No. 05-

IN THE

Supreme Court of the United States

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
Petitioner,

v.

MAUREEN DEAL; PHILLIP DEAL,
Parents on Behalf of ZACHARY DEAL,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1491o, which requires participating States to "ensure that all children with disabilities have available to them a free appropriate public education," *id.* § 1400(d)(1)(A), is satisfied when a school board provides disabled children with "*some* educational benefit" that is non-de minimis, as this Court indicated in *Board of Education* v. *Rowley*, 458 U.S. 176, 200 (1982) (emphasis added), or whether school boards must satisfy a heightened and inherently subjective standard by providing a "*meaningful* educational benefit."

2. Whether local educational authorities can use their educational expertise to prepare Individualized Education Program ("IEP") proposals in advance of IEP meetings or must instead bow to the unilateral dictates of parents regarding a child's IEP.

PARTIES TO THE PROCEEDING

All the parties in this case are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hamilton County Department of Education, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 392 F.3d 840 (6th Cir. 2004). Its decision denying the petition for rehearing *en banc*, (Pet. App. 115a), is unreported.

The August 20, 2001 opinion and order (Pet. App. 63a-114a) of the Tennessee State Department of Education administrative law judge is unreported. The March 4, 2003 opinion and order (Pet. App. 43a-62a) of the United States District Court for the Eastern District of Tennessee is reported at 259 F. Supp. 2d 687 (E.D. Tenn. 2003).

JURISDICTION

The court of appeals denied a timely petition for rehearing on April 1, 2005. Pet. App. 115a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 20 U.S.C. § 1401(9), which provides that:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

STATEMENT OF THE CASE

This case raises fundamentally important questions that directly affect the ability of local school boards and States to use their educational expertise to determine how best to marshal and allocate scarce resources to educate disabled children.

In *Board of Education* v. *Rowley*, 458 U.S. 176 (1982), this Court held that the Education of Handicapped Act (later renamed the Individuals with Disabilities Education Act ("IDEA" or the "Act")), requires participating States to provide meaningful access to an education "sufficient to confer *some educational benefit* upon the handicapped child." *Id.* at 200 (emphasis added). The Court declined, however, "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. In the ensuing two decades, the indeterminate nature of this approach has led to confusion and a deep division in the lower courts. Specifically, the circuits have split on whether educational programs must provide *some* non-de minimis educational benefit, or must instead satisfy a heightened and inherently subjective *meaningful* educational benefit standard. The time has come for the Court to provide further guidance on the meaning of "some educational benefit" and this case is the perfect vehicle for that undertaking.

In the decision below, the Sixth Circuit joined the minority of courts which have held that, to satisfy the IDEA's requirement of "a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), it is not enough for States to provide an educational program that "is reasonably calculated to [provide a] more than *de minimis* educational benefit." Pet. App. 33a. Instead, the lower court held, States must provide

disabled children with a "'*meaningful* educational benefit.'" *Id.* at 34a. On the basis of this heightened standard, the Sixth Circuit rejected as inadequate an individualized education program for an autistic child that was based on a scientifically acceptable teaching methodology and consisted of 35 hours per week of special education, including physical and speech therapy. The lower court remanded the case for a determination whether, under its "meaningful educational benefit" test, petitioner is obligated to pay for the particular—and decidedly more costly—in-home therapy technique favored by the child's parents.

Petitioner's proposed educational plan would undoubtedly have passed muster under the standard employed by the majority of circuits, which require only that schools provide *some* non-de minimis educational benefit. That standard, which appropriately defers to the educational expertise of local school officials, ensures that federal courts do not entangle themselves in complex and difficult assessments of how best to educate children with a host of varying disabilities. It also ensures that federal courts will not, inadvertently or otherwise, dictate local educational policy, by mandating expensive potential-maximizing programs that inevitably force local schools to forgo other, competing educational priorities.

Indeed, the decision below exacerbates this very danger. The Sixth Circuit held that petitioner's consideration of the cost implications of providing the particular therapy that respondents advocated gave rise to a procedural violation of the IDEA. According to the lower court, such considerations constituted impermissible predetermination. This ruling, too, conflicts with the view of the majority of circuits.[1]

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[1] This Court recently recognized the importance of determining, when a child's IEP is challenged, whether parents or school boards bear the burden of proof, by granting certiorari in *Schaffer* v. *Weast*, 377 F.3d 449

The legal and fiscal ramifications of this case are enormous. In 2003, school systems around the country served nearly 7 million children under the IDEA. The "meaningful benefit" and predetermination standards the lower court employed authorize federal court micromanagement of fundamentally local educational policy. This Court should grant the petition to clarify the legal standards applicable to these important cases.

A. The IDEA.

Congress enacted the IDEA pursuant to its power under the Spending Clause. See 20 U.S.C. § 1412(a). Accordingly, Congress uses federal monies to induce States to provide disabled children with "a free appropriate public education." *Id.*; see also *id.* §§ 1401(9), 1412(a)(1). To this end, local school systems are required, with parents' participation, to develop and implement an individualized education program ("IEP") for each disabled child. *Id.* § 1401(14); see also 34 C.F.R. §§ 300.340-.350. IEPs determine educational placement for disabled children and must be revised annually. 20 U.S.C. § 1414(d). IEP disputes are subject to administrative and judicial review. *Id.* § 1415.

B. The *Rowley* Opinion.

In *Rowley,* this Court answered two questions regarding the precursor to the IDEA. First, "[w]hat is meant by the Act's requirement of a 'free appropriate public education'?" 458 U.S. at 186. Second, "what is the role of state and federal courts in exercising the review granted by 20 U.S.C. § 1415?" *Id.*

To answer the first question, this Court sought to discern the meaning of the Act's "cryptic" definition of a "free appropriate public education," or "FAPE," *id.* at 187-89, and held that a State provides a FAPE by "providing personalized

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(4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698). The Sixth Circuit's predetermination ruling raises related questions.

instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. The Court made clear, however, that provision of a FAPE does not require States to "maximize the potential of handicapped children." *Id.* at 189. Indeed, the Court explained "[w]hatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." *Id.* at 197 n.21. "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Id.* at 189. To discern such a substantive standard, the Court turned to the Act's legislative history. *Id.* at 190-92.

That history led the Court to draw a sharp distinction between educational *access* and educational *benefit*. The Court explained that Congress intended to help disabled children by extending access to special education, even though it understood such special education could not be substantively guaranteed to produce any particular outcome:

> By passing the Act, Congress sought primarily to make public education *available* to handicapped children. But in seeking to provide such *access* to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such *access* meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*." Thus, the intent of the Act was more to *open the door* of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. at 192 (alteration in original) (emphases added) (citation omitted). The Court attributed the focus on "access"—as opposed to "any particular substantive level of education"—to Congress's reliance on two "landmark" district court cases.

Id. at 192-93 (citing *Pennsylvania Ass'n for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)). The Court explained that both cases focused on "*access* to an adequate, publicly supported education," but "[n]either case purport[ed] to require any particular substantive level of education." *Id.* at 193.

Accordingly, Congress intended to afford "meaningful" access to public education, *id.* at 192, but required only that "the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child." *Id.* at 200 (emphasis added). Thus, while the Act requires States to provide *meaningful access* to education, it only requires "*some* educational benefit." *Id.* (emphasis added).

In answer to the second, procedural question, this Court held the Act's "provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. Indeed, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." *Id.* at 207. The "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." *Id.* Congress sought to limit federal judicial scrutiny, because the Act's "require[ment] that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that *due weight* shall be given to these proceedings." *Id.* at 206 (second alteration in original) (emphasis added). In short, "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Id.* at 208

(quoting *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973)).

Still, this Court was careful to explain that "[e]ntrusting a child's education to state and local agencies does not leave the child without protection," because the Act ensured parental involvement in IEP formulation. *Id.* at 208. The Court had no doubt that "parents . . . will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Id.* at 209.

On the basis of these legal standards, the Court reversed the Second Circuit, and held the Act did not require the school to provide Amy Rowley with a sign language interpreter. *Id.* at 209-10. In reaching this result, however, the Court found it unnecessary "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. Rather, the Court concluded that, because Amy was receiving personalized instruction and related services calculated to meet her educational needs, and was performing better than the average child in her class, she was necessarily receiving an "appropriate" education.

C. Zachary Deal's IEPs.

The Deals are the parents of Zachary, an autistic elementary school boy. Pet. App. 1a. Zachary was diagnosed as autistic at the age of three. *Id.* at 2a. His parents have an unbending belief that Zachary can only benefit from the applied behavioral analysis ("ABA") developed by Dr. Ivar Lovaas at UCLA. *Id.* at 3a. The Deals thus have insisted from day one that the only FAPE for Zachary must contain a significant amount—at least 30 hours—of Lovaas-style ABA. *Id.* at 3a-5a.

Petitioner Hamilton County Department of Education devised a 1998 IEP for Zachary that was 95 pages in length and provided for 35 hours per week of special education instruction. Pet. App. 3a-4a. The plan also provided physical and speech therapy. *Id.* at 4a. The Deals object to that report,

arguing that the petitioner should fund what they describe as a "private ABA program in the home." *Id.* In 1998, Zachary only spent 16 percent of his time in the School System, even though petitioner declined to pay for the in-home services. *Id.*

In its 1999 IEP, petitioner proposed that Zachary participate in the comprehensive development class program that was the core of the earlier program proposed for Zachary, and the IEP added a series of programs designed to ease Zachary into mainstream kindergarten classes. Pet. App. 4a-5a. The teaching methods would include one-on-one discrete teaching with a variety of special education programs, including speech and language therapy and occupational and physical therapy. *Id.* The Deals rejected this plan outright and enrolled Zachary in a private school to provide him with more time in regular classes. *Id.* at 5a. Consequently, Zachary did not attend public school at all during the 1999 school year. *Id.*

Although petitioner proposed placement in a regular education kindergarten class for the year 2000 and additional therapies along the lines identified in the 1999 IEP, the Deals rejected that plan in favor of their private program, for which they requested full reimbursement. Pet. App. 5a. Zachary did, however, attend the public school part-time during the 2000 school year. *Id.*

D. Proceedings Below.

The Deals brought this action under the IDEA. Pet. App. 1a. The matter was first submitted to a Tennessee Department of Education Administrative Law Judge ("ALJ"), who held a 27-day trial. *Id.* at 63a-114a. The ALJ held that the School System *procedurally* violated the IDEA by predetermining that Lovaas-style ABA was not appropriate for Zachary and by not having a regular education teacher attend the IEP meetings. *Id.* at 98a-99a. The ALJ also held that the School System *substantively* violated the IDEA by

failing to provide Zachary with a proven methodology for dealing with his autism and by failing to provide Zachary with extended school year ("ESY") services in 1999. *Id.* at 101a-106a. Accordingly, the ALJ concluded that the Deals were entitled to reimbursement for 30 hours per week of home-based ABA services, which would continue until a properly constituted IEP team was established. *Id.* at 108a-109a.

The parties cross-appealed to the United States District Court for the Eastern District of Tennessee. Pet. App. 43a-62a. The district court accepted the record as developed by the ALJ, but granted the School System's request to supplement the record. *Id.* at 46a. The district court recognized that it needed to give "due weight to the ALJ's findings of fact," *id.* at 47a, but also explained it was duty-bound to make independent findings with deference to the "school district's choice about the appropriate educational methods for a disabled child." *Id.* at 48a.

On the procedural question of predetermination, the district court held that petitioner was permitted to have the representatives of the School System meet *ex parte* and to form an opinion about the advisability of using the Lovaas-style ABA to assist Zachary. Pet. App. 54a-55a. The key was the ability of the parents to present their arguments forcefully and without any limits having been imposed on their level of participation.[2] *Id.*

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[2] With regard to the failure to have regular classroom teachers available, the district court held that there were only two IEP meetings involved. Pet. App. 55a. One took place long before Zachary was old enough to attend school and the other was during a year when Zachary was not attending public school. *Id.* at 55a-56a. Thus, the district court held that this procedural irregularity had no effect on Zachary's IEP. *Id.* In addition, the district court rejected any suggestion that the IEP team must have an ABA expert on it, as the ALJ had ordered. *Id.* at 56a.

Regarding the substantive violations, the district court held that petitioner did not deprive Zachary of a FAPE by refusing to pay for his home-based Lovaas-style ABA. Pet. App. 58a-61a. The district court held that "nowhere in [the] IDEA is there a requirement that a FAPE cannot be eclectic [as proposed by petitioner], or cannot employ multiple teaching approaches." *Id.* at 58a. The district court credited one expert's testimony that "there is no scientific consensus that any one method of treating autism is any better than another." *Id.* The district court also rejected the ALJ's suggestion that petitioner improperly "consider[ed] cost in the formulation of an IEP so long as the IEP provides a FAPE for the handicapped child." *Id.* The district court then held that petitioner's "program was appropriate for Zachary, not only because it provided an acceptable methodology, but because [the School System] had qualified personnel to implement it." *Id.* at 60a.

On appeal, the Sixth Circuit reversed. Pet. App. 42a. In doing so, the court of appeals made two critical holdings. *Id.* at 21a-29a, 32a-40a. First, it reinstated the ALJ's conclusion that petitioner had predetermined Zachary's IEP by conducting a meeting *ex parte* and refusing to accede to all the Deals' demands, thereby procedurally violating the IDEA. *Id.* at 21a-29a. Second, it categorically rejected the premise that a school district satisfies its obligation to provide a FAPE by providing an educational program that "is reasonably calculated to enable the child to derive more than *de minimis* educational benefit." *Id.* at 33a. Instead, the lower court held that "an IEP [must] confer a 'meaningful educational benefit.'" *Id.* at 34a. Ultimately, the court of appeals remanded for further fact-finding based on this heightened "meaningful" benefit standard. *Id.* at 40a.

REASONS FOR GRANTING THE PETITION

There is a clear circuit split regarding whether participating States satisfy the IDEA's requirement of a "free appropriate

public education" by providing disabled children with some non-de minimis educational benefit, or whether States must instead provide such children a "meaningful educational benefit." Furthermore, the Sixth Circuit's predetermination ruling inappropriately allows parents, rather than expert educators, to dictate unilaterally their children's IEP placements. These issues are of fundamental importance. They directly affect the ability of local school boards and States to use their educational expertise to determine how best to marshal and allocate scarce resources to educate disabled children. If allowed to stand, the erroneous legal standards the Sixth Circuit and other courts of appeals have adopted will inevitably entangle federal courts in complex educational policy disputes that, as this Court recognized in *Rowley*, they lack the expertise to resolve. Accordingly, this Court should grant the petition to resolve these important and recurring questions of federal law.

I. THERE IS A CLEAR SPLIT IN THE CIRCUITS CONCERNING HOW STATES COMPLY WITH THEIR OBLIGATION TO PROVIDE A "FREE APPROPRIATE PUBLIC EDUCATION."

The circuit split regarding whether States provide a FAPE under the IDEA by providing *some* educational benefit or a *meaningful* educational benefit is ripe for this Court's review. To date, most of the circuits have weighed in on this issue with fundamentally varying results.

The majority of circuits merely require States to provide "some educational benefit." This is the rule of the First, Fourth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. *Reid ex rel. Reid* v. *District of Columbia*, 401 F.3d 516, 523 (D.C. Cir. 2005); *Missouri Dep't of Elementary & Secondary Educ.* v. *Springfield R-12 Sch. Dist.*, 358 F.3d 992, 999 n.7 (8th Cir. 2004); *A.B. ex rel. D.B.* v. *Lawson*, 354 F.3d 315, 319 (4th Cir. 2004); *Maine Sch. Admin. Dist. No. 35* v. *Mr. & Mrs. R.*, 321 F.3d 9, 11 (1st Cir. 2003); *Todd* v. *Duneland Sch. Corp.*, 299 F.3d 899, 905 & n.3 (7th Cir. 2002); *O'Toole*

ex rel. O'Toole v. *Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 700 (10th Cir. 1998); *JSK ex rel. JK* v. *Hendry County Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991). As the D.C. Circuit has explained, this standard follows from *Rowley* itself, which "requires only that schools provide 'some educational benefit.'" *Reid*, 401 F.3d at 523 (quoting *Rowley*, 458 U.S. at 200, and explaining why this modest standard does not guarantee the right to undo any educational damage done by prior violations of the IDEA).

This modest standard is also consistent with the deference courts owe expert professional educators. As the Fourth Circuit has explained, courts should "not 'disturb an IEP simply because [they] disagree with its content,' and [they] are obliged to 'defer to educators' decisions as long as an IEP provided the child [with] the basic floor of opportunity that access to special education and related services provides.'" *MM ex rel. DM* v. *School Dist.*, 303 F.3d 523, 532 (4th Cir. 2002) (quoting *Tice ex rel. Tice* v. *Botetourt County Sch. Bd.*, 908 F.2d 1200, 1207 (4th Cir. 1990)). Accordingly, a number of courts have squarely rejected the "meaningful educational benefit" standard that the Sixth Circuit adopted below. See *JSK*, 941 F.2d at 1572 (refusing to adopt "meaningful benefit" standard "to the extent 'meaningful' means anything more than 'some' or 'adequate' educational benefit"); *A.B.*, 354 F.3d at 319, 330 (distinguishing "'meaningful access' to public education" and the requirement that a FAPE "must only be calculated to confer *some* educational benefit," and reversing district court decision because the "IDEA's FAPE standards are far more modest than to require that a child excel or thrive") (internal quotation marks omitted); see also *Todd*, 299 F.3d at 905 n.3 (noting difference between standards, but finding that the school district would prevail even under the "'meaningful benefit'" test).

On the other hand, a minority of circuits require States to satisfy the heightened "meaningful educational benefit" standard. This is the rule of the Second, Third, Fifth, Sixth,

and Ninth Circuits. Pet. App. 34a; *Shore Reg'l High Sch. Bd. of Educ.* v. *P.S. ex rel. P.S.*, 381 F.3d 194, 198 (3d Cir. 2004); *Adam J. ex rel. Robert J.* v. *Keller Indep. Sch. Dist.*, 328 F.3d 804, 808-09 (5th Cir. 2003); *Adams* v. *Oregon*, 195 F.3d 1141, 1149-50 (9th Cir. 1999); *Mrs. B.* v. *Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (2d Cir. 1997). Like the Sixth Circuit in the decision below, these courts reject the notion that the IDEA's requirement of a "free appropriate public education" is a modest standard that simply requires some non-de minimis educational benefit. Although dutifully acknowledging this Court's admonition that an "'appropriate'" education does not mean "a potential-maximizing education," *Rowley*, 458 U.S. at 197 n.21, these courts have attempted to identify an intermediate standard between "some" benefit and a "maximum" benefit, pursuant to which an IEP must "be reasonably calculated to confer a *meaningful* benefit on the child," *Adams*, 195 F.3d at 1150 (emphasis added), that is, a benefit that is more than "'a mere modicum,'" and is instead "'likely to produce progress.'" *Adam J.*, 328 F.3d at 808-09 (citations omitted).

This minority rule appears to be based on a misreading of this Court's opinion in *Rowley*. But whatever its source, the circuit split it has engendered implicates a number of important policy concerns for our public educational structure that makes the issue of paramount importance.

A. The Minority Rule Misreads *Rowley*.

The minority rule appears to be based on a misreading of *Rowley*. In *Rowley*, this Court held a State provides a FAPE as long as "the education to which access is provided [is] sufficient to confer *some* educational benefit." 458 U.S. at 200 (emphasis added). Nevertheless, a minority of circuits appear to have conflated the standard for *access* to education (meaningful access) with the standard for the substance of that education (some educational benefit). In doing so, these circuits have adopted an untenable legal standard.

The Third Circuit was the first to commit this error. In *Polk* v. *Central Susquehanna Intermediate Unit*, the Third Circuit reversed a district court's application of the some-educational-benefit standard. 853 F.2d 171, 172 (3d Cir. 1988). The Third Circuit reasoned that the district court's reliance upon *Rowley*'s language was "out of context" and "beyond [its] narrow holding." *Id.* Though the Third Circuit conceded that the *Rowley* Court "focused on *access* to special education rather than the content of that education," *id.* at 179, the court of appeals slid past this Court's careful distinction between access and substantive content:

> Although the tenor of the *Rowley* opinion reflects the Court's reluctance to involve the courts in substantive determinations of appropriate education and its emphasis on the *procedural* protection of the IEP process, it is clear that the Court was not espousing an entirely toothless standard of substantive review. Rather, the *Rowley* Court described the level of benefit conferred by the Act as "meaningful."

Id. (quoting *Rowley*, 458 U.S. at 192).

In fact, the *Polk* court took the word "meaningful" out of context. Read in context, the Court was clearly addressing congressional concern with "access to public education," *Rowley*, 458 U.S. at 192, not the substantive benefit of that education. This is made clear by the next two sentences in *Rowley* itself:

> Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*." Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. (alteration in original) (emphasis added) (citation omitted).

In the decision below, the Sixth Circuit was mistakenly persuaded by the Third Circuit's faulty reading of *Rowley* and the IDEA's legislative history. Pet. App. 34a-35a, 37a n.16 (explaining with approval that the *Polk* court noted *Rowley* "was a narrow decision [because] the precise issue of how much educational benefit must be provided had not been squarely before the Court," and therefore "relied on *Rowley*'s use of the word 'meaningful,' as well as legislative history emphasizing the importance of self-sufficiency, to find that the educational benefit must be more than *de minimis*"). The Sixth Circuit's independent review of legislative history led it to conclude that, "[a]t the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child." *Id.* at 38a. Accordingly, the Sixth Circuit adopted the minority's meaningful-educational-benefit standard.

Indeed, in dictum the court of appeals stated the "implication from these manifestations of congressional intent might be that, where self-sufficiency is a realistic goal for a child, a program that maximizes the possibility of self-sufficiency could be required." Pet. App. 38a n.17. This dictum is difficult to square with *Rowley*. Not only did the *Rowley* Court explicitly hold that the IDEA never requires a "potential-maximizing education," 458 U.S. at 197 n.21, but the Court also rejected the argument that self-sufficiency was the substantive standard, *id.* at 201 n.23. At best, then, the Sixth Circuit's otherwise innocuous dictum merely serves notice that the minority's meaningful-educational-benefit standard is in fact the first judicial step on the slippery slope toward a potential-maximizing standard.

In contrast to the minority-rule circuits, the opinions from the majority-rule circuits have carefully distinguished between *access* to, and the *benefit* from, education. See, *e.g.*, *A.B.*, 354 F.3d at 319 ("Under the act, the state must provide

children with 'meaningful access' to public education. The FAPE must only be 'calculated to confer *some* educational benefit on a disabled child.'" (citation omitted)). As the Eleventh Circuit has recognized, in *Rowley*, the adjective "meaningful" only modified the noun "access," *not* the educational "benefit." *JSK*, 941 F.2d at 1572 ("'Meaningful' only modified 'access.'").

Moreover, the fact that *Rowley* did not "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," 458 U.S. at 202, does not suggest, as some of the minority-rule courts have concluded, that courts are free to require a more demanding standard than the "some benefit" test. Rather, as the Eleventh Circuit explained, the *Rowley* Court "realiz[ed] that there could be no universal measure of 'some educational benefit,' [so] the Court confined itself to a case-specific analysis of the handicapped child." *JSK*, 941 F.2d at 1572. But that approach does not legitimate the court of appeals' decision here to impose a heightened standard of judicial review to the School System's proposed IEP.

B. The Minority Rule Implicates Important Policy Concerns for Public Education.

The minority rule espoused by the Sixth Circuit in the decision below raises fundamental policy concerns for public education. That rule improperly denigrates local educators' expertise, fosters an unworkable micromanagement of local educational policy by federal courts, and encourages more federal court litigation on educational issues.

In *Rowley*, this Court reaffirmed the principle that the "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." 458 U.S. at 207. The Court recognized that "courts lack the

'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Id.* at 208. Accordingly, the Court was very careful to explain that the IDEA's "provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 206. Rather, courts must give state administrative proceedings their "due weight." *Id.*

The "some educational benefit" standard protects the primary role of local officials in establishing educational policy, and prevents courts from overstepping their bounds and embroiling themselves in issues that require educational expertise they do not have. Indeed, whatever uncertainty or ambiguity may inhere in the deferential "some benefit" standard, any difficulties it has engendered pale in comparison to those that a heightened—and inescapably subjective—"meaningful benefit" standard will spawn. School officials have no way of determining whether a court will deem an IEP's educational benefit sufficiently "meaningful." Indeed, this case illustrates the potential for judicial second-guessing of good-faith educational decisions: the Sixth Circuit used its "meaningful benefit" standard to reject an educational plan that employed scientifically recognized teaching methods for autistic children, and a significant amount of speech and physical therapy. This 35-hour per week program indisputably would confer "some" educational benefit on children such as Zachary Deal. But educators such as petitioner cannot be sure, at the time they develop such an IEP, whether a court will consider those benefits sufficiently "meaningful" to make that program lawful.

The untoward consequences of such uncertainty are obvious and significant. The more stringent "meaningful educational benefit" standard will encourage dissatisfied

parents to file lawsuits predicated on the theory that IEPs are simply not good enough to deliver meaningful benefits. Unable to predict the outcome of such litigation, educators will be forced to practice a form of "defensive" education, yielding to the demands of those parents whose intransigence and resources suggest they are most likely to pursue litigation. Such practices will not serve the community's larger educational goals, and cannot be what Congress intended within the IDEA.

Finally, the minority rule implicates another, more structural concern of federalism. In *Rowley*, this Court repeatedly stressed that any substantive standard beyond "some educational benefit" would run afoul of the Spending Clause's "unambiguous" obligation requirement. *Id.* at 190 n.11 (explaining that "Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously"); *id.* at 204 n.26 (explaining that, "'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously'"). This limitation on congressional use of the Spending Clause emerges from the recognition that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the" federal funding. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Here, there is no "unambiguous" language in the IDEA that would imply that the States had "voluntarily and knowingly accept[ed] the terms of the [IDEA] 'contract,'" *id.*, thereby contractually obligating themselves to confer "meaningful educational benefits" on all disabled children. Instead, at most the States voluntarily and knowingly undertook the contractual obligation to provide "some educational benefit."

II. THE SIXTH CIRCUIT'S PREDETERMINATION RULING INAPPROPRIATELY ALLOWS PARENTS, RATHER THAN EXPERT EDUCATORS, TO DICTATE UNILATERALLY THEIR CHILDREN'S IEP PLACEMENTS.

Another aspect of the decision below exacerbates these policy concerns. The Sixth Circuit's predetermination ruling inappropriately allows parents, rather than expert educators, to dictate unilaterally their children's IEP placements. In *Rowley*, the Court had no doubt that "parents . . . will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." 458 U.S. at 209. Nevertheless, the Court did not expect that parents could dictate unilaterally their children's IEP placements by inflexibly adopting hard bargaining positions. Instead, the Court envisioned a situation where parents would vigorously assert their children's rights, but not necessarily be entitled to receive whatever benefits they deemed appropriate. At the end of the day, the School System is entitled to make the final call so long as it provides some educational benefit.

Recently, this Court recognized the importance of determining, when a child's IEP is challenged, whether parents or school boards bear the burden of proof, by granting certiorari in *Schaffer* v. *Weast*, 377 F.3d 449 (4th Cir. 2004), *cert. granted*, 125 S. Ct. 1300 (2005) (No. 04-698). The Sixth Circuit's predetermination ruling below raises the closely related question of to what extent may school boards prepare draft proposals for IEP meetings and advocate for those proposals based on their educational expertise and their obligation to provide appropriate educations to *all* disabled children.[3]

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[3] While the questions presented in this petition independently warrant the grant of certiorari, there is a substantial possibility that the Court may decide *Schaffer* in a way that sheds light on the propriety of the Sixth

The circuits that have considered the question of predetermination have concluded that, whenever parents are afforded a full opportunity to participate actively in IEP meetings, and are not simply presented with take-it-or-leave-it options, school systems cannot be said to have engaged in predetermination. *Fuhrmann ex rel. Fuhrmann* v. *East Hanover Bd. of Educ.*, 993 F.2d 1031, 1036 (3d Cir. 1993) ("there was clearly more than after the fact involvement here. The record indicates that the Fuhrmanns had an opportunity to participate in the IEP formulation process in a meaningful way"); *W.G.* v. *Board of Trs.*, 960 F.2d 1479, 1484 (9th Cir. 1992) (holding a school system predetermined an IEP when it "assumed a 'take it or leave it' position at the meeting"); *Spielberg ex rel. Spielberg* v. *Henrico County Pub. Schs.*, 853 F.2d 256, 259 (4th Cir. 1988) ("After the fact involvement is not enough."); see also *Hanson ex rel. Hanson* v. *Smith*, 212 F. Supp. 2d 474, 487 (D. Md. 2002) (no predetermination where parents were "given a full opportunity to participate in the formulation of the IEP"); *Doyle* v. *Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) (no predetermination where parents "participated extensively in the IEP process"), *aff'd*, 39 F.3d 1176 (4th Cir. 1994) (unpublished table decision).

The Sixth Circuit had previously recognized these principles when it explained that "school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *N.L. ex rel. Mrs. C.* v. *Knox County Schs.*, 315 F.3d 688, 694 (6th Cir. 2003). As a pure policy matter, it risks stating the obvious to observe that, "while a school system must not finalize its placement decision before an IEP meeting, it can, and should, have given some thought to that placement. *Doyle*, 806 F.

Circuit's predetermination ruling. In that event, pending the resolution of *Schaffer*, the Court may wish to hold this petition.

Supp. at 1262. In other words, "school officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind." *Id.*

In the decision below, the Sixth Circuit improperly faulted school evaluators for diligently preparing for and vigorously advocating a position based on their educational expertise at an IEP meeting. The court of appeals found a procedural violation based on its view that the facts "*strongly suggest* that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that School System personnel thus did not have open minds and were not willing to consider the provision of such a program." Pet. App. 26a (emphasis added). But a predisposition to employ one scientifically recognized method rather than another, dramatically more expensive, method is not, and cannot be, impermissible predetermination.

Indeed, it is clear that the Sixth Circuit deemed it improper for petitioner to consider the expense of Lovaas-style ABA, particularly the expense of providing such therapy on a system-wide basis. Pet. App. 39a. But it is hardly inappropriate for educators working in a world of limited resources to consider the cost implications of a particular educational program for one student. It is clear from the record in this case that petitioner was prepared to make important accommodations and provide rigorous one-on-one opportunities for Zachary Deal. Though school officials may have been skeptical about the effectiveness of the ABA method, it is clear the Deals were absolutely unwilling to consider any other approach. To put the onus on the School System to compromise and allow the parents effectively to decide what is best for the child and thereby to expose the School System to the risk of having to pay for that educational preference poses a fundamental question about who gets to decide under the IDEA.

* * *

The implications of the two issues raised in this case are enormous. The IDEA affects hundreds of thousands of children and educators. In 2003, school systems served more than 6,725,000 children between the ages of 3 and 21 under the IDEA. U.S. Office of Special Educ. Programs, *Part B Annual Report* tbl.AA1 (July 31, 2004), *available at* http://www.ideadata.org/tables27th/ar_aa1.htm. In 2002, the educators employed to provide special education and related services numbered more than 430,000. *Id.* tbl.AC1, *available at* http://www.ideadata.org/tables27th/ar_ac1.htm; *id.* tbl.AC2, *available at* http://www.ideadata.org/tables27th/ar_ac2.htm. Just as the IDEA directly affects the lives of many families, children, and educators, it indirectly touches the lives of all Americans, by requiring the use of relatively scarce tax dollars to meet its mandates. In 2005 alone, the IDEA required the federal appropriation of nearly $12 billion. U.S. Dep't of Educ., *Fiscal Year 2006 Congressional Action* 9 (June 23, 2005), *available at* http://www.ed.gov/about/overview/budget/budget06/06action.pdf.

Requiring educators to satisfy an amorphous "meaningful benefit" standard, and treating their informed educational predispositions as violations of the IDEA's procedural requirements, will unduly tax local resources, inject federal courts into educational policy-making, and foster expensive and time-consuming litigation. These are consequences that Congress did not countenance in the IDEA and they are concerns that warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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