Case No. 17-16722

IN THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

R.M., a minor student, by and through his parents S.M. and M.M.,
Plaintiff-Appellant,

v.

Gilbert Unified School District,
Defendant-Appellee.

Appeal from a Decision of the
United States District Court for the District of Arizona
Honorable John Joseph Tuchi
No. 2:16-cv-02614-JJT

BRIEF OF AMICI CURIAE
NATIONAL SCHOOL BOARDS ASSOCIATION AND ARIZONA
SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF GILBERT UNIFIED SCHOOL DISTRICT AND
AFFIRMATION OF THE DISTRICT COURT'S DECISION

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae*

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT

TABLE OF AUTHORITIES ii

STATEMENT OF IDENTITY, INTEREST OF AMICI CURIAE 1

FRAP 29(C)(5) STATEMENT 2

ARGUMENT 2

I. The Supreme Court Has Clarified That a School District Provides a Free Appropriate Public Education in the Least Restrictive Environment When It Offers a Program Reasonably Calculated to Enable Progress 2

II. Educational Benefit is the Key Factor for a Court Determining

TABLE OF AUTHORITIES

CASES:

A.W. v. Fairfax Cnty. Sch. Bd.,
372 F.3d 674 (4th Cir. 2004) 9-10, 12

Barnett v. Fairfax Cnty. Sch. Bd.,
927 F.2d 146 (4th Cir. 1991) 22

Baquerizo v. Garden Grove Unified Sch. Dist.,
826 F.3d 1179 (9th Cir. 2016) 14

Board of Education v. Rowley,
458 U.S. 176 (1982) ..... passim

Clyde K. v. Puyallup Sch. Dist., No.3,
35 F.3d 1396 (9th Cir. 1994) 13

Concerned Parents & Citizens for the Continuing Educ. at Malcolm X
(PS 79) v. New York City Bd. of Educ.,
629 F.2d 751 (2d. Cir. 1980) 16

Deer Valley Unified Sch. Dist. v. L.P. ex rel. Schripsema,
942 F. Supp. 2d 880 (D. Ariz. 2013) 16

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

Flour Bluff Indep. Sch. Dist. v. Katherine M.,
91 F.3d 689 (5th Cir. 1996) 21

Honig v. Doe,
484 U.S. 305 (1988) 3

J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.,
626 F.3d 431 (9th Cir. 2010) 20

Katherine G. ex rel. Cynthia G. v. Kentfield Sch. Dist.,
261 F. Supp. 2d 1159 (N.D. Cal. 2003) 14

34 C.F.R. § 300.115(a) (2017) 10
34 C.F.R. § 300.115(b) (2017) 11, 17
34 C.F.R. § 300.116(b)(3) & (c) (2017) 21

71 Fed. Reg 46588 (2006) 12, 22

H.R. Rep. No. 94-332 (1975) 9

OTHER AUTHORITIES:

Dear Colleague Letter from Michael Yudin, Assistant Secretary, and Melody Musgrove, Director, U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS), November 16, 2015, available at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf 17

Letter from Office of Special Education Programs to Paul Veazey, (26 Nov. 2001) 22

Letter from Office of Special Education Programs to Tom Trigg, (30 Nov. 2007) 22

Letter to Fisher, 21 IDELR 992 (OSEP 1994) 18

U.S. Department of Education, National Center for Education Statistics (2016), Digest of Education Statistics, 2015 (NCES 2016-014), available at https://nces.ed.gov/fastfacts/display.asp?id=59 8

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae National School Boards Association ("NSBA"), founded in 1940, 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 who govern

remind local education agencies of 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 Arizona and the Ninth Circuit determine the least restrictive environment for students with disabilities in which schools can provide an educational program that is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." Id. at 992. To assist the Court in evaluating the issues before it, Amici Curiae present the following ideas, arguments, theories, insights, and additional information. This brief is submitted with the consent of both parties.

FRAP 29(C)(5) STATEMENT

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, Amici Curiae state that (A) 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 0.004 5on8.4(e)3.2e8ffT unel cai Tw1 T

need to promise any particular level of benefit so long as it was "'reasonably calculated' to provide some benefit, as opposed to none.'" Id. at 997-998. The Court found "little significance in the Rowley [] Court's language requiring States to provide instruction calculated to 'confer some educational benefit,'" given that the case before Rowley "involved a child whose progress plainly demonstrated that her IEP was designed to deliver more than adequate educational benefit." Id. (internal citations omitted). Instead, the Court held that the IEP must provide the child with an "appropriately ambitious" program in light of his circumstances. Id. at 1000.

The Court explained that the Rowley decision and the IDEA's 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. The Court cautioned 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." (citing Rowley, at 206-207). The Court discussed, in detail, the need to focus on each individual child a his unique needs to determine how the child's disability affects his involvement and progress in the general education curriculum and to provide specialized instruction and services to enable the child to make appropriate progress. Id. at 999-1000. The Court acknowledged that the IEP does not have to aim for grade level advancement when it is not a reasonable prospect for a child. Id.

The Court did not elaborate on what "appropriate" progress might look like in each case, reiterating that the "adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Id. The Court cautioned that "the absence of a bright-line rule … should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" Id. (quoting Rowley, 458 U.S. at 206). Such deference is based on the school authorities' application of expertise and the exercise of judgment. Id. "Those authorities should be able to offer a reviewing court a cogent and responsive explanation for their decisions …." Id. at 1002.

That is exactly what the Gilbert Unified School District ("District") has done in the present case. After providing special education to the student who has26.1bp(i5(r)3.u

circumstances. They are also typical of the situations that school districts encounter every day in serving students with disabilities.

School district staff are well-aware of the presumption in favor of serving these students in the regular classroom, and routinely provide special ed

II. EducaTj /TTBDC TTBi-5.145Tj /Ta2 1 0.206.A.W. v.

Fairfax Cnty. Sch. Bd., 372 F.3d 674, 681 (4th Cir. 2004) (citing Rowley, 458 U.S. at 180-82). While the FAPE requirement addresses the substantive content of the educational services disabled students are entitled to receive, the LRE requirement reflects a preference for mainstreaming disabled students to the extent appropriate. See id. But the IDEA's "preference for mainstreaming is not an absolute commandment." Poolaw v. Bishop, 67 F.3d 830, 836 (9th Cir. 1995). Instead, the FAPE requirement "qualifies and limits" the mainstreaming preference at 8-3(w)4. ,ive,ive

special classes, special schools, home instruction, and instruction in hospitals and institutions, and supplementary services (such as resource room or itinerant instruction) that can be provided in conjunction with regular class placement. Id. § 300.115(b). The placement continuum is necessary to ensure that disabled children receive services in the appropriate setting, based on their unique needs and circumstances. Id.

"Educational placement" is a "term of art" that is not defined in the IDEA, requiring courts to examine the IDEA to "find the interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." N.D. v. Hawaii Dep't of Educ., 600 F.3d 1104, 1114 (9th Cir. 2010) (internal quotations omitted). Because "children were excluded entirely from the public school system and from being educated with their peers," the I

"educational placement" means "the general educational program of the student." Id. at 1116.

The term was not intended to include the "precise physical location" but rather to reflect the degree to which the placement segregates a disabled student from non-disabled students. See, e.g., id. at 1116 (recognizing that a change in educational placement occurs when a student is moved from one type of program to another type or when there is a significant change in the student's program, even when the student's setting doesn't change); A.W., 372 F.3d at 681-82 (finding that "educational placement" describes the environment in which educational services are provided and not the "precise physical location"); White ex rel. White v. Ascension Parish Sch., 343 F.3d 373, 379-80 (5th Cir. 2003) (noting the options on the placement continuum are differentiated from each other by the extent to which they depart from a mainstream assignment; finding that placement refers only to the setting in which the student is educated). The U.S. Department of Education's notes and comments to the regulations support this definition, reiterating its longstanding position "that placement refers to the provision of special education and related services rather than a specific place, such as

B. In Endrew F., the Supreme Court strengthened the importance of the educational benefit factor in LRE determinations.

The District Court's decision properly noted that "[t]he Ninth Circuit has affirmed the use of the Rachel H. factors to analyze whether a placement change represents the LRE." District Court Decision at 6 (E.R., Vol. I, at 6) (citing Clyde K. v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1401 (9th Cir. 1994)). The four factors set out by this Court in Sacramento City Unified Sch. Dist. v. Rachel H. are: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] has on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student]." 14 F.3d 1398,1404 (9th Cir. 1994). These factors reflect the many considerations educators must balance when designing or modifying special education services that will meet the unique needs of an individual child. For each child with a disability 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 there, and the costs, e.g., for employing a one-on-one aide for the child in that setting rather than placing him in a classroom with more students with disabilities and more specialized instruction.

Here, the IEP team determined that Student would be served in the Academic SCILLS classroom at his home school. The administrative law

judge("ALJ") and the District Court applied the Rachel H. factors to determine that the District's proposed changes properly weighed these concerns and satisfied the IDEA's LRE provision. In reaching this conclusion, the District Court correctly explained that "the weight that the Ninth Circuit has accorded to this first educational benefit factor in Rachel H. alone compels the Court to conclude that Student's lack of educational benefit in a general classroom outweighs any comparably small social benefits." District Court Decision, at 8-9.

The weight given to the first factor is both necessary and appropriate, especially in light of the Supreme Court's dicta in Endrew F. Although the nonacademic benefits of mainstreaming are "very important, the IDEA is primarily concerned with the long term educational welfare of disabled students." Pt. 67 Law F.3d at 836; see also Baquerizo v. Garden Grove Unified Sch. Dist., 826 F.3d 1179, 1188 (9th Cir. 2016) (stating the hearing officer reasonably determined the student's academic needs "weighed most heavily against a mainstream environment"); Katherine G. ex rel. Cynthia G. v. Kentfield Sch. Dist., 261 F. Supp. 2d 1159, 1173–74 (N.D. Cal. 2003) (affirming hearing officer's determination that a finding that mainstreaming would provide student with no educational benefit was dispositive of the entire LRE analysis). Endrew F. reinforces the importance of the first factor in the analysis. If a student is not benefitting from the general education classroom, his educational program may not be reasonably calculated to enable the student to make

"progress appropriate in light of his circumstances," which would ultimately result in a denial of FAPE. See Endrew F., 137 S. Ct. at 1002.

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. As

c 0tn tik

a [(.6(ss)-4.3(s)73.2(s)-2.2(R)4.3(E4A)8.1(P718.6(n)5.2(s)-7.3(a)12.1(c)-8.3(e)-8.1(ilve)12.1(.3(9i23

students with disabilities various alternative placements, including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and supplementary services (such as resource room or itinerant instruction) that can be provided in conjunction with regular class placement. 34 C.F.R. § 300.115(b). Where the child continues to spend the same amount of time in the general education classroom with his disabled peers, no change in placement has occurred.

Similarly, a change in placement does not occur simply because a student is not provided with the exact methodology and materials used in a mainstreamed classroom. The U.S. Department of Education, Office of Special Education and Rehabilitative Services ("OSERS"), issued guidance regarding the meaning of "general education curriculum." See Dear Colleague Letter from Michael Yudin, Assistant Secretary, and Melody Musgrove, Director, OSERS, November 16, 2015 (available at

should be given to the District's decision to tailor Student's educational program to better meet his needs. Rowley, at 207-208 (instructing courts to avoid imposing their view of preferable educational methods on the states, as they lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy").

Finally, changes in the location of services that transfer a disabled child away from his neighborhood school do not necessarily violate the IDEA. IDEA regulations require schools to ensure that a disabled child's placement is "as close as possible to the child's home," and "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. 300.116(b)(3) & (c) (2017). This does not mandate that a child be placed in his neighborhood or home school. See, e.g., Flour Bluff Indep. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-94 (5th Cir. 1996) ("It must be emphasized that the proximity preference or factor is not a presumption that a disabled student attend his or her neighborhood school."). "There is at most a preference for education in the neighborhood school."

"significant authority to select the school site, as long as it is educationally appropriate." White, 343 F.3d at 382 (5th Cir. 2003). When a district has "two or more equally appropriate locations that meet the child's special education and related services needs, school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with

location in which to provide services. See, e.g., Wilson, 735 F.2d at 1183-84 (granting deference to the school district's "sound judgment" and affirming placement of child in school 30 minutes away despite parents' argument that student could receive an appropriate education at her neighborhood school); Poolaw, 67 F.3d at 837 (affirming placement of a deaf student at a location 280 miles from the student's home based on his needs and the fact that the location was the closest facility

CERTIFICATION OF COMPLIANCE PURSUANT TO
FED R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER
17-16722

I certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 5,780 words.

Dated: November 28, 2017

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

CERTIFICATE OF SERVICE