No. _____

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

PETITION FOR WRIT OF CERTIORARI

Benjamin J. Wish
TODD & WELD, LLP
One Federal St.,
27th Fl.
Boston, MA 02110

Laurie R. Martucci
MARTUCCI LAW ASSOCIATES
20 Cabot Blvd., Ste. 300
Mansfield, MA 02048

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners

QUESTION PRESENTED

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, conditions federal funding on compliance with several requirements, including a directive that students with disabilities be educated, "[t]o the maximum extent appropriate," "in regular classes with the use of supplementary aids and services." § 1412(a)(5)(A). As this Court has recognized, that statutory mandate reflects Congress' "'mainstreaming' preference," *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202–03 (1982)—*i.e.*, that "children with disabilities receive education in the regular classroom 'whenever possible.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (quoting *Rowley*, 458 U.S. at 202).

The courts of appeals have divided on how to interpret this mainstreaming mandate. The First Circuit permits a school district to remove a child with a disability from regular classes so long as the district weighs the costs and benefits of different placement options and picks one educators find appropriate. The Second, Third, Fifth, Tenth, and Eleventh Circuits track the IDEA's text by requiring mainstreaming whenever a child's education can be achieved satisfactorily in regular classes with supplementary aids and services and program modifications. The Fourth, Sixth, and Eighth Circuits apply a test that starts from the assumption that segregated special education classes are superior. And the Seventh and Ninth Circuits have taken still different approaches.

The question presented is: When does a school district's decision to educate a child with disabilities outside the regular classroom violate the IDEA's mainstreaming mandate?

RELATED PROCEEDINGS

United States District Court (D. Mass.):

C.D., by and through her Parents and Next Friends, M.D. and P.D. v. Natick Public School District and Bureau of Special Education Appeals, No. 15-13617 (July 20, 2018)

United States Court of Appeals (1st Cir.):

C.D., by and through her Parents and Next Friends, M.D. and P.D.; M.D.; P.D. v. Natick Public School District; Bureau of Special Education Appeals, No. 18-1794 (May 22, 2019)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case presents an acknowledged circuit split about the standard for determining whether a school district has complied with the "mainstreaming" or "least restrictive environment" requirement of the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400 *et seq*. That requirement directs participating states to educate children with disabilities in "the regular educational environment," "with children who are not disabled," "[t]o the maximum extent appropriate." § 1412(a)(5)(A). A student may be removed from regular classes "only when the nature or severity of [her] disability … is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* This Court has twice recognized that this language requires school districts to educate children with disabilities in the regular classroom "whenever possible." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982)).

The circuits have divided over how courts are to enforce the IDEA's mainstreaming preference. The First Circuit ignores Congress' substantive preference for mainstreaming, and transforms the mainstreaming directive into a mere procedural hurdle for school districts. So long as they consider different options, including mainstreaming, they may pick the option they consider most appropriate. And a court has no more role to play in enforcing Congress' mandate.

Here, respondent Natick Public School District proposed to place petitioner C.D. in special education classes, rather than regular classes. The First Circuit held that Natick nevertheless complied with the

mainstreaming requirement because it chose special education classes after considering three different educational environments for C.D. and balancing their costs and benefits in its discretion. Contrary to the IDEA's text, the First Circuit did not require Natick to show "that education in regular classes with the use of supplementary aids and services [could] not be achieved satisfactorily," or that Natick proposed to educate C.D. in regular classes "[t]o the maximum extent appropriate."

In so doing, the First Circuit expressly "eschew[ed] the *Daniel R.R.* test" adopted by the Second, Third, Fifth, Tenth, and Eleventh Circuits. App. 16a. Those courts enforce the IDEA's mainstreaming directive as a substantive requirement. Unlike the First Circuit's atextual deference to unfettered balancing by school districts, the *Daniel R.R.* test hews closely to the IDEA's text and respects Congress' strong preference for mainstreaming. Courts applying the *Daniel R.R.* test first ask whether a child can be satisfactorily educated in regular classes with supplementary aids and services and curriculum modifications. If so, the student *must* be educated in regular classes. If not, the school district *still* must mainstream the child to the maximum extent appropriate. The First Circuit's approach also conflicts with the *Roncker* test, adopted by the Fourth, Sixth, and Eighth Circuits, and the Ninth Circuit's test, which draws from both *Daniel R.R.* and *Roncker*. In all those other courts, Natick's proposed placement would have violated the IDEA's mainstreaming directive.

This Court should grant certiorari to decide the proper test for enforcing the IDEA's mainstreaming mandate. The Court often provides guidance in IDEA

cases. That makes sense, because the IDEA protects some seven million children nationwide. Just two Terms ago, the Court in *Endrew F.* explained how to determine whether a state is providing a child with the free appropriate public education the Act guarantees. The IDEA's mainstreaming requirement is no less crucial, for the Act requires a free appropriate public education *in the least restrictive environment*. Educators and parents cannot answer key questions about children's educational placements, and courts cannot properly enforce the IDEA, without guidance on *both* of the Act's substantive mandates.

OPINIONS BELOW

The opinion of the court of appeals is reported at 924 F.3d 621 and reproduced at App. 1a–21a. The opinions of the district court are not reported, but are available electronically at 2018 WL 3510291 and 2017 WL 3122654, and are reproduced at 24a–32a and 40a–105a.

JURISDICTION

The court of appeals affirmed the district court's decision on May 22, 2019. App. 1a. Petitioners timely filed this petition within 90 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, provides in § 1412(a)(5)(A):

> 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.

STATEMENT OF THE CASE

1. a. The IDEA is "an 'ambitious' piece of legislation enacted 'in response to Congress' perception that a majority of handicapped children in the United States were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.'" *Endrew F.*, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 179; quotation marks omitted). The IDEA offers states federal funds in exchange for a commitment to adhere to several conditions. *Id.* at 993. Two are central: The state must provide a "free appropriate public education"—or FAPE—for all eligible children, and it must do so in regular classes "'whenever possible.'" *Id.* at 993, 999 (quoting *Rowley*, 458 U.S. at 202).[1]

First, the state must provide a FAPE for all children living with certain disabilities. § 1412(a)(1)(A); *see* § 1401(3)(A)(i) (covered disabilities); *Endrew F.*, 137 S. Ct. at 993. For an eligible child, a FAPE is a "substantive right." *Endrew F.*, 137 S. Ct. at 993; *accord Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017). It must be provided "at public expense"; "meet

[1] These requirements were "initially set out in the Education of the Handicapped Act, which was later amended and renamed the IDEA." *Endrew F.*, 137 S. Ct. at 994 n.1. "For simplicity's sake," this petition uses IDEA or Act throughout. *Id.*

the standards of the State educational agency;" "include an appropriate preschool, elementary school, or secondary school education"; and "conform[] with the [child's] individualized education program." § 1401(9)(A)–(D). And it must include "special education" and "related services" required "to meet the unique needs of a child with a disability" and "to assist a child … to benefit from" that instruction. § 1401(9), (26), (29); *Endrew F.*, 137 S. Ct. at 994, 999.

Because the IDEA "'requires participating States to educate a wide spectrum of … children'" with disabilities, the IDEA "cannot and does not promise 'any particular [educational] outcome'" for any child. *Endrew F.*, 137 S. Ct. at 998–99 (quoting *Rowley*, 458 U.S. at 192, 193 n.15, 202). But the FAPE requirement does set forth "a substantive standard." *Id.* at 998. "[A] school must offer an [individualized education program] reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999; *see id.* at 1001.

Second, the state must provide that education in the least restrictive environment possible—or LRE. *See* § 1412(a)(5)(A). That means the state must educate children with disabilities in the regular classroom with children without disabilities "whenever possible." *Endrew F.*, 137 S. Ct. at 999; *Rowley*, 458 U.S. at 202 & n.24. The Act states:

> 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.

§ 1412(a)(5)(A). This requirement is known as the statute's "'mainstreaming' preference." *Rowley*, 458 U.S. at 202–03.

The rationale for the Act, which followed landmark equal-protection rulings mandating public education for children with disabilities, was that mainstreaming and other measures would help "provid[e] full educational opportunity to all children with disabilities," § 1412(a)(2), and enable them to become independent. *See* S. Rep. No. 94-168, at 6, 9, 33 (1975); H.R. Rep. No. 94-332, at 3, 11, 65 (1975). The Act's sponsors "advocated dignity" and "stressed the long-term financial savings." *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181 (3d Cir. 1988) (Becker, J.). And since enacting the mainstreaming requirement, Congress has found that "[a]lmost 30 years of research and experience" confirm that "access to the general education curriculum in the regular classroom, to the maximum extent possible," helps children with disabilities "meet developmental goals" and "the challenging expectations that have been established for all children," in preparation for "lead[ing] productive and independent adult lives." § 1400(c)(5)(A)(i)–(ii).

Department of Education regulations track the statutory text. States must offer "a continuum of alternative placements … to meet the needs of children

with disabilities." 34 C.F.R. § 300.115(a). That continuum must provide "for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement." § 300.115(b). And "[a] child with a disability [may] not [be] removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum." § 300.116(e). States must ensure that teachers and administrators understand the mainstreaming requirement and receive the necessary "technical assistance and training." § 300.119(a) & (b).

b. "[T]he centerpiece of the statute's education delivery system" is the "individualized education program," or IEP. *Endrew F.*, 137 S. Ct. at 994 (citation omitted); *see* § 1414(d)(1)(A). An IEP is a "comprehensive plan" "for pursuing [a child's] academic and functional advancement." *Endrew F.*, 137 S. Ct. at 994, 999. The teacher, parents, and school officials must collaborate to develop the IEP under detailed procedures "requir[ing] careful consideration of the child's individual circumstances." *Id.* at 994.

An IEP must assess the "the child's present levels of academic achievement and functional performance"; describe "how the child's disability affects the child's involvement and progress in the general education curriculum"; establish "measurable annual goals, including academic and functional goals"; and describe "how the child's progress toward meeting the annual goals … will be measured." § 1414(d)(1)(A)(i)(I)–(III); *see Endrew F.*, 137 S. Ct. at 994. Crucially, the IEP must set out "the special education and related services and supplementary aids and services," as well as "the program modifications

or supports for school personnel," that will be provided for the child to be educated "in the general education curriculum." § 1414(d)(1)(A)(i)(IV). And the IEP must be reviewed and revised at least annually to address "whether the annual goals for the child are being achieved"; "any lack of expected progress toward the annual goals and in the general education curriculum"; "the results of any reevaluation"; "information about the child provided to, or by, the parents"; "the child's anticipated needs; or other matters." § 1414(d)(4)(A)(i), (ii).

Typically, "[w]hen a child is fully integrated in the regular classroom, as the Act prefers," his IEP will anticipate a FAPE that "provid[es] a level of instruction reasonably calculated to permit advancement through the general curriculum." *Endrew F.*, 137 S. Ct. at 1000. But the FAPE requirement focuses on the child's unique needs in his unique circumstances. *Id.* at 999–1000. Thus, if smooth progress "through the regular curriculum … is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement" so long as it is "appropriately ambitious in light of his circumstances." *Id.* at 1000.

c. Because parents and educators do not always agree on an IEP, the IDEA establishes formal dispute-resolution procedures. *Fry*, 137 S. Ct. at 749; *Endrew F.*, 137 S. Ct. at 994. Parents may trigger a "[p]reliminary meeting" with educators; instead (or also), they may pursue mediation. § 1415(e), (f)(1)(B)(i). If those measures fail, the parties may proceed to a "due process hearing" before a state or local hearing officer. § 1415(f)(1)(A), (g). The losing party may seek relief in state or federal court. § 1415(i)(2)(A).

Meanwhile, a child's parents may choose to place the child in a private school. Reimbursement may be required if the parents can show that the school district violated the IDEA and that the private placement is otherwise proper. *See Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 13 (1993); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369–70 (1985).

2. Petitioner C.D. is a young woman diagnosed with borderline intellectual functioning. App. 48a. She lives with her parents, petitioners M.D. and P.D., in Natick, Massachusetts, which receives IDEA funds. *Id.*

a. C.D. attended public school in Natick through fifth grade. App. 5a. For grades six through eight, she attended McAuliffe Regional Charter Public School in Framingham, Massachusetts. App. 5a, 46a. At McAuliffe, C.D. took all her classes except math in the regular classroom setting. App. 5a, 48a–49a. She received supplementary support in those regular classes from two retired special education teachers that her parents hired. App. 5a, 49a. C.D. performed well at McAuliffe. She could access the general education curriculum, and her self-confidence improved significantly. App. 49a.

b. In the summer of 2012, before C.D. began high school, her parents met twice with officials from respondent Natick Public School District to discuss C.D.'s reentry into the Natick public schools and develop an IEP. App. 5a, 49a–58a. This dispute centers on whether the IEPs that Natick offered complied with the IDEA's mainstreaming requirement.

C.D.'s parents explained that C.D. had performed well in her regular classes at McAuliffe with support from her tutors. App. 51a. They hoped for similar support at the Natick high school so C.D. could continue in regular classes. App. 5a, 51a. C.D.'s tutors from McAuliffe reiterated that C.D. performed well in her regular classes with appropriate—and not significant—support. App. 56a. An independent evaluator who accompanied C.D.'s parents added that with appropriate supports and services, C.D. could perform at a level much higher than her test scores suggested. *Id.*

Natick responded that it generally offered three classroom settings for high school students with disabilities: regular classes with teaching aides; replacement classes—separate classes taught by special education teachers where all students had IEPs; and a separate "ACCESS" program with a significantly different curriculum that did not lead to high school diplomas. App. 6a, 51a. In neither of the relevant years did Natick propose an IEP that put C.D. in the regular classroom for her academic subjects. Nor did Natick say it had even evaluated whether C.D. could be satisfactorily educated in regular classes with supports and services or program modifications. Instead, Natick opined that some combination of ACCESS and replacement classes was appropriate. App. 57a, 62a.

Specifically, Natick's proposed IEPs for the 2012–2013 and 2013–2014 school years placed C.D. in the ACCESS program for all of her academic classes, and in regular classes only for her electives. App. 58a–59a. And for 2014–2015, Natick proposed to place C.D. in replacement classes for English and science; in the ACCESS program for math and another reading class; and in regular classes, with support, for history/social

studies. App. 62a. New psychological, speech, and language evaluations suggested that C.D. had a narrower language or communication disability than previously thought; these evaluations noted not only weaknesses, but also strengths, such as eye contact, body language, word memory, and comprehension of spoken paragraphs. App. 60a–62a.

Each year, C.D.'s parents rejected Natick's proposed IEP and enrolled C.D. in Learning Prep, a private school. App. 6a–7a, 58a–59a, 63a. They maintained that C.D. should be placed in regular classes with support, and they asked Natick to reimburse the cost of Learning Prep. *Id.*

3. In May 2014, C.D.'s parents initiated a due process hearing. App. 7a, 69a. They contended, as relevant here, that Natick's proposed IEPs violated C.D.'s right to a FAPE in the least restrictive environment, and sought reimbursement. App. 69a.

In July 2015, the hearing officer determined that Natick's proposed IEPs were "reasonably calculated to provide [C.D.] with a free public education in the least restrictive environment." App. 139a–40a; *see* App. 8a, 70a. The officer did not set out any standard for assessing compliance with the IDEA's mainstreaming requirement. Instead, she stated that the "two parts to the legal analysis" were whether the district had complied with the IDEA's procedures and provided a FAPE. App. 135a. She did not assess the non-academic benefits of mainstreaming; how regular classes could be modified to better suit C.D.; or whether, and, if so to what extent, C.D. could access the mainstream curriculum with support like she had at McAuliffe.

The only basis for the hearing officer's determination that Natick's proposed IEPs for 2012–2013 and 2013–2014 were not "overly restrictive" was her conclusion that the ACCESS program was "less restrictive than [C.D.'s] McAuliffe placement" because at McAuliffe C.D. had "a full time one-to-one assistant who also acted as a one-to-one tutor as needed." App. 136a; *see* App. 140a (same conclusion and reasoning for both years). In other words, the officer concluded that C.D.'s supplementary support in regular classes created a more restrictive experience than a solely special education environment. The officer provided little analysis about restrictiveness for Natick's proposed IEP for 2014–2015. *See* App. 140a–45a.

Finding that Natick's proposed IEPs were reasonably calculated to provide C.D. with a FAPE in the least restrictive environment, the officer concluded that C.D.'s parents had no right to reimbursement for placing C.D. at Learning Prep. App. 8a, 74a, 148a.

4. C.D. and her parents sought review in federal district court, which remanded for the hearing officer to reconsider her analysis. App. 9a, 74a, 105a. The court explained that under the First Circuit's decision in *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990), "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." App. 86a. Contrary to the hearing officer's reasoning, the court explained, "a separate program for students with disabilities is not less restrictive than a placement in mainstream, general-education classes." App. 87a. The court found it "unclear whether the

hearing officer [had] adhered" to the *Roland* balancing test. *Id.*

5. On remand, the hearing officer affirmed her earlier opinion. App. 33a–39a. She noted that "the Natick Team … considered three programs": regular classes, the ACCESS program, and replacement classes. App. 35a. And she observed that Natick did not believe, "based on [C.D.'s] IEP from her prior placement and her test scores, … that general education was appropriate for [C.D.]." *Id.*

The hearing officer did not independently evaluate Natick's analysis. She did not determine whether regular classes could be modified, or whether C.D. could perform satisfactorily with supports. The officer did not consider the option of placing C.D. in a mainstream classroom with an aide, or state that Natick had considered that option. To the contrary, the officer found that "Natick's proposed IEP for the 2012–2013 school year would have provided [C.D.] with the opportunity to independently access curriculum at her level, *rather than relying on aides, as would have been required in a general education setting*." App. 37a–38a (emphasis added).

6. The district court entered judgment for Natick. App. 22a–23a. The court noted that the hearing officer "explain[ed] the three options considered by the Natick team." App. 31a. The court stated that "[t]he hearing officer noted that the district considered the 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.'" *Id.* Based primarily on these ob-

servations, the court concluded that the "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." *Id.*

7. The First Circuit affirmed. App. 1a–21a.

The First Circuit began by "eschewing" the mainstreaming test first set out in *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1046–50 (5th Cir. 1989), and later followed by "[s]everal other circuits." App. 16a. The court noted that the *Daniel R.R.* test asks "first, 'whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily,' and, if the child cannot be educated in the regular classroom, ask[s] second 'whether the school has mainstreamed the child to the maximum extent appropriate.'" App. 14a (quoting *Daniel R.R.*, 874 F.2d at 1048). The First Circuit noted that courts consider several factors to make the determination under the first step. App. 14a–15a. The First Circuit also observed that some other courts apply a different test under *Roncker* v. *Walter*, 700 F.2d 1058 (6th Cir. 1983). App. 15a n.9. But the court rejected those other tests. The court reasoned that it needed no guidance beyond "[t]he text of § 1412(a)(5)(A) and prior [First Circuit] precedent." App. 16a.

Instead, the First Circuit emphasized the "respect and deference" it believed "courts owe … to the expert decisions of school officials and state administrative boards." *Id.* Thus, the court reasoned, it had "every reason not" "to add complexity to the LRE mandate in

the form of *Daniel R.R.*'s judicial gloss." App. 17a. The court explained that schools comply with the IDEA when they "evaluat[e] potential placements' 'marginal benefits' and costs and choos[e] a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress." App. 17a–18a (quoting *Roland M.*, 910 F.2d at 992–93). In the First Circuit's view, the district court correctly applied *Roland* by stating that "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." App. 18a (citation omitted).

The First Circuit noted conclusorily that "evidence supported the [hearing officer's] and Natick's conclusion that the ACCESS program was appropriate because of C.D.'s particular disability." App. 19a. Finding the district court's approach "appropriately deferential," the First Circuit affirmed. *Id.*

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The courts of appeals are divided on how to enforce the IDEA's mainstreaming mandate

The courts of appeals have articulated no fewer than four different standards for assessing compliance with the IDEA's mainstreaming requirement. Although courts and commentators have long acknowledged differing approaches, the First Circuit's decision represents a stark departure from the other tests. Most other courts of appeals recognize that the mainstreaming directive imposes a substantive requirement; they differ only about how to enforce it.

The First Circuit, in contrast, asks only whether educators have weighed the costs and benefits of several placements and chosen what, in their view, is an appropriate option. That approach makes little reference to the statute's text or the Department of Education's regulations, and ignores Congress' strong preference for mainstreaming. The conflict on this question is persistent, and the question is ripe for this Court's review.

A. The First Circuit alone refuses to apply any meaningful scrutiny to enforce the IDEA's mainstreaming directive

Although the courts following *Daniel R.R.* and *Roncker* disagree on the correct test (as does the Ninth Circuit), the First Circuit's approach is an outlier altogether. The First Circuit transforms a substantive statutory preference for mainstreaming into a mere procedural requirement that educators consider different placement options. Thus, in the First Circuit, school officials can place a student with a disability in a separate classroom, over her parents' wishes, even if they could provide her with a FAPE in regular classes alongside her peers. *Daniel R.R.* and *Roncker* do not permit that result. Neither does the IDEA's plain language.

1. The *Daniel R.R.* test, as several circuits have concluded, closely tracks the IDEA's text. *Infra* pp. 19–23, 25, 29. It asks, first, whether a child can be educated satisfactorily—*i.e.*, provided a FAPE—in regular classes with supplementary aids and services, and considering curriculum modifications. *Infra* pp. 19–21. If so, the school district must educate the child in regular classes. If not, the district still must

mainstream the child to the maximum extent appropriate. And *Roncker* asks if those services that make a segregated environment superior can feasibly be brought into the regular classroom environment. *See infra* pp. 25–26. If so, the school district must educate the student in regular classes. Neither test restricts mainstreaming to situations in which a child with a disability can perform at the level of children without disabilities. *See, e.g.*, *Daniel R.R.*, 874 F.2d at 1047; *Oberti by Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3d Cir. 1993); *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 792–93 (6th Cir. 2018). At the same time, the *Daniel R.R.* test does not supplant educators' expertise in assessing costs and benefits—it simply requires educators to determine whether mainstreaming can be "achieved satisfactorily," and to achieve mainstreaming "[t]o the maximum extent appropriate." § 1412(a)(5)(A). Under both *Daniel R.R.* and *Roncker*, mainstreaming is the preference, as Congress intended.

2. The First Circuit expressly "eschew[s]" *Daniel R.R.* and does not follow *Roncker*. App. 16a. The First Circuit does not require a school district to place a child with a disability in regular classes, "[t]o the maximum extent appropriate," if it finds that her education could "be achieved satisfactorily" in that environment. § 1412(a)(5)(A). The First Circuit does not ask whether the school district could provide a FAPE in regular classes. The court does not require a school district to consider, as part of identifying "possible educational environments," App. 17a, whether the child's education could be "achieved satisfactorily" "in regular classes with the use of supplementary aids

and services," § 1412(a)(5)(A), or with "program modifications," § 1414(d)(1)(A)(i)(IV). The court does not ask whether a school district proposed mainstreaming the child "[t]o the maximum extent appropriate."

Instead, the First Circuit defers completely to a school district's determination of which environment it thinks is appropriate for the child. The court holds that so long as educators evaluate "potential placements' 'marginal benefits' and costs," the mainstreaming requirement allows them to "choos[e] a placement that strikes an appropriate balance between the restrictiveness of the placement and educational progress." App. 17a–18a (quoting *Roland*, 910 F.2d at 992–93). And under the court's earlier decision in *Roland*, "[n]either side" of "the maximum benefit/least restrictive fulcrum" "is automatically entitled to extra ballast." 910 F.2d at 993. In other words, educators may select "*an* appropriate educational plan"—indeed, any plan they "reasonably consider[] *more* appropriate"—so long as they have considered several options and have "struck *an* 'adequate and appropriate' balance on the maximum benefit/least restrictive fulcrum." *Id.* (emphases added). Thus, the First Circuit found Natick's proposed IEPs sufficient simply because Natick had considered three potential placements and concluded that one particular non-mainstream environment—the most restrictive environment—"was appropriate." App. 19a.

3. The First Circuit's test not only diverges from *Daniel R.R.* and *Roncker*, but it also contravenes the IDEA's plain language. Section 1412(a)(5)(A) does not mention "marginal benefits" or "costs" (let alone "fulcrum" or "ballast"). And for good reason. Although the

IDEA may respect educators' judgments about pedagogy and likely outcomes in particular placements, it *directs* educators to place children in the mainstream environment whenever that placement can "be achieved satisfactorily." § 1412(a)(5)(A). If the mainstream environment is satisfactory, the IDEA does not give educators the latitude to place children in special education classrooms just because educators might find those environments more appropriate. And even where the mainstream environment is *not* satisfactory, the statute directs educators to place children with disabilities in regular classes "[t]o the maximum extent appropriate." *Id.*

Unlike courts applying *Daniel R.R.* and *Roncker*, the First Circuit fails to enforce the IDEA's mainstreaming mandate. Contrary to other circuits and this Court's guidance, the First Circuit does not require school districts to mainstream children with disabilities "whenever possible." *Endrew F.*, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202). And in deferring to educators' judgments, the First Circuit undermines *Congress'* judgment that students with disabilities must be mainstreamed "[t]o the maximum extent appropriate."

B. The Second, Third, Fifth, Tenth, and Eleventh Circuits have adopted the *Daniel R.R.* test, which adheres to the IDEA's text

1. In *Daniel R.R.*, the Fifth Circuit set out the two-part test that has since become the dominant standard. Recognizing that "Congress created a strong preference in favor of mainstreaming," the

court explained that "the language of the Act itself provides a workable test." 874 F.2d at 1044, 1046.

First, the court "ask[s] whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child." *Id.* at 1048. If it cannot, the court asks, second, "whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* Schools thus must "offer a continuum of services" and "must take intermediate steps where appropriate, such as placing the child in regular education for some academic classes and in special education for others." *Id.*

The Fifth Circuit explained that, based on the Act, "[a] variety of factors," none of which "is dispositive in all cases," "will inform each stage of [the] inquiry." *Id.*; *see R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1013–14 (5th Cir. 2010) ("a flexible, two-part test" resisting "rigid interpretation"). Those factors include—

- "whether the state has taken steps to accommodate the … child in regular education," because the Act requires states to provide supplementary aid and services and modify the general education program, *Daniel R.R.*, 874 F.2d at 1048;
- "whether the child will receive an educational benefit from regular education"—assessed with "close attention to the nature and severity of the child's" disability, and with the recognition that "academic achievement is not the only purpose of mainstreaming," *id.* at 1049; and
- "what effect the … child's presence has on the regular classroom environment and, thus, on

> the education that the other students are receiving," because requiring a teacher to spend too much time with a disruptive student could mean that educational environment is not "appropriate," *id.*

The court also explained that "[i]f the state has made no effort to take such accommodating steps, [the] inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education." *Id.* at 1048. The Fifth Circuit has continued to follow *Daniel R.R. See, e.g.*, *Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.*, 582 F.3d 576, 586 (5th Cir. 2009).

2. The Eleventh Circuit adopted the *Daniel R.R.* test because it "adheres so closely to the language of the Act and, therefore, clearly reflects Congressional intent." *Greer ex rel. Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991), *withdrawn*, 956 F.2d 1025, *and reinstated in relevant part*, 967 F.2d 470 (1992). The court explained that the first step of the test flows from the statute's "specific directive," *id.* at 695: "The Act itself mandates that a [child with a disability] be educated in the regular classroom *unless* such education cannot be achieved satisfactorily with the use of supplemental aids and services." *Id.* at 696. As a result, a "school district must consider the whole range of supplemental aids and services," and it must consider those aids and services "*prior to and during* the development of the IEP." *Id.* School officials may not "determine what they believe to be the appropriate placement for a … child and then attempt to justify this placement only after the proposed IEP is challenged by the child's parents." *Id.*

The Eleventh Circuit also explained that whether mainstreaming is appropriate or satisfactory depends on whether it will provide the student with a FAPE if the necessary aids and services are provided. *See id.* at 697. If a child "would receive considerable non-academic benefit, such as language and role modeling, from association" with peers in regular classes, the school district may not be able to educate the child outside the regular classroom even if the child could "make academic progress more quickly in a self-contained special education environment." *Id.*[2]

Under this test, the Eleventh Circuit in *Greer* concluded that the school district had violated the mainstreaming requirement for a student with Down syndrome when it "failed to consider the full range of supplemental aids and services." *Id.* at 698. The court held that the "district's determination that [the student] would receive more benefit from education in a self-contained special education classroom is due no deference because the school officials failed to consider what benefit she would receive from education in a regular classroom *with appropriate supplemental aids and services*." *Id.* The court found it insufficient that the district considered "only three options … : the regular classroom with no supplemental aids and services, the regular classroom with some speech therapy

---

[2] The Eleventh Circuit also noted that a school district may consider the cost of the supplemental aids and services necessary for mainstreaming. *Greer*, 950 F.2d at 697. Other courts following the *Daniel R.R.* test have found no occasion to address cost. *See P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 120 n.4 (2d Cir. 2008); *Oberti*, 995 F.2d at 1218 n.25 (3d Cir.); *Daniel R.R.*, 874 F.2d at 1049 n.9 (5th Cir.); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004).

only, and the self-contained special education classroom." *Id.*

3. The Third Circuit adopted the *Daniel R.R.* test in *Oberti* (Becker, J.). The court found that the test is "derived from the language of," "closely tracks," and "is faithful to IDEA's [mainstreaming] directive," 995 F.2d at 1215 (citation omitted), which sets forth "a strong congressional preference for integrating children with disabilities in regular classrooms," *id.* at 1213–14 (quotation marks omitted). The court explained that "proper use of 'supplementary aids and services,' … may enable [a] school to educate a child with disabilities for a majority of the time within a regular classroom, while at the same time addressing that child's unique educational needs." *Id.* at 1214 (citation omitted).

The Third Circuit expanded on the Fifth and Eleventh Circuits' guidance. *First*, the Third Circuit agreed that "the school 'must consider the whole range of supplemental aids and services.'" *Id.* at 1216 (quoting *Greer*, 950 F.2d at 696); *accord L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006). Absent "serious consideration to including the child in a regular class with such supplementary aids and services and to modifying the regular curriculum to accommodate the child," the court explained, the school "has most likely violated the Act's mainstreaming directive." *Oberti*, 995 F.2d at 1216. The court emphasized that the school district has an "obligation under the Act to provide supplementary aids and services to accommodate the child's disabilities." *Id.* at 1217.

Second, the Third Circuit explained that "a determination that a child with disabilities might make

greater *academic* progress in a segregated, special education class may not warrant excluding that child from a regular classroom environment." *Id.* The court pointed to this Court's observation that "the Act does *not* require states to offer *the same* educational experience to a child with disabilities as is generally provided for nondisabled children." *Id.* (citing *Rowley*, 458 U.S. at 189, 202).

Applying the test, the Third Circuit in *Oberti* held that a school district violated the mainstreaming mandate when it "fail[ed] to give adequate consideration to including [a student with Down syndrome] in a regular classroom with supplementary aids and services." *Id.* at 1220–24. The court explained that the school "made only negligible efforts to include [the student] in a regular classroom," *id.* at 1220–21; that the student "would benefit academically and socially from inclusion in a regular classroom," despite his "severe intellectual disabilities," *id.* at 1221–22; and that supplementary aids and services would address the student's disruptive behaviors, *id.* at 1222.

Since *Oberti*, the Third Circuit has reaffirmed that the IDEA's mainstreaming requirement is "strict." *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 579 (3d Cir. 2000) (Alito, J.). Removal from the regular classroom is justified only if "education in a regular classroom (with the use of supplementary aids and services) could not be achieved satisfactorily." *Id.*

4. The Second Circuit adopted the *Daniel R.R.* test in *P. ex rel. Mr. & Mrs. P. v. Newington Board of Education*, 546 F.3d 111, 119–20 (2d Cir. 2008). The court explained that the IDEA demands "searching" review "to ensure compliance with Congress's directives," notwithstanding courts' "deferential position

with respect to state educational authorities crafting educational policy." *Id.* at 120–21.

In *T.M. ex rel. A.M. v. Cornwall Central School District*, 752 F.3d 145, 163 (2d Cir. 2014), the Second Circuit underscored that the inquiry is not limited "by what programs the school district already offers." The court explained that the mainstreaming mandate requires placement in "the least restrictive educational setting consistent with that student's needs, not the least restrictive setting that the school district chooses to make available." *Id.* Consequently, a district must evaluate "a full continuum of alternative placements and then offer [the student] the least restrictive placement from that continuum that is appropriate for his needs." *Id.* at 166. The court emphasized that its interpretation "flows directly from the text of the statute." *Id.* at 163.

5. The Tenth Circuit adopted the *Daniel R.R.* test in *L.B. ex rel. K.B. v. Nebo School District*, 379 F.3d 966, 977 (10th Cir. 2004). There, the court held that the school district had violated the mainstreaming requirement when it proposed to place a child diagnosed with autism in a school mainly for children with disabilities rather than in a mainstream school where the child was progressing successfully with a supplementary aide. *Id.* at 968, 975, 978.

C. The Fourth, Sixth, and Eighth Circuits have adopted the *Roncker* test

1. In *Roncker*, the Sixth Circuit set out the test that the Fourth, Sixth, and Eighth Circuits now follow: "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." 700 F.2d at 1063. The court noted that the Act's language "indicates a very strong congressional preference." *Id.* Thus, the court explained, "a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming," and may instead "reflect no more than a basic disagreement with the mainstreaming concept." *Id.* Finally, the court permitted consideration of cost because "excessive spending on one … child deprives" other children with disabilities. *Id.*

The Sixth Circuit has continued to adhere to the *Roncker* test. In *L.H.*, the court held that the school district had violated the mainstreaming requirement when it moved a student with Down syndrome from mainstream classes to a special education environment despite evidence that regular classes "could provide [him] with a meaningful educational benefit"—*i.e.*, a FAPE. 900 F.3d at 785, 789, 792.

2. The Fourth Circuit adopted the *Roncker* test in *DeVries by DeBlaay v. Fairfax County School Board*, 882 F.2d 876, 878–79 (4th Cir. 1989). The court has stressed the "strong congressional preference for mainstreaming." *R.F. ex rel. E.F. v. Cecil Cty. Pub. Sch.*, 919 F.3d 237, 246–47 (4th Cir. 2019) (quoting *DeVries*, 882 F.2d at 878). And the court has explained that the inquiry about whether the proposed placement is "appropriate" is simply whether the placement "provides the child with a FAPE." *Id.* at 246.

3. The Eighth Circuit has also adopted the *Roncker* test. *See A.W. ex rel. N.W. v. Nw. R-1 Sch. Dist.*, 813 F.2d 158, 163–64 (8th Cir. 1987); *Pachl v.*

Seagren, 453 F.3d 1064, 1067–68 (8th Cir. 2006). The Eighth Circuit too has found that the Act's "framework reveals the strong congressional preference for mainstreaming." *A.W.*, 813 F.2d at 162.

D. The Seventh and Ninth Circuits have offered little or unclear guidance

The Seventh and Ninth Circuits' failure to offer clear guidance contributes to the confusion about the meaning of Congress' mainstreaming directive.

1. The Seventh Circuit has found "it unnecessary at this point in time to adopt a formal test." *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002); *see Bd. of Educ. v. Ross*, 486 F.3d 267, 277 (7th Cir. 2007). Even so, the court has stated that the "preference for mainstreaming demands a hard look and a careful analysis." *Beth B.*, 282 F.3d at 498.

2. For its part, the Ninth Circuit uses a test with "factors found in both [the *Daniel R.R.* and *Roncker*] lines of cases." *Sacramento City Unified Sch. Dist. v. Rachel H. ex rel. Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994); *see Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1401 (9th Cir. 1994); *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1187–88 (9th Cir. 2016). But "[t]he Ninth Circuit has not expressly adopted the second prong of the *Daniel R.R.* test—*i.e.*, if education in the regular classroom, with supplemental aids and services, cannot be satisfactorily achieved, has the child nonetheless been mainstreamed to the maximum extent appropriate?" *Murray ex rel. Murray v. Montrose Cty. Sch. Dist. RE-1J*, 51 F.3d 921, 927 n.10 (10th Cir. 1995). The Ninth Circuit's guidance remains unclear.

E. Courts and commentators have recognized the circuit courts' divergent approaches

For years, courts and commentators have acknowledged the courts of appeals' divergent approaches to the IDEA's mainstreaming requirement. Yet none of the courts has changed its view. Only this Court's intervention can resolve their disagreement.

1. In addition to the First Circuit below, several courts have noted the different approaches. *See, e.g.*, *L.B.*, 379 F.3d at 976–77; *Murray*, 51 F.3d at 927 n.10; *Rachel H.*, 14 F.3d 1398, 1403–04; *Oberti*, 995 F.2d at 1215. Indeed, courts following *Daniel R.R.* have criticized the *Roncker* test:

- The Fifth Circuit in *Daniel R.R.* "decline[d] to follow [the *Roncker* test]" because it "makes little reference to the language of the [Act]." 874 F.2d at 1046. The Fifth Circuit also criticized the *Roncker* test for "necessitat[ing] too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials" by asking "[w]hether a particular service feasibly can be provided in a regular or special education setting." *Id.*
- The Third Circuit in *Oberti* criticized the *Roncker* test for being unclear about the important requirement that "the school is still required to include [a] child in school programs with nondisabled children (specific academic classes, other classes such as music and art, lunch, recess, etc.) whenever possi-

ble," even if education in regular classes "cannot be achieved satisfactorily for the major portion of [the] child's education program." 995 F.2d at 1215.

- The Tenth Circuit, noting that the *Roncker* test does not track the statutory language as well as the *Daniel R.R.* test, has found that the "*Roncker* test is not appropriate in all cases" because it starts from the premise that "the more restrictive placement is considered a superior educational choice." *L.B.*, 379 F.3d at 977.

Criticism has flowed in other directions, too. The First Circuit below criticized "*Daniel R.R.*'s judicial gloss," "eschewing" it because the IDEA "itself provides enough of a framework." App. 16a (quoting *Beth B.*, 282 F.3d at 499 (7th Cir.)).

2. Commentators have also noted the courts of appeals' divergent approaches. *E.g.*, Ian Farrell & Chelsea Marx, *The Fallacy of Choice: The Destructive Effect of School Vouchers on Children with Disabilities*, 67 Am. U. L. Rev. 1797, 1829 (2018) ("Circuit courts are split three ways"); Ashley Oliver, *Should Special Education Have A Price Tag? A New Reasonableness Standard for Cost*, 83 Denv. U. L. Rev. 763, 775 (2006) ("Each of the three circuit tests brings a unique approach to identifying a child's LRE."); Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 Wash. L. Rev. 809, 831 (2002) ("varying tests" lead to "potential disparity in outcomes").

II. The question presented is important

The question presented is important to millions of children and their families. Every year, parents and educators create or revise IEPs for the seven million students receiving special education services under the IDEA—that is, for "14 percent of all public school students." U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *The Condition of Education 2019*, at xxxii, https://nces.ed.gov/pubs2019/2019144.pdf. And the mainstreaming mandate is a factor for *all* those students, because it requires mainstreaming "to the maximum extent appropriate"—whether that means for all classes, only for certain classes or electives, or even just for lunch and recess. *Accord* 34 C.F.R. § 300.117. Educators and parents need guidance on what the mainstreaming provision requires.

A. This Court's guidance is necessary for educators and parents

Courts may owe educators some deference about pedagogy and what outcomes different learning environments are likely to produce. But the IDEA establishes procedural and substantive standards that educators must meet, and it gives parents the right to enforce those mandates in court. Unlike the First Circuit, courts following the *Daniel R.R.* and *Roncker* tests agree on this point. As the Tenth Circuit has explained, the mainstreaming directive "is one of the IDEA's most important *substantive* requirements." *L.B.*, 379 F.3d at 976 (emphasis added). It is "a specific statutory mandate," not "a question about educational methodology." *Id.* As the Sixth Circuit has put it, while "methods for educating a disabled student … require

the school district's educational expertise," "[e]stablishing the LRE … does not." *L.H.*, 900 F.3d at 789. Oftentimes the refusal to mainstream is simply improper disagreement with "'mainstreaming' as a concept." *Id.* at 794. Understanding what the IDEA requires is therefore critical for educators and parents alike.

Parenting a child with disabilities involves significant emotional and practical challenges about what is best for that child. And the IDEA requires parental collaboration to create IEPs and determine the course of the child's education. Yet "parents who seek more integrated placements for disabled children often find themselves in the double-bind of having to stress both the child's unique needs and the child's similarities with nondisabled children." *Oberti*, 995 F.2d at 1214 n.18 (citation omitted). The process is much better, for all involved, when parents have more certainty about the benefits and placements to which their child is entitled. Greater certainty means better collaboration as well as better guidance for cases—like this one—in which parents must consider placing their child in a different school when they cannot resolve a dispute with the school district. That decision has serious emotional and financial consequences, and many parents will be unable to afford the significant costs of litigation or private placement. Parents and educators alike deserve guidance.

B. This Court often grants review to clarify the IDEA

This Court has often granted certiorari to provide guidance about the IDEA. In 2017, the Court clarified the FAPE requirement in *Endrew F.*, 137 S. Ct. 988,

and the exhaustion requirement in *Fry*, 137 S. Ct. 743. Since *Rowley*, the Court has granted review in several other IDEA cases. *E.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Winkelman v. Parma Cty. Sch. Dist.*, 550 U.S. 516 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999); *Carter*, 510 U.S. 7; *Burlington*, 471 U.S. 359.

As important as this Court's existing guidance is—especially *Endrew F.*'s guidance on the FAPE requirement—it is far from complete. As the circuit split shows, this Court's guidance is necessary to ensure that children with disabilities are not only receiving FAPEs, but that they are receiving them in the least restrictive environments, as Congress intended.

III. The First Circuit's decision is wrong

The decision below is wrong. It applies no substantive standard to enforce the IDEA's mainstreaming requirement and thereby treats the requirement as a mere procedural hurdle for school officials. It departs from the clear text of the statute and contravenes Congress' preference that students with disabilities be educated with their nondisabled peers "[t]o the maximum extent appropriate," and that students with disabilities be removed from regular classes "only when the nature or severity of the disability … is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." § 1412(a)(5); *supra* pp. 18–19.

As this Court recognized in *Rowley* and *Endrew F.*, the IDEA mandates mainstreaming "whenever

possible." 137 S. Ct. at 999; 458 U.S. at 202. Mainstreaming is a requirement, not a suggestion about methodology. Thus, courts should ask the questions the *Daniel R.R.* test derives from the statute's plain text: Can a student be educated "satisfactorily" "in regular classes with the use of supplementary aids and services"? If not, has the school district provided for education "in regular classes with the use of supplementary aids and services" "[t]o the maximum extent appropriate"?

As courts applying the *Daniel R.R.* test have recognized, there may be situations in which a student's disability is of a "nature or severity" that the child cannot be satisfactorily educated in regular classes even with "supplementary aids and services" and program modifications. That was the case in *Daniel R.R.* itself. 874 F.2d at 1046. But if a student's education *can* "be achieved satisfactorily" "in regular classes," school officials may not place the student in a more restrictive environment because that environment, in their view, is somehow *better*. Section 1412(a)(5)(A)'s text gives educators no such license. To the contrary, the statute explicitly requires mainstreaming "[t]o the maximum extent appropriate." And the FAPE requirement—of a "free *appropriate* public education"— defines what is "appropriate." Indeed, the requirement of a "satisfactor[y]" education is likewise the domain of the FAPE requirement, which ensures that a child's education is "substantively adequate," both academically and functionally, *Endrew F.*, 137 S. Ct. at 994–95, 999.

As a result, educators and courts can and should compare the benefits, both academic and functional, of placement in regular classes (with program modifications and supplementary aids and services) with

those of placement in a more restrictive environment. And they may consider the other types of factors set out in the *Daniel R.R.* cases. Those factors inform the necessary inquiry—whether the school district can provide a FAPE in regular classes. If the district cannot do so, despite considering program modifications and the whole range of aids and services, then mainstreaming may be neither "appropriate" nor capable of being "achieved satisfactorily." § 1412(a)(5)(A). Yet that inquiry may lead to precisely the opposite conclusion, as in *Oberti*, *Greer*, *L.B.*, and *T.M.* Those different outcomes confirm that the *Daniel R.R.* test is appropriately calibrated—like the IDEA itself—to the needs of each individual child.

IV. This case is an excellent vehicle for deciding this important question

The First Circuit considered both the *Daniel R.R.* and *Roncker* approaches. But the court "eschew[ed]" those frameworks in favor of complete deference whenever school districts have considered several options and weighed their costs and benefits.

Comparing this case with, for example, *Oberti* and *Greer* shows that the choice of test is outcome-determinative. In each of the three cases, the IEP assigned a student with an intellectual disability to special education classes. App. 48a, 58a–62a; 995 F.2d at 1207–09; 950 F.2d at 691–92, 698. And in each case, school officials failed to show that the student could not be educated satisfactorily in regular classes with supplementary aids and services and considering curriculum modifications. *Supra* pp. 9–13; 995 F.2d at 1220–24; 950 F.2d at 698–99. Indeed, in each case, the school district failed to even ask that question. *Id.*

The courts in *Oberti* and *Greer* found mainstreaming violations. The court in *Greer* even noted that it did not matter that officials thought the student would benefit *more* from special education than from mainstreaming. 950 F.2d at 698. In "consider[ing] only three options"; the officials "made no effort to modify the … curriculum," and they disregarded the student's academic progress in regular classes, "especially after the school district began to provide her with [supplementary] speech therapy." *Id.* "[C]onsideration of only these limited options" violated the IDEA, the court explained, because the district did not ask the right question: Could the student be accommodated "in the regular classroom by considering whether education in that classroom could be satisfactorily achieved with the use of supplemental aids and services," *id.* at 699?

The First Circuit here, in contrast, deferred unquestioningly to school officials' preferred placement and found no mainstreaming violation. Had the court applied the right test, as in *Oberti* and *Greer*, however, it too would have found a violation. C.D. performed well at McAuliffe with tutors, but Natick did not consider whether the whole range of supports could have helped to "satisfactorily achieve[]" her education. *Supra* pp. 9–13. And although evidence showed that C.D.'s test scores understated her capabilities, Natick did not consider curriculum modifications. *Id.* Natick did not explain why it could not provide a FAPE for C.D. in regular classes with supports and modifications, and instead needed to put C.D. in special classes that could not lead to a high school diploma. Nor did Natick explain how it had mainstreamed C.D. "[t]o the maximum extent appropriate."

The question presented is ripe for review. The Court has already devoted substantial resources to the interrelated FAPE requirement (*Endrew F.*). And there are no jurisdictional disputes, procedural complications, alternative holdings, or other obstacles to this Court's review.

CONCLUSION

The Court should grant the petition for writ of certiorari.

August 20, 2019

Respectfully submitted,

Benjamin J. Wish
TODD & WELD, LLP
One Federal St.,
27th Fl.
Boston, MA 02110

Laurie R. Martucci
MARTUCCI LAW
ASSOCIATES
20 Cabot Blvd., Ste. 300
Mansfield, MA 02048

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioners