No. 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.

Plaintiffs-Appellants

v.

NATICK PUBLIC SCHOOL DISTRICT,

Defendants-Appellees

and

MASSACHUSETTS BUREAU OF SPECIAL EDUCATION APPEALS

Third Party
Defendant/Appellee

On Appeal from a Judgement of the United States District Court for the District of Massachusetts

---

Amicus Curiae Brief of the Judge David L. Bazelon Center for Mental Health Law, Association of University Centers on Disabilities, Disability Law Center, National Center for Learning Disabilities, National Center for Youth Law, National Disability Rights Network, and National Down Syndrome Congress

---

Ira A. Burnim
Lewis Bossing
THE JUDGE DAVID L. BAZELON
CENTER FOR MENTAL HEALTH
LAW 1101 15th Street NW, Suite 1212
Washington, DC 20005
Tel: (202) 467-5730 x1307

Counsel for Amici Curiae

Elizabeth B. McCallum
Paul E. Poirot
William T. DeVinney
BAKER HOSTETLER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Tel: (202) 861-1500

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Statements of the Interest of the *Amici*

Amici are organizations dedicated to the interest of people with disabilities, including improving the educational opportunities available to children with disabilities. *Amici* have a strong interest in ensuring that state actors are held to the correct high standard in providing students with disabilities the required free appropriate public education under the IDEA, and submit this brief to further that end rather than addressing the merits of either side of the appeal.

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center"), is a non-profit legal advocacy organization dedicated to advancing the rights of people with disabilities, including mental disabilities, for over four decades. Ensuring that children with disabilities are provided with a free appropriate public education, as mandated by the IDEA, is a central part of the Bazelon Center's mission.

The Association of University Centers on Disabilities ("AUCD") is a nonprofit membership association of 130 university centers and programs in each of the fifty States and six Territories. AUCD members conduct research, create innovative programs, prepare individuals to serve and support people with disabilities and their families, and disseminate information about best practices in disability programming, including educational instruction from preschool to postsecondary education.

The Disability Law Center (DLC) is a statewide private non-profit organization that is federally mandated to protect and advocate for the rights of individuals with disabilities in Massachusetts. Pursuant to the Protection and Advocacy of Individuals with Developmental Disabilities, 42 U.S.C. § 15043, the Disability Law Center represents students with disabilities who are denied their right to an appropriate education. Since 1978 the Law Center has provided a full range of legal assistance to people with disabilities in Massachusetts, including legal representation, regulatory and legislative advocacy, and education and training on the legal rights of students with disabilities.

DLC regularly represents students with special needs and has developed a specialty in this area of the law. DLC has participated in many important special education cases in the federal courts, including: participating (as amicus) in *School Committee of the Town of Burlington, Massachusetts v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359 (1996), and (as counsel for the student) in *David D. v. Dartmouth School Committee*, 615 F. Supp. 639 (D. Mass. 1984), aff'd *David D. v. Dartmouth School Committee*, 775 F2d 411 (1st Cir. 1985).

The National Center for Learning Disabilities ("NCLD") is a parent-founded and parent-led non-profit organization. NCLD's mission is to improve the lives of the 1 in 5 children and adults nationwide with learning and attention issues—by

empowering parents and young adults and advocating for equal rights and opportunities. NCLD works to create a society in which every individual possesses the academic, social and emotional skills needed to succeed in school, at work and in life. NCLD has more than 40 years of experience providing essential information to parents, professionals and individuals with learning disabilities and attention issues, promoting research and programs to foster effective learning, and advocating for policies to protect and strengthen educational rights and opportunities. NCLD also generates policy and advocacy impact by implementing national campaigns to advance important and systemic change, educating and engaging policymakers at the national, state and local levels, leading knowledge-building initiatives to drive the policy debate and build consensus around best practices for children and adults with learning and attention issues.

The National Center for Youth Law ("NCYL") is a private, non-profit organization that uses that law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities necessary for healthy and productive lives. NCYL provides representation to children with disabilities in litigation and class administrative complaints to ensure their access to appropriate and non-discriminatory services. NCYL engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect

their lives. NCYL pilots collaborative reforms with state and local jurisdictions across the nation to improve educational outcomes of children in the foster care and juvenile justice systems, with a particular focus on improving education for system-involved children with disabilities.

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") and Client Assistance Program ("CAP") agencies located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories, with a Native American Consortium affiliate located in the Four Corners region. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN provides to its members training and technical assistance, legal support, and legislative advocacy. It works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Education-related cases under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act make up a large percentage of the P&A/CAP system's caseload, with over 10,000 such matters handled in the most recent year for which data is available.

The National Down Syndrome Congress ("NDSC"), is the leading national resource for advocacy, support, and information for anyone touched by or seeking to learn about Down syndrome, from the moment of a prenatal diagnosis through adulthood. Founded in 1973, the NDSC is a member-sustained, 501(c)(3) organization, representing the approximately 350,000 people in the United States with Down syndrome and their families. The NDSC's programs provide individuals with Down syndrome the opportunities and respect they deserve so they can live the life of their choosing.

Corporate Disclosure Statement

As required by Federal Rules of Appellate Procedure 26.1 and 29, the *amici* state that they have no parent corporation, nor is there any publicly-held corporation owning 10 per cent or more of their stock.

/s/ Ira A. Burnim
Ira A. Burnim
Bar #1160742
Counsel for Amici Curiae

Consent of Participation

As required by Circuit rules 29(a)(2), the *amici* state that all parties to this proceeding have consented to their participation as amici curiae.

/s/ Ira A. Burnim
Ira A. Burnim
Bar #1160742
Counsel for Amici Curiae

Introduction

The Individuals with Disabilities Education Act ("IDEA") is ambitious legislation intended to ensure that children with disabilities obtain a free appropriate public education ("FAPE"). 20 U. S. C. § 1412(1). Following the Supreme Court's first decision addressing the IDEA's FAPE requirement, *Board of Education v. Rowley*,[1] different standards and tests arose among the Circuits to determine whether a child was receiving a FAPE. As a result, what schools were required to do to provide a FAPE to children with disabilities differed in different regions across the country.

The Court recently revisited the question of what level of educational benefits must be provided to a child with a disability under the IDEA. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). In *Endrew F.*, the Supreme Court held that, "[t]o meet its substantive obligation under the IDEA, a school must offer an [individualized education program] reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. It further made plain that the appropriate standard for a FAPE is demanding: schools must offer *all* students with disabilities educational programs that are

[1] *Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

"appropriately ambitious," and focused on "challenging objectives." *Id.* at 1000. For most students, the special education provided must be reasonably calculated to help the student meet academic standards and advance from grade to grade. *Id.* The Supreme Court clarified that the correct standard under the IDEA is "markedly more demanding" than some of the standards various circuits had employed in the past. *Id.* (distinguishing the "merely more than *de minimis*" test applied by the Tenth Circuit).

In its first case to discuss *Endrew F.* in this Circuit, *Johnson v. Boston Public Schools*, 906 F.3d 182, 194 (1st Cir. 2018), the panel found that "the standard [already] applied in this circuit comports with that dictated by *Endrew F.*" Nevertheless, there are some statements in earlier opinions from this Circuit and its district courts that could be read in isolation as inconsistent with the governing *Endrew F.* standard. If this Court does not clarify how precedent in this Circuit is consistent with the Supreme Court's holding in *Endrew F.* in toto, it risks inconsistent or conflicting standards arising in the district courts, similar to the conflicting standards that arose among the Circuits prior to *Endrew F.* Although *amici* take no position regarding the merits of any party's case, *amici* respectfully suggest that this Court expand on and further explain the *Johnson* opinion to provide additional guidance to future stakeholders in the Circuit—by, for example, expressly confirming that a FAPE requires substantially more than a "merely more

than trivial" educational benefit, that educational programs must be "appropriately ambitious" and focused on "challenging objectives" suited to the student at issue, and that for most students that will mean "integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." 137 S. Ct. at 1000

Argument

I. This Court Should Explain Expressly That Under *Endrew F.* and *Johnson* the IDEA Requires the State to Provide Children with Disabilities an Ambitious Education and an IEP That Helps the Child Meet Challenging Objectives

A. Before *Endrew F.*, the Supreme Court declined to set any particular standard to determine when a child receives a FAPE, which led to a split among the Circuits regarding the FAPE Requirement

Congress enacted the IDEA because, at the time, the educational needs of millions of children were not being met. 20 U.S.C. § 1400(c)(2). Children with developmental or mental disabilities, or other issues that required special educational services, were either totally excluded from schools or sitting idly in regular classrooms until they could drop out. *Id.*; H. R. Rep. No. 94-332, p. 2 (1975); *see also* 20 U.S.C. § 1400(c)(5), (d)(1)(A) (encouraging "high expectations" for students with disabilities, to prepare them for "further education, employment, and independent living").

In response, Congress enacted the IDEA—an "ambitious" piece of legislation (*Rowley*, 458 U.S. at 179)—which provides federal funds to States that ensure all children with disabilities receive a FAPE. 20 U.S.C. § 1412(1). A free appropriate public education includes providing both "specially designed instruction ... to meet the unique needs of a child with a disability" and any related support services "required to assist a child ... to benefit from" that specially designed instruction. *Id.* at §§ 1401(9), (26), (29).

The specially-designed instruction cannot be one-size-fits-all. To meet the FAPE requirement, the IDEA requires the State to provide the child an "individualized education program," or IEP, each year. *Id.* at §§ 1401(9)(D), 1412(a)(1). The IDEA requires that a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, if appropriate, the child all participate in preparing the IEP. *Id.* at § 1414. The IEP is the centerpiece of the child's educational program. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

The Supreme Court first addressed what is meant by the IDEA's FAPE requirement in *Rowley*, 458 U.S. at 179. The Court held that the FAPE requirement in the IDEA provided the child a substantive right to a FAPE that included "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. Because it determined that

the child at issue had clearly received a FAPE, the Court declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202.

The Supreme Court's decision not to articulate an "overarching" standard for what schools must do to provide a FAPE to a child with a disability, *Endrew*, 137 S. Ct. at 998, led to different standards among the Circuits. Some Circuits, like the Tenth Circuit, adopted a standard under which a school provided a FAPE so long as it provided anything above a negligible educational benefit. The Eighth Circuit similarly held that a child received a FAPE if the child only "enjoyed more than what we would consider slight or *de minimis* academic progress." *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 810 (8th Cir. 2011) (internal quotation marks omitted). The Second, Fourth, Seventh, and Eleventh Circuits adopted essentially the same "merely . . . more than *de minimis*" standard.[2]

[2] *See*, *e.g.*, *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 450 (2d Cir. 2015) ("To be substantively adequate, an IEP … must be likely to produce progress that is more than trivial advancement.") (citation and internal quotation marks omitted), *cert. denied*, 136 S. Ct. 2022 (2016); *O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 360 (4th Cir. 2015) ("[A] school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and services."); *M.B. v. Hamilton Se. Sch.*, 668 F.3d 851, 862 (7th Cir. 2011) (requiring IEP that is likely to produce educational progress, "not regression or trivial educational advancement") (citations and internal quotation marks omitted); *Todd v. Duneland Sch.l Corp.*, 299 F.3d 899, 906 n.3 (7th Cir. 2002) (approving district court's use of a "more than mere trivial educational benefit" test); *JSK v. Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1572-73 (11th Cir.

The Third Circuit, in contrast, rejected any standard under which the State need only exceed a trivial or *de minimis* benefit, requiring lower courts in that Circuit to determine "whether [an] IEP would confer a *meaningful* educational benefit." *T.R. v. Kingwood Twp. Bd. Of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000). That benefit must be "gauged in relation to the child's potential." *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999). *In Deal v. Hamilton County Board of Education*, the Sixth Circuit also adopted the Third Circuit's "meaningful educational benefit" standard. 392 F.3d 840, 862 (6th Cir. 2004). The Sixth Circuit held, like the Third Circuit, that "[i]n evaluating whether an educational benefit is meaningful, logic dictates that the benefit must be gauged in relation to a child's potential." *Id.* at 864 (internal quotation marks omitted).

The First Circuit pre-*Endrew F.* had held, like the Third and Sixth Circuits, that "to comply with the IDEA, an IEP must be reasonably calculated to confer a meaningful educational benefit." *See*, *e.g.*, *D.B. v. Esposito*, 675 F.3d 26, 34 (1st Cir. 2012). But it also had used language indicating that the benefit must be only "more than trivial." *Id.* Also, it did not expressly adopt the Third or Sixth Circuit's reasoning. Accordingly, some courts and others (including the Solicitor General) had found it was not clear whether, in practice, the First Circuit's standard was the

---

1991) (requiring merely "some" benefit and indicating that "a trifle [of benefit] might not" satisfy that standard.).

same as the Tenth's Circuit's "merely more than *de minimis*" standard. *See O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d at 359 (noting that, "although using the word 'meaningful,'" the First Circuit's standard seemed to describe the "some benefit" or "more than *de minimis*" standard); Brief of the United States as *Amicus Curiae* in *Endrew F. v. Douglas County School Dist. RE-1*, No. 15-827, 2016 WL 4426710 (U.S.), at *10 n.4 (filed Aug. 18, 2016) (citing *D.B.* and stating that "[i]t is not clear, however, whether [the First Circuit] would hold that the provision of anything beyond a trivial benefit necessarily means that the education provided is 'meaningful' and thus satisfies the FAPE standard").

B. In *Endrew F.* the Supreme Court held that the IDEA imposes a substantive requirement that schools must provide students with disabilities an ambitious education, including challenging objectives, and must provide more than a merely trivial educational benefit

The conflicting standards, including some setting low expectations for children with disabilities (and what schools must do to educate them), used in the different Circuits led the Supreme Court to grant certiorari in a Tenth Circuit case applying the "merely more than *de minimis*" standard. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). In *Endrew F.*, the Supreme Court addressed "that more difficult problem" that it had declined to address in *Rowley*: "determining 'when handicapped children are receiving sufficient educational

benefits to satisfy the requirements of the Act.'" *Id*. at 993 (citing *Rowley*, 458 U.S. at 202).

The Supreme Court held that its "decision [in *Rowley*] and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. In order to provide a FAPE, the IEP for every child with a disability must be "appropriately ambitious," and give the child the chance to meet "challenging objectives." *Id.* at 1000.[3] The IDEA requires an ambitious IEP because "the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.* at 999 (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV)); *see also id.* ("Progress through [the educational] system is what our society generally means by an 'education.'"). The Supreme Court explained that this was a "markedly more demanding" standard than the "merely more than *de minimis*" test used by the Tenth and other Circuits, and which some had viewed this Circuit as applying. *Id.* at 1000.

The Supreme Court explained that "for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated

[3] *Cf.* U.S. Dep't of Educ., *Questions and Answers (Q&A) on U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1*, 7 (Dec. 2017) (indicating that "IEP annual goals" must be "appropriately ambitious"), https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf.

to achieve advancement from grade to grade." *Id.* Further, the Court recognized that not all children with disabilities can master the school's curriculum, and that some may have significant cognitive or other disabilities that limit their ability to meet grade level academic standards. For these children, as for others, special education must provide "the chance to meet challenging objectives." *Id.*[4] Every child, therefore, must have the chance to meet "challenging objectives" that promote further education, work, and independence.

C. This Court should provide guidance for future district court decisions and affected parties by expanding on its *Johnson* holding and expressly explaining how *Endrew F.* applies in this Circuit

After *Endrew F.*, the panel in *Johnson v. Boston Public Schools*, 906 F.3d 182, 194-95 (1st Cir. 2018), confirmed that "the standard applied in this circuit comports with that dictated by *Endrew F.*" Because the panel saw no "evident

[4] Congress has directed that, for such students, progress should be measured against "alternate academic achievement standards." Every Student Succeeds Act, 20 U.S.C. § 6311(b)(1)(E)(i)(V). Such standards must be "aligned to ensure" the student "is on track to pursue postsecondary education or employment." *Id.*; *cf.* 20 U.S.C. § 1400(d)(1)(A) (special education should "emphasize[]" instruction and services designed to prepare students "for further education, employment, and independent living"). Additionally, such standards "must be aligned with the [s]tate's grade level content standards," i.e., "the [s]tate's [academic] content standards for the grade in which the student is enrolled." U.S. Dep't of Educ., Office of Special Educ. & Rehab. Servs., *Dear Colleague Letter on FAPE* 5 (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf.

discrepancy between the standard applied in this circuit (and in this case) and that announced by *Endrew F.*," the panel did not elaborate on the Supreme Court's holding in *Endrew F.* or remand for further consideration. *Id.*

Amici respectfully request that the Court now expand on the *Johnson* holding by expressly explaining how the holdings of *Endrew F.* should apply in this Circuit going forward. Specifically, the Court should explain that a "meaningful" educational plan must be "*appropriately ambitious*" and set "*challenging objectives*" for the child. *See* 137 S.Ct. at 1000 (emphasis added). It should also explain that that "for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* at 1000. It should make plain, moreover, that the *Endrew F.* standard is "markedly more demanding" than previous standards requiring only more than a trivial or minimal educational benefit.

Such clarification will be helpful for several reasons. First, an express explanation of the *Endrew F.* standard will provide further necessary guidance on the governing substantive standard to district courts in this Circuit addressing the IDEA. In *Endrew F.*, the Supreme Court rejected the school district's argument that "appropriately ambitious" and "challenging objectives" are "only procedural requirements—a checklist of items the IEP must address—not a substantive standard enforceable in court." *Id.* This Court should likewise make clear, for the

first time in an opinion in this Circuit, that the standard announced in *Endrew F.* is a *substantive* requirement under the IDEA.

Second, an opinion specifically incorporating *Endrew F.*'s holdings—and making plain that the standard is "markedly more demanding" than the *de minimis* standard—would avoid any confusion that could be caused by language contained in prior opinions in this Circuit that, read in isolation, conflict with *Endrew F.* Some cases in this Circuit, for example, mirror the improper "more than *de minimis*" standard by emphasizing the *limits* of a school's FAPE obligation, rather than the substantive requirement that special education be "appropriately ambitious." Such decisions state, for instance, that the IDEA requires only a "trivial" or "some" educational benefit or only "modest" goals for students with disabilities. *See*, *e.g.*, *D.B. v. Esposito*, 675 F.3d at 34 (IDEA requires only "more than a *trivial* educational benefit"); *Lessard v. Wilton-Lyndeborough Coop. Sch. Dist. (Lessard I)*, 518 F.3d 18, 23-24 (1st Cir. 2008) ("an IEP need only 'supply *some* educational benefit'"); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1086 (1st Cir. 1993) (IDEA requires only "modest goals" for students with disabilities). In *Kathleen H. v. Massachusetts Department of Education*, similarly, the panel determined that an IEP need only be "adequate and appropriate for a particular child at a given point in time." 154 F.3d 8, 13 (1st Cir. 1998).

These holdings that an IEP need only provide a more than "trivial" or "some" educational benefit, be only "adequate," or set only "modest goals," appear to conflict with the Supreme Court's (and *Johnson*'s) holding that the IEP must be "appropriately ambitious" and set "challenging" goals. 137 S. Ct. at 1000. They also seem at odds with the Supreme Court's recognition that "for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* at 1000.

Moreover, as described above parties and courts relying on similar statements from *Rowley*, in isolation, helped give rise to the pre-*Endrew F*. split among the Circuits. Indeed, in *Endrew F.*, the school district argued that its "merely more than *de minimis*" standard was justified by several statements from the Court's decision in *Rowley*. *See* 137 S. Ct. at 998. In ruling agaist the district, the Supreme Court recognized that the "statements in isolation do support the school district's argument," but conflicted with *Rowley* and the text of the IDEA. *Id*. If the panel does not clarify that the Supreme Court's declaration in *Endrew F.* that an IEP must be "appropriately ambitious," and set "challenging objectives," and that "for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade," *id.* at 1000, it risks confusion arising in the district courts,

with conflicting standards or interpretations of *Endrew F.* being applied, similar to the conflicting standards that arose among the Circuits after *Rowley*.

Indeed, one district court in this Circuit has already applied *Endrew F.* without considering whether the IEP at issue was "appropriately ambitious." *Doe v. Belchertown Pub. Sch.*, No. CV 16-30189-MGM, 2018 WL 5920747, at *8 (D. Mass. Nov. 13, 2018). Rather, in upholding the IEP over the guardians' challenge, the district court cited only the Supreme Court's statement that "[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Id.* (quoting *Endrew F.*, 137 S.Ct. at 999). That language is an accurate *but not complete* quote from *Endrew F.* By emphasizing the limits of the IDEA without at the same time recognizing its requirement for ambitious and challenging goals, it is similar in effect to the language from *Rowley* that the Supreme Court found, "in isolation," supported a minimal standard under the IDEA that was not appropriate when considering the *Rowley* decision and the text of the statute as a whole. The Court could prevent similar confusion by incorporating the specific holdings of *Endrew F.* into its opinion, thus clarifying the standard to be applied in this Circuit and providing guidance to parties and judges in the district courts.

II. Under the IDEA and *Endrew F.*, Children with Disabilities Must Be Educated in Regular Classrooms Whenever Possible

The IDEA requires the State to provide a child with developmental disabilities or other special educational needs an education in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5)(A). Thus, the child must be educated with students without disabilities in regular classrooms to "the maximum extent appropriate." *Id.* A student with a disability must not be removed from the regular classroom "solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e).

Amici further urge that this Court make clear in its opinion that the Supreme Court's holding in *Endrew F.* confirms that schools must be vigilant in including children with special educational needs in regular classrooms, with classmates without disabilities, "whenever possible." 137 S. Ct. at 999 (citing § 1412(a)(5)). When a child is able to participate in the regular classroom, "the system itself monitors the educational progress of the child." *Id.* (quoting *Rowley*, 458 U.S. at 202-03). Thus, "for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* at 1000.

As recent national and Massachusetts research indicate, IEPs that help children with disabilities meet "ambitious" goals and "challenging" objectives

should be developed and implemented in regular classrooms "whenever possible." A comprehensive analysis of educational data from Massachusetts showed that including students with disabilities in regular classrooms led to better performance on state academic proficiency tests, even after controlling for income, race, English language proficiency, and type of disability.[5] Students with disabilities included in regular classrooms were also far more likely to graduate than students who spent all or most of the day in segregated settings.[6]

The Massachusetts study conforms with extensive research sponsored by the Department of Education. Those studies also show that students with disabilities who spend most of their time in regular classes have higher test scores in reading and mathematics than students who spend most of their time in segregated schools and classes.[7] Those students also enjoy more success outside the classroom, such

---

[5] Thomas Hehir et al., *Review of Special Education in the Commonwealth of Massachusetts* 1, 5 (Apr. 2012), http://www.doe.mass.edu/sped/hehir/2012-04sped.pdf.

[6] Thomas Hehir et al., *Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report* 9-10 & n.14 (Aug. 2014), http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf.

[7] *See* Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal Study* (SEELS) 24 (June 2004), http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf; Jose Blackorby et al., *What Makes a Difference? Influences on Outcomes for Students with Disabilities* 7-7 (Feb. 2007), http://www.seels.net/designdocs/SEELS_W1W3_FINAL.pdf.

as social interaction and school attendance.[8] Students included in the regular classroom achieve greater postsecondary success, including employment, postsecondary education, and income.[9]

Given the IDEA's preference for regular classroom participation, and the demonstrated benefits of such participation, any IEP that is "appropriately ambitious" and designed to help the child meet "challenging objectives" should be implemented in the regular classroom whenever possible.

Conclusion

In *Endrew F.*, the Supreme Court found that the IDEA contains a substantive requirement that a State must offer educational programs that are "appropriately ambitious," focused on "challenging objectives," and "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1000-01. It found further that this standard was "markedly more demanding" than minimal standards applied in some circuits. It explained, moreover, that "for most children, a FAPE will involve integration in the regular

---

[8] *What Makes A Difference*?, supra note 17, at 7-17; Overview of Findings from Wave 1, supra note 17, at 24.

[9] *See* Mary Wagner et al., *What Makes a Difference? Influences on Postschool Outcomes of Youth with Disabilities: The Third Comprehensive Report from the National Longitudinal Transition Study of Special Education Students* 4-8 to 4-9 & Table 4-5 (Dec. 1993), http://files.eric.ed.gov/fulltext/ED365085.pdf.

classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* at 1000. This Court should build on the *Johnson* opinion finding that this Circuit's prior standard was consistent with *Endrew F.* by expressly incorporating the full substantive standard announced in *Endrew F.* Otherwise, the Court risks sowing confusion among litigants, and risks giving rise to different, inconsistent standards arising among the district courts.

Dated: December 17, 2018

Respectfully submitted,

/s/ Ira A. Burnim

Ira A. Brunim
Bar # 1160742
Lewis Bossing
THE JUDGE DAVID L. BAZELON
CENTER FOR MENTAL HEALTH LAW
1101 15th Street NW, Suite 1212
Washington, DC 20005
Tel: (202) 467-5730 x1307

Elizabeth B. McCallum
Paul E. Poirot
William T. DeVinney
BAKER HOSTETLER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Tel: (202) 861-1500

Counsel for Amici Curiae

Certification of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 For Case Number

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 3,854 words.

Dated: December 17, 2018

/s/ Ira A. Burnim
Ira A. Burnim

Certificate of Service

I hereby certify that on December 17, 2018, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF System. All interested parties are registered CM/ECF users.

/s/ Ira A. Burnim
Ira A. Burnim