No. 15-827

IN THE
Supreme Court of the United States

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

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

This brief is submitted with the consent of the parties[1] on behalf of the National Education Association (NEA) as *amicus curiae* in support of the Petitioner, Endrew F.

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a strong and longstanding commitment to equal educational opportunity for students with disabilities. The NEA Representative Assembly, NEA's highest governing body, has adopted numerous resolutions to increase the support provided to children with disabilities. For example, NEA Resolution B-34 ("Education for All Students with Disabilities") urges, among other measures, that "[s]tudent placement must be based on individual needs rather than on available space, funding, or local philosophy of a school district." Furthermore, NEA Resolution B-31 ("Alternative Programs for At-Risk and/or Students with Special Needs") "recommends early access to intervening services" that "emphasize a broad range of approaches for addressing students' differing behavioral patterns, interests, needs, cultural backgrounds, and learning styles." As recently as 2016, the NEA Representative Assembly adopted New Business

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Item 3 to "bring[] special education reform to the forefront, by collecting . . . the personal stories and experiences of educators, parents, and students to highlight the detrimental impact that inadequate funding and resources ha[ve] on the achievement of students with disabilities in our schools."

INTRODUCTION AND SUMMARY OF ARGUMENT

As an organization that represents millions of educators, including special education teachers and paraeducators, *amicus* understands the gravity of failing to provide students with disabilities an "appropriate education." *Amicus* submits this brief in support of Petitioner, Endrew F., to emphasize that providing students with disabilities the opportunity to succeed academically is a moral and professional obligation of the educator community. This obligation cannot be fulfilled solely through the procedural protections in the Individuals with Disabilities Education Act (IDEA); the IDEA imposes a substantive education obligation that is higher than the slightly-more-than-nothing standard prescribed by the Tenth Circuit Court of Appeals.

First, the Tenth Circuit's standard that an appropriate education must merely provide "some" educational benefit that is more than *de minimis* is contradicted by both educators' and Congress' understanding of the original IDEA, and subsequent amendments thereto. In 1975, educators concluded that an appropriate education was nothing less than one which harnessed disabled students' abilities to their fullest extent. Thereafter, when Congress acknowledged

that the IDEA had successfully achieved *access* to a public education, educators reiterated their commitment to achieve high quality outcomes for all students, including those with disabilities. On this front, educators and Congress were in agreement, and the new IDEA emphasized improving concrete, academic results for students with disabilities. This united focus on improved educational achievement for students with disabilities is irreconcilable with a standard that requires only slightly above the barest educational progress.

Second, aiming for a student with a disability to achieve only "some" progress is contrary to educational best practices. The Tenth Circuit's minimal educational standard is a proclamation to aim low, when best practices dictate that students with disabilities best learn when they aim high. Furthermore, such a standard ignores the necessity of behavioral interventions for students with disabilities, and ignores the diversity of needs and abilities within the disability population itself.

ARGUMENT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, proclaims that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." *Id.* § 1400(c)(1). To that end, the IDEA requires that public schools that receive federal funds for special education services must provide students with certain disabilities

a "free appropriate public education." 20 U.S.C. §§ 1401(9), 1412(a)(1)(A).

The Tenth Circuit below held that the "free appropriate public education" to which covered students are substantively entitled under the IDEA is provided so long as a student obtains "more than [a] *de minimis*" educational benefit. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. Re-1*, 798 F.3d 1329, 1338–39 (10th Cir. 2015) (citations and quotation marks omitted). In opposing *certiorari*, the Respondent contends that this next-to-*de minimis* standard is adequate to carry out the objectives of the IDEA, in part because individual educators will be "no less dedicated to ensuring that their schools offer supportive and nurturing learning environments for children with disabilities" than they wound be under a more meaningful substantive standard. Resp't's Suppl. Br. Opp'n Cert. at 3.

It is no doubt impossible to overstate the dedication and commitment of our nation's educators to their students—and, in particular, to their students with disabilities. Still, the Respondent's argument is wrong. The Tenth Circuit's standard is incompatible with both the text and purpose of the IDEA, with educators' understanding of those objectives, and with educational practice for students with disabilities.

A. The Tenth Circuit's Standard Is Incompatible with the "Free Appropriate Public Education" that the Text and Purpose of the IDEA Guarantee

The IDEA, through its original enactment and subsequent amendments, makes plain that an "appropriate public education" necessitates more than providing

only "some" educational benefit. Providing students with disabilities with only a modicum of an educational benefit is antithetical not only to Congress' vision of equity and empowerment for students with disabilities, but also to educators' vision of the same.

1. When Congress considered the Education for All Handicapped Children Act (EAHCA) more than four decades ago, it sought to address the concern that many children with disabilities were not receiving an adequate education through the nation's public schools. In particular, Congress found that children with disabilities frequently did not receive "appropriate educational services" and that, in some cases, such students "were excluded entirely from the public school system . . . ." 20 U.S.C. § 1400(c)(2)(A), (B). The schools' shortcomings in educating these students had "long range implications": not only were these students prevented from fulfilling their full capacities, but the missed educational opportunity meant that "public agencies and taxpayers w[ould] spend billions of dollars over the lifetimes of these individuals to maintain [them] as dependents . . . ." S. Rep. No. 94-168, at 9 (1975).

Faced with that stark reality, Congress understood that a federal statute providing for "proper education services" to students with disabilities meant that "many [of these students] would be able to become productive citizens, contributing to society . . . ." *Id.* Educators who supported the EAHCA understood that the very purpose of such federal legislation was to impose a substantive standard as to the type of educational opportunities that must be provided for students with disabilities.

For example, in the 1975 hearings preceding the EAHCA, the Director of the Department of Legislation in the American Federation of Teachers (AFT), and a former teacher himself, testified that "[w]hat we need is to get handicapped children and people full opportunity for *an education to the extent of their ability* and try to get them [to be] self-supporting . . . ." Education for All Handicapped Children Act of 1975: Hearing on S. 6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Pub. Welfare, 94th Cong. 329 (1975) (statement of Carl J. Megel, Director of Department of Legislation, American Federation of Teachers, AFL-CIO) (emphasis added). The AFT anticipated that this "legislation . . . would *guarantee* the right of every handicapped child in the United States to *an education to the extent of his capacities* and to the extent possible to prepare him for gainful employment in accordance with his abilities." *Id.* at 332 (emphasis added). The then president of the National Education Association (NEA) expressed a similar hope for the EAHCA's passage, emphasizing the need to develop and disseminate "promising teaching practices" for the benefit of students with disabilities. *Id.* at 351 (statement of James A. Harris, President, National Education Association). Congress espoused the same goals: "The intent [of] S. 6 is to . . . insure that [the EAHCA] . . . will result in maximum benefits to handicapped children and their families." S. Rep. No. 94-168, at 6. This conception of the statute as a mandate to educate children with disabilities "to the extent of [their] capacities" cannot be squared with the notion that any educational benefit, no matter how trivial, is sufficient to comply with the statute.

2. That becomes especially apparent from subsequent amendments to the IDEA in 1997 and 2004. *Compare* Pub. L. No. 94-142, 89 Stat. 773 (1975) (EAHCA) *with* Pub. L. No. 105-17, 111 Stat. 37 (1997) (IDEA 1997 amendments); Pub. L. No. 108-446, 118 Stat. 2647 (2004) (IDEA 2004 amendments). In 1997, Congress found that the IDEA had "successful[ly] . . . ensur[ed] children with disabilities . . . *access* to a free appropriate public education . . . ." Pub L. No. 105-17, § 101, 111 Stat. 37, 39 (codified as amended at 20 U.S.C. § 1400(c)(3)) (emphasis added). But access alone was insufficient in Congress' view. A bipartisan Senate report regarding the 1997 amendments concluded "that the critical issue now is to place greater emphasis on improving student performance and ensuring that children with disabilities receive a *quality* public education." S. Rep. No. 105-17, at 1–3 (1997) (emphasis added); *see also id.* at 3 (discussing how amendments to the IDEA were "needed . . . to improve and increase [the] educational achievement" of children with disabilities); S. Rep. No. 104-275, at 14 (1996) (recognizing that more needed to be done to "improv[e] the quality of services received . . . and transitional results or outcomes obtained by [such] students").

In concrete terms, the 1997 amendments strengthened the requirements for the individual education programs (or IEPs) mandated by the IDEA by, among other things, requiring the inclusion of "measurable" education goals that would be tracked regularly and—as students approached adulthood—a plan for services to enable those students with disabilities to transition to "post-school activities, including post-secondary education, vocational training, integrated employment, . . . continuing and adult education, adult ser-

vices, independent living, or community participation . . . .” Pub. L. No. 105-17, 111 Stat. 37, 46 (1997).

Educators’ experiences were critical to this new congressional focus on raising the level of achievement for students with disabilities through the 1997 amendments. In the lead up to the amendment, Congress heard from educational researchers explaining “the restructuring of public education . . . [to] a new paradigm shift . . . [towards a] *quality* [education] for *all* children” that had been embraced by educators. Reauthorization of the Individuals with Disabilities Education Act (IDEA): Hearing Before the Subcomm. on Select Educ. and Civil Rights of the H. Comm. on Educ. and Labor, 103d Cong. 86 (1994) (statement of Dorothy Kerzner Lipsky and Alan Gartner, National Center on Educational Restructuring and Inclusion) (emphasis added).

3. The 2004 amendments to the IDEA furthered this focus on academic achievement by establishing in the Act high expectations for students with disabilities. This renewed focus was due, in part, to testimony from educators on the pressing need to reduce the paperwork required to comply with the IDEA, while simultaneously increasing academic expectations for students with disabilities. *See* Special Education: Is IDEA Working as Congress Intended?: Hearing Before the H. Comm. on Gov’t Reform, 107th Cong. 307–08 (2001) (statement of Ed Amundson, Chair, National Education Association’s Caucus for Educators of Exceptional Children) (“In effect, educators have made a real commitment and received additional training to teach special needs students; however, they find themselves filling in the boxes . . .

[more than they are] filling in the kids."). In anticipation of the 2004 amendments, educators reiterated their commitment to "providing the best possible education to all students, including those with disabilities." *Id.* at 311.

The 2004 amendments embraced this commitment from educators to "support[] high-quality, intensive preservice preparation and professional development . . . to improve the academic achievement and functional performance of children with disabilities . . . to the maximum extent possible." Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2649–50 (codified as amended at 20 U.S.C. § 1400(c)(5)(E)). In particular, the amendments included congressional findings that education for children with disabilities "can be made more effective" by employing the "improvement efforts" established by the Elementary and Secondary Education Act (ESEA). 20 U.S.C. § 1400(c)(5)(C). To that end, Congress aligned the IDEA's IEP requirements with ESEA's academic standards and testing requirements, thereby requiring that the States' academic expectations for students with disabilities be the same as those for students without disabilities. *Id.* § 1412(a)(16).

4. The Tenth Circuit's more-than-*de minimis* standard simply cannot be reconciled with the text or purpose of the IDEA as it has been outlined here. Ultimately, Congress agreed with educators' predominant view that the IDEA and its amendments must embody a substantive guarantee of an educational benefit. The IDEA seeks to achieve "equality of opportunity" for disabled students, 20 U.S.C. § 1400(c)(1), and is meant to provide disabled children with the

"necessary tools" to "prepare for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A), (3). The Tenth Circuit's minimal view of the educational benefit that must be provided all but ensures that those objectives will never be met for some disabled students.

B. The Tenth Circuit's Standard Is Incompatible with Educational Best Practices.

The Tenth Circuit's standard for an "appropriate education" is also incompatible with the current consensus on best practices for educating students both with and without disabilities. This Court "must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954). The "full development" of educational pedagogy emphasizes: maintaining high academic expectations regardless of a student's purported disabilities, differentiating material to be accessible to students at all levels, and creating early behavioral interventions as a necessary component of academic achievement.

1. "Meeting children where they are is essential, but no good teacher simply leaves them there." Nat'l Ass'n for the Educ. of Young Child., *Position Statement: Developmentally Appropriate Practice in Early Childhood Programs Serving Children from Birth through Age 8*, at 10 (2009) ("NAEYC, *Developmentally Appropriate Practice*"), https://www.naeyc.org/files/naeyc/file/positions/position%20statement%20Web.pdf. Even for students in preschool, "having high expectations for all children is

essential." *Id.* at 12. Indeed, teachers' expectations about children's abilities can have either profound or devastating consequences. *See* Ulrich Boser et al., Ctr. for Am. Progress, *The Power of the Pygmalion Effect: Teacher Expectations Strongly Predict College Completion* (2014) ("Boser et al."), https://www.americanprogress.org/issues/education/reports/2014/10/06/96806/the-power-of-the-pygmalion-effect/ (teacher expectations can powerfully predict student achievement); Alix Spiegel, *Teachers' Expectations Can Influence How Students Perform*, NAT'L PUB. RADIO (Sept. 17, 2012, 3:36 AM) ("Spiegel, *Teachers' Expectations*"), http://www.npr.org/sections/health-shots/2012/09/18/161159263/teachers-expectations-can-influence-how-students-perform (finding that when teachers were led to believe a student had a higher IQ, that student's IQ subsequently rose).

For students with disabilities, low expectations create a self-fulfilling prophecy of academic failure, even where special education supports are in place. *See* Laudan Aron & Pamela Loprest, *Disability and the Education System*, 22 FUTURE OF CHILD. 97, 111 (Spring 2012). Setting a standard that is "merely more than *de minimis*" would fix in the IDEA—the primary federal statute aimed at increasing educational access and opportunity for disabled students—low expectations for students with disabilities, despite ample evidence that even the act of conveying high expectations to students creates educational progress. *See* Boser et al., *supra*; Spiegel, *Teachers' Expectations*, *supra*; *see also* Michael Yudin, *Higher Expectations to Better Outcomes for Children with Disabilities*, HOMEROOM: THE OFFICIAL BLOG OF THE U.S. DEP'T OF EDUC. (June 25, 2014), http://blog.ed.gov/2014/06/higher-expectations-

to-better-outcomes-for-children-with-disabilities/ ("Too often, students' educational opportunities are limited by low expectations.").

2. In addition to high expectations, educators agree that differentiating content in order to effectively convey material to students at every level is critical for academic progress. Differentiation means that educators instruct children according to not just what would be appropriate for their grade level, but also as to what would be appropriate for children's "own strengths, needs, and interests[,]" which account for "enormous variation among children of the same chronological age." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 11; *see also* Toni A. Sondergeld & Robert A. Schultz, *Science*, *Standards*, *and Differentiation*, 31 GIFTED CHILD TODAY 34, 35 (2008) ("Differentiation provides students with opportunities to approach curriculum from their strengths, as varied as these might be. From this firm footing, limitations can be addressed without developing negative perceptions of self-ability or self-worth."). This method of instruction also is called "scaffolding," which "provid[es] the support or assistance that allows the child to succeed at [a certain] task," and then further allows that child to "go on to use the skill independently in a variety of contexts . . . ." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 15. Scaffolding and differentiation serve to benefit both general education and special education students. *See* Nat'l Educ. Ass'n Educ. Policy & Practice Dep't, *Universal Design for Learning (UDL): Making Learning Accessible and Engaging for All Students (PB23)*, at 1 (2008),

www.nea.org/assets/docs/PB23_UDL08.pdf (discussing Universal Design for Learning, a form of differentiated instruction which was developed for students with disabilities but "is a research-based framework . . . to provide ALL students with equal opportunities to learn") (emphasis in original).[2]

The Tenth Circuit's low standard for educational progress fails to account for varying needs and abilities within the special education population itself. Take, for example, the population of students with a disability who are also gifted, sometimes called "twice-exceptional students."[3] *See* Sarah D. Sparks, *Studies Shed Light on 'Twice Exceptional' Students*, EDUC. WEEK (May 9, 2012) ("Sparks, *'Twice Exceptional' Students*"), http://www.edweek.org/ew/articles/2012/05/08/30gifted.h31.html?tkn=PVWFDRZv62bLKAdNRPRfGOfkavzwUOCHZ0Zw&cmp=ENL-EU-NEWS1. Under the Tenth Circuit's standard, if a gifted and dyslexic child were making "some academic progress" in, for instance, science, but not reading, a court could find that such a child received an appropriate education even if her academic potential indicated that she could make enormous gains across all subject areas beyond her current grade

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[2] The IDEA also encourages the use of universal design in schools. *See* 20 U.S.C. § 1474(b)(2) (awarding grants for activities based on universal design principles).

[3] In 2004, the IDEA for the first time recognized this group's inclusion in the population of students with disabilities. *See* Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2796 (codified as amended at 20 U.S.C. § 1481(d)(3)(J)) (grants should give priority to projects that address "children who are gifted and talented").

level.[4] *Endrew F.*, 798 F.3d at 1342. Satisfying barely-above-the-minimum requirements for such a student has especially far-reaching consequences in early elementary education: "Research continues to confirm the greater efficacy of early action—and in some cases, intensive intervention—as compared with remediation and other 'too little' or 'too late' approaches." NAEYC, *Developmentally Appropriate Practice*, *supra*, at 6; *see also* Sparks, *'Twice Exceptional' Students*, *supra* ("If we . . . neglect the other kinds of skills [that twice-exceptional students] may have a propensity toward, we may actually be shaping the brains of these kids . . . and miss the opportunity to develop other skills they may manifest . . . .") (quoting a social science expert on the topic).

Petitioner's case is telling in this respect, where his academic problems appear to have become more pronounced in second grade, gradually deteriorating from grade to grade thereafter. *See Endrew F.*, 798 F.3d at 1333, 1341 (describing Petitioner's fourth grade as "an especially rocky" year). The Tenth Circuit's standard fails to account for the diversity within the special education population, effectively ig-

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[4] In Petitioner's case, for example, the District Court found it acceptable that some of Petitioner's "objectives carried over from year to year, and [that] some [were] only slightly modified"—essentially permitting Petitioner to fall wholly behind grade-level expectations. *Endrew F. v. Douglas Cty. Sch. Dist. Re-1*, No. 12–cv–2620–LTB, 2014 WL 4548439, at *9 (D. Colo. Sept. 15, 2014), *aff'd*, 798 F.3d 1329 (10th Cir. 2015). Petitioner's actual academic potential became evident when, in his private placement, he had either "mastered . . . the draft IEP objectives" or was on track to master them within two months of his enrollment. *Id.* at *7.

nores best practices to differentiate academic material for students like Petitioner, and would set the bar for the substantive educational benefit required so low as to ensure that IDEA compliance would not need to meet the educational needs of disabled students.[5]

3. Finally, the Tenth Circuit's standard ignores educators' consensus that meaningful academic gains for students who exhibit behavioral and socio-emotional difficulties are nearly impossible without proper interventions and supports—particularly in a child's early years. In ruling against Petitioner, the Tenth Circuit mistakenly concluded that behavioral interventions essentially were not a substantive component of an appropriate education. *See Endrew F.*, 798 F.3d at 1342 n.12. This conclusion exhibits a fundamental misunderstanding of child development. A child's academic needs and her behavioral needs are inseparable. While a child's behavioral problems inevitably cause underachievement, it is now also clear that academic struggles often cause behavioral problems as well, creating a vicious cycle of behavioral and academic lapses. *See* Robert F. Putnam et al., *Academic Achievement and the Implementation of School-Wide Behavior Support*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS NEWSL.,

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[5] To be sure, many educators and school districts will go far beyond the minimal substantive mandate required. Of course, they will as they have always done so. But that is no argument against setting the substantive standard for the education required by the IDEA at a more than minimal level, any more than would be the argument that there is no need for a higher minimum wage because most employers pay more than the current minimum wage.

VOL. 3:1, at 2 (2016), https://www.pbis.org/Common/Cms/Documents/Newsletter/Volume3%20Issue1.pdf ("As the student's literacy skills do not keep pace with those of peers, academic tasks become more aversive, and problem behaviors that lead to escape from these tasks become more likely."); Lisa Trei, *Academic Performance and Social Behavior in Elementary School Are Connected, New Study Shows*, STAN. NEWS SERV. (Feb. 15, 2006), http://news.stanford.edu/pr/2006/pr-children-021506.html ("Children's social behavior can promote or undermine their learning, and their academic performance may have implications for their social behavior."). Like early interventions for learning disabilities, tackling behavioral problems early in a child's schooling—and continuing such interventions throughout—is critical to her success. *See* NAEYC, *Developmentally Appropriate Practice*, *supra*, at 7 ("Of course, children's social, emotional, and behavioral adjustment is important in its own right, both in and out of the classroom. But it now appears that some variables in these domains also relate to and predict school success."); *see generally* Nat'l Educ. Ass'n Educ. Policy & Practice Dep't, *Positive Behavioral Interventions and Supports: A Multi-tiered Framework that Works for Every Student (PB41A)* (2014), http://www.nea.org/assets/docs/PB41A-Positive_Behavioral_Interventions-Final.pdf.

The Tenth Circuit's standard for an "appropriate education" is so distant from current best practices in both general education and special education curricula as to be an anachronism. The IDEA has recognized the importance of using research-based methods to inform educating students with disabilities; it is important that this Court do so as well. *See* 20 U.S.C.

§ 1400(c)(4) (IDEA "has been impeded by . . . an insufficient focus on applying replicable research on proven methods of teaching and learning for students with disabilities"). The substantive standard of educational benefit required by the IDEA must be set in line with the purpose and structure of the IDEA, and evolving practice as to the most effective manner to reach the IDEA's stated goal of "[i]mproving educational results for children with disabilities" in order to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

CONCLUSION

For the foregoing reasons, *amicus* NEA respectfully requests that the ruling below be reversed.

Respectfully submitted,

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