No. 19-1008

In the United States Court of Appeals
For the Tenth Circuit

N.M., A MINOR BY AND THROUGH HIS PARENT, AMANDA M.,
APPELLANT

v.

HARRISON SCHOOL DISTRICT NO. 2,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE RICHARD P. MATSCH
CIVIL ACTION NO. 18-CV-00085-RPM

BRIEF OF *AMICI CURIAE*
NATIONAL SCHOOL BOARDS ASSOCIATION, COLORADO ASSOCIATION OF SCHOOL BOARDS, KANSAS ASSOCIATION OF SCHOOL BOARDS, NEW MEXICO SCHOOL BOARDS ASSOCIATION, OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION, UTAH SCHOOL BOARDS ASSOCIATION, AND WYOMING SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF HARRISON SCHOOL DISTRICT NO. 2 AND AFFIRMATION OF THE DISTRICT COURT'S DECISION

Francisco M. Negrón, Jr., Chief Legal Officer*
National School Boards Association
1680 Duke Street, FL2
Alexandria, VA 22314
(703) 838-6722

W. Stuart Stuller
Caplan and Earnest, LLC
3107 Iris Avenue, Suite 100
Boulder, CO 80301
(303) 443-8010

*Counsel of Record
Attorney for *Amici Curiae*

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* National School Boards Association states that it does not issue stock and is not a subsidiary or affiliate of any publicly owned corporation.

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INDENTITIES AND INTEREST OF *AMICI CURIAE*

Amicus Curiae National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities. NSBA regularly represents its members' interests before Congress, as well as federal and state courts, and has participated as *amicus curiae* in numerous cases involving issues under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* (2019). NSBA is joined by its member state school boards association from every state in the Tenth Circuit, as more fully described in the accompanying Motion For Leave to File.

The Colorado Association of School Boards' (CASB) membership includes the school boards of 177 of Colorado's 178 public school districts, including the Board of Education of Harrison School District No. 2.

The Kansas Association of School Boards ("KASB") is a nonprofit organization dedicated to providing education services to 312 locally elected school boards and the board members of special education cooperatives, interlocals and service centers.

The New Mexico School Boards Association (NMSBA) is the member organization for all of New Mexico's school boards to support their efforts in providing a quality education for all students of New Mexico. Its members comprise one hundred percent of the state's eighty-nine school boards.

The Oklahoma State School Boards Association (OSSBA) is a non-profit association whose membership consists of all of the boards of education of local public school districts in the State of Oklahoma.

The Wyoming School Boards Association's (WSBA) members are the 48 school districts across Wyoming, consisting of 338 board members and representing all public schools in Wyoming.

The Utah School Boards Association (USBA), as set forth in Utah Code 53G-4-502, "is recognized as an organization and agency of the school boards of Utah and is representative of those boards."

The case at hand presents a significant issue to the Court that will affect the membership of *Amici* state school boards associations, which have the responsibility to provide IDEA-eligible students in their states with a free appropriate public education (FAPE).

This case is a matter of circuit-wide significance because it presents this Court with its first opportunity since the U.S. Supreme Court issued its decision in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), to

provide guidance to district courts, administrative law judges, and hearing officers on the appropriate standards for determining whether a local education agency has provided a child with a disability with a FAPE in the least restrictive environment (LRE).

To assist the Court in evaluating the issues before it, *Amici* present the following ideas, arguments, theories, insights, and additional information.

FRAP 29(a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* state that (A) no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money to fund preparing or submitting this brief; and (C) no person other than *Amici*, its members, or its counsel contributed money to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

In *Endrew F*, the Supreme Court provided a common-sense standard for courts reviewing complex educational decisions under the IDEA – a standard that focuses on the unique needs of the individual child. The Supreme Court's ruling, tied to the language of IDEA itself, reflects decades of practice in public schools, and has been embraced by this Court's sister circuits. *Amici* urge this Court to take a similar approach in this case, applying the straightforward standard offered in *Endrew F.*, rather than a new standard unrelated to the IDEA.

Endrew F. neither changed nor expanded the LRE preference long required by the IDEA but re-emphasized the importance of judicial deference to educators for complex and prospective educational judgments where courts have little expertise. *Amici* implore the court to retain this deference to decisions made by the individualized education program (IEP) team, and to refrain from altering the long-applied standards used in LRE disputes.

ARGUMENT

I. THIS COURT SHOULD APPLY *ENDREW F.* CONSISTENTLY WITH OTHER CIRCUITS AND THE SUPREME COURT'S CLEAR INTENT TO ASSESS FAPE BASED ON THE CHILD'S INDIVIDUAL CIRCUMSTANCES.

The Supreme Court's decision in *Endrew F.* gives this circuit the opportunity to move away from measuring the adequacy of a student's IEP against phrases such as "more than de minimis,"[1] "some educational benefit,"[2] and "meaningful educational benefit,"[3] that this circuit acknowledged were not easily distinguishable. *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1313 n.7 (10th Cir. 2008). Instead, this circuit should join other circuits consistent with *Endrew F.* in measuring the adequacy of a student's IEP against the individual circumstances of the student.

[1] *Urban v. Jefferson Cnty Sch. Dist.*, 89 F.3d 720, 726-27 (10th Cir. 1996).
[2] *O'Toole v. Olathe Uni. Sch. Dist.*, 144 F.3d 692, 700 (10th Cir. 1998).
[3] *Jefferson Cnty Sch. Dist. v. Elizabeth E.*, 702 F.3d 1227, 1238 (10th Cir. 2012).

A. Before *Endrew F.*, Legal Standards Articulated by Courts to Assess FAPE Were Dependent on Adjectives Unconnected to the Statutory Language.

The federal government first addressed the education of students with disabilities in 1966, amending the Elementary and Secondary Education Act (ESEA),[4] to authorize grants to states to initiate, expand, and improve programs to educate children with disabilities. ESEA Amendments of 1966, § 602, 80 Stat. 1204. Grants were needed to "initiate" such programs because some school districts did not have them; some even affirmatively excluded students with disabilities from public education.

A separate act, the Education of the Handicapped Act (EHA), was adopted in 1970, building upon the structure created by the 1966 amendments to the ESEA. Pub. L. No. 91-230, 84 Stat. 175-181. Four years later, Congress amended the EHA to permit parents of children with disabilities to request a hearing, subject to judicial review, to contest educators' decisions regarding the "identification, evaluation and educational placement" of their children. Education Amendments of 1974, Pub. L. No. 93-380, § 612(d)(13), 88 Stat. 484, 582. The EHA, however, provided no guidance as to what educators were required to do or the standard that courts should apply in reviewing educators' decisions. This vacuum did not last long.

[4] Elementary and Secondary Education Act Amendments of 1966 (ESEA Amendments of 1966), Pub. L. No. 89-750, 80 Stat. 1191.

The following year Congress passed the Education of All Handicapped Children Act of 1975 (EAHCA),[5] which was renamed the IDEA in 1997. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 601, 111 Stat. 37. The 1975 Act expanded the EHA and was modeled upon consent decrees from two lawsuits that challenged the exclusion of children with disabilities from public schools;[6] *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, 283 (E.D. Pa. 1972) and *Mills v. Board of Education,* 348 F. Supp. 866 (D. D.C. 1972). *PARC* required school districts to provide students with disabilities with "access to a free public program of education and training *appropriate* to his capacities." *PARC*, 343 F. Supp. at 287 (emphasis added). *Mills* required school districts to provide "a publicly-supported education *suited* to [the students'] needs." *Mills*, 348 F. Supp. at 971 (emphasis added).

The new Act required that public schools make a "free appropriate public education" available to children with disabilities. 20 U.S.C. § 1412(a)(1)(A) (2019). A free appropriate public education (FAPE) was defined as:

> . . . special education and related services which (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

[5] Pub. L. No. 94-142, 89 Stat. 773.
[6] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982).

with the individualized education program . . . .

EAHCA, § 602(18), 89 Stat. 775.

The definition incorporated three other defined terms: "special education," "related services," and, "individualized education program." Special education was defined as "specially designed instruction . . . to meet the unique needs of a handicapped child." EAHCA § 602(4), Pub. L. No. 94-142, 89 Stat. 775. Related services were defined as "supportive services . . . as may be required to allow the child to benefit from special education." EAHCA § 602(17), Pub. L. No. 94-142, 89 Stat. 775. An IEP was defined as a written statement developed by the child's parents and relevant educators that assessed the child's present levels of educational performance, set annual goals, established criteria for determining whether instructional objectives were being achieved, and specified the special education and related services that would be provided to the child. EAHCA, § 602(19), 89 Stat. 776. In short, the definition of FAPE provided a road map for making a child's education "appropriate" in light of the challenges presented by the child's disability.

Despite the detailed statutory definition, early court decisions complained that Congress had not spoken with sufficient clarity. *E.g.*, *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 533 (S.D.N.Y. 1980) ("The Act itself does not define appropriate education."); *Armstrong v. Kline*, 476 F. Supp. 583, 603 (E.D. Pa. 1979) ("Although this additional statutory directive seems to clarify the ingredients of an appropriate

education, it is still sometimes difficult to determine precisely what the state is required to provide."). Judges offered various proposals to fill the perceived void. *E.g.*, *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 286 (3d Cir. 1980) (Sloviter, J., concurring in part, dissenting in part) (free appropriate public education must enable children to attain "reasonable self-sufficiency under their individual circumstances"); *Springdale Sch. Dist. v. Grace*, 494 F. Supp. 266, 273 (W.D. Ark. 1980), *quoting Rowley*, 483 F. Supp. at 534 (FAPE requires "that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children"); *Armstrong*, 483 F. Supp. at 604 (FAPE must "allow the child, within the limits of his or her handicap, to become self-sufficient").

The Supreme Court provided guidance in 1982 in *Board of Education of Hendrick Heights School District v. Rowley*, 458 U.S. 176 (1982). The Court's "primary concern" in *Rowley* was "to correct the surprising rulings below: that the IDEA effectively empowers federal judges to elaborate a federal common law of public education, and that a child performing *better* than most in her class had been deprived of a [free appropriate public education]."[7] *Endrew F. v. Douglas Cnty Sch. Dist. RE-1*, 137 S.Ct. 988, 998 (2017).

[7] The plaintiff, Amy Rowley, who had a hearing impairment, was "perform[ing] better than the average child in her class" through the interventions that were available to her. 458 U.S. at 185.

Like the lower courts, the Supreme Court expressed frustration that the statutory definition "tends toward the cryptic." 458 U.S. at 189. The Court observed, "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Id*. Nonetheless, the Court was able to distill meaning from two statutory definitions embedded in the term FAPE – special education and related services:

> According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction . . . Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction . . . the child is receiving a "free appropriate public education" as defined by the Act.

Id. at 188-89.

The Court directed reviewing courts to ask, "is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-07.

The Court acknowledged that "[t]he determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem," *Id.* at 202, but declined to answer the question. "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. Thus, the task of determining the adequacy of educational benefits

necessary to satisfy the statute fell to the lower courts using the guidance that they could discern from *Rowley*.

The first two cases to reach federal appellate courts following *Rowley* presented no difficulty applying the Court's guidance. Both cases arrived with factual findings that the proposed IEPs would have caused the children to regress. *Colin K. v. Schmidt*, 715 F.2d 1, 6 (1st Cir. 1983); *Doe v. Anrig*, 692 F.2d 800, 808 (1st Cir. 1982). Regression was not an educational benefit.

James Hall presented a more difficult case. *Hall v. Vance Cnty Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). James was a bright student, but struggled through kindergarten and first grade, repeated second grade, was given an IEP in third grade but continued to struggle until an outside evaluator diagnosed him with dyslexia. *Id.* at 631. His parents sued the school district, alleging that the school district failed to provide James with a FAPE.

Rowley stated, "the education to which access is provided [must] be sufficient to confer *some* educational benefit upon the handicapped child." 458 U.S. at 200 (emphasis added). The school district argued that while James had struggled, he had advanced from grade to grade, and had learned at least some things. *Hall*, 774 F.2d at 635-36. If "*some* educational benefit" meant "*any* educational benefit," then James had received a FAPE. The Fourth Circuit was not persuaded: "Clearly, Congress did not intend that a school system could discharge its duty under the

[IDEA] by providing a program that produces some minimal academic advancement, *no matter how trivial*." *Hall*, 774 F.2d at 636 (emphasis in original).

The Third Circuit adopted *Hall*'s standard: "The Act . . . requires a plan likely to produce progress, not regression or trivial educational advancement." *Bd. of Educ. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986), *citing Hall*, 774 F.2d at 636. The Third Circuit later stated, "the *Rowley* Court described the level of benefit conferred by the Act as 'meaningful.'" *Polk v. Cent. Susquehanna Inter. Unit 16*, 853 F.2d 171, 179 (3d Cir. 1988). "The use of the term 'meaningful' indicates that the Court expected more than *de minimis* benefit." *Id.* at 182.

This circuit, like others, adopted *Polk*'s "more than *de minimis*" phrasing. *Urban v. Jefferson Cnty Sch. Dist.*, 89 F.3d 720, 726-27 (10th Cir. 1996); *Doe ex rel. Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989). *Polk*'s phrase, "meaningful benefit," was incorporated into opinions in the First, Fifth, Sixth, and Ninth Circuits. *Adams v. State of Oregon*, 195 F.2d 1141, 1149 (9th Cir. 1999); *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1120 (1st Cir. 1997); *Christopher M. by LeVeta McA v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1289 (5th Cir. 1991); *Cordrey v. Eukert*, 917 F.2d 1460, 1471 (6th Cir. 1990).

The Third Circuit later clarified that "the standard set forth in *Polk* requires 'significant learning' and 'meaningful benefit.' The provision of merely 'more than a trivial educational benefit' does not meet these standards." *Ridgewood Bd. of*

Educ. v. M.E., 172 F.3d 238, 247 (3d Cir. 1999). The Third Circuit characterized its "meaningful benefit test" as "somewhat more stringent" than a test that was satisfied with something that was "merely more than trivial." *T.R. v. Kingwood Township Bd. of Educ.,* 205 F.3d 572, 577 (3d Cir. 2000).

Courts' use of the phrase "some benefit" as opposed to "meaningful benefit" prompted commentators to speculate that a split was developing between circuits. Scott F. Johnson, "*Rowley* Forever More? A Call for Clarity and Change," 41 J.L. & Educ. 25, 27 (2012); Scott Goldschmidt, "A New Idea for the Special Education Law: Resolving the 'Appropriate' Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities," 60 Cath. U. L. Rev. 749, 758-59 (2012); Ron Wenkart, "The *Rowley* Standard: A Circuit by Circuit Review of How *Rowley* Has Been Interpreted," 247 Educ. L. Rep. 1 (2009); Lester Aron, "Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education after *Rowley*?", 39 Suffolk U. L. Rev. 1, 7 (2005). The commentators, however, could not agree on what circuits fell on each side of the split. *Compare* Aron, 39 Suffolk U. L. Rev. at 7 *with* Wenkart, 247 Educ. L. Rep. at 1-3 *and* Goldschmidt, 60 Cath. U. L. Rev. at 758-59.

This and other circuits expressed doubt that the different adjective represented substantively different standards: "Admittedly, it is difficult to distinguish between the requirements of the 'some benefit' and the 'meaningful benefit' standards."

Sytsema, 538 F.3d at 1313 n.7 (10th Cir. 2008); *see* also JSK *v. Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991) ("We disagree to the extent that 'meaningful' means anything other than 'some' or 'adequate' educational benefit."); *J.L. v. Mercer Island Sch. Dist*., 592 F.3d 938, 951 n.10 (9th Cir. 2010) (no substantive distinction between "some" and "meaningful").

The common thread among all these formulations was an attempt to describe *Rowley*'s "educational benefit" standard using an adjective that was external to the child and unconnected to the statutory language. Split or not, the situation was neither analytically satisfying nor doctrinally coherent.

B. *Endrew F.* Provides a Workable Standard Consistent with the IDEA's Historic Focus on the Needs of the Individual Child.

Thirty-three years after *Rowley*, in *Endrew F. v. Douglas County School District*, this Court phrased the relevant standard as some benefit that was "merely . . . more than *de minimis*." 798 F.3d 1329, 1338 (10th Cir. 2015), *vacated and remanded*, 137 S.Ct. 988 (2017). Endrew's parents asked the Supreme Court to address the question left unanswered by *Rowley*: "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act?" *Endrew F., a Minor by and through his Parents Joseph F. and Jennifer F. v. Douglas County School District RE-1*, case 15-826, Pet. for Writ of Certiorari (Dec. 20, 2015).

Consistent with more than thirty years of the adjective-based practice, the parties and various *amici* asked the Supreme Court to provide a benefit standard using an adjective. Endrew's petition urged the Court to require that "school districts must provide a substantial educational benefit." *Id.* at 21. The United States, appearing as an *amicus* on Endrew's behalf, urged the Court to hold that an IEP must confer "significant educational benefit." Br. for the United States, *Endrew F. ex rel Joseph F. v. Douglas County Sch. Dist. No. 1*, case no. 15-827, p. 9. Various *amici* offered other proposals; "meaningful educational outcomes;"[8] "meaningful educational benefits,"[9] and "substantially equal opportunities to advance to further education, employment and independent living as their non-disabled peers." Br. of Disability Rights Organizations et al., *Endrew F. ex rel Joseph F. v. Douglas County Sch. Dist. No. 1*, case no. 15-827, p. 5. Endrew's merits brief urged the Court to hold that the IDEA "obligates schools to provide children with disabilities with substantially equal opportunities." Br. for Petitioner, *Endrew F. ex rel Joseph F. v. Douglas County Sch. Dist. No. 1*, case no. 15-827, p. 14.

Frustrated by the task of selecting just the right adjective, Justice Alito lamented at oral argument: "We're going to have to use musical notation to -- and

[8] Br. of 118 Members of Congress, *Endrew F. ex rel Joseph F. v. Douglas County Sch. Dist. No. 1*, case no. 15-827, p. 21.
[9] Br. of Delaware, Massachusetts, and New Mexico, *Endrew F. ex rel Joseph F. v. Douglas County Sch. Dist. No. 1*, case no. 15-827, p. 10.

not just words -- to express the -- the idea that seems to be emerging." Trans. of Oral Argument, *Endrew F. ex rel Joseph F. v. Douglas County Sch. Dist. No. 1*, case no. 15-827, p. 59.

Justice Breyer noted that the statute uses the words "progress" and "appropriate," and that appropriate is "spelled out in light of the student's particular needs and abilities."[10] *Id.* at 21-23. He and Justice Sotomayor pressed counsel for the United States to offer a standard that reflected the statutory language. Counsel responded that a workable standard might be, "reasonably calculated to make progress that is appropriate in light of the child's circumstances." *Id*. at 24.

The Court issued a unanimous decision. *Endrew F. v. Douglas Cnty. Sch. Dist*., 137 S. Ct. 988 (2017). Focusing on the phrase "merely more than *de minimis*," the Court rejected the notion "that any educational benefit was enough." *Id*. at 998. The Court, however, did not choose an adjective – *e.g.*, meaningful, substantial, or significant – to describe a prescribed level of benefit. Nor did it endorse a formulation then being used by *any* circuit. Instead, the Court adopted the standard articulated by the United States at oral argument: "[A] school must offer an IEP

[10] IEPs must describe "how the child's disability affects the child's involvement and progress in the general education curriculum," set goals that are "designed to meet the needs resulting from the child's disability to enable the child to be involved in and make progress in the general education curriculum," and specify the special education and related services that the child will receive to "advance appropriately toward attaining the annual goals." 20 U.S.C. § 1414(d)(i)(I)(aa), (II)(aa), and (IV)(aa) (2019).

reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999.

Contrary to the representations of Appellant, the Court did not renounce *Rowley*, or contend that any passage of *Rowley* misrepresented the legislative mandate of the IDEA. Instead, the Court explained that its task in *Endrew F.* was to fill the gap left by *Rowley*'s refusal to set "one test for determining the adequacy of educational benefits" by using the foundation of *Rowley* and the statutory language of the IDEA:

> While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided by the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

Id. at 998-99.

The Court returned focus to the needs and challenges of the individual child, the same focus the statute requires of the IEP team. "It is through the IEP that the free appropriate public education required by the Act is tailored to the unique needs of a particular child." *Id*. at 1000 (internal quotation and citation omitted). And the Court emphasized that the development of the IEP represents the exercise of educational judgment. *Id.* at 999. Therefore, the standard of judicial review of those judgment calls is the deferential standard of reasonableness. *Id.*

In the end, "*Endrew F.* represents no major departure from *Rowley*." *E.R. by*

E.R. v. Spring Branch Indep. Sch. Dist., 909 F.3d 754, 766 (5th Cir. 2018). Nor does it judicially enhance the Congressional mandate originally spelled out in 1975. As the Court pointed out, while Congress has amended the IDEA several times since *Rowley*, "Congress . . . has not materially changed the statutory definition of a [free appropriate public education] since *Rowley* was decided." *Endrew F.*, 137 S. Ct. at 1001.

To be sure, the new test is markedly more demanding than merely more than *de minimis*, but the markedness of the demands is a product of the individual child's needs and circumstances, not an adjective that is unconnected to the statute. *Endrew F.* represents a common-sense clarification of the process by which courts should review complex educational decisions: By focusing on the individual child.

The district court correctly found that the ALJ correctly applied the *Endrew F.* standard. (Attach. D to Op. Br., p. 10.) The ALJ made specific findings that: (1) the reevaluation "provided an adequate base of knowledge for the IEP team;" (2) the functional behavioral assessment was not perfect, but adequate; (3) no witnesses established that N.M.'s goals or measures were inappropriate; (4) the District staff's proposal to educate N.M. at Otero Elementary School offered him the opportunity to interact with typically-developing peers; and (5) the IEP contained supports, including a behavior intervention plan, "that were reasonably calculated to enable [N.M.] to realize the benefits of being educated with typically developing children."

(Attach. C to Op. Br. p. 25-27.) This is exactly the way that *Endrew F.* should be implemented: The school district offered a program based on the child's individual needs in the least restrictive setting appropriate. This is also exactly how other circuits have applied *Endrew F.*

C. Other Circuits Have Applied *Endrew F.* to Require a Program Reasonably Calculated to Enable Progress Appropriate to the Child's Circumstances.

Other circuits view *Endrew F.* as standing for a limited proposition: "[T]he Court found that the IDEA demands more than an educational program providing merely more than *de minimis* progress from year to year." *M.L. by Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017) (internal quotation and citation omitted). Because the Supreme Court did not endorse the practice then in use by any other circuit, but instead instructed courts to use a new inquiry, every circuit to address *Endrew F.* has stated the central holding of the case clearly and unambiguously. *E.g.*, *Johnson v. Boston Publ. Schs.*, 906 F.3d 182, 194 (1st Cir. 2018) (IEP must be "'reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.'"), *quoting Endrew F.*, 137 S. Ct. at 1001; *Mr. P. v. West Hartford Bd. of Educ.*, 885 F.3d 735, 757 (2nd Cir. 2018) (same); *K.D. by and through Dunn v. Downington Area Sch. Dist.*, 904 F.3d 248, 254 (3d Cir. 2018) (same); *M.L. by Leiman v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017) (same); *Somberg v. Utica Comm. Schs.*, 908 F.3d 162, 177 (6th Cir. 2018) (same); *I.Z.M. v. Rosemont-Apple Valley-*

Eagan Publ. Schs., 863 F.3d 966, 971 (8th Cir. 2017) (same); *Rachel H. v. Dep't of Educ.*, 868 F.3d 1085, 1088 (9th Cir. 2017) (same); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 517 (D.C. Cir. 2018) (same).

Even circuits that formerly applied an ostensibly more robust adjective than merely more than *de minimis*, no longer rely on the old adjectives as judicial benchmarks, but look to the needs of the individual child. For example, the First Circuit explained: "To the extent that Johnson implies that 'slow' progress is, in and of itself, insufficient to constitute a 'meaningful educational benefit,' we cannot agree. Instead, the relationship between speed of advancement and the educational benefit must be viewed in light of a child's individual circumstances." *Johnson*, 906 F.3d at 196; *see also Pollock v. Regional Sch. Unit 75*, 886 F.3d 75, 87 (1st Cir. 2018) ("IDEA requires a hearing officer to pay heed to the precise circumstances confronting an individual student").

The Third Circuit noted that by rejecting the use of the phrase "merely more than *de minimis*," the Supreme Court had rejected this circuit's standard, not the Third Circuit's standard. *K.D.*, 904 F.3d at 254. The Third Circuit went on to note that the Supreme Court's "language mirrors our longstanding formulation: the educational program must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities." *Id.* (internal citation and omission deleted). Thus, a child who

makes only "fragmented progress" is not denied a FAPE if "fragmented progress could reasonably be expected." *Id.* at 255. Similarly, the Fourth Circuit has held that an IEP is not deficient because it failed to contemplate grade level progress where the goals were based on the child's circumstances. *R.F. v. Cecil Sch. Dist.*, 919 F.3d 237, 252 (4th Cir. 2019). "[T]he obligation enforceable under the IDEA is to provide, if the IEP so requires, instruction that is sufficient to enable the child to attain the specified level of proficiency." *I.Z.M. v. Rosemont-Apple Valley-Eagan Publ. Schs.*, 863 F.3d 966, 971 (8th Cir. 2017) (internal quotation omitted); *see also Z.B.*, 888 F.3d at 518 (D.C. Cir. 2018) (affirming the decision that IEP met the *Endrew F.* standard where IEP was based on individual circumstances, but remanding judgment regarding other IEP where it was "unclear whether and how DCPS itself made a valid assessment of Z.B.'s needs").

II. *ENDREW F.* DID NOT EXPAND IDEA'S LRE PREFERENCE, NOR CHANGE THE PROCESS FOR IEP TEAMS TO DETERMINE THE APPROPRIATE LRE FOR THE CHILD.

In carrying out the difficult balancing act necessary to develop an appropriate special education program that will enable the child to make appropriate progress in an educational setting that includes typically developing peers as much as possible, educators work with the child's parents and other experts who make up the child's IEP team. The team determines the child's LRE by considering not only the means,

methodology, and location in which a student receives academic instruction, but also whether and how a student may access the many other extracurricular activities and nonacademic programs and services offered by public school districts. 34 C.F.R. § 300.117 (2019). The Supreme Court did not alter this process or change the LRE standard in *Endrew F*.

A. Determination of LRE is a Complex Educational Decision Based on the Child's Current Performance, Potential for Growth, and Necessary Services.

Endrew F. recognizes that when the IEP process is followed with fidelity, the IEP team will produce an IEP that is reasonably calculated to enable a child to make progress that is appropriate in light of the child's circumstances. The Court explained, "A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew F.*, 137 S. Ct. at 1002. An IEP is the vehicle by which the IEP team determines the progress that is appropriate in light of the challenges posed by the child's disability. Thus, "a substantive inquiry focuses on the proper content of an IEP." *Pollock*, 886 F.3d at 87.

An IEP must set out the child's specific needs and services designed to meet them. It must include:

- "present levels of academic achievement and functional performance

including how the child's disability affects the child's involvement and progress in the general education curriculum."[11] 20 U.S.C. § 1414(d)(1)(A)(i)(I) (2019);

- academic and functional goals for the child that are "designed to meet the needs that result from the child's disability to enable the child to be involved in and make progress in the general educational curriculum," 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2019); and
- the special education and related services that will be provided to allow the child to advance appropriately toward his or her goals, and to make progress in the general education curriculum, 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2019).

The IEP also must state the extent to which the child will be educated with typically developing peers,[12] a function of the LRE requirement. Under the statute,

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[11] The IDEA does not define "general education curriculum." The Elementary and Secondary Education Act, however, requires states to adopt "academic content standards and aligned academic achievement standards." 20 U.S.C. § 1611(b)(1); 34 C.F.R. § 200.1(c)(1)(i) (2019). The Department of Education explains that the term general education curriculum refers to an education that is based on the State's academic content standards. U.S. Dep't of Educ., Analysis of Comments and Changes, 71 Fed. Reg. 46579 (Aug. 14, 2006). In order to be involved and participate in the general education curriculum, a child's IEP goals should be "aligned" with the state's content standards, which are broad enough to embrace a progression of achievement standards. Dear Colleague Letter, November 16, 2015, p. 4, https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/guidance-on-fape -11-17-2015.pdf.

[12] 20 U.S.C. § 1414(d)(1)(A)(i)(VI) (2019).

children with disabilities should be educated with typically developing students to the "maximum extent appropriate" and not removed to more restrictive settings, such as special classes or separate schools when the child can be educated "satisfactorily" in a less restrictive setting with supplementary aids and services. 20 U.S.C. § 1412(a)(5) (2019).

IDEA-eligible children range from those for whom education means learning to eat, dress, and toilet,[13] to those with superior cognitive skills but behavioral challenges. *E.g., Adam v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003). Nearly ninety-five percent of IDEA students spend at least part of their school day in regular education classrooms. Dep't of Educ., 39th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (hereinafter 39th Annual Report), 2015, p. 49, https://www2.ed.gov/about/reports/annual/osep/2017/parts-b-c/39th-arc-for-idea.pdf. More than sixty percent spend at least eighty percent of their school day in regular education settings. *Id.*

Given this large spectrum of students, school districts must have a continuum of options available to meet the individual needs of the diverse range of students who require special education. 34 C.F.R. § 300.115 (2019). One student's educational needs might be adequately addressed in a regular education class where grade level content is team-taught by a regular education teacher and a special

[13] *E.g.*, *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981).

education teacher, with the special education teacher responding to the unique needs of IDEA-eligible students in a manner that is indistinguishable from the in-class assistance that is provided to their typically-developing classmates. A child with challenges that prevent him from assimilating grade level material in a particular content area might need to be educated in a separate class for that content area but participate in grade level classes in other content areas. A child with a significant cognitive impairment who cannot assimilate grade level material in several content areas might be educated in a special education program operated in a regular education school with the opportunity to participate with typically-developing students in less academically-focused classes such as art, choir, or physical education. Some students might be so impacted that they can only be educated in a highly-specialized school with multiple supports, populated solely with students with disabilities, with no opportunity to engage with typically-developing peers.

The statutory benchmark for assessing whether an IEP team may remove a child from a more or less restrictive setting to another is whether the child's education can be "achieved satisfactorily" in a less restrictive setting with supplementary aids and services. 20 U.S.C. § 1412(a)(5)(A) (2019). *Endrew F.*'s requirement that an IEP must be reasonably calculated to enable the child to make progress that is appropriate in light of the child's circumstances gives meaning to an education that is "achieved satisfactorily." If supplementary aids and services are

not sufficient to enable a child to make progress that is appropriate in light of the child's circumstances in a team-taught class, the student may be removed to a separate class. Conversely, if supplementary aids and services will permit the child to make progress that is appropriate in light of the child's circumstances in the team-taught class, generally, the child should not be retained in the separate class.

Appellant contends that the district court "erroneously prioritize[d] the IDEA's least restrictive environment (LRE) provision over the requirement of offering a [FAPE]." Op. Br. p. 23. The IDEA, however, balances the FAPE requirement with the LRE requirement. The priority set by the IDEA is that if the child can be educated satisfactorily in the less restrictive setting with supplementary aids or services, the child should not be kept in a more restrictive setting.

B. Complex Educational Decisions Should Not be Second-Guessed by Courts Unless They Are Not Reasonably Calculated to Enable the Child to Make Progress in Light of His Circumstances.

As Appellee aptly argues (Aplee. Brief at 31-51), the School District offered a program reasonably calculated to enable the child in this case to make progress appropriate in light of his circumstances. This circuit has identified certain factors that educators can consider when deciding whether to move a child from a less restrictive setting to a more restrictive setting or vice versa; (1) the steps taken (or available) to accommodate the child in the less restrictive setting; (2) comparing the academic benefits of the two settings; (3) the child's overall experience, including

non-academic benefits, in the less restrictive setting; and (4) the effect of the child's presence in the less restrictive setting. *L.B. and J.B. ex rel K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976-77 (10th Cir. 2004). Other factors raised and considered by the IEP team might be relevant; no one factor is dispositive. *Id.* In this case, the program proposed by the School District would be provided in a *less* restrictive setting than the current setting, preferred by the Appellants. The School District proposes a specialized program within Otero Elementary School staffed by licensed teachers with the opportunity for interaction with typically-developing peers. The parents propose that the child remain at Alpine Autism Center, a separate facility without typically-developing peers or properly licensed teachers. Thus, while some LRE decisions require balancing a child's academic progress against the functional benefits of socialization with typically-developing peers, the decision here did not require any such balancing because the program at Otero Elementary School offered N.M. access to better academic instruction and interaction with typically-developing peers. As the School District's education personnel indicated, and as the district court found: "The deficiency at Alpine is in learning instruction. There are no certified teachers on the Alpine staff and Nathan has made little academic progress, particularly in writing. The other deficiency is that there is no opportunity for him to interact with children making normal progress." (Attach. D to Op. Br., pp. 10-11.)

Such decisions are part of the complex "alchemy of reasonable calculation" with which educational professionals must contend for each child with disabilities, and which is entitled to substantial deference by the courts. *See Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). These calculations, of course, involve prospective educational judgments where courts have little expertise, and thus are evaluated under a deferential reasonableness review. *Endrew F.*, 137 S. Ct. at 999. The IDEA does not "empower judges to elaborate a federal common law of education." *Id.* at 998. Because an IEP team considers a student's LRE in tandem with its determination about appropriate services and methodologies, courts should defer to educators' expertise regarding a student's LRE, as a component of the IEP as a whole.

Other courts have deferred to the educational expertise of local school officials when deciding LRE disputes. *E.g., Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991) ("[w]hether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make."); *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995) ("whether to educate a handicapped child in the regular classroom or to place him in a special education environment is necessarily an individualized, fact specific inquiry. . ."); *Wilson v. Marana Unified Sch. Dist.*, 735

F.2d 1178 (9th Cir. 1984) (deferring to local educational officials in making special education determinations, including those relating to student's LRE).

This approach to judicial review is consistent with the Supreme Court's admonition that courts should not "substitute their own notions of sound educational policy for those of the school authorities of which they review." *Rowley*, 458 U.S. at 206. In *Endrew F.*, the Court reiterated the importance of judicial respect for "the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child." 137 S. Ct. at 1001. *Amici* urge this Court to afford such deference to the school officials here who have offered a "cogent and responsive explanation for their decisions that shows [them to be] reasonably calculated to enable the child to make progress in light of his circumstances." *Id*.

CONCLUSION

Based on the foregoing, and the reasons explained in Appellee's Brief, *Amici* respectfully request that this Court affirm the decision below.

Respectfully submitted,

/S/Francisco M. Negrón, Jr., Chief Legal Officer*
National School Boards Association
1680 Duke Street, FL2
Alexandria, VA 22314
(703) 838-6722

W. Stuart Stuller
Caplan and Earnest, LLC
3107 Iris Avenue, Suite 100
Boulder, CO 80301
(303) 443-8010

May 16, 2019

CERTIFICATE OF COMPLIANCE

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As required by Fed. R. App. P. 32(a)(4)-(7), I certify that this brief is proportionally spaced, uses 14-point font and contains 6789 words.

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By:

/S/Francisco M. Negrón, Jr.
Counsel for Amici Curiae
National School Boards Assoc., et al.

Dated: May 16, 2019

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing BRIEF of AMICI CURIAE as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the clerk and has been scanned for viruses with the most recent version of Symantec Endpoint Protection dated May 16, 2019 and Microsoft Advanced Threat Protection and Exchange Online Protection dated May 16, 2019, and according to these programs, is free of viruses. In addition, I certify all required privacy redactions have been made. Hard copies to be submitted to the court are exact copies of the version submitted electronically.

By:

/S/Francisco M. Negrón, Jr.
Counsel for Amici Curiae
National School Boards Assoc., et al.

CERTIFICATE OF SERVICE

I hereby certify that on a copy of the foregoing BRIEF OF AMICI CURIAE was furnished through (ECF) electronic service to the following on this 16th day of May 2016:

Jack D. Robinson
Spies, Powers & Robinson, P.C.
950 South Cherry Street, #700
Denver, CO 80246
robinson@sprlaw.net

W. Kelly Dude
Anderson, Dude Bailey & Lebel, P.C.
111 South Tejon Street, Suite 400
Colorado Springs, CO 80903
wkdude@adllaw.com

John R. Stanek
Anderson, Dude & Lebel
111 South Tejon Street, Suite 400
Colorado Springs, CO 80903
(719)632-3545
johnstanek@adllaw.com

/S/ Francisco M. Negrón, Jr.
Attorney for *Amici Curiae*
National School Boards Association
1680 Duke Street, FL2
fnegron@nsba.org
(703) 838-6722