No. 10-20694

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KLEIN INDEPENDENT SCHOOL DISTRICT,

Plaintiff-Appellant

v.

PER HOVEM, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Fifth Circuit Rule 29.

The Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, is a federal grant program that provides funding to States for special education and related services. It requires States that receive such funding to assure that children with disabilities are provided a free appropriate public education (FAPE). The United States Department of Education has been charged by Congress with the

administration of the IDEA. The Department of Education also can refer IDEA cases to the Department of Justice for enforcement.

This appeal raises important questions involving the interpretation and policy goals of the Act. Accordingly, the United States and the Department of Education have a strong interest in the correct interpretation and application of the IDEA and its regulations. Consistent with this interest, the United States has filed briefs in other appeals concerning the IDEA. See, *e.g.*, *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484 (2009); *Cedar Rapids Cnty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66 (1999); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176 (1982); *Hartmann* v. *Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997), cert. denied, 522 U.S. 1046 (1998).

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the continuing failure of a school district to provide an individualized education program that addresses a student's learning disability violates the student's right to a free appropriate public education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*.

2. Whether, under the IDEA, a school district may refuse to reimburse tuition expenses for an appropriate IDEA placement paid by the parents of a student 18 years old or older.

STATEMENT OF THE CASE

A. Background

The IDEA requires States that receive federal IDEA funding to assure that children with disabilities are provided a FAPE designed to meet their unique educational needs. 20 U.S.C. 1412(a)(1) & (5). For each child, the IDEA requires the development of an individualized education program (IEP) following a meeting at which parents, teachers, other school personnel, and educational experts all contribute. 20 U.S.C. 1414(d)(1)(B). The IEP includes a statement of the special education and related services the school will provide the child. 20 U.S.C. 1414(d)(1)(A). Once school officials and parents agree on the IEP, the school district must put it into effect. 20 U.S.C. 1414(d)(2)(A).

The IDEA also requires States to establish procedures to resolve IEP-related disputes between parents and school districts. 20 U.S.C. 1414; 20 U.S.C. 1415. A State must provide parents or guardians an opportunity to present complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6)(A). If such a complaint cannot be resolved to the parents' satisfaction, the parents may proceed to an impartial due process hearing. 20 U.S.C. 1415(f)(1)(A). The hearing generally is limited to the

identification, evaluation, or educational placement of the child, or, as here, determining whether the child received a FAPE. 20 U.S.C. 1415(f)(3)(E)(i).

After parents have exhausted the administrative procedures, any party aggrieved by the final decision of the state education agency may "bring a civil action with respect to the complaint presented pursuant to this section" in state or federal court. 20 U.S.C. 1415(i)(2)(A). While the court must receive the record of the administrative proceeding and give it "due weight," it also must hear any additional evidence the parties present. 20 U.S.C. 1415(i)(2)(C); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 206 (1982). The IDEA authorizes the court to issue "appropriate" relief. 20 U.S.C. 1415(i)(2)(C).

Parents who remove their child from a public school placement because they contend that the school program fails to provide a FAPE and place the child into a private school are entitled to reimbursement if the court holds that the proposed IEP did not provide a FAPE and the private placement provided educational benefit. *School Comm. of Burlington* v. *Department of Educ. of Mass.*, 471 U.S. 359, 369 (1985); see also 34 C.F.R. 300.148(c); *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2496 (2009).

B. Facts

1. Appellee Per Hovem is a twenty-one year old former student of the Klein Independent School District (KISD or Klein). USCA5 688.[1] He moved into the school district from Norway in 2000. USCA5 688. During the 2001-2002 school year, when Hovem was in the sixth grade, school officials determined that Hovem was eligible for special education services due to his Attention Deficit Disorder (ADD) and learning disability in the area of written expression. USCA5 689.

In October 2001, Klein determined that Hovem's "writing skills were extremely limited, that his spelling and handwriting skills were very poor, and that he had difficulty in transferring information to paper." USCA5 689. Accordingly, his Admission, Review, and Dismissal (ARD) Committee concluded that Hovem was "eligible for special education services, effective December 3, 2001." USCA5 689. These services included an English resource class. USCA5 689.

In October 2003, when Hovem was in eighth grade, a Klein occupational therapist recommended modifying Hovem's special education services "to address his spelling errors, illegible handwriting, and difficulty in using a dictionary to correct spelling." USCA5 690. Among the report's specific recommendations were that Hovem be provided with study guides, hard copies of notes, use of a

[1] Citiations to "USCA5 " refer to the page numbers in the sequentially paginated record on appeal.

computer in class for essay questions and use a portable speller. USCA5 690. In the following years, teachers consistently reported that Hovem was not using the portable speller or the computer. USCA5 690.

When Hovem entered high school in 2004-2005, he underwent extensive testing by school personnel that demonstrated that "a significant discrepancy existed between Per's potential and current achievement in the areas of written expression and basic reading skills and that he had a learning disorder in reading and written language, requiring special education and related services." USCA5 691. This testing seemed to indicate that Hovem had received little to no educational benefit from the previous IEPs.

At an ARD Committee meeting in September 2006 to plan for eleventh grade, the Committee decided to mainstream Hovem completely. USCA5 691-692. It also set out the annual goals and objectives for his IEP, which remained the same through the 2007-2008 twelfth grade school year. The recurring annual goal was that Hovem would "advance one grade level in all classes with 70% mastery as measured by grades," and continue to use his "current speller in all classes." USCA5 692. The IEP's objective/benchmark also stated that Hovem would advance one grade level in all classes with 70% or higher on his grades and continue to use his speller. USCA5 692. Among the listed modifications were that he be given "extra time to complete assignments, [an] opportunity to respond

orally, cop[ies] of class notes, and [the] use of the portable spelling device." USCA5 692.

Hovem passed the written part of the Texas Assessment of Knowledge and Skills (TAKS), a statewide achievement test, in 2007, but failed it three more times in the next two years. USCA5 692. Thus, in his senior year, he was placed in a practical writing class where students were taught how to pass the test. During the rest of his time in high school, Hovem "passed all of his mainstream general education classes and all TAKS tests except the English Language/Arts" portion. USCA5 693.

2. During the 2006-2007 school year, when Hovem was in eleventh grade, the ARD committee discussed dismissing Hovem from special education services, but his parents disagreed. USCA5 693. On November 28, 2007, Hovem turned 18, and all his parents' rights under the IDEA transferred to him. USCA5 694-695. During that same fall, Hovem's parents began to look at private schools because they felt that Hovem was not progressing. USCA5 695. His parents learned of the Landmark School which "specializes in remediating language problems in bright students." USCA5 695. Because Landmark does not accept students who have graduated from high school, Hovem dropped a required course during his 2007-2008 senior year so that he would not graduate. USCA5 696.

3. While applying to Landmark, Hovem "participated in a battery of educational tests paid for by the Hovems, for a new evaluation of [his] skills and recommendations for addressing his weaknesses." USCA5 696. In March 2008, the Hovems received not only the scores and percentiles of these evaluations and tests, but also the equivalent grade levels at which he was functioning. USCA5 697. While Hovem showed high comprehension, he "performed at a 5.1 grade equivalent in word identification, 2.0 grade in word attack, 5th grade and four months in reading, second grade fourth month in accuracy of reading, and third grade seventh month in the fluency of reading, while his score for word attack (dealing with phonetic decoding) was in the 1% level." USCA5 697.

Hovem was admitted to Landmark as a summer and fall boarding student in 2008. USCA5 697. Landmark diagnosed Hovem with "ADD, disorder understanding language-written/spoken & graphomotor/dysgraphia, and [Language Disorder] written lang/reading." USCA5 698.

At a May 2008 ARD Committee meeting, Hovem "asserted that he was not ready to leave high school and go to college or to get a job because of his poor spelling and writing skills." USCA5 698. The Hovem family asked that Klein fund the program at the Landmark School, but the Committee felt the school had provided Hovem with a FAPE and he was ready to graduate. USCA5 698. The meeting ended with no consensus. USCA5 698. The ARD Committee met again

on May 21, 2008 and again failed to reach consensus. USCA5 699. Hovem went to Landmark for the summer and continued there for the 2008-2009 school year. USCA5 700.

4. When Klein declined to pay for Landmark, the Hovems filed a request for a special education due process hearing under the IDEA. USCA5 700. The hearing was held December 3-5, 2008. USCA5 700. At the hearing, Hovem testified that, at the May 2008 ARD meeting, "when he asked why his IEP never addressed the need to remediate his weaknesses, the Committee members responded that he had been doing fine and was ready to graduate, so why change." USCA5 703. Hovem also testified that "every time he was behind on an assignment, daily or major, his teachers asked him to finish it at home, and he would have his parents or brother type it for him." USCA5 703. According to Hovem this was "one of the * * * main reasons why [he] * * * got through high school at all." USCA5 703.

Mrs. Hovem testified "that the Hovems participated in many ADR meetings, with many people telling them that Per was wonderful, bright, handsome, and respectful, and achieved good grades and TAKS test scores," and that "Per was on track for graduation." USCA5 704. It was "[o]nly after outside testing during his senior year provided grade equivalents to his scores" that the Hovems realized how badly he was doing. USCA5 704.

C. Hearing Officer's Decision

The due process hearing officer issued his opinion on January 9, 2009. The officer held that Klein had failed to provide a FAPE to Hovem, that Landmark School provided an appropriate educational program for his needs, and that the costs of Hovem's placement at Landmark School for the school years of 2008-2009 and 2009-2010 should be reimbursed to the Hovems. USCA5 41-42. The hearing officer found that although Klein had known about Hovem's problems with writing and language since 2002, his IEP's goals and objectives had not changed since 2006. USCA5 22-23. The hearing officer held that "by early 2002 when the district was made aware of 'symptoms of disgraphia or a significant writing disorder,' the child's IEP should have been modified to provide services, goals, and objectives to meet the child's needs." USCA5 34 (citation omitted).[2] The hearing officer stated:

> [T]he child's IEP since 2006 has had the same goals and objectives: (1) pass all his classes with 70% mastery, and (2) use his speller. * * * The first goal listed in the IEP has nothing to do with the child's Learning Disability. It is a goal that is the same for all non-special education students who desire to graduate. The second goal is designed to help the child with his spelling problem, and this goal was not being met since all of the child's teachers had reported in an Occupational Therapy Re-

[2] The hearing officer said that this failure was not the basis of his relief because it was outside the Statute of Limitations. USCA5 34.

> Evaluation as early as 2006 that the child did not use the speller.

USCA5 30-31. The hearing officer also stated that Hovem "went through the last two years of school at Klein ISD with essentially no goals and objectives different from a non-special education child," and that the "district failed to develop and implement an IEP which was created to address the unique and individual needs of the child in order to provide the child with an educational benefit." USCA5 31. According to the district court, the hearing officer found that Klein's passing Hovem from grade to grade did not establish compliance with IDEA. USCA5 713-714. The hearing officer found that Hovem continued with essentially the same IEP from the fall of 2006 through May 2008 which failed to address his learning disability, and therefore he did not receive a meaningful educational benefit.

D. District Court Decision

The district court affirmed in part and reversed in part. The district court agreed with the hearing officer's decision that Klein had failed to provide Hovem with a FAPE and that the Hovems were entitled to reimbursement for the educational costs of the Landmark School. USCA5 668. The court held Klein was not responsible for residential expenses at Landmark. USCA5 668. The district court stated that the IDEA's "focus is on the special education services' targeting

the student's disability and/or weakness, not his normal abilities or strengths," and that an educational program provided by a school district must be "designed to meet the disabled child's unique needs, supported by services necessary for the child to benefit from the instruction." USCA5 775. The district court stated that Klein "appears to turn that standard on its head in arguing that because Per did well in all other areas than that in which his disability lies, his IEP was adequate even though it was not designed nor modified when shown to be ineffective to focus on that unique weakness/need." USCA5 775-776.

The district court held that Hovem's 2006-2008 IEPs, which remained unchanged for three years, when "viewed against his history of continuing and severe deficiencies in written expression and his inability to pass the written TAKS test during his last two years in the district, were not reasonably calculated to enable him to receive educational benefit." USCA5 776 (citing *Rowley*, 458 U.S. at 206-207). The court stated that although Klein was obviously not required to cure Hovem's learning disability, it "was required to address his learning disability." USCA5 776. The district found that "KISD ignored Per's area of weakness and even chose to obscure it by highlighting Per's success in areas not impacted by his learning disability." USCA5 776.

The court applied this Court's decision in *Cypress-Fairbanks Independent School District* v. *Michael F.*, 118 F.3d 245 (5th Cir. 1997), cert. denied, 522 U.S.

1047 (1998). USCA5 776-785. The district court first held that Hovem's "IEP was not sufficiently individualized on the basis of his assessment and performance to meet his needs," USCA5 778, and that Hovem's testing results in spring 2008 helped demonstrate the inadequacy of Klein's repetitive IEP, USCA5 780. The court held that Klein's failed IEPs were not likely to produce meaningful progress. USCA5 783-784. The district held that Klein's effort to provide Hovem "with a FAPE was *de minimis*" and that the school district had failed its obligation to review and modify the IEP when it proved to be ineffective. USCA5 783-784. Thus, the court held that Hovem's "IEP at KISD was not reasonably calculated to provide him with some 'meaningful' educational benefit, with progress which is neither trivial or de minimis, and ultimately a FAPE 'tailored to the child's unique needs by' means of an appropriate IEP." USCA5 785 (quoting *Richardson Indep. Sch. Dist.* v. *Michael Z.*, 580 F.3d 286, 292 (5th Cir. 2009)).

The court held the Hovems were entitled to reimbursement of educational, but not residential, expenses at Landmark. USCA5 786-789.

SUMMARY OF ARGUMENT

1. School districts fail their IDEA obligations when a student with a disability shows a total lack of improvement in the educational program tied to his disability over a significant period of time, and the school district is aware of this lack of progress and fails to review and revise the student's IEP to address this

serious lack of progress. Accepting the district court's factual findings here as true, Klein continually and repeatedly failed to provide an IEP that addressed Hovem's unique learning disability, thereby violating his right to a FAPE. If, as Klein argues here, school districts are able to rely on a student's progress in areas in which the student does not have serious learning disabilities to argue that a FAPE has been provided, the central goals of the IDEA will be thwarted. Assessing the success of an IEP in educational areas in which the child has no disabilities, and ignoring a nearly total lack of progress in the area in which he does have a disability and needs special education and related services, turns the IDEA on its head.

2. Hovem, who was 18 when he began attending Landmark School and no longer a minor, may recover the costs his parents incurred in sending him there. This conclusion is supported by the IDEA's plain language, the statute's overall purpose, and by the principles of subrogation. The IDEA allows parents the right to tuition reimbursement when the public school's IEP is legally insufficient and the private education provides a FAPE. 20 U.S.C. 1415(i)(2)(C)(iii). The IDEA also allows States to transfer parents' rights under the IDEA to the child when he or she reaches the age of majority. Texas has elected to transfer these rights to the student on reaching the age of 18. It follows that one of the rights that transfers to the student is his or her parents' right to reimbursement for an alternate placement.

Moreover, this reading comports with the larger purpose of the IDEA to provide children with a FAPE.

ARGUMENT

I

THE CONTINUAL AND REPEATED FAILURE OF KLEIN TO PROVIDE AN IEP THAT ADDRESSED HOVEM'S UNIQUE LEARNING DISABILITY VIOLATED THE IDEA

The district court's findings of fact portray a school district that continuously passed plaintiff Per Hovem, a student with a disability, ostensibly because he was progressing in all his subjects. The findings also demonstrate that the district, despite knowing that Hovem was not progressing in the subjects directly affected by his learning disability, never attempted to modify his IEP to address his continued lack of progress. This continual lack of progress, along with the school's failure to adjust its IEP, clearly denied Hovem the FAPE to which he was entitled under the IDEA.

This Court stated that "[o]ne of the primary purposes of the IDEA is to ensure that children with disabilities receive a 'free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.'" *Houston Indep. Sch. Dist.* v. *Juan P.*, 582 F.3d 576, 583 (5th

Cir. 2009) (quoting 20 U.S.C. 1400(d)(1)(A)), cert. denied, 130 S. Ct. 1892 (2010). Under the IDEA, a school district must "(1) provide each disabled child within its jurisdictional boundaries with a 'free appropriate public education' tailored to his unique needs." *Ibid*. (quoting *Cypress-Fairbanks Indep. Sch. Dist.* v. *Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998)).

While the special education and related services provided under IDEA need not "maximize the child's educational potential," they must provide "an education that is specifically designed to meet the child's unique needs, supported by services that will permit him 'to benefit' from the instruction." *Michael F.*, 118 F.3d at 247-248 (footnote omitted).

The reference to "unique needs" obviously refers to educational needs caused by the child's disability. Were that premise in any doubt, the definitions section of the IDEA makes the point abundantly clear. See 20 U.S.C. 1401(3). After defining "child with a disability" with terms describing disabling conditions such as "mental retardation," "autism," or, as in this case, "specific learning disabilities," 20 U.S.C. 1401(3)(i), the text following those conditions defines the child as one "who *by reason thereof*, needs special education and related services," 20 U.S.C. 1401(3)(ii) (emphasis added). Obviously, the IDEA defines the educational services set forth in the IEP to be ones aimed at the child's needs, and

the IEP must include those specifically addressing educational deficiencies caused by the child's disability.

This educational program is intended to provide some positive results. The "educational benefit * * * cannot be a mere modicum or *de minimis*," but "rather, an IEP must be 'likely to produce progress, not regression or trivial educational advancement.'" *Michael F.*, 118 F.3d at 248 (footnote omitted). "[T]he educational benefit that an IEP is designed to achieve must be 'meaningful.'" *Ibid.* (footnote omitted). And such a meaningful education benefit must be "gauged in relation to the potential of the child at issue." *Deal* v. *Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004), cert. denied, 546 U.S. 936 (2005). An "appropriate education" under the IDEA means that a student is "making measurable and adequate gains in the classroom." *JSK* v. *Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991); see also *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272, 291 (5th Cir.) ("goal of the IDEA is to require a FAPE that will permit the child 'to benefit' from" education), cert. denied, 546 U.S. 933 (2005); see also *Reauthorization of the Individuals with Disabilities Education Act: Hearing Before the Senate Comm. on Labor and Human Resources*, 105th Cong., 1st Sess. 1 (1997) (stating that goal of the IDEA should be "that when it comes time to graduate from high school, * * * students, *all* students, [should] have the skills to either pursue postsecondary education or training, or to get a good job and

be contributing members of our communities") (statement of Sen. James Jeffords, Chairman, S. Comm. on Labor and Human Resources); S. Rep. No. 275, 104th Cong., 2d Sess. 50 (1996) (stating that IDEA's modifications "place[] greater emphasis on educational results for children with disabilities" and that "[t]he bill also provides for a statement of how the progress of the child toward measurable annual objectives will be measured through benchmarks or other measurable indicators of progress").

This Court applies a four-factor test to determine whether an IEP was reasonably calculated substantively to provide a student with a meaningful educational benefit. These factors are whether: "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." *Michael F.*, 118 F.3d at 253.

Periodic review of an IEP is essential to ensure that the student progresses in the educational area affected by his or her disability. IEPs are required to be reviewed "at least annually to determine whether the child is reaching the stated goals. In addition, the IEP team is to revise the IEP to *address lack of progress*, necessary changes arising from reevaluation of the child, and parental input,

among other things." *S.H.* v. *State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 265 (3d Cir. 2003) (emphasis added). In addition, the language of IDEA establishes this responsibility as well. In 20 U.S.C. 1414(d)(4)(A), the IDEA states, in a section titled "Review and revision of IEP," that the school district must "(i) review[] the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and (ii) revise[] the IEP as appropriate to address – (I) any lack of expected progress toward the annual goals." Where a student makes no progress under an IEP, school officials must address the IEP and make necessary adjustments.

Here, the district court found that, for at least three consecutive years, Klein employed the same IEP for Hovem while knowing that he was not progressing in his language and writing abilities.[3] It also found that when Hovem, who had been in the school district with an IEP since 2000, entered high school in 2004, "a significant discrepancy existed between Per's potential and current achievement in the areas of written expression and basic reading skills." USCA5 691. This strongly suggests that the IEPs prior to 2006 were substantively inadequate. Indeed, the hearing officer concluded that "by early 2002 when the district was

[3] The district court's factual findings are reviewed for clear error. *Houston Indep. Sch. Dist.* v. *Bobby R.*, 200 F.3d 341, 347 (5th Cir.) (district court's "underlying fact-findings, 'such as findings that a disabled student obtained educational benefits under an IEP, are reviewed for clear error'"), cert. denied, 531 U.S. 817 (2000).

made aware" of Hovem's language disability, "the child's IEP should have been modified to provide services, goals and objectives to meet the child's needs." USCA5 34. Where a school district continues to offer IEPs that fail, as demonstrated by a lack of progress in the educational areas affected by the disability, and the school officials are aware that these IEPs are not providing the student a meaningful educational benefit and nonetheless make no changes, the school district violates that student's right to a FAPE. This conclusion follows from the IDEA's language and purpose and this Court's case law interpreting the IDEA.

This does not mean that a school district automatically has violated a student's right to a FAPE under the IDEA any time a student with a disability has failed to progress. Rather, it means that where a school district is aware of a student's disability, has implemented an IEP, knows that this IEP is not providing any measurable progress in the specific areas of need, and fails to amend or adapt the IEP in light of this failure, the school district violates the student's right to a FAPE. After all, "[a]lthough a school district can meet its statutory obligation even though its IEP proves ultimately unsuccessful, the fact that the program is unsuccessful is strong evidence that the IEP should be modified during the development of the child's next IEP. Otherwise, the new IEP would not be reasonably calculated to provide educational benefit in the face of evidence that the

program has already failed." *Board of Educ. of Kanawha* v. *Michael M.*, 95 F. Supp. 2d 600, 609 n.8 (S.D. W. Va. 2000).

That was precisely the case here. The district court obviously was correct to focus on Hovem's lack of progress in his area of disability, rather than, as Klein urges, on his progress in those areas where his disability did not affect his learning. An IEP aims special education and related services at the child's disability, *Lenn* v. *Portland School Committee*, 998 F.2d 1083, 1089-1090 (1st Cir. 1993), and they must be "tailored to his unique needs," *Juan P.*, 582 F.3d at 583. Here, Klein failed to target the very language disability that affected Hovem and prevented him from obtaining a meaningful educational benefit in that area of learning. Even after realizing that the IEP was not delivering Hovem a meaningful educational benefit in the area of language and writing, Klein officials continued to provide the same IEP they knew to be failing to meet Hovem's needs. This action violates the IDEA.

Contrary to Klein's brief (Appellant's Br. 32), this conclusion does not contradict *Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). Klein argues that the district court "deviate[d]" from *Rowley's* "mandate by refusing to credit any of Per's many educational achievements." Appellant's Br. 32. In short, Klein argues that because Hovem was mainstreamed, and because

he was achieving passing marks and advancing from grade to grade, Klein met its IDEA responsibilities.

In this case, though, Klein's actions advancing Hovem from grade to grade does not establish compliance with the IDEA. In *Rowley*, the Court held that a State *can* satisfy the requirement to provide a FAPE when a child performs well enough to advance from grade to grade, considering the child's disability and the efforts aimed at ameliorating its effects. 458 U.S. at 203-204. In *Rowley*, the child, who had hearing loss for which the school provided amplified sound, legitimately progressed in all her subjects well enough to advance. The Supreme Court stated that, "[t]he grading and advancement system thus constitutes an important factor in determining educational benefit." *Id.* at 203.

The Court, however, cautioned against reading *Rowley's* mandate too broadly, stating that a school's action continuously advancing a child from one grade to another does not automatically prove that the child is receiving a FAPE. 458 U.S. at 203 n.25. Rather, the Court was finding only in that particular case that the child's "academic progress, when considered *with* the special services and professional consideration accorded" her by the school system demonstrated progress. *Ibid*. (emphasis added).

The Court in *Rowley* was looking at the student's legitimate grade to grade advancement; no one questioned the accuracy of her educational progress in any

area of learning. In Hovem's case, however, he was not advancing in the areas of learning tied to his specific learning disability. Rather, Hovem's advancement from grade to grade in language and writing skills was akin to "social promotion," as indicated by his nearly total lack of educational progress in language, and quite demonstrably by his incredibly low scores in the testing he took as a senior. Those scores demonstrated that he performed at a fifth grade level in word identification and reading, third grade in the fluency of reading, and second grade level in word attack and accuracy of reading, and his score for word attack (dealing with phonetic decoding) was in the 1% level.

Clearly, these are not scores that translate into adequate progress for a child with normal intelligence at the time he was set to graduate from high school. There was never a fair and accurate determination that Hovem was actually making progress in his language work, which was the work affected by his disability. The fact Hovem was making progress in other work unaffected by his language problems does not put him into the same situation as the student in *Rowley*. Further, whatever success he was having in his English class was, as the school officials knew, in large measure because he was allowed to take work home where his family helped him do and type up his work. Hovem demonstrably was not progressing in the area affected by his disability, and Klein's action in moving

him from grade to grade in his language classes was unsupported by actual progress.

At least one circuit court has distinguished *Rowley* directly along these lines. In *Hall* v. *Vance County Board of Education*, 774 F.2d 629, 631 (4th Cir. 1985), the student was functionally illiterate and, like Hovem, "had a high IQ" and was advanced from grade to grade by school officials. The school board contended that the student's "academic progress, as measured by his grade promotions and test scores, evince[d] educational benefit" and therefore satisfied *Rowley*. *Id*. at 635. The district court and Fourth Circuit disagreed. "Although the *Rowley* Court considered Amy Rowley's promotions in determining that she had been afforded a FAPE, the Court limited its analysis to that one case and recognized that promotions were a fallible measure of educational benefit." *Id*. at 635-636 (citing *Rowley*, 458 U.S. at 203 n.25). The Fourth Circuit further stated:

> The district court did not err in discounting James' promotions in light of the school's policy of social promotion and James' test scores and independent evaluations. Nor was the district court compelled by a showing of minimal improvement on some test results to rule that the school had given James a FAPE. *Rowley* recognized that a FAPE must be tailored to the individual child's capabilities and that while one might demand only minimal results in the case of the most severely handicapped children, such results would be insufficient in the case of other children. Clearly, Congress did not intend that a school system could discharge its duty under

> the EAHCA by providing a program that produces some minimal academic advancement, no matter how trivial.

Id. at 636.

Other courts agree. In *D.B.* v. *Bedford County School Board*, 708 F. Supp. 2d 564, 584 (W.D. Va. 2010), the court held that despite the fact that the student "was promoted a grade every year, * * * this token advancement documents, at best, a sad case of social promotion." See also *Smith* v. *Parham*, 72 F. Supp. 2d 570, 576 (D. Md. 1999) (parents of student were "quite correct in asserting that advancement from grade to grade should not be the only factor considered when determining whether a child is receiving an educational benefit"); *Carl D.* v. *Special Sch. Dist. of St. Louis Cnty.*, 21 F. Supp. 2d 1042, 1053 (E.D. Mo. 1998) ("Achievement of passing marks and advancement from grade to grade are important — but not dispositive — factors in assessing educational benefit" (citing *Rowley*, 458 U.S. at 203).). Similarly, here Hovem advanced from grade to grade despite his total lack of progress in the language skills that were affected by his disability. His IEP failed to provide any progress in the area affected by his disability, and, despite that failure of the IEP, the school district never changed it. This lack of "meaningful benefit" violates the IDEA.

II

HOVEM, WHO IS AN ADULT, MAY RECOVER THE COSTS HIS PARENTS INCURRED IN SENDING HIM TO THE LANDMARK SCHOOL

Hovem was 18 at the time of his due process hearing and attendance at Landmark. Under the IDEA, a State "may provide that, when a child with a disability reaches the age of majority under State law * * * the agency shall provide any notice required by the [Section 1415 of the IDEA] to both the individual and the parents * * * [and that] all other rights accorded to parents under [the IDEA] transfer to the child." 20 U.S.C. 1415(m)(1)(A) & (B); see also 34 C.F.R. 300.520(a)(1)(i) & (ii). The IDEA also requires that "the individual and the parents" "shall" be notified of the "transfer of rights." 20 U.S.C. 1415(m)(1)(C); see also 34 C.F.R. 300.520(a)(3). Texas transfers all IDEA rights to a student who has turned 18. Tex. Ed. Code 29.017.

The district court's opinion is unclear on whether it was affirming the award of tuition costs to Hovem's parents as individuals having standing themselves, or rather if the award was to Hovem of his parents' expenses. Still, while it is not entirely clear, its opinion certainly allows for Hovem's recovery as an alternative to his parents having a direct right of recovery. This recovery is allowed under the IDEA. A student, such as Hovem, *can* recover the costs of tuition expended on his behalf by his parents. This conclusion is supported by the plain language of the

IDEA, the IDEA's larger and overall purpose, and by long-standing principles of subrogation.

Under the IDEA, parents have a right to receive tuition reimbursement for an appropriate private school placement when the public placement was inappropriate. *School Comm. of Burlington* v. *Department of Educ. of Mass.*, 471 U.S. 359, 369 (1985). *Burlington* held that under 20 U.S.C. 1415(e)(2), now codified at 20 U.S.C. 1415(i)(2)(C)(iii), which allows a court to grant "such relief" as the court deems "appropriate," a court is authorized to grant tuition reimbursement for private placement ultimately judged "proper under the Act." 471 U.S. at 369. The IDEA allows parents' rights to be transferred to a student upon obtaining the age of majority. In this case, the Hovems' decision to transfer Hovem to a private placement was deemed proper by the district court, and under the IDEA the Hovems therefore have a right to receive reimbursement for this placement. Klein can hardly claim that all of the Hovems' rights transfer to Hovem except for the right to "such relief as the court determines is appropriate," 20 U.S.C. 1415(i)(2)(C)(iii), in this case reimbursement for the Landmark School.

This Court has stated that "statutes must be read in the light of their purpose." *Regional Props., Inc.* v. *Financial & Real Estate Consulting Co.*, 678 F.2d 552, 561 (5th Cir. 1982); *United States* v. *Olander*, 572 F.3d 764, 768 (9th Cir. 2009) ("If necessary to discern Congress's intent, we may read statutory terms

in light of the purpose of the statute."), cert. denied, 130 S. Ct. 113 (2010); "[A] fundamental principle of statutory construction" is the employment of "common sense." *Burlington N. & Santa Fe Ry. Co.* v. *Poole Chem. Co.*, 419 F.3d 355, 364 (5th Cir. 2005). And "the common mandate of statutory construction [is] to avoid absurd results." *In re Contractor Tech., Ltd.*, 529 F.3d 313, 320 (5th Cir. 2008) (citation omitted).

The IDEA's larger purpose, common sense, and the mandate to avoid absurd results all support the conclusion that Hovem can recover his parents' tuition expenses. It would lead to absurd results to prohibit an adult student from recovering the tuition reimbursement to which his parents are rightfully entitled. If merely turning 18 prevents such reimbursement, students between 18 and 21 may well be denied a FAPE because they likely have no money to pay for a private placement. And, if the parents cannot get reimbursement, many parents of children nearing the age of majority or who are 18 will be reluctant to pull their children from public school placements, even if inadequate, because they would have no way to obtain reimbursement for their expenses. Allowing such a gap for obtaining reimbursement the IDEA permits clearly runs contrary to intended goals of the IDEA and to common sense.

The principles of subrogation also support the conclusion that Hovem can recover the tuition expenses his parents paid. "[S]ubrogation is generally defined

as the substitution of one person in the place of another with reference to a lawful claim or right." *BancInsure, Inc.* v. *BNC Nat'l Bank, N.A.*, 263 F.3d 766, 773 (8th Cir. 2001) (citation omitted). Here, by effect of law at the time he turned 18, Per Hovem was substituted for his parents in the IDEA process. The IDEA, combined with the Texas Education Code, transfers all his parents' rights to him. He thus stands in their place with regard to the tuition reimbursement. Contrary to KISD's claims, Per Hovem can recover the tuition costs expended by his parents.

CONCLUSION

The Court should affirm the district court's ruling that Hovem was denied a free appropriate education and that he is entitled to recovery of tuition costs incurred by his parents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2011, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system.

I certify that the all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Date: April 22, 2011

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