No. 19-229

IN THE

Supreme Court of the United States

C.D., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, M.D. AND P.D.; M.D.; P.D.,
Petitioners,

v.

NATICK PUBLIC SCHOOL DISTRICT; BUREAU OF SPECIAL EDUCATION APPEALS,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NATICK PUBLIC SCHOOL DISTRICT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The Individuals with Disabilities Education Act ("IDEA") obligates school districts to provide an eligible child with a disability with a free and appropriate public education ("FAPE"). Under the IDEA, the educational program provided to a child with a disability must be individualized to meet his or her unique needs. Additionally, children with disabilities must be educated in the least restrictive environment ("LRE") to the maximum extent *appropriate*. The question presented in this case is:

1. Does the IDEA's LRE mandate require a public school district to place a child in a general education classroom that has been considered and rejected as inappropriate given the child's individualized needs?

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INTRODUCTION

This petition should be denied because the question presented does not satisfy the Court's criteria under Rule 10. The Petitioners try to argue that there are meaningful differences in the approaches to LRE between the Court of Appeals. Although the courts have articulated varying approaches to determine whether a particular placement is the least restrictive environment for a disabled student, these approaches are not meaningfully different. In fact, they are nearly identical in what they consider. They all apply the statute. In this particular case, the First Circuit quoted the statute as the framework that it applied. The Circuits all recognize that there is a balance between mainstreaming and educational progress. They all consider the benefits (both academic and non-academic) of regular class placement with supplementary aids and services. They all also recognize that the balancing is an individualized and fact-specific inquiry into the nature of the student's condition and the school's particular efforts to accommodate it, ever mindful of the IDEA's purpose of educating children with disabilities, to the maximum extent appropriate, together with their non-disabled peers. Finally, they all consider the aids and services which a child with a disability may require to benefit from regular education placement. Given that any conflict is illusory, pursuant to Supreme Court Rule 10, this case is not one that merits review.

Second, this case is a poor vehicle for resolving the presented question for review. In this case, the

Petitioners have forfeited arguments about the 2014-2015 individualized education programs ("IEPs") as they did not challenge them at the First Circuit and about LRE for the 2012-2013 and 2013-2014 IEPs as they did not challenge the standard for LRE at the Bureau of Special Education Appeals ("BSEA") or at the District Court. Finally, assuming arguendo this Court reverses, such reversal would not lead to a different outcome. Applying the *Daniel R.R.* approach does not change the outcome. Furthermore, even if Petitioners were to prevail before this Court, they may well ultimately lose on the merits because no court has yet determined whether they meet the second criteria for reimbursement for the wholly-segregated private-school placement they unilaterally chose—that this placement itself is appropriate. In fact it is questionable that they could meet this standard based on their position in this litigation that the only appropriate placement was a full-inclusion placement.

Finally, in contrast to the Petitioners' allegations, the First Circuit applied the precepts outlined above, in correctly affirming the decision. The decision not to place C.D. in general education classes for academics arose from her individualized needs, as set forth in her IEP. C.D. required language-based instruction based on C.D.'s significant language impairments and small classes of six to eight students. C.D. required multimodal instruction, such as use of thinking maps and other graphic organizers. As a result, C.D. required substantially separate special education classes for her academics to receive a FAPE.

STATUTORY BACKGROUND

The IDEA requires public schools to provide all disabled children with a FAPE. 20 U.S.C. §§ 1400(d), 1412(a)(1), 1414(b)(2)(A), 1416. The IEP is the IDEA's primary means for assuring the provision of a FAPE to disabled children. See 20 U.S.C. § 1414(d). IEPs are written statements detailing an individualized education plan for disabled children. *Id.* At a minimum, each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. *Id.* IEPs must be formulated through the participation of a team that includes the student's parents, at least one of the student's regular education teachers (if any), at least one special education teacher, a representative of the local education agency, and an individual who can interpret the instructional implications of evaluation results. 20 U.S.C. § 1414(d)(1)(B).

The IDEA expresses a preference for the education of children with disabilities in the "least restrictive environment." *See* 20 U.S.C. § 1412(a)(5). It requires states to maintain policies and procedures to ensure that

> [t]o 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

> 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.

Id.

STATEMENT OF THE CASE

A. Factual Background

C.D. attended public school in Natick, Massachusetts through fifth grade. Pet. App. 5a. C.D. attended McAuliffe Charter School for grades six through eight. Pet. App. 48a. C.D. has an intellectual disability and serious language deficits. Pet. App. 13a.

In May 2012, C.D.'s Parents contacted Natick about re-enrollment for C.D.'s ninth grade year – the 2012-2013 school year. Pet. App. 49a. When the Team, consisting of the director of special education, three assistant directors of student services, principal, a general education teacher, a special education teacher, convened to consider C.D.'s placement for the 2012–2013 school year, they considered three programs. Pet. App. 35a, 50a, 54a-55a; *see also* 20 U.S.C. § 1414(d)(1)(B). The first option -- the general education program, with supports, such as teaching aides -- was preferred by the Parents, but deemed inappropriate by Natick based on the student's IEP from her prior placement and her test scores. Pet. App. 35a, 51a-52a. Thus,

in contrast to the Petitioners' allegations, Pet. 10, Natick considered and did not believe C.D. could be satisfactorily educated in regular classes with supports and services. Natick was concerned that larger class sizes, close to thirty students, and more advanced content in high school would make it difficult for C.D. to access the general education curriculum. Pet. App. 6a, 52a.

Natick next considered placing C.D. in replacement classes in which a modified general education curriculum is taught by a special education teacher. Pet. App. 6a, 35a-36a. Based upon the information available to the Team, Natick did not believe even the replacement classes designed for students with communication disabilities and taught at a slower pace would be appropriate. Pet. App. 36a.

For the third option, the Team considered the ACCESS Program, which is a self-contained special education program located at Natick High School and designed for students who, like C.D., have cognitive and communication deficits. Pet. App. 6a, 36a. The Team believed it was appropriate because C.D. would have received a modified curriculum according to her abilities, as well as instruction in a small group. Pet. App. 36a. It proposed for the 2012–2013 school year that C.D. attend regular classes for her elective courses and the substantially separate classes in the ACCESS Program for her academic courses. Pet. App. 6a; *see generally* § 1414(d). Participating in the general education electives would expose C.D. to general education peers, while also providing her with the specialized services she required, including support for her

significant language deficits, to make progress on her IEP goals. Pet. App. 36a-37a; *see also* 20 U.S.C. § 1412(a)(5).

C.D.'s parents rejected the IEP, saying that the ACCESS Program was an overly "restricted environment" and that C.D.'s placement there would "hinder" her academic and social growth. Pet. App. 6a. They enrolled C.D. at Learning Prep School, a private school for students with disabilities where she would spend all of her time in a substantially separate classroom without any opportunities for inclusion. Pet. App. 6a, 37a.

Natick declined to fund the unilateral placement and stated that the placement at Learning Prep was a more restrictive placement than the in-district program Natick had proposed for C.D. Pet. App. 113a. Natick also referenced a prior BSEA decision in which the hearing officer had affirmed the appropriateness of Natick's ACCESS program for C.D. Pet. App 113a.

The Parents' own expert, Dr. Gibbons', recommendation supported a program like the ACCESS program. Pet. App. 130a-31a. She recommended language-based instruction based on C.D.'s significant language impairments and small classes of six to eight students. Pet. App. 130a-31a. Dr. Gibbons had explained that C.D. requires multimodal instruction, such as use of thinking maps and other graphic organizers. Pet. App. 131a. Dr. Gibbons stated that C.D. required substantially separate special education classes for her academics. Pet. App. 131a. Dr. Gibbons, the Parent's expert,

further stated that "[s]he did not think it would have been appropriate for Student to be in mainstream classes at Natick Public Schools after attending the McAuliffe School." Pet. App. 131a.

In May 2013, before C.D. was to enter tenth grade, Natick convened a team meeting to review C.D.'s IEP and propose a new IEP for the 2013–14 school year. Pet. App. 59a; *see generally* 20 U.S.C. § 1414(d)(1)(B). Natick presented to C.D.'s parents an IEP for the 2013–2014 school year that again placed C.D. in the ACCESS Program for her academic classes. Pet. App. 6a; *see generally* § 1412(a)(5), 1414(d). C.D.'s parents again rejected the IEP, giving the same reasons, and enrolled C.D. at Learning Prep, a completely segregated environment. Pet. App. 6a-7a.

Before the 2014-2015 school year, the IEP Team reconvened, this time with the benefit of a fresh set of assessments of C.D. Pet. App. 7a. Based on these assessments and on reports of C.D.'s progress at Learning Prep, Natick proposed a new IEP for the 2014–2015 school year that placed C.D. in a mix of ACCESS classes, replacement classes, and general education classes. Pet. App. 7a; *see generally* 20 U.S.C. §§ 1412(a)(5), 1414(d). C.D.'s parents rejected this IEP for two reasons due to what they perceived as inadequate time for speech and language services and a lack of a transition assessment. Pet. App. 7a.

Natick then performed a formal transition assessment and proposed a new IEP, with the same mix of classes, but extended C.D.'s school day to allow for speech and language therapy as well as

career preparation services. Pet. App. 7a; *see also* 20 U.S.C. §§ 1401(34), 1400(d)(1)(A). C.D.'s parents rejected this IEP and C.D. attended Learning Prep, again a wholly segregated environment, for the 2014-2015 school year. Pet. App. 7a.

B. Procedural History

On or about May 23, 2014, C.D.'s parents filed their initial Request for Hearing with the BSEA, which they later amended to include claims for the 2014-2015 school year. Pet. App. 7a, 69a, 108a. After a hearing, the Hearing Officer concluded that the IEPs proposed by Natick for the 2012-2013, 2013-2014, and 2014-2015 school years were reasonably calculated to provide C.D. with a FAPE in the LRE. Pet. App. 8a.[1] The Hearing Officer did not credit two of the Parents' experts. Pet. App. 147a. First, she did not credit the Parents' private speech and language pathologist, Ms. Flax, saying:

> Although she had appropriate credentials and experience as a speech and language pathologist, the statements she made during her testimony caused her to lose credibility. For example, she steadfastly stated that Student would not benefit at all from any inclusion. This statement was

[1] The Petitioners did not include the full decision in their Appendix to the Petition. They are missing Summary of the Evidence, Paragraphs 1 through 7. The full decision can be found at Ex. To Pl.'s Compl., No. 15-13617, ECF No. 2 (D. Mass. Oct. 21, 2015).

> not supported by any other witness for either party, nor did it comport with Ms. Flax's own prior recommendations for Student's programming.

Pet. App. 147a. Second, she did not credit Dr. Imber, a neuropsychologist, explaining that "it appears that Dr. Imber has changed his recommendations to align with which ever placement [C.D.] was in at the time he was asked to state his opinion." Pet. App. 147a.

C.D.'s parents appealed to Federal District Court. Pet. App. 8a. The District Court denied the Appellants' Motion for Summary Judgment on almost all grounds, but remanded the case, in part, to the BSEA to determine whether the 2012-13 and 2013-14 school year IEPs provided a FAPE in the LRE. Pet. App. 105a. The BSEA issued its order on March 22, 2018, concluding that the IEPs were reasonably calculated to provide a FAPE in the LRE. Pet. App. 33a, 39a. In contrast to the Petitioners' allegations, the Hearing Officer examined whether removal from the regular education environment should occur or whether, given the nature and severity of C.D.'s disability, education in regular classes with supplementary aids and services could be achieved satisfactorily. *Compare* Pet. 11,13, *with* App. 34a-35a, 38a ("The record is clear that Natick balanced the benefits to be gained, namely Student being able to independently access curriculum at a level and pace appropriate to her profile, against being outside of the general education setting for much of her day . . . ."). The Hearing Officer explained that the District considered C.D.'s parents' preference that C.D. take part in general education,

but found the District's proposal more appropriate because of C.D.'s unique "intellectual disability in conjunction with weaknesses in receptive and expressive language." Pet. App. 31a. The hearing officer also took into consideration Natick's proposal to allow C.D. to participate in general education electives, to "expose [C.D.] to general education peers, while also providing her with the specialized services she requires, including support for her significant language deficits, to make progress on her IEP goals." Pet. App. 31a.

C.D.'s parents then submitted a Supplemental Motion for Summary Judgment and the District Court concluded that "the BSEA hearing officer appropriately found that the district balanced the benefits of mainstreaming against the restrictions associated with the Access classes, and that the [2012-2013 and 2013-2014] IEPs were reasonably calculated to provide a FAPE in the least restrictive environment possible." Pet. App. 9a, 25a.

C.D.'s parents then appealed to the First Circuit and the First Circuit upheld the determinations of the District Court. Pet. App. 2a. The First Circuit explained that, in contrast to the Parents' arguments, there is no ground for distinguishing cases where parents sought a more restrictive setting from the present case where parents sought a less restrictive setting. Pet. App. 15a-16a. The First Circuit quoted the statute for LRE and stated it was applying the statute to review the District Court's decision. Pet. App 17a. It explained that "determining an appropriate placement for a disabled child is a complex task. It is one that

'involves choices among educational policies and theories – choices which courts, relatively speaking, are poorly equipped to make.'" Pet. App. 16a. The First Circuit then weighed the preference for mainstreaming 'in concert with the' FAPE mandate." Pet. App. 17a. It explained that:

> The two requirements "operate in tandem to create a continuum" of possible educational environments, each offering a different mix of benefits (and costs) for a student's academic, as well as social and emotional, progress. For schools, complying with the two mandates means evaluating potential placements' "marginal benefits" and costs and choosing a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress.

Pet. App. 17a-18a (citations omitted). The First Circuit concluded that "[t]he district court here verified that Natick and the BSEA had considered 'the nature and severity' of C.D.'s disability as well as the impact of 'supplementary aids and services.'" Pet. App. 18a. It noted that the BSEA and Natick:

> had both examined three potential placements: the regular classroom, replacement classes, and the ACCESS Program. Then the district court found that evidence supported the BSEA's and Natick's conclusion that the ACCESS Program was appropriate

> because of C.D.'s particular disability—an "intellectual disability in conjunction with weaknesses in receptive and expressive language."

Pet. App. 18a-19a (footnote and citations omitted).

REASONS FOR DENYING THE PETITION

A. There is no meaningful difference in the standard applied in the circuits.

Although different courts of appeals have articulated the IDEA's LRE requirement in different ways depending on the facts of the particular cases before the courts, the courts' articulations of the standards are not meaningfully different.[2] In fact, they are nearly identical in what they consider.

The statute, 20 U.S.C. § 1412(a)(5)(A), states:

> 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 educational environment occurs only

[2] In contrast to the Petitioners' allegations, Pet. 16, the Seventh Circuit has the same articulation as the First Circuit. Pet. App 16a; s*ee Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002) ("We find it unnecessary at this point in time Ronkto adopt a formal test for district courts uniformly to apply when deciding LRE cases. The Act itself provides enough of a framework for our discussion.").

> 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.

All of the court of appeals, including the First Circuit, recognize that § 1412(a)(5)(A), imposes a substantive LRE requirement. *See, e.g.*, Pet. App. 16a-18a; *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Holland ex rel. Rachel H.*, 14 F.3d 1398, 1403 (9th Cir. 1994); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044-45 (5th Cir. 1989); *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

When imposing that substantive requirement, all of the circuits are applying the language of the statute as the general framework. *See infra.* For example, the First and Seventh Circuits reference the statute directly. Pet. App. 16a-17a; s*ee Beth B.*, 282 F.3d at 499 ("The Act itself provides enough of a framework for our discussion."). The two step articulation from *Daniel R.R.* also stems directly from the statutory language as it first questions whether a student can be educated "satisfactorily" in the regular education environment, with supplementary aids and services, and if not if the student is mainstreamed to the "maximum extent appropriate." 874 F.2d at 1048; 20 U.S.C. § 1412(a)(5)(A). Similarly, the *Roncker* articulation examines whether services, which make a substantially separate program appropriate, could be feasibly provided in a non-segregated setting, i.e., whether supplementary aids and services can be

provided in a regular education environment. 700 F.2d at 1063. If not, mainstreaming is not appropriate. *Id.*

When applying these articulations to the individual fact circumstances before each court, all of the circuits *also* recognize that *implementation* of the LRE requirement requires balancing between the appropriateness of a particular placement and whether a fully mainstreamed placement is appropriate for the particular child at issue. *See* Pet. App 17a-18a ("For schools, complying with the two mandates means evaluating potential placements' 'marginal benefits' and costs and choosing a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress."); *Poolaw ex rel. Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995) ("In each case, the apparent tension between the IDEA's clear preference for mainstreaming and its requirements that schools provide individualized programs tailored to the specific needs of each disabled child must be balanced." (citations omitted)); *Daniel R.R.*, 874 F.2d at 1048 ("Ultimately, our task is to balance competing requirements of the EHA's dual mandate: a free appropriate public education that is provided, to the maximum extent appropriate, in the regular education classroom."); *Roncker*, 700 F.2d at 1063 (balancing marginal benefits received from mainstreaming with benefits gained from services which could not feasibly be provided in non-segregated setting).

They all also recognize that the balancing is "an individualized and fact-specific inquiry into the

nature of the student's condition and the school's particular efforts to accommodate it, ever mindful of the IDEA's purpose of educating children with disabilities, to the maximum extent appropriate, together with their non-disabled peers." *Mr. and Mrs. P ex rel. P. v. Newington Bd. of Educ.,* 546 F.3d 111, 120 (2d Cir. 2008) (citations and internal quotation marks omitted); *see also Abrahamson v. Hershman*, 701 F.2d 223, 230 (1st Cir. 1983) ("Under the regulations, the decision as to which placement is appropriate for a child, is primarily an individualized one."); *Ellenberg v. N.M. Military Inst.,* 478 F.3d 1262, 1277 (10th Cir. 2007); *Poolaw*, 67 F.3d at 836 ("The question whether to educate a handicapped child in the regular classroom or to place him in a special education environment is necessarily an individualized, fact specific inquiry."); *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1223 n.28 (3d Cir. 1993) ("However, as the court emphasized in *Daniel R.R.,* application of the mainstreaming requirement of IDEA to a particular case is 'an individualized, fact-specific inquiry.'"(citation omitted)); *Daniel R.R.*, 874 F.2d at 1048 ("Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs."); *Roncker*, 700 F.2d at 1063 (examining student's individual educational, physical or emotional needs).

This individualized analysis for LRE arises from the direct text of the IDEA, which the First Circuit cited and explained, Pet. App. 17a, requires an IEP

designed to meet a child's unique needs in an appropriate placement. *See* 20 U.S.C. §§ 1401(29), 1412(a)(5), 1414(d). The Department of Education confirms this approach as well. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46540, 46587 (Aug. 14, 2006) (instructing that placement decisions must be made on an individual basis and the requirement for the continuum of alternative placements "reinforces the importance of the individualized inquiry, not a 'one size fits all' approach, in determining what placement is the LRE for each child with a disability.").

As part of this individualized inquiry, they all consider the benefits (both academic and non-academic) of regular class placement with supplementary aids and services. *See, e.g.*, *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1188 (9th Cir. 2016) (considering non-academic social benefits of general education compared to segregated setting); *Cypress-Fairbanks Indep. Sch. Dist. v. Barry F. ex rel. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997) (considering academic and non-academic benefits); *McWhirt ex rel. McWhirt v. Williamson Cty. Sch.*, 28 F.3d 1213, 1994 WL 330027, at *4 (6th Cir. 1994) (unpublished) ("A school district must examine the educational benefits, both academic and nonacademic, available to a child with a disability in a regular classroom."); *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, 1090 n.7 (1st Cir. 1993) ("When a child, like Daniel, demonstrates a particular need for learning how to interact with

non-disabled peers, a mainstream placement will almost inevitably help to address that need. Such an integral aspect of an IEP package cannot be ignored when judging the program's overall adequacy and appropriateness.").

Finally, they all consider the aids and services which a child with a disability may require to benefit from regular education placement. *K.L.A. v. Windham Se. Supervisory Union*, 371 F. App'x 151, 155 (2d Cir. 2010) ("To the extent that the parents were primarily concerned about disruptive noise at BUHS, it appears that with proper accommodation, the District was capable of providing K.L.A. with a suitably quiet learning environment."); *Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48, 52-53 (1st. Cir. 1992) (finding most recent IEP addressed the needs of the student by adding supportive services to address student's inattention, lack of motivation and homework issue, while offering him placement in mainstream classes and resource room access); *DeBlaay ex rel. DeVries*, 882 F.2d 876, 880 (4th Cir. 1989) ("In our view, the district court's conclusions encompassed the finding that Michael's education could not be accommodated at Annandale High School even with the use of supplementary aids and services."); *Pass v. Rollinsford Sch. Dist.*, 928 F. Supp. 2d 349, 369 (D.N.H. 2013) ("'IEPs are by their very nature idiosyncratic' . . . .such that, while something 'different from the standard math curriculum' may be necessary for one student, the standard math curriculum, in connection with support services and accommodations, may be well-suited for another. Indeed, the IDEA expresses a preference for 'education in regular classes with the

use of supplementary aids and services.'" (citation omitted)).

Consequently, the inquiry is the same. The same fact pattern applied to each of the LRE analyses adopted would result in identical outcomes. The Petitioners try to argue that different outcomes in two cases, *Greer* and *Oberti,* show that the different articulations made a difference. Pet. 34. In fact, in these two cases, the Court of Appeals upheld the finding of the District Court where there was no specific articulation; hence an explicit articulation did not change the outcome in the case. *Oberti ex rel. Oberti v. Bd. of Educ.,* 995 F.2d 1204, 1215, 1223-24 (3d Cir.1993) (applying articulation led to upholding district court decision); *Greer ex rel. Greer v. Rome City Sch. Dist.,* 950 F.2d 688, 696, 699 (11th Cir. 1991) (affirmed district court decision despite adopting articulation).

Furthermore, these different formulations have co-existed for years, without incident, and without need for the Court's intervention, and, indeed, the Court has denied cert multiple times in response to petitions likewise claiming that these differences in articulations represent a split requiring the Court's attention. *Solana Beach Sch. Dist. v. Ky. D. ex rel. Ka. D.*, 568 U.S. 1026 (2012); *Emily H. ex rel. R.H. v. Plano Indep. Sch. Dist.*, 562 U.S. 1216 (2011); *Beth B. v. Van Clay*, 537 U.S. 948 (2002); *Hudson ex rel. Hudson v. Bloomfield Hills Pub. Sch.*, 522 U.S. 822 (1997); *Sacramento City Unified Sch. Dist. Bd. of Educ. v. Holland*, 512 U.S. 1207 (1994).

Since each circuit court examines the issue has applied the same reasoning, any conflict is illusory.

B. Even if the Court believes that there is a meaningful circuit split, this case is a poor vehicle for resolving the issue.

1. It is a poor vehicle for a addressing the issue as the Petitioners forfeited their argument about the standard to apply for least restrictive environment and about the 2014-2015 IEPs.

The Court's review would be impeded by the fact that Petitioners have forfeited two different sets of issues purportedly presented in their petition. First, the Petitioners did not ask either the BSEA or the District Court to make findings under a different standard for least restrictive environment and the First Circuit erred in failing to recognize that Petitioners had forfeited their arguments here.

The Petitioners for the first time at the First Circuit challenged the standard that the First Circuit applied for least restrictive environment analysis and asked the First Circuit to adopt the *Daniel R.R.* framework. *See infra.* However, in this case, the Petitioners made a strategic decision not raise their argument challenging the First Circuit framework of least restrictive environment at the District Court. *See* Am. Mem. in Supp. of Pl.'s Mot. for Summ. J., No. 15-13617, ECF No. 38, 3-4, 16-21 (D. Mass. July 7, 2016); Suppl. Mot. for Summ. J., No. 15-13617, ECF No. 91 (D. Mass. May 25, 2018);

Reply to Resp. to Suppl. Mot. for Summ. J., No. 15-13617, ECF No. 96 (D. Mass. July 3, 2018). They also did not mention the argument at the BSEA hearing. *See* R. App., No. 18-1794, at 1694-1738 (1st. Cir. Dec. 20, 2018). In fact, they cited in both forums the First Circuit standard, which the First Circuit upheld, as the standard to apply in determining the least restrictive environment analysis. *See* R. App., No. 18-1794, at 1694-1738 (1st. Cir. Dec. 20, 2018); Am. Mem. in Supp. of Pl.'s Mot. for Summ. J., No. 15-13617, ECF No. 38, 3-4, 16-21 (D. Mass. July 7, 2016); Suppl. Mot. for Summ. J., No. 15-13617, ECF No. 91 (D. Mass. May 25, 2018); Reply to Resp. to Suppl. Mot. for Summ. J., No. 15-13617, ECF No. 96 (D. Mass. July 3, 2018). The Petitioners did not apply the *Daniel R.R.* standard anywhere when analyzing the least restrictive environment in the District Court or at the BSEA. *See* R. App., No. 18-1794, at 1694-1738 (1st. Cir. Dec. 20, 2018); Am. Mem. in Supp. of Pl.'s Mot. for Summ. J., No. 15-13617, ECF No. 38, 3-4, 16-21 (D. Mass. July 7, 2016); Suppl. Mot. for Summ. J., No. 15-13617, ECF No. 91 (D. Mass. May 25, 2018); Reply to Resp. to Suppl. Mot. for Summ. J., No. 15-13617, ECF No. 96 (D. Mass. July 3, 2018).

Natick and the BSEA raised the issue of lack of preservation to the First Circuit. Pet. App. 14a. However, the First Circuit decided that it was preserved because "the parents' motions cited to and the district court quoted from Daniel R.R." Pet. App. 14a. However, mere citations are not enough to preserve an argument under First Circuit standards. As the First Circuit states, "It is not enough merely to mention a possible argument in the most skeletal

way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). "Judges are not expected to be mindreaders. Consequently, a litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace." *Rivera-Gomez v. de Castro*, 843 F.2d. 631, 635 (1st Cir. 1988) (citation omitted).

This Court has stated the same standard that the First Circuit applied around preservation. It has said that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The Court explained that it is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id.* (citation omitted). "This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States v. Atkinson*, 297 U.S. 157, 159 (1936).

In this case, as stated above, this Court would not have any factual findings under other standards because the Petitioners never created a fact issue that the Team did not appropriately apply the *Daniel R.R.* factors or that the *Daniel R.R.* factors favor them at the administrative hearing or in the

District Court. Natick and the BSEA litigated the issue of least restrictive environment for over four years, well after the factual record closed, before the argument was raised. It is not fair to have Natick or the BSEA litigate these issues at such a late stage in the litigation. It is not an exceptional circumstance where justice requires addressing the issue in spite of the lack of forfeiture.

Second, the Petitioners appear to be challenging the 2014-2015 IEPs and whether Natick offered a FAPE in the LRE. Pet. 10, 12. However, the only issue before the First Circuit in terms of LRE was the 2012-2013 and 2013-2014 IEPs. As the First Circuit stated, "C.D.'s parents argue next that the *2012–2013 and 2013–2014 IEPs* violated the LRE mandate by proposing to place C.D. in the ACCESS Program, which the parents view as overly restrictive." Pet. App. at 13a. (emphasis added). The Petitioners did not challenge the 2014-2015 IEPs in terms of the least restrictive environment. *Id.; see also Meyer v. Holley,* 537 U.S. 280, 291 (2003) ("[I]n the absence of consideration of [a] matter by the Court of Appeals, we shall not consider it."); *Youakim v. Miller,* 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

Consequently, because the First Circuit did not address the issue of the 2014-2015 IEPs and it was not raised below, the record in this case does not support review of the questions presented in the petition for the 2014-2015 IEPs.

2. It is a poor vehicle for addressing the issue because applying different formulations would not change the outcome.

This case is an inappropriate vehicle for resolving the issue because, even if the Court were to conclude that the *Daniel R.R.* formulation is meaningfully different from the statute as quoted and applied by the First Circuit below, and even if the Court were to adopt the *Daniel R.R.* formulation as the Petitioners request, the outcome would be the same.

The first factor in Daniel R.R.'s articulation of the LRE standard is whether the district "has taken steps to accommodate the handicapped child in regular education." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). The parties had gone to a BSEA hearing in 2011 about moving the student from inclusion to ACCESS and the hearing officer concluded that ACCESS was appropriate. *See* R. App., No. 18-1794, at 243-70 (1st. Cir. Dec. 20, 2018). C.D.'s profile had not changed since the prior hearing. *See* Pet. App. 114a. As a result, Natick had tried inclusion with C.D., but it was no longer appropriate, as previously decided. *See* R. App., No. 18-1794, at 243-70 (1st. Cir. Dec. 20, 2018). Additionally, when the Team convened to consider C.D.'s placement for the 2012–2013 school year, they considered regular education, with supports, such as teaching aides. Pet. App. 35a. Natick deemed it inappropriate based on C.D.'s IEP from her prior placement and her test scores. Pet. App. 35a-36a. Natick was concerned that larger

class sizes, close to thirty students, and more advanced content in high school would make it difficult for C.D. to access the general education curriculum. Pet. App. 6a, 52a.

Furthermore, the Court in *Daniel R.R.* explained,

> the Act does not require regular education instructors to devote all or most of their time to one handicapped child or to modify the regular education program beyond recognition. . . . Likewise, mainstreaming would be pointless if we 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 regular education. . . . [T]he only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student.

Daniel R.R., 874 F.2d at 1048–49. C.D.'s deficits require her to have multimodal and language-based instruction. Pet. App. 130a-31a. C.D.'s parents' own expert, Dr. Gibbons, testified that a general education program was inappropriate for C.D. and that she requires substantially separate classes for academics. Pet. App. 130a-31a. As a result, with all of this information, for C.D. to be in a regular

education classroom, instructors would have to modify the regular education curriculum to such an extent that C.D. would not be learning any of the skills normally taught in regular education.

> The second factor is
>
> > whether the child will receive an educational benefit from regular education. This inquiry necessarily will focus on the student's ability to grasp the essential elements of the regular education curriculum. Thus, we must pay close attention to the nature and severity of the child's handicap as well as to the curriculum and goals of the regular education class.

Daniel R.R., 874 F.2d at 1049. As explained, C.D. could not grasp the essential elements of the regular education curriculum and consequently could not receive a meaningful educational benefit in a general education setting for academic settings.

The third factor is the "effect the handicapped child's presence has on the regular classroom environment and, thus, on the education that the other students are receiving." *Id.* The court explained that

> the child may require so much of the instructor's attention that the instructor will have to ignore the other student's needs in order to tend to the handicapped child. The Act and its

> regulations mandate that the school provide supplementary aids and services in the regular education classroom. A teaching assistant or an aide may minimize the burden on the teacher. If, however, the handicapped child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education.

Id. at 1049-50. As explained above, C.D. was so far below grade level that she would not be able to engage in any of the instruction provided in a general education high school class with twenty-six to thirty students. Pet. App. 6a, 35a-36a, 52a, 130a-31a. Therefore, all of these factors weigh in favor of placing C.D. in a substantially separate classroom.

Finally, "[if] education in the regular classroom cannot be achieved satisfactorily, we next ask whether the child has been mainstreamed to the maximum extent appropriate." *Id.* at 1050. Here, Natick offered to educate C.D. in the mainstream to the maximum extent appropriate. Natick High School still would have afforded C.D. access to interact with non-disabled, general education peers for regular education electives. Pet. App. 6a.

Consequently, applying the *Daniel R.R.* factors would lead to the same outcome in this present case.

3. **It is a poor vehicle for addressing the issue because, even if Petitioners**

> **prevail on the question they present to this Court, it would not end the controversy in this case and it is not clear Petitioners would prevail on the other requirements for seeking reimbursement of the private placement they unilaterally chose for their child.**

To the extent that there is reversal that requires a new standard and leads to a different outcome, a question will nevertheless remain as to whether Learning Prep was an appropriate placement under the IDEA, which will involve multiple inquiries. *See C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 289 (1st Cir. 2008) (explaining that reimbursement of parental expenses is contingent upon a determination that "the private placement is a suitable alternative."); *see also* 34 C.F.R. § 300.148(c). Because the authority to grant reimbursement is discretionary, the Hearing Officer will have to weigh equitable considerations relating to the reasonableness of the actions taken by the parents in determining whether tuition reimbursement is appropriate. *Frank G v. Bd. of Educ.*, 459 F.3d 356, 363-64 (2d Cir. 2006). "Generally, 'the same considerations and criteria that apply in determining whether the School District's placement is appropriate should be considered in determining the appropriateness of the parents' placement.'" *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 451 (2d Cir. 2015) (citation omitted).

Because the Hearing Officer determined that Natick's proposed IEPs were reasonably calculated

to offer a FAPE public education in the LRE, the Hearing Officer did not rule on the appropriateness of Learning Prep. Pet. App. 146a-47a; *see also* 34 C.F.R. § 300.148(a). Because no finding was made at the BSEA on this issue, to the extent there is any reversal which leads to a determination that Natick's proposed IEPs were not reasonably calculated to offer a FAPE, it would not end the controversy in this case. The Hearing Officer would have to make multiple findings related to these issues.

The Petitioners are likely not to prevail on the appropriateness of Learning Prep. In this case, the Petitioners are seeking reimbursement for a private special education school, which is a completely segregated environment while at the same time arguing that the least restrictive environment for her is a full inclusion program. Pet. App. 6a, 37a. As a result, the relief that the Petitioners are seeking completely contradicts what they argue is appropriate for C.D.

Therefore, this case is a poor vehicle for resolving the issue because even if they were to prevail on the question raised in this Petition, they would not be entitled to any relief.

C. The First Circuit applied meaningful scrutiny to the least restrictive analysis inquiry consistent with the IDEA.

1. The First Circuit applied the LRE substantively.

The Petition should be denied for the further reason that the First Circuit did not err below in affirming the District Court's judgment. In contrast to the Petitioners' allegations, the First Circuit reviewed the least restrictive environment as a substantive requirement and adhered to the statute of requiring a school district to place a child with a disability in regular classes, "[t]o the maximum extent appropriate." Pet. 16-17. The First Circuit hence has a definitive standard, the Act itself.

The First Circuit specifically applied the language of the IDEA and its implementing regulations in making its decision. The First Circuit in analyzing least restrictive environment quoted the actual framework from § 1412(a)(5)(A), which states:

> 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 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.

Compare Pet. App. 17a *with* Pet. 16. The First Circuit approach is a common sense approach to the LRE issue. The definitions of "appropriate" and "satisfactory" in this context will depend on the

needs of the student at issue, a fact which this Court has previously recognized. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 197 n.21 (1982) ("The [IDEA's] use of the word 'appropriate' thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children.").

Underscoring that individualized determination and reviewing the language as a whole, the First Circuit explained that:

> Our cases have "weighed" this preference for mainstreaming "in concert with the" FAPE mandate. The two requirements "operate in tandem to create a continuum" of possible educational environments, each offering a different mix of benefits (and costs) for a student's academic, as well as social and emotional, progress. For schools, complying with the two mandates means evaluating potential placements' "marginal benefits" and costs and choosing a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress.

Pet. App. 17a-18a (citations omitted). This weighing of benefits is exactly what the Petitioners request to occur. *See* Pet. 33-34.

The First Circuit continued that "[q]uoting Roland M., the district court explained that

'[m]ainstreaming may not be ignored, even to fulfill substantive educational criteria.' Rather, the benefits to be gained from mainstreaming must be weighed against the educational improvements that could be attained in a more restrictive (that is, non-mainstream) environment.'" Pet. App. 18a. This balancing is appropriate because of the requirement to provide a FAPE. As the First Circuit has stated in other cases, "placement is not to be made by mechanically choosing the least restrictive environment; rather, *the decision must consider the child's own needs . . . .*" *Abrahamson v. Hershman*, 701 F.2d 223, 230 (1st Cir. 1983) (emphasis added). "The goal, then, is to find the least restrictive educational environment *that will accommodate the child's legitimate needs*." *See C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.,* 513 F.3d 279, 285 (1st Cir. 2008) (emphasis added) (citations omitted).

Given that the fact pattern of this case addresses C.D.'s education and her unique needs, it is impossible of being replicated. The First Circuit's decision to utilize the language of the IDEA when determining LRE is entirely appropriate and recognizes the individualized nature of the IEP process. It will not result in the First Circuit recommending a more restrictive educational placement being made for a child with a disability than is required based on a student's needs. As outlined in the decision, Pet. App. 16a-19a, recommendations for placements are made on a case-by-case basis based on the student's individualized need and take into account the expertise of school officials.

Thus, the First Circuit's holding that Natick proposed an appropriate public placement for C.D. did not originate from a refusal to conduct a substantive mainstreaming analysis or consider mainstreaming, but instead involved a thorough analysis of the mainstreaming requirements, applied to her individual circumstances.

2. The First Circuit's decision arose from a review of C.D.'s individualized needs, which the Petitioners cannot dispute.

The decision not to place C.D. in general education classes for academics arose from her individualized needs, as set forth in her IEP. As the record reflects, the First Circuit concluded that when applying the actual statutory framework to this case and weighing the preference towards mainstreaming, "[t]he district court here verified that Natick and the BSEA had considered 'the nature and severity' of C.D.'s disability as well as the impact of 'supplementary aids and services.'" Pet. App. 18a. It continued that the District Court:

> noted that the BSEA and Natick had both examined three potential placements: the regular classroom, replacement classes, and the ACCESS Program. Then the district court found that evidence supported the BSEA's and Natick's conclusion that the ACCESS Program was appropriate because of C.D.'s particular disability—an "intellectual disability in conjunction

> with weaknesses in receptive and expressive language."

Pet. App. 18a-19a (citation omitted).

Consequently, the First Circuit, District Court, BSEA and IEP Team substantively analyzed the least restrictive environment. Consistent with the statute, the courts and BSEA held that given the nature and severity of C.D.'s disability, an intellectual disability in conjunction with weaknesses in receptive and expressive language, even with the use of supplementary aids and services, she could not be educated in a regular classroom or replacement classes and required the ACCESS program. Pet. App. 6a, 35a-36a, 52a, 130a-31a. Specifically, even with supports of aides, C.D. given her scores on standardized tests and the nature of her disabilities, with larger class sizes and more advanced content in high school, C.D. would be unable to access the general education curriculum. Pet. App. 6a, 35a, 52a, 56a-57a, 84a. Indeed, Dr. Gibbons, the Parent's own expert, supported that claim, stating that "[s]he did not think it would have been appropriate for Student to be in mainstream classes at Natick Public Schools after attending the McAuliffe School." Pet. App. 131a. Hence, in contrast to the Petitioners' allegations, Pet. 16, the First Circuit, District Court, BSEA and IEP Team asked first and foremost whether C.D. could receive a FAPE in general education classes for academics and concluded that she could not.

Natick considered second placing C.D. in replacement classes in which a modified general

education curriculum is taught by a special education teacher. Pet. App. 6a, 35a-36a. Based upon the information available to the Team, Natick did not believe that even the replacement classes designed for students with communication disabilities and taught at a slower pace would be appropriate for C.D. Pet. App. 36a. For the third option, the Team considered the ACCESS Program, which is a self-contained special education program located at Natick High School and designed for students who, like C.D., have cognitive and communication deficits. Pet. App. 6a, 36a. The Team believed it was appropriate because C.D. would have received a modified curriculum according to her abilities, as well as instruction in a small group. Pet. App. 36a. This program was consistent with the Parents' own expert, Dr. Gibbons, who stated C.D. required language-based instruction based on C.D.'s significant language impairments and small classes of six to eight students. Pet. App. 131a.[3] Dr. Gibbons had explained that C.D. requires multimodal instruction, such as use of thinking maps and other graphic organizers. Pet. App. 131a. Dr. Gibbons stated that C.D. required substantially separate special education classes for her academics. Pet. App. 131a. ACCESS was such a substantially

[3] The Petitioners state that "evidence showed that C.D.'s test scores understated her capabilities." Pet. 35. However, that statement came from Dr. Imber, reflecting on his own testing. Pet. App. 56a. Dr. Imber was discredited by the Hearing Officer as she explained "it appears that Dr. Imber has changed his recommendations to align with which ever placement she was in at the time he was asked to state his opinion." Pet. App. 147a. The evidence referred to was thus not credible.

separate program. C.D. would have attended regular classes for her elective courses, exposing C.D. to general education peers. Pet. App. 36a-37a.

Therefore, the First Circuit, District Court, BSEA and IEP Team engaged in a meaningful scrutiny and concluded that C.D. required the ACCESS program for her academic classes and general education classes to receive a FAPE in the LRE. Such an inquiry is consistent with the purpose behind the IDEA of finding the "least restrictive environment commensurate with [a student's] needs." S. REP. No. 94-168, at 54 (1975); *see, e.g.*, *E.F. ex rel. R.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 247 (4th Cir. 2019) (finding that LRE "requires placement in the least restrictive environment *appropriate for the child's education*."), *cert. denied*, 140 S. Ct. 156 (2019); *Houston Indep. Sch. Dist. v. Juan P. ex rel. V.P.*, 582 F.3d 576, 586 (5th Cir. 2009) ("the IDEA mandates that a child be placed in the least restrictive environment in which the child can achieve an *appropriate* education."); *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 393 (3d Cir. 2006) (in this case cited by Petitioners at 23, upheld more restrictive placement after district considered other regular education because "such a placement would not provide him with satisfactory educational opportunities."). It was not about finding any appropriate setting, as alleged in the Petitioners' Writ for Cert, but understanding her disability and needs given that disability. Pet. 18. In this case, given the nature of C.D.'s individual needs, which the Parents' own expert acknowledged, it was not possible for her to receive a FAPE in regular classes

and the least restrictive appropriate setting was the ACCESS program.

To accept the Petitioners' argument here that C.D. should have been mainstreamed for academics would impermissibly disregard her IEP and the individual needs it addressed. The Hearing Officer determined that C.D.'s placement in ACCESS was appropriate and individualized on the basis of her assessments and performance. Pet. App. 39a. C.D.'s IEPs determined that she required support for her significant language deficits, such as small group-instruction to provided modified curriculum and approaches. Pet. App. 38a; Ex. To Pl.'s Compl., No. 15-13617, ECF No. 2, at 6-12 (D. Mass. Oct. 21, 2015). The Hearing Officer and District Court agreed that the IEP was appropriately individualized. Pet. App. 13a. It was these individual needs that led to the determination that ACCESS, was the least restrictive environment appropriate. Pet. App. 13a. The Petitioners cannot dispute these facts now. The Supreme Court is a court of final review, not first view.

Finally, the First Circuit's decision to give deference to school authorities is consistent with Supreme Court precedent. This Court in *Joseph F. ex rel. Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, stated that "[t]his absence of a bright-line rule, however, 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.'" 137 S. Ct. 988, 1001 (2017). Similarly, in *Bd. of Educ. v. Rowley ex rel. Rowley*, this Court said that

> [i]n assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

458 U.S. 176, 207 (1982). This Court continued that "[i]n the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2)." *Id.* at 207-08.

The First Circuit stated consistent with these opinions that determining an appropriate placement for a disabled child is already a complex task.

> It is one that "involves choices among educational policies and theories—choices which courts, relatively speaking, are poorly equipped to make." That is why the IDEA "vests" state and school "officials with responsibility for" choosing a child's placement.

Pet. App. 16a (citations omitted). The First Circuit finished that "[a]nd it is why courts owe respect and deference to the expert decisions of school officials

and state administrative boards." Pet. App. 16a. Nowhere did the First Circuit state that it was giving complete deference to school officials, in contrast to the Petitioners' allegations. Pet. 18. The First Circuit appropriately deferred to the expertise of Natick and the BSEA in analyzing the least restrictive environment for C.D.

Thus, C.D.'s individualized needs cannot be ignored. Given her individualized needs, as outlined by her own experts, the ACCESS program was appropriate with regular classes for electives. The IDEA's least restrictive environment provision makes this explicit, directing that the educational placement of a child with a disability must be *appropriate*. 20 U.S.C. § 1412(a)(5)(A).

CONCLUSION

For the reasons enumerated above, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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