No. 17-5989

In the United States Court of Appeals
For the Sixth Circuit

L.H., A MINOR STUDENT; G.H.; D.H.
PLAINTIFFS-APPELLEES,

v.

HAMILTON COUNTY DEPARTMENT OF EDUCATION,
DEFENDANT-APPELLEE,

-AND-

TENNESSEE DEPARTMENT OF EDUCATION,
DEFENDANT

On Appeal from the United States District Court
For Eastern District of Tennessee
Case No. 1:14-cv-126
(Curtis L. Collier, Judge)

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, KENTUCKY SCHOOL BOARDS ASSOCIATION, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, OHIO SCHOOL BOARDS ASSOCIATION, AND TENNESSEE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLANT AND REVERSAL OF DISTRICT COURT DECISION

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-5989 Case Name: L.H. v. Hamilton County DOE

Name of counsel: Francisco M. Negron, Jr.

Pursuant to 6th Cir. R. 26.1, National School Boards Association
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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CERTIFICATE OF SERVICE

I certify that on December 15, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Francisco M. Negron, Jr.
FRANCISCO M. NEGRON, JR.
Attorney for Amicus Curiae

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-5989 Case Name: L.H. v. Hamilton County DOE

Name of counsel: Francisco M. Negron, Jr.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Sixth Circuit
Case Number: 17-5989 Case Name: L.H. v. Hamilton County DOE

Name of counsel: Francisco M. Negron, Jr.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-5989 Case Name: L.H. v. Hamilton County DOE

Name of counsel: Francisco M. Negron, Jr.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-5989 Case Name: L.H. v. Hamilton County DOE

Name of counsel: Francisco M. Negron, Jr.

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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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s/Francisco M. Negron, Jr.
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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The National School Boards Association ("NSBA") is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members governing approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities. NSBA regularly represents its members' interests before Congress and federal and state courts, and has participated as *amicus curiae* in numerous cases involving issues under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*. (2017).

The Kentucky School Boards Association ("KSBA"), established in 1936, has 100 percent participation by the state's 173 local boards of education. Throughout its history, KSBA has sought to be the leading advocate and resource for public school boards to foster successful students and stronger communities. KSBA provides school board members, district administrators, school board attorneys, and other education stakeholders with support services, including board training and development; local board policies and procedures; legal consultation and resources; and advocacy at the state and federal levels.

The Michigan Association of School Boards ("MASB") is a voluntary, non-profit association of approximately 600 local and intermediate school district boards

of education throughout the state. Organized in 1949, MASB has worked to provide quality educational leadership services for Michigan boards of education and to advocate for student achievement and public education. Its goals are to advance the quality of public education in the state, promote high educational program standards, help school board members keep informed about education issues, represent the interest of boards of education, and promote public understanding about school boards and citizen involvement in schools.

The Ohio School Boards Association ("OSBA") is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 713 district boards and educational service center governing boards throughout the state are members of the OSBA, whose activities include extensive informational support, advocacy and consulting activities such as board development and training, legal information, labor relations representation, and policy service and analysis.

The Tennessee School Boards Association ("TSBA") is a nonprofit 501(c)(3) organization. TSBA's purpose, as stated in Article II of the TSBA Constitution and Bylaws, is to work for the general advancement and improvement of public education in Tennessee. TSBA is recognized as the organization and representative agency of Tennessee's school board members. Tenn. Code Ann. § 49-2-2001. Its

membership includes all 141 county, city and special school district boards of education throughout the state.

This case presents this Court its first opportunity since the U.S. Supreme Court decision in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), and its most significant opportunity since *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied,* 464 U.S. 864 (1983), to address the appropriate standards for determining whether an educational placement offers the least restrictive environment ("LRE") for a student with a disability and whether a change in location constitutes a change of placement. The Court's decision here will affect how school districts throughout the Sixth Circuit determine the least restrictive environment for students with disabilities without sacrificing educational programming that is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. To assist the Court in evaluating the issues before it, *Amici* present the following ideas, arguments, theories, insights, and additional information.

FRAP 29 (A)(2) and (C)(5) STATEMENT

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (1) no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money to fund the preparation or submission

of this brief; and (C) no person other than *Amici Curiae* and their counsel contributed money to fund the preparation or submission of this brief.

Both parties have consented to the submission of this brief.

ARGUMENT

I. A SCHOOL DISTRICT PROVIDES A FAPE IN THE LRE[1] WHEN IT OFFERS A PROGRAM REASONABLY CALCULATED TO ENABLE PROGRESS.

The IDEA is an "ambitious federal effort to promote the education of handicapped children." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982). It requires states to ensure that eligible children with disabilities receive a free appropriate public education ("FAPE"), 20 U.S.C. § 1412(a)(1)(A) (2017). FAPE is defined as:

> special education and related services that—
>
> (A) Have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) Meet the standards of the State educational agency;
>
> (C) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and

[1] Because the district court analyzed the dispute over the recommendation to move L.H. to a comprehensive development classroom as an LRE issue, *Amici* present the Court with this discussion on the importance of revisiting the LRE analysis established in *Roncker* in light of *Endrew F*. and *Deal*, something the district court failed to do. *Amici* do not intend by this discussion to suggest that the issue should be properly viewed as one related to mainstreaming as opposed to a dispute over methodology.

> (D) Are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. § 1401(9).

"Special education" is "specially designed instruction . . . to meet the unique needs of a student with a disability," and "related services" are the support services required to assist a child to benefit from that instruction. *Id*. § 1401(26), (29). States must provide each disabled child with special education and related services "in conformity with the [child's] individualized education program" ("IEP"). *Id*. § 1401(9)(D).

As "the centerpiece of the statute's education delivery system for disabled children," *Honig v. Doe*, 484 U.S. 305, 311 (1988), the IEP is a thorough, detailed written program, prepared by the child's IEP team, that discusses the child's unique needs and circumstances and sets forth how the school will provide a FAPE to the child, including the placement where the child will receive special education and related services. 20 U.S.C. §§ 1401(9), (29), 1414(d)(1)(A) (2017).

In *Rowley*, the Supreme Court developed a two-prong test to determine whether school districts have provided a FAPE:

> 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 reasonably calculated to enable the child to receive educational benefits?* If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

458 U.S. at 206-207 (emphasis added).

More than a decade ago, this Court interpreted *Rowley*'s substantive requirement, concluding that an IEP must confer "meaningful" educational benefit gauged in relation to the potential of the child at issue. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004). More recently, the U.S. Supreme Court in *Endrew F.* revisited and clarified *Rowley*'s second prong. The Court rejected the notion that an IEP need not offer any particular level of benefit so long as it was "reasonably calculated" to provide *some* benefit, as opposed to none. 137 S. Ct. at 997-98. Rather, to meet their substantive obligation under the IDEA, school districts must offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id*. at 999.

Further, the progress contemplated by the IDEA focuses on meeting the unique needs of a child with a disability:

> When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum. . . . If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be *appropriately ambitious in light of his circumstances*, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but *every child should have the chance to meet challenging objectives*.

Id. at 1000 (emphasis added). *See also* U.S. Department of Education, *Questions and Answers on the U.S. Supreme Court Case Decision Endrew F. v. Douglas*

County School District RE-1, at 6 (Dec. 7, 2017) ("ED *Endrew F.* Q & A"), available at https://www2.ed.gov/policy/speced/guid/idea /memosdcltrs/qa-endrewcase-12-07-2017.pdf (noting IEP process requires individualized decision-making involving consideration of child's present levels of achievement, disability and potential for growth).

Requiring IEPs to be designed to enable the child to meet challenging objectives reflects the desired goal of preparing children with disabilities for future education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A) (2017). Notably, the U.S. Supreme Court stated:

> [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. [citation omitted]. This reflects the broad purpose of the IDEA, an "ambitious" piece of legislation enacted "in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" *Rowley*, 458 U.S. at 179 (quoting H.R. Rep. No. 94-332, p. 2 (1975)). *A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act*.

137 S. Ct. at 1001 (emphasis added).

While the IDEA's FAPE requirement addresses the substance of educational services for students with disabilities, the statute also requires schools to educate such students alongside students without disabilities, or in the LRE, to the maximum extent appropriate. Specifically, the IDEA requires:

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational 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)(A) (2017); 34 C.F.R. § 300.114 (2017) (emphasis added).

This LRE requirement creates a "natural tension" within the IDEA. *See Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995). In developing IEPs, educators now must balance the *Endrew F.* FAPE obligation emphasizing progress, with the IDEA's LRE mandate, commonly referred to as "mainstreaming." IDEA's LRE requirement, however, is not an "inflexible federal mandate." *Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998); *accord Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) (the modifier "appropriate" limits IDEA's mainstreaming mandate). Indeed, this Court in *Roncker* emphasized that the IDEA does not require mainstreaming in every case; rather, the proper inquiry is whether the proposed placement is appropriate. 700 F.3d at 1063.

While the IDEA expresses a preference for mainstreaming, it only does so to the extent that mainstreaming does not prevent a child with a disability from receiving educational benefit. *Hartmann*, 118 F.3d at 1005 n.6. When the nature or severity of the student's disability is such that education in regular classes with the

use of supplementary aids and services cannot be achieved satisfactorily, mainstreaming is inappropriate. *Id.* at 1004. In those situations, educators who believe instruction in the regular classroom cannot meet the unique needs of the student may appropriately recommend moving the child to a special education environment where the student can receive a meaningful education. Any other result would allow student location concerns to swallow educational concerns in their entirety, thereby subverting the IDEA's purpose.

In balancing public schools' obligation to provide an education that helps a child to progress toward appropriately ambitious goals with their obligation to educate students with disabilities in the LRE, courts routinely have tipped the scales in favor of ensuring that students with disabilities receive an appropriate education. *E.g., Poolaw,* 67 F.3d at 834-836 (recognizing IDEA's FAPE requirement "qualifies and limits" mainstreaming preference); *P. v Newington Bd. of Educ.*, 546 F.3d 111, 122 (2d Cir. 2008) (acknowledging importance of IDEA's LRE requirement, but recognizing that "presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education . . .."); *Pachl v. School Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11*, 453 F.3d 1064 (8th Cir. 2006) (mainstreaming requirement inapplicable where education in mainstream environment "cannot be achieved satisfactorily").

The Second Circuit in *T.M. ex rel A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 162 (2d Cir. 2014), explained the relationship between the FAPE requirement and the LRE preference:

> [T]he LRE requirement is not absolute. It does not require a school district to place a student in the single least restrictive environment in which he is capable of any satisfactory learning. *M.W.*, 725 F.3d at 145. Although the IDEA strongly prefers placing children in their least restrictive environment, "the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students." *Newington*, 546 F.3d at 119 (quoting *Briggs v. Board of Educ.*, 882 F.2d 688, 692 (2d Cir. 1989)). The school must aim to minimize the restrictiveness of the student's environment while also considering the educational benefits available in that environment, "seek[ing] an *optimal* result across the two requirements."

Recognizing that the regular education environment may not be the appropriate placement for a student with a disability, the IDEA requires public schools to make available a continuum of placement options to meet the unique needs of each student with a disability. This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and must make provision for supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with the regular class placement. 34 C.F.R. § 300.115 (2017). Despite the IDEA's preference for mainstreaming, the IDEA also clearly contemplates that some students with disabilities require educational services in settings other than the regular education environment to benefit from their education and make progress on appropriately

ambitious goals. The U.S. Department of Education recently reiterated this individualized determination:

> . . .it is essential to make individualized determinations about what constitutes appropriate instruction and services . . .and the placement in which that instruction and those services can be provided. . . . There is no "one-size-fits-all" approach to educating children with disabilities. Rather placement decisions must be individualized and made consistent with a child's IEP. . . .[P]lacement in regular classes may not be the least restrictive placement for every child with a disability.

ED *Endrew F*. Q & A at 8.

This Court adopted such an educational benefit analysis in *Roncker*:

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the act. Framing the issue in this manner accords the proper respect for the strong preference and favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children (citation omitted).

700 F.2d at 1063.

The above factors reflect the many considerations educators must balance when developing or modifying a student's IEP to meet the child's unique needs. For each child served under the IDEA, educators must decide how one setting will

benefit the child academically, socially, and behaviorally; how the classroom teacher and fellow students will be affected by the child receiving services; and the costs, e.g., for employing a one-on-one aide for the child in the less restrictive setting rather than placing the child in a classroom with students with disabilities where he or she can receive more specialized instruction.

The importance of this educational benefit analysis has been heightened by this Court's adoption in *Deal v. Hamilton Cnty. Bd. of Educ*., 392 F.3d 840 (6th Cir. 2004), of the meaningful benefit standard to evaluate an IEP's provision of FAPE and the Supreme Court's emphasis on appropriate progress in *Endrew F*. Although the non-academic benefits of mainstreaming are "very important," the IDEA is primarily concerned with the long-term educational welfare of disabled students. *Poolaw*, 67 F.3d at 836. If a student is not benefitting from the general educational classroom, his IEP may not be reasonably calculated to enable the student to make "progress appropriate in light of his circumstances." *Endrew F.*, 137 S. Ct. at 999. The U.S. Department of Education recently explained what "reasonably calculated" means:

> . . .[S]chool personnel will make decisions that are informed by their own expertise, the progress of the child, the child's potential for growth and the views of the child's parents. IEP Team members should consider how special education and related services, if any, have been provided to the child in the past, including the effectiveness of specific instructional strategies and supports and services with the student. . . the child's previous rate of academic growth, whether the child is on track to achieve or exceed grade-level proficiency, any behaviors

> interfering with the child's progress, and additional information and input provided by the child's parents.

ED *Endrew F.* Q & A, at 5. These are exactly the considerations that lead the Hamilton County Department of Education to recommend moving L.H. to part-time placement in a comprehensive development classroom

Amici urge this Court to reaffirm the primacy of the educational benefit factor by recognizing that educators must now balance the "mainstreaming" goal encapsulated in the IDEA's LRE requirement with the Supreme Court's directive that schools develop programs reasonably calculated to enable a child to make progress – a nuanced and fact-specific process that involves a great deal of expertise and knowledge of the child. The level of educational benefit a given program will provide a child will be front-of-mind for IEP teams now in light of *Endrew F*. To allow the district court's rationale to stand would be to ignore the impact of both *Deal* and *Endrew F*. on LRE determinations.

II. COURTS SHOULD DEFER TO PLACEMENT DECISIONS OF SCHOOL PERSONNEL, BECAUSE THEY ARE INDIVIDUALIZED DETERMINATIONS REQUIRING EDUCATIONAL EXPERTISE.

A. LRE Determinations Are Complex Educational Decisions.

Special education determinations regarding FAPE, the methodologies with which it will be provided, and closely-related LRE issues are inherently complex.

As the First Circuit explained in *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990):

> Correctly understood, the correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities. To determine a particular child's place on this continuum, the desirability of mainstreaming must be weighed in concert with the act's mandate for educational improvement. Assaying an appropriate educational plan, therefore, requires a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum. Neither side is automatically entitled extra ballast.

Id. at 993 (citations omitted). School personnel charged with this complex task must ensure that educational benefit and LRE are "*optimally* accommodated under particular circumstances." *M.W. v New York Dep't of Educ.*, 725 F.3d 131, 143 (2d Cir. 2013).

In carrying out the difficult balancing act necessary to develop an appropriate special education program for a child, educators work with the child's parents and other experts who make up the child's IEP team. As an integral part of this process, the team determines the LRE by considering not only the means, methodology, and location in which a student receives academic instruction, but also whether and how a student may access the many other extracurricular activities and nonacademic programs and services offered by public school districts. 34 C.F.R. § 300.117 (2017).

With respect to academic instruction, "mainstreaming would be pointless if

the IDEA forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child was sitting next to a nonhandicapped student."[2] *Daniel R.R. v. State Bd. of Educ*., 874 F.2d 1036, 1049 (5th Cir. 1989). In *Dick-Friedman v. Board of Educ.,* 427 F. Supp. 2d 768 (E.D. Mich. 2006), the court balanced the social and emotional factors in reviewing LRE issues pertaining to a significantly cognitively impaired student. Deferring to school officials' testimony about the child's academic ability, the court placed considerable weight upon the unrebutted conclusion that the student would need to work in isolation in general education settings. *Id.* at 782-783. The court determined that the "feasibility" of the general education placement related more to the student's educational growth than whether it could be done at all, and concluded that a student with a disability in a general education setting "working on individual assignments with no class-wide instruction or participation" is "far from being 'fully included' in the general education curriculum." In the court's view, the child's current placement in a regular classroom did not support the notion that

[2] While some students with disabilities may reap benefits from language models provided by non-disabled peers in the regular classroom, *see, e.g., Oberti v. Board of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993), not all do. In assessing the benefits a child may obtain from a language-rich environment, primary consideration must be given to his unique circumstances.

"[the student's] disabilities do not require his removal from the regular education classroom for any amount of time." *Id*. at 782.

Although a student may be unable to participate full-time in academic general education courses, he nevertheless must be afforded an appropriate opportunity to participate in nonacademic activities with nondisabled peers. *See, e.g.*, *Liscio v. Woodland Hills Sch. Dist.*, 734 F. Supp. 689, 702 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1561 (3d Cir. 1990) (student's LRE was determined to be segregated school for academics, with "mainstreaming" into the general population for classes and activities such as "homeroom, physical education, music, library, and art"). This could include counseling services, athletics, transportation, health services, recreational activities, and school-sponsored clubs and special interest groups. 34 C.F.R. § 300.107(b) (2017). These opportunities may provide significant emotional and social benefits to students with disabilities, allow them to model behaviors exhibited by their non-disabled peers, and prevent their unnecessary segregation from the general student population.

Notably, 95% of children with qualifying disabilities receive some special education and related services in a regular classroom setting. U.S. Department of Education, National Center for Education Statistics (2016), *Digest of Education Statistics, 2015* (NCES 2016-014), Ch. 2 (*available at* https://nces.ed.gov/programs/digest/d15/ch_2.asp (showing over 80% of children

with disabilities spent 40% to 80+% of their time in a regular classroom in 2013 school year)). Each of these children has an IEP that may provide additional support such as pull-out and resource room services designed to help the child make progress on his individualized goals. As teachers and support professionals work with each child, they may recognize that a particular child is not making adequate progress, indicating a need for changes in methodology, level of support or type of resources provided to that student. These changes may require that a student be transferred to a different location to receive the modified services. Such decisions are part of the complex "alchemy of reasonable calculation" with which educational professionals must contend for each child with disabilities, and which is entitled to substantial deference by the courts. *See Roland M.*, 910 F.2d 983.

LRE determinations are also closely related to methodology issues, and at times may be virtually indistinguishable from them. Resolving these issues falls within the realm of the complex professional determinations inherent in IEP development and requires the IEP team to give primary attention to whether a placement is *appropriate*, not simply whether the least restrictive physically feasible placement may be safely and non-disruptively implemented. Thus, whether a student's placement in a particular physical setting is a mainstreaming question, a dispute over methodology or a combination of both is not a ministerial issue which can be resolved by application of a simple common law test, but rather is an

individualized educational determination requiring deference to the professional judgment of educators.

B. Complex Educational Decisions Should Not Be Second-Guessed by Courts Unless They Are Not Reasonably Calculated To Enable the Child To Make Progress in Light of His Circumstances.

In reviewing LRE determinations made by school personnel, federal courts consistently have examined them under the educational benefit prong of the *Rowley* analysis. *E.g., Dong v. Board of Educ.*, 197 F.3d 793, 802-803 (6th Cir. 1999), *Thomas v. Cincinnati Bd. of Educ*., 918 F.2d 618, 626-627 (6th Cir. 1990), *Dick-Friedman*, 427 F. Supp. 2d 768 (E.D. Mich. 2006). The Sixth Circuit applies the following three-factor test in assessing the feasibility of mainstreaming: (1) whether the student will benefit from inclusion; (2) whether such benefits would be outweighed by the benefits provided in a non-inclusive setting; and (3) whether the student is disruptive to the general education environment. *Roncker*, 700 F.2d at 1063.

This Court has yet to provide detailed guidance regarding the *Roncker* test's application, particularly in light of *Deal* and *Endrew F*. *See Thomas*, 918 F.2d at 627 (student's profound disabilities rendered the mainstreaming concept inapplicable); *McLaughlin v Holt Pub. Sch. Bd.*, 320 F.3d 663, 667-668, 670-672 (6th Cir. 2003) (in examining student's placement half-day in general education

kindergarten and half-day in segregated special education, court noted LRE analysis provides no mechanism to evaluate varying degrees of restrictiveness).

Other courts adopting the *Roncker* test have refined it by focusing on the professional expertise required to make an LRE determination. In *Hartmann*, the Fourth Circuit applied the *Roncker* "feasibility" factors to analyze issues relating to "mainstreaming" a child with profoundly limited academic abilities. When considering the feasibility of providing special education in the general education setting, the court focused not upon the *physical* feasibility of "pushing in" such services, as the lower court did here, but rather upon *educational* feasibility – the relative unlikelihood that the child would be able to make substantial academic gains or to otherwise benefit from the general education setting. 118 F.3d at 1001-1002. Ultimately, the Fourth Circuit supported the local education officials' determination that the student required "significant instruction outside of the regular education setting." *Id*. at 1002. In deferring to the judgment of the education officials, the court stated, "[a]bsent some statutory infraction, the task of education belongs to the educators who have been charged by society with that critical task." *Id.* at 1000.

Using a modified *de novo* standard of review, this Court has expressed a similar deference when analyzing LRE determinations under *Rowley*'s educational benefits prong:

> [W]e must keep in mind that the state and local agencies are deemed to possess expertise in education policy and practice. The focus of the

> Supreme Court [in *Rowley*, *supra*] and this court upon the presumed educational expertise of state and local agencies leads to the conclusion that *the amount of weight due depends upon whether such expertise is relevant to the decision-making process*.
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> * * *
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> More weight is due to an agency's determinations on matters for which educational expertise would be relevant.

Burilovich v. Board of Educ., 208 F.3d 560, 567 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000) (emphasis added).

Other courts have deferred to the educational expertise of local school officials when deciding LRE disputes. *E.g., Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), *cert. denied*, 502 U.S. 859 (1991) ("[w]hether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make."); *Poolaw*, 67 F.3d at 836 ("whether to educate a handicap child in the regular classroom or to place him in a special education environment is necessarily an individualized, fact specific inquiry. . ."); *Wilson v. Marana Unified Sch. Dist*., 735 F.2d 1178 (9th Cir. 1984) (deferring to local educational officials in making special education determinations, including those relating to student's LRE).

This approach to judicial review is consistent with the Supreme Court's admonition that courts should not "substitute their own notions of sound educational policy for those of the school authorities of which they review." *Rowley*, 458 U.S.

at 206. Quoting this language in *Endrew F.*, the Court reiterated the importance of judicial respect for "the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child." 137 S. Ct. at 1001. *Amici* urge this Court to afford such deference to the school officials here who have offered a "cogent and responsive explanation for their decisions that shows [them to be] reasonably calculated to enable the child to make progress in light of his circumstances." *Id.*

III. IMPOSING AUTOMATIC LIABILITY UNDER THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 FOR IDEA VIOLATIONS CONTRAVENES ESTABLISHED LAW AND HARMS SCHOOL DISTRICTS' ABILITY TO EDUCATE CHILDREN WITH DISABILITIES.

The district court's holding that a plaintiff seeking equitable remedies under the ADA and Section 504, as opposed to monetary damages, need not show discriminatory intent is contrary to statutory intent and inconsistent with established case law.

A. Section 504 and the ADA Require Proof of Bad Faith or Gross Misjudgment To Show Educational Decisions Are Discriminatory.

The IDEA's purpose is to "ensure that all children with disabilities have available to them a free appropriate public education…." 34 C.F.R. § 300.1 (2017). As an education statute, its detailed mandates ensure that schools provide students appropriate educational services. In contrast, Section 504 of the Rehabilitation Act

("Section 504") and Title II of the Americans with Disabilities Act ("ADA")("Title II") are anti-discrimination statutes. Section 504 states:

> No otherwise qualified individual with a disability . . ., shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance….

29 U.S.C. § 794(a) (2017).

Title II similarly provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (2017).

Recently, the Supreme Court differentiated claims rooted in Section 504/ADA from claims brought under the IDEA. In *Fry v. Napoleon Comm. Sch.*, 137 S. Ct. 743 (2017), the Court established a test for determining when a disability discrimination plaintiff must first exhaust administration remedies under the IDEA. In so doing, the Court provided important distinctions between claims brought under the two statutory regimens:

> [A] court should attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other. The IDEA, of course, protects only "children" . . . and concerns only their schooling. . . .[T]he statute's goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her "unique needs." By contrast, Title II of the ADA and § 504 of the Rehabilitation Act cover people with disabilities of all ages,

> and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs. In short, the IDEA guarantees individually tailored educational services, while Title II and §504 promise non-discriminatory access to public institutions.

Id. at 755-756 (citations omitted).

The notable difference in the statutory purposes of IDEA and Section 504/ADA underlies this Court's recognition in *Campbell v. Board of Educ. of Centerline Sch. Dist*., 58 Fed. Appx. 162 (6th Cir. 2003), that liability for disability discrimination under 504/ADA upon proof of an IDEA violation is not automatic, but instead requires a showing of bad faith or gross misjudgment. In *Campbell*, this Court examined the application of the elements of a Section 504 discrimination claim to the failure to provide FAPE under the IDEA:

> IDEA compels every public school system to furnish a "free appropriate public education" to each of its special needs students. *See* 20 U.S.C. §§ 1401(8), 1412(a)(1). However, "when reviewing the substance of academic decisions, courts 'should show great respect for the faculty's professional judgment.'" *Kaltenberger*, 162 F.3d at 436 [citations omitted]. "Courts must also give deference to professional academic judgments when evaluating the reasonable accommodation requirement [under Section 504]." *Kaltenberger*, 162 F.3d at 436.
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> [Plaintiffs] must ultimately prove that the defendant's failure to provide [the student] with a "free appropriate public education" was discriminatory. Surmounting that evidentiary hurdle requires that "either bad faith or gross misjudgment must be shown before a § 504

> violation can be made out, at least in the context of education of handicapped children."

Id. at 165-167 (citations omitted).

In *Campbell*, this Court cited *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), distinguishing between a violation of the IDEA's precursor (Education for All Handicapped Children Act or "EAHCA") and a violation of Section 504:

> The reference in the Rehabilitation Act to "discrimination" must require. . .something more than an incorrect evaluation, or a substantively faulty individualized education plan, in order for liability to exist. Experts often disagree on what the special needs of a handicapped child are, and the educational placement of such children is often necessarily an arguable matter. That a court may, after hearing evidence and argument, come to the conclusion that an incorrect evaluation has been made, and that a different placement must be required under EAHCA, is not necessarily the same thing as a holding that a handicapped child has been discriminated against. . . .
>
> . . . We think, rather, that *either bad faith or gross misjudgment should be shown before a § 504 violation can be made out, at least in the context of education of handicapped children.* . . .So long as the state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals, we cannot believe that Congress intended to create liability under § 504.

Id. at 1170-1171 (emphasis added).

As these cases demonstrate, Section 504 and the ADA require some showing of intentional discrimination to hold a public school district liable for damages or equitable relief. Without such a requirement, every good-faith IEP team decision with respect to educational services would be subject to a discrimination claim if the

parent disagreed with the decision, or even if the parent initially agreed, but later changed his or her mind.

B. Automatic Liability under Section 504 and the ADA Based on LRE Violations Has Significant Practical Implications for Schools.

To find that every IDEA disagreement that tips in a plaintiff's favor automatically violates Section 504 and the ADA impermissibly expands the scope and intent of those statutes. As applied, the lower court's ruling means that two plaintiffs pleading exactly the same case, but seeking different remedies, could obtain different outcomes on their Section 504 and ADA claims. The plaintiff seeking damages would need to show intentional discrimination, while the plaintiff seeking equitable relief would not.

Subjecting a school district acting in good faith to strict liability under Section 504 and the ADA simply because the plaintiff only seeks equitable relief for an alleged IDEA violation is clearly contrary to Congress' intent in enacting Section 504 and the ADA – to prohibit disability-based discrimination. As the Eighth Circuit recognized, "Experts often disagree on what the special needs of a [student with a disability] are, and the educational placement of such children is often necessarily an arguable matter." *Monahan*, 687 F.2d at 1170. Such disagreements cannot reasonably be said to involve the bad faith or gross misjudgment necessary to show intent to discriminate.

The decisions of education professionals acting in good faith are entitled to deference and protection from claims of alleged discrimination; to hold otherwise would undermine the IDEA's collaborative process. Strict liability under the ADA and Section 504 based on LRE violations would significantly reduce the incentive for families to work cooperatively with school districts to resolve IDEA disputes and would promote litigation in court as a viable option for parents to obtain the desired outcome on FAPE claims.[3] To avoid the tremendous burdens of litigation, school personnel would often be faced with the decision to capitulate to the parent's wishes – even if they did not believe the parent's wishes amounted to a FAPE – or face potential liability for "discrimination."

Litigating more FAPE disputes in federal court will hinder the ability of education professionals to meet the needs of each student by diverting money away from providing educational services into paying for legal proceedings. Even if parents do not seek damages under Section 504 or the ADA, expanded liability for equitable relief means teachers and administrators who make the well-intentioned decision to prioritize a student's educational growth over his or her classroom's location could be held strictly liable for disability discrimination, undermining the professional judgment of special educators.

[3] Parent attorneys already use potential Section 504 and ADA claims to leverage IDEA cases. Imposing strict liability for schools will increase such tactics.

This result could turn back the clock on student special education rights. The court's emphasis upon placing special education students in the regular classroom, with only secondary consideration of educational appropriateness, has the potential to return special education students to pre-IDEA days where they were "sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out'." *Rowley*, 458 U.S. 179. The only difference is that, under the district court's ruling, schools would need to spend considerable resources providing special education programs and services that give students little to no benefit. In short, this Court's affirmance of the district court would lead to results directly contrary to the purposes of the IDEA, the ADA, and Section 504—to open the benefits of public schools to students with disabilities.

CONCLUSION

Based on the foregoing, and the reasons explained in Appellant's Brief, *Amici* respectfully request that this Court reverse the decision below.

Respectfully submitted,

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December 15, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7), I certify this brief complies with the applicable type-volume limitation. According to the word count in Microsoft Word, there are 6497 words in this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties on the electronic filing receipt.

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