

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

K. D., by and through her parents, THERESA and JONATHAN DUNN;
THERESA DUNN; JONATHAN DUNN, individually,

Plaintiffs-Appellants,

—v.—

DOWNTOWN AREA SCHOOL DISTRICT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES, INC., EDUCATION LAW CENTER,
NEW JERSEY SPECIAL EDUCATION PRACTITIONERS
AND NATIONAL CENTER FOR LEARNING DISABILITIES
IN SUPPORT OF APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

Council of Parent Attorneys and Advocates
Education Law Center
New Jersey Special Education Practitioners
National Center for Learning Disabilities

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

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Invisible. That's how I often feel. Like Ralph Ellison's invisible man, my invisibility stems from people's unwillingness to see me. . . . People with [learning disabilities, like me,] often face a double invisibility: the invisibility of not being considered individually for their attributes and potential, and the invisibility of a stigmatic condition which, unlike physical disabilities, is less readily observable and all the more vulnerable to unwarranted assumptions.

Andrew Weis,
Author, Attorney, Stanford Law
Graduate, Person with a
Learning Disability.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent nonprofit organization of attorneys, advocates, and parents in forty-nine states and the District of Columbia, who are routinely involved in special education advocacy, including due process hearings throughout the country. COPAA believes effective educational programs for children with disabilities can be developed and implemented only with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation but provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*

COPAA also supports individuals with disabilities, their parents and advocates in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §

794 (Section 504) and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* (ADA).

COPAA’s primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding 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.” 20 U.S.C. §1400(c)(1).

COPAA filed a brief *amicus curiae* in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). COPAA seeks to have that decision implemented fully and consistently nationwide.

Education Law Center (ELC) is a non-profit organization that advocates on behalf of public school children, particularly at-risk students, students with disabilities, and students of color, for access to fair and adequate educational opportunity under state and federal laws. Since its founding in 1973, ELC has acted to achieve education equity, school improvement, and protection of student rights through policy initiatives, research, public education, and legal action. In New Jersey, ELC has represented the plaintiff school children in the landmark *Abbott*

v. Burke education equity case since 1981 and also provides a full range of direct legal services to hundreds of parents and students in public education cases every year, the vast majority of which involve students with disabilities. In states across the nation, ELC broadly advances children's opportunities to learn and assists those who promote such opportunities.

Through a longstanding contract with Disability Rights New Jersey, ELC provides direct legal assistance to the parents of students with disabilities in twelve northern counties in New Jersey. ELC has served as counsel and co-counsel in many special education cases, including *M.A. v. State-Operated Sch. Dist.*, 344 F.3d 335 (3d Cir. 2003), a child-find class action case that ultimately settled in 2012, and *Disability Rights New Jersey v. New Jersey Department of Education*, 3:07-CV-02978-MLC-LHG, a systemic inclusion case that settled in 2014.

ELC has also previously participated as *amicus curiae* in at least a half dozen special education cases before this Court and others. ELC has developed substantial expertise in legal issues related to educational programming for students with disabilities and maintains a strong

interest in ensuring that the rights of students with disabilities are protected.

New Jersey Special Education Practitioners (NJSEP) is a statewide association of approximately 100 attorneys and professional advocates from private law firms and public interest advocacy organizations who represent parents and their students with disabilities in special education matters. Collectively, NJSEP's members have extensive experience in special education law, and NJSEP provides a forum through which its members regularly exchange information, support high quality representation, and discuss issues of importance to the practice of special education law. NJSEP engages in systemic advocacy on behalf of students with disabilities and has appeared as *amicus curiae* in a number of special education cases before this Court and others. NJSEP's primary interest is in protecting and advancing the legal rights of students with disabilities.

The **National Center for Learning Disabilities (NCLD)** is a parent-founded and parent-led non-profit organization. NCLD's mission is to improve the lives of the one in five children and adults nationwide with learning and attention issues by empowering them and advocating

for equal rights and opportunities. NCLD works to create a society in which every individual possesses the academic, social, and emotional skills needed to succeed in school, at work, and in life. NCLD has more than forty years of experience providing essential information to parents, professionals, and individuals with learning disabilities and attention issues; promoting research and programs to foster effective learning; and advocating for policies to protect and strengthen educational rights and opportunities. On behalf of fifteen nonprofit partners, NCLD manages and operates Understood.org—a free, comprehensive resource designed to empower parents of children with learning and attention issues. Understood.org provides two million parents per month with personalized resources, daily access to experts, interactive tools, and a supportive community. NCLD also generates policy and advocacy by (1) implementing national campaigns to advance important and systemic change, (2) educating and engaging policymakers at the national, state, and local levels, and (3) leading knowledge-building initiatives to drive the policy debate and build consensus around best practices for children and adults with learning and attention issues.

Amici are deeply concerned about presumptions that students with learning disabilities are not capable of grade-level advancement, and Amici provide a unique perspective on IDEA issues raised by *K.D. v. Downingtown Area School District*, No. 16-0165 (E.D. Pa. Sep. 1, 2017). Too often Amici have observed that stereotypes prevent schools from providing students with “appropriately ambitious” Individualized Education Programs (IEPs) and challenging goals. *See Endrew F.*, 137 S. Ct. at 1000. Too often low expectations deprive students of the free appropriate education guaranteed by IDEA.

Appellant and Appellee have both consented to COPAA filing this brief.¹

SUMMARY OF ARGUMENT

The Supreme Court recently made clear that the IEPs of children with disabilities must be “appropriately ambitious” to enable them to make progress in in light of their unique abilities. *Endrew F.*, 137 S. Ct.

¹ Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amici states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than Amici and its members.

at 1000. The Court explained that children with disabilities are to be challenged to reach their potential for progress just as their non-disabled peers are, regardless of the severity of their disabilities. IDEA, the Court held, “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 1001.

There are many misconceptions about learning disabilities.² Some people, for example, assume that children with learning disabilities are a homogenous group with limited potential for educational growth.³ But children with learning disabilities are a diverse group, and with appropriate, individualized interventions, many are capable of advancing grade to grade with their nondisabled peers. Children with learning disabilities have deficits in a specific learning skill, so some struggle in

² *Understanding Learning and Attention Issues*, The Nat’l Ctr. for Learning Disabilities (Feb. 22, 2018), <https://www.nclld.org/understanding-learning-and-attention-issues#ch1howcommon> (“Public perceptions [about learning disabilities] reveal widespread misconceptions.”); Sharon Vaughn and Sylvia Linan-Thompson, *What is Special About Special Education for Students with Learning Disabilities*, 37(3) J. Special Educ. 140, 140 (2003) (“[S]pecial education of students with [learning disabilities] has traveled a somewhat rocky road of false starts, misconceptions, and misinformed ideas.”).

³ See *Five Misconceptions about Learning Disabilities*, PBS News Hour (Feb. 23, 2018), <https://www.pbs.org/newshour/health/five-misconceptions-about-learning-disabilities> (noting that people sometimes wrongly assume that children with learning disabilities have “diminished cognitive ability”).

reading, some in math, and some in other areas. And a child's learning disability is just one part of her educational profile. Beyond learning disabilities, other factors influence a child's potential, including social intelligence, creativity, emotional regulation, and work ethic.⁴ Each child with a learning disability possesses a unique blend of these attributes. Many children with learning disabilities have average to above-average intelligence and potential for grade-level growth.

Despite the differences among children with disabilities, research shows one important similarity: with appropriate, individualized interventions, most can bridge achievement gaps with their same age peers and progress through the general education curriculum. This is not surprising. Most children with disabilities are capable of grade-level advancement. Indeed, IDEA "reflect[s] [an] expectation that, for most children, a[n] [appropriate education] will involve integration in the regular classroom and individualized special education calculated to

⁴ Christine Kerres Malecki and Stephen N. Elliott, *Children's Social Behaviors as Predictors of Academic Achievement: A Longitudinal Analysis*, (17)1 Sch. Psych. Q. 1, 19–21 (2002) (finding a correlation between social intelligence and academic achievement); Paulo A. Graziano et al., *The Role of Emotion Regulation and Children's Early Academic Success*, 45(1) J. Sch. Psych. 1, 3 (2007) (concluding that emotional regulation influences educational achievement); Ian J. Deary et al., *Intelligence and Educational Achievement*, 35 Intelligence 13, 19 (2007) (identifying a correlation between general intellectual ability and educational achievement).

achieve advancement from grade to grade.” *See Andrew F.*, 137 S. Ct. at 1000.

Amici are concerned that the district court’s decision is based on the erroneous view that children with learning disabilities have limited potential. In evaluating the amount of progress that K.D. is capable of, the district court erroneously presumed that it was unreasonable to expect children with severe learning disabilities to achieve grade-level advancement. The court found that, because of the severity of K.D.’s learning disability in comprehension, reading, and writing, only “fragmented progress” could be reasonably expected. *K.D.*, slip op. at 26.

IDEA, designed to protect children from misconceptions and low expectations, forbids such a presumption. It demands that schools expect grade-level advancement from children with learning disabilities, including those with severe learning disabilities in comprehension, reading, and writing. *See Andrew F.*, 137 S. Ct. at 999–1000.

ARGUMENT

Learning disabilities are common.⁵ More children qualify for IDEA services based on a learning disability than any other category of disability.⁶ Over two million special education students are classified as learning disabled—35% of all special education students.⁷ Learning disability is a broad category of disability, encompassing children with a variety of learning profiles, including many children with average to above-average intelligence who have the same potential as their nondisabled peers.⁸

Fortunately, the effects of learning disabilities can be remediated with proper interventions, and students with learning disabilities can develop compensatory skills—skills that allow them to access the general education curriculum to the same extent as their peers. For example,

⁵ Laura E. Naistadt, *Understanding Learning Disabilities*, 42 S. Tex. L. Rev. 97, 98 (2000) (“[S]tudies suggest that learning disabilities affect about five to fifteen percent of the general population.”).

⁶ *Children and Youth With Disabilities*, U.S. Dep’t of Educ. Nat’l Ctr. for Educ. Statistics (Feb. 22, 2018), https://nces.ed.gov/programs/coe/indicator_cgg.asp.

⁷ *Id.*

⁸ See J.K. Torgesen, *Recent Discoveries from Research on Remedial Interventions for Children with Dyslexia*, in *The Science of Reading* 521–53 (M. Snowling and C. Hulme eds., 2005).

Carol Greider, Ph.D., co-recipient of the 2009 Nobel Prize in Medicine for her discovery of telomerase, an enzyme that plays a role in the division of cells, has dyslexia. Although she was a poor speller and took special classes in elementary school, she reports:

[M]y compensatory skills played a role in my success as a scientist because one has to intuit many different things that are going on at the same time and apply those to a particular problem, to not just concentrate on one of them, but to bring many in laterally. Perhaps my ability to pull more information out of context and to put together different ideas may have been affected by what I learned to do from dyslexia.⁹

Dr. Greider is far from unique. Many children with learning disabilities have significant potential. Recognizing this, IDEA expects schools to challenge children with learning disabilities to meet grade level expectations. *See Endrew F.*, 137 S. Ct. at 999–1000.

⁹ Kathy Crockett, *Success Stories: Carol Greider, Ph.D., Director of Molecular Biology & Genetics at Johns Hopkins University*, Yale Center for Dyslexia and Creativity (Feb. 22, 2018), <http://dyslexia.yale.edu/story/carol-greider-ph-d/>.

I. LIKE THEIR NONDISABLED PEERS, CHILDREN WITH LEARNING DISABILITIES HAVE DIVERSE NEEDS AND POTENTIAL.

A. Each child with a learning disability has deficits in a discrete skill, not in global ability.

Learning disabilities are neither a measure of a child’s global academic skills nor a measure of innate intelligence.¹⁰ They occur in individuals with average to superior intelligence.¹¹ A child with a learning disability is simply a child who has deficits in a particular learning skill, such as processing visual or verbal information. Learning disabilities “are relatively specific neurological or biochemical conditions which impair a [child]’s ability to take in, retain, recall, comprehend, analyze, process or manipulate, organize, and/or express (either verbally or in writing) information, concepts, and ideas.” Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 Akron L. Rev. 1, 12–14 (1999).

IDEA codifies this broad definition of learning disability. “Specific learning disability,” under IDEA, is a category of disability that can qualify a child for special education services. See 34 C.F.R. §

¹⁰ See *Understanding Learning and Attention Issues*, *supra* n.2.

¹¹ *Id.*

300.8(c)(10)(i). The category includes any “disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” *Id.*

The brain “is a complex system in which distinct . . . sections are relatively specialized and have significant responsibility for performing a particular physical or mental task.” Smith, 32 Akron L. Rev. at 16. “Operations such as seeing, reading, hearing, listening, memorizing and recalling information, . . . [and] performing mathematical operations . . . require that the relevant parts of the brain properly perform their specialized functions.” *Id.* “These operations also require that distinct and sometimes distant brain sites communicate effectively and coordinate their activity in an appropriate manner” *Id.*

“As with all physiological attributes, significant differences exist between individuals in the efficiency and effectiveness with which the parts of this metasystem function.” *Id.* When a child has a learning

disability, “one or more parts of the system do not function as efficiently or effectively as the other parts.” *Id.* at 16–17. For example, a child might have a learning disability in reading because his brain sites which process visual information communicate slowly, causing him to read slower than his peers. And the child’s reading difficulties might be more or less intense than another child’s, depending on the severity of each child’s deficits. Some children have severe learning disabilities that require intense interventions, and some have learning disabilities that require minimal interventions.

Although “learning disabilities are too diverse to permit a comprehensive listing,” the more well-known learning disabilities are dyslexia, dyscalculia, and dysgraphia. *Id.* at 15 n.36. Children with dyslexia have reading difficulties, children with dyscalculia have math difficulties, and children with dysgraphia have writing difficulties.¹²

¹² *The State of Learning Disabilities: Facts, Trends, and Emerging Issues*, The Nat’l Ctr. for Learning Disabilities (Feb. 22, 2018), <https://www.nclld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf> (explaining the characteristics of dyslexia, dyscalculia, and dysgraphia).

B. Many children with learning disabilities have average to above-average intelligence and the same potential as their nondisabled peers.

Besides disability, numerous factors influence a child’s potential for growth, including social intelligence, creativity, emotional regulation, and work ethic, to name a few.¹³ Each child with a learning disability possesses a unique blend of these attributes.¹⁴ Children with learning disabilities, for example, present with a variety of cognitive abilities—most “are as smart as their typically developing peers, and many have average or above-average intelligence.” *Understanding Learning and Attention Issues*, *supra* n.2. In fact, there are many children with learning disabilities who are intellectually gifted.¹⁵

Children with learning disabilities, therefore, often demonstrate the same potential for educational growth and professional accomplishment as their nondisabled peers. Over 70% of children with learning disabilities graduate high school with a regular diploma, and about one third attend

¹³ Malecki and Elliott, *supra* n.4, at 19–21; Graziano et al., *supra* n.4, at 3; Deary et al., *supra* n.4, at 19.

¹⁴ See Marshall H. Raskind et al., [*Patterns of Change and Predictors of Success in Individuals with Learning Disabilities: Results from a Twenty-Year Longitudinal Study*](#), 14(1) *Learning Disabilities Research & Practice* 35, 36 (1999) (finding that a group of people with learning disabilities exhibited different blends of “success attributes”).

¹⁵ *Understanding Learning and Attention Issues*, *supra* n.2.

college.¹⁶ Further, many individuals with learning disabilities are successful in college and beyond. Each year, for example, many people with learning disabilities gain admission into law school.¹⁷ And one study that examined the collegiate and professional careers of a group of adults with learning disabilities found that several of them attended graduate school, obtained leadership positions in their fields, or both.¹⁸ One adult went to graduate school and then became a teacher, another secured a position as a chemist, and another became the manager of a travel agency.¹⁹

That individuals with learning disabilities have tremendous potential is demonstrated by the long list of well-known, highly successful persons with learning disabilities. Individuals with learning disabilities have been successful political and military leaders such as Winston Churchill, Nelson Rockefeller, and General George Patton; famous entertainers, such as Harry Belafonte, Whoopi Goldberg, and Octavia Spencer; world-

¹⁶ Executive Summary to *The State of L.D.: Understanding Learning and Attention Issues*, Nat'l Ctr. for Learning Disabilities (Feb. 22, 2018): www.ncld.org/executive-summary; *After High School: A First Look at the Post-School Experiences of Youth With Disabilities*, Office of Special Educ. Programs, U.S. Dep't of Educ. (Feb. 6, 2018), <https://files.eric.ed.gov/fulltext/ED494935.pdf>.

¹⁷ Smith, 32 Akron L. Rev. at 16.

¹⁸ Pamela B. Adelman and Susan A. Vogel, *College Graduates with Learning Disabilities: Employment Attainment and Career Patterns*, 13(3) Learning Disability Q. 154, 156–57 (1990).

¹⁹ *Id.* at 159.

renowned scientists, such as Albert Einstein and Carol Greider; business leaders, such as Richard Branson, Steve Jobs, and Charles Schwab; athletes, such as Muhammad Ali; and lawyers, such as David Boies and former federal judge J.H. Gallet, who excelled in school and in the legal profession despite having dyslexia, dyscalculia, and dysgraphia.²⁰

II. RESEARCH SHOWS THAT, WITH APPROPRIATE EDUCATIONAL INTERVENTIONS, CHILDREN WITH LEARNING DISABILITIES CAN BRIDGE ACHIEVEMENT GAPS WITH THEIR PEERS AND ADVANCE GRADE TO GRADE.

Since IDEA's predecessor became law in 1975, educators have developed many successful approaches to teaching students with learning disabilities. Some students require intensive one-on-one instruction, and some require only a few classroom accommodations. But with individualized, appropriately intensive interventions, most children with learning disabilities can bridge achievement gaps and progress

²⁰ Naistadt, 42 S. Tex. L. Rev. at 98; Amanda Moring, *Success Stories: Celebrities with Dyslexia, ADHD and Dyscalculia*, Understood.org (Feb. 4, 2018), <https://www.understood.org/en/learning-attention-issues/personal-stories/famous-people/success-stories-celebrities-with-dyslexia-adhd-and-dyscalculia?view=slideview>; Dylan Love, *15 CEOs with Learning Disabilities*, Business Insider (Feb. 22, 2018), <http://www.businessinsider.com/ceo-learning-disabilities-2011-5?op=1/#chard-bransons-dyslexia-made-high-school-especially-difficult-1>; *List of Dyslexic Achievers*, Dylsexia.com (Feb. 22, 2018), <https://www.dyslexia.com/about-dyslexia/dyslexic-achievers/all-achievers/>; *J.H. Gallet, 58, Federal Judge Who Transcended Disabilities*, N.Y. Times (April 27, 2001).

through the general education curriculum. As the United States Department of Education observed: “Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.” See [*Dear Colleague Letter*](#), Office of Special Educ. and Rehabilitative Servs., U.S. Dep’t of Educ. (Nov. 13, 2015).

Many educators expect children with learning disabilities to make progress in the general education curriculum. Countless “adolescents with learning disabilities spend the majority of their school day in general education classes and are expected to meet most, if not all, of the academic requirements of the[] classes.” Charles A. Hughes et al., [*Interventions that Positively Impact the Performance of Students with Learning Disabilities in Secondary General Education Classes*](#), 12(3) *Learning Disabilities* 101, 101 (2003).

And study after study shows that, with the right interventions, children with learning disabilities can make great strides:

- Several studies have found that even children with severe deficits in phonological processing (a hallmark of dyslexia) can achieve in reading if they receive intensive and explicit reading instruction

from skilled teachers.²¹ Explicit, or direct, instruction requires educators to teach concepts in small steps, check for student understanding, and achieve active participation by all students.²²

- One study conducted by the Florida Center for Reading Research found that a group of elementary school students with dyslexia who received intensive one-on-one reading instruction for eight weeks achieved around a year's worth of growth and closed achievement gaps with their peers.²³
- Another study also examined the effects of intensive interventions on a group of students with severe reading disabilities and similarly found that the interventions “resulted in significant improvement.”²⁴
- A variety of strategies have proven to enhance the writing skills of children with learning disabilities, including (1) providing writing opportunities with relevant and engaging tasks, (2) offering individualized and explicit instruction in writing; and (3) utilizing technology.²⁵

²¹ P.F. Vadasy and E.A. Sanders, *Benefits of Repeated Reading Intervention for Low-Achieving Fourth and Fifth Grade Students*, 29 Remedial and Special Educ. 235 (2008).

²² Nancy E. Marchand-Martella and Ronald C. Martella, *Explicit Reading Instruction: Important Features and Findings*, McGraw Hill Education (Feb. 22, 2018), <https://s3.amazonaws.com/ecommerce-prod.mheducation.com/unitas/school/explore/sites/flex/flex-white-paper-explicit-reading-instruction.pdf>.

²³ J.K. Torgesen et al., *Intensive Remedial Instruction for Children With Severe Reading Disabilities: Immediate and Long Term Outcomes From Two Instructional Approaches*, 34 J. Learning Disabilities 33, 33–35 (2001).

²⁴ Carolyn A. Denton, *An Evaluation of Intensive Intervention for Students with Persistent Reading Difficulties*, 39(5) J. of Learning Disabilities 447, 447 (2006).

²⁵ Tanya Santangelo, *Why is Writing So Difficult for Students with Learning Disabilities? A Narrative Review to Inform the Design of Effective Instruction*, 12(1) Learning Disabilities: A Contemporary J. 5, 7 (2014).

- Research shows that children with math disabilities respond to direct and explicit math instruction, with one study finding that two programs that utilize such instruction have “statistically significant and practically important effects on” math skills.²⁶
- A literature review of research on learning disabilities concluded that a number of interventions exist that are “effective for . . . students [with learning disabilities] in general education classrooms.”²⁷

In sum, children with learning disabilities have potential for grade-level advancement; they just need the right interventions to unlock it. With access to “high-quality instruction,” they can “successfully learn grade-level content.” *See Improving the Academic Achievement of the Disadvantaged; Assistance to States for the Education of Children With Disabilities*, Final Rule, 80 Fed. Reg. 50777 (Aug. 21, 2015).

III. THE DISTRICT COURT ERRED IN SETTING LOW EXPECTATIONS FOR A STUDENT WITH A LEARNING DISABILITY AND IN HOLDING THAT STUDENTS WITH LEARNING DISABILITIES GENERALLY CANNOT BE EXPECTED TO ACHIEVE GRADE-LEVEL LEARNING.

Children with learning disabilities represent a substantial pool of human capital. Numbering in the millions and presenting with an array of talents and potential, they have the ability to contribute greatly to our

²⁶ Lynn S. Fuchs et al., [*Intensive Interventions for Students with Mathematics Disabilities: Seven Principles of Effective Practice*](#), 31(2) Learning Disabilities Q. 79 (2008).

²⁷ See Hughes et al., *supra* 18, at 109.

communities and national economy. But no child with a learning disability can realize her ability if she is burdened with low expectations. Low expectations deny children the opportunity for educational growth. Low expectations lead to children “sitting idly awaiting the time when they [a]re old enough to ‘drop out.’” *See Endrew F.*, 137 S. Ct. at 1001 (internal quotation marks omitted).

Seeking to avoid this result and the social costs that accompany it,²⁸ IDEA demands “high expectations” and “access to the general education curriculum” to the maximum extent appropriate. *See* 20 U.S.C. § 1400(c)(5); § 1400(c)(3) & (4) (recognizing that low expectations impede IDEA’s goal of “improving educational results” for children with disabilities). For most children—including children with learning disabilities—IDEA expects “integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *See Endrew F.*, 137 S. Ct. at 1000.

²⁸ “Dropouts are much more likely than their peers who graduate to be unemployed, living in poverty, receiving public assistance, in prison, on death row, unhealthy, [and] divorced.” *The Silent Epidemic: Perspective of High School Dropouts*, Institute of Educ. Sciences, U.S. Dep’t of Educ. (Feb. 22, 2018), <https://files.eric.ed.gov/fulltext/ED513444.pdf>.

IDEA, in other words, protects children from the “soft bigotry of low expectations.” See President George W. Bush, [Address to the Latin Business Association](#) (Sep. 3, 1999) (“Now some say it is unfair to hold disadvantaged children to rigorous standards. I say it is discrimination to require anything less—the soft bigotry of low expectations.”); *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 864 (6th Cir. 2004) (“[C]ourts should heed the congressional admonishment not to set unduly low expectations for disabled children.”).

The Supreme Court’s recent decision in *Endrew F.* solidified this protection. In rejecting the Tenth Circuit’s low standard of receiving “merely more than *de minimis*” educational benefit to determine whether a child with disabilities has been provided FAPE, the Supreme Court clarified that, “The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001.

The *Endrew F.* Court not only proclaimed that all children with disabilities are entitled to an “appropriately ambitious” and “challenging” educational program but also set forth a fact-intensive FAPE analysis

that shields children from low expectations. *See id.* at 1000. General assumptions about a category of disability have no place in the analysis; IDEA’s expectation of grade-level advancement and a child’s individual circumstances are paramount.

Under *Andrew F.*, a court considering a FAPE claim must first identify the child’s individual “circumstances”: her present levels of educational achievement, the characteristics of her disability, and her potential for growth. *See id.* at 999. Then it must determine whether the child’s program is “appropriately ambitious” in light of those circumstances. *See id.* at 999–1000. This standard requires the court to consider whether the program aims for grade-level advancement in the general education curriculum. *See id.* If the program does not, the court must assess whether the child’s circumstances justify that departure from the curriculum, and if a departure is justified, the court must consider whether the program is nevertheless challenging given the child’s unique potential for growth. *See id.*

Strict adherence to *Andrew F.*—and strict compliance with IDEA’s ban on low expectations—is critical to securing educational opportunity for the millions of children with learning disabilities. The *Andrew F.*

Court noted that Congress had acted to adopt IDEA because of the “pervasive and tragic academic stagnation,” with the majority of students with disabilities either entirely excluded from public education or “sitting idly in regular classrooms awaiting the time they were old enough to ‘drop out.’” *Id.* at 999 (internal quotation marks omitted).

Because misconceptions about learning disabilities abound, when schools and courts forego an individualized analysis of a child’s circumstances, they risk imposing expectations on the child that are divorced from her potential. Further, even setting aside the misconceptions about learning disabilities, a risk of inappropriate expectations exists because children with learning disabilities are such a diverse group. Analysis driven by merely the presence of a learning disability, rather than by the child’s individual circumstances, will fail to capture the child’s unique needs and potential.

Here, the district court did not undertake *Endrew F.*’s fact-intensive FAPE analysis, and instead saddled K.D. with low expectations, apparently based on misconceptions about the potential of children with learning disabilities. In considering K.D.’s potential for growth, the court stated that there are “two types of students: (1) a child

who is progressing smoothly, grade-to-grade, through school; and (2) a child with a learning disability or cognitive limitation who is not progressing grade-to-grade through school.” *K.D.*, slip op. at 25. Then, after conflating learning disabilities with cognitive limitations, the court went on to conclude that “[i]n light of K.D.’s severe learning disability,” only “fragmented progress could reasonably be expected.”

The district court thus ignored the possibility that a child with a learning disability might not be progressing smoothly through school, not because of her disability, but because of deficits in the school’s special education program. But courts have repeatedly recognized that deficient special education programs can deny students with learning disabilities FAPE and thus the opportunity for grade-level achievement. *See, e.g., Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1289–90 (11th Cir. 2008) (upholding award of compensatory education for student with dyslexia who was denied FAPE); *J.M. v. Morris Sch. Dist. Bd. of Educ.*, No. 10-cv-06660-SDW, 2011 U.S. Dist. LEXIS 148670, at *32–34 (D.N.J. Dec. 23, 2011) (school program was both inappropriate and ineffective for student with dyslexia); *Evans v. Bd. of Educ.*, 930 F. Supp. 83, 102 (S.D.N.Y. 1996) (student with dyslexia denied FAPE).

Further, in opining that students with severe learning disabilities generally cannot be expected to make grade-level progress, the district court relied on *Andrew F.*, which involved a student with a cognitive impairment, and *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 567 (3d Cir. 2010). But neither case stands for the proposition that students with learning disabilities cannot reasonably make grade-level progress or that challenging objectives are inappropriate for such students.

Significantly, on remand, the district court in *Andrew F.* held that the Supreme Court established a new FAPE standard, and applying that standard, the court found that Andrew had been denied FAPE. *Andrew F. v. Douglas Cty. Sch. Dist.*, No. 12-cv-2620-LTB, 2018 U.S. Dist. LEXIS 22111, at *3, *26 (D. Colo. Feb. 12, 2018). The court concluded that:

[Andrew's] IEP was not appropriately ambitious because it did not give [him] the chance to meet challenging objectives under his particular circumstances. Specifically, the IEP proposed by the District was not reasonably calculated for [him] to achieve academic success, attain self-sufficiency, and [receive opportunities to] contribute to society that are substantially equal to the opportunities afforded children without disabilities.

Id. at *26 (citing *Andrew F.*, 137 S. Ct. at 1001).

And in *D.S.* this Court held that the school had failed to provide a student with learning disabilities²⁹ FAPE because it had not provided the specialized instruction necessary for him to make educational progress, including a multi-sensory reading instruction program such as Orton-Gillingham and language-based classroom instruction. *D.S.*, 602 F.3d at 566. This Court had disregarded his high grades in self-contained special education classes, not because grades and grade-level advancement were unimportant for *D.S.*, but because those grades were not adequate proof that he had in fact made grade-level progress. *Id.* at 567–68.

Here, like *Andrew F.* and *D.S.*, *K.D.* was not provided FAPE. Contrary to the district court’s erroneous assumption, the fact that *K.D.*’s circumstances include a severe learning disability does not mean that it is unreasonable to expect that she can make grade-level achievement if she is provided with appropriate special education services. Her circumstances also include, among other things, average-range

²⁹ Underscoring that the district court conflated cognitive limitations with learning disabilities, the district court stated that *D.S.* had intellectual disability, even though *D.S.* had learning disabilities as a result of brain tumors. *Compare K.D.*, slip op. at 25–26 *with D.S.*, 602 F.3d at 558. *D.S.* had tested in the intellectually disabled range at age 6, but after surgery for the brain tumors, he improved, and by eighth grade, he tested in the low-average intellectual range. *D.S.*, 602 F.3d at 558.

intelligence. She was entitled to “challenging objectives” that took into account all her circumstances—not just her disability. *See Andrew F.*, 137 S. Ct. at 1000. For K.D., appropriate special education services should work to bridge the gap between her current educational performance and grade-level performance. Without intensive special education services, the gap will only widen.

CONCLUSION

This Court should reverse the district court’s decision because it places low expectations on children with learning disabilities and removes from schools the obligation to challenge children with learning disabilities to reach their potential and achieve grade-level performance.

Affirmance would not only chisel into IDEA jurisprudence the dangerous misconception that children with learning disabilities have limited potential but also erode *Andrew F.*’s protections against low expectations. That result would contravene IDEA, and it would be an injustice to the millions of children with learning disabilities in our public schools. No child should have to suffer “the invisibility of not being considered individually for [her] attributes and potential.”³⁰

³⁰ *See Andrew Weis Quote, supra ii.*

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**CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(a)(7)(C)**

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 4537 words.

Dated: February 27, 2018

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CERTIFICATE OF SERVICE

I certify that on February 27, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below.

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