Case No. 17-16722

IN THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

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

v.

Gilbert Unified School District,
Defendant-Appellee.

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

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* National School Boards Association and Arizona School Boards Association state that they do not issue stock and that neither of them is a subsidiary or affiliate of any publicly owned corporation.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Curiae National School Boards Association ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities. NSBA regularly represents its members' interests before Congress, as well as federal and state courts, and has participated as *amicus curiae* in numerous cases involving issues under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.* (2017).

Amicus Curiae Arizona School Boards Association ("ASBA") is one of the state members of NSBA. It is a non-profit corporation providing assistance to the more than 240 Arizona school boards, including Defendant-Appellee, that are its members. ASBA serves 98 percent of Arizona's public school districts, and those districts serve over 1.2 million children, a significant portion of whom are students with disabilities eligible for services under the IDEA.

This case is a matter of statewide and Circuit-wide significance because it presents this Court with its first opportunity since the U.S. Supreme Court issued its decision in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), to

remind local education agencies of the appropriate standards for determining whether an educational placement offers the least restrictive environment ("LRE") for a student with a disability and whether a change in location constitutes a change of placement. The Court's decision here will affect how school districts throughout Arizona and the Ninth Circuit determine the least restrictive environment for students with disabilities in which schools can provide an educational program that is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Id.* at 992. To assist the Court in evaluating the issues before it, *Amici Curiae* present the following ideas, arguments, theories, insights, and additional information. This brief is submitted with the consent of both parties.

FRAP 29(C)(5) STATEMENT

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (A) no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (C) no person other than *Amici Curiae* and their counsel contributed money to fund the preparation or submission of this brief.

ARGUMENT

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

The IDEA requires states to provide a free appropriate public education

("FAPE") to all eligible children. 20 U.S.C. § 1412(a)(1) (2017). The IDEA defines the term "FAPE" as

> special education and related services that—
> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. § 1401(9). "Special education" is "specially designed instruction … to meet the unique needs of a student with a disability," and "related services" are the support services required to assist a child to benefit from that instruction. *Id.* § 1401(26), (29). States must provide each disabled child with special education and related services "in conformity with the [child's] individualized education program" ("IEP"). *Id.* § 1401(9)(D).

The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe,* 484 U.S. 305, 311 (1988). It is a thorough, detailed written program, prepared by the child's IEP team, that discusses the child's unique needs and circumstances and sets forth how the school will provide a FAPE to the child. 20 U.S.C. § 1414(d)(1)(A) (2017). The IEP must include "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class" as well as extracurricular and nonacademic activities. *Id*. § 1414(d)(1)(A)(i)(V). A disabled child's participation with nondisabled children in a

regular education classroom is referred to as “mainstreaming” or “inclusion.”

The U.S. Supreme Court first addressed the FAPE requirement in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Court reviewed and discussed the statutory definition of FAPE to determine legislative intent, acknowledging that the definition “tends toward the cryptic rather than the comprehensive,” but provides “[a]lmost … a checklist for adequacy.” *Id.* at 188-89. “[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a ‘free appropriate public education’….” *Id.* at 189. This is consistent with Congress’ intent to provide disabled students with “meaningful” access to public education. *Id.* at 192.

The *Rowley* Court ultimately held that the substantive standard is satisfied when a disabled child is provided “personalized instruction with sufficient support services to permit the child *to benefit educationally from that instruction*,” and when the instruction and services are provided at public expense, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s IEP. *Id.* at 203 (emphasis added). While the Court outlined the parameters of the substantive standard for FAPE, it expressly confined its analysis of these parameters to the facts before it. “Observing that the Act requires states to ‘educate a wide spectrum’ of children with disabilities and that

'the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, [the *Rowley* Court] declined 'to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.'" *Endrew F.*, 137 S. Ct. at 996 (quoting *Rowley*, 458 U.S. at 202)).

Recently, in *Endrew F.*, the U.S. Supreme Court revisited and clarified the substantive standard set forth in *Rowley.* This was necessary, as 35 years had passed since *Rowley,* and the Tenth Circuit had long-interpreted *Rowley* to set a substantive standard that required more than merely *de minimis* progress for students with disabilities. *See id.* at 997. The Tenth Circuit's standard was based on language in *Rowley* stating the instruction and services furnished to children with disabilities must be calculated to confer "some educational benefit," which it had interpreted to mean that a child's IEP is adequate if it is calculated to confer an "'educational benefit [that is] merely … more than *de minimis*." *Id.* (internal citations omitted). Applying this *de minimis* standard, the Tenth Circuit held that the student had not been denied a FAPE because his IEP had been "'reasonably calculated to enable [him] to make *some* progress.'" *Id.*

The U.S. Supreme Court clarified that the FAPE standard "is markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id.* at 1000. In doing so, the Court rejected the idea that the IEP did not

need to promise any particular level of benefit so long as it was "'reasonably calculated' to provide *some* benefit, as opposed to none.'" *Id.* at 997-98. The Court found "little significance in the [*Rowley*] Court's language requiring States to provide instruction calculated to 'confer some educational benefit,'" given that the case before *Rowley* "involved a child whose progress plainly demonstrated that her IEP was designed to deliver more than adequate educational benefits." *Id.* (internal citations omitted). Instead, the Court held that the IEP must provide the child with an "appropriately ambitious" program in light of his circumstances. *Id*. at 1000.

The Court explained that the *Rowley* decision and the IDEA's language "point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. The Court cautioned that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.* (citing *Rowley*, at 206-207). The Court discussed, in detail, the need to focus on each individual child and his unique needs to determine how the child's disability affects his involvement and progress in the general education curriculum and to provide specialized instruction and services to enable the child to make appropriate progress. *Id.* at 999-1000. The Court acknowledged that the IEP does not have to aim for grade-level advancement when it is not a reasonable prospect for a child. *Id.*

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

That is exactly what the Gilbert Unified School District ("District") has done in the present case. After providing special education to the student who has Down Syndrome ("Student") during preschool and kindergarten, the District proposed changes in Student's IEP, including a daily 20-minute increase in services provided to Student in the Resource Room and the transfer from the Resource Room in his neighborhood school to the Academic SCILLS classroom at a different school in the District. These proposals were based on assessments by the education professionals working with Student that he was not making adequate progress under his current IEP. These actions were precisely the type of educational judgments that the *Endrew F.* decision demands of educators to deliver "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's

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

School district staff are well-aware of the presumption in favor of serving these students in the regular classroom, and routinely provide special education and related services in that setting to 95% of children with qualifying disabilities, including those like Student with Down Syndrome. U.S. Department of Education, National Center for Education Statistics (2016). *Digest of Education Statistics, 2015* (NCES 2016-014), Ch. 2 (*available at* https://nces.ed.gov/fastfacts/display.asp?id=59 (showing more than 80% of children with disabilities spent 40% to 80+% of their time in a regular classroom in the 2013 school year)). Each of these children has an IEP that may provide additional support such as pull-out and resource room services designed to help the child make progress on his individualized goals. As teachers and support professionals work with each child, they may recognize that a particular child is not making adequate progress, indicating a need for changes in methodology, level of support or type of resources provided to that student. Sometimes these changes may require that a student be transferred to a different location to receive the modified services. As the Court in *Endrew F.* cautioned, these judgments 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.

II. Educational Benefit is the Key Factor for a Court Determining Whether a School District Has Provided Services in the Least Restrictive Environment

A. The IDEA's preference for providing services in the LRE is not absolute.

Before the IDEA, many disabled children were "excluded completely from any form of public education or were left to fend for themselves in classrooms designed for the education of their nonhandicapped peers." *Rowley*, 458 U.S. at 191. Congress was concerned about this "exclusion and misplacement, noting that millions of handicapped children 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Id.* (quoting H.R. Rep. No. 94-332, p.2 (1975) (H.R. Rep.)). The IDEA requires that disabled students are provided a FAPE in the "least restrictive environment" appropriate. 20 U.S.C. § 1412(a)(5) (2017) (requiring that, to the maximum extent possible, disabled children are educated with their non-disabled peers, "and special classes, separate schooling, or other removal of children with disabilities from the regular educational 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").

Courts have long recognized that the IDEA "rests on these two primary premises: that all disabled students receive a FAPE and that each disabled student receives instruction in the 'least restrictive environment' ('LRE') possible." *A.W. v.*

Fairfax Cnty. Sch. Bd., 372 F.3d 674, 681 (4th Cir. 2004) (citing *Rowley*, 458 U.S. at 180-82). While the FAPE requirement addresses the substantive content of the educational services disabled students are entitled to receive, the LRE requirement reflects a preference for mainstreaming disabled students to the extent appropriate. *See id.* But the IDEA's "preference for mainstreaming is not an absolute commandment." *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995). Instead, the FAPE requirement "qualifies and limits" the mainstreaming preference. *Id.* at 834-836 (acknowledging the question of mainstreaming is "necessarily an individualized, fact specific inquiry" where the tension between the IDEA's mainstreaming preference and its requirement that schools provide individualized programs tailored to the needs of each disabled child must be balanced); *see also A.W.*, 372 F.3d at 681 (noting the preference for mainstreaming is not absolute, permitting educational services to be delivered "in less integrated settings as necessitated by the student's disability") (internal citation omitted). As a child's IEP team considers how to provide individually-tailored services in the LRE, its primary consideration must be the disabled child's unique needs and circumstances.

Schools must ensure that "a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. § 300.115(a) (2017). The educational placement continuum must include various alternative placements, including instruction in regular classes,

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

"Educational placement" is a "term of art" that is not defined in the IDEA, requiring courts to examine the IDEA to "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1114 (9th Cir. 2010) (internal quotations omitted). Because "children were excluded entirely from the public school system and from being educated with their peers," the IDEA requires disabled children to have "access to the general education curriculum in the regular classroom, to the maximum extent possible." *Id.* at 1115 (quoting 20 U.S.C. § 1400(c)). The Ninth Circuit noted, "the overarching goal of the IDEA is to prevent the isolation and exclusion of disabled children, and provide them with a classroom setting as similar to non-disabled children as possible." *Id.* The implementing regulations, specifically the continuum of alternative placements, "supports the idea that placement relates to the classroom setting." *Id.* Thus, this court and other courts have found that the term

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

The term was not intended to include the "precise physical location" but rather to reflect the degree to which the placement segregates a disabled student from non-disabled students. *See, e.g., id.* at 1116 (recognizing that a change in educational placement occurs when a student is moved from one type of program to another type or when there is a significant change in the student's program, even when the student's setting doesn't change); *A.W.*, 372 F.3d at 681-82 (finding that "educational placement" describes the environment in which educational services are provided and not the "precise physical location"); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379-80 (5th Cir. 2003) (noting the options on the placement continuum are differentiated from each other by the extent to which they departed from a mainstream assignment, finding that placement refers only to the setting in which the student is educated). The U.S. Department of Education's notes and comments to the regulations support this definition, reiterating its longstanding position "that placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school." 71 Fed. Reg. 46588 (2006). The Department historically has "referred to 'placement' as points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services." *Id.*

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

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

Here, the IEP team determined that Student would be better served in the Academic SCILLS classroom available at a different school. The administrative law

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

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

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

Amici urge this Court to reaffirm the primacy of the educational benefit factor by recognizing that educators must now balance the "mainstreaming" goal encapsulated in the IDEA's LRE requirement with the Supreme Court's directive that schools develop programs reasonably calculated to enable a child to make progress – a nuanced and fact-specific process that involves a great deal of expertise and knowledge of the child. The level of educational benefit a given program will provide a child will be front-of-mind for IEP teams now in light of *Endrew F*. As the Supreme Court noted, courts should defer to the educational judgments of trained school personnel who can make a "cogent" explanation for the program they have designed for the child, in cooperation with the parents.

III. The IDEA's LRE Preference Does Not Prohibit Transfers That Change the Location Where Services Are Delivered.

As discussed in Section II(A) *supra*, the term "educational placement" means the general educational program of the student. *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d at 1116. "[U]nder the IDEA a change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction." *Id.* "A change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting." *Id.* This interpretation is consistent with

Congress' intent "to prevent the singling out of disabled children and to 'mainstream' them with non-disabled children." *Id.* Put simply, educational placement was intended to describe the degree to which the placement segregates a disabled student from non-disabled students, not the specific location where the student's educational program is implemented. *See Concerned Parents & Citizens for the Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir. 1980) (determining that educational placement refers only to the general educational program in which the disabled child is placed and finding no change in placement when disabled students remained "in the same classification, the same school district, and the same type of educational program special classes in regular schools").

Conversely, "[t]he location of services in the context of an IEP generally refers to the type of environment that is the *appropriate place for provision of the service*. For example, is the related service to be provided in the child's regular classroom or resource room?" *Deer Valley Unified Sch. Dist. v. L.P. ex rel. Schripsema*, 942 F. Supp. 2d 880, 887 (D. Ariz. 2013) (emphasis added; internal citations and quotations omitted). A change in the place where services are delivered does not necessarily equate with a change in the child's placement along the continuum of alternative placements a district must make available under the IDEA. The continuum referenced in the regulations requires that schools make available to

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

Similarly, a change in placement does not occur simply because a student is not provided with the exact methodology and materials used in a mainstreamed classroom. The U.S. Department of Education, Office of Special Education and Rehabilitative Services ("OSERS"), issued guidance regarding the meaning of "general education curriculum." *See* Dear Colleague Letter from Michael Yudin, Assistant Secretary, and Melody Musgrove, Director, OSERS, November 16, 2015 (available at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf). OSERS interprets the general education curriculum or "'the same curriculum as for nondisabled children' to be the curriculum that is based on a State's academic content standards for the grade in which a child is enrolled." *Id.* at 3. This is not simply one reading curriculum used in the classroom, but encompasses the entire curriculum related to the comprehensive academic content standards established by the state.

In the case at hand, both the ALJ and the District Court used the *Fisher* analysis, "Letter to Fisher," 21 IDELR 992 (OSEP 1994), to find correctly that the proposed move to the Academic SCILLS classroom was simply a change in location, *i.e.*, type of environment where services are provided. Student's educational placement, *i.e.*, partially mainstreamed with instructional services provided by a special education teacher outside the regular classroom, would continue regardless of whether he received such services in the Resource Room or the Academic SCILLS classroom. Neither the extent to which Student was segregated from the non-disabled students on campus nor his access to the general education curriculum would change if he received services in the Academic SCILLS classroom. *Amici* urge this Court to affirm the lower court's ruling and rationale, giving school districts the flexibility they need to change the location of services set forth in a child's IEP when such change is based on educational concerns about how to leverage the district's available resources to address a child's noted lack of progress toward his individualized goals.

IV. Courts Must Defer to School Personnel on Matters of Educational Methodology, Including Changes in Location of Services.

Amici urge this Court to take heed of the large body of case law, including the Supreme Court's most recent directive, supporting deference to school personnel with respect to educational methodology. School districts must be permitted to change the location of services to tailor a child's educational program to his unique

needs. Such changes do not automatically invoke LRE concerns. "[T]here is no basis in the 'least restrictive environment' provision for evaluating the 'restrictiveness' of alternative special education placement options, all of which require separation from non-disabled peers." *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 673 (6th Cir. 2003) (explaining that determining the extent to which a disabled child should be mainstreamed is different than the decision between two alternative methods of educating a disabled child, which is an issue of methodology that should be left to the states).

Although the IDEA provides parents with an important role in developing the IEP and selecting their child's educational placement, schools are ultimately responsible for ensuring that each student's educational program is reasonably calculated to allow the child to benefit academically from the instruction and to make progress appropriate in light of the child's circumstances. Thus, after a school district determines that a disabled child is not making sufficient progress, it is permitted to transfer the child to a different location that provides the special education and supplementary services the child needs to progress satisfactorily. *See, e.g.*, *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182 (9th Cir. 1984) (acknowledging that, although *Rowley* does not require states to provide disabled children with the best education possible; states do not lack the power to provide disabled children with an education they consider more appropriate than that proposed by the parents);

M.W. v. New York City Dep't of Educ., 725 F.3d 131, 145 (2d Cir. 2013) (rejecting parents' argument that IDEA requires only an appropriate education and that "any classroom restrictions that result in raising the educational level afforded to the student beyond what can be deemed appropriate are … impermissible"). The presumption of mainstreaming must be weighed against "educational benefits obtained in more restrictive settings through a case-by-case analysis that seeks an *optimal* result across the two requirements." *Id.* (discussing *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111 (2d Cir. 2008)).

Where the transfer to a new location would allow a school district to provide a different methodology of instruction that would enable the student to progress satisfactorily in the general education curriculum, the change is appropriate under the IDEA.

> The IDEA's broad mandate to provide handicapped children with a free appropriate public education designed to meet the unique needs of each handicapped child is fairly imprecise in its mechanics. This vagueness reflects Congress' clear intent to leave educational policy making to state and local education officials. … School officials therefore retain maximum flexibility to tailor education programs as closely as possible to the needs of each handicapped child.

Poolaw, 67 F.3d at 834 (internal citation omitted); *see also J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 450 (9th Cir. 2010) (giving deference to school district to tailor the educational program to the needs of the child and rejecting student's argument that the methodology of education was inappropriate). Deference

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

Finally, changes in the location of services that transfer a disabled child away from his neighborhood school do not necessarily violate the IDEA. IDEA regulations require schools to ensure that a disabled child's placement is "as close as possible to the child's home," and "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." 34 C.F.R. § 300.116(b)(3) & (c) (2017). This does not mandate that a child be placed in his neighborhood or home school. *See, e.g.*, *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693-94 (5th Cir. 1996) ("It must be emphasized that the proximity preference or factor is not a presumption that a disabled student attend his or her neighborhood school."). "There is at most a preference for education in the neighborhood school." *Murray v. Montrose Cnty. Sch. Dist.*, 51 F.3d 921, 929 (10th Cir. 1995) (disagreeing with the Third Circuit's decision in *Oberti* to the extent it encompasses a presumption of neighborhood schooling).

Administrative agency interpretations and guidance confirm that schools have

"significant authority to select the school site, as long as it is educationally appropriate." *White*, 343 F.3d at 382 (5th Cir. 2003). When a district has "two or more equally appropriate locations that meet the child's special education and related services needs, school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." 71 Fed. Reg. 46540, 46588 (2006); *see also White*, 343 F.3d at 382 (same) (quoting *Letter from Office of Special Education Programs to Paul Veazey* (26 Nov. 2001)); *see also Letter from Office of Special Education Programs to Tom Trigg* (30 Nov. 2007) ("If a child's IEP requires services that are not available at the school closest to the child's home, the child may be placed in another school that can offer the services that are included in the IEP and necessary for the child to receive a free appropriate public education.").

Courts have consistently allowed school administrators the discretion to determine the most appropriate location in which to provide services to disabled students, based on the students' unique needs and circumstances. "Whether 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." *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991). The Ninth Circuit has affirmed placements made by school administrators exercising their discretion in determining the appropriate

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

The *Wilson* court addressed the same issue presented by Student's proposed placement in the Academic SCILLS classroom in this case. 735 F.2d at 1182-83 ("At issue here is a school district's ability, after determining that a handicapped student is not making satisfactory progress, to transfer that student to a school which can provide assistance from an instructor especially qualified to train a student with that particular disability."). The *Wilson* court found the district's proposal complemented federal law by attempting to provide the student with "a teacher particularly suited to deal with her learning problems." *Id.* at 1183. Thus, the proposal was reasonably calculated to provide a FAPE to the student. *Id.*

Here, Student was not making satisfactory progress in the general education curriculum at his current location. The District wanted to transfer Student to the Academic SCILLS classroom, which is especially suited to address his unique needs and circumstances. This change in location reflects the District's individualized

assessment of the progress appropriate in light of Student's circumstances, as required by *Endrew F.*, and the methodology reasonably calculated to enable him to make such progress. This transfer is consistent with the FAPE standard described in *Endrew F.* and what the IDEA requires.

CONCLUSION

Amici urge this Court to affirm the District Court's decision, in keeping with the Supreme Court's decision in *Endrew F.*, which clearly requires school districts to provide each child with disabilities an educational program that sets appropriately ambitious educational goals and the services necessary for the child to make progress in light of his unique circumstances. In determining whether a school district has met these obligations, courts must defer to the district's application of expertise and exercise of judgment in determining the appropriate methodologies and location for delivery of services. When a school district proposes changes based on a student's insufficient progress on his educational goals at his current location, a court should determine if the school district has offered a cogent and responsive explanation for the proposed changes. *Amici* submit that where school districts have provided such

explanations, as Gilbert USD has done here, this Court should hold that they have met their obligation to provide a FAPE in the least restrictive environment.

Respectfully submitted,

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November 28, 2017

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

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 5870 words.

Dated: November 28, 2017

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CERTIFICATE OF SERVICE

I certify that on November 28, 2017 the foregoing document was served on all parties or their counsel of record through CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the address below.

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