonable
4 is, is there any place to discuss the cost that the --
5 would -- would be incurred for, say, severely disabled
6 students?

7 MR. FISHER: Let me answer both
8 reasonableness first and cost second.

9 So reasonableness, yes, is an essential
10 feature of the Act. And in Rowley itself, the Court
11 said that the plan that the -- that the IEP team puts
12 together needs to be, quote, "reasonably calculated to
13 achieve the level of educational benefit that should be
14 guaranteed."

15 So, if you go into court -- or actually
16 here, you don't start in court; you start with a hearing
17 officer. And if there's going to be a dispute, what a
18 parent has to show is that the plan the school adopted
19 was one that no reasonable educator would have adopted.
20 And so reasonableness is an important part of the --
21 of -- of the way a court would look at it, the hearing
22 officer, and indeed the IEP teams.

23 Now, with specific reference to cost, let me
24 say three things about cost, Justice Kennedy. First of
25 all, the vast, vast majority of IEPs and programs put

1 together under the statute don't cost much at all. They
2 involve things like providing braille textbooks,
3 providing an iPad, providing some specialized
4 instruction by a -- by a staff member who's already on
5 staff.

6 There are going to be some extreme cases,
7 and the Court saw one several years ago in the Garrett
8 F. case, which involved a situation where a child with a
9 ventilator needed full-time nursing services, and the
10 Court quite clearly said that even there, where the
11 school district was saying that was going to cost 30 to
12 \$40,000, the Act does not permit cost to trump what the
13 Act otherwise requires.

14 And the reason why, Justice Kennedy, is
15 because Congress expressly thought about this. All the
16 way back to the 1975 Act what Congress said is this:
17 Yes, it costs money and that's why it's spending cause
18 legislation and that's why we're giving money to the
19 States, but it is cheaper to provide services to
20 somebody while they are being educated than it is to pay
21 out of the public fisc for the rest of that person's
22 life than make up for the deficit that a bad education
23 provided.

24 JUSTICE GINSBURG: Mr. -- Mr. Fisher, the
25 tab here is -- is at \$70,000 tuition?

1 MR. FISHER: Well, Justice Ginsburg, at the
2 time this case was litigated, it was more like \$40,000
3 in the private school. Currently, it is closer to the
4 number you described. But the tab to put the child in
5 private school -- remember, the school district had an
6 opportunity come -- to come forward with -- with a
7 proper IEP plan to provide Drew with a FAPE, and it
8 simply --

9 JUSTICE KENNEDY: And in your -- in your
10 position, what -- in your view, what should have been
11 done for this student?

12 MR. FISHER: The first and most important
13 thing that should have been done is what's known as a
14 behavioral assessment should have taken place to figure
15 out why Drew's behaviors were so dramatically
16 interfering with his education. That's something that
17 every reasonable educator would have done; all the
18 peer-reviewed research say it's vital. It's the very
19 first thing that the private school did in this
20 situation. And if you look at the plans that are laid
21 out in the supplemental Joint Appendix, that was never
22 done.

23 And what's -- what's particularly striking,
24 Justice Kennedy, is that even after Drew was really, in
25 an emergency situation in the spring of his fourth grade

1 year, put into private school, the parents came back to
2 the school district again six months later in November
3 and said now that we see he's progressing, now that
4 they've done a behavioral analysis, what will you do,
5 because we actually would like to have him educated in
6 the public schools. And it's amazing that all they did
7 was offer -- and this is at pages 182 and 183 -- the
8 exact same failed behavioral plan that they had been
9 using in the fourth grade.

10 JUSTICE GINSBURG: Weren't they going to --
11 what -- the -- the conference that the parents didn't
12 attend, they had scheduled a conference, and I thought a
13 behavioral expert was part of that conference.

14 MR. FISHER: So there were two conferences,
15 Justice Ginsburg. There was a first one in April of
16 Drew's fourth grade year that the same old plan was
17 presented with no experts.

18 They then offered to have another conference
19 a month later in May, and what the parents decided at
20 that point is things had reached such a critical and
21 emergency stage, that Drew was falling so far behind,
22 they had to put him in a private school, so they did not
23 attend that meeting.

24 But, Justice Ginsburg, what my friend on the
25 other side leaves out of his brief is that what I just

1 described, which is the parents did return in the fall
2 once Drew had been stabilized and did offer to meet with
3 the school district. The school district brought no
4 autism expert to that meeting, and the plan that they
5 proposed to deal with his behavior is verbatim the same
6 plan that they had offered back in the fourth grade.

7 And so at that point, the -- the parents had
8 no choice reasonably but to leave Drew in private school
9 and to seek remedies under the Act. And there are going
10 to be -- and I think this returns me to Justice
11 Kennedy's question about cost. We recognized, and
12 Congress recognized, and this Court recognized in
13 Burlington, that there are going to be rare extreme
14 circumstances where children are going to be put into a
15 private school or otherwise need significant
16 resources --

17 JUSTICE BREYER: Why didn't the -- why
18 didn't the -- the statement that an IEP, what it has to
19 do is it has to, based on peer-reviewed research, when
20 practicable, will -- will be provided to the child to
21 advance appropriately towards attaining the annual goals
22 to make progress in the general education curriculum and
23 so forth. So you've just described if the situation is
24 that, wouldn't that have been violated? Or if they
25 wrote the IEP that way, wouldn't you be able to go to

1 court and say, look, there is their IEP and they didn't
2 live up to it?

3 So you already have two arguments under the
4 statute, and the problem that's working in my mind is if
5 we suddenly adopt a new standard, all over the country
6 we'll have judges and lawyers and -- and -- and people
7 interpreting it differently and -- and -- so why isn't
8 the present situation sufficient?

9 MR. FISHER: Yeah.

10 JUSTICE BREYER: Besides having nine people
11 who don't know -- I mean, at least speaking for
12 myself -- don't know that much about it, creating a new
13 standard out of legal materials which are at a distance
14 from the people, the children and the parents, who need
15 help.

16 MR. FISHER: So I think the critical reason
17 why the Court in Rowley itself gestured towards needing
18 the need for a overall standard that encapsulates the
19 Act and the reason why we ask for it here today is that
20 you will find in every brief in this case -- our
21 brief --

22 JUSTICE BREYER: Uh-huh.

23 MR. FISHER: -- the red brief, their amicus
24 briefs -- everyone agrees that school districts, I
25 believe -- this is at page 29 and 47 of my friend's

1 brief. They agree that the IEP provisions have to be
2 followed. Everybody agrees that. The difficulty is, is
3 that it just doesn't happen.

4 JUSTICE BREYER: Well, I'm sorry if it
5 doesn't happen. What are we supposed to do to make it
6 happen? I mean, you have a statute that certainly seems
7 to say that and you have a system for enforcement. And
8 how does us suddenly using this word "equal" -- you
9 know, the word "equal" has history from a lot of
10 different areas of law. And -- and what do you do with
11 a wide range of -- of disabilities, a huge range in
12 individual students and -- and -- do you see what I
13 foresee?

14 MR. FISHER: Yes. I --

15 JUSTICE BREYER: I foresee taking the money
16 that ought to go to the children and spending it on
17 lawsuits and lawyers and all kinds of things that are
18 extraneous. That is what's actually bothering me.

19 MR. FISHER: Right. So let -- let me
20 address -- say a word more about why we need a standard,
21 and then I'll say something about the lawsuits question
22 that you raised.

23 So, first, we need a standard because the
24 Act -- it's best to encapsulate what the IEP provisions
25 required. If you don't like the word "equal," I'm

1 seemingly giving you the word that Congress used when it
2 amended the Act, and that very much -- this Court said
3 very much the same thing in Rowley when it said, in the
4 general situation, a child's plan should be tailored to
5 allow her to advance from grade to grade.

6 Now, if you don't want to use the word
7 "equal," here's what we would suggest, Justice Breyer:
8 You can say, as a general rule, the IEP provisions and,
9 therefore, the FAPE requirement of the Act, demands a
10 level of educational services designed to allow the
11 child to progress from grade to grade in the general
12 curriculum.

13 JUSTICE BREYER: Well, suppose we have a
14 child who is a handicapped child, there's a range of
15 people, and they can't do much for them, but they can do
16 something for them. And if they can do something for
17 them, do it.

18 MR. FISHER: Uh-huh.

19 JUSTICE BREYER: But if you, say, measure
20 that in terms of their ability to progress from grade to
21 grade, maybe some will; some won't. And how does that
22 -- it seems to me the word "appropriate" tried to
23 recognize that. And -- and do you want to recognize
24 that? I mean, you can't ask for more than is reasonable
25 for them to do. So -- so what -- what words do we use?

1 MR. FISHER: At bottom, we agree that
2 there's flexibility in the Act to accommodate each
3 child's individual potential and needs.

4 But if I could just give a full answer to
5 your question, we think that it would be fine if the
6 Court just said the IEP should be tailored to achieve in
7 a general educational curriculum at grade level for most
8 kids. And when that is not possible, Justice Breyer,
9 and this goes back to Mr. Chief Justice's question, you
10 would go to the alternate achievement standards
11 according to the language I described to you at page
12 79(a), and that is all straight out of the text of the
13 Act. It's a more complicated --

14 JUSTICE KAGAN: How so --

15 MR. FISHER: -- way of putting it.

16 JUSTICE ALITO: It makes a big difference
17 whether you take the word "equal" out though. What
18 you've just said takes the word "equal" out of the
19 standard.

20 MR. FISHER: Well, it might --

21 JUSTICE ALITO: Isn't that --

22 MR. FISHER: It might be, Justice Alito, I'm
23 describing what it means to provide an equal educational
24 opportunity. If you don't think that I'm actually --

25 JUSTICE ALITO: Well, I understand what an

1 equal outcome would be, but I don't understand what an
2 equal opportunity means when an equal outcome is not
3 practical.

4 MR. FISHER: What it means is that you give
5 the -- so when you're dealing with a child who cannot
6 get to grade level -- I think that's what you're
7 asking -- what it means -- and this is in a 2005
8 guidance document by the Department of Education -- what
9 it means is you're giving children with disabilities
10 equally challenging curriculum on the academic side and
11 in terms of their functional and -- functional and
12 developmental goals.

13 JUSTICE KAGAN: But for those --

14 MR. FISHER: The standard -- I would just
15 say the standard is highest possible standards
16 achievable directly in the text of the statute.

17 JUSTICE KAGAN: But for those of us who have
18 some feeling that the word "equality" is a poor fit for
19 this statute and its focus on individuation --

20 MR. FISHER: Uh-huh.

21 JUSTICE KAGAN: -- what would you say to
22 those of us? How would you describe what you think is
23 required without focusing on equality?

24 MR. FISHER: I would say just what the Court
25 said in Rowley for the -- for the typical child with a

1 disability who can achieve at grade level, which is the
2 standard that the school district has to try to meet, is
3 progress in the general educational curriculum --

4 JUSTICE GINSBURG: But we're dealing here --

5 MR. FISHER: -- at grade level.

6 JUSTICE GINSBURG: We're dealing here with a
7 child who --

8 MR. FISHER: And then -- and then dealing
9 with a child who's not going to get there equally
10 challenging or, Justice Kagan, I would say alternate
11 achievement benchmarks, to use exactly the words in the
12 standards, that are the highest possible achievable by
13 the student. Those are the exact words at page 79(a) of
14 the -- of the -- of the statute.

15 If I could reserve the remainder of my time,
16 please.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Gornstein.

19 ORAL ARGUMENT OF IRV GORNSTEIN

20 FOR UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE PETITIONER

22 MR. GORNSTEIN: Mr. Chief Justice, and may
23 it please the Court:

24 The requirement of a free appropriate public
25 education is not satisfied by the program that aims at

1 barely more than de minimis progress. What it requires
2 instead is a program that is aimed at significant
3 educational progress in light of the child's
4 circumstances. What that --

5 JUSTICE GINSBURG: How does that differ --
6 how does your formulation differ from the one we were
7 just offered by Mr. Fisher?

8 MR. GORNSTEIN: So I think we would take the
9 same position with respect to Amy and similar students.
10 It's grade-level competence for students who are in the
11 regular classroom or in the general curriculum.

12 CHIEF JUSTICE ROBERTS: We're talking about
13 somebody for whom I think you'd agree that that standard
14 doesn't apply.

15 MR. GORNSTEIN: Right. And so that is where
16 we have a slight area of disagreement. We would say
17 significant progress towards grade-level standards, not
18 as close as possible to grade-level standards.

19 JUSTICE SOTOMAYOR: How about "meaningful"
20 instead of "significant"?

21 MR. GORNSTEIN: So we are not committed to
22 any one particular terminology. We think that
23 "significant" is synonymous with "meaningful." It's
24 synonymous with progress that's -- reasonably can be
25 expected.

1 JUSTICE KENNEDY: "Meaningful" --

2 MR. GORNSTEIN: It's progress --

3 JUSTICE KENNEDY: "Meaningful" was a word
4 used in Rowley.

5 MR. GORNSTEIN: Yes, it was used in Rowley.
6 And the only reason I would -- of all the terms -- and
7 I -- and I would give you one more, which is
8 "appropriate." In light of the child's circumstances,
9 progress that's appropriate.

10 The only one I would urge you away from
11 actually is "meaningful." And the reason is that it has
12 baggage in various courts of appeals. It means
13 different things to different courts, and it has been
14 applied in different ways by different courts. So I
15 would urge you to pick -- although we think that
16 captures what we're saying --

17 JUSTICE KAGAN: So we should come up with
18 our own that can then be applied in different ways in
19 different courts.

20 (Laughter.)

21 MR. GORNSTEIN: Well, I think the most
22 important thing for you to say is that this is not a
23 barely more than de minimis standard, and it's not a
24 maximization standard. What it is, is -- and I would
25 leave it to you to choose any of those adjectives that

1 --

2 JUSTICE BREYER: The problem is you say
3 leave it to us. You represent the Department of
4 Education here. They at least have experience with it
5 and we have far less. And so, obviously, I'm relying
6 and must rely upon people who have connection with
7 expertise. And I don't want to do something that uses
8 words that has effects that I have no idea.

9 MR. GORNSTEIN: So we --

10 JUSTICE BREYER: So I go back to look at two
11 words. The IEP is filled with the word "progress."
12 There's several. So the word "progress" seems like
13 something that should be there.

14 MR. GORNSTEIN: Yes.

15 JUSTICE BREYER: And then the other word --

16 MR. GORNSTEIN: I would agree with that.

17 JUSTICE BREYER: -- that goes -- goes -- you
18 see a lot is "appropriate." Now, you've taken that word
19 "appropriate" and spelled it out in light of the
20 student's particular needs and abilities. I think
21 that's what you're doing with "appropriate."

22 MR. GORNSTEIN: Yes.

23 JUSTICE BREYER: And if we stick
24 "appropriate" in that sentence somewhere so it's
25 significant and appropriate, does that matter?

1 MR. GORNSTEIN: That happen -- we are happy
2 with that. One of the formulations we --

3 JUSTICE BREYER: You looked into this and
4 you don't --

5 MR. GORNSTEIN: Yes.

6 JUSTICE BREYER: -- see anything wrong with
7 sticking in the word "appropriate"?

8 MR. GORNSTEIN: We do not.

9 JUSTICE BREYER: Okay. Now -- now, the
10 other thing I looked at in yours is you say the
11 school -- "requires school districts to provide." And
12 when I see "requires school districts to provide," I
13 begin to think everybody is going to start suing about
14 whether they did provide.

15 MR. GORNSTEIN: No, no.

16 JUSTICE BREYER: So I'm thinking, well,
17 maybe it should be something like they are reasonably
18 calculated to provide.

19 MR. GORNSTEIN: That's actually -- we agree
20 with that. That is what Rowley said, and that is what
21 the standard -- that's what it means to require. It's a
22 program that is reasonably calculated to -- to make
23 significant --

24 JUSTICE SOTOMAYOR: What does that --

25 MR. GORNSTEIN: -- educational --

1 JUSTICE SOTOMAYOR: For all of us --

2 MR. GORNSTEIN: -- progress in light of the
3 child's circumstances.

4 JUSTICE SOTOMAYOR: For all of us who might
5 be a little slow --

6 MR. GORNSTEIN: Yes.

7 JUSTICE SOTOMAYOR: -- now tell me what the
8 new standard you're proposing is.

9 MR. GORNSTEIN: So --

10 JUSTICE SOTOMAYOR: And I don't mean to be
11 buying into your --

12 MR. GORNSTEIN: So --

13 JUSTICE SOTOMAYOR: -- adversary's position.
14 I do think the Act provides enough to set a clear
15 standard. But the words are what we're trying to -- to
16 come to that would be less confusing to everyone.

17 MR. GORNSTEIN: So one formulation that I
18 think that would be consistent with what we are saying
19 is reasonably calculated to make progress that is
20 appropriate in light of the child's circumstances.

21 CHIEF JUSTICE ROBERTS: So how does that
22 actually work in -- in practice? I mean, I understand
23 in the Rowley standard, you're dealing with someone who
24 has a disability that is readily addressed so that they
25 can keep track with grade progress. But if you're out

1 of that realm where that is not a realistic goal in
2 light of the child's potential, how do you decide what
3 it is? You're sitting -- you're sitting down at the
4 meeting, and how do you decide --

5 MR. GORNSTEIN: All right. So you -- what
6 the -- the IEP provisions tell you where to start. You
7 look at the -- where the child currently is in terms of
8 academic performance, what are their present levels of
9 achievement. Then you examine the disability and you
10 ask to what extent has this impeding progress in the
11 general curriculum. And then what you do is you
12 basically make an estimate --

13 CHIEF JUSTICE ROBERTS: Is there somebody at
14 that meeting? I mean, you have the parents --

15 MR. GORNSTEIN: You have expert -- you have
16 educational experts who will say, make an estimate of
17 how much progress towards grade level standards that
18 child can make in light of where they are now and the --
19 the nature of the disability.

20 CHIEF JUSTICE ROBERTS: Maybe there's still
21 time to grade level standards. I would think in many
22 situations those would largely be irrelevant.

23 MR. GORNSTEIN: So here's what we mean by
24 that, Mr. Chief Justice. You start with the grade level
25 standards, but then you see the building blocks that are

1 missing underneath those grade level standards, and you
2 set those out. So if you can't multiply and you can't
3 add, and multiplication is the standard, maybe you need
4 to learn how to add first. So you set forth what are
5 the building blocks that the child is missing.

6 CHIEF JUSTICE ROBERTS: Everybody -- I say
7 everybody. I assume everybody needs to learn how to add
8 before they learn how to multiply.

9 And -- and the basis of my concern is that
10 it seems to me that even though you have a lot of --
11 maybe because you have a lot of different adjectives to
12 describe the standard, that there's really nothing
13 concrete there. And when you're asking the courts to
14 undertake judicial review, it's not clear to me exactly
15 what they're supposed to do.

16 MR. GORNSTEIN: So -- so again, it's
17 appropriate in light of the circumstances. And we think
18 that this is just what most school boards are already
19 doing. And I agree that the concern is with court
20 enforcement of the standard, and the risk of court
21 over-involvement in educational decisions. But the
22 response to is that is not to adopt a barely more than
23 de minimis standard that nobody purports to apply, but
24 it's to say that the court's role is limited to ensuring
25 that the State's program for progress or appropriate

1 progress is based on reasonable educational judgments.

2 JUSTICE ALITO: Do you agree with Mr. Fisher
3 that cost has no place in this calculation? No matter
4 how expensive it would be and no matter what the impact
5 in, let's say, a poor school district would be on the
6 general student population, cost can't be considered?
7 And do you think in the real world, school boards are
8 disregarding costs entirely?

9 MR. GORNSTEIN: So they're definitely not
10 disregarding costs entirely, because there could be two
11 different programs, both of which are reasonable, and
12 they would take into account costs, surely, in deciding
13 which of those reasonable programs to adopt.

14 But more generally, I would say the answer
15 is no in the usual case. And -- and from Cedar Rapids,
16 that's -- what the Court said is you consider cost in
17 deciding what the standard should be in the first place,
18 but cost can't define what the standards are.

19 And that makes sense to me in -- in light of
20 the way you look at this statute. Congress obviously
21 knew, when it passed this law, that there were going to
22 be some significant expenses associated with some kids,
23 and that's why it gave money and made it an opt-in
24 program. So at the very least, it seems to me, Cedar
25 Rapids and the structure of the statute tell you that in

1 the usual case it can't be cost, but --

2 JUSTICE ALITO: Do you -- do you know what
3 percentage of the funds that are spent by school
4 districts for this program are paid by the Federal
5 government?

6 MR. GORNSTEIN: I think it's a relatively --
7 I think it's like 15 percent or something like that.

8 JUSTICE ALITO: Federal government pays 15
9 percent?

10 MR. GORNSTEIN: I think it's something like
11 that. I could be -- I could be corrected, and maybe my
12 -- my -- but the point of it is they realized that they
13 were going to give money and they made it an open-ended
14 choice for the school district. So if the school --

15 JUSTICE KENNEDY: But -- but do you think
16 that costs should be measured against the possible
17 results to be achieved?

18 MR. GORNSTEIN: So not in the usual case. I
19 think Congress took costs off the table in the usual
20 case. I think in the extreme case, you would do exactly
21 what you're talking about. You would say for very
22 little gain for extreme cost, no.

23 JUSTICE BREYER: Not appropriate. Is
24 that --

25 MR. GORNSTEIN: Not appropriate. Yes.

1 So --

2 JUSTICE SOTOMAYOR: That's not the case in
3 this case.

4 MR. GORNSTEIN: No. No. The -- the school
5 district in this case hasn't raised a cost defense. And
6 so --

7 JUSTICE SOTOMAYOR: And -- and more
8 importantly, the cost gave significant progress.

9 MR. GORNSTEIN: The cost did give -- I'm
10 sorry?

11 JUSTICE SOTOMAYOR: The cost of the private
12 education resulted in significant --

13 MR. GORNSTEIN: It -- it did result in
14 significant progress.

15 Now, I'm not sure you would -- you -- the --
16 the benchmark is what is to be achieved in a private
17 school. I think as long as the school district's plan
18 makes significant progress or appropriate progress
19 towards grade level in light of the child's
20 circumstances, that's all you have to do.

21 JUSTICE SOTOMAYOR: Well, here, even by the
22 Tenth Circuit's admission, this was barely de minimis
23 progress.

24 MR. GORNSTEIN: So I think what they -- the
25 court of appeals said is -- the only thing it said is

1 there was a free, appropriate public education because
2 Drew had made minimum progress on some of his goals in
3 the prior years, and that's clearly not enough to meet
4 the standard that we're talking about.

5 If the Court has no further questions.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Katyal.

8 ORAL ARGUMENT OF NEAL K. KATYAL

9 ON BEHALF OF THE RESPONDENT

10 MR. KATYAL: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 To prevail, my friends have to overcome
13 three different things. First, they must overcome the
14 Spending Clause, which requires that any standard be
15 imposed unambiguously.

16 Second, they must overcome Rowley, which
17 found far from a clear statement that the statute was
18 noticeably absent on a substantive standard for the
19 level of education, including any standard based on
20 equality.

21 And third, they must overcome the fact that
22 with each amendment to the IDEA, Congress has reaffirmed
23 its faith in the procedural protections and systemic
24 requirements without touching the statute's substantive
25 standard.

1 They have to --

2 JUSTICE GINSBURG: What did you -- what we
3 were told by Mr. Fisher, I think he was referring to 79A
4 of the government's appendix.

5 MR. KATYAL: So he has two different
6 arguments, Justice Ginsburg, about -- about the changes
7 to the amendments. We think neither of them is going to
8 come close.

9 First of all, nothing is unambiguous as the
10 Spending Clause requires. These are changes to the
11 procedural protections in 1414(d), and an -- and an
12 additional goal found in 1400. None of that comes close
13 to this.

14 And I think the best barometer of this is
15 that it's taken until Mr. Fisher's creativity for any
16 court, really, to even entertain the notion that the '97
17 or 2004 amendments changed the standard. He has not a
18 single case to cite that supports this idea.

19 In all of the --

20 JUSTICE KENNEDY: But the procedural
21 standards certainly are the measure by which a court can
22 determine whether or not the procedures were adequate.

23 MR. KATYAL: Absolutely, Justice Kennedy.
24 We agree.

25 JUSTICE KENNEDY: Then why doesn't that

1 automatically make these part of the standards?

2 MR. KATYAL: We -- we do think it makes them
3 part of the standards. It just makes them part of the
4 procedural standards. That is to say, we agree with
5 them that in 1997 and 2004, Congress really changed the
6 IDEA in a significant way. The question is --

7 JUSTICE KENNEDY: Well, do you agree that
8 the procedures have to meet these standards?

9 MR. KATYAL: Absolutely. Absolutely. And
10 so to the extent the procedures are met, to the extent
11 that the --

12 JUSTICE KENNEDY: Then I don't understand
13 your disagreement with Mr. Fisher.

14 MR. KATYAL: Well, it's -- it's very large.
15 That is, we think that these are -- a procedural
16 checklist, and it's a detailed and exhaustive one, to be
17 sure, Justice Kennedy, after --

18 JUSTICE KENNEDY: But -- but are -- are not
19 the procedures subject to judicial review to see that
20 the procedures were followed?

21 MR. KATYAL: Absolutely, Justice Kennedy.
22 We agree with that. That's actually the way -- that's
23 what Congress had in mind, the idea that you've got to
24 go through the checklist, you can look at the checklist
25 here. It's very detailed and extensive, the

1 supplemental appendix, pages 131 to 142. And so long as
2 the Court has considered those things -- excuse me -- so
3 long as the IEP process has considered those things --

4 JUSTICE KAGAN: But the procedures, as I'm
5 sure you'll agree, is geared towards something. It's
6 geared towards the provision of a free appropriate
7 public education.

8 Then the Act, what it does, is it sets up --
9 this is why I -- I guess I -- I -- I can't readily agree
10 with your understanding of it's all procedures and we
11 just have to make sure the procedures are followed,
12 because what the Act does is it sets up an
13 administrative process. And it says when you have
14 disagreements about the provision of a -- of a FAPE, you
15 go to this administrative process.

16 And what does the hearing officer do? I'm
17 going to just read you, subject to another exception, "A
18 decision made by a hearing officer shall be made on
19 substantive grounds based on a determination of whether
20 the child received a free appropriate public education."

21 MR. KATYAL: Correct.

22 JUSTICE KAGAN: So that's what the dispute
23 is ultimately going to be about. It might be about some
24 procedures along the way, and maybe it will be solved
25 just by saying follow the right procedures, but often

1 not. Often, what the hearing officer is told to do,
2 shall do, is to decide on substantive grounds whether a
3 child has received a free appropriate public education.

4 MR. KATYAL: Justice Kagan, we don't
5 disagree with a lot of what you said. That is to say
6 that we do think -- and Rowley is very clear on this --
7 that there is a substantive standard in the IDEA. It's
8 just a "some benefit" standard, not -- and there's nine
9 different standards now that we've heard just in the
10 last half hour, which I'll walk you through in a minute,
11 but that the Petitioner and the government are saying,
12 so it's some benefit.

13 We do think there's substantive review.
14 That's what that provision is about. And by the way,
15 that provision also says there can be procedural review
16 on a harmless error.

17 JUSTICE KAGAN: But your substantive
18 standard is so low, is so easy to meet, and then you
19 justify that. You say, don't worry about it because
20 it's all in the process.

21 But this provision, the idea of what a
22 hearing officer is supposed to do, and then what a court
23 is supposed to do, says it's not all in the process.
24 There is a question of whether a student is receiving a
25 -- a FAPE.

1 MR. KATYAL: So we disagree in two different
2 respects. Number one, the experience for 34 years since
3 Rowley, almost every circuit, both the government and
4 Petitioner agree, whether it's Eighth or Tenth Circuit,
5 have been applying the -- the some benefit standard, and
6 that it had bite. Indeed, their own reply brief at page
7 19 admits and says, look, actually schools are doing
8 fine.

9 So to the extent that you're concerned about
10 some really low standard in the courts, that's actually
11 not what's materializing, and you will get case after
12 case on this ASA brief at page 24. So it's three cases
13 using the some benefit standard just from this year.
14 Judge Colloton's opinion in CB. There's case after case
15 saying this is not some, you know, totally minor
16 standard, it is the standard that Rowley said.

17 CHIEF JUSTICE ROBERTS: It says "some
18 benefit," but you're -- you're reading it as saying
19 "some benefit," and the other side is reading it as
20 saying "some benefit," and you know that --

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: And it makes a
23 difference. And I -- one reason I think that it -- it's
24 problematic for you is because Rowley just doesn't say
25 "some benefit." It tells you what it is. And it's

1 enough benefit to keep track with grade progress. And
2 if that's what the standard is, that's certainly more
3 than -- you know, slightly more than de minimis.

4 And, now, obviously, we -- we -- you can't
5 take that actual substantive standard and apply it in a
6 case such as this, but it does seem to indicate that
7 there is a substantive standard and it's not just some
8 benefit.

9 MR. KATYAL: Well, our position is Rowley
10 doesn't say that it's got to be grade-level progress.
11 Rather, it says that you've got the -- the word
12 "appropriate" -- this is footnote 21 -- reflects --

13 CHIEF JUSTICE ROBERTS: The -- the --

14 MR. KATYAL: -- reflects, quote, "Its
15 recognition that some settings simply are not suitable
16 environments for the participation of some handicapped
17 children," not as a term of art which concisely
18 expresses the standard found by the lower court's
19 equality standard. That is to say, I think, you can --
20 there -- there are lots of different ways of trying to
21 understand what the statute means, but Rowley said the
22 way for the Court to understand it is Spending Clause
23 legislation. That is, the State entered into a contract
24 and they need to know the terms of the deal, and to the
25 extent there's any ambiguity, I think Rowley was very

1 clear in saying it is just some benefit, and that is a
2 natural thing it follows from the kind of presumption
3 against de minimis --

4 JUSTICE GINSBURG: You don't think "some
5 benefit" is ambiguous?

6 MR. KATYAL: Well, I think that there's a
7 little bit of ambiguity in that, but I think it's a lot
8 easier to administer that question because the
9 question -- you know, Justice Ginsburg, let's just say,
10 this is the way ordinary English works.

11 If I have a duty to benefit you, Justice
12 Ginsburg, if I give you no benefit, I think courts can
13 easily review that. I've given you no benefit, I've
14 fallen down on my duty. Now, if I've given you some
15 benefit, I've met my duty to benefit you, but I think
16 that --

17 JUSTICE GINSBURG: But I think it doesn't
18 say it's more than de minimis.

19 MR. KATYAL: Exactly, but that can't be --

20 JUSTICE GINSBURG: So what is it?

21 MR. KATYAL: That can't be -- just to finish
22 that -- that -- that thought. It can't be that the
23 standard is, if I benefit you significantly, that's the
24 standard; or if I benefit you equally with your
25 colleagues or something like that. That's all adding

1 words to the statute that aren't there.

2 JUSTICE BREYER: Where is it? As I see one
3 way of looking at what we're doing, two things have
4 occurred. One, Rowley itself is somewhat ambiguous. It
5 doesn't -- it deliberately doesn't say how much, and
6 that's why you get the ambiguity.

7 The second thing that happens is the statute
8 is amended. So what we're doing is going back and
9 looking at those somewhat ambiguous words in Rowley in
10 light of a statute that was amended.

11 Now, when you look at the statute that was
12 amended in the IEP, you do see in at least two and maybe
13 more places that that IEP is designed to be a statement
14 that will produce -- meet the child's needs to enable
15 the child to be involved in and make progress in the
16 general education, and then further, advance
17 appropriately towards an -- annual goals to make
18 progress in the general education.

19 So now what the SG has done is go back, take
20 those words, "make progress," and put them in a phrase
21 which, in fact, I think with not much modification says,
22 look, let's read what Rowley said in light of these
23 additional words, "make progress," which are statutory
24 words, while taking account of great differences by
25 using words like "appropriately in light of the

1 student's particular needs and abilities," and those all
2 come from the statute.

3 MR. KATYAL: So, Justice Breyer, three
4 things. Number one is we don't agree that Rowley itself
5 is ambiguous as it's been interpreted for 34 years.
6 Indeed, they can't cite any cases showing that there's
7 any problem. Indeed, their reply brief admits at page
8 19, things are working just fine. So the idea that
9 there's, like, some need for this Court to get involved
10 and clarify Rowley, I think, you know, there's no case
11 law or anything to support that.

12 Second, the idea that the amendments somehow
13 changed the game, I think, is not nearly enough to be
14 the clear statement that Pennhurst requires. I mean,
15 this isn't just elephants being hided -- hided in mouse
16 holes. This is elephants being hidden in romanette
17 mouse holes. I mean, this is -- you know, just listen
18 to the things that he had to point to. It's subsection
19 D4, romanette ii, and things like that, none of which --

20 JUSTICE GINSBURG: But would you agree with
21 at least the courts should say that the formulation more
22 than de minimis sets the level too low, and that's --
23 that's the formula that was used at levels here.

24 MR. KATYAL: And, Justice Ginsburg, we
25 disagree with that. We think more than de minimis,

1 which is what almost every circuit is using right now,
2 has worked and it follows naturally from the some
3 benefit language in Rowley.

4 Now, you might disagree --

5 JUSTICE GINSBURG: So you're -- you're
6 equating some benefit to more than --

7 MR. KATYAL: More than de minimis. We think
8 it means the same thing, and we think there's a long
9 history of experience with this showing that it's
10 working.

11 And to return, Justice Breyer, to a point
12 that you had made before. It's that there's some
13 concern about the standard. That's really got to be up
14 to Congress. If this Court were to change the standard,
15 you know, it would invite all sorts of litigation.

16 And just look at what Mr. Fisher said. As
17 the Chief Justice started, he -- first his petition
18 started with a substantial equal opportunity standard,
19 then it became in its merits brief an equal opportunity
20 standard, then in the beginning of his oral argument it
21 was, quote, "tailored to achieve at grade level what" --

22 CHIEF JUSTICE ROBERTS: But, Mr. Katyal,
23 let's say -- let's say that during the school year, the
24 school districts -- district sends someone to work with
25 the particular student in this case, and they send her

1 there for two weeks, you know, she goes around. And
2 that's it. And that's all they do. That's some
3 benefit. Better to have the person there for two weeks
4 than not at all, but you wouldn't say that satisfies the
5 statute.

6 MR. KATYAL: It does not. As our brief
7 explains there is two different provisions in the
8 statute, 1414(b)(r) and (c)(5)(A), which explain that
9 the benefit from special education must be, quote,
10 "continuous." And Cedar Rapids actually said that.
11 So --

12 CHIEF JUSTICE ROBERTS: Okay. So -- and
13 just change the hypothetical. She's there five minutes
14 a day.

15 MR. KATYAL: And -- and -- and, you know,
16 five minutes a day, I think, wouldn't meet the
17 de minimis standard. That is -- that is, that itself is
18 not a significant -- that -- that is not a word --

19 CHIEF JUSTICE ROBERTS: Well, I guess it
20 depends on whether somebody can tell us at some point
21 whether it's beneficial. And yet, I think most people
22 would agree that it -- well, I mean, are you saying that
23 the -- the judicial review is supposed to be whether
24 that's de minimis or more than de minimis, and they're
25 supposed to say, well, a half hour is -- is -- is good,

1 it's not de minimis, but that's all you have to do?

2 MR. KATYAL: Mr. Chief Justice, I'm saying
3 two different things. One is yes, ultimately, if we got
4 there, that it would flunk substantive de minimis
5 review, but you wouldn't get there. Congress's whole
6 judgment here was to put the emphasis on procedural
7 protections in the Act, and they bolstered them in '97
8 and 2004. And as long as they could shine a light by
9 creating an IEP team process where they trusted teachers
10 and they trusted parents who are highly incentivized to
11 come together --

12 CHIEF JUSTICE ROBERTS: Yeah, but you're
13 putting a lot -- you're assuming that the procedural
14 process will yield significant results. What if they do
15 the whole thing? Yeah, we have a hearing. Everybody
16 comes in. We bring the expert in and the expert says,
17 well, you need to have somebody there six hours of the
18 day to help the child learn, and they say, okay,
19 that's -- that's the procedure, we listen to you. In
20 fact, we're only going to have somebody there a half
21 hour a day.

22 MR. KATYAL: I -- I am assuming that it is
23 in general going to work, which is what Rowley itself
24 said at page 206 of its opinion. That -- that was
25 Congress's judgment.

1 Now, I agree, you can give me a hypothetical
2 which says that in some case the procedures aren't going
3 to work and there's going to be a bad result. No system
4 is perfect, not even a judicial system, as the error
5 correction rules of this Court recognize.

6 I think the -- the question for the Court is
7 should you kind of re-jigger the statute and impose a
8 new standard, particularly in the context --

9 CHIEF JUSTICE ROBERTS: It's not exact --

10 JUSTICE KENNEDY: You'll have to excuse me,
11 I'm not sure I understood your answer to the Chief
12 Justice.

13 He -- he had a hypothetical where you have
14 the hearing, the hearing makes a recommendation,
15 recommendation not followed. What result?

16 MR. KATYAL: If the recommend --

17 JUSTICE KENNEDY: And -- and then I thought
18 I heard you say, well, the procedure we followed, that's
19 good enough.

20 MR. KATYAL: If -- if -- I might have
21 misunderstood. I thought there was a five minutes of
22 services thing.

23 If it's not followed, everyone agrees
24 there's judicial review of that. The IEP is essentially
25 a contract. Our brief cites the provision which says

1 that you can come in and enforce the IEP. I don't think
2 there's any disagreement about that.

3 I understood the hypothetical to be about
4 some really low level of benefit. And our point is,
5 Rowley says there is a some benefit standard. That has
6 been interpreted in court after court to actually have
7 bite. The ASA brief cites the -- three cases just in
8 the last year alone about that.

9 The question is, in Spending Clause context,
10 do you want to actually impose something new? I mean,
11 Mr. Gornstein gave you three different new standards,
12 starting with his cert petition and then -- and then his
13 merits brief taking a different view.

14 JUSTICE SOTOMAYOR: So where do you get
15 "some benefit" from?

16 MR. KATYAL: I get it from Rowley itself at
17 page 200 which says that --

18 JUSTICE SOTOMAYOR: What do you do with
19 "meaningful" --

20 MR. KATYAL: So "meaningful" --

21 JUSTICE SOTOMAYOR: -- that was in Rowley
22 itself?

23 MR. KATYAL: So "meaningful" was not
24 actually in Rowley. The Court there just mentioned
25 "meaningful" once only to say that it can't be more than

1 meaningful. It didn't adopt that as a standard. There
2 is some baggage, as Mr. Gornstein says, but the really
3 important baggage is actually what this Court said in
4 Cedar Rapids, which is that meaningful access doesn't
5 require a particular level of education.

6 JUSTICE BREYER: All right.

7 MR. KATYAL: So that's what we have --

8 JUSTICE BREYER: That's what we have -- we
9 have now. We have the words you've mentioned. They are
10 in old cases. As was just pointed out, those words
11 "some" -- what is it? "Some" -- "some" -- "some
12 benefit."

13 MR. KATYAL: "Some benefit."

14 JUSTICE BREYER: You could say some benefit
15 or you could say some benefit.

16 MR. KATYAL: Yeah.

17 JUSTICE BREYER: All right. Now, that's an
18 ambiguity.

19 MR. KATYAL: Yes.

20 JUSTICE BREYER: And as you pointed out,
21 most courts have interpreted what I think is the correct
22 thing, they said benefit. Okay? And you say there is
23 really no problem. Okay? There is really no problem.
24 But there still is a problem with the language in a
25 handful of courts. And now we have an IEP statute which

1 again and again and again looks to progress.

2 So why is it making something up out of
3 whole cloth --

4 MR. KATYAL: Well, first --

5 JUSTICE BREYER: -- simply to take that word
6 from the IEP, which is enforceable anyway, and say, look
7 at these two words of ambiguity, and we think we should
8 interpret them in light of the IEP requirements, which
9 are pretty close to what the SG suggests?

10 MR. KATYAL: But, Justice Breyer, I don't
11 think that there was some problem in the lower courts.
12 They're not citing cases that show that there's some
13 parade of horrors akin to the hypotheticals --

14 JUSTICE BREYER: Uh-huh.

15 MR. KATYAL: -- that we've heard. And
16 Congress's judgment was that the procedural protections
17 will do a lot at the front end to avoid that problem.
18 There might be some situation at the back end, but
19 that's where the system -- systemic requirements of the
20 IDEA No Child Left Behind are so important. Because
21 what they say is that the Department of Education can
22 cut off funds, can redirect funds, can require annual
23 reports, all sorts of things happening.

24 And, indeed, annual reports have been
25 required since 2004 to Congress. Congress has never

1 changed the statute in the way they want, a substantive
2 standard change. You know, and -- and, again, their own
3 reply brief at page 19 and the SG's brief admits the
4 standard is generally working. Teachers are teaching to
5 the top.

6 JUSTICE ALITO: What is frustrating about
7 this case and about this statute is that we have a
8 blizzard of words. And if you --

9 MR. KATYAL: Right.

10 JUSTICE ALITO: -- read them literally, it's
11 not clear to me that they mean anything different.

12 Now, "progress" benefit. Yeah, I don't see
13 how you can have a benefit unless you're making some
14 progress.

15 "Significant," "meaningful," they're
16 synonyms. If something is significant or meaningful,
17 it's more than de minimis. And if it's more than de
18 minimis, you could say it's significant. It's something
19 that you note. So it's really -- I mean, what everybody
20 seems to be looking for is the word that has just the
21 right nuance to express this thought.

22 MR. KATYAL: Well, we think that you should
23 look to what Rowley did here, which is to say the word
24 is "some benefit." And that actually follows from the
25 text of the statute itself. There is a long

1 presumption, Justice Alito, against de minimis, starting
2 with Wrigley, which this Court said applies to all
3 statutes. So we think our standard comes from the text,
4 but there is no canon about significance or quality or
5 anything like that.

6 JUSTICE ALITO: What is the difference
7 between "some benefit" and "significant"?

8 MR. KATYAL: I think it's quite large; that
9 is, you know -- you know, I think it's straightforward.
10 So, you know, basically, I think, you know, if -- if the
11 Court is to ask whether there is some benefit, as I was
12 saying to Justice Ginsburg in my hypothetical, you know,
13 that's a pretty easy question, is, have I benefited?
14 Has the school district benefited? But once we start
15 getting beyond that to "significant," the Court has to
16 ask both: Was there some benefit and then was that
17 benefit significant? And I can imagine --

18 CHIEF JUSTICE ROBERTS: It didn't just
19 say --

20 MR. KATYAL: -- a variety of views about
21 what is significant.

22 CHIEF JUSTICE ROBERTS: It didn't just say
23 "some benefit." It said that that benefit would
24 normally allow the -- a student with the disability to
25 keep up with his peers in a different grade.

1 Now, as soon as they say that, you
2 appreciate that you're dealing with more than just some
3 benefit. I mean, that's a significant benefit. Well --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Significant --
6 "significant," "meaningful," whatever. It's more than
7 simply de minimis. It suggests that you can't just look
8 at something and say, aha, here, that was helpful, that
9 was helpful, because it's -- the whole package has got
10 to be helpful enough to allow the student to keep up
11 with his peers.

12 MR. KATYAL: Mr. Chief Justice, I don't
13 think that's what Rowley said when it used grade to
14 grade. I think that all the -- the grade to grade was
15 just to say, procedurally, they've got to consider that
16 and make sure that, for example, a high school kid isn't
17 put in first grade. But I don't think that's part of
18 the test. And several times Rowley rejected this idea
19 that there's any sort of level-of-education test.

20 JUSTICE KAGAN: Well, how does your
21 position, Mr. Katyal -- you have a passage in your brief
22 on page 47 which says, "An IEP must have the goal of
23 advancing a child in the general education curriculum
24 and, to the extent possible, enable her to be educated
25 in the school's regular classes."

1 And, to me, that sounds exactly like what
2 the chief justice just said, that an IEP has to be
3 reasonably calculated to do those things. And if it's
4 not, then relief follows.

5 MR. KATYAL: So I think, again, it's just a
6 procedural guarantee that they have to think about and
7 consider grade-level progress. It does not mean sort of
8 substantive standard --

9 JUSTICE KAGAN: That's wrong. This is not
10 just a procedural guarantee. Yes, the IDEA has lots of
11 procedures in it, but they're all geared towards a
12 particular substantive result. And it's that
13 substantive result that's the focus of the -- both the
14 administrative process and then judicial review of what
15 comes out of the administrative process.

16 MR. KATYAL: But I don't think so, Justice
17 Kagan. I think all that those standards say is what an
18 IEP must address, not how an IEP must deal with them.
19 And so if you look -- and I think the Second Circuit
20 recently, in a case called LO v. New York City just a
21 couple of months ago, decided -- basically went through
22 this and said the 1414 standards like that are
23 checklist. You've got to consider grade-level progress
24 and things like that.

25 JUSTICE KAGAN: But if we --

1 MR. KATYAL: But you wouldn't --

2 JUSTICE KAGAN: -- consider all of them and
3 we do none of them, that's just fine?

4 MR. KATYAL: That's -- well, the Congress's
5 judgment was the process -- and this is something that
6 happens in NEPA --

7 JUSTICE KENNEDY: So your answer to Justice
8 Kagan is yes. If you consider everything but do
9 nothing, that's okay.

10 MR. KATYAL: No. Because there's still --
11 if you do nothing, then you haven't provided any
12 benefit. And so there is still some substantive bite in
13 the standard of Rowley itself. What we're saying is, in
14 the context of Spending Clause legislation, you can't do
15 more than that and require something significant.

16 And the reason, Justice Kennedy, is once you
17 start going into significance, as the amici briefs point
18 out, education is the most -- one of the more contested
19 areas in our society. Parents have been known to
20 disagree. There is more acronyms about lawsuits about
21 this newfangled theory or that newfangled theory or 30
22 hours versus 35 hours being significant. And you get
23 into a huge morass.

24 What Rowley said citing San Antonio v.
25 Rodriguez is that that kind of thing in the educational

1 context is not where Federal generalist courts should
2 be.

3 Now, I suppose you could say maybe that's
4 not the right policy. Maybe, you know, this is
5 something that should happen. Courts should get
6 involved in this. That's really got to be a judgment
7 for Congress to make, and it's got to be something they
8 say clearly in the context of Spending Clause
9 legislation. Rowley expressly said the Pennhurst
10 principle applies to this provision of the statute.
11 This is core legislation, core -- a core requirement of
12 the statute, and they are imposing any number of
13 different standards.

14 And so I understand that there is some
15 policy concerns among -- among the Court, even if
16 they're not shared by the -- my friends on the other
17 side, because they disclaim them. But to the extent
18 there are those policy concerns, that's really got to be
19 something that Congress deals with.

20 JUSTICE ALITO: And what I'm --

21 JUSTICE GINSBURG: One -- one aspect of --
22 of your position is you say yes, there is a substantive
23 standard, some benefit. And then you, in the course of
24 your argument, said some, as interpreted by most courts,
25 has bite. But then you say de minimis is enough -- more

1 than de minimis is enough.

2 MR. KATYAL: Correct.

3 JUSTICE GINSBURG: So some with bite and
4 more than de minimis don't sound like equivalence to me.

5 MR. KATYAL: I think they are, and I think
6 that's what the -- circuit after circuit has said, which
7 is that some educational benefit, the language at page
8 200, means more -- more than de minimis. And so -- and,
9 you know, I think there is a whole variety of cases that
10 have interpreted this.

11 And, Justice Ginsburg, even this Court has
12 actually had one of them. In Florence v. Carter, that
13 came from a circuit which had a "more than merely de
14 minimis" standard. The Court there found that the IEP
15 substantively didn't meet the protections of the "some
16 benefit" or "merely more than de minimis" standard.

17 JUSTICE BREYER: We get that -- I mean, how
18 does this actually work? I thought there is a statute
19 in 1414 before that, it says you have to, school
20 district, write an IEP. Then it says what an IEP is.
21 And one of the things it says an IEP is, is it is a
22 statement of the services, et cetera, based on peer
23 review stuff that will be provided for the child to
24 advance appropriately and to make progress in the
25 general education curriculum.

1 Now, suppose the school district writes a
2 statement called an IEP, but it does not show that the
3 child is likely to advance. Can't they go to the
4 administrative thing and then go to court and say to the
5 judge, look, they didn't write what they were required
6 to write?

7 MR. KATYAL: Absolutely. So --

8 JUSTICE BREYER: Okay.

9 MR. KATYAL: -- if there is a statement, the
10 key word --

11 JUSTICE BREYER: So they have to write
12 something that's minimally --

13 MR. KATYAL: -- is statement.

14 JUSTICE BREYER: Now, let's suppose they
15 write it, but they don't do it.

16 MR. KATYAL: Yes.

17 JUSTICE BREYER: Now, isn't there something
18 saying you have to follow the IEP?

19 MR. KATYAL: Correct.

20 JUSTICE BREYER: And so, again, they go to
21 court?

22 MR. KATYAL: Correct. But what there is
23 not --

24 JUSTICE BREYER: And what they -- again they
25 say they didn't follow the IEP?

1 MR. KATYAL: Correct, Justice Breyer. But
2 what there is not is something in 1414 which says that
3 they've got to provide a significant benefit or an equal
4 benefit --

5 JUSTICE BREYER: But they do have to provide
6 something that makes progress in the general education
7 curriculum and --

8 MR. KATYAL: They have to follow the
9 checklist that is a statement --

10 JUSTICE BREYER: -- and advance
11 appropriately --

12 MR. KATYAL: Yes. There must be a
13 statement --

14 JUSTICE BREYER: -- towards a --

15 MR. KATYAL: -- yes.

16 I think everyone agrees you don't look at
17 outcomes or anything like that. So it's -- it's just a
18 procedural requirement --

19 JUSTICE BREYER: It's procedurally
20 calculated.

21 MR. KATYAL: It's just the same as Rowley.
22 Rowley -- you know, we're not saying anything different
23 than what Rowley said.

24 JUSTICE BREYER: I don't know. I would say
25 if you take Rowley as meaning -- hmm, or whatever those

1 two words were, what, beneficial? What's the one before
2 "beneficial"?

3 JUSTICE KENNEDY: Some -- some benefit.

4 MR. KATYAL: Some educational benefit.

5 JUSTICE BREYER: Some educational benefit.

6 If you say "some," this is inconsistent with Rowley.

7 MR. KATYAL: Well, I don't think so. I
8 think it's got to be some educational benefit designed
9 to get the general education curriculum or --

10 JUSTICE KAGAN: Mr. Katyal --

11 JUSTICE KENNEDY: Mr. Katyal, are there --
12 in the wake of the many years this Act has been enforced
13 and these many individual meetings, have there been
14 documented areas of consensus as to certain standards,
15 certain methodologies, certain systems that work and
16 certain that don't? And do the courts, in reviewing
17 these proceedings, ever refer to those?

18 MR. KATYAL: So I think that's where the
19 amici briefs are so important, because they show -- say
20 that education isn't really one of those areas. I mean,
21 you know, people disagree about the most simple things
22 about educational philosophy.

23 JUSTICE KENNEDY: So we've gone -- so we've
24 gone nowhere.

25 MR. KATYAL: Well, I don't think we've gone

1 nowhere, but I think that worry is to thrust courts into
2 the business of deciding which philosophy is
3 appropriate.

4 And take Firefly, for --

5 JUSTICE KENNEDY: So you say that there is
6 generally no consensus as to appropriate methodologies
7 for, say, a hearing-impaired student, an autistic
8 student. No agreement on that?

9 MR. KATYAL: I don't mean to say that
10 there's no agreement. I am -- I do mean to say that the
11 amici briefs and the case law recognizes that there is a
12 lot of disagreement. And Rowley itself says this,
13 picking up on San Antonio v. Rodriguez, that the
14 Congress's judgment was not to thrust courts into these
15 really highly, very difficult considerations.

16 And if I could just give you one example,
17 talking about Justice Sotomayor, your indication of
18 Firefly. So eventually right, that, you know, once Drew
19 went to Firefly, there was progress that was made. But
20 there was also a lot that was given up.

21 I mean, one of the core purposes of the IDEA
22 is mainstreaming. And of course, Firefly is not a
23 mainstream school. So yes, there were some behavioral
24 problems that were addressed by the private placement --

25 JUSTICE KAGAN: Mr. Katyal, can you go back

1 to Justice Ginsburg's question that I'm a bit confused
2 of -- about for the same reason.

3 You said something like, well, this -- this
4 standard is -- is being applied with bite. So I'm just
5 wondering, do you favor a standard with bite?

6 MR. KATYAL: We favor the standard that
7 Rowley said, which lower courts have done for 34 years,
8 which does have --

9 JUSTICE KAGAN: Do you favor a standard with
10 bite?

11 MR. KATYAL: It does have some bite. It
12 does. We're not trying to --

13 JUSTICE KAGAN: Would that be "some bite" or
14 "somebite"?

15 (Laughter.)

16 MR. KATYAL: It is some educational benefit.
17 That's the language of Rowley. And if you disagree with
18 it, Congress can change it.

19 JUSTICE KAGAN: Well, again, if somebody
20 said to you, write a statute with -- write a standard
21 with bite, I doubt you would come up with the words
22 "more than merely de minimis."

23 MR. KATYAL: Well, but again, I think,
24 Justice Kagan, Congress's bite, the substantive bite is
25 only at the back end. It's a small feature in a much

1 bigger statute.

2 Congress's judgment was --

3 JUSTICE KAGAN: But the back end is what
4 this case is all about.

5 MR. KATYAL: I understand that.

6 JUSTICE KAGAN: We are at the back end.

7 MR. KATYAL: But -- but, Justice Kagan,
8 don't take the policy concerns about the hypotheticals
9 and other things to try and re-jigger the back end.

10 Congress's handiwork was to say it's the
11 procedural protections shining a light, the IEP process
12 with highly incentivized teachers and -- teachers and
13 parents that's generally going to yield the right
14 result. That's what Rowley itself said at page 206.

15 JUSTICE ALITO: We're going to have to use
16 musical notation to -- and not just words -- to express
17 the -- the idea that seems to be emerging. All right.

18 Would you say -- I'll ask the same thing of
19 Mr. Fisher if he has a chance to address it.

20 If -- if we were to look at what the lower
21 courts have been doing -- we don't see very many of
22 these cases, the lower courts see a lot of them. If we
23 looked at what they have been doing in general, would
24 you say that they are doing -- that they are applying
25 the statute appropriately and consistent with correct

1 interpretation?

2 MR. KATYAL: I would. Ten circuits are
3 applying the more than de minimis standard. It's
4 working. Sometimes it has some bite. But to change it,
5 as Justice Breyer was indicating to my friend, is --
6 with eight million potential IEPs, is to invite massive
7 amounts of litigation.

8 JUSTICE ALITO: That sounds very harsh.
9 What's the origin of this phrase, "more than de
10 minimis"? Who thought this up?

11 MR. KATYAL: Well, it goes back to Latin.
12 And so again, we, you know --

13 JUSTICE ALITO: I know where "de minimis"
14 comes from.

15 (Laughter.)

16 MR. KATYAL: No, no, no. No. The -- the --
17 no. The -- the presumption against trifles, you know.
18 It's -- Justice Scalia invokes it why and folks in the
19 Wrigley case. It's an old formulation.

20 JUSTICE ALITO: But who -- who decided to
21 apply it here in this context?

22 MR. KATYAL: Well, I think the Court in --
23 in Rowley, then Justice Rehnquist's opinion, invoked
24 that by talking about some benefit. And Wrigley says
25 that is a presumption that applies to all statutes.

1 And look --

2 JUSTICE GINSBURG: Who -- who put the term,
3 "more than merely de minimis"? That's the formula that
4 we're -- that you are espousing.

5 MR. KATYAL: Yes. We --

6 JUSTICE KAGAN: And de minimis is not
7 enough, you know. It's "merely de minimis."

8 (Laughter.)

9 JUSTICE GINSBURG: And it's not in Rowley.
10 So where does it -- who invented it?

11 MR. KATYAL: Well, I think that it came
12 directly from the circuits right after Rowley. But all
13 we are saying is "some benefit" means the more than de
14 minimis test. That's the way court after court has
15 interpreted it. It's worked well. This Court shouldn't
16 renege on that.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Two minutes, Mr. Fisher.

19 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

20 ON BEHALF OF THE PETITIONER

21 MR. FISHER: Three points, Your Honors. Two
22 about the statute, and one about the practicalities.

23 First, as to the statute, the word
24 "procedural" has been used by my friend to describe the
25 IEP provisions. But whenever pressed, even he admits

1 that the IEP provisions are enforceable in the way
2 Justice Breyer described, which is the plan has to meet
3 the requirements of 1414(d). And if the services on the
4 ground don't meet the requirements in the plan, they're
5 enforceable. That's at page 47A of his brief and
6 throughout the others --

7 JUSTICE SOTOMAYOR: Answer Justice Alito's
8 question. What's the practice today?

9 MR. FISHER: Pardon me?

10 JUSTICE SOTOMAYOR: What's the practice
11 today? Do most courts use the "more than de minimis"
12 standard?

13 MR. FISHER: Yes. That is the formula in
14 most of the circuits. That brings me to an important
15 question on the ground, and if I'll circle back to my
16 other statutory point.

17 JUSTICE ALITO: Before -- putting aside -- I
18 don't want -- I'll take 10 seconds. Putting aside the
19 words, are the outcomes appropriate, or do you think the
20 lower courts need a kick?

21 MR. FISHER: I think they need a kick. I
22 think the outcomes are quite scattered. I think the
23 only reason why you get some favorable outcomes is
24 because even the courts themselves don't believe barely
25 more than de minimis.

1 But I think you have a disjoint. And my
2 friend keeps pointing to the amicus briefs. I think
3 educators are, by and large, following the plan -- I'm
4 sorry -- the -- the standard we propose and the
5 solicitor general imposes.

6 The No Child Left Behind Act in 2004 was a
7 very important, revolutionary, bipartisan policy change.
8 And so educators on the ground are aiming high, as they
9 put it. The city's brief says we are aiming to maximize
10 the benefit for our students. And so you have a
11 disjoint between what educators are doing and the
12 courts. And the reason they need a kick is because the
13 very, very, very, very, very rare case that makes it
14 into the court system is not being properly reviewed.

15 And that leaves the last point I want to
16 respond to, which is the fact that Congress left us
17 alone after Rowley. What the Court has said in Rowley
18 and in Honig and in other cases is the IEP rules are,
19 quote, "the centerpiece of the Act." They're the
20 centerpiece for how the education delivery services are
21 put forward.

22 If you look at page 182 of Rowley, the IEP
23 provisions were quite hollow. They didn't have any
24 benchmarks at all. That has dramatically changed. They
25 now have the general educational curriculum benchmarks

1 Justice Breyer has been referring to, and we repeatedly
2 refer to in our brief, and I think, Mr. Chief Justice,
3 you agree cannot be met under their standard.

4 And then that leaves the last little piece
5 of the puzzle here, which is this child who cannot get
6 up to grade level standards. We give you an
7 answer-direct question that is directly in the text of
8 the Act, just as my friend demands. Alternative
9 achievement benchmarks at the bottom of 52A is what is
10 required. And that takes you to 79A, which gives you
11 the exact statutory formula.

12 So if you want to use that formula, combined
13 with general educational curriculum at grade level, we
14 think that would be a proper answer to the question
15 presented in this case.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 The case is submitted.

18 (Whereupon, at 11:05 a.m., the case in the
19 above-entitled matter was submitted.)

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