

**IN THE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**  
No. 17-16722

---

R.M.

Plaintiff-Appellant

vs.

Gilbert Unified School District

Defendant-Appellee

---

Appeal from the United States District Court  
For the District of Arizona  
HONORABLE JOHN JOSEPH TUCHI  
No. 2:16-cv-02614-JJT

***AMICUS CURIAE* BRIEF OF FORMER OFFICIALS OF THE U.S.  
DEPARTMENT OF EDUCATION, THE NATIONAL DOWN SYNDROME  
CONGRESS, THE ASSOCIATION OF UNIVERSITY CENTERS ON  
DISABILITIES, THE ARC OF ARIZONA, AND THE ARC OF  
WASHINGTON STATE IN SUPPORT OF NEITHER PARTY**

Lewis Bossing  
CA Bar No. 227492  
THE JUDGE DAVID L. BAZELON  
CENTER FOR MENTAL HEALTH LAW  
1101 15<sup>th</sup> Street NW, Suite 1212  
Washington, DC 20005  
Telephone (202) 467-5730 x1307  
Counsel for *Amici Curiae*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI.....	ix
CORPORATE DISCLOSURE STATEMENT.....	xiii
INTRODUCTION.....	1
ARGUMENT.....	3
I.    The Supreme Court’s Decision in Endrew Announced a “Markedly More Demanding” Standard for Educating Students With Disabilities, Reflecting the IDEA’s High Expectations For Students.....	3
II.   Students with Disabilities Benefit from Being Included in Regular Classrooms with Non-Disabled Peers.....	9

## TABLE OF AUTHORITIES

	Page
CASES	
<i>A.M. v. Monrovia Unified Sch. Dist.</i> , 627 F.3d 773 (9th Cir. 2010).....	3
<i>Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley</i> , 458 U.S. 176 (1982).....	4, 5
<i>Capistrano Unified Sch. Dist. v. Wartenberg</i> , 59 F.3d 884 (9th Cir. 1995).....	4
<i>Andrew F. v. Douglas County School District RE-1</i> , 137 S. Ct. 988 (2017).....	1, 2, 5, 6, 7, 9
<i>Forest Grove Sch. Dist. v. Student</i> , 665 F. App'x 612 (9th Cir. 2016).....	4
<i>M.C. v. Antelope Valley Union High Sch. Dist.</i> , 858 F.3d 1189, 1200-01 (9th Cir. 2017).....	1, 5, 9
<i>Sacramento City Sch. Dist., Board of Educ. v. Rachel H.</i> , 14 F.3d 1398 (9th Cir. 1994).....	14
<i>Sch. Comm. Of Burlington v. Dep't of Educ.</i> , 471 U.S. 359 (1985).....	1
<i>Wilson v. Marana</i> , 735 F.2d 1178 (9th Cir. 1984).....	3
STATUTES, REGULATIONS, AND RULES	
Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 <i>et seq.</i> .....	6
20 U.S.C. § 6311(b)(1).....	7
20 U.S.C. § 6311(b)(1)(A)-(D).....	6
20 U.S.C. § 6311(b)(1)(D)(i).....	7
20 U.S.C. § 6311(b)(1)(E)(i)(V).....	7, 8
20 U.S.C. § 6311(b)(2).....	6

20 U.S.C. § 6311(c)(4)(A).....	6
Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802 (2015).....	7, 8
Individuals with Disabilities Education Act, 20 U.S.C. § 1400 <i>et seq.</i> .....	<i>passim</i>
20 U.S.C. § 1401(9).....	1
20 U.S.C. § 1412(a)(1)(A).....	1
20 U.S.C. § 1412(a)(5)(A).....	10
20 U.S.C. § 1414(d)(1)(A).....	1, 8
No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).....	6
34 C.F.R.:	
§ 300.39(b)(3).....	1
§ 300.34(a).....	1, 8
§ 300.116(e).....	10
§ 300.530(f).....	8
Fed. R. App. P.:	
Rule 26.1.....	xiii
Rule 29.....	xiii
Rule 29(a)(4)(E).....	ix

LEGISLATIVE MATERIALS

S. Rep. No. 108-185 (2003).....6-7

ADMINISTRATIVE MATERIALS

Final Rule, *Improving the Academic Achievement of the Disadvantaged: Assistance to States for the Education of Children with Disabilities*, 80 Fed. Reg. 50,773, 50,774, 50,776 (Aug. 21, 2015).....7, 13, 14

Massachusetts Dep’t of Elementary & Secondary Educ.:

The Massachusetts Tiered System of Supports (MTSS) (last updated Oct. 11, 2011), <http://www.doe.mass.edu/sped/mtss.html>.....14

U.S. Dep’t of Educ.:

Inst. of Educ. Sciences:

*A Compendium of Social-Behavioral Research Funded by NCER and NCSE: 2002-2013* (2016), <http://ies.ed.gov/ncer/pubs/20162002/pdf/20162002.pdf>.....15

Office of Special Educ. & Rehabilitative Services:

Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities (Aug. 1, 2016), <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>.....8

Dear Colleague Letter on FAPE 1 (Nov. 16, 2015), [https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance\\_on\\_fape\\_11\\_17\\_2015.pdf](https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance_on_fape_11_17_2015.pdf).....7, 8

*Effective Evidence-based Practices for Preventing and Addressing Bullying at 2* (Enclosure to Aug. 20, 2013)

Dear Colleague Letter on Bullying),  
[http://www2.ed.gov/policy/speced/  
guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf](http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf).....15

Office of Special Education Programs:

IDEAs That Work: Preparing Children and Youth  
With Disabilities for Success,  
<https://ccrs.osepideasthatwork.org/>.....16

OTHER MATERIALS

American Institutes for Research, Ctr. on Response to Intervention,  
RTI Glossary of Terms, [http://www.rti4success.org/  
resources/rti-glossary-terms#MTSS](http://www.rti4success.org/resources/rti-glossary-terms#MTSS).....13

Jose Blackorby et al., *What Makes a Difference?*  
*Influences on Outcomes for Students with Disabilities* (Feb. 2007),  
[http://www.seels.net/designdocs/SEELS\\_W1W3\\_FINAL.pdf](http://www.seels.net/designdocs/SEELS_W1W3_FINAL.pdf).....10, 11

Brief of 118 Members of Congress as *Amici Curiae*  
in Support of Petitioners, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*,  
137 S. Ct. 988 (2017) (No. 15-827) 2016 WL 6873059.....4

Brief of *Amici Curiae* Delaware, et al.,  
*Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017)  
(No. 15-827) 2016 WL 6916169.....4

Brief of Former Officials of the U.S. Dep't of Educ. as *Amici Curiae*  
in Support of Petitioner, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*,  
137 S. Ct. 988 (2017) (No. 15-827) 2016 WL 6873058.....7, 9

Brief for the United States of America as *Amicus Curiae*  
in Support of Petitioner, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*,  
137 S. Ct. 988 (2017) (No. 15-827) 2016 WL 6873024.....7

Michael A. Gottfried et al., Does the Presence of a Classmate  
With Emotional/Behavioral Disabilities Link to Other Students'  
Absences in Kindergarten?,  
35 Early Childhood Res. Qtrly. 506 (2016).....12

Thomas Hehir, New Directions in Special Education: Eliminating Ableism in Policy and Practice 18-39 (2005).....	15
Thomas Hehir et al., Review of Special Education in the Commonwealth of Massachusetts (Apr. 2012), <a href="http://www.doe.mass.edu/sped/hehir/2012-04sped.pdf">http://www.doe.mass.edu/sped/hehir/2012-04sped.pdf</a> .....	11
Thomas Hehir et al., Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report (Aug. 2014), <a href="http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf">http://www.doe.mass.edu/sped/hehir/2014-09synthesis.pdf</a> .....	12
Nat'l Ctr. on Universal Design for Learning, What is UDL?, <a href="http://www.udlcenter.org/aboutudl/whatisudl">http://www.udlcenter.org/aboutudl/whatisudl</a> .....	14
OSEP Technical Assistance Ctr.:	
Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS, <a href="http://www.pbis.org/school/mtss">http://www.pbis.org/school/mtss</a> .....	13, 15
Positive Behavioral Interventions & Supports, Tier 3 Supports, <a href="http://www.pbis.org/school/tier3supports">http://www.pbis.org/school/tier3supports</a> .....	14, 15
Gary L. Peltier, The Effect of Inclusion on Non-Disabled Children: A Review of the Literature, 68 Contemporary Educ. 234 (1997).....	12
Wayne S. Sailor & Amy B. McCart, Stars in Alignment, 39 Res. & Prac. for Persons with Severe Disabilities 55 (2014), <a href="http://rps.sagepub.com/content/39/1/55.full.pdf">http://rps.sagepub.com/content/39/1/55.full.pdf</a> .....	12
Schoolwide Integrated Framework for Transformation, SWIFT Guide: Inclusive Academic Instruction, <a href="http://guide.swiftschools.org/multi-tiered-system-of-support/inclusive-academic-instruction">http://guide.swiftschools.org/multi-tiered-system-of-support/ inclusive-academic-instruction</a> .....	15
Thomas E. Scruggs et al., Do Special Education Interventions Improve Learning of Secondary Content? A Meta-Analysis, 31 Remedial & Special Educ. 437 (2010).....	13

Transcript of Oral Argument, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*,  
 No. 15-827 (Jan. 11, 2017).....4

U.S. Dep’t of Educ., *New Accountability Framework Raises the Bar  
 for State Special Education Programs* (June 24, 2014).....9

Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1  
 of the Special Education Elementary Longitudinal Study  
 (SEELS)* (June 2004), [http://www.seels.net/  
 designdocs/seels\\_wave1\\_9-23-04.pdf](http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf).....10, 11

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* (Dec. 1993),  
<http://files.eric.ed.gov/fulltext/ED365085.pdf>.....11

## STATEMENTS OF INTEREST OF *AMICI*<sup>1</sup>

*Amici* individuals and organizations are dedicated to advancing the interests of students with disabilities. The individual *amici* are former U.S. Department of Education officials responsible for special education policy; as such, they have been responsible for enforcing the statutory rights and obligations enacted by Congress for the benefit of students with disabilities and their families, and for leading the Department's support of peer-reviewed research into effective approaches to educating students with disabilities. The *amici* organizations are national and state organizations dedicated to advancing and protecting the civil rights of students with disabilities, fostering their integration into all aspects of school and adult life, and furthering their ability to live full and independent lives. *Amici* individuals and organizations have extensive experience and nationally recognized expertise in the interpretation of the Individuals with Disabilities Education Act (IDEA) and other disability rights laws.

*Amicus* Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan.

---

<sup>1</sup> Pursuant to Fed. R. Civ. P. 29(a)(4)(E), counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Ms. Will has more than 35 years of experience advocating for individuals with intellectual disabilities and their families and developing partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities.

*Amicus* Stephanie Smith Lee served as the Director of the Office of Special Education Programs (OSEP) in the US Department of Education, from 2002 through March 2005 under President George W. Bush. In that position, Ms. Lee directed the policy development, program planning, monitoring, evaluation, research and implementation of the Federal special education law. Ms. Lee is currently the Senior Policy Advisor for the National Down Syndrome Congress, and has over 35 years of experience in public policy, including serving in senior Congressional staff positions, as a foundation administrator, and as a nationally

recognized disability parent leader. Since her daughter, Laura, was born with Down syndrome in 1982, Ms. Lee has organized and led many successful bipartisan, collaborative efforts to improve special education and disability policy in Virginia and at the national level.

*Amicus* 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.

*Amicus* 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.

*Amicus* The Arc of Arizona advocates for the rights and full community participation of all people with intellectual and developmental disabilities (I/DD), with a focus on the more than 125,000 Arizonans with an I/DD diagnosis. The Arc of Arizona connects families and self-advocates to promote and protect their human rights and actively supports their inclusion and participation in the community throughout their lifetimes. Together with its network of members and affiliated chapters, the organization improves systems of supports and services, inspires communication and builds capacity in communities across the state. The Arc of Arizona is affiliated with The Arc of the United States.

*Amicus* The Arc of Washington State advocates for the rights and full participation of all people with I/DD. Along with our network of members and chapters, The Arc of Washington State supports and empowers individuals and families; improves support and service systems; influences public policy; and inspires inclusive communities. For more than 80 years, The Arc of Washington State has advocated for quality services and necessary funding to meet the needs of people with I/DD and their families including birth to three services, special education, employment and residential supports, health care, transportation, respite and inclusion in the community. The Arc of Washington State is affiliated with The Arc of the United States and oversees the work of nine local chapters throughout the state.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 29, incorporated *amici curiae* state that they have no parent corporations, nor is there any public held corporation owning 10 per cent or more of their stock.

## INTRODUCTION

In its decision denying Plaintiff's claims under the Individuals with Disabilities Education Act (IDEA),<sup>2</sup> the district court held that R.M. did not derive "meaningful benefit" from his "general education" classroom, such that additional time in an "Academic SCILLS" classroom was appropriate. Order at 8, 15-17.

As this Court has recognized, the U.S. Supreme Court recently changed the legal landscape for judging the adequacy under the IDEA of the special education being provided by school systems. *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1200-01 (9th Cir. 2017) (remanding to district court to apply Supreme Court's "new guidance"). In *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 1000 (2017), the Supreme Court announced a new, "markedly more demanding" standard for judging the special education provided to a student with a disability. Under this "more precise" standard, *M.C.*, 858 F.3d at 1200, schools must provide an education "reasonably calculated to enable [the]

---

<sup>2</sup> The IDEA requires states receiving federal funds to ensure that that all eligible children with disabilities are provided a "free and appropriate public education," or "FAPE." 20 U.S.C. § 1401(9), 1412(a)(1)(A), 1414(d)(1)(A). The "FAPE requirement embodies Congress's ambitious objective of promoting educational opportunities for such children." *Sch. Comm. Of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) (internal quotes omitted). Schools meet this requirement by providing students with disabilities "special education": specially designed instruction to help them meet the grade-level educational standards that apply to all students, 34 C.F.R. § 300.39(b)(3), and the related supportive services, if any, each child needs to benefit from instruction. 34 C.F.R. § 300.34(a).

child to make progress appropriate in light of the child’s circumstances.” *Id.* at 999. Moreover, each child’s education must be “appropriately ambitious,” and every child must have the chance to meet “challenging objectives.” *Id.* at 1000.

*Amici* write to clarify further what *Endrew* requires of school districts and schools, and to emphasize that “an ‘education’ is what the IDEA promises” – and “[p]rogress through [mastery of the school curriculum] is what our society generally means by an ‘education.’” *Id.* at 999. *Endrew* requires that schools provide children who are capable of mastering the school curriculum and advancing from grade to grade the special education they need to meet these goals. As the Court noted in *Endrew*, “for most children, a FAPE [free appropriate public education] will involve integration in the regular classroom and individualized special education calculated to *achieve advancement from grade to grade.*” *Id.* at 1000 (emphasis added).

In addition, *amici* write to emphasize the importance and value of IDEA’s requirement that children be educated in the “least restrictive environment” (LRE). As the Court explained in *Endrew*, the IDEA requires that children with disabilities receive education in the regular “general education” classroom “whenever possible.” *Id.*

Across the country, schools are educating students with disabilities, including those with significant cognitive disabilities, in regular “general

education” classrooms. In general, students with disabilities in such “inclusive” settings<sup>3</sup> do much better in school and after they leave school than do students separated from their peers. More time in regular classrooms results in better outcomes for students with disabilities, regardless of race, class, gender, and type of disability. By employing approaches and technologies developed through research into how students with disabilities learn, school staff can and regularly do provide special education in regular classrooms, including to students with significant cognitive disabilities.

## ARGUMENT

### **I. The Supreme Court’s Decision in *Endrew* Announced a “Markedly More Demanding” Standard for Educating Students with Disabilities, Reflecting the IDEA’s High Expectations for Students.**

Echoing this Court’s pre-*Endrew* precedent, the district court appeared to rely on whether R.M. was receiving a “meaningful benefit” from his special education. Order at 16 (citing *Wilson v. Marana*, 735 F.2d 1178 (9th Cir. 1984) and *A.M. v. Monrovia Unified Sch. Dist.*, 627 F.3d 773 (9th Cir. 2010)).<sup>4</sup>

---

<sup>3</sup> In recent years, educators and parents tend to use the terms “LRE” and “inclusion” interchangeably, as *amici* sometimes do in this brief. As discussed below, in *Endrew* the Supreme Court described the IDEA’s “preference” that the LRE for students with disabilities be inclusion in a regular classroom, with non-disabled students.

<sup>4</sup> Elsewhere, the Order states that “A school district provides [a FAPE] if it: (1) addresses the child’s unique needs, (2) provides adequate support services so the child can take advantage of the educational opportunities, and (3) is in accord with

The “meaningful benefit” standard is different than the standard the Supreme Court embraced in *Endrew*. That standard does not appear in the Court’s decision. The Court knew that some lower courts, including at least two Ninth Circuit panels, applied that standard, and some *amici* urged the Court to endorse it.<sup>5</sup> But the United States, to whom the Court substantially deferred in writing its opinion, urged the Court not to adopt that standard,<sup>6</sup> and it does not feature in the Court’s decision.

Instead, it adopted a new standard. In so doing, it rejected the idea that its prior decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), had

---

the [child’s] individualized education program.” Order at 14 (quoting *Forest Grove Sch. Dist. v. Student*, 665 F. App’x 612, 614 (9th Cir. 2016) (citing *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995))). This standard is closer to the standard the Court adopted in *Endrew*, that special education should be calculated to enable the student to make appropriate progress in light of the student’s circumstances, including enabling the student to meet challenging goals.

<sup>5</sup> See, e.g., Brief of 118 Members of Congress as *Amici Curiae* in Support of Petitioners, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827) 2016 WL 6873059; Brief of *Amici Curiae* Delaware, et al., *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827) 2016 WL 6916169.

<sup>6</sup> See, e.g., Transcript of Oral Argument, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827 (Jan. 11, 2017), at 21:10-14 (attorney for United States urging Court to reject “meaningful benefit” standard, because “it has baggage in various courts of appeals. It means different things to different courts, and it has been applied in different ways by different courts”)).

“endorse[d] any one standard for judging the adequacy of special education.” *Id.* at 993 (quoting *Rowley*, 458 U.S. at 202).

As the Court explained in *Endrew*, schools are required to offer each eligible child an Individualized Education Program (IEP) that is “reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances,” including the child’s abilities. *Id.* at 999. A substantive standard not focused on the child making progress that is commensurate with the child’s abilities “would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act” in the IDEA. *Id.*; *M.C.*, 858 F.3d at 1201 (child’s “potential” is key factor in judging adequacy of special education). As the Court noted, “an ‘education’ is what the IDEA promises,” and “[p]rogress through [mastery of the school curriculum] is what our society generally means by an ‘education.’” *Id.*

Accordingly, each child’s special education must be “appropriately ambitious” in light of the child’s strengths and capabilities. *Id.* at 1000. “[F]or most children,” the Court stated, achieving “appropriately ambitious” goals “will involve integration in the regular classroom and individualized special education

calculated to *achieve advancement from grade to grade.*” *Id.* at 1000 (emphasis added).<sup>7</sup>

The Court’s insistence on high expectations for students with disabilities is well-grounded in federal law. Congress expressly linked the IDEA to the “No Child Left Behind Act,” the 2001 reauthorization of the Elementary and Secondary Education Act (“ESEA”), which requires States to adopt “challenging academic content standards” for all students, including those with disabilities. 20 U.S.C. § 6311 (b)(1)(A)-(D); *see also* 20 U.S.C. § 6311(b)(2) and (c)(4)(A). By linking the two statutes, Congress established a “unified system of accountability” to promote its purpose of “ensur[ing] that all children”— “including children with disabilities”—“are held to high academic achievement standards.” S. Rep. No.

---

<sup>7</sup> The Court cautioned, however, that not every student with a disability “who is advancing from grade to grade . . . is automatically receiving a [FAPE].” *Endrew F.*, 137 S. Ct. at 1000 n.2. Children who can excel must be provided the special education they need to help them achieve “appropriately ambitious” goals.

108-185, at 17-18 (2003).<sup>8</sup> The 2015 reauthorization of the ESEA, the Every Student Succeeds Act (ESSA), retains this requirement. 20 U.S.C. § 6311(b)(1).<sup>9</sup>

The Court recognized that not all children with disabilities can master the school’s curriculum. Some have significant cognitive or other disabilities that may 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.*

Congress has directed that, for such students, progress should be measured against “alternate academic achievement standards.” Every Student Succeeds Act,

---

<sup>8</sup> “In a situation where a child is performing significantly below the level of the grade in which the child is enrolled,” special education should enable the child to meet “annual goals that are ambitious . . . . [T]he annual goals need not necessarily result in the child’s reaching grade-level within the year covered by the IEP, but [should] . . . help close the gap.” U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Dear Colleague Letter on FAPE 1 (Nov. 16, 2015) (“Dear Colleague Letter”) (“Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.”) (citing 80 Fed. Reg. at 50,776), [https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance\\_on\\_fape\\_11\\_17\\_2015.pdf](https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance_on_fape_11_17_2015.pdf). The guidance in the Department’s Dear Colleague Letter was a focus of the United States’ brief in the Supreme Court, as well as those of other *amici*. See generally Brief for the United States of America as *Amicus Curiae* in Support of Petitioner, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827) 2016 WL 6873024; Brief of Former Officials of the U.S. Dep’t of Educ. as *Amici Curiae* in Support of Petitioner, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827) 2016 WL 6873058.

<sup>9</sup> It also requires that such standards be aligned with the entrance requirements for public colleges and universities in each State. 20 U.S.C. § 6311(b)(1)(D)(i).

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.”<sup>10</sup>

Additionally, for a student whose behavior impedes learning, special education must include behavioral services.<sup>11</sup> These and other “related services” must be provided when needed to address behavior that interferes with the student’s learning.<sup>12</sup>

---

<sup>10</sup> Dear Colleague Letter, *supra* note 8, at 5.

<sup>11</sup> The U.S. Department of Education has stated that behavioral services should include positive behavioral interventions and supports, such as functional behavior assessments (FBAs), and behavior intervention plans (BIPs). U.S. Dep’t of Educ., Office of Special Educ. & Rehab. Servs., Dear Colleague Letter on Ensuring Equity and Providing Behavioral Supports to Students with Disabilities 1, 4 (Aug. 1, 2016), <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf>; *cf.* 29 C.F.R. § 300.530(f) (requiring FBAs and BIPs where behavior violating school’s code of conduct is manifestation of student’s disability).

<sup>12</sup> 34 C.F.R. § 300.34(a) (related services are provided as “required to assist a child . . . to benefit from special education”).

In sum, the Court in *Endrew* resoundingly rejected the “bigotry of low expectations”<sup>13</sup> that marked lower courts’ interpretations of *Rowley*, and embraced a standard that incorporates appropriately ambitious goals for students with disabilities. This Court has acknowledged the change wrought by *Endrew*, see *M.C.*, 858 F.3d at 1200, although it has not yet spelled out all its implications.<sup>14</sup>

## **II. Students with Disabilities Benefit from Being Included in Regular Classrooms with Non-Disabled Peers.**

In *Endrew*, the Supreme Court emphasized the IDEA’s strong preference for inclusion, including for students not able to meet grade level academic standards. 137 S. Ct. at 999-1000.<sup>15</sup>

---

<sup>13</sup> Brief of Former Officials, *supra* note 8, at 6 (“[W]e should reject the soft bigotry of low expectations and expect all children, including children with disabilities, to achieve academic success....”); see also *id.* at 17 (“Educators now have many highly effective interventions that can help every student meet the state academic standards that apply to all students.”). Cf. U.S. Dep’t of Educ., New Accountability Framework Raises the Bar for State Special Education Programs (June 24, 2014) (quoting then-Secretary of Education Arne Duncan: “We know that when students with disabilities are held to high expectations . . . They excel.”).

<sup>14</sup> See *id.* at 1201. In *M.C.*, this Court moved well beyond prior Circuit law, declaring that “the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can ‘make progress in the general education curriculum,’ taking into account the progress of his non-disabled peers, and the child’s potential.”

<sup>15</sup> See *id.* at 1000 (“[T]he Act prefers . . . [that] a child is fully integrated in the regular classroom . . . .”); *id.* at 999 (“[T]he IDEA requires that children with disabilities receive education in the regular classroom ‘whenever possible.’”).

To advance students' learning, the IDEA requires education in the least restrictive environment (LRE). 20 U.S.C. § 1412(a)(5)(A). To meet this requirement, the student must be educated with non-disabled students 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).<sup>16</sup>

Research, and the experience of *amici*, demonstrate the well-established benefits of educating students with disabilities in regular classrooms. Longitudinal research sponsored by the Department of Education, along with independent studies, confirms that students with disabilities who are included in regular classrooms do better in school and as adults than students with disabilities in separate, "segregated" schools or classrooms.

The Department has found that, even controlling for students' cognitive abilities, 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.<sup>17</sup> Greater participation in regular

---

<sup>16</sup> The ability to meet grade-level academic standards is not a precondition to inclusion, as the district court recognized below.

<sup>17</sup> 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](http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf); Jose Blackorby et al.,

classrooms also leads to positive social outcomes for students with disabilities, including belonging to school or community groups and missing fewer days of school.<sup>18</sup> Inclusion also leads to better postsecondary outcomes, including in employment, postsecondary education, and income.<sup>19</sup>

More recently, an extensive analysis of student and school district data from Massachusetts showed that including students with disabilities in regular classrooms led to better performance on state academic proficiency tests.<sup>20</sup> The higher scores were not explained by income, race, English language proficiency, or type of disability. Further, across all disability groups, students with disabilities

---

*What Makes a Difference? Influences on Outcomes for Students with Disabilities* 7-7 (Feb. 2007), [http://www.seels.net/designdocs/SEELS\\_W1W3\\_FINAL.pdf](http://www.seels.net/designdocs/SEELS_W1W3_FINAL.pdf).

<sup>18</sup> *What Makes A Difference?*, *supra* note 17, at 7-17; Overview of Findings from Wave 1, *supra* note 17, at 24.

<sup>19</sup> 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>.

<sup>20</sup> 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>.

included in regular classrooms were more likely to graduate than students who spent all or most of the day in segregated settings.<sup>21</sup>

*Amici* are aware of no study finding that separate classrooms or schools benefit students with disabilities. What research does show, however, is that including students with disabilities in regular classrooms does not harm or disadvantage students without disabilities.<sup>22</sup> In fact, many studies show that inclusion benefits students without disabilities. One reason is because the added staff and services placed in regular classrooms to support students with disabilities often benefit their non-disabled peers as well.

---

<sup>21</sup> 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>.

<sup>22</sup> See, e.g., Wayne S. Sailor & Amy B. McCart, Stars in Alignment, 39 Res. & Prac. for Persons with Severe Disabilities 55 (2014) (collecting studies and noting benefit to all students of educational practices that support inclusion), <http://rps.sagepub.com/content/39/1/55.full.pdf>; Gary L. Peltier, The Effect of Inclusion on Non-Disabled Children: A Review of the Literature, 68 Contemporary Educ. 234 (1997) (“Research indicates that inclusive education promotes and enhances all students' social growth within inclusive classrooms and does not negatively affect typical students' academic growth.”). Other research indicates that teachers with more experience, including special education experience, mitigate any adverse impact. See Michael A. Gottfried et al., Does the Presence of a Classmate With Emotional/Behavioral Disabilities Link to Other Students' Absences in Kindergarten?, 35 Early Childhood Res. Qtrly. 506 (2016).

Education methods for students with disabilities have vastly improved, making inclusion more feasible than ever, including for students who, like R.M., have been diagnosed with Down syndrome.

For example, public schools regularly implement multi-tiered systems of support (MTSS) to meet the academic and behavioral needs of students, including students with disabilities.<sup>23</sup> Schools provide core instruction that meets the needs of most students. After identifying students who need additional support, including students with disabilities, schools provide evidence-based interventions of moderate to high intensity to address the individual learning challenges of each student.<sup>24</sup>

---

<sup>23</sup> See OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Multi-tiered System of Support (MTSS) & PBIS (defining MTSS as providing instruction and interventions “matched to student need, monitoring progress frequently to make decisions about changes in instruction or goals, and applying child response data to important educational decisions”), <http://www.pbis.org/school/mtss> (last visited Oct. 17, 2017).

<sup>24</sup> See, e.g., American Institutes for Research, Ctr. on Response to Intervention, RTI Glossary of Terms (“MTSS allows for the early identification of learning and behavioral challenges and timely intervention for students who are at risk for poor learning outcomes.”), <http://www.rti4success.org/resources/rti-glossary-terms#MTSS> (last visited Oct. 17, 2017); Thomas E. Scruggs et al., Do Special Education Interventions Improve Learning of Secondary Content? A Meta-Analysis, 31 Remedial & Special Educ. 437-49 (2010) (meta-analysis of 70 independent studies investigating effects of special education interventions on student achievement found that students with disabilities made significant progress across different content areas and across different educational settings when they received systematic, explicit instruction; learning strategy instruction; and other evidence-based instructional strategies and supports), cited in Final Rule, Improving the Academic Achievement of the Disadvantaged: Assistance to States

Schools, including those implementing MTSS, are also guided by the principles of Universal Design for Learning (UDL), which focuses on individualizing approaches to teaching and learning, thereby facilitating the inclusion of students with disabilities in regular classrooms.<sup>25</sup>

Public schools also regularly implement supports for student behavior,<sup>26</sup> including through systematic approaches like schoolwide positive behavioral interventions and supports (PBIS),<sup>27</sup> and individualized services for students who

---

for the Education of Children With Disabilities, 80 Fed. Reg. 50,773, 50,774 (Aug. 21, 2015).

<sup>25</sup> See Massachusetts Dep't of Elementary & Secondary Educ., The Massachusetts Tiered System of Supports (MTSS) (last updated Oct. 11, 2011) (explaining that schools implementing MTSS are guided by UDL principles), <http://www.doe.mass.edu/sped/mtss.html>; Nat'l Ctr. on Universal Design for Learning, What is UDL?, <http://www.udlcenter.org/aboutudl/whatisudl> (last visited Oct. 17, 2017).

<sup>26</sup> The district court expressed concern about what it characterized as R.M.'s "occasionally disruptive behaviors" in his regular classroom, which the court held made "the second and third *Rachel H.* factors weigh in favor of the increase in service minutes," or services delivered in a segregated special education classroom. Order at 8 (referencing *Sacramento City Sch. Dist., Board of Educ. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994)).

<sup>27</sup> See OSEP Technical Assistance Ctr., Positive Behavioral Interventions & Supports, Tier 3 Supports ("Positive behavior intervention and support is an application of a behaviorally-based systems approach. . . . Attention is focused on creating and sustaining Tier 1 (universal for ALL students), Tier 2 (targeted group support for SOME students), and Tier 3 (individual support for a FEW students) systems of support that improve lifestyle results (personal, health, social, family, work, recreation) for all children and youth by making problem behavior less effective, efficient, and relevant, and desired behavior more functional."),

exhibit problematic behavior.<sup>28</sup> Research has shown that implementation of these approaches results in improved academic outcomes among students.<sup>29</sup>

These inclusion strategies, focused on instructional and behavioral supports, engage and support all students in the school, including those with disabilities.<sup>30</sup>

Teams developing individualized education programs (“IEPs”) in public schools nationwide prescribe such instructional and behavior supports to students with disabilities as needed to provide special education in regular classrooms.<sup>31</sup>

---

<http://www.pbis.org/school/tier3supports> (last visited Oct. 17, 2017); *id.*, Multi-tiered System of Support (MTSS) & PBIS (“Positive Behavioral Interventions and Supports (PBIS) is a process that is consistent with the core principles of MTSS.”), <http://www.pbis.org/school/mtss> (last visited Oct. 17, 2017).

<sup>28</sup> See U.S. Dep’t of Educ., Office of Special Educ. & Rehabilitative Services, *Effective Evidence-based Practices for Preventing and Addressing Bullying* at 2 (Enclosure to Aug. 20, 2013 Dear Colleague Letter on Bullying), <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-enclosure-8-20-13.pdf>.

<sup>29</sup> See U.S. Dep’t of Educ., Inst. of Educ. Sciences, *A Compendium of Social-Behavioral Research Funded by NCER and NCSE: 2002-2013*, at 99 (2016), <http://ies.ed.gov/ncer/pubs/20162002/pdf/20162002.pdf>.

<sup>30</sup> See Schoolwide Integrated Framework for Transformation, SWIFT Guide: Inclusive Academic Instruction (“Schools use multi-tiered instructional strategies [and] differentiation . . . to support instruction [for] all students, including those with the most extensive support needs. Academic and behavior supports are integrated within one multi-tiered system of support.”), <http://guide.swiftschools.org/multi-tiered-system-of-support/inclusive-academic-instruction> (last visited Oct. 17, 2017).

<sup>31</sup> See generally Thomas Hehir, *New Directions in Special Education: Eliminating Ableism in Policy and Practice* 18-39 (2005). The Department of Education has

Where a student may need increased support to achieve IEP goals, described by the district court as an increase in “service minutes,” such support can usually be provided in regular classrooms.<sup>32</sup>

Respectfully submitted,

THE JUDGE DAVID L. BAZELON  
CENTER FOR MENTAL HEALTH LAW

Date: October 30, 2017

/s/\_\_\_\_\_

LEWIS BOSSING

---

sponsored research that has tested the effectiveness of many such interventions; evidence-based tools and supports for teachers and families are available at <https://ccrs.osepideasthatwork.org/>.

For example, students with learning disabilities, intellectual disabilities, autism, and other disabilities may benefit from assistive technologies such as taped books, e-book readers, or word processing “spell check” programs to access instruction and demonstrate mastery of material on writing assignments and assessments.

<sup>32</sup> In this case, a record does not appear to have been developed to establish the feasibility of providing increased “service minutes” in a regular classroom.

## CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* hereby certifies that, using the word-count function in Microsoft Word, this brief contains 5,776 words counting toward the word limit requirement of Federal Rules of Appellate Procedure 29(5) and 32(g)(1), and so complies with these rules.

Respectfully submitted,

THE JUDGE DAVID L. BAZELON  
CENTER FOR MENTAL HEALTH LAW

Date: October 30, 2017

/s/ \_\_\_\_\_

LEWIS BOSSING

