18-1794

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

C.D., by and through her Parents and Next Friends,
M.D. and P.D.; M.D.; P.D.,

Plaintiffs-Appellants,

—v.—

NATICK PUBLIC SCHOOL DISTRICT;
BUREAU OF SPECIAL EDUCATION APPEALS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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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

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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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nationwide 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'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).[1]

Children with disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring that every child with a disability receives a free appropriate public education in the child's least restrictive environment (LRE), as the Individuals with Disabilities Education Act (IDEA) requires. Under IDEA, Congress mandated that children with disabilities be educated in the general education classroom to the maximum extent appropriate. 20

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amicus 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 Amicus and its members.

U.S.C. § 1412(a)(5). Further, under IDEA, the educational placement of a student with a disability shall be "as close as possible to the child's home" and "unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school he or she would attend if nondisabled." 34 C.F.R. § 300.116(c).

Amicus are also committed to ensuring that children with disabilities are not simply included in the general education classroom but also that their Individual Education Programs (IEPs) are challenging and ambitious so they can make appropriate progress in the general education curriculum in light of their unique abilities. Accordingly, Amicus submits this brief in support of plaintiff-appellants to provide the Court with some of the extensive empirical research demonstrating the efficacy of providing education to children with disabilities in the child's LRE and to address the impact of the Supreme Court's recent decision in *Endrew F.* on prior case law regarding the least restrictive environment for students with disabilities Amicus, therefore, respectfully urge reversal of the district court's decision. Defendants-Appellees, Natick Public School District and Massachusetts Bureau of Special Education Appeals, declined to consent. Plaintiffs-Appellants consent.

SUMMARY OF ARGUMENT

Congress made clear that one of its overriding priorities in enacting IDEA was giving students with disabilities access to the general education curriculum and education in the regular classroom to the maximum extent possible. This requirement has been strengthened in subsequent reauthorizations of the IDEA. Thus, in the most recent reauthorization, Congress found "almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the *general education curriculum* in the regular classroom, to the maximum extent possible." 20 U.S.C. § 1400(c)(5). Moreover, abundant quantitative and qualitative research demonstrates that students with disabilities can achieve considerable educational benefit from access to the general education curriculum and placement in general education classes with supplementary aids and services, such as modified curriculum, resource rooms, itinerant instruction, and support from paraprofessionals.

IDEA's mandates are not empty aspirations; in fact, research demonstrates that children with disabilities can achieve considerably more educational benefit from placement in general education classes with access to the general education curriculum through supplementary aids and services than from placement in special education classrooms or schools with limited access, or no access to their age-

appropriate non-disabled peers or general education curriculum. Further, the research also supports the finding that when students with and without disabilities spend time together, all students benefit; thus, there is a positive correlation between academic achievement and inclusion.

Additionally, the Supreme Court has made clear that the IEPs of children with disabilities must be "appropriately ambitious" to enable them to make progress in the *general education curriculum* in light of their unique abilities. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). The Court explained that children with disabilities are to be challenged to reach their potential progress just as their non-disabled peers are. For most students, including students with intellectual disabilities, including borderline intelligence, this progress happens most effectively when children with disabilities are given access to the general education curriculum and included in the general education classrooms with their peers without disabilities. School districts are required to comply both with *Endrew F.*'s requirement that IEPs be "appropriately ambitious" and the statutory requirement that students receive their educational services in the children's least restrictive environment.

ARGUMENT

I. MORE THAN FORTY YEARS OF RESEARCH SUPPORTS THE LEAST RESTRICTIVE ENVIRONMENT MANDATE

A. Congress Relied on Thirty Years of Research Supporting Inclusive Education in Reauthorizing the IDEA in 2004

Fourteen years ago, in its 2004 reauthorization of IDEA, with its renewed commitment to placement of students with disabilities in general education classroom, Congress relied on "30 years of research and experience." 20 U.S.C. § 1400(c)(5). That research showed that students with disabilities who are educated in general education classes do better academically and socially than comparable students educated in noninclusive settings, regardless of the type of disability or grade level. *See e.g.,* Xuan Bui, et al., *Inclusive Education Research & Practice*, Maryland Coalition for Inclusive Education *available at* http://www.mcie.org/usermedia/application/6/inclusion_works_final.pdf (last visited Dec. 14, 2018) (compiling 30 years of research on inclusive practices demonstrates included children perform better academically socially and have a positive effect on their non-disabled peers); Michael J. Guralnick et al., *Immediate Effects of Mainstreamed Settings on the Social Interactions and Social Integration of Preschool Children*, 100 Am. J. Mental Retardation 359-77 (1996) *available at https://depts.washington.edu/chdd/guralnick/pdfs/immed_effects_AJMR_vol100_94.pdf* (last visited Dec. 5, 2018) (finding that the behavior of children with disabilities appears to be positively affected by participation in activities and classrooms with typically developing children); Samuel Odom, *Preschool Inclusion: What We Know and Where We Go From Here*, 20 Topics in Early Childhood Special

Educ. 21, 20-27 (2000) (noting that various studies "found that children with severe disabilities who participate in inclusive settings appear to score higher on standardized measures of development than comparable children enrolled in traditional special education settings").

Moreover, research supports the conclusion that time spent with non-disabled peers enhances academic achievement for students with disabilities; meaning that inclusion and achievement are positively correlated. For example, a 2002 study compared results on measures of child development and social competence for children in inclusive programs versus children in segregated or "self-contained" programs over a two-year study period. The children enrolled in inclusive programs achieved statistically significant better results than the children in the segregated programs. Mary Fisher & Lauanna H. Meyer, "*Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs,*" 27 Res. & Prac. for Persons with Severe Disabilities 165, 169-73 (2002), available at https://www.researchgate.net/publication/250169854_Development_and_Social_Competence_After_Two_Years_for_Students_Enrolled_in_Inclusive_and_Self-Contained_Educational_Programs (last visited Dec. 14, 2018). The authors concluded:

> The results of this study point to greater gains on psychometrically valid measures for students who were included in general education settings

> in comparison to matched peers who were segregated. Moving instruction into inclusive environments, rather than providing instruction in isolation from normalized learning opportunities… seems to be beneficial for individual child learning outcomes.

Id. at 172-73.

B. Recent Research Confirms that Access to the General Education Curriculum and Non-Disabled Peers Benefits Students with Disabilities, particularly Students with Intellectual Disabilities

Research after the reauthorization of IDEA in 2004 continues to confirm the marked academic and social improvement in children with disabilities who are educated alongside their typical peers in the general education classroom. *E.g.,* Wayne S. Sailor & Amy B. McCart, Stars in Alignment, 39 Res. & Prac. for Persons with Severe Disabilities 55, 57-58 (2014) (collecting studies and noting benefit to *all* students of educational practices that support inclusion); Thomas Hehir, et al., Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report (2014), *available at* http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf (last visited Dec. 14, 2018);*see also* Lewis B. Jackson et al., *The Dynamic Relationship Between Context, Curriculum and Student Learning: A Case for Inclusive Education as a Research Based Practice*, 34 Res. & Prac. for Persons with Severe Disabilities 175-95 (2008), *available at* http://www.academia.edu/2567145/The_dynamic_relationship_between_context_curriculum_and_student_learning_A_case_for_inclusive_education_as_a_research-based_practice (last visited Dec. 14, 2018); Peggy Coyne et al., *Literacy by Design: A Universal Design for*

Learning Approach for Students with Significant Intellectual Disabilities, 33 Remedial & Special Educ., 162- 72 (2012), *available at* https://ccids.umaine.edu/wp-content/uploads/sites/26/2013/08/Remedial-and Special-Education-2012-Coyne-162-72_web.pdf (last visited Dec. 14, 2018) (students with significant disabilities can learn academic content, build social competence and develop friendships with peers).

In an analysis of self-contained classes, experts observed special education classes that were spacious, well-staffed by educators and paraprofessionals, and supplied with adequate resources. Despite these supports and resources, they found both a remarkable lack of time that students spent in instruction, and that paraprofessionals, not teachers, primarily provided the instruction that did occur. Further, they found there were few opportunities for students to respond to instructional cues, a high level of distractions in the classroom, a lack of communication supports for students, and a lack of individualized instruction. Jennifer A. Kurth, Kiara Born, and Hailey Love. *"Ecobehavioral Characteristics of Self-Contained High School Classrooms for Students with Severe Cognitive Disability."* Research & Prac. for Persons with Severe Disabilities 41, 227–43 (2016).

C. Inclusive Education Improves Outcomes for Students with Disabilities and Prepares Them for Post-Secondary Education and Employment

Students who have been provided with inclusive education throughout their primary and secondary education have improved outcomes. As noted in the National Council on Disabilities Report: "When students are included...they achieve at higher rates of academic performance, and they acquire better social and behavioral outcomes. Since 1990, research studies have demonstrated a variety of benefits for students with intellectual and developmental disabilities who are educated in general education classes. Membership and participation benefits include increased student engagement, improved communication, improved expressive language and literacy skills, more satisfying and diverse friendships, higher levels of social engagement with peers without disabilities, less disruptive behavior, and more social competence." National Council on Disability, *IDEA Series, The Segregation of Students with Disabilities* : at 38 (2018). https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf (last visited Dec. 14, 2018).

In addition, the National Longitudinal Transition Study examined the outcomes of 11,000 students with a range of disabilities and found that more time spent in a general education classroom was positively correlated with a) fewer absences from school, b) fewer referrals for disruptive behavior, and c) better outcomes after high school in the areas of employment and independent living. *Id; see also* : Mary Wagner et al, "The Academic Achievement and Functional

Performance of Youth with Disabilities." *A Report of Findings from the National Longitudinal Transition Study-2 (NLTS2)* (California: SRI International, 2006).

Today, students with disabilities are welcomed in college programs throughout the nation.[2] And studies have found that those individuals who attend post-secondary education programs earn 1.7 times more money than those who have no post-secondary education.[3] In 2008, the Higher Education Act was reauthorized as the Higher Education Opportunity Act (HEOA) and for the first time required avenues to increase access to higher education for students with intellectual disabilities (ID) by removing barriers to Title IV student aid. HEOA also authorized model demonstration projects to "create or expand inclusive higher education programs for students with ID" called the Transition and Postsecondary Programs for Students with Intellectual Disabilities (TPSID). Meg Grigal & Clare

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[2] Michael L.Wehmeyer, and Susan B. Palmer. "*Adult Outcomes for Students with Cognitive Disabilities Three-Years After High School: The Impact of Self-Determination.*" Education and Training in Developmental Disabilities 38, no. 2: 131-44(2003) . http://www.jstor.org/stable/23879591. This article reports a follow-up study of school leavers with mental retardation or learning disabilities who were surveyed 1- and 3-years after they left school to determine what they were doing in major life areas (employment, independent living or community integration). Students were divided into two groups based on self-determination scores collected during their final year at high school. Comparisons between these groups on outcomes at 1 and 3 years post-graduation indicate that students who were more self-determined fared better across multiple life categories, including employment and access to health and other benefits, financial independence, and independent living.

[3]https://www.usnews.com/education/articles/2009/02/13/college-is-possible-for-students-with-intellectual-disabilities.

Papay *The Promise of Postsecondary Education for Students With Intellectual Disability. New Directions for Adult and Continuing Education*. 2018; 78-79 . Data collected shows that the rate of student employment while attending TPSID programs has grown from 27% in 2010-11 to 43% in 2015-16. *Id* at 85.

Postsecondary education has emerged as a pathway to desirable life outcomes for individuals with ID. Whether as a location for providing transition services or as a postschool outcome of secondary education, enrolling in higher education allows individuals with ID to engage in further learning, prepare for independent living, and develop skills that they can use to gain competitive employment. In FY2015, $9.8 million was awarded to a further twenty-five grantees, with TPSID projects currently being implemented between 2015 and 2020 at more than forty colleges and universities in nineteen states. Grigal at 79. Growth in higher education programs for students with intellectual disabilities has grown from 25 colleges in 2004 to 268 in 2018. *Id.* at 83.

II. THE DISTRICT COURT DECISION SHOULD BE REVERSED BECAUSE IT DID NOT APPLY THE PROPER LRE ANALYSIS TO THE CHANGE IN PLACEMENT

A. IDEA Mandates that School Districts Provide Both a Free Appropriate Public Education and also the Least Restrictive Environment

IDEA requires that states receiving federal funds provide to all children with disabilities a Free Appropriate Public Education, (FAPE) 20 U.S.C. § 1412(a)(1) in

the Least Restrictive Environment, (LRE), 20 U.S.C. § 1412(a)(5). The statute explains, "To the maximum extent appropriate, children with disabilities... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

The federal regulations explicate the least restrictive environment requirement mandating that school systems ensure that …"[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. § 300.116(c). School districts may not unnecessarily restrict a child if that child's IEP can be implemented using supplementary aids and services in a regular education classroom in the student's neighborhood school. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). A detailed set of procedures govern the drafting of the IEP, the "centerpiece of the statute's educational delivery system for disabled children." *Endrew F.*, 137 S. Ct. at 994 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)).

In adopting the IDEA,[4] Congress created a strong preference for educating students with disabilities in regular education classrooms. Basic to the IDEA and its precursor, the Education for All Handicapped Children Act, is the student's Fourteenth Amendment right to avoid seclusion and re-segregation. These protections emerged as statutory and regulatory obligations:

> [T]he Act also contains a specific directive regarding the placement of handicapped children. The Act requires the state to establish procedures to assure that, to the maximum extent appropriate, handicapped children…are educated with children who are not handicapped.
>
> With this directive, which is often referred to as "mainstreaming" or placement in the "least restrictive environment," Congress created a statutory preference for educating handicapped children with nonhandicapped children. (Footnote omitted citing to *Rowley supra* at 181 n.4)

Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991). This right is independent of FAPE. *Id.* at 695-96. "Thus, the *Rowley* test assumes the Act's mainstreaming requirement has been met." *Id*. at 696, *quoting and adopting, Daniel R.R. v. State Bd. of Ed*., 874 F.2d 1036, 1048 (5th Cir. 1989).

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[4] IDEA 1997 *renewed and strengthened* the obligations attendant to the LRE requirements.

> The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general educational curriculum and the special services, which may be necessary for appropriate participation in the particular areas of the curriculum due to the nature of the disability.

The IDEA defines supplementary aids and services as "aids, services and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate…." 34 C.F.R. § 300.42. The regulations recognize the critical role that supplementary aids and services play in a disabled child's ability to participate in the regular classroom. IEP requirements dictate that every IEP must contain a written statement of "special education and related services and supplementary aids and services, *based upon peer reviewed research to the extent practicable*, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child" to participate in regular education. *Id.* § 300.320(a)(4) (emphasis added).

In its 2004 Reauthorization of the IDEA, Congress, in its findings, emphasized the importance of educating children with disabilities in the regular classroom:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by-
> (A) Having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible …
> (C) Coordinating this title with other local, educational service agency State, Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such

> children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;
> (D) Providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate ….

20 U.S.C. § 1400(c)(5).

Congress recognized that "special education can become a *service* for such children rather that a *place* where such children are sent." *Id.* § 1400(c)(5)(C) (emphasis added). Accordingly, Congress has made involvement and progress in the "general curriculum" an overall priority and goal for students with disabilities. *Id.* § 1400(c)(5)(D).

Several regulations ensure compliance with this LRE mandate. "The IEP must include supplementary aids and services in order to facilitate the provision of services to the student in the general education classroom." 34 C.F.R. § 300.320(a)(4). Further, a student cannot be removed from general education classes based solely on a need for curriculum modification. *Id.* § 300.116(e). And if a student will not be participating in general education classes, justification for that exclusion must be provided in the IEP. *Id.* § 300.320(a)(5). Additionally, unless the IEP of a child with a disability requires some other arrangement," the child must be educated in the school that he or she would attend if nondisabled. *Id.* § 300.116(c).

B. *Endrew F.* Addressed the FAPE Standard for Education

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 a 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 Court held and emphasized that the IEP must be "appropriately ambitious," and the objectives must be "challenging." *Id.* at 999-1000.

Endrew F. was confined to the issue of FAPE and did not address LRE. Thus, the Supreme Court did not address the inclusion of students with significant needs for special education in general education classes. *Endrew F.* is entirely consistent with the long line of cases holding that, if students can achieve satisfactory progress in a general education class with the use of supplementary aids and services, then the student must be provided with the supplementary aids and services necessary to provide that satisfactory progress.

The Supreme Court emphasized the importance of compliance with IDEA's procedures, which include the LRE requirement. The Supreme Court rejected the argument that such provisions governing the IEPs required components "impose only procedural requirements – a checklist of items the IEP must address – not a substantive standard enforceable in court." *Endrew F.*, *Id.* at 1000. As the Supreme Court explained, the "procedures are there for a reason." They provide insight into

what it means to meet the unique needs of a child with a disability. *Id.* And as the regulations set forth, the unique needs of a child with a disability must be met in the child's LRE.

On December 7, 2017, the U.S. Department of Education released a helpful resource for parents, advocates and attorneys in its Questions and Answers (Q&A) on *Endrew F. v. Douglas County School District RE-1*, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-endrewcase-12-07-2017.pdf (last viewed Dec.14, 2018). As the Q&A acknowledged, the Court's clarification of a school's substantive obligation under the IDEA, "reinforced the requirement that 'every child should have the chance to meet challenging objectives.'" (Q&A No. 3). The use of the word "reinforced" by the Department demonstrates that the substantive standard clarified by the Court in *Endrew F.* is one schools should have been providing all along to every child with a disability. The guidance also makes clear that placement decisions must be "individualized" and "[t]here is no "one-size-fits-all" approach to educating children with disabilities." (Q&A No. 17).

C. LRE caselaw has evolved using the *Daniel R.R.* Standard

The legal standard to be used in determining the least restrictive environment (LRE) for a student is question of first impression for this Court. This Court addressed LRE in *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 989 (1st

Cir. 1990), but that case involved parents who sought a more restrictive setting, namely a residential private school for students with disabilities, for their child with learning disabilities; this Court ruled that the district's program offered FAPE in the LRE. In this case, in contrast, the parents seek full inclusion for their student in a regular high school education program.

The majority of circuits that have considered the issue use the test first set out by the Fifth Circuit in *Daniel R.R.*, 874 F.2d at 1045, to determine whether inclusive placements for students with disabilities are required. *See, e.g.,* W*alczak v. Fla. Union Free Sch. Dist.,* 142 F.3d 119, 132 (2d Cir. 1998); *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1403 (9th Cir. 1994); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1213-14 (3d Cir. 1993); *Greer*, 950 F.2d at 695; *Girty v. Sch. Dist.*, 163 F. Supp. 2d 527 (W.D. Pa. 2001), *aff'd*, 60 F. App'x 889 (3d Cir. 2002)**.**

The Fifth Circuit Court, in a case of first impression, identified the IDEA's "strong preference for mainstreaming" and articulated a test for determining the appropriateness of a student's placement in regular education classes.[5]

[5] The Court in *Daniel R.R.*, 874 F.2d 1036*,* described a tension that exists when balancing the mainstreaming requirements of the Act and the requirement that an educational program be individualized. *Id.* at 1044. That tension arises during the determination of the student's placement in the LRE. The 1997 amendments to the IDEA rectified this tension, largely by clarifying the role of supplementary aids and services in assisting in the implementation of a student's IEP in regular education classrooms and the obligation of school districts to make proper use of such aids and services.

> First we ask whether education in the regular classroom with the use of supplementary aids and services, can be achieved satisfactorily for a given child. If it cannot and the school intends…to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate."[6]

Id. at 1048. As the Third Circuit noted, "this two-part test, which closely tracks the language of § 1412(5)(B), is faithful to IDEA's directive that children with disabilities be educated with nondisabled children 'to the maximum extent appropriate,' 20 U.S.C. § 1412(5)(B), and to the Act's requirement that schools provide individualized programs to account for each child's specific needs." *Oberti*, 995 F.2d at 1215.

The Third Circuit's *Oberti* case is the bellwether for explaining *how* supplementary services allow a child with Down syndrome greater structural support in order to access the general education curriculum. *See Oberti*, 995 F.2d 1204. As *Oberti* explains, supports for inclusion of a child with disabilities to access the general education classroom and curriculum requires teacher training, and supports like resource room or itinerant teaching—not removal to a separate class on a separate alternative curriculum, as the District's IEP proposed in the instant case. *Id.* at 1212.

[6] *Id* at 1048. Significantly, the court reasoned that academic achievement is not the sole determinant of mainstreaming and access to regular education cannot be denied simply because the progress of a student with a disability will not be equal to that of a nondisabled student.

Rafael Oberti, like C.D., had an intellectual disability. Unlike C.D., Rafael's behavior was significantly disruptive. Rafael's IEP team recommended a "segregated special education class" which did not exist in his current elementary school; therefore, like the District proposed to do with C.D., the school required Rafael to travel to a different school. *Id.* Like C.D.'s parents, the *Oberti* parents objected to a segregated program and requested an inclusive program. *Id.*

When the school said Rafael could not "keep up," or that he was on a different learning track, his parents responded with the following suggestions to keep him in general education and live out the least restrictive mandate of the IDEA such as modifying his curriculum; modifying only Rafael's program so that he would perform a similar activity or exercise; removing Rafael from the classroom to receive some special instruction or services in a resource room; and parallel instruction. *Id.* at 1211.

The district court in *Oberti* found that the school did not properly consider "an itinerant teacher trained in aiding students with mental retardation," "modification of the regular curriculum to accommodate Rafael," and "special education training and consultation for the regular teacher." *Id.* at 1212 (citing *Oberti v. Bd. of Educ. of Clementon Sch. Dist.*, 801 F. Supp. 1392, 1397 (D.N.J. 1992)). The Court of Appeals agreed, finding the "continuum" is not an "all or nothing educational system." *Id.* at 1218. The Third Circuit also affirmed the proposition that the school

"must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction." *Id.* at 1216. Finally, the Court of Appeals rejected the student's need for a modified curriculum as a basis for exclusion. *Id.* at 1222. IDEA contemplates that children with disabilities may lag behind their peers and need modifications to the general education curriculum; for this reason, IDEA provides education for those students who do not obtain a regular diploma earlier through the school year in which they turn 21. 20 U.S.C. § 1412.

Oberti relied on an earlier case involving Christy Greer, a ten-year-old child with Down syndrome, *Greer*, 950 F.2d at 690. The school system "proposed placing Christy in a self-contained special education class.... The self-contained class was located at Southeast Elementary School, which also had classes for non-handicapped children." *Id.* at 691.

In *Greer*, the Eleventh Circuit simply applied the language of IDEA regulations to conclude that resource room and itinerant instruction had never been attempted:

> Thus, before the school district may conclude that a handicapped child should be educated outside the regular classroom, it must consider whether supplemental aids and services would permit satisfactory education in the regular classroom. **The school district must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction, for which it is obligated under the Act and the regulations promulgated thereunder to make provision.** Only when the handicapped child's education may not be achieved satisfactorily, even with one or more of these

> supplemental aids and services, may the school board consider placing the child outside of the regular classroom.

Id. at 696 (emphasis added).

In these cases, the courts reasoned that the one-on-one instruction provided in self-contained classrooms also could be provided through "resource rooms" or through "itinerant instruction," which are less restrictive environments for these children, because again, as both courts explained, by law, the use of "resource rooms" or itinerant instruction" are supplements to general education. *See also H.L. v. Downingtown Area Sch. Dist., 624 F. App'* x, 64, 68 (3rd Cir. 2015); *Girty*, 163 F. Supp. 2d at 536 (in a case involving a sixth grade child who could not yet spell his own name, "the relevant focus is whether Spike can progress on his IEP goals in a regular education classroom with supplementary aids and services, not whether he can progress at a level near to that of his nondisabled peers.").

These cases make clear that schools cannot require that students like C.D. must keep pace with the grade level curriculum as a prerequisite to participating in general education classes with her typically developing peers. [7]

[7] In a recent case from the Sixth Circuit, *L.H. v. Hamilton County Dep't of Ed.*, 900 F.3d 779 (6th Cir. 2018), involved a district's decision to remove a student with Down Syndrome from a general education placement (with pull-out 1:1 special education instruction) and place the student in a self-contained special education class at another school for most academic instruction. While the Sixth Circuit did not articulate the *Daniel R.R.* standard its holding is consistent with the Courts in the Third, Fifth, Ninth and Eleventh cited in Section II C. Affirming a district court decision the Sixth Circuit held that the segregated classroom was more restrictive

D. This Court Should Adopt the Daniel R.R. Standard for Determining the LRE

The line of cases cited above, in particular, *Daniel R.R., Holland, Greer,* and *Oberti*, forged a test and a set of three factors to be used to determine whether a school system has fulfilled its obligation to place children with disabilities in the mainstream of the regular education classroom to the maximum extent appropriate.

1. Factor 1: Sufficiency of Supplementary Aids and Services

The first factor to consider in applying this test is whether the school system has made attempts to accommodate the student in regular education and if it has, whether its efforts are sufficient. The Fifth Circuit said, "If the state has made no effort to make such accommodating steps, our inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education." *Daniel R.R.*, 874 F.2d at 1048. And, in making such accommodations, the school district "must consider the whole range of supplementary aids and services…" *Greer*, 950 F.2d at 696, *Oberti*, 995 F.2d at 1216; 20 U.S.C. §

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than necessary. The Court held that a placement which may be better for academic reasons may still not be appropriate because it is more restrictive. *Id.* at 789. The Sixth Circuit noted that a child need not master the regular education grade level curriculum to remain in a general education classroom; the standard is whether the child, with appropriate supplemental aids and services, can make progress toward the IEP's goals in the regular education setting. *Id.* at 793.

1401(33); 20 U.S.C. § 1412 (5)(A); 34 C.F.R. § 300.42.

The Sixth Circuit, the first circuit court to address the LRE requirement, has stated that the portability of services into the regular education classroom must be considered. *Roncker on behalf of Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983). *Roncker* stands for the proposition that the special education services rendered in self-contained settings are portable - services that can be brought to the child rather than removing the child from an integrated setting in order to receive the services. With the "portability of services" doctrine comes the necessary separation of services from the setting in which those services are delivered.

Here, the district court did not consider whether C.D. could be satisfactorily educated in the regular education classroom with supplementary aids and services but instead found the district's segregated program "more appropriate." ADD000086. Moreover, the district court did not address whether any of the modifications that C.D. requires could be provided in a general education setting.

2. Factor 2: Educational Benefit

The second factor to consider is whether the student can receive meaningful academic or non-academic educational benefit from the LRE. The Court in *Greer* noted:

> A determination by a school district that a handicapped child will make academic progress more quickly in a self-contained special education environment may not justify educating the child in that environment if the child would receive considerable non-academic

> benefit, such as language and role-modeling, from association his or her non-handicapped peers.

Greer, 950 F.2d at 697. As the Third Circuit noted, there are "unique benefits the child may obtain from integration in a regular education classroom which cannot be achieved in a segregated environment, i.e., the development of social and communication skills from interaction with nondisabled peers." *Oberti*, 995 F.2d at 1216. Further, the court in *Daniel R.R.* found that a child with disabilities need not perform at the same pace as non-disabled peers. The disparity in the academic progress is not sufficient reason to deny the child with disabilities access to regular education.

The district court did not consider either the academic or the non-academic benefits C.D. would experience from a regular education classroom. The district court did not address the record evidence that the student could learn satisfactorily in a regular evidence, namely, the student's history of satisfactory achievement in regular middle school classes. In the district court's earlier decision, the court noted first that C.D. " took all of her classes, with the exception of math, in an inclusive, general-education setting" in middle school, with "supplementary support in her general-education classes from two retired special-education teachers . . .who had been hired by her parents." *C.D. v. Natick Pub. Sch. Dist.*, No. 15-13617-FDS, 2017 U.S. Dist. LEXIS 113970, at *10 (D. Mass. July 21, 2017). The court concluded that "C.D. did very well at McAuliffe, was able to access the

general-education curriculum, and that her self-confidence improved significantly while she was there." *C.D.*, 2017 U.S. Dist. LEXIS 113970, at *10

3. Factor 3: Adverse Effects

The next factor to consider is whether there are any negative or adverse effects from C.D.'s placement in a regular high school, either to C.D. or to her classmates. In order to weigh against placement in regular education, this adverse effect needs to rise to a level so as to "significantly impair the education of other children in the class." *Oberti*, 995 F.2d at 1217. There is no evidence that C.D.'s presence would be a detriment to her classmates.

4. Applying the factors to C.D.'s case

Applying the factors of the federal courts' LRE standard to this case, it becomes clear that C.D. could have received an appropriate education in a regular education school at Natick High School with the use of supplementary aids and services; her IEP can be implemented satisfactorily; she will educational benefit (both academic and non-academic) from a regular education placement; and there is no significant adverse effect on her \or her classmates. It is also clear that Natick failed to consider fully supplementary aids and services as required by state and federal law.

Here, the district judge did not even address the standard set by the majority of circuits, and, therefore, did not discuss "whether education in the regular classroom with the use of supplementary aids and services, can be achieved satisfactorily for" C.D. He ignored the evidence of the Student's success in a mainstreamed program with supplemental supports and aids prior to her enrollment in Natick and did not address the initial Natick IEP. The district judge instead placed the burden on the student to demonstrate progress in a segregated setting before being considered for mainstreaming. The district judge stated, "had further offered to reconvene in October 2012 to determine if C.D.'s progress merited a move to a less restrictive environment in replacement or general education classes." ADD000086-87. The offer to reconvene does not remedy the failure to provide LRE in the initial IEP.

The district court ignored the statutory presumption in favor of educating students with disabilities in regular education classes. Instead, he adopted a rule that bars students with intellectual disabilities, including borderline intelligence, from general education classes in core subject areas; he ruled that the district's IEP was "more appropriate because of C.D.'s unique 'intellectual disability in conjunction with weaknesses in receptive and expressive language.'" ADD000086. Thus, the district court explicitly approved of the school district's practice of

categorically placing all students with intellectual disabilities in segregated classrooms.

Professor Mark Weber posits that IDEA creates an entitlement to services in the LRE:

> When a court asks if a school district has provided all the services that could make special classes or separate schooling unnecessary, it effectively creates a positive entitlement to services. This positive entitlement has two dimensions, one heightening the level of services to which a child is entitled under the special education law, the other lessening the degree of deference to local decision making that the law requires.

Mark Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. Davis J. Juv. L. & Pol'y 147, 148 (2001).

Simply put, States that accept IDEA funding do not face the question of *whether* a student should be educated in the least restrictive environment. Rather, Congress has required States and school districts to determine *how* a child can be educated in the LRE. Thus, school districts must, as a preliminary matter in every case, determine whether the child can be provided with an appropriate education in the regular education classroom with supplementary aids and services. *See Dep't of Educ. v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983).

These cases make clear that schools cannot require that students like C.D. must keep pace with the grade level curriculum as a prerequisite to participating in general education classes with her typically developing peers.

CONCLUSION

For the reasons stated above, *Amicus* respectfully requests that this Court reverse the district court's decision and hold that Natick failed to provide C.D. with a FAPE in the LRE.

Dated: December 17, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER

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 6,467 words.

Dated: December 17, 2018

/s/ Selene Almazan-Altobelli
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Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on December 17, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF

/s/ Selene Almazan-Altobelli
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