18-1794

# In the United States Court of Appeals
# For the First Circuit

C.D. by and through her parents and Next Friends
M.D. AND P.D.; M.D.; P.D.,
PLAINTIFFS-APPELLANTS,

v.

NATICK PUBLIC SCHOOL DISTRICT;
BUREAU OF SPECIAL EDUCATION APPEALS
DEFENDANTS-APPELLEES.

---

On Appeal from the United States District Court
For the District of Massachusetts

---

**Brief of *Amici Curiae***
**National School Boards Association and**
**Massachusetts Association of School Committees**
**In Support of Defendants-Appellees**

---


Francisco M. Negrón, Jr.*
Chief Legal Officer
National School Boards Association
1680 Duke Street, FL2
Alexandria, VA 22314
(703) 838-6722

Cristine M.D. Goldman
Colleen Shea
Colby S. Brunt
Stoneman, Chandler & Miller, LLP
99 High Street
Boston, MA 02110
(206) 462-6700

*Counsel of Record
Counsel for *Amici Curiae*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the National School Boards Association and Massachusetts Association of School Committees make the following disclosures as *amici curiae*:

1. No amicus is a publicly held corporation or other publicly held entity.
2. No amicus has a parent corporation;
3. No amicus has 10% or more of its stock owned by a corporation.

By: /s/Francisco M. Negrón, Jr.
Francisco M. Negrón, Jr.
Attorney for Amicus Curiae
National School Boards Association
Massachusetts Association of School Committees

## TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT

TABLE OF AUTHORITIES ........................................................................ ii

IDENTITIES AND INTEREST OF AMICI CURIAE ................................. 1

FRAP (a)(4)(E) STATEMENT..................................................................... 2

SUMMARY OF ARGUMENT ..................................................................... 3

ARGUMENT ............................................................................................... 4

I. *ENDREW F.* DID NOT EXPAND IDEA'S LEAST RESTRICTIVE ENVIRONMENT PREFERENCE NOR CHANGE THE PROCESS FOR IEP TEAM'S TO DETERMINE PLACEMENT ............................ 4

   A. Placement is a Complex Educational Decision Based on the Student's Current Performance, Potential for Growth, and Necessary Services . 9

   B. Assigning More Weight to the Least Restrictive Environment Preference Than to Academic and Functional Goals Would Disrupt IEP Team's Balancing of a Student's Unique Needs......................... 11

   C. 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 Her Circumstances .................... 17

II. THE IEP TRANSITION PLANNING REQUIREMENT IS A FLEXIBLE AND INDIVIDUALIZED PROCESS ASSESSED BY COURTS AS PART OF A MULTI-FACETED IEP, WHICH IS EVALUATED IN ITS ENTIRETY ...................................................... 19

CONCLUSION ........................................................................................... 26

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

## TABLE OF AUTHORITIES

### CASES:

*Barnett v. Fairfax Cnty. Sch. Bd.*,
927 F.2d 146 (4th Cir. 1991), *cert denied*, 502 U.S. 859 (1991) ................ 18

*Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,*
458 U.S. 176 (1982)........................................................................ 6, 18, 19

*Bohn v. Cedar Rapids Cmty. Sch. Dist.,*
No. 15 CV 106 EJM, 2016 WL 6828207 (N.D. Iowa Nov. 18, 2016)......... 25

*Dracut Sch. Comm. v. Bureau of Special Educ. Appeals of the Mass. Dep't of Elementary & Secondary Educ.,*
737 F. Supp. 2d 35 (D. Mass. 2010) ............................................................ 24

*Endrew F. v. Douglas Cnty. Sch. Dist. RE-1,*
137 S. Ct. 988 (2017) ........................................................................ passim

*F.L. v. New York City Dep't of Educ.,*
No. 15-CV-520 (KBF), 2016 WL 3211969 (S.D.N.Y. June 8, 2016).......... 23

*Forest Grove Sch. Dist. v. Student,*
No. 3:12-CV-01837-AC, 2014 WL 2592654 (D. Or. Jun. 9, 2014),
*aff'd*, 665 F. App'x 612 (9th Cir. 2016)...................................................... 22

*Forest Grove Sch. Dist. v. Student,*
665 F. App'x 612 (9th Cir. 2016) ................................................................ 24

*Gibson v. Forest Hills Local Sch. Bd. of Educ.,*
655 F. App'x 423 (6th Cir. 2016) ................................................................ 20

*Greer v. Rome City School Dist.,*
950 F.2d 688 (11th Cir. 1991) ..................................................................... 10

*Hartmann v. Loudoun Bd. of Educ.,*
118 F.3d 996 (4th Cir. 1997) ....................................................................... 17

*Honig v. Doe*,
484 U.S. 305 (1988) ........ 5

*Kevin T. v. Elmhurst Community School Dist. No. 205*,
No. 01C0005 2002 WL 433061 (N.D. Ill. 2002) ........ 19

*Lenn v. Portland School Committee*,
988 F.2d 1083 (1st Cir. 1993) ........ 10

*Lessard v. Wilton Lyndeborough Coop. School Dist.*,
518 F.3d 18 (1st Cir. 2008) ........ 13, 25, 26

*Me. Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R.*,
321 F.3d 9 (1st Cir. 2003) ........ 25

*Poolaw v. Bishop*,
67 F.3d 830 (9th Cir. 1995) ........ 7, 18

*Roland M. v. Concord Sch. Comm.*,
910 F.2d 983 (1st Cir. 1990) ........ 10, 13, 17

*Sebastian M. v. King Philip Reg'l Sch. Dist.*,
774 F. Supp. 2d 393 (D. Mass. 2011), *aff'd*, 685 F. 3d 79
(1st Cir. 2012) ........ 23, 24

*S.S. by S.Y. v. City of Springfield, Massachusetts*,
318 F.R.D. 210 (D. Mass. 2016) ........ 7

*T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*,
752 F.3d 145 (2d Cir. 2014) ........ 14

*Wilson v. Marana Unified Sch. Dist.*,
735 F.2d 1178 (9th Cir. 1984) ........ 18

**STATUTES:**

Individuals with Disabilities Education Act ("IDEA"),
20 U.S.C. §§ 1400 *et seq*. (2019) ........ 1
20 U.S.C. § 1400(c)(1) (2019) ........ 19
20 U.S.C. § 1400(d)(1)(A) (2019) ........ 4, 19

20 U.S.C. § 1401(9), (29) (2019) ..... 5
20 U.S.C. § 1401(34) (2019) ..... 20
20 U.S.C. § 1401(34)(A-C) (2019) ..... 20
20 U.S.C. § 1412(a)(5)(A) (2019) ..... 6, 7
20 U.S.C. § 1414(d)(1)(A) (2019) ..... 5
20 U.S.C. § 1414(d)(1)(A)(i) (2019) ..... 6
20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa)(II)(aa), (IV)(bb) (2019) ..... 22
20 U.S.C. § 1414(d)(1)(A)(i)(VIII) (2019) ..... 20
20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa—bb) (2019) ..... 21, 22
20 U.S.C. § 1414(34) (2019) ..... 20

34 C.F.R. § 300.107(b) (2019) ..... 16
34 C.F.R. § 300.117 (2019) ..... 11
34 C.F.R. § 300.321(b) (2019) ..... 20

105 ILCS 5/14-8.02 (b)(7) (2019) ..... 15
603 CMR 28.02 (2019) ..... 15
603 CMR 28.05(6) (2019) ..... 15
693 CMR 28.06(4) (2019) ..... 21

ME:05-1511 CMR ch. 101 § II (2019) ..... 15
M.G.L. c. 71B, § 2 (2019) ..... 20

**OTHER AUTHORITIES:**

Dracut Public Schools, BSEA, #08-5330, 52 IDELR, 82 (SEA MA 2009), *available at* https://www.masslegalservices.org/contentbsea-08-5330-dracut-public-school ..... 22

Massachusetts Department of Elementary and Secondary Education, Technical Assistance Advisory SPED 2009-1 (Sep. 3, 2008) ..... 23

Massachusetts Department of Elementary and Secondary Education, Technical Assistance Advisory SPED 2014-4 (Apr. 9, 2014) ..... 21, 23

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 ..... 16

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* (Dec. 7, 2017), *available at* https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf ....................... 9

## INDENTITIES AND INTEREST 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. (2019).

The Massachusetts Association of School Committees, Inc., ("MASC") is one of the state members of NSBA. MASC, a Massachusetts corporation incorporated under M. G. L. c. 180, is located at One McKinley Square, Boston, Massachusetts 02109. The members of MASC consist of three hundred and twenty-four out of a total of three hundred and twenty-five Massachusetts school committees comprising cities, towns and regional school districts. MASC represents the interests of its members in supporting and enhancing public elementary and secondary education in the Commonwealth of Massachusetts. The issue presented to the Court has substantial implications for MASC's members,

which provide services to students with disabilities under IDEA and its state counterpart daily.

This case presents an opportunity for this Court to apply the U.S. Supreme Court decision in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) to address the appropriate standards for determining whether an educational placement offers a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") for a student with a disability. The Court's decision will affect how school districts throughout the First Circuit determine the LRE 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." *Id*. at 999. To assist the Court in evaluating the issues before it, *Amici* present the following ideas, arguments, insights, and additional information.

## FRAP (a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person other than *Amici Curiae* and their counsel contributed money to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The centerpiece of the IDEA is its requirement that students with disabilities be provided a FAPE in the LRE. Local education agencies ("LEAs") must provide a FAPE by carefully evaluating the needs and abilities of each individual student and crafting an educational plan that provides that student with the opportunity to make progress in light of that student's circumstances. *Endrew F.*, 137 S. Ct. at 999.[1] During this process, educators, evaluators, and the student's family who comprise the child's Individualized Education Program ("IEP") team make complex, qualitative, and individualized decisions about appropriate programming for a student with a disability. As the Supreme Court has noted, these decisions require deference and respect from courts.

The legacy of the IDEA is to ensure not only that special education students receive an appropriate education, but also to end the unnecessary segregation of special education students that historically separated them from their general education peers. The statute, therefore, requires schools to educate eligible students alongside students without disabilities to the maximum extent appropriate. IEP teams balance the academic benefits a child may achieve with the LRE in which she can realize those benefits. Courts and IEP teams have long applied the LRE

[1] As appellees note, this Court has found that its pre-*Endrew F.* jurisprudence holding "an IEP must be reasonably calculated to confer a meaningful benefit," has not been affected by *Endrew F.* Appellee's Br. at 29-30.

doctrine as a statutory preference, not a "mainstreaming" mandate that is weighed more heavily than other components of a child's program. The Supreme Court did not change or expand the LRE preference, nor make it primary to academic benefit, when it decided *Endrew F.* If this Court incorrectly applies *Endrew F*. to expand the LRE requirement, IEP team decisions throughout the First Circuit will be unnecessarily upended.

The IDEA and its state counterparts require IEPs to include planning for a student's transition to post-secondary education and life in their communities. Starting at age sixteen (fourteen in Massachusetts), a child's IEP must address such transition services. 20 U.S.C. §1414 (2019). Because the IEP team determines what transition planning is appropriate for each individual student, courts should defer to transition planning decisions as they defer to other decisions of the IEP team.

## ARGUMENT

### I. *ENDREW F*. DID NOT EXPAND IDEA'S "LEAST RESTRICTIVE ENVIRONMENT" PREFERENCE, NOR CHANGE THE PROCESS FOR IEP TEAMS TO DETERMINE PLACEMENT.

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs…" 20 U.S.C. § 1400(d)(1)(A) (2019). 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

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

20 U.S.C. § 1401(9)(2019).

The vehicle to provide students with a FAPE is the IEP, the "centerpiece of the statute's education delivery system." *Honig v. Doe*, 484 U.S. 305, 311 (1988). The IEP is a thorough, detailed written program, prepared by the student'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) (2019). The federal statute requires that the IEP include eight components: a statement of the child's present levels of academic achievement and functional performance; measurable annual goals, including academic and functional goals; a description of how and when the child's progress will be measured; special education and related services and supplementary aids and

services to be provided; the extent, if any, to which the child will not participate with nondisabled children in the regular class; appropriate accommodations for state and districtwide assessments; the projected start date for services, and appropriate postsecondary goals based on age-appropriate transition assessments. 20 U.S.C. § 1414(d)(1)(A)(i) (2019).

The Supreme Court has twice weighed in on the standard to be applied by courts deciding whether an LEA has provided a FAPE. *In Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), the Court provided a two-prong test: (1) whether the state has complied with IDEA procedures; and (2) whether the IEP is reasonably calculated to enable the student to receive educational benefits. *Id*. at 206-207. Thirty-five years later, the Court clarified the *Rowley* standard, finding that an IEP provides FAPE when it is "…reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" *Endrew F.,* 137 S.Ct. at 1001.

FAPE must be provided to students in the LRE:

> 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) (2019).

An IEP team considers the LRE requirement when it is deciding "placement," the setting in which the services described in the IEP will be provided. The team considers the extent to which the student's needs can be met in a general education setting (or the "regular class" or "full inclusion") to appropriately provide that student with the opportunity to reach her academic and non-academic IEP goals. The IEP goals are the substantive and qualitative statement of effective progress for the individual student.

Generally, the IDEA framework prefers that students with disabilities access the same educational experiences that their general education peers experience both in the classroom and in the school environment (extracurricular and non-academic settings). The LRE requirement creates some "natural tension" within the IDEA. *See Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995), as the child's ability to make academic and/or functional progress in a setting must be balanced against the preference to include students in the regular classroom "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A) (2019). Educational progress and LRE work in tandem, therefore, to determine the appropriate placement for a student. *S.S. by S.Y. v. City of Springfield, Massachusetts*, 318 F.R.D. 210, 220 (D. Mass. 2016) (internal citations and quotations omitted) ("Under the IDEA, an appropriate educational plan must balance the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive

fulcrum. As with all aspects of the development of IEPs under the IDEA, such a balancing must be based on the specific needs of the individual child.”).

In *Endrew F.,* the Supreme Court examined the FAPE requirement it had articulated 35 years earlier for a student who, unlike the student in *Rowley*, could not be provided with adequate educational progress in the general education classroom and was not able to achieve progress on grade level with his peers. By describing the FAPE standard for a student who cannot access the general curriculum, the Court clarified, but did not change, how schools make placement decisions:

> Rowley sheds light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’ When this preference is met, ‘the system itself monitors the educational progress of the child.’

*Endrew F.*, 137 S.Ct. at 999 (citations omitted).

The Court explained that “progress” can be measured differently depending on a student’s unique needs:

> 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://sites.ed.gov/idea/files/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).

The Court did not set a new standard regarding the extent to which IDEA's LRE preference should be weighed when IEP teams are determining the appropriate educational setting for a student's special education and related service.

**A. Placement is a Complex Educational Decision Based on the Student's Current Performance, Potential for Growth, and Necessary Services.**

A student's IEP is a carefully-designed combination of goals, services, and placement. The IEP team weighs each in a highly individualized determination of a child's unique needs in a process that is inherently complex.

> 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.

*Roland M. v. Concord Sch. Comm.,* 910 F.2d 983, 993 (1st Cir. 1990) (citations omitted).[2]

Because the individualized process of providing effective education to a student with disabilities requires the weighing, balancing, and compromising of various critical elements, this Court has recognized that courts must evaluate the program offered by an LEA as a whole, rather than component parts.

> The [IDEA] does not mandate, nor has any court held it to require, that the district judge must consider each unique need in isolation and make a separate finding regarding the preponderance of the evidence in each and every identified area. …In the last analysis, what matters is not whether the district judge makes a series of segregable findings, but whether the judge is cognizant of all the child's special needs and considers the IEP's offerings as a unitary whole, taking those special needs into proper account." *Lenn v. Portland School Committee*, 998 F.2d 1083, 1090 (1st Cir. 1993).

---

[2] *See also, Greer v. Rome City School Dist*., 950 F.2d 688, (11th Cir. 1991) which adopted the Fifth Circuit's *Daniel R.R.* test, but did not elevate mainstreaming above academic progress: "Accordingly, a determination by the school district that a handicapped child will make academic progress more quickly in a self-contained special education environment may not justify educating the child in that environment if the child would receive considerable non-academic benefit, such as language and role modeling, from association with his or her nonhandicapped peers. If, however, the school board determines that the handicapped child will make significantly more progress in a self-contained special education environment and that education in a regular classroom may cause the child to fall behind his or her handicapped peers who are being educated in the self-contained environment, mainstreaming may not be appropriate. In such a case, mainstreaming may actually be detrimental to the child and, therefore, would not provide the child with a free appropriate public education." *Id*. at 697.

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 (2019).

### B. Assigning More Weight to the Least Restrictive Environment Preference Than to Academic and Functional Goals Would Disrupt IEP Teams' Careful Balancing of a Student's Unique Needs.

Appellants seek to upend the careful balancing process IEP teams conduct by arguing that "mainstreaming" should be their primary priority. Adoption of appellants' argument would result in a lopsided relationship between educational progress and LRE where the latter wins even where significant progress will be lost. That approach is contrary to the IDEA framework that requires balancing the complex needs of each unique child:

> An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. … "[T]he benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."

*Endrew F.*, 137 S.Ct. at 999.

IDEA's preference for inclusion does not mean a student must be situated next to a general education peer no matter the educational cost to that student. IEP teams decide the placement of a student by calculating what educational arrangement provides the student with the greatest access to the general education curriculum and experience (non-academic benefits) while providing the student the opportunity to make effective progress academically and socially/emotionally. Generally, an IEP team places a child in a "full inclusion" general education setting only when appropriate supports, modifications, and services enable the student to access the general education curriculum. Without that access, "inclusion" is a matter of geography and not of substantive educational benefit which is the underpinning of the IDEA and is the focus and requirement of public education.

Nor does the IDEA require IEP teams to specifically address the academic or non-academic benefits of mainstreaming. Such requirement would be an awkward fit to the reality of how LRE is determined and discussed between schools and families. When IEP teams discuss and determine placement, they are making a qualitative statement about how closely they feel the child can come to making effective progress in a general education environment. Courts apply the well-worn LRE standard in terms of a particular placement's relationship to full inclusion – full inclusion or "mainstreaming" being the least restrictive placement

and all others being somewhere on the restrictiveness continuum.[3] The benefits of mainstreaming are so inherent in the LRE decision-making process that they are indistinguishable from the process itself.

If this Court adopts a standard that requires IEP teams "to balance non-academic benefits against the putative academic advantages of a substantially separate classroom" (Appellee's Br. at 41), their efforts to plan a child's educational program through balancing will be hampered, and First Circuit courts will be prevented from considering an IEP as "unitary whole." As the IEP is an individualized plan necessarily balancing the academic and non-academic needs of the student, so should its review by a court be an independent balance of such needs.[4] As the Second Circuit found:

> [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. 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

[3] "Correctly understood, the correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities" *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990).

[4] Both the IEP team and the District Court considered whether LRE was addressed, without the mechanical checklist the appellants would have preferred. "There is no mechanical checklist by which an inquiring court can determine the proper content of an IEP; IEPs are by their very nature idiosyncratic." *Lessard v. Wilton Lyndeborough Coop. School Dist.*, 518 F.3d 18, 24 (1st Cir. 2008) (citation and internal quotation omitted).

> students." 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."

*T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 162 (2d Cir. 2014)(citations omitted).

The IDEA 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.

IEP teams are keenly aware of their obligations to propose an IEP which provides a student the opportunity to make effective progress, which in Massachusetts includes social/emotional progress,[5] while placing the child in the

[5] "[Effective progress] shall mean to make documented growth in the acquisition of knowledge and skills, including social/emotional development, within the general education program, with or without accommodations, according to the

least restrictive placement possible. The IEP team must look forward one year and propose a plan that is appropriate for that student. Once the team establishes what progress can look like for that student, it develops IEP goals and benchmarks, determining what services are necessary to provide the student with the opportunity to make effective progress toward these goals. In Massachusetts, only *after* a team has determined what services are necessary for the student to make effective progress on the IEP goals does it determine what placement is the LRE that would permit the student to make this effective progress.[6]

There is no requirement that an LEA attempt a placement that it believes will fail because it is less restrictive than a placement it believes will succeed. IEP teams know how detrimental failure can be to a student's self-esteem and future progress, especially a student with cognitive disabilities. It is the IEP team's responsibility to recommend a placement that will succeed both socially/emotionally and academically while ensuring that the student is not removed from the general education classroom or environment more than is

---

chronological age and developmental expectations, the individual educational potential of the student, and the learning standards …" 603 CMR 28.02 (2019); *See also* 105 ILCS 5/14-8.02 (b)(7) (2019); ME: 05-1511 CMR ch. 101 § II (2019).

[6] *See, e.g*., 603 CMR 28.05(6) (2019): "Determination of Placement. At the Team meeting, *after the IEP has been fully developed*, the Team shall determine the appropriate placement to deliver the services on the student's IEP. Unless the student's IEP requires some other arrangement, the student shall be educated in the school that he or she would attend if the student did not require special education" (emphasis added).

necessary to ensure a level of success for the student. To suggest otherwise is to put the IEP team in a position of setting up students for failure, which would be a perverse legacy for the IDEA. The LRE is the least restrictive *environment in which the student can make effective progress*. The effective progress cannot be subservient to the placement. Otherwise *Endrew F.*'s directive that progress must be effective for the individual student would be undermined so drastically as to render it meaningless.

It is common for IEP teams to develop programs for students who may be able to participate at some level in the general education environment, but not in all academic classes. This could mean inclusion in the general education classes for classes such as art and music, as well as counseling services, athletics, transportation, health services, recreational activities, and school-sponsored clubs and special interest groups. 34 C.F.R. § 300.107(b) (2019). 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. Ninety-five percent of children with qualifying disabilities receive some special education and related services in a regular classroom setting.[7]

[7] U.S. Department of Education, National Center for Education Statistics (2016), Digest of Education Statistics, 2015 (NCES 2016-014), Ch. 2, p.122 (available at

### C. 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 Her Circumstances.

IEP teams develop a program for an IDEA-eligible student, then as teachers and support professionals work with her, they may recognize that she 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 even require a new location so that the child may 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 at 992.

It is well-established that courts defer to the educational expertise of school personnel in choices regarding pedagogy – including methodology in the IDEA context.[8] Because an IEP team considers a student's placement in tandem with its

---

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)).

[8] *See, e.g., Hartmann v. Loudoun County Bd. of Educ*., 118 F.3d 996, 1005 (4th Cir. 1997): "The IDEA encourages mainstreaming, but only to the extent that it does not prevent a child from receiving educational benefit….Loudon County properly proposed to place Mark in a partially mainstreamed program which would have addressed the academic deficiencies of his full inclusion program while permitting him to interact with nonhandicapped students to the greatest extent possible. This professional judgement by local educators was deserving of respect. The approval of this educational approach by the local and state administrative officers likewise deserved a deference from the district court which it failed to receive. In rejecting reasonable pedagogical choices and disregarding well-

determination about appropriate services and methodologies, courts should defer to educators' expertise regarding a student's placement, as a component of a the IEP as a whole.

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

---

supported administrative findings, the district court assumed an educational mantle which the IDEA did not confer."

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." *Endrew F.,*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.*

## II. THE IEP TRANSITION PLANNING REQUIREMENT IS A FLEXIBLE AND INDIVIDUALIZED PROCESS ASSESSED BY COURTS AS PART OF A MULTI-FACETED IEP, WHICH IS EVALUATED IN ITS ENTIRETY.

IDEA provides a framework to ensure students with disabilities can fully integrate into their communities, "achieve a reasonable degree of self-sufficiency," and "become a contributing part of our society." 20 U.S.C. § 1400(c)(1) (2019); *Rowley,* 458 U.S. 176, 201 n.23 (1982). Thus, the IDEA requires public schools to offer students with disabilities a FAPE in the LRE principally to "prepare [students with disabilities] for further education, employment, and independent living" 20 U.S.C. § 1400(d)(1)(A) (2019). IDEA-mandated transition services are designed to "improv[e] the...functional achievement of the [student] to facilitate [his or her] movement from school to post-school activities, including post-secondary education...[and] integrated employment." 20 U.S.C. § 1401(34) (2019); *See also Kevin T. v. Elmhurst Community School Dist. No. 205,* No. 01 C 0005, 2002 WL

433061 (N.D. Ill. March 20, 2002) (noting the purpose of transition services is "[t]o ensure that disabled students can adequately function in society after graduation.").

Federal standards require that transition planning focus on the student's self-directed vision. *See* 34 C.F.R. § 300.321(b) (2019) (mandating transition service planning and post-secondary goal setting be driven by student's own preferences and interests); *Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 655 F. App'x 423, 430 (6th Cir. 2016) (finding a transition plan inadequate because it failed to consider the student's own post-secondary goals, interests and preferences).

As noted above, transition services must be included in a student's IEP starting at age sixteen – fourteen in Massachusetts. 20 U.S.C. §§ 1401(34), 1414(d)(1)(A)(i)(VIII) (2019); M.G.L. c. 71B, § 2 (2019). The IDEA defines transition services as "a coordinated set of activities" that is "designed to be within a results-oriented process...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." 20 U.S.C. § 1401(34)(A-C) (2019). The transition services must take "into account the child's strengths, preferences, and interests" and "include[] instruction, related services, community experiences, the development of employment and other post-school living objectives, and when

appropriate, acquisition of daily living skills and functional vocational evaluation." *Id*. Additionally, the IEP must include "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and...independent living skills; [and] the transition services...needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)—(bb) (2019). Massachusetts state regulations require school districts to "ensure [transition service] options are available for older students, particularly those eligible students ages 18 through 21 years old." 603 C.M.R. 28.06(4) (2019).

LEAs in Massachusetts and throughout the country provide general education curriculum geared towards all transition-aged students, which often includes "whole school programming such as social-emotional learning curricula, work-and-learning experiences, guidance department courses and opportunities, or the standard academic course of study." Massachusetts Department of Elementary and Secondary Education, Technical Assistance Advisory SPED 2014-4 (Apr. 9, 2014). For students with IEPs, transition services provide a "year by year...sequential and developmental process whereby the student's disability-related needs are addressed in order to build skills necessary to achieve the student's postsecondary goals/vision." *Id.* Younger transition-aged students may only require informal and/or discussion-based assessment and academic, functional

and social-emotionally focused transition goals and services. As the demands for post-secondary preparedness and independence in the general education curriculum ramp-up as an eligible student ages, he or she may require more comprehensive and formal transition assessments and intensive vocational, life skills services to make educational progress in light of his or her circumstances.

Transition service planning, like all components of the IEP, is driven by the student's unique needs and ability to make progress in the general education curriculum. *See Endrew F.*, 137 S. Ct. 992 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)(aa), (II)(aa), (IV)(bb)). The implementation of a student's transition plan "will need to be monitored and adjustments made over the course of the [years] in response to the parties' changing understanding of Student's needs ... and Student's progress." *In Re: Dracut Public Schools*, BSEA # 08-5330, 52 IDELR 85, 29 (SEA MA 2009) (also available at https://www.masslegalservices.org/content/bsea-08-5330-dracut-public-school).

The IDEA does not dictate how an LEA assesses an eligible student's transition needs related to training, education, employment and independent living skills. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)—(bb) (2019); *see also Forest Grove Sch. Dist. v. Student*, No. 3:12-CV-01837-AC, 2014 WL 2592654, at *29 (D. Or. Jun. 9, 2014), *aff'd*, 665 F. App'x 612 (9th Cir. 2016) (noting "IDEA does not mandate any particular transition assessment tool."). Nor does the IDEA require a

stand-alone transition plan. *Sebastian M. v. King Philip Reg'l Sch. Dist.,* 774 F. Supp. 2d 393, 407 (D. Mass. 2011), *aff'd,* 685 F.3d 79 (1st Cir. 2012). Instead, in considering the adequacy of transition services, a court must "view those services in the aggregate and in light of the child's overall needs." *Lessard*, 518 F.3d at 30.

Moreover, the state's guidance disfavors "adopting a restrictive approach which might seem to imply the required use of highly specialized formal assessments for each student." Massachusetts Department of Elementary and Secondary Education, Technical Assistance Advisory SPED 2014-4 (Apr. 9, 2014). At a minimum, the IEP team must "plan for the student's need for transition services and the school district must document *this discussion* annually." Massachusetts Department of Elementary and Secondary Education, Technical Assistance Advisory SPED 2009-1 (Sept. 3, 2008) (emphasis added). *See, e.g., F.L. v. New York City Dep't of Educ.,* No. 15-CV-520 (KBF), 2016 WL 3211969, at *8–9 (S.D.N.Y. June 8, 2016) (finding that although the school district did not conduct any formal or informal transition-related assessments for the student, the IEP team adequately assessed the student's transition-related needs based on the information provided at the IEP team meeting by the unilateral school placement and developed appropriate IEP goals and services to support the student's post-secondary vision).

Furthermore, as the District Court correctly noted, citing the state's guidance on transition planning, age-appropriate assessments can be anything that "affords information which can be used to discern the student's vision; understand the student's needs, preference, and interests; and measure progress towards the acquisition of skills." *Id.* Transition data may be properly gathered as "part of the typical school routine." *Id.* Therefore, an IEP team's discussion of the student's vision, interests, needs, as well as appropriate services and goals to support the acquisition of skills needed to achieve the post-secondary vision indeed qualify as a form of data collection and assessment.[9]

Thus, in order to provide a FAPE for a transition-age student, the IEP team must discuss the student's transition needs, and the goals and services must support the student's post-secondary vision. *See Sebastian M.,* 774 F. Supp. 2d at 407 (holding no error in transition planning where the student's IEP goals were appropriate, transition services were mentioned in the IEP and the student was actually provided with transition services); *Forest Grove Sch. Dist. v. Student*, 665

---

[9] This is not to say that an informal discussion to assess a student's transitions needs will always be sufficient or appropriate for all transition-age students. *See, e.g., Dracut Sch. Comm. v. Bureau of Special Educ. Appeals of the Mass. Dep't of Elementary & Secondary Educ.,* 737 F. Supp. 2d 35, 47 (D. Mass. 2010) (finding that because the school had failed to conduct appropriate transition assessments, it could not "understand the nature and scope of Student's deficits" pertaining to transition, and thus the IEPs "did not include any goals to effectively address Student's vocational needs and independent living skills deficits.")

F. App'x 612, 614–15 (9th Cir. 2016) (holding a school district overcame a deficient transition assessment by providing IEPs "sufficiently focused on the development of Student's post-secondary skills" to provide a FAPE).

Because an IEP is assessed "in its entirety" to determine whether it provides an individual student with a FAPE, *Lessard*, 518 F.3d at 30, and IEPs are "by their very nature idiosyncratic," *Me. Sch. Admin. Dist. No. 35 v. Mr. & Mrs. R.,* 321 F.3d 9, 20 (1st Cir.2003), IEP goals that address the student's academic and functional needs may be appropriate, measurable post-secondary goals. *See, e.g., Bohn v. Cedar Rapids Cmty. Sch. Dist.,* No. 15 CV 106 EJM, 2016 WL 6828207, at *10–11 (N.D. Iowa Nov. 18, 2016) (holding no error in transition planning where a student's measurable goals and direct services in reading, writing and organizational skills supported the student's post-secondary graduation vision).

This case nicely illustrates the progression in transition services offered to a student as she ages, and the need for deference to IEP teams' transition decisions in the context of a student's overall program. C.D. was, like many of her same-age peers, understandably unsure about her post-secondary vision the summer before she entered high school and chose to focus on high school graduation as her post-secondary vision goal. The IEP team focused C.D.'s functional, academic goals and services (including the provision of vocational services) around supporting that goal. As C.D. aged and she and her non-disabled peers faced increased demands

for independence and functional life skills, the LEA properly conducted a more formal and comprehensive transition assessment and offered more intensive direct services, such as one-on-one after-school session, to build transition-related skills for C.D. To hold that this is inadequate for transition planning would endlessly compartmentalize transition planning into a series of checklists and boxes, erroneously moving away from a holistic view of the IEP and consideration of the child's own post-secondary vision, age, and unique needs. *See Lessard,* 518 F.3d at 30.

## CONCLUSION

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

Respectfully submitted,

Cristine M. D. Goldman
Colleen Shea
Colby S. Brunt
STONEMAN, CHANDLER & MILLER LLP
99 High Street
Boston, MA 02110
CGoldman@SCMLLP.COM

/s/Francisco M. Negrón, Jr.
Counsel of Record
National School Boards Association
1680 Duke Street, FL 2
Alexandria, VA 22314
fnegron@nsba.org

February 27, 2019

## CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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

**Case Number 18-1794**

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6125 words.

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

Dated: February 27, 2019

/s/ Francisco M. Negrón, Jr.
FRANCISCO M. NEGRÓN, JR.
Attorney for Amici Curiae

## CERTIFICATE OF SERVICE FORM
## FOR ELECTRONIC FILINGS

I hereby certify that on February 27, 2019 I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Selene A. Almazan-Altobelli
Council of Parent Attorneys and Advocates

Iraida J. Alvarez
MA Attorney General's Office

Ira A. Burnim
Bazelon Center for Mental Health Law

Anna Rachel Dray-Seigel
MA Attorney General's Office

Doris Regina MacKenzi Ehrens
Murphy Hesse Toomey & Lehane LLP

Julia Eleanor Kobick
MA Attorney General's Office

Laurie R. Martucci
Martucci Law Assoc

Elizabeth Brewster McCallum
BakerHostetler LLP

Felicia S. Vasudevan
Murphy Hesse Toomey & Lehane LLP

Benjamin J. Wish
Todd & Weld LLP

I further certify that on February 27, 2019 I served a copy of the foregoing document on the following parties or their counsel of record by U.S. mail:

Lewis Bossing
Bazelon Center for Mental Health Law
1101 15th St, NW
Ste 1212
Washington, DC 20005-5002

William T. DeVinney
BakerHostetler LLP
1050 Connecticut Ave, NW
Ste 1100
Washington, DC 20036-0000

Paul E. Poirot
BakerHostetler LLP
1050 Connecticut Ave, NW
Ste 1100
Washington, DC 20036-0000

/S/ Francisco M. Negrón, Jr.____
FRANCISCO M. NEGRÓN, JR.
Attorney for Amicus Curiae