

No. 25-581

In the
Supreme Court of the United States

ST. MARY CATHOLIC PARISH IN LITTLETON, et al.,
Petitioners,

v.

LISA ROY, in her official capacity as Executive Director
of the Colorado Department of Early Childhood, et al.,
Respondents.

On Writ of Certiorari to the
U.S. Court of Appeals for the Tenth Circuit

**BRIEF OF DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND AND 12 DISABILITY AND
CIVIL RIGHTS ORGANIZATIONS AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTERESTS OF *AMICI CURIAE*¹

Approximately one out of every seven children in American public schools has a disability that qualifies for individual educational services under the federal Individuals with Disabilities Education Act (“IDEA”). See NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., INST. FOR EDUC. SCIS., CONDITION OF EDUCATION: STUDENTS WITH DISABILITIES (2024) [hereinafter NAT’L CTR. FOR EDUC. STAT.], <https://tinyurl.com/ye22kxud>. For forty years, Congress has recognized “an urgent and substantial need” to identify and provide services to disabled children before they reach school age. 20 U.S.C. § 1431(a) (added by Pub. L. No. 99-457, § 101, 100 Stat. 1145, 1145 (1986)). Though strides have been made, families of young children with disabilities continue to face significant barriers to equal access, as compared to their nondisabled peers. See, e.g., *A.J.T. ex rel. A.T. v. Osseo Area Schs.*, 605 U.S. 335, 351 (2025) (acknowledging that “a great many children with disabilities and their parents . . . face daunting challenges on a daily basis”) (citation and internal quotation marks omitted).

Amici are disability rights organizations that have substantial expertise related to federal, state, and

¹ Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel has contributed monetarily to the preparation or submission of this brief.

local disability rights law, policy, and litigation: the Disability Rights Education and Defense Fund; AdvocacyDenver; the Arc of the United States; the Autistic Self Advocacy Network, the Autistic Women and Nonbinary Network; the Colorado Cross-Disability Coalition; the Colorado Disability Bar Association; CommunicationFIRST; the Council of Parent Attorneys and Advocates; Deaf Equality; Disability Justice (formerly Disability Law Colorado); Disability Law United; and the National Association of the Deaf.

As explained below, Petitioners’ free exercise challenge to the generally applicable equal-opportunity requirement of Colorado’s universal preschool (“UPK”) program fundamentally misunderstands disability law. Accordingly, *Amici* write to explain why Petitioners’ free exercise challenge—to the extent it is premised on UPK’s protections for disabled students—is at odds with reality and well-settled tenets of disability law.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2022, Colorado enacted its UPK program, providing universal access to preschool for every four-year-old in the state. The state-funded UPK program uses a mixed-delivery system in which students may enroll in a variety of participating public and private preschools. As a condition of participation, Colorado

law requires all UPK schools to “provide eligible children an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child’s family.” COLO. REV. STAT. § 26.5-4-205(2)(b).

Though all schools must comply with this equal-opportunity provision, the UPK program is open to both secular and religious schools; as of October 2023, 40 faith-based providers were participating in the UPK program and 904 children had been matched with such providers. Pet.App. 303a. Beyond basic academic requirements, the UPK program does not dictate what or how participating schools teach. Religious schools are free to teach religious doctrine.

Despite this, Petitioner religious schools seek an exception to the equal-opportunity provision permitting them to exclude eligible children from enrollment based on the sexual orientation or gender identity of the children or their families. Petitioners assert that being required to enroll these students burdens the free exercise of their religion. In the absence of the requested exception, Petitioner religious schools refuse to agree to the equal-opportunity provision and thus decline to participate in the UPK program. That is, the UPK program has not excluded Petitioners on the basis of religion;

Petitioners have opted out of the program because they refuse to comply with a neutral and generally applicable rule.

The UPK uses an algorithm to match students with schools. Generally, families will select and rank five preschools and the algorithm will match the student with one of their selections. However, the State recognized that this system could be impractical in certain situations. To address this, the implementing regulations include “Provider Matching Criteria” allowing schools to employ certain algorithmic preferences in the matching process, including an “IEP preference” enabling them to “reserv[e] placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act [and analogous state law].” 8 COLO. CODE REGS. 1404-1 § 4.109(A)(3).

The IEP preference lies at the heart of Petitioners’ free exercise challenge to the equal-opportunity requirement. Petitioners attempt to leverage this preference to avoid the long-accepted rule that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’” *Emp. Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872, 879 (1990) (citation omitted); *accord Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025) (“[T]he government is generally free to

place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable.”). However, Petitioners’ efforts to characterize the IEP preference as undermining the general applicability of the equal-opportunity provision rely on mischaracterizations of the IEP preference, the statutes that it implements, and long-accepted principles of disability law.

In essence, Petitioners argue that state law ensuring children with disabilities are *included* in the UPK program *as required by federal law* justifies their request to *exclude* LGBTQ children and families. They do this by turning the effect of the law on its head, equating their desire to exclude LGBTQ children with an imagined exclusion of nondisabled children. However, Petitioners misunderstand the purpose of the IEP preference, which is designed to ensure that disabled students receive the services required for them to have the “equal opportunity to enroll” promised by the equal-opportunity provision. The IEP preference is not an *exception* to that provision, but a *requirement* of its “equal opportunity” language.

Reality confirms that the IEP preference, in fact, advances the government’s unwavering interest in equal opportunity here. While this preference has brought Colorado closer to its goal of providing equal access, it has not, in fact, caused disproportionate UPK enrollment of disabled preschoolers nor caused

any concrete harm to nondisabled peers. Conversely, equal educational opportunity for disabled students would be a mirage if Colorado were to conform the UPK program to Petitioners' myopic view of general applicability, under which any unique treatment of disabled children is categorically off limits (or else, strict scrutiny applies).

Amici urge this Court to reject Petitioners' free exercise arguments premised on the IEP preference.

ARGUMENT

The IEP preference advances, rather than undermines, Colorado's equal-access interest.

The IEP preference codifies what is already required of the State under the IDEA and correlative state law. The express purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). The IDEA is built on the principle that students with disabilities should be educated alongside their peers and have access to the same academic standards, accountability systems, and opportunities for success. Colorado is ensuring that disabled children are granted equal opportunity and access to the UPK program.

Far from undermining Colorado's interest in providing all children with an equal opportunity to

attend preschool, as Petitioners argue, the IEP preference ensures that goal can be achieved. Accordingly, as the Tenth Circuit unanimously recognized, the IEP preference does not “undermine[] the government’s asserted interest in ensuring equal access to pre-schools.” Pet.App. 39a.

A. The IDEA was passed to ensure children with disabilities were afforded an equal opportunity to receive an education.

In 1954, this Court declared that “education is perhaps the most important function of state and local governments.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). “[W]here the state has undertaken to provide it, [education] is a right which must be made available to all on equal terms.” *Id.* Two decades later, however, Congress found that such a right had yet to be fully extended to children with disabilities. At the time, “more than half of the handicapped children in the United States [did] not receive appropriate educational services which would enable them to have full equality of opportunity,” and “one million . . . [were] excluded entirely from the public school system.” Education for All Handicapped Children Act, Pub. L. No. 94-142, § 3(a), 89 Stat. 773, 774 (1975);² *see also*

² The Education for All Handicapped Children Act was eventually renamed the IDEA. Pub. L. No. 101-476, 104 Stat. 1103, 1103-51 (1990). For simplicity, *Amici* use “IDEA” to refer

Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982) (noting Congress’s finding that the majority of disabled children “were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out’”) (citation and alteration omitted).

The segregation and neglect of children with disabilities was the product of a long history of *de jure* discrimination. See FREDERICK J. WEINTRAUB ET AL., STATE LAW AND EDUCATION OF HANDICAPPED CHILDREN: ISSUES AND RECOMMENDATIONS 11-17 (1971). Texas, for instance, permitted the exclusion of “blind, dumb, or feeble minded children.” TEX. REV. CIV. STAT. art. 2893, § 3 (1936). Nevada still has a law on the books that excludes children with disabilities which render attendance “inadvisable.” NEV. REV. STAT. § 392.050(2) (2025). Delaware’s constitution declares that the state legislature “may require by law that every child, not physically or mentally disabled, shall attend the public school.” DEL. CONST. art. X, § 1. Other state constitutions specify that education is required only for children of “sufficient” physical and mental ability. *E.g.*, N.M. CONST. art. XII § 5. By 1971, only seven states had enacted laws requiring education for all disabled children. Donald W. Keim, *Legislative Notes: The Education of All Handicapped*

to its predecessors as well. See, *e.g.*, *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 392 n.1 (2017).

Children Act of 1975, 10 U. MICH. J. L. REFORM 110, 119 (1976).

Children with disabilities fared no better in the courts. In 1893, for example, a Massachusetts court held that schools were not required to educate children whose behavior was “by reason of imbecility.” *Watson v. Cambridge*, 32 N.E. 864, 865 (Mass. 1893). Nearly three decades later, the Wisconsin Supreme Court held that “the right of a child of school age to attend the public schools of this state cannot be insisted upon” where “his physical condition and ailment produces a depressing and nauseating effect upon the teachers and school children.” *State ex rel. Beattie v. Bd. of Educ.*, 172 N.W. 153, 154 (Wis. 1919). In 1934, an Ohio court emphatically stated, “[a]s a matter of common sense it is apparent that a moron of very low type, or an idiot or imbecile who is incapable of absorbing knowledge or making progress in the schools, ought to be excluded.” *Bd. of Educ. v. State*, 191 N.E. 914, 916 (Ohio. App. 1934).³

It was against this backdrop that Congress first attempted to promote education of disabled children by establishing a grant program “aimed primarily at

³ Eventually, in 1972, two courts held that disabled children were guaranteed certain rights to education. *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972). These cases influenced the IDEA’s structure.

stimulating the States to develop educational resources and to train personnel for educating the handicapped,” yet neither law contained specific guidelines on how the money should be used. *Rowley*, 458 U.S. at 180. Quickly recognized as ineffective, Congress passed the IDEA in 1975, establishing the nation’s modern special education scheme. *Id.*; *see also* 121 Cong. Rec. 37417 (1975) (statement of Sen. Schweiker) (“It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. [The bill] takes positive necessary steps to insure that the rights of children and their families are protected.”).

The IDEA was a robust and comprehensive civil rights law which sought “to ensure children with disabilities receive a free and appropriate public education.” *Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 144 (2023). Specifically, “the [IDEA] confers upon disabled students an *enforceable substantive right* to public education in participating States.” *Honig v. Doe*, 484 U.S. 305, 310 (1988) (emphasis added). In reauthorizing the law in 2004, Congress reflected that prior to the passage of the IDEA, children with disabilities “did not receive appropriate educational services,” they “were excluded entirely from the public school system,” and “a lack of adequate resources within the public school system forced families to find services outside the public school system.” 20 U.S.C.

§ 1400(c)(2); Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2649 (2004). Congress found that “this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.” 20 U.S.C. § 1400(c)(3).

At the same time, Congress found that the IDEA “has been impeded by low expectations.” *Id.* § 1400(c)(4). To this day, the IDEA remains necessary to ensure children with disabilities receive an education. *See, e.g., Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 395-97 (2017) (school district failed to offer services that would allow student to make meaningful progress); *Perez*, 598 U.S. at 145 (school district artificially inflated student’s grades and routinely failed to provide deaf student with qualified aides).

B. Schools have an affirmative statutory duty to accommodate disabled students.

The IDEA was enacted pursuant to the Spending Clause. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006) (citing U.S. CONST. art. I, § 8, cl. 1). As it functions, the IDEA offers federal financial assistance to states. *Rowley*, 458 U.S. at 180-81; 20 U.S.C. § 1411. The assistance is optional, and

states are not required to accept it.⁴ However, “once a State accepts the IDEA’s financial assistance, it *must* provide special education and related services, including instruction tailored to meet a child’s unique needs and sufficient support services to permit the child to benefit from that instruction.” *A.J.T.*, 605 U.S. at 340 (quoting *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 158 (2017)) (emphasis added) (internal quotation marks omitted). Thus, the IDEA creates an affirmative duty to accommodate children with disabilities. *Endrew F.*, 580 U.S. at 399 (IDEA imposes a “substantive obligation” on states); *Fry*, 580 U.S. at 155 (“The IDEA guarantees individually tailored educational services for children with disabilities.”); *T.K. v. N.Y.C. Dep’t of Educ.*, 810 F.3d 869, 875 (2d Cir. 2016) (“States have an affirmative obligation to

⁴ Even if the State were to opt out of this financial assistance, Title II of the Americans with Disabilities Act would still require that students with disabilities be provided with equal access to education, a requirement that the IEP preference seeks to advance. That statute prohibits states from discriminating on the basis of disability, 42 U.S.C. § 12132, which is defined as “a physical or mental impairment that substantially limits one or more major life activities,” *id.* § 12102(1)(A). Title II requires states to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7)(i). The IEP preference would be required to ensure that the matching algorithm did not operate to deny disabled students the services they need.

provide a basic floor of opportunity for all children with disabilities.”); *D.A. v. Hous. Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010) (“IDEA imposes an affirmative obligation on states.”); *Richard S. v. Wissahickon Sch. Dist.*, 334 F. App’x 508, 510-11 (3d Cir. 2009) (IDEA creates an “affirmative duty”).

“The primary vehicle for implementing these congressional goals is the ‘individualized educational program’ (IEP).” *Honig*, 484 U.S. at 311. “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.” *Endrew F.*, 580 U.S. at 399. An IEP thus puts into practice the IDEA’s requirement that children with disabilities be afforded a free appropriate public education. An IEP sets out “the special education and related services and supplementary aids and services, [and] program modifications” that a disabled student will receive. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). A “special education” amounts to “*pecially designed instruction*, at no cost to parents, to meet *the unique needs* of a child with a disability.” *Id.* § 1401(29) (emphasis added). Once a state accepts IDEA funding, it has an affirmative duty to offer specially designed instruction and other services that “ensure that all children with disabilities have available to them a free appropriate public education.” *Id.* § 1400(d)(1)(A).

Relevant here, an IEP team is convened between a parent and their local education agency—in Colorado, their local school district—to develop an IEP which identifies, among other things, what services the local agency will provide and where they will provide them, known as a “placement.” *Id.* § 1414(d)(1)(A)-(B), (e); 34 C.F.R. §§ 300.320-300.324. In determining a child’s placement, the local agency must ensure that the child is educated in the “least restrictive environment,” meaning that a child must, to the maximum extent possible, be educated alongside their nondisabled peers. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114. Additionally, unless the IEP requires otherwise, a child *must* be educated in the school they would otherwise attend if they were not disabled, and the placement is as close as possible to the child’s home. 34 C.F.R. § 300.116(b), (c). Various other nuanced considerations may affect a child’s placement. *See* 20 U.S.C. § 1414(d)(1), (d)(3); 34 C.F.R. §§ 300.114-300.120. Ultimately, a state must provide “full educational opportunity to all children with disabilities.” 20 U.S.C. § 1412(a)(2); 34 C.F.R. § 300.109.

C. The IEP preference codifies what the IDEA requires and thereby ensures equal opportunity for disabled students.

In invoking the IEP preference, the essence of Petitioners’ argument is that allowing schools to consider disability denies equal opportunity to non-

disabled children. This is incorrect. First, “disability” as used in the UPK statute means individuals who have a disability; being nondisabled is not a protected characteristic. Second, as Congress and this Court have noted, preferential treatment may be required to ensure that people with disabilities are afforded an equal opportunity. The IDEA, as established by its text and history, affords “special” rights and accommodations to children with disabilities unavailable to the nondisabled so that such children may attain an equal opportunity. The IEP preference merely ensures conformity with this federal requirement and supports Colorado’s equal-opportunity interest.

1. The plain statutory text establishes Colorado’s interest in affording equal opportunity to disabled children.

Petitioners contend that the UPK statute’s equal-opportunity provision is not generally applicable because it allows the State “to deny families equal access for secular reasons.” Pets.’ Br. 40. Specifically, Petitioners take issue with the IEP preference which, they argue, discriminates against nondisabled students. Petitioners make much of the “plain text” of the equal-opportunity provision to argue that it “proscribes *all* unequal access based on *any* protected characteristic,” and that the IEP preference “undermine[s] this equal access interest.” *Id.* at 37-39, 41.

To the contrary, the plain text of the provision requires “equal opportunity,” a goal that cannot be achieved without the IDEA, as implemented by the IEP preference. This is reinforced by the text of the UPK statute as a whole. As this Court has instructed, “‘we must read the words [of a statutory provision] ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions.’” *King v. Burwell*, 576 U.S. 473, 486 (2015) (citations omitted); *accord Nieto v. Clark’s Mkt., Inc.*, 488 P.3d 1140, 1143 (Colo. 2020). The whole text of the UPK statute demonstrates that the State’s interest regarding students with disabilities is to ensure equal opportunity, including provision of required services.

Most importantly, the definitions provision of the UPK statute defines “children with disabilities” in terms of specific conditions, not as a generic term encompassing both disabled and nondisabled children. COLO. REV. STAT. § 26.5-4-203(3) (incorporating by reference COLO. REV. STAT. § 22-20-103). The equal-opportunity provision’s requirement of “equal opportunity . . . regardless of . . . disability” must be interpreted to harmonize the use of “disability” with the definition in the same statute. *See, e.g., Am. Nat’l Gen. Ins. Co. v. Rivera*, 217 P.3d 1257, 1260-61 (Colo. App. 2007) (applying statutory definition throughout statutory scheme).

In addition, the UPK statute expressly “recognizes the requirement of the federal [IDEA] to provide educational services to every three- or four-year-old child with a disability, in accordance with the child’s individualized education program.” COLO. REV. STAT. § 26.5-4-202(4). One of the four stated purposes of the law is “[t]o provide access to preschool services for children who are three years of age, or in limited circumstances younger than three years of age, and are children with disabilities.” *Id.* § 26.5-4-204(1)(c); *see also id.* § 26.5-4-204(3)(a)(II) (“Pursuant to IDEA and [state equivalent], every child who is three or four years of age and is a child with disabilities must be offered preschool services in accordance with the child’s individualized education program.”); *id.* § 26.5-4-204(4) (children with disabilities exempted from various requirements pursuant to the IDEA and their IEP). Indeed, the law has an entire section detailing special education requirements. *Id.* § 26.5-4-206. The IEP preference itself states that its purpose is “*to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act.*” 8 COLO. CODE REGS. 1404-1 § 4.109(A)(3) (emphasis added). Reading the plain text of the UPK statute, it is clear that Colorado intended to ensure that children with disabilities were afforded an equal opportunity to access and benefit from the UPK program as required by the IDEA. Implementing a federal law that ensures

disabled children have equal access does not undermine Colorado’s equal-access interest.

2. Accommodations and services are necessary to ensure equal opportunity regardless of disability.

Narrowing the focus from the UPK statute as a whole to the equal-opportunity provision, Petitioners’ argument still fails. Again, the plain text of the provision requires “equal opportunity.” COLO. REV. STAT. § 26.5-4-205(2)(b). This term requires that disabled students be afforded accommodations and services—including, if necessary, “preferences”—in order to obtain the same opportunities as their non-disabled peers. *See U.S. Airways v. Barnett*, 535 U.S. 391, 397 (2002) (recognizing “preferences will sometimes prove necessary to achieve the [ADA]’s basic equal opportunity goal”); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (“[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit,” and “to assure [such] access, reasonable accommodations in the . . . program or benefit may have to be made.”); *A.L. ex rel. D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1295 (11th Cir. 2018) (holding the ADA and Section 504 of the Rehabilitation Act require “meaningful access or an equal opportunity to gain the same benefit as [a disabled individual’s] nondisabled peers”); 20 U.S.C. § 1400(c)(1) (“Improving educ-

ational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity”); *Cinnamon Hills Youth Crisis Ctr., Inc. v. St. George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.) (“Of course, in some sense *all* reasonable accommodations treat the disabled not just equally but preferentially. . . . [I]t is sometimes necessary to dispense with formal equality of treatment in order to advance a more substantial equality of opportunity.”).

Petitioners suggest that Colorado discriminates against nondisabled children by permitting preschools to consider disability by reserving spaces for children with IEPs in conformance with the IDEA. But Petitioners cite no authority contradicting the well-established understanding that nondisabled people are not protected by statutes prohibiting discrimination on the basis of disability. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 894 (1984) (“In the absence of a handicap that requires special education, the need for what otherwise might qualify as a related service does not create an obligation under the [IDEA].”); *A.J.T.*, 605 U.S. at 339 (describing ADA and Section 504 as “generally applicable antidiscrimination laws” which afford “protections *for children with disabilities*”) (emphasis added); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 258 (3d Cir. 2013) (“[U]nder the Act’s plain language, it is clear

that the IDEA creates a cause of action only for individuals with disabilities.”); *Morgan v. Ohio Dep’t of Rehab. & Corr.*, No. 25-3722, 2026 WL 1009160, at *3 (6th Cir. Apr. 14, 2026) (“[T]he fact that an employee does not have a disability obviates an employer’s obligation to provide an accommodation.”) (citing *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999)).⁵ Therefore, where the law guarantees equal access for disabled students, it is not conversely denying equal access to any other protected class.

The reasoning behind this principle should be obvious. In enacting the IDEA, Congress found it was students with disabilities, not students without disabilities, that suffered a systemic disadvantage in education. The IDEA sets out a number of mechanisms ensuring that children with disabilities may obtain an educational opportunity on par with that of their non-disabled peers. Such mechanisms include specially designed instruction, related services, supplementary supports, and reasonable modifications. 20 U.S.C.

⁵ In limited circumstances, certain nondisabled individuals may be protected from discrimination. *See, e.g.*, 42 U.S.C. § 12102(1)(C) (“regarded as” claims); *id.* § 12182(b)(1)(E) (associational discrimination). These provisions do not protect nondisabled people based on their lack of disability; rather, they prohibit, respectively, (1) discriminating against a nondisabled person because the discriminator thinks they are disabled; and (2) discriminating against a nondisabled person because they are associated with a disabled person.

§ 1400(d)(1); 34 C.F.R. §§ 300.17, 300.34, 300.39, 300.42, 300.114, 300.320. Therefore, the IDEA requires that disabled students be granted modifications to policies and practices when necessary to bridge the gap and afford disabled students a free appropriate public education. Otherwise, Congress and the courts have recognized, children with disabilities would suffer segregation, neglect, and discrimination.

This Court addressed this very argument in *U.S. Airways v. Barnett*. In that case, U.S. Airways argued that the ADA does not require employers to grant “preferential” treatment to disabled employees in the form of reasonable accommodations. 535 U.S. at 397. This Court soundly rejected this position, holding that “[t]he Act *requires preferences* in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy.” *Id.* (emphasis added). Otherwise, the ADA “could not accomplish its intended objective.” *Id.*

In passing the IDEA, Congress explicitly found that disabled students were suffering at the expense of their nondisabled peers, and that this problem required a federal statute to place disabled students in parity with nondisabled students. *Cf. Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 591 (2004) (explaining why Age Discrimination in Employment Act does not protect younger workers); 20 U.S.C.

§ 1400(c)(2); *Rowley*, 458 U.S. at 179-80. To comply with the IDEA, the UPK statute’s equal-opportunity provision—per *Barnett*—“requires preferences . . . that are needed for those with disabilities to obtain the same [educational] opportunities that those without disabilities automatically enjoy.” 535 U.S. at 397. Otherwise, neither the IDEA nor the UPK statute could “accomplish its intended objective.” *Id.* In fact, this rationale is written into the IEP preference itself. 8 COLO. CODE REGS. 1404-1 § 4.109(A)(3) (preference permitted “to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act”) (emphasis added).

Petitioners reject these holdings, arguing that crafting a preference that matches disabled students with required services, on the one hand, and denying equal access to LGBTQ families, on the other, similarly undermine Colorado’s interest in affording equal access to all children. Petitioners argue that, under the rationale of the IEP preference, Colorado could even fund UPK schools serving only “white” or “Irish families.” Pets.’ Br. 43. But this inapt analogy ignores the unique meaning of “disability,” which is distinct from other protected classes.

For example, “race,” as a protected class, applies to all races. *See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 206-07, 229-30 (2023). Therefore, a school would not

be permitted to consider race and thus only enroll white families, as that would deny equal access to the other races that fall under the protected class. “Disability,” as explained above, does not include non-disabled people. Thus, in considering disability and providing legally required services and placements to disabled students, a school is not denying equal access to any other protected class. *See also Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 681 (5th Cir. 1996) (distinguishing “disability” from “race”); *Cline*, 540 U.S. at 597-98 (distinguishing “age” from “race” and “sex”).

Petitioners’ argument ultimately rests on the unfounded premise that the IEP preference undermines Colorado’s equal access interest, as well as a faulty comparison of the IEP matching preference to Petitioners’ desired anti-LGBTQ exclusion. But the difference between the two is clear: the former *does not* deny equal access to a protected class, while the latter *does*. Indeed, the IEP preference simply codifies what the IDEA already requires: to “ensure[] that children with disabilities receive needed special education services.” *Fry*, 580 U.S. at 157. The IDEA contemplates where a child must receive services, 20 U.S.C. § 1412(a)(5); 34 C.F.R. §§ 300.114, 300.116, 300.320, and the IEP preference simply ensures that the UPK program’s algorithm will not deprive a disabled child of that legally mandated placement. Thus, the IEP preference is

instrumental in fulfilling the UPK program’s promise of equal opportunity.

D. Without the IEP preference, disabled preschoolers would be denied equal opportunity.

Petitioners’ theoretical claims about the IEP preference are at odds with reality.

Even with the IEP preference, children with disabilities have not disproportionately enrolled in the UPK program nor displaced their nondisabled peers. While 15 percent of public-school students nationwide are served under the IDEA, *see* NAT’L CTR. FOR EDUC. STAT., *supra* at 1, UPK enrollment of disabled children has hovered around 13.5 percent of four-year-old enrollment each year since the program’s inception, *e.g.*, COLO. DEP’T EARLY CHILDHOOD, COLO. UNIVERSAL PRESCHOOL SCHOOL YEAR 2023-24 ANNUAL REPORT 10 fig.5 (2025) (“child[ren] with IEP[s]” comprised “13.5%” of all four-year-olds served in inaugural year of UPK), <https://tinyurl.com/3bh4apub>; COLO. DEP’T EARLY CHILDHOOD, COLO. UNIVERSAL PRESCHOOL PROGRAM YEAR 2024-25 ANNUAL REPORT 13 fig.5 (2026) (“child[ren] with IEP[s]” comprised “13.5%” of “all four-year-olds served” in second year of UPK), <https://tinyurl.com/53ae7bpt>.

The IEP preference has not harmed nondisabled children’s opportunities either. *Amici* are unaware of any UPK-participating preschools that exclusively or

even primarily serve children with disabilities. Despite claiming that these schools exist, Petitioners provide no examples. *See* *Pets.* Br. 10, 38. So, although Colorado allows UPK providers to reserve seats to ensure IEP-compliant placements for disabled children, no identified UPK provider has closed its doors to nondisabled children. In fact, keeping the full slate of UPK providers open to the 86.5 percent majority of nondisabled UPK enrollees aligns with the IDEA’s integrated-education requirement, as well as applicable Colorado Department of Education standards requiring that “[c]lassrooms serving children with IEPs always have fewer than 50% of students with IEPs” and are otherwise comprised “of age-appropriate non-disabled peers,” COLO. DEP’T OF EDUC., CDE STANDARDS FOR PLACEMENT OF PRESCHOOLERS WITH IEPs IN EDUCATIONAL PROGRAMS 2 (2024), <https://tinyurl.com/t5d6hd8y>.

Further, as the Colorado legislature understood when enacting the UPK statute in 2022, families with disabled children often have unique placement needs and, notwithstanding antidiscrimination protections, may still have fewer viable choices in an open market. Before UPK, due to “significantly limited” options for her preschooler with a rare developmental disability, one parent’s “only option was to drive across town to one of the very few programs [she] could find in Denver,” to a school so far away that often “the best

use of time [was] just to stay in the parking lot” while her daughter “attended preschool for two-and-a-half hours, four days a week.” Hearing on H.B. 22-1295 Before the H. Comm. on Educ., 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022) (statement of Corinne DePersis). Summit County Commissioner Elisabeth Lawrence similarly described the challenges she faced earlier in life as “a young, low-income, single mother with a [disabled] infant”; while early intervention services were crucial and “saved [her] family,” it “was only through grit and determination that [she] finally found a spot for [her] daughter.” Hearing on H.B. 22-1295 Before the S. Comm. on Educ., 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022) (statement of Elisabeth Lawrence, Summit County Board of Commissioners, and Colorado Counties, Inc.) (“I can’t imagine for other families . . . the struggles to find adequate quality care.”).

As the legislature also understood, a generic prohibition of disability discrimination alone could not secure equal UPK access for disabled preschoolers. Petitioners do not address the complexity of this formidable issue, which spurred “many thoughtful discussions about how to ensure ongoing compliance with federal requirements” for “identifying and serving preschool children with disabilities” within the UPK program. Hearing on H.B. 22-1295 Before the H. Comm. on Educ., 73d Gen. Assemb., 2d Reg. Sess.

(Colo. 2022) (statement of Lucinda Hundley, Exec. Dir., Consortium of Directors of Special Education); *accord id.* (statement of George Welsh, Opportunity Coalition, and frmr. Superintendent, Cañon City Public Schools) (“We also had monthly town halls . . . [and] ongoing conversation with special education directors.”).

These real-world concerns were also front of mind when the UPK regulations containing the IEP preference were drafted and eventually adopted in 2024. By late 2022, Colorado’s top education agencies were aware that disabled students were being systemically underserved in a similar school-choice matching process, owing, in part, to inadequate state-level safeguards for ensuring IEP-compliant placements. Indeed, a 130-page federal administrative complaint submitted by *Amicus* Disability Justice (then Disability Law Colorado) comprehensively demonstrated with empirical data and anecdotal support that, without stronger protections for IEP-required seats, “students with disabilities are disproportionately denied enrollment at public schools of their choice when compared to similarly situated students without disabilities” Complaint by Disability Law Colorado (n/k/a Disability Justice) to U.S. Dep’t of Educ., Office for Civil Rights, at 5, OCR Case No. 08-22-1563 (filed Sept. 2, 2022), <https://tinyurl.com/5dfsbz6w>; *see also* Erica Meltzer,

Colorado school choice law discriminates against students with disabilities, complaint alleges, CHALKBEAT COLO. (Sept. 14, 2022, 6:00 a.m. MDT), <https://tinyurl.com/3466ecj4>. Against that backdrop, the IEP preference was born.

CONCLUSION

The IEP preference does not undermine Colorado’s equal-opportunity interest. Rather, it implements what the IDEA already requires. If a child were denied enrollment in the school designated as their placement, the State (and local educational agency) would be in violation of the IDEA. As such, the IEP preference allows Colorado to provide “full educational opportunity” by permitting schools to reserve spots for children with IEPs “to ensure conformity with obligations incurred pursuant to the [IDEA].” 8 COLO. CODE REGS. 1404-1 § 4.109(A)(3).

Amici urge the Court to reject Petitioners’ arguments and uphold the rights of disabled students.

Respectfully submitted,

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