

No. 19-35134

**In the United States
Court of Appeals for the Ninth Circuit**

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BUTTE SCHOOL DISTRICT NO. 1,

Plaintiff-Appellee,

v.

C.S. and STUART McCARVEL, in his capacity as
originator of the C.S. due process complaint,

Defendants-Appellants.

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE TASH**

Pursuant to Fed. R. App. P. 29, **TASH** (*Amicus*) hereby respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of Defendants-Appellants C.S. and Stuart McCarvel, C.S.’s judicially appointed representative. As required by Fed R. App. P. 29(b), the proposed brief of *Amicus* accompanies this motion.

ARGUMENT

A. Interests of Proposed *Amicus Curiae*

TASH is a national non-profit organization founded in 1975 advocating for human rights and inclusion for people with significant disabilities and support needs. TASH works to advance effective education practices through advocacy, research, professional development, policy, and information and resources for parents, families and self-advocates. The practices TASH validates through research have been shown to improve outcomes for all people. Because of its activities TASH has significant knowledge about what works in public schools for persons with disabilities. In particular, the organization and its members have profound knowledge and experience in the outcomes of effective transition services for school age youth. TASH and its members have a deep understanding, gained through practice and rigorous research, of how to evaluate the needs, preferences and interests of transition-age youth, and how to provide individualized, outcome-driven employment services to those young people in community-integrated environments.

TASH has served as an amicus curiae in cases decided by the United States Supreme Court, *see, e.g., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 104 S. Ct. 3371 (1984) and several of the Courts of Appeals. In those cases, TASH sought to vindicate the rights of students with disabilities to receive an effective education, to be educated to the great extent possible with children who do not have disabilities and to attend their neighborhood schools. *See, e.g. John M. v. Bd. of Educ. of*

Evanston Twp. High Sch. Dist. 202, 502 F.3d 708 (7th Cir. 2007); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268 (10th Cir. 2000); *Barnett v. Fairfax Cty. Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991); *Timothy W. v. Rochester, Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989). In other cases, TASH has appeared as an amicus curiae to advocate that persons with intellectual disabilities not be subjected to the death penalty, and to advance the right of persons with disabilities to physical accessibility of city streets and sidewalks, see *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993).

Based upon its experience, TASH offers the Court a unique perspective and respectfully requests that it be granted permission to submit the attached *Amicus Curiae* brief. TASH requested consent to file this motion and the accompanying brief from all parties. Appellants consented and Appellee Butte School District No. 1 declined to consent.

B. Why an *Amicus Curiae* Brief from TASH Is Relevant and Desirable

This amicus brief addresses the violations by Butte School District No. 1 of the transition requirements of the Individuals with Disabilities Education Act and the standards for determining the appropriateness of special education students' programs set forth by the U.S. Supreme Court in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) in which the transition requirements are grounded. Failure to require that school districts meet those requirements may result in disabled students' exiting school without the skills and access to

employment needed to pursue a livelihood, become productive adults and contribute to their communities. It is important, therefore, for the courts to require that the Individualized Education Programs (IEPs) of students like C.S. contain meaningful goals and services based on personalized assessments that reflect the student's needs, abilities and interests. It is equally important that programs for transition-age youth reflect current knowledge of effective practices in customized employment and personalized assessment.

CONCLUSION

For the foregoing reasons, TASH respectfully requests that the Court grant their motion to file the attached brief *Amicus Curiae* in support of Plaintiffs-Appellants.

Respectfully submitted,

/s/ Catherine Merino Reisman

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Dated: September 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion for Leave to File Brief Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 10, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 10th day of September, 2019.

/s/ Catherine Merino Reisman

**Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Requirements**

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 589 words, excluding the parts exempted by Fed R. App. P. 27(a)(2)(B).
2. This motion complies with the typeface requirements and the type style requirements of Fed. R. App. P. 27(d)(2)(A) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in Times New Roman 14 point typeface.
3. This motion has been scanned for viruses and is virus free.

/s/ Catherine Merino Reisman
Catherine Merino Reisman

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Defendants-Appellants.

On appeal from the United States District Court
for the District of Montana
D.C. No. 2:14-cv-00060-SHE & 2:14-cv-00061-SHE
(Honorable Sam E. Haddon)

**BRIEF *AMICUS CURIAE* OF TASH
IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, TASH makes the following disclosure:

1. TASH is not a publicly held corporation or other publicly held entity;
2. TASH has no parent corporations; and
3. TASH does not have 10% or more of stock owned by a corporation.

Dated: September 10, 2019

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STATEMENT OF INTEREST OF THE AMICUS

TASH is a national non-profit organization founded in 1975 advocating for human rights and inclusion for people with significant disabilities and support needs. TASH works to advance effective education practices through advocacy, research, professional development, policy, and information and resources for parents, families and self-advocates. The practices TASH validates through research have been shown to improve outcomes for all people. Because of its activities TASH has significant knowledge about what works in public schools for persons with disabilities. In particular, the organization and its members have profound knowledge and experience in the outcomes of effective transition services for school age youth. TASH and its members have a deep understanding, gained through practice and rigorous research, of how to evaluate the needs, preferences and interests of transition-age youth, and how to provide individualized, outcome-driven employment services to those young people in community-integrated environments.

Amicus has moved for permission to file this brief, with the consent of counsel for Appellants. Counsel for Appellee has declined to consent.

STATEMENT REQUIRED BY FRAP 29(a)(4)(E)

This brief was not authored by any party's counsel in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or

submitting the brief. No person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

A. The Butte School District #1 Failed to Provide C.S. with Transition Services Designed to Provide Educational Benefit.

1. IDEA's Mandate that Students with Disabilities Receive Services Designed to Confer Educational Benefit.

The requirement that the educational program of a child with a disability confer “educational benefit” is the central substantive obligation imposed by IDEA. In *Board of Education of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176 (1982), the Supreme Court held that the educational program for a Deaf child satisfied the substantive requirements of IDEA (then the Education of the Handicapped Act). 458 U.S. at 209-10. The Court observed that according to the definitions contained in the Act, a “free appropriate public education” consisted of instruction specially designed to meet the unique needs of the child, supported by such services as are necessary to enable the child to “benefit” from instruction. Based on its analysis of the statute and the legislative history, the Court concluded that the “basic floor of opportunity” guaranteed by IDEA “consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” 458 U.S. at 200-01. The

Court did not define “educational benefit” other than as “personalized instruction and related services” calculated to meet the student’s educational needs. 458 U.S. at 209-10.

In *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), the Court elucidated the “educational benefit” requirement of IDEA in greater detail, holding that the provision of educational benefit requires courts and administrative hearing officers to determine whether the following requirements are met.

(a) First, school districts must provide an IEP that enables the child to make progress. “[T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Endrew F.*, 137 S.Ct. at 999.

(b) Second, the progress contemplated by the IEP must be appropriate in light of the child’s circumstances. 137 S. Ct. at 999. “The child’s circumstances” means, specifically, “the child’s present levels of achievement, disability, and potential for growth.” *Id.*, citing 20 U.S.C. §§1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv). The IEP team must carefully consider these three factors.

(c) An IEP must “meet the unique needs of the child.” That means that the IEP must adhere to the explicit requirements of IDEA that are designed to assure that IEPs are individualized to each child. 137 S. Ct. at

1000. According to those requirements, the school district must describe “how the child’s disability affects the child’s involvement and progress in the general education curriculum,” *id.*, *citing* §1414(d)(1)(A)(i)(I)(aa). It must set out “a statement of measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum,” along with a description of specialized instruction and services that the child will receive, 137 S. Ct. at 1000, *citing* §§1414(d)(1)(A)(i)(II), (IV). It must provide instruction and services designed to promote “progress in the general education curriculum.” 137 S. Ct. at 1000, *citing* §1414(d)(1)(A)(i)(IV)(bb).

(d) The child’s educational program “must be appropriately ambitious in light of his circumstances.” This means that “[e]very child should have the chance to meet challenging objectives.” 137 S. Ct. at 1000.

(e) Finally, educational authorities must be able to offer “a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* at 1002. If they cannot, then courts should not defer to their decisions, for “deference is based on the application of expertise and the exercise of judgment.” The obligation to assure that IEPs are reasonably calculated to enable a student with disabilities to make

progress in light of his circumstances is not to be undertaken lightly, because “[t]he Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child.” *Id.*

In addition to the elements of educational benefit analyzed in *Andrew F.*, IDEA sets forth additional explicit requirements. The educational agency must conduct periodic evaluations that assess the child in all areas of suspected disability; are “sufficiently comprehensive to identify all of the child’s special education and related service needs,” and provide “relevant information that directly assists” in determining the child’s educational needs. 20 U.S.C. §§ 1414(a)(1)(C)(i)(II), 1414(a)(2)(A), 1414(b)(2)(A)(ii), 1414(b)(3)(B); 34 C.F.R. §§300.304(c)(1)(ii—iv), (2), (4), (6), (7). If a student fails to make reasonable progress on the goals in his IEP, the school district must make changes in the goals or the services in the IEP to enable the student to make progress. 20 U.S.C. §§ 1414(c)(1)(B), 1414(d)(4); 34 C.F.R. § 300.324.

Each of these requirements are necessary components of a free, appropriate public education or FAPE. Moreover, to be “reasonably calculated” to offer educational benefit to a student with disabilities, the student’s IEP must demonstrate a clear relationship between the student’s needs, as identified in an IDEA-compliant evaluation, and the goals and services in the IEP. The assessments used to analyze the student’s disability, present levels of achievement

and potential for growth will identify the specific needs that must be addressed by IEP goals. The identified needs will drive the development of goals, objectives, accommodations and modifications, which in turn will drive the nature and quantity of educational services and related services.¹

2. IDEA's Mandate to Provide Appropriate Transition Services.

Transition services are part of FAPE for students with disabilities aged 16 or older. For students like C.S., the IEP must contain appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills, together with the transition services needed to assist the child in reaching those goals. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa), (bb). The transition requirements are

¹ Some states carry out their obligation to monitor school district's compliance with IDEA by analyzing the IEPs and evaluations of samples of special education students, using a method called "educational benefit review" that analyzes the relationship and alignment between the student's identified needs, present levels of achievement, goals, and services and how they result in progress, or lack thereof, over the course of a three-year cycle. The premise of this analysis is that evaluations, present levels, goals and services must have a direct relationship to one another. Reviewers analyze students' IEPs and evaluations to determine whether such a direct relationship exists. *See, e.g.*, K.A. Mearman, Educational Benefit Review Process: A Reflective Process to Examine the Quality of IEPs (State Education Resource Center of Connecticut, 2013), <https://ctserc.org/documents/news/2013-11-20-serc-edbenefit.pdf> (accessed on September 8, 2019).

even more specific in the definition of transition services contained in 20 U.S.C. § 1401(34):

The term “transition services” means a coordinated set of activities for a child with a disability that—

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

Thus, in addition to the requirements that apply to every special education student’s IEP, the IEP for a transition-age student must include goals that are based on age-appropriate transition assessments in the areas of training, employment, and for those like C.S. for whom development of skills in daily living is appropriate, independent living. The goals must take account of the student’s strengths, preferences and interests. The process must be “results-oriented,” that is, designed to secure results, which echoes the standard prescribed by the Supreme Court in *Endrew F.* that “the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Endrew F.*, 137 S.Ct. at 999.

3. The School District's Failure to Provide Transition Services to C.S. in Compliance with IDEA's Mandate.

FAPE cannot be reduced to the mere provision of a written plan, or to the provision of some services. Nor can it be reduced even to progress. A student may make progress in some areas of his education yet be denied FAPE. To receive FAPE, the student must receive the services he requires to make reasonable progress on goals that are designed to meet the needs identified in an evaluation that meets the substantive requirements of IDEA. *See D.S. v. Bayonne Board of Education*, 602 F.3d 553 (3rd Cir. 2010); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). As we shall show below, the transition provisions of C.S.'s IEPs did not meet those elementary requirements.

(i) The transition goals are not results-oriented.

C.S.'s transition goals do not specify an outcome, particularly in the area of employment. The goals in the IEP of October, 2010 are the following:

- (1) C.S. will determine which education or training program will be right for his needs within 3 months of graduation in 2013.
- (2) C.S.'s adult placement will also constitute his employment and will be in place 3 months after graduation in 2013.

(3) C.S.'s independent living skills will be self-determined with the assistance of the team. He will choose his adult services within 1 month of graduation in 2013.

ER1147. These are not measurable post-secondary goals for training, employment or independent living. Rather, they are statements that postpone the development of transition goals until after graduation, when C.S. was no longer able to work on transition-related skills in school.

A year later, the IEP OF October, 2011 contained the same transition goals.

ER1261. No indication appears in the IEP whether C.S. had made progress toward the goals in the previous year's IEP. In the IEP of October, 2012, the goals were slightly changed:

(1) C.S. will graduate from high school in May of 2013. C.S. will continue to work with family outreach and Stuart [C.S.'s foster parent] to continue to develop skills necessary for life beyond school.

(2) C.S. will work with vocrehab and family outreach to find a job within 6 months of graduation. C.S. will work with the school, Stuart, family outreach and vocrehab to pursue job opportunities and skill building.

(3) C.S. will be able to effectively cook, clean, count money and do his own laundry with support from school, Stuart, family outreach.

ER1330. Again, the goals postpone the work of transition until after C.S. had left school and transition services no longer were the responsibility of the school district. None of the goals requires any activity on the part of school district staff. They place all the responsibility for C.S.'s transition on C.S. himself, his foster parent and outside agencies.

Here, as in *Marple Newtown Sch. Dist. v. Rafael N.*, No. 07-0558, 2007 U.S. Dist. LEXIS 62494, at *32-33 (E.D. Pa. Aug. 23, 2007), C.S.'s IEP contained "generic goals that have remained static from year to year." Similarly, the IEPs did not take into account C.S.'s strengths or preferences. *Id.* at 32. *See also Va. S. v. Dep't. of Educ.*, No. 06-00128 JMS/LEK, 2007 U.S. Dist. LEXIS 1518, at *31 (D. Haw. Jan. 8, 2007) (accord).

(ii) The transition provisions in the IEPs do not describe C.S.'s present levels of achievement or his potential for growth.

No results of assessments of C.S.'s skills are included in the IEPs, and the statement of "goals," such as they are, contain no baseline information and no information from which it is possible to track his progress from year to year. Indeed, the record contains little evidence that any meaningful transition assessments were conducted. C.S.'s needs in the areas of further education, employment and independent living should have been assessed when he turned sixteen, but were not. This clearly violates IDEA, 20 U.S.C. §

1414(d)(1)(A)(i)(VIII), 34 C.F.R. § 300.320(b). *See Jefferson City Bd. of Educ. v. Lolita S.*, 977 F. Supp. 2d 1091, 1120 (N.D. Ala. 2013) (since IDEA requires that transition services begin when the student is 16, and transition services must be based on appropriate transition assessments, failure to provide an appropriate transition assessment when the student turns 16 violates IDEA). *See Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, No. 1:11-cv-329, 2014 U.S. Dist. LEXIS 17111, at *7 (S.D. Ohio Feb. 11, 2014); *see also S.G.W. v. Eugene Sch. Dist.*, No. 6:16-cv-01612-AA, 2017 U.S. Dist. LEXIS 37902, at *17-18 (D. Or. Mar. 16, 2017) (although IDEA does not mandate any particular transition assessment, a student interview, without more, is insufficient to satisfy the assessment requirement).

The “results of age-appropriate transition assessments” set forth in the October 2010 IEP are not results of assessments at all. Rather, they are general, nonspecific statements that C.S. will receive services. This section includes the uninformative statement that C.S. “educational needs will be met by the staff of Butte School District #1 ... includ[ing] life skills/job training”; that he is “expected to graduate with a high school diploma in 2013”; that he “will be eligible to participate in a school to work program that will help him develop work skills”; and he is “currently enrolled in a life skills class [which] will foster [C.S.’s] success in living independently.” ER1176, E1187. Nothing in these statements

describes the skills that C.S. is able to perform or his potential for further skill development. They are merely statements about his eligibility for or enrollment in a program. Not even the expectations for those programs are described.

The section on “results of age-appropriate transition assessments” was modified in October, 2011 to state that in the area of employment, C.S. “says he doesn't want to work or have any idea what he might like to do.” ER1261.

Although the IEP contains a full-page list of “resources for transition assessments,” the plan does not indicate which, if any, of these assessments might have been administered to C.S. ER1283.

In April, 2012, C.S.’s Power of Attorney for education matters, Shaun Petersen, wrote to Butte requesting a transition assessment by a competent vocational counselor with experience in customized employment to determine C.S.’s interests and abilities. Mr. Petersen also requested that C.S.’s transition goals include the opportunity to visit at least three potential work sites outside of school that are compatible with his interests by the end of the school year, and that C.S.’s IEP include measurable goals and benchmarks for the development of skills of daily living and employment. ER1295, ER1344. Mr. Petersen subsequently requested an Independent Educational Evaluation including a transition assessment, at public expense, which the school district failed either to grant or to

initiate a due process hearing to defend its own evaluation, as required by 34 CFR § 300.502(b)(2)(I). *See* ER1347.

Despite Mr. Petersen's requests, the transition portion of C.S.'s IEP of October, 2012, is little changed and once again fails to report the results of age-appropriate assessments. Rather, it states that he will "work with outside agencies such as family outreach and voc rehab in finding training"; that he will graduate by the end of the school year; that he will "begin looking for work after graduat[ing] high school" and "continue to work on job skills and job ideas with support from teachers, family outreach, voc rehab and Stuart"; and that he will "work on daily living skills such as cooking, cleaning, proper social skills and money management." ER1330. No information is provided about the skills he currently had or his potential to develop skills. The IEP states that C.S. will take the ASVAB test and continue to work on the results of the Brigance inventory of transition skills, but no results of such testing are contained in the record. ER1331.

(iii) The transition portions of C.S.'s IEP are not individualized.

The transition provisions of C.S.'s IEPs do not are not individualized nor do they address his unique needs, as *Andrew F.* requires. They do not contain specialized instruction that may enable C.S. to make progress. Instead, the transition services described in the IEPs are generic. C.S.'s IEPs contain no objectives for him to accomplish in transition services, let alone challenging ones,

and thus the IEP falls far short of the requirement of *Endrew F.* that students be provided the opportunity to meet challenging objectives.

(iv) School district authorities offered no cogent and responsive explanation for their decisions concerning C.S.’s services.

School district authorities must be able to offer “a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Endrew F.*, 137 S. Ct. at 1002. If they cannot, then courts should not defer to their decisions, for “deference is based on the application of expertise and the exercise of judgment.” The obligation to assure that IEPs are reasonably calculated to enable a student with disabilities to make progress in light of his circumstances is not to be undertaken lightly, because “[t]he Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. *Id.*

(v) The school district failed to monitor C.S.’s progress and made no effort to change C.S.’s goals or services when he failed to make progress.

IDEA, 34 C.F.R. 300.324(b), requires school districts to review each student’s IEP annually, determine whether the annual goals for the student are being achieved and revise the IEP as appropriate to address any lack of expected progress toward the goals. That review may require revision of the goals or provision of additional services or different services. The school district failed to

revise C.S.'s IEP, but its failure is deeper than that, for it did not report progress on the goals in his IEP in the first place. No progress reports nor any other information about C.S.'s progress on his transition goals appears in the record. The testimony of school district witnesses did not mention C.S.'s progress or lack thereof. *See* ER562, ER583-584, ER587-590, ER615-622. Like the student's IEPs in *Jefferson Cty. Bd. of Educ. v. Lolita S*, 977 F. Supp. 2d at 1120, C.S.'s transition goals remained essentially the same from year to year and did not increase in expectations or complexity, suggesting that he made little or no progress. *See also Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, 2014 U.S. Dist. LEXIS 17111, at *7, where the student engaged in the same transition activities year after year.

B. The Butte School District #1 Ignored the Effective Practices That Could Have Provided C.S. with Effective Employment Outcomes.

The school district's failure to fulfill its obligations under IDEA's transition requirements to evaluate C.S.'s needs, abilities, interests, preferences and potential for growth and to develop appropriate goals and services based on those requirements is far more than a mere procedural violation. The District's failure clearly caused serious, and possibly life-long harm to C.S., who according to the record is unemployed and spends his time in a day program, unengaged in meaningful activities. Most of his time is spent sleeping. ER 465. The school district's failure is all the more tragic since the knowledge of how to create effective transition services is well-established.

The hearing officer found that the post-secondary goals in C.S.'s IEP were "not goals for C.S. to achieve, but rather statements postponing the setting up of goals or identifying goals for outside adult providers to achieve." ER145. The district court criticized this finding as impermissible "hindsight," ER33, although it is quite clear that the hearing officer judged the goals not in hindsight, but for their appropriateness at the time the IEP was written. The district court seemed to treat the statement in C.S.'s IEPs that he was "unsure of what he wants to do when he finishes school" as absolving the school district of the obligation to conduct a meaningful transition assessment and develop outcome-driven goals. The court found it reasonable to postpone consideration of post-secondary outcomes until C.S. 77 had decided what he wanted to do. ER34. The district court erroneously treated C.S.'s uncertainty about his future as the end of the school district's obligations, rather than as its starting point.

Unquestionably, C.S. has complex support needs that make conventional "demand" employment challenging to secure. C.S. has autism, emotional support needs arising from severe abuse in his natural family, post-traumatic stress disorder, challenging behavior and learning disabilities, and all these conditions have affected him in school and will affect him in employment. ER248, ER 250, ER450. It is not enough to give him an interest inventory, ask him to express a career preference and wait for him to decide what he would like to do. Not only

C.S.'s school staff and potential service providers but C.S. himself need a deeper process of exploration to identify a match between his interests, preferences and abilities and a career path.

1. Personalized Assessment.

“Transition assessment is a cornerstone of the transition planning process.”

M.E. MORNINGSTAR AND B. CLAVENNA-DEANE, *YOUR COMPLETE GUIDE TO TRANSITION PLANNING AND SERVICES* (Baltimore: Brookes Publishing Co., 2018) at 91. It is a truism that successful transition requires working with students, families and school staff “to identify what a student does well, where he or she is interested in heading in the future, and what additional or ongoing supports are needed.” *Id.*

Fortunately, the knowledge and experience of how to conduct personalized exploration of the interests, preferences, skills and abilities of young persons with complex support needs is well-established in the field of transition services. Consistent with the requirement of IDEA and its interpretation by the Supreme Court in *Endrew F.*, a number of strategies and tools for personalized assessment are available as the first step toward meaningful transition goals.

Obviously, it does little good to conduct assessments if the results of those assessments are not used as the foundation on which to base transition goals and services. The district court credited the school district with having administered the

Interest Determination, Exploration and Assessment System (“IDEAS”), a career interest inventory available within the Montana Career Information System (“MCIS”) to C.S., ER32, and a career cluster inventory, but nothing in the record suggests that the information was used to plan C.S.’s services. As C.S.’s transition expert testified, the IDEAS and the career cluster data referenced by the district court was “clear information related to his career interests that could have been reported in the IEP, and could be used as the basis for identifying measurable post-secondary goals, and then the provision of transition services,” but was not reflected in any of C.S.’s IEPs. ER465.

Thus, the interest inventories the school district used would have been a useful first step, had they been used for their intended purpose. But had the school district desired to assess C.S.’s skills and abilities to develop transition goals that would lead to productive employment, it should have done much more.

Traditional vocational assessments, based on norm-referenced or criterion-referenced standardized assessments that allow comparison with other job seeker, have disadvantages for persons with complex disabilities such as C.S. for whom obtaining and keeping a job has historically been more challenging. *See M. Callahan, Using Alternatives to Traditional Vocational Assessment: The Why and How of Exploration Strategies such as Discovery* (Marc Gold Associates, n.d.), available at

<https://static1.squarespace.com/static/57fa78cd6a496306c83a2ca7/t/5cddbab47f948000018f3baf/1558035125146/Using+Alternatives+to+Traditional+Vocational+Assessment+5-2019.pdf> (accessed on September 9, 2019).

A commonly used strategy for assessing a job-seeker's functional skills is situational assessment, which involves taking the individual to an actual job site and seeing how well he performs real job tasks. This minimizes the artificiality of assessments and measures real job skills. However, the element of comparison that remains may still work to the disadvantage of a job-seeker with complex disabilities such as C.S. Callahan, *Using Alternatives*, *supra* at 2.

A highly effective practice for assessing the potential job skills of a person with complex support needs is the Discovery process. Rather than compare the skills of a person with disabilities with the skills in a job description, the Discovery process seeks to discern through observation, interviews and other evidence the tasks that the person can perform, as a prelude to identifying work at which the person is likely to be successful. Discovery strategies focus on three aspects of an individual's life that provide sufficient direction for success: a) conditions for success, b) interests toward certain aspects of the job market, and, c) potential contributions to employers. Callahan, *Using Alternatives*, *supra* at 3-4. The U.S. Department of Labor, Office of Disability Employment Policy (ODEP) has supported the Discovery process by funding the development of tools for

implementing the process, including a facilitator's manual, Self-Guided Discovery Facilitator's Guide: Helping People Discover their Own Path To Employment, <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2018/12/self-gd-facilitator-guide.pdf> (accessed on September 10, 2019). In Montana, Discovery is supported by the state's University Center for Excellence in Developmental Disabilities Education, Research and Service, the Rural Institute at the University of Montana, also supports the Discovery process in its work with transition-age youth. See <http://ruralinstitute.umt.edu/component/contact/contact/8-contacts/14>.

2. Customized Employment.

Customized employment is a form of supported employment in which job responsibilities are individually negotiated to fit the needs of individuals with disabilities as well as those of the employer. As is true of supported employment generally, customized employment includes the provision of reasonable accommodations and the support necessary for the individual to perform the functions of the job. See Federal Register, June 26, 2002, Vol. 67, No. 123 at 43154-43149. Customized employment is designed to be implemented together with the Discovery process; both approaches build on identification of the unique individual strengths of transition-aged youth and adults that traditional vocational assessments may not succeed in identifying. See WINTAC, The Essential Elements of Customized Employment for Universal Application (June 2017) at 5.

In 2014, customized employment was added to the definition of supported employment in the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. § 3101 *et seq.* WIOA defines customized employment as “competitive integrated employment, for an individual with a significant disability, that is –

- (i) Based on an individualized determination of the unique strengths, needs and interests of the individual with a significant disability;
- (ii) Designed to meet the specific abilities of the individual with a significant disability and the business needs of the employer; and
- (iii) Carried out through flexible strategies, such as –
 - (A) Job exploration by the individual; and
 - (B) Working with an employer to facilitate placement, including –
 - (1) Customizing a job description based on current employer needs or on previously unidentified and unmet employer needs;
 - (2) Developing a set of job duties, a work schedule and job arrangement, and specifics of supervision (including performance evaluation and review), and determining a job location;
 - (3) Using a professional representative chosen by the individual, or if elected self-representation, to work with an employer to facilitate placement; and
 - (4) Providing services and supports at the job location.

34 C.F.R. § 361.5 (11). Of note is that customized employment contemplates that an individual such as C.S. may choose a professional representative such as Mr.

McCarvel to negotiate accommodations and other job modifications needed to facilitate his placement on the job.

The Rehabilitation Services Administration of the U.S. Department of Education has funded the Workforce Innovation Technical Assistance Center (WINTAC) and the Youth Technical Assistance Center to provide technical assistance and training to state vocational rehabilitation agencies and their partners. C.S.'s team, which acknowledged its responsibility to bring the local vocational rehabilitation to the table, could have availed itself of those services. WINTAC, *The Essential Elements of Customized Employment for Universal Application* at 1. Other federal agencies have supported state and local initiatives in customized employment, *see* <https://www.dol.gov/odep/topics/CustomizedEmployment.htm> (accessed on September 10, 2019), including the Transition and Employment Projects at the University of Montana's Rural Institute. <http://ruralinstitute.umt.edu/transition/> (Accessed on September 10, 2019). The Institute provides training and technical assistance to schools throughout the state and could have provided such assistance to Butte School District #1.

Customized employment is considered a research-based practice. Demonstration projects designed to test the efficacy of the model over periods of five to seven years found that between 62% and 72% of transitioning youth achieved employment outcomes using customized employment strategies. Citron et

al., *A revolution in the employment process of individuals with disabilities: Customized employment as the catalyst for system change*, 28 JOURNAL OF VOCATIONAL REHABILITATION 169-179 (2008); Rogers, et al., *Customized employment: Changing what it means to be qualified in the workforce for transition-aged youth and young adults*, JOURNAL OF VOCATIONAL REHABILITATION 191-207 (2008). Two peer-reviewed literature reviews showed consistent positive results for customized employment interventions. Riesen et al., *Customized employment: A review of the literature*, 43 Vocational Rehabilitation 183-193 (2015); Wehman, et al., *Employment of adults with autism spectrum disorder: A retrospective review of a customized employment approach*, 53 Research in Developmental Disabilities 61-72 (2016).

Although the Butte School District made little effort to implement conventional transition services, even if it had done so and had argued seriously that C.S.'s disabilities were too severe for him to find employment, current practice, supported by federal and local initiatives in Montana, shows that effective approaches to transition exist from which C.S. could have benefitted.

CONCLUSION

The Butte School District #1 failed to provide an appropriate education to C.S. in the area of transition services. TASH therefore supports the request for reversal and further relief of Appellants C.S. and McCarvel.

Respectfully submitted,

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Dated: September 10, 2019

**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(A)(7)(C)**

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 5,126 words, excluding parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of the Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using 14-point Times New Roman font.

Dated this 10th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 10, 2019.

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/s/ Catherine Merino Reisman
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