17-5989, 18-5086

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

L. H., a Minor Student; G. H.; D. H.,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

HAMILTON COUNTY DEPARTMENT OF EDUCATION,

Defendant-Appellant-Cross-Appellee,

—and—

TENNESSEE DEPARTMENT OF EDUCATION,

Defendant.

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

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND THE NATIONAL DOWN SYNDROME SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-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
National Down Syndrome Society

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.

/s/ Judith A. Gran
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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, Amici states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than Amici and its members.

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 Curiae **The National Down Syndrome Society (NDSS)** is the leading human rights organization for all individuals with Down syndrome, advocating for the value, acceptance and inclusion of all people with Down syndrome and their families. Since its founding in 1979, NDSS has actively advocated for policies and programs to promote inclusion for students with Down syndrome, thereby allowing students with Down syndrome access to the general education curriculum. In accordance with the Individuals with Disabilities Education Act (IDEA), NDSS works vigorously to empower families, who are equal members of the IEP team, to have a voice in critical decisions such as educational placement. NDSS recognizes that individuals with Down syndrome are lifelong learners who learn and develop at their own rate and in their own way, and that students with Down syndrome are best served in the least restrictive environment. NDSS actively advocates for all students to be in their LRE, a right afforded under IDEA. Therefore, NDSS advocates for students with Down syndrome to have the maximum amount of time in the general education classroom with access not only to the

general education curriculum, but also to their typically developing peers which fosters the socialization instrumental in their lifelong success as independent adults. As with any student, those with Down syndrome have varied goals for their futures and individual expectations of their roles in the family, school and community. NDSS maintains that the highest quality education results in the greatest academic gains as well as the greatest level of independence, both of which are achieved through an education where students with Down syndrome have the greatest access to the general education curriculum and their general education peers in the LRE.

Amici 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, Amici submits this brief in support of plaintiff-appellant-cross appellee 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 as well as the parents' right to tuition reimbursement when the school district's placement does not meet the LRE requirement. Amici, therefore, respectfully urge affirmance of the district court's decision insofar as it held that the

school district violated IDEA's Least Restrictive Environment Requirement and reversal insofar as it held that the parents were not entitled to tuition reimbursement for the Montessori placement and the paraprofessional aide. Defendant-Appellants and Plaintiffs-Appellees-Cross Appellants have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Society has come a long way in its understanding of the capabilities of children with Down syndrome. Once consigned to institutions even from birth, other segregated settings, and early death,[2] today, students with Down syndrome can, and frequently do, graduate from high school, attend college, and live to their 60s and beyond. Facts About Down Syndrome, *available at* http://www.ndss.org/ Down-Syndrome/Down-Syndrome-Facts/ (last visited Jan. 26, 2018). But to do this, much is required: supplementary aids and services, trained teachers, paraprofessionals, committed parents, and, perhaps most importantly, *attitudinal* change. 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.42; *see also, e.g.*, R*oncker on behalf of Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983) (quashing idea of segregated facilities as academically superior for teaching children with disabilities as a fundamental disagreement with concept of mainstreaming children with disabilities).

Congress made clear that one of its overriding priorities was giving students with disabilities access to the general education curriculum and education in the

[2] In 1983, the life expectancy for individuals with Down Syndrome was 25.

regular classroom to the maximum extent possible. This requirement has been strengthened in subsequent reauthorizations of the IDEA. Thus, in the most 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 and itinerant instruction.

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 recently 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, 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

Thirteen 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 Jan. 26, 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 Jan. 26, 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) (Appx. 1) (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 Jan. 26, 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 Jan. 26, 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 Jan. 26, 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 Jan. 26, 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).

Particularly important here, is that research demonstrates the benefits of inclusion in the general education classroom especially for children who, like L.H., have Down syndrome. Sue Buckley et al., *A Comparison of Mainstream and Special School Education for Teenagers with Down Syndrome: Effects on Social and Academic Development*, 9 Down Syndrome Res. & Prac. (2006), *available at* https://www.down-syndrome.org/reports/295/reports-295.pdf (last visited Jan. 26,

2018). This study compared two groups of children with Down syndrome, one group educated with their non-disabled peers in general education classrooms and another group educated in special education classrooms containing only peers with disabilities. *Id.* The study found that by their teenage years, the children with Down syndrome included in general education with non-disabled peers were reading and writing more than 3.4 years ahead of children with Down syndrome educated in special education classrooms with only disabled peers. *Id.* at p. 57. Similarly, the expressive language of the included children was 2.6 years ahead of that of the non-included children. *Id.* at 56-57. And, by being educated alongside typically developing children, 78% of the included children had language intelligible to strangers, as compared to 56% of those educated in separate classrooms. *Id.*; *see also A Summary of the Research Evidence on Inclusive Education* (PDF Download Available), *available at* https://www.researchgate.net/ publication/312084483_ A_Summary_of_the_Research_Evidence_on_Inclusive_Education (last accessed Jan. 26, 2018) (summarizing extensive benefits, including academic, social and emotion, of including students with disabilities, particularly those with Down syndrome, in the general education classroom with non-disabled peers).

II. DISTRICT COURT CORRECTLY HELD THAT A STUDENT MAINTAINS THE RIGHT TO AN EDUCATION IN THE LEAST RESTRCTIVE ENVIRONMENT POSSIBLE FOLLOWING THE SUPREME COURT'S DECISION IN *ENDREW F.*

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." 20 U.S.C. § 1412(a)(5).

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 Ed.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

In adopting the IDEA,[3] 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 School District, 950 F.2d 688, 695 (11th Cir. 1991). This right is independent of FAPE. *Id*. at 695-696. "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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[3] IDEA 1997 *renewed and strengthened* the obligations attendant to the LRE requirements. The considerations of inclusion and attending class with age appropriate peers and access to the general curriculum were expressly reinforced in IDEA 1997:

> 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.

H. Rep. No. 105-95, reprinted in U.S. Cod. Cong. And Admin. News, 105th Congress, First Session, 97-98.

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).

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) (emphasis added).

Congress recognized that "**special education can become a *service* for such children rather that a *place* where such children are sent.**" 20 U.S.C. §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. 20 U.S.C. §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. 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). Additionally, unless the IEP of a child with a disability require***s*** some other

arrangement," the child must be educated in the school that he or she would attend if nondisabled. 34 C.F.R. §300.116(c).

B. *Endrew F.* Addressed the FAPE Standard for Education and Did Not Change the Law Regarding LRE

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 free appropriate public education (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 emphasized that the IEP must be "appropriately ambitious," and the objectives must be "challenging." *Id.* at 999-1000.

Significantly, *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.*, therefore, 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.

Further, 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 alike 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 Jan. 26, 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 not a "new" standard, but rather 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 determinations about what constitutes appropriate instruction and services for each child with a disability and the

placement in which that instruction and those services can be provided to the child" and "[t]here is no "one-size-fits-all" approach to educating children with disabilities." (Q&A No. 17).

C. *Roncker's* Requirement that Supplementary Aids and Services Be "Ported" into the Regular Education Classroom if Feasible Is Entirely Consistent with *Endrew F.*

This Court has held that, if the supplementary aids and services necessary for a student to obtain FAPE, can be brought into the regular education class, then the district is required to do so. *Roncker*, 700 F.2d at 1063. The *Roncker* court stated:

> In a case where the segregated facility is considered superior, the court should determine whether the services that make that placement superior could be feasibly provided in a non-segregated setting. If they can, placement in the segregated facility would be inappropriate under the Act.

Id. *Roncker* stands for the proposition that 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.

Endrew F. is also consistent with the long line of cases holding that school districts must provide inclusion programs for students with intellectual impairments. 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. *Oberti v. Board of Educ.*, 995 F.2d 1204

(3rd Cir. 1993). 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 school with a separate class on a separate alternative curriculum, as the District's IEP proposed in the instant case. *Id.* at 1212.

Rafael Oberti, like L.H., was an elementary school student with Down syndrome. Unlike L.H., Rafael's behavior was significantly disruptive. Rafael demonstrated "temper tantrums, crawling and hiding under furniture, and touching, hitting and spitting on other children. On several occasions Rafael struck at and hit the teacher and the teacher's aide." *Oberti*, 995 F.2d at 1208. 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 L.H., the school required Rafael to travel to a different school. *Id.* Like L.H.'s parents, the *Oberti* parents objected to the different school 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:*

> (1) modifying some of the curriculum to accommodate Rafael's different level of ability;
> (2) modifying only Rafael's program so that he would perform a similar activity or exercise to that performed by the whole

> class, but at a level appropriate to his ability;
> (3) "parallel instruction," i.e., having Rafael work separately within the classroom on an activity beneficial to him while the rest of the class worked on an activity that Rafael could not benefit from; and
> (4) removing Rafael from the classroom to receive some special instruction or services in a resource room, completely apart from the class.

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*, 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, that is, a class attended only by mentally handicapped children. 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:

> The Act itself mandates that a handicapped child be educated in the regular classroom unless such education cannot be achieved satisfactorily with the use of supplemental aids and services. 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) (citing *Oberti* and explaining that "[s]chool districts must make available a 'continuum of placements' to meet disabled children's needs, and, in seeking to accommodate the child in the regular classroom, they "'must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction.'"); *Girty v. Sch. Dist.*, 163 F. Supp. 2d 527, 536 (W.D. Pa. 2001) (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."); *see also* 34 C.F.R. §300.114(a)(2)(ii) (school is not allowed to remove child from regular education classes unless it establishes that *with supplementary aids and services* her education cannot be achieved satisfactorily). What is clear from this line of cases is that schools cannot require that students like L.H. must keep pace with the grade level curriculum.

III. THE DISTRICT COURT ERRED IN DENYING REIMBURSEMENT FOR BOTH PRIVATE SCHOOL TUITION AND A PARAPROFESSIONAL BECAUSE, HAVING HELD THAT THE SCHOOL DISRICT PROGRAM DID NOT MEET THE LRE REQUIREMENT, THE COURT SHOULD HAVE FOUND IT WAS EQUITABLE FOR THE PARENTS TO OBTAIN REIMBURSEMENT

FOR A PRIVATE SCHOOL WILLING TO PROVIDE AN INCLUSIVE PROGRAM WITH AN AIDE

The Supreme Court recognized that special education litigation, with its "ponderous" review process, puts parents in a terrible bind: "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Burlington Sch. Committee v. Dep't of Educ.*, 471 U.S. 359, 370 (1985). The Court recognized that "conscientious parents who have adequate means and are reasonably confident of their assessment normally would" choose to pay for the placement that they believed to be appropriate. The Court, therefore, held that the equitable relief available under IDEA incudes "retroactive reimbursement to parents as an available remedy in a proper case." *Id.*

COPAA is very concerned that the district court's decision would make it very difficult for parents to get any tuition reimbursement in inclusion cases, where the issue is least restrictive environment. COPAA knows that many parents find it very difficult to find private schools that serve non-disabled students willing to educate students with disabilities who need more than reasonable accommodations. Federal law bars discrimination against students that can have their needs met with reasonable accommodations. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq* (ADA).

A placement need not be ideal for a parent to get reimbursement as long as the placement is appropriate. Montessori programs have a long history of providing inclusive education to students with disabilities, and, therefore, are one of the few programs that may be willing to provide an inclusive education to students with disabilities. Jacqueline Cossentino, *Following All the Children: Early Intervention and Montessori* (2016) available at https://www.public-montessori.org/wp-content/uploads/2016/10/Following-All-the-Children-Early-Intervention-and-Montessori.pdf (last visited Jan. 28, 2018)(Montessori method constitutes the world's first inclusion model of support services); *See also*, Barbara Schramm, *Case Studies of Two Downs Syndrome Children Functioning in a Montessori Environment*, (1974) available at https://files.eric.ed.gov/fulltext/ED111120.pdf (last visited Jan. 28, 2018)(Research project, completed one year before the enactment of the IDEA, detailing progress of two girls with Down Syndrome in Montessori programs with typically developing students) .

CONCLUSION

An oft-used quotation among special educators is that "special education is not a *place*." *See* 20 U.S.C. §1400(c)(5). As explained above, the goal of inclusion is to bring educational services *to the child with a disability*, not removing the child to go to the service. *See e.g., Roncker*, 700 F. 2d at 1063 (explaining the strong congressional preference for providing services within the mainstream classroom,

not separately.); *Oberti*, 995 F.2d at 1206 (case of child with Down Syndrome which describes how Congress intended supportive services to be provided without segregating the disabled). Thus, allowing the District to remove L.H. to a special education classroom outside of his neighborhood school reverses more than forty years of hard-earned law requiring the education of students with disabilities in their LRE. Accordingly, Amici respectfully submit that the judgment be affirmed insofar as the court held that the school district violated the LRE requirement and be reversed insofar as the court denied tuition reimbursement to the parents.

Dated: January 29, 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 5,431words.

Dated: January 29, 2018

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CERTIFICATE OF SERVICE

I certify that on January 29, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below.

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