

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

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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.

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IDENTITIES 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. 2(n)8.oTd (1)o Tf

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

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

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

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*

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

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

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

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

C. Complex Educational Decisions Should

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

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.

appropriate, acquisition of daily living skills and functional vocational evaluation."

Id

and social-

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 s 83.7(f)3.6(or)3.6(ts)8.4the student(h)8.2de Ptans(t)8.5(i)8.5(on)]TJ 0

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

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.

for independence and functional life skills,

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Dated: February 27, 2019

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