No. 21-56053

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.R., a minor, by and through his guardian ad litem R.C.,

Plaintiff-Appellant,

v.

REDONDO BEACH UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

D.C. No. 2:20-cv-6307-JFW(MAAx)
Hon. John. F. Walter

BRIEF OF AMICUS CURIAE THE ARC OF THE UNITED STATES, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL DISABILITY RIGHTS NETWORK, AND THE NATIVE AMERICAN DISABILITY LAW CENTER IN SUPPORT OF APPELLANT

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DISCLOSURE STATEMENT

Amici Curiae The Arc of the United States, the Bazelon Center for Mental Health Law, the National Disability Rights Network, and the Native American Disability Law Center are all individual nonprofit corporations dedicated to serving individuals with disabilities. None of these nonprofit organizations has a parent company, and no public company has any ownership interest in any of these organizations.

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INTEREST OF AMICI CURIAE[1]

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and/or developmental disabilities (I/DD). The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with I/DD receive the protections and supports provided by law and has long advocated for the rights of children and youth with I/DD to receive a free, appropriate public education as guaranteed by the Individuals with Disabilities Education Act to ensure that students with disabilities receive individualized supports and services, quality instruction, and access to the general education curriculum in age-appropriate inclusive settings, in preparation for adult life. With over 600 state and local chapters, The Arc is well positioned to comment on the impact of this case on students with I/DD and their families.

The Bazelon Center for Mental Health Law ("Bazelon Center") is a non-profit legal advocacy organization dedicated to advancing the rights of people with

[1] No counsel for any party authored this brief in whole or in part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amici curiae or their counsel contributed money intended to fund preparation of this brief or its submission. All parties have consented to the filing of this amicus curiae brief.

disabilities, including mental disabilities, for almost five decades. Ensuring that children with disabilities are provided with a free appropriate public education, as mandated by the IDEA, is a central part of the Bazelon Center's mission. The Center has litigated groundbreaking class actions seeking to improve educational and health services for children with mental disabilities, including *Mills v. Board of Education,* 348 F. Supp. 866 (D.D.C. 1972).

The National Disability Rights Network (NDRN) is a non-profit membership association of protection and advocacy (P&A) agencies located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. In addition, there is a P&A / CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in various settings. The P&A system is the nation's largest provider of legally based advocacy services for persons with disabilities.

NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and ensure they are able to fully participate by exercising choice and self-determination. Education

cases make up a large percentage of the P&A network's casework. P&A agencies handled over 10,000 education matters in the most recent year for which data is available. These education matters include claims under IDEA, Section 504, and the ADA.

NDRN has filed as amicus curiae in the United States Supreme Court in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), and in numerous cases in the United States Courts of Appeal.

The Native American Disability Law Center (NADLC) is a non-profit 501(c)(3) entity located in Arizona and New Mexico. It is the American Indian Consortium of the protection and advocacy (P&A) system designated by the Navajo and Hopi Nations and serving Native American communities across the Four Corners region of the Southwest. The NADLC provides individual and systemic advocacy for Native American children receiving special education services across multiple educational entities, including the Bureau of Indian Education. Education cases comprise a significant portion of the NADLC's individual cases. These cases are primarily based on the IDEA.

INTRODUCTION

Nearly 30 years ago, this Court's *Rachel H.* decision affirmed the right of children with disabilities to learn in the least restrictive environment (LRE) under the Individuals with Disabilities Education Act (IDEA). Since then, courts in the Ninth Circuit and beyond have reinforced the IDEA's robust presumption of inclusion and innovative education reforms have enabled schools to serve students with disabilities seamlessly in general education classrooms. The District Court's decision ignores these developments and defies the hard-won progress achieved by *Rachel H.* and the IDEA. The District Court errs by: (1) reversing the IDEA's presumption of inclusion; (2) denying access to general education for children with disabilities performing below grade level; and (3) ignoring decades of advancements in inclusive education. If allowed to stand, the District Court decision will do untold damage to the *Rachel H.* test and the LRE standard, depriving not just D.R. but countless students of their right to inclusive education.

ARGUMENT

I. Children with disabilities have a right to receive FAPE in the LRE.

The IDEA entitles children with disabilities to a free, appropriate public education (FAPE) in the LRE. The LRE requirement mandates that students with disabilities be educated in general education "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i). It contemplates curricular

modifications, stipulating that students with disabilities may not be removed "solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e). Less inclusive settings, including "[s]pecial classes . . . or other removal . . . from the regular educational environment," are tolerated "*only if* . . . education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 300.114(a)(2)(ii) (emphasis added).

The Ninth Circuit uses a four-factor balancing test to ensure that districts meet their obligation to place students in the LRE. Courts should consider: "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect . . . on the teacher and children in the regular class; and (4) the costs of mainstreaming. . . ." *Sacramento City Unified School Dist. v. Rachel H. ex rel. Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994).

Since *Rachel H.*, the Supreme Court has directed schools to set "appropriately ambitious" goals for students with disabilities, while emphasizing its continued commitment to inclusion. *Endrew F. v. Douglas Cnty. Sch. Dist.,* 137 S. Ct. 988, 999-1000 (2017) (quoting *Bd. of Educ. of the Henrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 202 (1982) (reiterating that students with disabilities be educated in general education "whenever possible"). The Court acknowledged that though a child's educational goals will vary "in light of [their] circumstances," for "most children," an appropriately ambitious education "involve[s] integration

in the regular classroom *and* individualized special education . . . " *Id.* at 1000 (emphasis added).

II. The weight of statutory language, legislative history, and case law affirms a robust presumption of inclusion.

The District Court would deny D.R. a more inclusive placement because he failed to demonstrate "appropriate educational benefit" from inclusion in general education. *D.R. v. Redondo Beach Unified Sch. Dist.*, No. CV 20-6307-JFW, 2021 WL 4434358, at *14 (C.D. Cal. Sept. 3, 2021) [hereinafter Order]. By placing the onus on students to prove that they can benefit from general education, the District Court would overturn fifty years of Congressional and judicial consensus that students with disabilities should be educated in inclusive settings "whenever possible." *Endrew F.,* 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 202).

The IDEA's language, legislative history, and judicial interpretation speak with one voice: "To the maximum extent appropriate," students with disabilities must be educated "with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A). This robust presumption of inclusion is reflected in the IDEA's procedural requirements, which require Individualized Education Programs (IEPs) to account affirmatively for "the extent, if any, to which the child will not participate with nondisabled children in the regular class." 20 U.S.C. § 1414(d)(1)(A)(V).

The IDEA codified an emerging consensus from landmark special education cases that schools must educate students with disabilities in integrated settings

wherever possible.[2] Congress later amended the IDEA to further strengthen the LRE requirement in light of new education research, describing it as "a presumption that children with disabilities are to be educated in regular classes." S. Rep. No. 105–17, at 21 (1997); Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17 § 101, 111 Stat. 37 (1997).

Courts have followed suit: The Ninth Circuit, consistent with other circuits, interprets the LRE provision to reflect a preference for inclusive settings "to the maximum extent possible." *Regan-Adkins v. San Diego Unified Sch. Dist.*, 27 F. App'x 932, 935 (9th Cir. 2002). *See Rachel H.*, 14 F.3d at 1403 (noting "Congress's preference for educating children with disabilities in regular classrooms with their peers"); *Poolaw v. Bishop*, 67 F.3d 830, 834 (9th Cir. 1995) ("The language of the IDEA, therefore, clearly indicates a strong preference for 'mainstreaming. . . .'"); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989) (noting that "Congress created a strong preference in favor of mainstreaming"); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1207 (3d Cir. 1993) (describing the "IDEA's mainstreaming requirement").

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[2] Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for A New Remedial Approach*, 25 J.L. & Educ. 523, 534-35 (1996) (noting that *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) and *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) protected plaintiff students' right not merely to an education but preferably to "placement in a regular public school class").

The District Court decision defies this overwhelming consensus. In claiming that D.R. presented no "credible evidence that he could obtain appropriate educational benefit" in general education, the District Court turns the IDEA's presumption of inclusion on its head. Order at *14. Statutory and judicial language make clear that placement in a more restrictive setting is justified *only if* the student cannot otherwise receive a "satisfactory education . . . even if appropriate support services are offered . . . ." *Bd. of Educ. v. Holland*, 786 F. Supp. 874, 879 (E.D. Cal. 1992), *aff'd,* 14 F.3d 1398 (9th Cir. 1994); *Oberti*, 995 F.2d at 1207.

The presumption of inclusion is so robust that it may even justify placement in general education in the rare case where the more restrictive setting may be educationally superior. *See Rachel H.*, 786 F. Supp. at 878-79 (finding that per the IDEA, a child with a disability must "be educated in a regular classroom if the child can receive a satisfactory education there, even if it is not the best academic setting for that child"); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) (directing the court to ask whether "the services which make [the more restrictive] placement superior could be feasibly provided in a non-segregated setting").

Finally, as the Supreme Court acknowledges, for "most children," inclusion in general education—far from hindering their ability to "derive appropriate educational benefit"—enables them to achieve "appropriately ambitious" goals. Order at *14; *Endrew F.,* 137 S. Ct. at 1000. *Endrew F.* contemplates that for most

students with disabilities, an appropriately ambitious education involves both "integration in the regular classroom *and* individualized special education . . . ." *Id.* (emphasis added). This is exactly the case with D.R., whose four hours per week of specialized instruction enabled him to progress in general education. The *Endrew F.* standard aims to set "challenging objectives" for students with disabilities; it does not aim to make their access to inclusive settings challenging—or impossible.

III. The IDEA requires that students with disabilities, including those performing below grade level, be included in the general education classroom with appropriate curriculum modifications.

The District Court suggests that D.R. did not belong in a general education class because he "perform[ed] several grade levels below his general education classmates . . . and required a heavily modified curriculum." Order at *6. The District Court misconstrues the standard. The IDEA does not use grade-level performance as its yardstick for student progress; rather, students in special education work towards "appropriately ambitious" IEP goals, which are individualized for each student's "circumstances." *Endrew F.* 137 S. Ct. at 1000. If students can progress towards their goals in a general education class with a modified curriculum, as D.R. did, that is the placement the IDEA requires.

A. The IDEA does not require grade-level performance for inclusion.

The IDEA requires that every student with a disability make progress toward ambitious goals defined by their IEP. As *Endrew F.* emphasized, "[a] child's IEP

need not aim for grade-level advancement if that is not a reasonable prospect." 137 S. Ct. at 992. Rather, "[a]n IEP must aim to enable the child to make progress . . . appropriate in light of the child's circumstances." *Id*. at 999. *See also Cnty. of San Diego v. Cal. Special Educ. Hearing Off.*, 93 F.3d 1458, 1468 (9th Cir. 1996) (noting that the LRE must "'meet[] the child's IEP goals'"); *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 444 (9th Cir. 2010) (quoting *Jaynes v. Newport News Sch. Board*, No. 4:99cv146, 33 Individuals with Disabilities Educ. L. Rep. 121, 2 (E.D. Va. 2000) (describing IEP goals as "the hallmark of the IDEA"). As the Sixth Circuit emphasized, "the appropriate yardstick" is not grade level advancement, but "whether the child, with appropriate supplemental aids and services, can make progress toward the [ ] IEP['s] goals in the regular education setting.'" *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 793 (6th Cir. 2018) (quoting *L.H. v. Hamilton Cty. Dep't of Educ.*, No. 1:14-CV-00126, 2016 WL 6581235 (E.D. Tenn. Nov. 4, 2016), *aff'd in part, rev'd in part and remanded*, 900 F.3d 779 (6th Cir. 2018)).

Instead, the District Court fashions its own yardstick for student progress, contrary to *Endrew F.*, *Rachel H.*, and the IDEA. Despite D.R.'s "reasonable progress" on his IEP goals, the Court repeatedly emphasized D.R.'s below grade-level performance to justify his placement in a special day class. Order at **4, 5, 6, 10, 12. The District Court would require students with disabilities to earn their

way into a general education setting by performing at grade level—a metric that has been explicitly rejected, in a case similar to *D.R.*, as "the wrong standard." *L.H.*, 900 F.3d at 792 (finding that the ALJ used the "wrong standard" in arguing that a student "had to exhibit a 'mastery' of the regular education grade-level curriculum."). The Ninth Circuit, consistent with *L.H.*, has also affirmed inclusive placements for students performing well below grade level—including Rachel H. herself: "a nine year old girl who . . . on academic testing functions at about the level of a four year old child." *Rachel H.*, 786 F. Supp. at 875. Under the District Court's new standard, Rachel would not have set foot in a general education classroom—not because she couldn't make appropriate progress there, but because she did not perform in the same way as her typically developing peers.

B. The IDEA requires that students with disabilities receive curriculum modifications in general education settings to meet their IEP goals.

"[T]he fact that a child with disabilities will learn differently from his or her education within a regular classroom does not justify exclusion from that environment." *Oberti*, 995 F.2d at 1217. In *Rachel H.*, the Ninth Circuit did not disturb the District Court's finding that "modification of the curriculum . . . even dramatic modification, has no significance in and of itself." 786 F. Supp. at 880. In fact, the Ninth Circuit affirmed the District Court's finding, in that case, that "[o]nly if the child cannot receive a satisfactory education in a regular education class, *even if appropriate support services are offered*, should the child be placed

in a special education class." *Id.* at 879 (emphasis added).

Defying both law and logic, the District Court held that D.R. did not belong in general education because he "required significant modifications to his assignments." Order at *10. But the IDEA anticipates that the curriculum may be modified to accommodate students with disabilities and prohibits the removal of students from general education "solely because of needed modifications in the general education curriculum." 34 C.F.R. § 300.116(e); *see also Rachel H.*, 786 F. Supp. at 880.[3] For students who cannot master grade-level academic standards, states may measure progress against "alternate academic achievement standards." Every Student Succeeds Act, 20 U.S.C. § 6311(b)(1)(E)(i). Students' use of curricular modifications should not be held against them; rather, the IDEA contemplates the use of such modifications precisely to *fulfill* its goal of inclusion.

IV. *Rachel H.* must be read in light of significant educational advancements that facilitate the seamless education of students with disabilities in inclusive settings.

In nearly thirty years since *Rachel H.*, advancements in teaching, curriculum design, and behavioral support have made inclusive education the norm. Evidence-

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[3] *See also* Julie F. Mead, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 Ed. Law Rep. 511, 516-517 (1998) (arguing that under the IDEA "educators must now consider how they can make the general curriculum accessible to students with disabilities within the regular classroom via supplementary aids and services and program modifications and supports.")

based strategies have been enshrined in the IDEA and implemented nationally, proving that inclusive education is a thriving practice that benefits all students.

Co-teaching enables teachers to bring services into the general education classroom rather than removing the student to a segregated setting.[4] In this model, a general education teacher and a special education teacher collaboratively design and deliver instruction to a blended class. Co-teaching diversifies instructional options for all students, increases teaching time and student engagement, reduces stigma for students with disabilities, and increases support for teachers.[5]

Curricular modifications are critical strategies to make the curriculum achievable for students with disabilities.[6] Modifications include altering content of lessons, adjusting conceptual difficulty, modifying educational goals, and changing the instructional method. This approach is grounded in differentiated instruction, a teaching theory proposing that instructional approaches should be adapted to meet

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[4] Jane M. Sileo, *Co-Teaching: Getting to Know Your Partner*, 43 Teaching Exceptional Child., May/June 2011, at 33, 35-36 (2011).

[5] Lynne Cook & Marilyn Friend, *Co-Teaching: Guidelines for Creating Effective Practices*, 28 Focus on Exceptional Child., Nov. 1995 at 3-4.

[6] Nicole Eredics, *Inclusion in Action: Practical Strategies to Modify Your Curriculum*, 47 (2018) (noting that "taking grade-level curriculum and modifying it for students who work below grade level is an essential task for inclusive educators in any type of classroom").

the individualized learning needs of diverse students.[7] The IDEA now recognizes training in "supports, accommodations, and curriculum modifications" as part of personnel development. 20 U.S.C. § 1462(b)(2)(A)(ii).

Universal Design for Learning (UDL) makes the general education curriculum accessible to students of all abilities, learning styles, and cultural backgrounds. UDL draws on cognitive neuroscience to create a three-part framework aligned to three neural networks involved in learning.[8] Under UDL, teachers should consider: 1) representation – how information is presented to students; 2) engagement – how students connect to the material; and 3) action & expression – providing multiple methods for students to communicate what they have learned.[9] To diversify representation, teachers might use graphics and videos. To foster engagement, teachers might bring in relevant current events or popular culture. To demonstrate expression, students might create a poster or presentation.

Since *Rachel H.*, UDL has been thoroughly embedded in law and policy. The 2004 IDEA first required state educational agencies to use universal design

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[7] Tracey Hall et al., *Differentiated Instruction and Implications for UDL Implementation* 2, NAT'L CTR. ON ACCESSING THE GEN. CURRICULUM, https://sde.ok.gov/sites/ok.gov.sde/files/DI_UDL.pdf (last visited Jan. 21, 2022).

[8] *A Practical Reader in Universal Design for Learning* viii-ix (David H. Rose & Anne Meyer eds., 2006).

[9] Sally A. Spencer, *Universal Design for Learning: Assistance for Teachers in Today's Inclusive Classrooms*, 1 Interdisc. J. Teaching & Learning 10, 11 (2011).

principles when developing assessments. 20 U.S.C. § 1412(a)(16)(E); 20 U.S.C. § 9567b(a)(12). The Higher Education Opportunity Act of 2008 requires grant recipients who train teachers to introduce UDL principles in their curricula. 20 U.S.C. § 1003(24); 20 U.S.C. § 1022a(d)(1)(A)(i)(II); 20 U.S.C. § 1034(c)(1)(B)(ii). And the Every Student Succeeds Act (ESSA) of 2015 requires state assessments to "be developed, to the extent practicable, using the principles of universal design for learning." 20 U.S.C. § 6311(b)(2)(B)(xiii).

Response to Intervention (RTI) is a systematic framework for identifying appropriate levels of academic support or identifying students for special education.[10] RTI uses careful progress monitoring to place students along three increasingly intensive tiers of instruction.[11] Tier 1 involves evidence-based core instruction in general education classrooms. Tier 2 consists of instruction for students who need additional support, including small groups, added time, or curricular enhancements. Tier 3 involves the most intensive instruction, including one-on-one lessons or after-school tutoring.

A decade after *Rachel H.*, the IDEA was amended to endorse the use of RTI

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[10] Paige C. Pullen *et al., RTI and MTSS: Response to Intervention and Multi-Tiered Systems of Support*, *in Handbook of Response to Intervention and Multi-Tiered Systems of Support* 6-7 (Paige C. Pullen & Michael J. Kennedy eds., 2018).

[11] Douglas Fuchs & Lynn S. Fuchs, *Introduction to Response to Intervention: What, Why, and How Valid is It?*, 41 Reading Res. Q. 93, 94-95 (2006).

to identify students with learning disabilities. Individuals with Disabilities Education Act Improvement Act of 2004, PL 108–446, 118 Stat. 2647, 2706 (2004) ("a local educational agency may use a process that determines if the child responds to scientific, research-based intervention . . . .").

Positive behavioral interventions and supports (PBIS) is a systemic approach to establishing a school culture and individual behavior supports needed to create a safe and productive environment for all students.[12] PBIS analyzes student responses to behavioral interventions in order to place them along three tiers of behavioral support.[13] This model progresses from a primary tier of school-wide behavioral expectations and disciplinary consequences to a tertiary tier with individualized interventions–such as school-based mental health supports or wraparound services from other public agencies. For students with disabilities, educators use a structured process called a functional behavioral assessment (FBA) to develop a behavioral intervention plan (BIP).[14] An FBA identifies the reason for

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[12] George Sugai & Robert H. Horner, *Defining and Describing Positive Behavior Support*, *in Handbook of Positive Behavior Support* 309 (Wayne Sailor et al. eds., 2009).

[13] *See Elements of PBIS*, CALIFORNIA PBIS COALITION, https://pbisca.org/elements-of-pbis (last visited Jan. 21, 2022) (illustrating California's PBIS model).

[14] Terrance M. Scott et al., *Function-Based Supports for Individual Students in School Settings*, *in Handbook of Positive Behavior Support* 421-29 (Wayne Sailor et al. eds., 2009).

a student's problem behavior and a BIP seeks to eliminate that behavior by teaching an appropriate replacement behavior that serves the same function.

Three years after *Rachel H.*, the 1997 IDEA amendments first required IEP teams to consider PBIS for students exhibiting problem behaviors that disrupt learning. Individuals with Disabilities Education Act Amendments for 1997, PL 105–17, 111 Stat 37, 86 (1997); 34 C.F.R. § 300.346(a)(2)(i)(1999). In response, the California education code now requires IEP teams to consider the use of PBIS for "a child whose behavior impedes the child's learning or that of others" and encourages schools to use PBIS as part of a comprehensive school safety plan. Cal. Educ. Code § 56521.2(b) (West); Cal. Educ. Code § 32282.1(b)(1) (West).

Multi-Tiered Systems of Support (MTSS) is a schoolwide framework that combines RTI and PBIS into an integrated continuum of support that aligns academic, behavioral, and social and emotional learning to benefit all students.[15] The integration of multiple service delivery systems into a unified three-tiered model enables educators to efficiently adjust all supports in a coordinated manner.

MTSS is already used widely in California and throughout the country. California has its own MTSS framework that explicitly incorporates UDL, RTI,

[15] Wayne Sailor, *Advances in Schoolwide Inclusive School Reform*, 36 Remedial & Special Educ. 94, 94-95 (2015).

PBIS, and differentiated instruction.[16] This framework undergirds a state-wide initiative called California Scaling-Up MTSS Statewide (CA SUMS), which has supported the development and dissemination of MTSS resources and technical assistance since 2015.[17] The California Budget Act of 2021 alone appropriated $50 million for SUMS, including $30 million in subgrants to fund schoolwide and districtwide implementation of MTSS. Cal. Educ. Code § 41490 (West).

Nationally, at least six states include MTSS for Early Reading (MTSS-R) as a core feature of State Personnel Development Grants.[18] And the Every Student Succeeds Act refers to MTSS as an approach for increasing student achievement and teacher effectiveness. 20 U.S.C. § 6613(b)(3)(F). Such widespread use of the MTSS framework helps to realize the potential of inclusive education for students with disabilities and redounds to the benefit of all students.

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[16] *See California MTSS Framework*, ORANGE COUNTY DEP'T OF EDUC., https://ocde.us/MTSS/Pages/CA-MTSS.aspx (last visited Jan 21, 2022).

[17] *Guide to Understanding California MTSS*, ORANGE COUNTY DEP'T OF EDUC., https://ocde.us/MTSS/Documents/CA%20MTSS%20Guide.pdf (last visited Jan 21, 2022).

[18] Hank Fien et al., *A Conceptual Replication Study of the Enhanced Core Reading Instruction MTSS-Reading Model*, 87 Exceptional Child. 265, 266 (2021) (noting California, Colorado, Illinois, Nebraska, Oregon, and Utah as example states supporting MTSS-R State Personnel Development Grants).

CONCLUSION

This Court's LRE test is just as important today as it was for Rachel Holland nearly 30 years ago, and significant advancements have made inclusive education more effective than ever. But the District Court's decision threatens to unwind *Rachel H.* and decades of case law recognizing the IDEA's robust presumption of inclusion. It must not be allowed to stand.

Dated: March 3, 2022

Respectfully submitted,

YOUTH & EDUCATION LAW PROJECT
MILLS LEGAL CLINIC
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FOR THE NINTH CIRCUIT

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