DOCKET NO. 15-12862

United States Court of Appeals

for the

Eleventh Circuit

S.M., a minor child, by and through her parents, T.M. and B.M.,

Plaintiffs-Appellants,

v.

GWINNETT COUNTY SCHOOL DISTRICT,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO: 1:14-cv-00247-MHC
(Honorable Mark Howard Cohen)

BRIEF OF AMICUS CURIAE COUNCIL FOR PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF PLAINTIFFS - APPELLANTS

ALICE K. NELSON, FL. BAR #211771
SOUTHERN LEGAL COUNSEL, INC.
1229 N.W. 12th Avenue
Gainesville, FL 32601
T: (352) 271-8890
Alice.nelson@southernlegal.org

DAWN R. SMITH, GA. BAR #655595
SMITH & LAKE, LLC.
One West Court Square, Suite410
Decatur, Georgia 30030
T: (404) 909-8300
dsmith@smithlakelaw.com

Counsel for Amicus Curiae

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UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
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No. 15-12862-A Caption: S.M. a minor child, by and through her parents, v. Gwinnett County School District

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Council of Parent Attorneys and Advocates who is Amicus Curiae, makes the following disclosure:

1. Amicus is not a publicly held corporation or other publicly held entity;

2. Amicus has no parent corporations;

3. Amicus does not have 10% or more of stock owned by a corporation.

/*s/ Alice K Nelson*
Alice K. Nelson
Fla. Bar No. 211771
Southern Legal Counsel, Inc.
1229 NW 12th Ave.
Gainesville, FL 32601
(352) 271-8890
alice.nelson@southernlegal.org

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INTERESTS OF THE AMICUS

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in forty-three states and the District of Columbia who are routinely involved in special education 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) (2006). Children with severe disabilities are among the most vulnerable in our society and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as the Individuals with Disabilities Educations Act (IDEA or Act) requires.[1] All parties to this litigation have consented to COPAA filing this Amicus Brief. COPAA submits this brief to address the particular importance of providing education to all children – including children with disabilities – in the least restrictive environment, so as to

[1] Pursuant to Fed. R. App. P. 29(5), counsel for COPAA, Alice Nelson and Dawn Smith, state: (1) They authored the brief in whole with comments from COPAA; and (2) no other person contributed money that was intended to fund the preparation or submission of the brief. FRAP 29(5).

promote independence and self-sufficiency for all children. In this Amicus Brief, COPAA places before the Court some of the extensive empirical research which demonstrates the efficacy of providing education to children with disabilities in the least restrictive environment, namely, the general education classroom.

STATEMENT OF THE ISSUES

Amicus adopt and incorporate by reference the Staement of Issues contained in the Appellants' opening brief filed on August 10, 2015.

SUMMARY OF ARGUMENT

Congress has made it an overall priority that a student with a disability is to be educated in the regular classroom to the maximum extent possible. Abundant quantitative and qualitative research demonstrates that students with disabilities can achieve considerable educational benefit from placement in general education classes with supplementary aids and services. Time spent with non-disabled peers enhances academic achievement for students with disabilities; *i.e.*, inclusion and achievement are positively correlated. Significantly, the record in this case confirms the research findings: Students with disabilities make greater progress in an inclusive class than in a segregated class.

ARGUMENT

I. In the Act's 1997 amendments and 2004 reauthorization, Congress made involvement and progress in the "general education" curriculum an overall priority and goal for students with disabilities.

The 2004 Reauthorization of the Act incorporated the following findings, thus renewing and strengthening the obligations of the least restrictive environment (LRE) requirements:

> 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). In 2004, therefore, Congress expressly reaffirmed that a student has the right of access to the general curriculum and classroom and opportunities to be educated alongside peers to the maximum extent

possible. Congress recognized that "special education can become a service for such children rather that a place where such children are sent." *Id.*[2]

Since the Act's 1997 amendments and subsequent 2004 Reauthorization, Congress made involvement and progress in the "general curriculum" an overall priority and goal for students with disabilities. *Id.* Congress also adopted a number of measures that further the goal of educating students with disabilities in general education classes to the maximum extent appropriate. For example, a student's general education teacher is a member of the team that develops the individual education plan (IEP) for a student with a disability and available to provide information on the student's participation in the regular education setting , 34 C.F.R. §300.324(b)(ii)(E)(3); 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); a student cannot be removed from general education classes based solely on a need for curriculum modification, 34 C.F.R. §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, 34 C.F.R. §300.320(a)(5). All of these

[2] Special education, therefore, is not a place where a child with a disability has to go in order to receive an education but services that can be provided in the regular education classroom. *See*, 20 U.S.C. §1400 (5)(c).

measures serve not only to reinforce the strong presumption of placement in general education classes, but also to highlight the Congressional intent that by educating students with disabilities in the regular education environment, school districts maintain high expectations for the educational achievements of those students.

II. Thirty Years of Educational Research Supports the Inclusion of Students with Disabilities in General Education Classes.

The Congressional commitment to placement of students with disabilities in general education classrooms reflected in these measures is a direct outgrowth of the "30 years research and experience" relied upon by the Congress in 2004. 20 U.S.C. §1400(c)(5). Abundant quantitative and qualitative research demonstrates that students with disabilities can achieve considerable educational benefit from placement in general education classes with supplementary aids and services. Time spent with non-disabled peers enhances academic achievement for students with disabilities; *i.e.*, inclusion and achievement are positively correlated. 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 2-year study period. The children enrolled in inclusive programs achieved statistically significant better results than the

children in the segregated programs. Fisher & Meyer, *Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs*," 27 Research & Practice for Persons with Severe Disabilities 165, 166, 169-73 (2002). 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.

Research also shows that students with disabilities who are educated in general education classes do better academically and socially than comparable students in noninclusive settings, regardless of the type of disability or grade level. R. Turnbull, A. Turnbull, M. Shank & S. Smith, *Exceptional Lives: Special Education in Today's Schools* 238 (2004). In 50 research studies since the 1980s comparing the academic performance of mainstreamed and segregated students with mild disabilities, the mean academic growth of the integrated group was in the 80th percentile, while the segregated students was in the 50th percentile. R. Weiner, *Impact on School*s (1985).

It is important to remember that all children – not only those with disabilities but also typical students – learn differently and benefit from the inclusion of students with disabilities. Including students with disabilities in regular education classrooms, as the law requires, makes it possible for educators to develop new methods of instruction that lead to improved outcomes for all students. *See, e.g.,* Cole, Waldron, and Majd, *Academic Progress of Students Across Inclusive and Traditional Settings. 42 Mental Retardation136-144* (2004). This study investigated the effects of inclusive programs for students without disabilities and students identified with mild disabilities in Indiana schools. Students' academic progress in reading and mathematics were compared using a curriculum-based measure, the Basic Academic Skills Sample (BASS). (The BASS is a group administered instrument designed to assess student achievement in the academic skill areas of mathematics and reading.) It was concluded that students with and without disabilities showed gains on BASS measured areas when placed in inclusive classrooms.

Significantly, the record in this case confirms the research findings: Students with disabilities make greater progress in an inclusive class than in a segregated class. There has also been research that supports the position of S.M. that the two part program offered by Gwinnett County in which S.M.

would receive instruction in a segregated special education classroom and then move to a general education setting, is ill advised and inappropriate for students like her. *See*, Vaughn, Moody, & Schumm, *Broken promises: Instruction in the Resource Room*, 64 Exceptional Children 211-255 (1998) (resource rooms provide primarily whole group reading instruction with little differentiated materials); Algozzine, Morsink & Algozzine, *What's Happening in Special Education Classrooms?*, 55 Exceptional Children 259-65 (1988)(few differences in instructional methods across self-contained classes for students with various disabilities); McDonnell, Thorson, McQuivey & Kiefer-O'Donnell, *Academic Engaged Time of Students With Low-Incidence Disabilities in General Education Classes*, 35Mental Retardation 18-26 (1997)(results showed no significant differences in academic responding and task management behaviors of students with and without disabilities enrolled in general education classes).

Recent research further bears out the efficacy of inclusive education for students with significant disabilities. Halle & Dymond *Inclusive Education: A Necessary Prerequisite to Accessing General Curriculum?* 33/34 Research and Practice for Persons with Severe Disabilities, 196-198 (2008/2009) (students with significant disabilities should learn alongside of same age peers as general education classrooms offer opportunities to

acquire academic skills through instruction by teachers with content expertise). *See also* Jackson, Ryndak & Wehmeyer *The Dynamic Relationship Between Context, Curriculum and Student Learning: A Case for Inclusive Education as a Research Based Practice*, 33/34, Research and Practice for Persons with Severe Disabilities, 175-195 (2008/2009). Students with significant disabilities can learn academic content, build social competence and develop friendships with peers. *See*, Coyne, Dalton & Smith, *Literacy by Design: A Universal Design for Learning Approach for Students with Significant Intellectual Disabilities*, 33 Remedial and Special Education, 162-172 (2012).

In sum, inclusive education is not only effective, but its effectiveness is improving with greater experience. This makes it even more important that courts enforce the law's mandate – education in the least restrictive environment – and to do so without hesitation or compromise.

III. A Free Appropriate Public Education

The IDEA requires that states receiving federal funds provide to all children with disabilities a "free appropriate public education" (FAPE) or "special education and related services that have been provided at public expense.…" 20 U.S.C. §1401(8). The program must comply with the procedures of the Act and be "reasonably calculated to enable the child to

receive educational benefits." *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1571 (11th Cir. 1991) (*citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist v. Rowley*, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 3051 (1982)). *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. Ga. 2008).

Pursuant to the IDEA, those educational services must be provided in the least restrictive environment (LRE). *Rowley*, 458 U.S. at 206-7, 102 S. Ct. at 3051 established a two-part test for determining whether a placement of a child with a disability in an education program complies with the requirements of the IDEA.

> First, has the State complied with the **procedures** set forth in the Act? And second, is the individualized education program developed through the Act's procedures calculated to enable the child to receive educational benefits?

(Emphasis added.) Thus, the Act provides both procedural safeguards and substantive requirements to be followed in the development of an IEP. In *Rowley*, the Court confirmed that Congress empowered federal courts to determine whether States have complied with the Act's procedural safeguards and substantive requirements, including whether the child's "individualized educational program developed through the [Act's] procedures [was] reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 206-07, 102 S.Ct. at 3050-3051 If, and

only if, a court determines that the school district has complied with the procedural safeguards and substantive requirements of the Act, *see supra*, determinations as to educational methodology are left to the school officials. *Id.*, at 208. *See JSK.*, at 1573.[3]

IV. Gwinnett County Failed to Make a Placement Recommendation in the Least Restrictive Environment

In addition to requiring the provision of a FAPE, the IDEA declares that children with disabilities shall be educated in the LRE. The federal regulations explicate the LRE 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. §300.552(c). School districts may not unnecessarily restrict a child's inclusion if that child's IEP can be implemented using supplementary aids and services in a regular education classroom in the student's neighborhood school. *Sacramento City Unified*

[3] The Ninth Circuit has held that procedural compliance is essential to ensuring that every eligible child receives FAPE, and those procedures which provide for meaningful parent participation are particularly important. *Amanda J. v. Clark Cty. Schl Dis.*, 267 F.3d 877, 891 (9th Cir. 2001). The reason is that "(t)he Act's procedural guarantees are not mere procedural hoops…Rather, 'the formality of the Act's procedures is itself a safeguard against arbitrary and erroneous decision making.'" *Mrs. S. v. Vashon Island Schl Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003) (*quoting Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)). Thus, a school district's non-compliance with the IDEA's procedural requirements can be a basis for holding that it failed to provide a student with FAPE.

Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994). In adopting the IDEA, 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.

The Court in *Rowley* acknowledged that the interpretation and requirements of the IDEA fall squarely within Fourteenth Amendment jurisprudence. *Rowley*, 458 U.S. at 200, 102 S.Ct. at 3048 (federal special education legislation designed to provide access to education consistent with equal protection). The IDEA was enacted pursuant to Congress' enforcement power under § 5 of the Fourteenth Amendment. *Dellmuth v. Muth*, 491 U.S. 223, 227, n.1, 109 S.Ct. 2397, 2400, n.1 (1989). While the IDEA does provide federal funds to assist the states, it is more than a simple funding statute; rather, the IDEA confers upon disabled students an enforceable substantive right to public education in participating States. *Honig v. Doe*, 484 U.S. 305, 310, 108 S.Ct. 592, 597 (1988).

Two landmark cases, *Mills v. Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972) (*PARC*), set forth the foundational

understanding of the Fourteenth Amendment principles on which the IDEA ultimately rests.[4] These foundational cases were specifically referenced in the legislative history of, and played a significant role in the passage of, the Education for All Handicapped Children Act of 1975. *Honig*, 484 U.S. at 309, 108 S.Ct. at 596 (citing S. REP. 94-168 (1975), 6, 1975 U.S.C.C.A.N. 1425, 1430).[5] These principles are so deeply embedded in present case law that many courts fail to make specific reference to them in reaching decisions over more recent controversies. The principles, however, bear restating as they provide the necessary context and foundation on which this case must be decided.

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[4] The *Mills* and *PARC* cases influenced the understanding of this area of law which led to the reform of the EHA into the Education for All Handicapped Children Act of 1975 (EAHCA), P.L. 94-142, 89 Stat. 773, 775, which was then reinforced by the passage of the newly titled Individuals with Disabilities Education Act, P.L.101-476, § 901(a)(1) and (3), 104 Stat. 1103, 1141, 1142.

[5] Congress stated its intent unambiguously:

> It is clear today that this 'right to education' is no longer in question. In 1954, the Supreme Court of the United States established the principle that all children be guaranteed equal educational opportunity. The Court stated: 'In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity . . . is a right which must be made available to all on equal terms*.' (*Brown v. Board of Education*).

First, "the right to an education, once given, is a fundamental right;[6] therefore, the defendants must show a compelling state interest in order to lawfully exclude [disabled] children." *PARC*, 343 F.Supp. at 283, n.8. Second, "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Mills*, 348 F.Supp. at 874 (*quoting Brown v. Board of Education*, 347 US. 483, 74 S.Ct. 686, 691 (1954)).

When Congress amended the IDEA in 1997, it continued to link its authority and intent to the Fourteenth Amendment noting its desire to "restate that the 'right to equal educational opportunities' is inherent in the equal protection clause of the 14th Amendment of the U.S. Constitution," and that the IDEA is founded in and secured by the 14th Amendment." S. Rep. No. 104-275, at 31 (1996). Clearly, the IDEA is a civil rights act, implementing the equal protection clause of the Fourteenth Amendment and it places an affirmative obligation upon the States to provide children with disabilities a free and appropriate education.[7]

Professor Mark Weber posits:

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[6] This is not to say that there is fundamental Constitutional right to education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38, 93 S.Ct. 1278, 1299(1973). However, once a child enters the school system, the equal access obligations of the IDEA apply. *See Rowley id.* at 200.

[7] *See* 143 Cong.Rec. 7925 (1997) (Sen.Harkin) and *id.* at 8187 (Sen. Lott).

Least restrictive environment obligations would appear to be a form of negative rights: A person is entitled to be free from intrusion or control to the greatest extent possible. In many contexts, courts have given the right that construction. For example, in *Olmstead v. L.C.*, 527 U.S. 581 (1999) the Supreme Court ruled that under the Americans with Disabilities Act, a person involuntarily confined on account of mental retardation has the right to placement in the least restrictive setting that would serve her needs, consistent with professional judgment concerning treatment and the legitimate cost concerns of the government. Similarly, in *Youngberg v. Romeo*, 457 U.S. 307 (1982) the Court construed due process to require that any confinement of persons with mental disabilities be in "reasonably nonrestrictive" conditions. *Id* at 324. The right is consistent with other constitutional rights, which are typically rights to be free from some form of intrusion, rather than rights to a specified good or service. (citation omitted)

In special education law, the situation is different. The Individuals with Disabilities Education Act (IDEA) recites the general obligation, "[t]o the maximum extent appropriate, children with disabilities...are [to be] educated with children who are not disabled . . . ." 20 U.S.C. §1412(a)(5). The statute goes on to provide:

Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [must] occur?] 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.*

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.

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

These protections emerged as statutory and regulatory obligations:

> 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*, at 181 n.4)

Greer v. Rome City School District, 950 F.2d 688, 695 (11th Cir. 1991) *withdrawn*, 956 F.2d 1025 (11th Cir. 1992), *reinstated in part*, 967 F.2d 470 (11th Cir. 1992). This right is independent of FAPE. *Id*. at 695-696. "Thus, the *Rowley* test assumes the Act's mainstreaming[8] requirement has been met." *Id*. at 696 (*quoting and adopting Daniel R.R.*, 874 F.2d at1048). The *Rowley* test presumes that such inclusion services with the use of supplementary aids and services are considered and rejected only when they "cannot" satisfactorily achieve the benefits of the program. *Greer*, 950 F.2d at 696. Thus, even if a child could learn at a higher rate if segregated, this alone does not defeat inclusion. *Id.* at 697.

[8] Mainstreaming means educating a handicapped child with non-handicapped peers. *Briggs v. Board of Educ*., 882 F.2d 688, 691 (2d Cir. 1989).

V. This Court Has Firmly and Directly Addressed the LRE Requirements Contained in the IDEA Beginning with *Greer*

Since *Greer*, other Courts have consistently reiterated the importance of the least restrictive environment provisions in the IDEA. *See J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 448-449 (9th Cir. 2010) *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., Id., Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993).

More restrictive placements are appropriate only if necessary for the student to receive benefit from the program. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996); *Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995)(*citing Rowley*, 458 U.S. at 188-89, 102 S.Ct at 3041-3042). These cases repeatedly hold that removal from the general education setting can occur only withen 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.

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. 34 C.F.R. §300.320(a)(4) (Emphasis added).

Additionally, in considering the continuum of alternative placements, the IEP team must "[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." 34 C.F.R. §300.115.

VI. The District Court's Conclusion that S.M. Could Not be Educated in Regular Education Classes is Inconsistent with *Greer* and its Progeny.

In *J.W.*, the Ninth Circuit noted that the "question whether to educate a handicapped child in the regular classroom or to place him in a special education environment is necessarily an individualized, fact specific inquiry. In each case, the apparent tension between the IDEA's clear preference for mainstreaming and its requirements that schools provide individualized programs tailored to the specific needs of each disabled child must be

balanced. 626 F.3d at 448 (*citing* 20 U.S.C. §§ 1401, 1414(a)(5); *see Oberti*, 995 F.2d at 1214*; Daniel R.R.*, 874 F.2d at 1044-45).[9]

In considering whether a school district proposed an appropriate placement for Student, the Eleventh Circuit has set forth three factors to evaluate the first part of the analysis: (1) comparing the educational benefits the student will receive in general versus special education; (2) considering the effect the student's presence will have on the education of other students in the relevant setting; and (3) considering the cost of supplemental aids and services necessary to achieve satisfactory education in the general education setting. *Id*, at 697.[10] Specifically, regarding the first factor, a court may consider a comparison of "the educational benefits that the handicapped child will receive in a regular classroom, supplemented by appropriate aids and services, with the benefits he or she will receive in a self-contained special education environment." *Id.* A determination by the school district that a handicapped child will make academic progress more quickly in a

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[9] "However, mainstreaming is the starting point and presumption. A placement in other than a regular class is a fall-back choice made only after it is determined that placement in regular classes will be unsuccessful." *Board of Educ. v. Holland,* 786 F. Supp. 874, 882 (E.D. Cal. 1992)

[10] One study found that the cost of educating students in segregated programs was double that for educating them in integrated programs. Piuma, Mary F., *Benefits and Costs of Integrating Students with Severe Disabilities into Public School Programs: A Study Summary of Money Well Spent.* San Francisco: San Francisco State University, 1989.

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 with his or her non-disabled peers. *Id*[11]. "The decision whether to mainstream a child must include an inquiry into whether the student will gain any educational benefit from regular education." *Daniel R.R.* 874 F.2d at 1047.

As argued above, Congress expressed a strong preference in favor of educating children with disabilities in an inclusive setting and requires States accepting IDEA funds to educate children in the LRE to the *maximum* extent appropriate.[12] 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 Department of Education v. Katherine D.*, 727 F.2d 809, 815 (9th Cir. 1983).

[11] This is consistent with S.M.'s expert's testimony in this regard. *See* Appellant's initial brief at 49-50 and record citations contained therein.
[12] Appropriate in this context means the least restrictive setting available that will provide the student with FAPE.

Conclusion

Truly inclusive education is effective and the law requires it. When a school district chooses, as Gwinnett County has chosen, to educate its non-disabled students in general education classrooms, nothing less can be considered inclusive, and the law requires that students with disabilities also have the opportunity to attend general education classes. Therefore, and for all of the foregoing reasons, Amicus respectfully request that this Court should reverse the district court's granting of motion for judgment on the record to Gwinnett County and grant S.M.'s motion for judgment on the record or motion for summary judgment, and remand this case for further proceedings.

Dated: August 17, 2015

Respectfully submitted,

/s/ Alice K Nelson
Alice K. Nelson
Fla. Bar No. 211771
Southern Legal Counsel, Inc.
1229 NW 12th Ave.
Gainesville, FL 32601
(352) 271-8890
alice.nelson@southernlegal.org

/s/ Dawn R.Smith
Dawn R.Smith
Ga. Bar No. 655595
Smith & Lake LLC
One West Court Square
Suite 410

Decatur, Georgia 30030
404-909-8300
dsmith@smithlakelaw.com

Counsel for Amicus Curiae

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Dated: August 17, 2015

Respectfully submitted,

/s/ Alice K. Nelson
Alice K. Nelson
Counsel for Amicus Curiae

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on the 17th day of August 2015, I caused this Brief to be filed and served through the Court's electronic docketing system (CM/ECF), to:

Torin D. Togut
140 Hanarry Drive
Lawrenceville, Georgia 30046
(678) 372-1829
torin@togutlaw.com

Victoria Sweeny
Melissa K. Stewart
Catherine T. Followill
Thompson, Sweeny, Kinsinger & Pereira P.C.
P.O. Drawer 1250
Lawrenceville, Georgia 30046

/s/ Alice K Nelson
Alice K. Nelson
Fla. Bar No. 211771
Southern Legal Counsel, Inc.
1229 NW 12th Ave.
Gainesville, FL 32601
(352) 271-8890
alice.nelson@southernlegal.org
Counsel for Amicus Curiae