No. 17-5989

In the United States Court of Appeals
For the Sixth Circuit

L.H., A MINOR STUDENT; G.H.; D.H.
PLAINTIFFS-APPELLEES,

ENNESSEE DEPARTMENT OF EDUCATION,
DEFENDANT

On Appeal from the United States District Court
For Eastern District of Tennessee
Case No. 1:14-cv-126
(Curtis L. Collier, Judge)

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, KENTUCKY SCHOOL BOARDS ASSOCIATION, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, OHIO SCHOOL BOARDS ASSOCIATION, AND TENNESSEE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLANT AND REVERSAL OF DISTRICT COURT DECISION

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Sixth Circuit
Case Number: 17-5989 Case Name: L.H. v. Hamilton County DOE

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Pursuant to 6th Cir. R. 26.1, National School Boards Association
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makes the following disclosure:

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identity of the t or affiliate and the rela ip een it and the n
party:

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2 Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Sixth Circuit

[redacted]

Name of counsel: Francisco M. Negron, Jr

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Name of Party

makes the following disclosure:

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliates

Sixth Circuit
Case Number: 17-5989 Case Name: L.H. v. Hamilton County DOE

Name of counsel: Francisco M. Negron, Jr

Pursuant to 6th Cir. R. 26.1, Ohio School Boards Association
Name of Party

[redacted]

O M. NEGRON, JR.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The National School Boards Association ("NSBA") is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members governing approximately 13,800 local school districts serving nearly 50 million public school students, including approximately 6.4 million students with disabilities. NSBA regularly represents its members' interests before C(). 9lt3(A)8.1( )8.m929gt5 ss

membership includes all 141 county, city and special school district boards of education throughout the state.

This case presents this Court its first opportunity since the U.S. Supreme Court decision in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), and its most significant opportunity since *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied,* 464 U.S. 864 (1983), to address 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 the Sixth Circuit determine the least restrictive environment for students with disabilities without sacrificing educational programming that is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 137 S. Ct. at 999. To assist the Court in evaluating the issues before it, *Amici* present the following ideas, arguments, theories, insights, and additional information.

FRAP 29 (A)(2) and (C)(5) STATEMENT

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (1) 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.

Both parties have consented to the submission of this brief.

ARGUMENT

I. A SCHOOL DISTRICT PROVIDES A FAPE IN THE LRE[1] WHEN IT OFFERS A PROGRAM REASONABLY CALCULATED TO ENABLE PROGRESS.

The IDEA is an "ambitious federal effort to promote the education of handicapped children." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 179 (1982). It requires states to ensure that

> (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).

As "the centerpiece of the statute's education delivery system for disabled children," *Honig v. Doe*, 484 U.S. 305, 311 (1988), the IEP 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, including the placement where the child will receive special education and related services. 20 U.S.C. §§ 1401(9), (29), 1414(d)(1)(A) (2017).

In *Rowley*, the Supreme Court developed a two-prong test to determine whether school districts have provided a FAPE:

> First, has the state complied with the procedures set forth in the act? And, second, *is the individualized education program developed through the act's procedures reasonably calculated to enable the child to receive educational benefits?* If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.

458 U.S. at 206-207 (emphasis added).

More than a decade ago,

County School District RE-1, at 6 (Dec. 7, 2017) ("ED *Endrew F*. Q & A"), available at https://www2.ed.gov/policy/speced/guid/idea /memosdcltrs/qa-endrewcase-12-07-2017.pdf (noting IEP process requires individualized decision-making involving consideration of child's present levels of achievement, disability and potential for growth).

Requ

> To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, 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*.

20 U.S.C. § 1412(a)(5)(A) (2017); 34 C.F.R. § 300.114 (2017) (emphasis added).

This LRE requirement creates a "natural tension" within the IDEA. *See Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995). In developing IEPs, educators now must balance the *Endrew F.* FAPE obligation emphasizing progress, with the IDEA's LRE mandate, commonly referred to as "mainstreaming." IDEA's LRE requirement, however, is not an "inflexible federal mandate." *Hartmann v. Loudoun Cnty. Bd. of Educ.*, 118 F.3d 996 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998); *accord Beth B. v. Van Clay*, 282 F.3d 493 (7th Cir.), *cert. denied*, 537

use of supplementary aids and services cannot be achieved satisfactorily, mainstreaming is inappropriate. *Id.* at 1004. In those situations, educators who believe instruction in the regular classroom cannot meet the unique needs of the student may appropriately recommend moving the child to a special education environment where the student can receive a meaningful education. Any other result would allow student location concerns to swallow educational concerns in their

ambitious goals. The U.S. Department of Education recently reiterated this individualized determination:

> . . .it is essential to make individualized determinations about what constitutes appropriate instruction and services . . .and the placement in which that instruction and those services can be provided. . . . There is no "one-size-fits-all" approach to educating children with disabilities. Rather placement decisions must be individualized and made consistent with a child's IEP. . . .[P]lacement in regular classes may not be the least restrictive placement for every child with a disability.

ED *Endrew F*. Q & A at 8.

This Court adopted such an educational benefit analysis in *Roncker*:

> In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the act. Framing the issue in this manner accords the proper respect for the strong preference and favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting. Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children (citation omitted).

700 F.2d at 1063.

The above factors reflect the many considerations educators must balance when developing or modifying a student's IEP to meet the child's unique needs. For each child 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; and the costs, e.g., for employing a one-on-one aide for the child in the less restrictive setting rather than placing the child in a classroom with students with disabilities where he or she can receive more specialized instruction.

The importance of this educational benefit analysis has been heightened by this Court's adoption in *Deal v. Hamilton Cnty. Bd. of Educ*., 392 F.3d 840 (6th Cir. 2004), of the meaningful benefit standard to evaluate an IEP's provision of FAPE and the Supreme Court's emphasis on appropriate progress in *Endrew F*. Although the non-academic 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. If a student is not benefitting from the general educational

> interfering with the child's progress, and additional information and input provided by the child's parents.

ED *Endrew F.* Q & A, at 5. These are exactly the considerations that lead the Hamilton County Department of Education to recommend moving L.H. to part-time placement in a comprehensive development classroom

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*. To allow the district court's rationale to stand would be to ignore the impact of both *Deal* and *Endrew F*. on LRE determinations.

II. COURTS SHOULD DEFER TO PLACEMENT DECISIONS OF SCHOOL PERSONNEL, BECAUSE THEY ARE INDIVIDUALIZED DETERMINATIONS REQUIRING EDUCATIONAL EXPERTISE.

A. LRE Determinations Are Complex Educational Decisions.

Special education determinations regarding FAPE, the methodologies with which it will be provided, and closely-related LRE issues are inherently complex.

As the First Circuit explained in *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990):

> Correctly understood, the correlative requirements of educational benefit and least restrictive environment operate in tandem to create a continuum of educational possibilities. To determine a particular child's place on this continuum, the desirability of mainstreaming must be weighed in concert with the act's mandate for educational improvement. Assaying an appropriate educational plan, therefore, requires a balancing of the marginal benefits to be gained or lost on both sides of the maximum benefit/least restrictive fulcrum. Neither side is automatically entitled extra ballast.

Id. at 993 (citations omitted). School personnel charged with this complex task must ensure that educational benefit and LRE are "*optimally* accommodated under particular circumstances." *M.W. v New York Dep't of Educ.*, 725 F.3d 131, 143 (2d Cir. 2013).

In carrying out the difficult balancing act necessary to develop an appropriate special education program for a child, educators work with the child's parents and other experts who make up the child's IEP team. As an integral part of this process, [illegible]

the IDEA forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child was sitting next to a nonhandicapped student."[2] *Daniel R.R. v. State Bd. of Educ*., 874 F.2d 1036, 1049 (5th Cir. 1989). In *Dick-Friedman v. Board of Educ.*, 427 F. Supp. 2d 768 (E.D. Mich. 2006), the court balanced the social ancitti2w 0 -2.2

"[the student's] disabilities do not require his removal from the regular education classroom for any amount of time." *Id*. at 782.

Although a student may be unable to participate full-time in academic general education courses, he nevertheless must be afforded an appropriate opportunity to participate in nonacademic activities with nondisabled peers. *See, e.g.*, *Liscio v. Woodland Hills Sch. Dist.*, 734 F. Supp. 689, 702 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1561 (3d Cir. 1990) (student's LRE was determined to be segregated school for academics, with "mainstreaming" into the general population for classes and activities such as "homeroom, physical education, music, library, and art"). This

individualized educational determination requiring deference to the professional judgment of educators.

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

In reviewing LRE determinations made by school personnel, federal courts consistently have examined them under the educational benefit prong of the *Rowley* analysis. *E.g., Dong v. Board of Educ.*, 197 F.3d 793, 802-803 (6th Cir. 1999), *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 626-627 (6th Cir. 1990), *Dick-*

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kindergarten and half-day in segregated special education, court noted LRE analysis provides no mechanism to evaluate varying degrees of restrictiveness).

Other courts adopting t

> Supreme Court [in *Rowley*, *supra*] and this court upon the presumed educational expertise of state and local agencies leads to the conclusion that *the amount of weight due depends upon whether such expertise is relevant to the decision-making process*.
>
> * * *
>
> More weight is due to an agency's determinations on matters for which educational expertise would be relevant.

Burilovich v. Board of Educ., 208 F.3d 560, 567 (6th Cir.), *cert. denied*, 531 U.S. 957 (2000) (emphasis added).

Other courts have deferred to the educational expertise of local school officials when deciding LRE disputes.

at 206. Quoting this language in *Endrew F.*, the Court reiterated the importance of judicial respect for "the application of expertise and the exercise of judgment by

("Section 504") and Title II of the Americans with Disabilities Act ("ADA")("Title II") are anti-discrimination statutes. Section 504 states:

> No otherwise qualified individual with a disability . . ., shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance….

29 U.S.C. § 794(a) (2017).

> and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs. In short, the IDEA guarantees individually tailored educational services, while Title II and §504 promise non-discriminatory access to public institutions.

Id. at 755-756 (citations omitted).

The notable difference in the statutory purposes of IDEA and Section 504/ADA underlies this Court's recognition in

> violation can be made out, at least in the context of education of handicapped children."

Id. at 165-167 (citations omitted).

In *Campbell*, this Court cited *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982), distinguishing between a violation of the IDEA's precursor

parent disagreed with the decision, or even if the parent initially agreed, but later changed his or her mind.

B. Automatic Liability under Section 504 and the ADA Based on LRE Violations Has Significant Practical Implications for Schools.

To find that every IDEA disagreement that tips in a plaintiff's favor automatically violates Section 504 and the ADA impermissibly expands the scope and intent of those statutes. As applied, the lower court's ruling means that two plaintiffs pleading exactly the same case, but seeking different remedies, could obtain different outcomes on their Section 504 and ADA claims. The plaintiff seeking damages would need to show intentional discrimination, while the plaintiff seeking equitable relief would not.

Subjecting a school district acting in good faith to strict liability under Section 504 and the ADA simply because the plaintiff only seeks equitable relief for an alleged IDEA violation is clearly contrary to Congress' intent in enacting Section 504 and the ADA – to prohibit disability-based discrimination. As the Eighth Circuit recognized, "Experts often disagree on what the special needs of a [student with a disability] are, and the educational placement of such children is often necessarily an arguable matter." *Monahan*, 687 F.2d at 1170. Such disagreements cannot reasonably be said to involve the bad faith or gross misjudgment necessary to show intent to discriminate.

The decisions of education professionals acting in good faith are entitled to deference and protection from claims of alleged discrimination; to hold otherwise would undermine the IDEA's collaborative process.

This result could turn back the clock on student special education rights. The court's emphasis upon placing special education students in the regular classroom,

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties on the electronic filing