21-3048

IN THE
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

J.P., BY NEXT FRIEND ALISHA OGDEN,
Plaintiff-Appellant,

—v.—

BELTON SCHOOL DISTRICT NO. 124,
Defendant-Appellee,
MISSOURI STATE BOARD OF EDUCATION, and
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION;
OFFICE OF SPECIAL EDUCATION,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS

Pursuant to Fed. R. App. P. 29, Council of Parent Attorneys and Advocates, Inc (COPAA), National Disability Rights Network (NDRN), Disability Rights Arkansas (DRA), Disability Rights Iowa (DRI), Disability Rights South Dakota (DRSD), The Minnesota Disability Law Center (MDLC), and The Disability Rights Education & Defense Fund (DREDF) hereby respectfully move for leave to file the attached brief as *Amici Curiae* in support of Plaintiffs-Appellants, J.P. and his parents and next friends (the Parents). This motion is accompanied by *Amici's* proposed brief as is required by Fed. R. App. P. 29(b).

Movant identifies that it has sought the parties' consent. The Appellants have consented; the Appellees have not responded to multiple requests for consent to the filing of an *amici curiae* brief in support of Plaintiffs-Appellants' position by the proposed *amici curiae*.

ARGUMENT

A. Interests of *Amici*

Council of Parent Attorneys and Advocates, Inc. (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in fifty states and the District of Columbia, who are routinely involved in special education advocacy, including due process hearings throughout the country. COPAA's primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. §1400(c)(1).

Children with disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring that every child with a disability receives a free appropriate public education in the child's least restrictive environment (LRE), as the Individuals with Disabilities Education Act (IDEA) requires. Under IDEA, Congress mandated that children with disabilities be

educated in the general education classroom to the maximum extent appropriate. 20 U.S.C. §1412(a)(5). Further, under IDEA, the educational placement of a student with a disability shall be "as close as possible to the child's home" and "unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school he or she would attend if nondisabled." 34 C.F.R. §300.116(c).

The National Disability Rights Network (NDRN) is a nonprofit membership association of protection and advocacy (P&A) agencies in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is a P&A agency affiliated with the Native American Consortium, the Native American Disability Law Center, which includes Native American Nations in the Four Corners region of the Southwest. The Native American Disability Law Center is one of the plaintiffs. Several federal statutes authorize P&A agencies to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in various settings. The P&A system is the nation's largest provider of legal-based advocacy services for people with disabilities.

NDRN supports its members through training, technical assistance, legal support, and legislative advocacy—all to foster a society that affords equality and opportunity to people with disabilities where they can fully participate in exercising choice and self-determination. Education cases make up a significant percentage of

P&A networks' casework. P&A agencies handled over 10,000 education matters in the most recent year for which data is available. These education matters include claims under IDEA, Section 504 of the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA).

Disability Rights Arkansas (DRA) is an independent, non-profit legal services and advocacy organization. It is the federally mandated protection and advocacy system for individuals with disabilities in the state of Arkansas. DRA's mission is to vigorously advocate for and enforce the legal rights of people with disabilities in Arkansas. As part of this mission, DRA provides legally based advocacy on behalf of Arkansans with disabilities to ensure equitable access to a free appropriate public education for children with disabilities. Representation of children and enforcement of the IDEA is a substantial part of DRA's activities. DRA shares an interest in the appropriate and necessary defense of the IDEA and its mandate that children with disabilities receive a challenging and ambitious educational plan in the LRE.

Disability Rights Iowa (DRI), an independent, non-profit law firm, is the federally mandated protection and advocacy system for individuals with disabilities in the state of Iowa. DRI's mission is to defend and promote the human and legal rights of Iowans with disabilities. As part of this mission, DRI provides legally based individual and systemic advocacy on behalf of Iowa students with disabilities

to protect their rights under IDEA. This includes representation of students with regard to their rights to be in the LRE.

Disability Rights South Dakota (DRSD) is the non-profit protection and advocacy (P&A) agency located in South Dakota, dedicated to preventing, investigating, and pursuing cases of abuse, neglect, and exploitation of South Dakotans with disabilities. DRSD's legal team works to protect the rights of the disability community. As the P&A agency for South Dakota, DRSD is authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in various settings.

A substantial portion of DRSD's casework involves special education cases. DRSD has attorneys on staff who have collectively practiced law in special education for over thirty-five years. DRSD attorneys represent parents of children with disabilities in South Dakota who have utilized their procedural safeguards under IDEA, Section 504, and the ADA at the due process hearing and court levels. DRSD attorneys provide training to various audiences on special education topics including at university-level classes and have written multiple publications on special education topics and provided professional expertise in prior *amici curiae* brief s to this Court.

The Minnesota Disability Law Center (MDLC) is a project of Mid-Minnesota Legal Aid (MMLA), which is designated by the Governor of Minnesota pursuant to federal statutes to serve as the Protection and Advocacy System for persons with disabilities in Minnesota. MMLA performs this function through the MDLC and works to advance the dignity, self-determination, and equality of individuals with disabilities through direct legal representation, advocacy, education, and policy analysis. As part of its Protection and Advocacy work, MDLC advocates for the rights of children with identified disabilities to receive special education services pursuant to federal and state law. MDLC provides comprehensive representation for these children, including individual and policy advocacy on special education issues. MDLC's interest in this case reflects its deep commitment to ensuring that all children with disabilities obtain appropriate special education services in the LRE.

The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF was founded by people with disabilities and parents of children with disabilities and remains board- and staff-led by members of the communities for whom it advocates. Recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF pursues its mission through education, advocacy, and law reform efforts. Consistent with its civil rights mission, DREDF supports legal protections

for all diversity and minority communities, including the intersectional interests of people within those communities who also have disabilities.

Amici are also committed to ensuring that children with disabilities are not simply included in the general education classroom but also that their Individual Education Programs (IEPs) are challenging and ambitious so they can make appropriate progress in the general education curriculum in light of their unique abilities. *Amici*, therefore, respectfully urge reversal of the district court's decision insofar as it held that the school district had not violated IDEA's Least Restrictive Environment requirement. Appellants provided consent for the filing of this brief; Appellees did not respond to multiple requests for consent.

Based upon their experience, *Amici* offer the Court a unique and important view on these issues. *Amici* therefore respectfully requests that they be granted permission to submit the attached *amici curiae* brief.

B. Why an *Amici* Brief Is Relevant and Desirable

The COPAA, NDRN, DRSD, DRA, DRI, MDLC and DREDF *amici curiae* brief is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issue presented in the appeal is of great importance to *Amici*, because the decision in this case will address the legal standards for determining whether a student was denied a FAPE in the LRE in light of *Endrew F.* COPAA offers the Court relevant matters not brought to Court's attention by the parties. *See Neonatology Assocs., P.A. v.*

Comm'r, 293 F.3d 128, 133 (3d Cir. 2002); *Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986). *Amici* offers a unique perspective on an issue raised by a Memorandum and Order of the United States District Court for the Western District of Missouri because the Order affects the ability of children with disabilities and their families to obtain an appropriate education.

Amici submit this brief in support of plaintiff-appellant to provide the Court with some of the extensive empirical research demonstrating the efficacy of providing education to children with disabilities in the children's LRE and to address the impact of the Supreme Court's recent decision in *Endrew F.* on prior case law regarding the least restrictive environment for students with disabilities as well as the parents' right to tuition reimbursement when the school district's placement does not meet the LRE requirement.

COPAA will present a distinct and relevant analysis of the issues presented on appeal.

CONCLUSION

For the forgoing reasons, COPAA respectfully requests that the Court grant its motion to file the attached *amici curiae* brief in support of Plaintiffs-Appellants.

Respectfully submitted this the 19th day of November 2021.

Respectfully submitted,

/s/Catherine Merino Reisman
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CERTIFICATE OF SERVICE

I certify that on November 19, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/Catherine Merino Reisman
Catherine Merino Reisman

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BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS ARKANSAS, DISABILITY RIGHTS IOWA, DISABILITY RIGHTS SOUTH DAKOTA, MINNESOTA DISABILITY LAW CENTER AND THE DISABILITY RIGHTS EDUCATION & DEFENSE FUND IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
NATIONAL DISABILITY RIGHTS NETWORK
DISABILITY RIGHTS ARKANSAS
DISABILITY RIGHTS IOWA
DISABILITY RIGHTS SOUTH DAKOTA
THE MINNESOTA DISABILITY LAW CENTER
THE DISABILITY RIGHTS EDUCATION & DEFENSE FUND

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

s/ Catherine Merino Reisman
Catherine Merino Reisman

Attorney for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

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Children with disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring that every child with a disability receives a free appropriate public education in the child's least restrictive environment (LRE), as the Individuals with Disabilities Education Act (IDEA) requires. Under IDEA, Congress mandated that children with disabilities be educated in the general education classroom to the maximum extent appropriate. 20 U.S.C. §1412(a)(5). Further, under IDEA, the educational placement of a student

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* states that: (A) there is no party, or counsel for a party in the pending appeal who authored the *amicus* brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and its members.

with a disability shall be "as close as possible to the child's home" and "unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school he or she would attend if nondisabled." 34 C.F.R. §300.116(c).

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SUMMARY OF ARGUMENT

Society has come a long way in its understanding of the capabilities of children with disabilities. But to do this, much is required: supplementary aids and services, trained teachers, paraprofessionals, committed parents, and, perhaps most importantly, *attitudinal* change. 20 U.S.C. §1412(a)(5); 34 C.F.R. §300.42; *see also, e.g., Roncker on behalf of Roncker v. Walter,* 700 F.2d 1058, 1063 (6th Cir. 1983) (quashing idea of segregated facilities as academically superior for teaching children with disabilities as a fundamental disagreement with concept of mainstreaming children with disabilities).

Through its passage and reauthorizations of the Individuals with Disabilities Education Act (IDEA), Congress made clear that one of its overriding priorities was giving students with disabilities access to the general education curriculum in the regular classroom to the maximum extent possible. Thus, in the most recent reauthorization, Congress found "almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access to the *general education curriculum* in the regular classroom, to the maximum extent possible." 20 U.S.C. §1400(c)(5) (emphasis added).

IDEA's mandates are not empty aspirations; in fact, abundant quantitative and qualitative research confirms that children with disabilities receive considerably

more educational benefit from placement in general education classes with access to the general education curriculum through supplementary aids and services than from placement in special education classrooms or schools with limited to no access to their age-appropriate non-disabled peers or general education curriculum. This research further supports the finding that students without disabilities also benefit—there is a positive correlation between academic achievement and inclusion.

Inclusion of disabled students in the regular classroom also ensures their access to the IDEA's high quality educational mandate. The Supreme Court has recently made clear that the IEPs of children with disabilities must be "appropriately ambitious" to enable them to make progress in the *general education curriculum* in light of their unique abilities. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). The Court explained that children with disabilities are to be challenged to reach their potential progress just as their non-disabled peers are. For most students, including students with intellectual disabilities, this progress happens most effectively when they are given access to the general education curriculum and included in the general education classrooms with their peers without disabilities. School districts must comply both with *Endrew F.*'s requirement that IEPs be "appropriately ambitious" and the statutory requirement that students receive their educational services in the children's least restrictive environment.

ARGUMENT

I. MORE THAN FORTY YEARS OF RESEARCH SUPPORTS THE LEAST RESTRICTIVE ENVIRONMENT MANDATE

A. Congress Relied on Thirty Years of Research Supporting Inclusive Education in Reauthorizing the IDEA in 2004

Seventeen years ago, in its 2004 reauthorization of IDEA, with its renewed commitment to placement of students with disabilities in general education classrooms, Congress relied on "30 years of research and experience." 20 U.S.C. §1400(c)(5). That research showed that students with disabilities who are educated in general education classes do better academically and socially than comparable students educated in segregated settings, regardless of the type of disability or grade level. *See, e.g.,* Xuan Bui, et al., *Inclusive Education Research & Practice*, Maryland Coalition for Inclusive Education, https://985bdc52-c4dd-40c1-b0f9-96d96b9eb561.filesusr.com/ugd/34e35e_0f6d9a16276648a2b68181b800d9e3e2.pdf (last visited Nov. 17, 2021) (compiling 30 years of research on inclusive practices demonstrating that included children perform better academically and socially and have a positive effect on their non-disabled peers); Samuel Odom, *Preschool Inclusion: What We Know and Where We Go From Here*, 20 Topics in Early Childhood Special Educ. 21, 20-27 (2000) (Appx. 1) (noting that various studies "found that children with severe disabilities who participate in inclusive settings

appear to score higher on standardized measures of development than comparable children enrolled in traditional special education settings").

For example, a 2002 study compared results on measures of child development and social competence for children in inclusive programs versus children in segregated or "self-contained" programs over a two-year study period. The children enrolled in inclusive programs achieved statistically significant better results than the children in the segregated programs. Mary Fisher & Lauanna H. Meyer, *Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs,* 27 Res. & Prac. for Persons with Severe Disabilities 165, 169-73 (2002), *https://www.researchgate.net/publication/250169854* (last visited Nov. 17, 2021). The authors concluded:

> The results of this study point to greater gains on psychometrically valid measures for students who were included in general education settings in comparison to matched peers who were segregated. Moving instruction into inclusive environments, rather than providing instruction in isolation from normalized learning opportunities . . . seems to be beneficial for individual child learning outcomes.

Id. at 172-73.

Similarly, the National Longitudinal Transition Study examined the outcomes of 11,000 students with a range of disabilities and found that more time spent in a general education classroom was positively correlated with a) fewer absences from school, b) fewer referrals for disruptive behavior, and c) better outcomes after high

school in the areas of employment and independent living. Mary Wagner et al., "The Academic Achievement and Functional Performance of Youth with Disabilities," in *A Report of Findings from the National Longitudinal Transition Study-2 (NLTS2)* (Menlo Park, CA: SRI International, 2006). This research supports the conclusion that inclusion and achievement are positively correlated.

B. Recent Research Confirms that Access to the General Education Curriculum and Non-Disabled Peers Benefits Students with Disabilities, Particularly Students with Intellectual Disabilities

Research after the reauthorization of IDEA in 2004 continues to confirm the marked academic and social improvement in children with disabilities who are educated alongside their typical peers in the general education classroom. *See, e.g.*, Wayne S. Sailor & Amy B. McCart, *Stars in Alignment*, 39 Res. & Prac. for Persons with Severe Disabilities 55, 57-58 (2014) (collecting studies and noting benefit to *all* students of educational practices that support inclusion); Thomas Hehir, et al., Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report (2014), *https://www.researchgate.net/publication/316478330_* (last visited Nov. 17, 2021); *see also* Diane Ryndak, Lewis B. Jackson, & Julia M. White, *Involvement and Progress in the General Curriculum for Students with Extensive Support Needs: K-12 Inclusive Education Research and Implications for the Future,* Inclusion 1 (2013): 28–49; Peggy Coyne et al., *Literacy by Design: A Universal Design for*

Learning Approach for Students with Significant Intellectual Disabilities, 33 Remedial & Special Educ., 162- 72 (2012), https://ccids.umaine.edu/wp-content/uploads/sites/26/2016/03/Remedial-and-Special-Education-2012-Coyne-162-72.pdf (last visited Nov. 17, 2021) (explaining that students with significant disabilities can learn academic content, build social competence and develop friendships with peers).

In an analysis of self-contained classes, experts observed self-contained special education classes that were spacious, well-staffed by educators and paraprofessionals, and supplied with adequate resources. Despite these supports and resources, they found both a remarkable lack of time that students spent in instruction; and that paraprofessionals, not teachers, primarily provided the instruction that did occur. Further, they found there were few opportunities for students to respond to instructional cues, a high level of distractions in the classroom, a lack of communication supports for students, and a lack of individualized instruction. Jennifer A. Kurth, Kiara Born, & Hailey Love. *Ecobehavioral Characteristics of Self-Contained High School Classrooms for Students with Severe Cognitive Disability,* Research & Prac. for Persons with Severe Disabilities 41, 227–43 (2016).

Particularly important here, is that research demonstrates the benefits of inclusion in the general education classroom, especially for children who have

significant support needs, such as J.P. Although students with extensive support needs (*i.e.*, students with intellectual disabilities, multiple disabilities, or autism) have higher rates of segregated schooling, research shows that these students actually acquire more academic benefits when included in general education instruction, particularly increases in literacy skills. Christopher Kliewer and Douglas Biklen, *School's Not Really a Place for Reading: A Research Synthesis of the Literate Lives of Students with Severe Disabilities,* 26 J. Ass'n for Persons with Severe Handicaps 1–12 (2001).

II. THE DISTRICT COURT INCORRECTLY HELD THAT THE SCHOOL DISTRICT COULD REQUIRE J.P. TO ATTEND A STATE-RUN SCHOOL FOR CHILDREN WITH SEVERE DISABILITIES INSTEAD OF A LOCAL PUBLIC SCHOOL THAT INCLUDES STUDENTS WITHOUT DISABILITIES

A. IDEA Mandates That School Districts Educate Disabled Students in the Least Restrictive Environment.

IDEA requires that states receiving federal funds provide an education to all children with disabilities in the "Least Restrictive Environment" ("LRE"), 20 U.S.C. § 1412(a)(5). The statute requires, "To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of

supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5).

The federal regulations clarify that school systems must ensure that "[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(c). School districts may not unnecessarily restrict a child if that child's IEP can be implemented using supplementary aids and services in a regular education classroom in the student's neighborhood school. *Daniel R.R. v. State Bd. of Educ.,* 874 F.2d 1036, 1048 (5th Cir. 1989). Supplementary aids and services mean "aids, services and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . . . ." 34 C.F.R. § 300.42. Further, a student cannot be removed from general education classes based solely on a need for curriculum modification. 34 C.F.R. §300.116(e). And if a student will not be participating in general education classes, justification for that exclusion must be provided in the IEP. 34 C.F.R. §300.320(a)(5). Additionally, "[u]nless the IEP of a child with a disability requires some other arrangement," the child must be educated in the school that he or she would attend if nondisabled. 34 C.F.R. §300.116(c).

IDEA[2] and its implementing regulations accordingly set educating students with disabilities in regular education classrooms as the default practice, with deviations requiring substantial justification. Indeed, students' Fourteenth Amendment right to avoid seclusion and re-segregation underpins the IDEA and its precursor, the Education for All Handicapped Children Act. These protections emerged as statutory and regulatory obligations:

> [T]he Act also contains a specific directive regarding the placement of handicapped children. The Act requires the state to establish procedures to assure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped.
>
> With this directive, which is often referred to as "mainstreaming" or placement in the "least restrictive environment," Congress created a statutory preference for educating handicapped children with nonhandicapped children. (Footnote omitted citing to *Rowley supra* at 181 n.4.)

Greer v. Rome City Sch. Dist., 950 F.2d 688, 695 (11th Cir. 1991). This right is independent of FAPE. *Id*. at 695-96. "Thus, the *Rowley* test assumes the Act's

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[2] IDEA 1997 *renewed and strengthened* the obligations attendant to the LRE requirements. The considerations of inclusion and attending class with age appropriate peers and access to the general curriculum were expressly reinforced in IDEA 1997:

> The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general educational curriculum and the special services which may be necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability.

H. Rep. No. 105-95, reprinted in U.S. Cod. Cong. And Admin. News, 105th Congress, First Session, 97-98.

mainstreaming requirement has been met." *Id*. at 696 (quoting and adopting *Daniel R.R. v.*., 874 F.2d at 1048).

In its 2004 Reauthorization of IDEA, Congress, in its findings, emphasized the importance of educating children with disabilities in the regular classroom:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by-
>
> (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible …
>
> (C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [citation omitted], in order to ensure that such children benefit from such efforts and that *special education can become a service for such children rather than a place where such children are sent;*
>
> (D) *providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate ….*

20 U.S.C. §1400(c)(5) (emphasis added).

Congress recognized that "*special education can become a service for such children rather that a place where such children are sent***.**" 20 U.S.C. §1400(c)(5)(C) (emphasis added). Accordingly, Congress has made involvement and progress in the "general curriculum" an overall priority and goal for students with disabilities. 20 U.S.C. §1400(c)(5)(D).

B. The IDEA Requires Students with Disabilities To Receive a FAPE, Which Is Consistent with the LRE Mandate.

IDEA also requires that states receiving federal funds provide to all children with disabilities a Free Appropriate Public Education (FAPE). 20 U.S.C. §1412(a)(1). The U.S. Supreme Court rejected the Tenth Circuit's interpretation that allowed schools to provide "merely more than *de minimis*" educational benefit. The Court clarified that "[t]he IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.* 137 S. Ct. at 1001. The Court held and emphasized that the IEP must be "appropriately ambitious," and the objectives must be "challenging." *Id.* at 999-1000. ["F]or most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* at 1000; *accord* 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (requiring clear, measurable IEP goals that, among other things, enable the student to "make progress in the general education curriculum").

Significantly, *Endrew F.* left the LRE mandate untouched. *Endrew F.,* therefore, is entirely consistent with the long line of cases holding that, if students can achieve satisfactory progress in a general education class with the use of supplementary aids and services, then the student must be provided with the supplementary aids and services necessary to provide that satisfactory progress.

C. *Roncker's* Requirement that Supplementary Aids and Services Be "Ported" into the Regular Education Classroom If Feasible Supports Educating J.P. in the General Education Classroom.

If the supplementary aids and services necessary for a student to obtain FAPE can be brought into the regular education class, then the district is required to do so. *Roncker*, 700 F.2d at 1063. The Roncker court stated:

> In a case where the segregated facility is considered superior, the court should determine whether the services that make that placement superior could be feasibly provided in a non-segregated setting. If they can, placement in the segregated facility would be inappropriate under the Act.

Id. Roncker requires that, where feasible, special education services rendered in self-contained settings are portable services which must brought to the child rather than removing the child from an integrated setting.[3]

In *Oberti v. Board of Education*, the Third Circuit Court of Appeals explained how supplementary services can provide children with severe disabilities like J.P. with greater structural support in order to access the general education curriculum. 995 F.2d 1204 (3rd Cir. 1993). These services and supports include teacher training and resource rooms or itinerant teaching—not removal to a separate school with a separate class on a separate alternative curriculum, as the District's IEP proposed in the instant case. *Id.* at 1212.

[3] The Eighth Circuit has adopted the analysis from *Roncker* to consider whether placement of a student in a segregated setting is appropriate. *See, e.g. A.W. By & Through N.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987); *L.H. v. Hamilton Cnty. Dep't of Educ.*, 900 F.3d 779,792 (6th Cir. 2018).

Rafael Oberti was an elementary school student with Down syndrome whose behavior was significantly disruptive. He demonstrated "temper tantrums, crawling and hiding under furniture, and touching, hitting and spitting on other children. On several occasions Rafael struck at and hit the teacher and the teacher's aide." *Oberti*, 995 F.2d at 1208. Rafael's IEP team recommended a "segregated special education class," which required Rafael to travel to a different school because the classroom did not exist in his elementary school. *Id.* Like J.P.'s parent, the *Oberti* parents objected to the suggested placement and requested an inclusive program. *Id.*

When the school said Rafael could not "keep up," or that he was on a different learning track, his parents responded with the following suggestions *to keep him in general education and fulfill the LRE mandate:*

> (1) modifying some of the curriculum to accommodate Rafael's different level of ability;
> (2) modifying only Rafael's program so that he would perform a similar activity or exercise to that performed by the whole class, but at a level appropriate to his ability;
> (3) "parallel instruction," i.e., having Rafael work separately within the classroom on an activity beneficial to him while the rest of the class worked on an activity that Rafael could not benefit from; and
> (4) removing Rafael from the classroom to receive some special instruction or services in a resource room, completely apart from the class.

Id. at 1211.

The district court in *Oberti* found that the school failed to properly consider "an itinerant teacher trained in aiding students with mental retardation,"

"modification of the regular curriculum to accommodate Rafael," and "special education training and consultation for the regular teacher." *Id*. at 1212 (citing *Oberti v. Bd of Educ,* 801 F.Supp. 1392, 1397 (D.N.J. 1992)). The Court of Appeals agreed, finding the "continuum" is not an "all or nothing educational system." *Id.* at 1218. The Third Circuit also affirmed the proposition that the school "must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction." *Id*. at 1216. Finally, the Court of Appeals rejected the student's need for a modified curriculum as a basis for exclusion. *Id*. at 1222. IDEA contemplates that children with disabilities may lag behind their peers and need modifications to the general education curriculum; for this reason, IDEA provides education for those students who do not obtain a regular diploma earlier through the school year in which they turn 21. 20 U.S.C. § 1412.

Oberti relied on an earlier case involving Christy Greer, a ten-year-old child with Down syndrome. *Greer,* 950 F.2d at 690. The school system "proposed placing Christy in a self-contained special education class, that is, a class attended only by mentally handicapped children. The self-contained class was located at Southeast Elementary School, which also had classes for non-handicapped children." *Id.* at 691. The Eleventh Circuit applied the IDEA regulations' plain language to conclude that the school district must attempt to provide a resource room and itinerant instruction:

> The Act itself mandates that a handicapped child be educated in the regular classroom unless such education cannot be achieved satisfactorily with the use of supplemental aids and services. Thus, before the school district may conclude that a handicapped child should be educated outside the regular classroom, it must consider whether supplemental aids and services would permit satisfactory education in the regular classroom. *The school district must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction, for which it is obligated under the Act and the regulations promulgated thereunder to make provision.* Only when the handicapped child's education may not be achieved satisfactorily, even with one or more of these supplemental aids and services, may the school board consider placing the child outside of the regular classroom.

Id. at 696 (emphasis added).

Other courts have confirmed that schools cannot require that students like J.P. keep pace with the grade level curriculum in order to participate in a general education class. Instead, schools must incorporate the one-on-one instruction from self-contained classrooms into less restrictive environments like "resource rooms" or "itinerant instruction." These services supplement general education. *See also H.L. v. Downingtown Area Sch. Dist.*, 624 F. App'x 64, 68 (3rd Cir. 2015) (citing *Oberti* and explaining that "[s]chool districts must make available a 'continuum of placements' to meet disabled children's needs, and, in seeking to accommodate the child in the regular classroom, they "'must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction.'"); *Girty v. Sch. Dist.,* 163 F. Supp. 2d 527, 536 (W.D. Pa. 2001) (in a case involving a sixth grade

child who could not yet spell his own name, "the relevant focus is whether Spike *can progress on his IEP goals* in a regular education classroom *with supplementary aids and services*, not whether he can progress at a level near to that of his nondisabled peers."); *see also* 34 C.F.R. §300.114(a)(2)(ii) (school is not allowed to remove a child from regular education classes unless it establishes that *with supplementary aids and services* her education cannot be achieved satisfactorily).

Here, Belton School District failed to consider and provide supplementary aids and services to J.P. as required by *Roncker*, *Oberti*, and their progeny. The district argued that they did not have the services in the Belton School District, specifically the general education school, Kentucky Trail. But the district could have integrated J.P.'s services and supports into the general education classroom but failed to do so. The failure to adequately analyze the decisions to further restrict J.P. occurred at the administrative level and again, at the district court level. Indeed, the district admitted it never trained J.P.'s general education teacher in the requisite skills needed to educate J.P. A.R. 1019-1020; 1023:9-13; 1024-1025:24-2; 1116:14-19; 1185-1186. As a result, J.P. was increasingly and unlawfully isolated in a resource room once placed at Kentucky Trail rather than being provided with services in the combination of general education and special education classrooms. A.R. 450:11-13, 1469; App. 43; R. Doc. 226, at 8.

CONCLUSION

An oft-used quotation among special educators is that "special education is not a *place*." *See* 20 U.S.C. §1400(c)(5). As explained above, the goal of inclusion is to bring educational services *to the child with a disability*, not remove the child to go to the service. *See e.g., Roncker,* 700 F. 2d at 1063 (explaining the strong congressional preference for providing services within the mainstream classroom, not separately.); *Oberti*, 995 F.2d at 1206 (case of child with Down Syndrome which describes how Congress intended supportive services to be provided without segregating the disabled). Thus, allowing the District to remove J.P. to a specialized school outside of his neighborhood school reverses more than forty years of hard-earned law requiring the education of students with disabilities in their LRE. Accordingly, *Amici* respectfully submit that the judgment be reversed.

Dated: November 19, 2021

Respectfully submitted,

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

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached *amicus* brief is proportionately spaced, has a typeface of 14 points and contains 4,923 words.

Dated: November 19, 2021

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CERTIFICATE OF SERVICE

I certify that on November 19, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users.

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