No. 19-1008

In the United States Court of Appeals
For the Tenth Circuit

N.M., A MINOR BY AND THROUGH HIS PARENT, AMANDA M.,
APPELLANT

v.

HARRISON SCHOOL DISTRICT NO. 2,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
THE HONORABLE RICHARD P. MATSCH
CIVIL ACTION NO. 18-CV-00085-RPM

BRIEF OF *AMICI CURIAE*
NATIONAL SCHOOL BOARDS ASSOCIATION, COLORADO ASSOCIATION OF SCHOOL BOARDS, KANSAS ASSOCIATION OF SCHOOL BOARDS, NEW MEXICO SCHOOL BOARDS ASSOCIATION, OKLAHOMA STATE SCHOOL BOARDS ASSOCIATION, UTAH SCHOOL BOARDS ASSOCIATION, AND WYOMING SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF HARRISON SCHOOL DISTRICT NO. 2 AND AFFIRMATION OF THE DISTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT

TABLE OF AUTHORITIES .....

IDENTITIES AND INTEREST OF AMICI CURIAE .....

FRAP (a)(4)(E) STATEMENT 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THIS COURT SHOULD APPLY *ENDREW F.* CONSISTENTLY WITH OTHER CIRCUITS AND THE SUPREME COURT'S CLEAR INTENT TO ASSESS FAPE BASED ON THE CHILD'S INDIVIDUAL CIRCUMSTANCES 4

A. Before *Endrew F.*, Legal Standards Articulated , to Require a Program Reasonably Calculated to Enable Progress Appropriate to the Child's Circumstances 18

II. *ENDREW F.* DID NOT EXPAND IDEA'S LRE PREFERENCE, NOR CHANGE THE PROCESS FOR IEP TEAMS TO DETERMINE THE APPROPRIATE LRE FOR THE CHILD 20

A. Determination of LRE is a Complex Educational Decision Based on the Child's Current Performance, Potential for Growth and Necessary Services 21

B. Complex Educational Decisions Should Not be Second-Guessed by Courts Unless They Are Not Reasonably Calculated to Enable The Child to Make Progress in Light of His Circumstances..... 25

TABLE OF AUTHORITIES

CASES:

Adam v.Keller Indep. Sch. Dist.,
328 F.3d 804 (5th Cir. 2003) 23

Adams v. State of Oregon,
195 F.2d 1141 (9th Cir. 1999) 11

Armstrong v. Kline,
476 F. Supp. 583 (E.D. Pa. 1979) 7, 8

Barnett v. Fairfax Cnty. Sch. Bd.,
927 F.2d 16 (4th Cir. 1991) 27

Battle v. Commonwealth of Pennsylvania,
629 F.2d 269 (3d Cir. 1980)..... 8

Bd. of Educ. v. Diamond,
808 F.2d 987 (3d Cir. 1986)..... 11

Board of Education of Hendrick Heights School District v. Rowley,
458 U.S. 176 (1982)..... 8, 9, 10, 16, 28

Christopher M. by LeVeta McA v. Corpus Christi Indep. Sch. Dist.,
933 F.2d 1285 (5th Cir. 1991) 11

Colin K. v. Schmidt,
715 F.2d 1 (1st Cir. 1983)..... 10

Cordrey v. Eukert,
917 F.2d 1460 (6th Cir. 1990) 11

Doe v. Anrig,
692 F.2d 800 (1st Cir. 1982)..... 10

Doe ex rel. Doe v. Smith,
879 F.2d 1340 (6th Cir. 1989) 11

Endrew F. v. Douglas Cnty. Sch. Dist. RE-1,
137 S. Ct. 988 (2017) 3, 4, 8, 13-18, 20-21, 27-28

E.R. v. Spring Branch Indep. Sch. Dist.,
909 F.3d 754 (5th Cir. 2018) 17

Hall v. Vance Cnty Bd. of Educ.,
774 F.2d 629 (4th Cir. 1985) 10, 11

I.Z.M. v. Rosemont-Apple Valley-Eagan Publ. Schs.,
863 F.3d 966 (8th Cir. 2017) 18-19, 20

Jefferson Cnty Sch. Dist. v. Elizabeth E.,
702 F.3d 1227 (10th Cir. 2012) 4

J.L. v. Mercer Island Sch. Dist.,
592 F.3d 938 (9th Cir. 2010) 13

Johnson v. Boston Publ. Schs.,
906 F.3d 182 (1st Cir. 2018) 18, 19

JSK v. Hendry Cnty Sch. Bd.,
941 F.2d 1563 (11th Cir. 1984) 13

K.D. by and through Dunn v. Downingtown Area Sch. Dist.,
904 F.3d 248 (3d Cir. 2018) 18, 19

Kruelle v. New Castle Cnty. Sch. Dist.,
642 F.2d 687 (3d Cir. 1981) 23

L.B. and J.B. ex rel K.B. v. Nebo Sch. Dist.,
379 F.3d 966 (10th Cir. 2004) 26

Mills v. Board of Education,
348 F. Supp. 866 (D. DC. 1972) 6

M.L. v. Leiman v. Smith,
867 F.3d 487 (4th Cir. 2017) 18

Mr. P. v. West Hartford Bd. of Educ.,
885 F.3d 735 (2d Cir. 2018)..... 18

Sytsema v. Academy Sch. Dist. No. 20,
538 F.3d 1306 (10th Cir. 2008) 4, 13

T.R. v. Kingwood Township Bd. of Educ.,
205 F.3d 572 (3d Cir. 2000)..... 12

Urban v. Jefferson Cnty. Sch. Dist.,
89 F.3d 720 (10th Cir. 1996) 4, 11

Wilson v. Marana Unified Sch. Dist.,
735 F.2d 1178 (9th Cir. 1984) 27-28

Z.B. v. Dist. of Columbia,
888 F.3d 515 (D.C. Cir. 2018)..... 19, 20

STATUTES:

Education Amendments of 1974,
Pub. L. No. 93-380 § 612(d)(13), 88 Stat. 484, 582..... 5

Education of All Handicapped Children Act of 1975 (EAHCA),
Pub. L. No. 94-142, 89 Stat. 773 6

EAHCA § 602(4), Pub. L. No. 94-142, 89 Stat. 775..... 7
EAHCA § 602(18), 89 Stat. 775..... 7
EAHCA § 602(17), Pub. L. No. 94-142, 89 Stat. 775..... 7
EAHCA § 602(19), 89 Stat. 776..... 7

Education of the Handicapped Act (EHA),
Pub. L. No. 91-230, 84 Stat. 175-181 5

Elementary and Secondary Education Act
20 U.S.C. § 1611 (b)(1) (2019)..... 22

Elementary and Secondary Education Act Amendments of 1966, (ESEA Amendments of 1966), Pub. L. No. 89-750, 80 Stat. 1191 5

Individuals with Disabilities Education Act Amendments of 1997,
Pub. L. No. 105-17 § 601, 111 Stat. 773 6

Individuals with Disabilities Education Act (IDEA),
20 U.S.C. §§ 1400 *et seq*. (2019) 1
20 U.S.C. § 1412(a)(1)(A) (2019) 6
20 U.S.C. § 1412(a)(5)(A) (2019) 24
20 U.S.C. § 1414(d)(i)(I)(aa)(II)(aa), (II)(aa), (IV)(aa) (2019)
) Tc 0 Tw 24 0524 ( )Tj

Lester Aron, “Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education after *Rowley?*, 39 Suffolk

INDENTITIES AND INTEREST OF *AMICI CURIAE*

Amicus Curiae National School Boards Association (NSBA), founded in 1940, is a non

l school districts serving nearly 50 million public school

ximately 6.4 million students with disabilities. NSBA

mbers' interests before Congress, as well as federal and

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The New Mexico School Boards Association (NMSBA) is the member organization for all of New Mexico's school boards to support their efforts in providing a quality education for all students of New Mexico. Its members comprise one hundred percent of the state's eighty-nine school boards.

The Oklahoma Stat

provide guidance to district courts, administrative law judges, and hearing officers on the appropriate standards for determining whether a local education agency has provided a child with a disability with a FAPE in the least restrictive environment (LRE).

To assist the Court in evaluating the issues before it, *Amici* present the following ideas, arguments, theories, insights, and additional information.

Endrew F. neither changed nor expanded the LRE preference long required by the IDEA but re-emphasized the importance of judicial deference to educators for complex and prospective educational judgments where courts have little expertise. *Amici* implore the court to retain this deference to decisions made by the individualized education program (IEP) team

A. Before *Endrew F.*, Legal Standards Articulated by Courts to

The following year Congress passed the Education of All Handicapped Children Act of 1975 (EAHCA),[5] which was renamed the IDEA in 1997. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 601, 111 Stat. 37. The 1975 Act expanded the EHA and was modeled upon consent decrees from two lawsuits that challenged the exclusion of children with disabilities from public schools;[6] *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, 283 (E.D. Pa. 1972) and *Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C. 1972). *PARC* required school districts to provide students with disabilities with "access to a free public program of education and training *appropriate* to his capacities." *PARC*, 343 F. Supp. at 287 (emphasis added). *Mills* required school districts to provide "a publicly-supported education *suited* to [the students'] needs." *Mills*, 348 F. Supp. at 971 (emphasis added).

The new Act required that public schools make a "free appropriate public education" available to children with disabilities. 20 U.S.C. § 1412(a)(1)(A) (2019). A free appropriate public education (FAPE) was defined as:

> . . . special education and related services which (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, or secondary school education in the State involved, and (D) are provided in conformity

[5] Pub. L. No. 94-142, 89 Stat. 773.
[6] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982).

with the individualized education program . . . .

Like the lower courts, the Supreme Court expressed frustration that the statutory definition "tends toward the cryptic." 458 U.S. at 189. The Court observed, "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Id*. Nonetheless, the Court was able to distill meaning from two statutory definitions embedded in the term FAPE – special education and related services:

> According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction . . . Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction . . . the child is receiving a "free appropriate public education" as defined by the Act.

Id. at 188-89.

The Court directed reviewing courts to ask, "is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-07.

The Court acknowledged that "[tme s thek -19.085 -2.29cve (l)8.5 ȃ3.5 (ti)8.5 (o)

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necessary to satisfy the statute fell to the lower courts using the guidance that they could discern from *Rowley*.

The first two cases to reach federal appellate courts following *Rowley* presented no difficulty applying the Court's guidance. Both cases arrived with factual findings that the proposed IEPs would have caused the children to regress. *Colin K. v. Schmidt*, 715 F.2d 1, 6 (1st Cir. 1983); *Doe v. Anrig*, 692 F.2d 800, 808 (1st Cir. 1982). Regression was not an educational benefit.

James Hall presented a more difficult case. *Hall v. Vance Cnty Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985). James was a bright student, but struggled through kindergarten and first grade, repeated second grade, was given an IEP in third grade but continued to struggle until an outside evaluator diagnosed him with dyslexia. *Id.* at 631. His parents sued the school district, alleging that the school district failed to provide James with a FAPE.

Rowley stated, "the education to which access is provided [must] be sufficient to confer *some* educational benefit upon the handicapped child." 458 U.S. at 200 (emphasis added). The school district argued that while James had struggled, he had advanced from grade to grade, and had learned at least some things. *Hall*, 774 F.2d at 635-36. If "*some* educational benefit" meant "*any* educational benefit," then James had received a FAPE. The Fourth Circuit was not persuaded: "Clearly, Congress did not intend that a school system could discharge its duty under the

[IDEA] by providing a program that produces some minimal academic advancement, *no matter how trivial*." *Hall*, 774 F.2d at 636 (emphasis in original).

Educ. v. M.E., 172 F.3d 238, 247 (3d Cir. 1999). The Third Circuit characterized its "meaningful benefit test" as "somewhat more stringent" than a test that was satisfied with something that was "merely more than trivial." *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000).

Courts' use of the phrase "some benefit" as opposed to "meaningful benefit" prompted commentators to speculate that a split was developing between circuits. Scott F. Johnson, "*Rowley* Forever More? A Call for Clarity and Change," 41 J.L. & Educ. 25, 27 (2012); Scott Goldschmidt, "A New Idea for the Special Education Law: Resolving the 'Appropriate' Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities," 60 Cath. U. L. Rev. 749, 758-59 (2012); Ron Wenkart, "The *Rowley* Standard: A Circuit by Circuit Review of How *Rowley* Has Been Interpreted," 247 Educ. L. Rep. 1 (2009); Lester Aron, "Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education after *Rowley*?", 39 Suffolk U. L. Rev. 1, 7 (2005). The commentators, however, could not agree on what circuits fell on each side of the split. *Compare* Aron, 39 Suffolk U. L. Rev. at 7 *with* Wenkart, 247 Educ. L. Rep. at 1-3 *and* Goldschmidt, 60 Cath. U. L. Rev. at 758-59.

This and other circuits expressed doubt that the different adjective represented substantively different standards: "Admittedly, it is difficult to distinguish between the requirements of the 'some benefit' and the 'meaningful benefit' standards."

Sytsema, 538 F.3d at 1313 n.7 (10th Cir. 2008); *see* also JSK *v. Hendry Cnty. Sch. Bd.*, 941 F.2d 1563, 1572 (11th Cir. 1991) ("We disagree to the extent that 'meaningful' means anything other than 'some' or 'adequate' educational benefit."); *J.L. v. Mercer Island Sch. Dist*., 592 F.3d 938, 951 n.10 (9th Cir. 2010) (no substantive distinction between "some" and "meaningful")

Consistent with more than thirty years of the

reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999.

Contrary to the representations of Appellant, the Court did not renounce *Rowley*, or contend that any passage of *Rowley* misrepresented the legislative mandate of the IDEA. Instead, the Court explained that its task in *Endrew F.* was to fill the gap left by *Rowley*'s refusal to set "one test for determining the adequacy of educational benefits" by using the foundation of *Rowley* and the statutory language of the IDEA:

> While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided by the Act, the decision 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 998-99.

The Court returned focus to the needs and challenges of the individual child, the same focus the statute requires of the IEP team. "It is through the IEP that the free appropriate public education required by the Act is tailored to the unique needs of a particular child." *Id*. at 1000 (internal quotation and citation omitted). And the Court emphasized that the development of the IEP represents the exercise of educational judgment. *Id.* at 999. Therefore, the standard of judicial review of those judgment calls is the deferential standard of reasonableness. *Id.*

In the end, "*Endrew F.* represents no major departure from *Rowley*." *E.R. by*

E.R. v. Spring Branch Indep. Sch. Dist., 909 F.3d 754, 766 (5th Cir. 2018). Nor does it judicially enhance the Congressional mandate originally spelled out in 1975. As the Court pointed out, while Congress has amended the IDEA several times since *Rowley*, "Congress . . . has not materially changed the statutory definition of a [free appropriate public education] since *Rowley* was decided." *Endrew F.*

(Attach. C to Op. Br. p.

Eagan Publ. Schs., 863 F.3d 966, 971 (8th Cir. 2017) (same); *Rachel H. v. Dep't of Educ.*, 868 F.3d 1085, 1088 (9th Cir. 2017) (same); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 517 (D.C. Cir. 2018) (same).

Even circuits that formerly applied an ostensibly more robust adjective than merely more than *de minimis*, no longer rely on the old adjectives as judicial benchmarks, but look to the needs of the individual child. For example, the First Circuit explained: "To the extent that Johnson implies that 'slow' progress is, in and of itself, insufficient to constitute a 'meaningful educational benefit,' we cannot agree. Instead, the relationship between speed of advancement and the educational benefit must be viewed in light of a child's individual circumstances." *Johnson*, 906 F.3d at 196; *see also Pollock v. Regional Sch. Unit 75*, 886 F.3d 75, 87 (1st Cir. 2018) ("IDEA requires a hearing officer to pay heed to the precise circumstances confronting an individual student").

The Third Circuit noted that by rejecting the use of the phrase "merely more than *de minimis*," the Supreme Cou(upr)3.9 (E)8.2 (A)8 (r)3.7gb(e)3.5(.)-1.9 ( )-8.8 (c Tw

makes only "fragmented progress" is not denied a FAPE if "fragmented progress could reasonably be expected." *Id.* at 255. Similarly, the Fourth Circuit has held that an IEP is not deficient because it failed to contemplate grade level progress where the goals were based on the child's circumstances. *R.F. v. Cecil Sch. Dist.*, 919 F.3d 237, 252 (4th Cir. 2019). "[T]he obligation enforceable under the IDEA is to provide, if the IEP so requires, instruction that is sufficient to enable the child to attain the specified level of proficiency." *I.Z.M. v. Rosemont-Apple Valley-Eagan Publ. Schs.*, 863 F.3d 966, 971 (8th Cir. 2017) (internal quotation omitted); *see also Z.B.*, 888 F.3d at 518 (D.C. Cir. 2018) (affirming the decision that IEP met the *Endrew F.* standard where IEP was based on individual circumstances, but remanding judgment regarding other IEP where it was "unclear whether and how(g)]TJ-0..32

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.

including how the child's disability affects the child's involvement and progress in the general education curriculum."[11] 20 U.S.C. § 1414(d)(1)(A)(i)(I) (2019);

- academic and functional goals for the child that are "designed to meet the needs that result from the child's disability to enable the child to be involved in and make progress in the general educational curriculum," 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2019); and
- the special education and related services that will be provided to allow the child to advance appropriately toward his or her goals, and to make progress in the general education curriculum, 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2019).

The IEP also must state the extent to which the child will be educated with typically developing peers,

children with disabilities should be educated with typically developing students to the "maximum extent appropriate" and not removed to more restrictive settings, such as special classes or separate schools when the child can be educated "satisfactorily" in a less restrictive setting with supplementary aids and services. 20 U.S.C. § 1412(a)(5) (2019).

IDEA-eligible children range from those for whom education means learning to eat, dress, and toilet,[13] to those with superior cognitive skills but behavioral challenges. *E.g., Adam v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003). Nearly ninety-five percent of IDEA students spend at least part of their school day in regular education classrooms. Dep't of Educ., 39th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (hereinafter 39th Annual Report), 2015, p. 49, https://www2.ed.gov/about/reports/annual/osep/2017/parts-b-c/39th-arc-for-idea.pdf. More than sixty percent spend at least eighty percent of their school day in regular education settings. *Id.*

Given this large spectrum of students, school districts must have a continuum of options available to meet the individual needs of the diverse range of students who require special education. 34 C.F.R. § 300.115 (2019). One student's educational needs might be adequately addressed in a regular education class where grade level content is team-taught by a regular education teacher and a special

[13] *E.g., Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981).

education teacher, with the special education teacher responding to the unique needs of IDEA-eligible students in a manner that is indistinguishable from the in-class assistance that is provided to their typically-developing classmates. A child with challenges that prevent him from assimilating grade level material in a particular content area might need to be educated in a separate class for that content area but participate in grade level classes in other content areas. A child with a significant cognitive impairment who cannot assimilate grade level material in several content areas might be educated in a special education program operated in a regular education school with the opportunity to participate with typically-developing students in less academically-focused classes such as art, choir, or physical education. Some students might be so impacted that they can only be educated in a highly-specialized school with multiple supports, populated solely with students with disabilities, with no opportunity to engage with typically-developing peers.

The statutory benchmark for assessing whether an IEP team may remove a child from a more or less restrictive setting to another is whether the child's education can be "achieved satisfactorily" in a less restrictive setting with supplementary aids and services. 20 U.S.C p91s3.6 (e)3.637 Tw -3-e4 Tc 0.-1n a

not sufficient to enable a child to make progress that is appropriate in light of the child's circumstances in a team-taught class, the student may be removed to a separate class. Conversely, if supplementary aids and services will permit the child to make progress that is appropriate in light of the child's circumstances in the team-taught class, generally, the child should not be retained in the separate class.

Appellant contends that the district court "erroneously prioritize[d] the IDEA's least restrictive environment (LRE) provision over the requirement of offering a [FAPE]." Op. Br. p. 23. The IDEA, however, balances the FAPE requirement with the LRE requirement. The priority set by the IDEA is that if the child can be educated satisfactorily in the less restrictive setting with supplementary aids or services, the child should not be kept in a more restrictive setting.

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

non-academic benefits, in the less restrictive setting; and (4) the effect of the child's presence in the less restrictive setting. *L.B. and J.B. ex rel K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976-77 (10th Cir. 2004). Other factors raised and considered by the IEP team might be relevant; no one factor is dispositive. *Id.* In this case, the program proposed by the School District would be provided in a *less* restrictive setting than the current setting, preferred by the Appellants. The School District proposes a specialized program within Otero Elementary School staffed by licensed teachers with the opportunity for interaction with typically-developing peers. The parents propose that the child remain at Alpine Autism Center, a separate facility without typically-developing peers or properly licensed teachers. Thus, while some LRE decisions require balancing a child's academic progress against the functional benefits of socialization with typically-developing peers, the decision here did not require any such balancing because the program at Otero Elementary School offered N.M. access to better academic instruction and interaction with typically-developing peers. As the School District's education personnel indicated, and as the district court found: "The deficiency at Alpine is in learning instruction. There are no

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. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). These calculations, of course, involve prospective educational judgments where courts have little expertise, and thus are evaluated under a deferential reasonableness review. *Endrew F.*, 137 S. Ct. at 999. The IDEA does not "empower judges to elaborate a federal common law of education." *Id.* at 998. Because an IEP team considers a student's LRE in tandem with its determination about appropriate services and methodologies, courts should defer to educators' expertise regarding a student's LRE, as a component of 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 v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995) ("whether to educate a handicapped 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. In *drc 0 Tw 27.TT1 28 0 T*

CERTIFICATE OF COMPLIANCE

Section 1. Word Count

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By:

/S/Francisco M. Negrón, Jr.
Counsel for Amici Curiae
National School Boards Assoc., et al.

Dated: May 16, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on a copy of the foregoing BRIEF OF AMICI CURIAE was furnished through (ECF) electronic service to the following on this 16th day of May 2016:

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