
Petitioner

Respondent.

Counsel of Record

Counsel for Amici Curiae

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86 'HS·W RI (GXF 2IILFH RI 6SHFLDO (GXFDWLR
 Rehabilitative Services, A New Era: Revitalizing

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide a free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.?

INTERESTS OF THE AMICI

Amici Curiae, National School Boards Association (NSBA), California School Boards Association (CSBA) and its Legal Alliance Fund (LAF), Colorado Association of School Boards (CASB), and the Horace Mann League (HML) respectfully submit this brief in support of the Respondent.¹ NSBA is a national organization representing state school boards associations and their more than 90,000 local school board members. NSBA believes education is the most vital institution. NSBA advocates for equity and excellence in public education through school board leadership. CSBA is a non-profit, member-supported organization that advocates for and advances the interests of more than 6 million public school students

¹ All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to the preparation and submission of this brief.

UHF RJQLJHV DQG UHVSHFWV & RQJUHVV. LQWHQW
state and local education agencies the task of

of educational benefit n HFHVVDU\ WR PHHW WKH , '(\$ · V
FAPE

floor of opportunity is the only substantive standard imposed by the Act *id.* at 191-92 (emphasis added).

7 K H & R X U W U H F R J Q L J H G W K D W ' > W @ K H S U responsibility for formulating the education to be accorded a handicapped child, and for choosing the H G X F D W L R Q D O P H W K R G P R V W V X L W D E O H W R W K H was left by the Act to state and local educational agencies in cooperation with the parents or guardian of t K H F K *Id.* at 207. IDEA delegates to IEP teams W K H D X W K R U L W \ W R G H Y H O R S D V W X G H Q W \ V , G H F L V L R Q V U H J D U G L Q J D V W X G H Q W \ V H G X F D W L R and collectively consider concerns parents have for ' H Q K D Q F L Q J W K H H G X F D W L R *See* 20 R I W K H L U F K L O G U.S.C. §§ 1412(a)(4), 1414(d)(3)(A)(ii). This framework is elaborate in order to establish the structure most likely to result in beneficial outcomes for disabled children. 458 U.S. at 205 -06.

A. By Design t he I D (\$ \cdot V , (3 Requirements Ensure t hat Each Child Receives t he Education al Benefits Envisioned by Congr ess Consistent with Rowley .

1. The comprehensive and collaborative IEP process is uniquely applied to each disabled child .

For decades IEP teams have collaborated in good faith with parents to design and deliver excellent, successful special education

programs.² The procedural requirements ensure this by creating a framework that fosters the development of an IEP that provides educational benefit for each child with a disability. 34 WHP · V RIIHU RI VSHFLDO education and related services flows from a detailed, pedagogical process that begins with a formal, multi-IDFWHG LGHQWLILFDWLRQ RI HDFK FKLOG · V XQLT does not depend on some amorphous barometer of educational benefit.

The level of educational benefit enjoyed by each child is a product of the IEP process itself and the IEP WHDP · V LQGH · YDOLDEOL · W. The IEP process requires 2006-61918-711 ET 05 E 140(b)-e 792 0(a) - 792 0 1 24 detailed procedural components and to tie individualized goals based on specific needs to services reasonably calculated to allow the partit6-6(c3(b)-3(l)-4()6(l)-1esTJ ET 05 E

determining whether the child is a child with a disability; and the content of the [IEP], including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate

Upon completion of the evaluation, an IEP team meets to review the results, *id.* § 1414(a)(1)(C)(i)(I), along with current classroom-based, local, or state assessments and classroom-based observations, and other observations by the relevant service providers. *Id.* § 1414(c)(1)(A). The IEP team is uniquely composed for each child and must include the parents, at least one general education teacher, at least one special education teacher, a school district representative, individuals who can interpret the instructional implications of evaluation results, others with knowledge or special expertise regarding the child, and, when appropriate, the child. ⁴ *Id.* § 1414(d)(1)(B). Beyond these minimum requirements, the composition of the team may vary to include additional experts and resources according to the

³ , '(\$·V SURFHGXUDO allow parents to obtain an independent educational evaluation at public expense if they GLVDJUHH ZLWK WKH GLVWULFW·V HYDOXDWL RQ 8 6 & t 1415(d)(2)(A); 34 C.F.R. § 300.502.

⁴ The state educational agency must establish and maintain qualifications to ensure that personnel necessary to carry out , '(\$·V SXUSRVHV DUH DSSURSULDWHO\ DQG DGHTXDWHO\ SU trained to serve children with disabilities. 20 U.S.C. § 1412(a)(14)(A).

The IEP must also recommend special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, and must include a statement of the program modifications or supports for school personnel designed to allow the child to advance appropriately toward D W W D L Q L Q J W K H F K L O G · V individualized annual goals; to be involved in the general education curriculum; and to be educated and participate with other children both with and without disabilities to the maximum extent appropriate . Id § 1414(d)(1)(A)(i)(IV). T

of report ca U G VId .p§ 1414(d)(1)(A)(i)(III). The IEP team must reconvene on at least an annual basis to review and update the IEP. Id. § 1414(d)(4). The team may reconvene at any time to amend the IEP, including at the request of the parents or other IEP

To illustrate the degree of complexity and specificity entailed in developing an IEP to serve each child, consider the following scenarios involving two children in the third grade. One is high-functioning and qualifies for special education and related services under the category of specific learning disability (SLD). The other is severely impacted and qualifies under the category of intellectual disability (ID).

Initially, when the students arrive in first grade, the school district assesses each student in all areas of suspected disability. A school psychologist assesses

W K H V W X G H Q W V . F

Then at the beginning of third grade, each

7 R N H H S W K H V W X G H Q W V . , (3 V D O L J Q H G Z L W H
standards, each team drafts annual goals in reading fluency and written expression. For the SLD student, the IEP team drafts the following goals based on comparable standards from the previous grades:

1. Reading fluency : By September 1, 2017, [student] will read with sufficient accuracy and fluency to support comprehension by reading a beginning second grade-level text orally with 90 percent accuracy at a rate of 100 words per minute, in two out of three successive readings as measured by teacher charting.
2. Written expression : By September 1, 2017, [student], when given a graphic organizer, an edit checklist, and modified paper, will write an opinion piece that includes a topic sentence, three supportive facts, and a concluding sentence, with 75 percent accuracy in two out of three trials as measured by work samples.

For the ID student, his IEP team drafts the following goals based on a functional modification of the standards :

1. Reading fluency : By September 1,

from a field of three, in five scenarios per

be

creating programs that produce positive outcomes
and achieve

B. A 1HZ 1DWLRQDO ´6WOLQGDUGµ
Deprive Students of the Benefits of
Individualized Consideration by
Shifting the IEP 7HDP·V)RFXV \$ZD\
from the Fine Points o I D &KLOG·V
Disability t o Artificial Legal
Constructs .

1. A heightened FAPE standard
will interfere with the
collaborative IEP process by
injecting an unmanageable
degree of uncertainty .

The Rowley Court ·V ´VRPHµ HGXFDWLRQDO EHQHILW
VWDQGDUG UHFRJQLJHV DQG UHVSFWV &RQJUHVV
defer to state and local agencies· HGXFDWLRQDO
judgments about the services students with
disabilities need. At the same time, it provides a
safeguard against the continued implementation of
programs that are clearly not resulting in educational
benefit. In contrast, the new FAPE standard s
advocated by Petitioner and supporting amici would
substantially disrupt the collaborative work of IEP
teams by shifting the ir focus from designing
appropriate programs to complying with ambiguou s
legal constraints. F or the seven million students
currently receiving special education and related
services,¹¹ an IEP team unique to each child engages
in thoughtful DQDO\VLV RI HDFK FKLOG·V LQGLYLGXD

¹¹ See

needs, at least once a year. For each team to try to quantify the level of benefit pertaining to those needs necessary

2. Departing from the current FAPE standard would create the inaccurate perception that IEPs valid under the Rowley standard shortchange students with disabilities.

For decades, IEP teams nationwide have been creating IEPs reasonably calculated to provide millions of students with disabilities with educational benefit in the least restrictive environment, while addressing their unique needs with appropriate goals and services, accommodations and modifications. If this Court expands the current FAPE standard, its decision will create a perception among IEP teams, including parents, that the programs currently offered to those students are insufficient, subjecting each IEP to the misconstrued requirement of upward revision regardless of its current effectiveness. Such a perception would lead to more confusion between parents and schools as to whether a child is actually receiving FAPE as everyone struggles to apply amorphous standards to real situations. Such uncertainty could create an adverse atmosphere where none existed before and likely would spur a significant increase in the number of due process complaints, pulling already -stretched public

was not reasonably tailored to accomplish the goals); *Carter v. Florence Cnty. Sch. Dist. Four*, 950 F.2d 156, 159 (4th Cir. 1991), *aff'd* 86 ILQGLQJ, (3 JRD OV SUHVFULELQJ 'PHUH IR PRQWK.

resources into litigation and away from the service of children.¹⁵

If this Court adopts a heightened FAPE standard, it removes the question from the demonstrably capable hands of the IEP team and places it into the realm of courts and administrative hearing officers. It would result in an environment in which the educational benefit sought through the redefined FAPE standard would inure only to parents who have the means and ability to access due process and courts, at the expense of other students with disabilities whose parents do not or cannot litigate. This is contrary to the purpose of the IDEA, which provides great deference and flexibility to IEP teams of all schools, based on the unique expertise and personal knowledge of the individual child and his or her family.

¹⁵ In 1975, Congress promised to provide federal funds to cover 40% of the cost of educating students with disabilities by 1982. Pub. L. No. 94-142, 89 Stat. 777, § 1401(a)(B)(v) (1975). Federal funding only covered 16.2% of IDEA costs during the 2014 fiscal year. Clare McCann, IDEA Funding, 2014 fs, (f)-3(Tf 1 0 0 1 158.42 3Span1.82 Tm

class time that becomes increasingly crucial in higher grades as the curriculum focuses on substantive material rather than basic skills. In the case of the ID student, the team had to weigh the benefit of direct L Q V W U X F W L R Q D W W K H V W X G H Q W · V I X Q F W L R Q D O with what that team believed to be the heightened social and emotional benefit of the general education classroom. In both of these scenarios, an expansion of the legal standard applied to educational benefit FR X O G F K L O O D W H D P · V Z L O O L Q J Q H V V W R S U L R U education class time, or social/emotional development over academic goals.

Courts have grappled with similar situations. In *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314-15 (9th Cir. 1987), a school district offered a placement that included both general and special education classes. The parents requested a placement that included three hours per day of individual tutoring outside the classroom setting. 7 K H , (3 W H D P K D G W R E D O D Q F H W K H V W X G H Q W · V develop higher order intellectual skills with the W X W R U L Q J S U R J U D P · V H P S K D · V R Q U R W H V N L O

been greater, , (3 WHDP RIIHUG D SURJUDP WKDW ´ VWU) a suitable balance between the goals of PDLQ VWUHDPLQJ DQG ¶PD[LPXP SRWHQWL GHYHORSFHQW, 62 F.3d at 535 (IEP in which district proposed placement of blind student in physical support class on comprehensive campus rather than residential school was appropriate, even LI QRW ´RSWLPDO µ

When an IEP team considers the information available , it may conclude that more than one placement available would provide the student with some educational benefit. Under the current framework, the IEP team balances the potential educational benefits of each program option against the least restrictive environment requirement. The IDEA is satisfied by such balancing, even if the team does not offer the placement that would confer the maximum educational benefit with respect to a particular need. Amann,) G DW ´\$Q , (3

¶PD\ QRW only appropriate choice, or the choice of FHUWDLQ VHOHFWHG H[SHUW RU WKH FKLOG·V choice, or even the best FKRLFH · \HW VWLOO SURYLGH D IU appropri DWH SXEOLF HGXFDFWL RQµ FLWDFWL RQ RI (emphasis in original)).

Moving to the heightened FA PE standard that Petitioner propounds would ul677.01 h propounds

II. IMPOSING A NEW FAPE STANDARD
WOULD VIOLATE THE SPENDING
CLAUSE BY FAILING TO PROVIDE STATE
AND LOCAL EDUCATION AGENCIES
WITH APPROPRIATE NOTICE OF THE
SCOPE OF THEIR OBLIGATIONS UNDER
THE IDEA AND THEIR ACQUIESCENCE
TO A NATIONAL EDUCATION
STANDARD .

This Court should not do from the bench what it has said Congress cannot do by legislation³ fail to give appropriate notice to the States about the obligations associated with accepting federal IDEA funding. See *Arlington Cent. Sch. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). A judicially imposed change in the FAPE standard would have just such an effect where Congress has made no change in the law and would violate the principles of federalism by invading educational policy decisions that belong to states and local governments .

A. Congress Has Provided No Clear Notice
that the FAPE Standard Has Been
Heightened Beyond the Rowley
Standard.

The States, through the Spending Clause, accept federal funds in exchange for complying with IDEA, including its definition of FAPE. The statutory definition of FAPE, as interpreted by the Court in

Rowley, has not substantively changed since 1975. ¹⁶
This Court has continued to cite to Rowley when
interpreting IDEA. E.g., Arlington

official, there is no notice of a new or more onerous obligation to provide a different level of FAPE. See *Arlington*, 548 U.S. at 296. Given the lack of any change in the FAPE definition by Congress, state officials and school districts have reasonably continued to rely on the *Rowley* standard.

1. Requiring that IEPs contain measurable annual goals and the participation of students with disabilities in statewide assessments does not evince congressional intent to heighten the FAPE standard.

Petitioner and NEA imply that the 1997 amendments introduced a new requirement that IEPs include annual goals WKDW HYLGHQFHG & RQJUHVV· LQWH to expand the FAPE standard. See Pet. Br. at 6-7; NEA Br. at 7. However, the initial enactment of the EHA in 1975 required WKDW , (3V FRQWDLQ ´D VWDWHPHQW of annual goals, including short-term instructional REMHF. The 1997 amendments simply specified WKDW JRDOV VKRXOG⁹ EH ´PHDVXUDEOH µ

Petitioner attempts to shore up the case for clear notice of a heightened FAPE standard by pointing to

Left Behind Act ²⁰ (the predecessor of Every Student
Succeeds Act (ESSA)). 20 U.S.C. § 1412(a)(15)-(16).
The congressional findings in the preamble to IDEA
2004 do ODPHQW ´ORZ H[SHFWDWLRQVµ DQG H[SUHV

1412(a)(15). Students with disabilities are required to receive appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs. 20 U.S.C. § 1412(a)(16).

Taken together, the state accountability provisions (now expressed in ESSA) and the 2004 amendments to the IDEA do not stand for the proposition that any individual student from a subgroup has an individual entitlement to a particular level of progress. While Congress

has not established a federal law to establish group outcome standards for students with disabilities (along with other subgroups), it has established an individual entitlement to an appropriate program developed collaboratively according to the procedural protections of the statute. Congress specifically abjured from creating an entitlement to a certain level of academic progress in IDEA.

2. IDEA amendments adding transition services to IEP requirements fall far short of demonstrating clear notice of Congress's intent to heighten the FAPE standard.

When Congress introduced transition services in the 1983 amendments, it authorized federal funding to assist in the transitional process to postsecondary education, vocational training, competitive employment, continuing education, or

adult services, but did not require states to supply such services.²² In 1986, Congress slightly modified the statute regarding transition services.²³ In 1990, Congress amended the definition of transition services and required that transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning earlier), be provided beginning no later than the first IEP when the child is 16.²⁴ In the 1997 reauthorization of IDEA, Congress required that the IEP include a statement of the transition service needs of the child, including participation in advanced placement courses or a course of study beyond high school.²⁵ In 2004, Congress again made changes regarding transition services in the IDEA reauthorization, requiring that IEPs contain appropriate measurable postsecondary goals based upon age appropriate transition assessments and that transition services needed to assist the child in reaching those goals be provided beginning no later than the first IEP when the child is 16.²⁶ It also again amended the definition of transition services. As Congress has amended the transition services requirements over the years, it has never tied them to any clear change in the definition of FAPE, expressed

²² Pub. L. No. 98-199, 97 Stat. 1357, 1367 (1983).

²³ Pub. L. No. 99-457, 100 Stat. 1145, 1163 (1986).

²⁴ Pub. L. No. 101-476, 104 Stat. 1103-04 (1990).

²⁵

disagreement with the Rowley standard, nor indicate d W K D W)\$3(Z D V F R Q W L Q J H Q W R Q D F K L O C attainment of transition goals. J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 948-951 (9th Cir. 2009). Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re -enacts a V W D W X W H Z L W K F o x s W G r o v e S c h D i s t v. T.A., 557 U.S. 230, 239 (2009).

B. 7 K H , ' (\$. V ' H I H U H Q S t a t e s a n d Local Education Agencies Is the Fundamental Construct Underlying the 6 W D W H V . \$ J U I d C o m p Q W i t h M t s Expansive Statutory and Regulatory Requirements in Exchange for Federal Funds.

The IDEA mak es clear that both the broad education policy decisions necessary to implement the Act as well as judgments concerning the educational needs of individual students are appropriately left to the states and local agencies. This construct is of I X Q G D P H Q W D O L P S R U W D Q F H W R W K H V W D W H V . D . act in accordance with the IDEA in exchange for receiving federal funds. To carry out their responsibilities under the Act, states have adopted H [W H Q V L Y H S U R F H G X U H V W R F R P S O \ Z L W K , ' (\$. V V and regulatory requirements. In turn, local school personnel are

& R Q J U H V V · i Z d r a f t I E P s a n d a n a r r a n g e m e n t w h e n
it set forth the Rowley standard that focuses on state
D Q G O R F D O H G X F D W R U V · F R P S O L D Q F H Z L W K , '(S
process and procedural safeguards . In Rowley, the
Court encourages courts reviewing IEPs to find them
to satisfy FAPE requirements as long as they are
reasonably calculated to provide some educational
benefit in keeping with academic standards set by the
state for children educated in the general curriculum .
This standard i V F R Q V L V W H Q W Z L W K W K H & R X U W ·
longstanding recognition that educational decisions
should not be second-guessed by judges.²⁷

Such judicial and congressional deference
provides state and local policy makers with some
assurance of stability in the law as they decide how
best to provide FAPE to children with disabilities,
including ensuring that adequate funding is available
to pay for the necessary services . As the costs of
special education have increased exponentially over
the years, states and local school boards have
continued to make concerted efforts to meet their
commitment to serve children with disabilities. To do
so, states have adopted different funding methods to
pay for these rising costs, even as Congress has never
met its commitment to fully fund 40% of the
additional costs of educating student with
disabilities.²⁸ These additional costs have a
significant impact on state and local education
budgets as students with disabilities, on average,

²⁷

require nearly two times more in total expenditures than their non-disabled peers.²⁹

States generally use one of three main funding methods to provide special education and related services to students with disabilities: formula funding, categorical funding, or reimbursement.³⁰ Thirty-three states and the District of Columbia use formula funding to pay for the cost of educating students with disabilities.³¹

FAPE standard would require states to bear the burden of the increased costs to meet the heightened standard.

Five states fund students with disabilities through reimbursements, also allocated outside of the VWDWH·V SULPDU\ IXQ School Districts PXOD must report their actual expenses to the state and then are reimbursed for a portion of their costs to educate students with disabilities. State reimbursement rates vary from 26.79% in Wisconsin to 100% in Wyoming.³⁵ A heightened standard would place an increased burden on local school districts as there is no guarantee that states would have additional funds to reimburse districts for the associated costs.

The Court should not adopt a new and unexpected FAPE standard, as it could disrupt complex state funding schemes and require difficult adjustments that impact the resources available to educate other children³ burdens which the state and local education agencies did not knowingly accept.

CONCLUSION

Congress empowered IEP teams with both the authority and responsibility to identify students' needs, prioritize them, and offer special education and related services calculated to allow students with disabilities to receive educational benefit in keeping with state standards and in the least restrictive environment appropriate to their needs. Deference to

³⁴ Id.

³⁵ Id.

the IEP process is the only workable manner by which to achieve the goals of IDEA. Amici urge the Court to reaffirm the standard it set forth in *Rowley* rather than adopt an artificial national standard that would call millions of programs into question and require schools to re-examine and litigate more claims, contrary to the purposes of the IDEA.

Based on the foregoing, and the reasons set forth in Respondent Douglas County School District RE - 1 V brief, Amici respectfully request that this Court affirm the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

Jonathan P. Reed
John W. Norlin

Francisco M. Negrón, Jr.
Counsel of