12-1610

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

C.L., INDIVIDUALLY, G.W., INDIVIDUALLY, AND ON BEHALF OF C.L., A CHILD WITH A DISABILITY,

Plaintiffs-Appellants

v.

SCARSDALE UNION FREE SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANTS AND URGING REVERSAL

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STATEMENT OF THE ISSUE

The United States will address:

Whether tuition reimbursement may be denied due to "restrictiveness" when the parents of a child with a disability who was denied a free appropriate public education by the public school place the child in a specialized private school that does not provide classroom interaction with students without disabilities.

INTRODUCTION AND INTEREST OF THE UNITED STATES

This case requires this Court to interpret and apply the Individuals with Disabilities Education Act (IDEA), a civil rights statute that provides federal grants to help fund special education and related services for school children with disabilities. The United States has a strong interest in the proper interpretation and application of the IDEA. The Department of Education administers and enforces the IDEA and is authorized to issue regulations, policy statements, and interpretive letters implementing the Act. See 20 U.S.C. 1402, 1406, 1416; 34 C.F.R. 300.1 *et seq.* Upon referral from the Department of Education, the Justice Department may bring actions in federal court to enforce the IDEA. 20 U.S.C. 1416(e)(2)-(3). The United States accordingly files this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a).

This case addresses whether and how the IDEA's least restrictive environment (LRE) or "mainstreaming" requirement applies when a parent of a child with a disability places the child in a private school because the public school denies the child the free appropriate public education (FAPE) that the IDEA requires it to provide. The issue arises when school districts attempt to use the LRE requirement to shield themselves from liability after they have violated the IDEA. When the public school fails to provide a FAPE, the child's parents are entitled to place the child in a private school where the child will receive an

appropriate special education. The parents may then seek tuition reimbursement from the school district, rather than keep the child in the public school that is failing to provide the child appropriate special education and related services. 20 U.S.C. 1412(a)(10)(C)(ii). If the public school failed to provide a FAPE, and the private placement provided "appropriate" educational services, a court may require the school district to reimburse the parents for the cost of the private education. See *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 232 (2009); *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 370 (1985).

Here, the district court improperly denied reimbursement by holding that CL's private placement was not as inclusive as the public school's program. But since the public school did not offer CL a FAPE, the court's assessment of inclusiveness should have focused only on private placements available to the parents. Therefore, the court's decision is error.

If the IDEA's LRE provision, in this context, is construed to require that a disabled child be educated with nondisabled children, the IDEA's "appropriateness" standard will be virtually impossible for parents to meet. Private schools equipped to educate children with serious disabilities will most often be specialized schools designed to meet *those* children's needs. While many of these schools offer comprehensive services for children with special needs, they often enroll only children with disabilities. This Court should reject the district court's

interpretation of the LRE factor and make clear that a private placement is not inappropriate simply because it is a more restrictive environment than the public school that denied the child a FAPE.

STATEMENT

1. Statutory Background

The IDEA is a federal statute that provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). States receiving federal funds must provide a "free appropriate public education," or FAPE, to every child with a disability residing in the State. 20 U.S.C. 1412 (a)(1)(A). As part of that requirement, school districts must provide for each child with a disability an "individualized education program," or IEP, that complies with the specific statutory requirements for such programs and meets the unique needs of that child. 20 U.S.C. 1412(a)(4). School districts must also educate children with disabilities in the "least restrictive environment," or LRE, meaning that school districts should, to the maximum extent appropriate, educate children with disabilities with children who do not have disabilities. 20 U.S.C. 1412(a)(5)(A). Where a school district has not complied with the IDEA's requirements, parents may place their child in a private school and, if that education is appropriate for the child, be reimbursed by the school district for the cost of that placement. 20 U.S.C. 1412(a)(10)(C)(i) & (ii).

2. Facts

CL is a student with a disability. He attended public school at Greenacres Elementary, located in the Scarsdale Union Free School District (the School District or District) through third grade. JA9.[1] The School District classified CL as an individual with a disability eligible for services under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of disability and applies to school districts, like the Scarsdale Free Union School District, that receive any form of federal financial assistance. JA9. The School District's Section 504 Committee recommended, and CL received, a number of disability-related services. JA9-14. The School District, however, determined that CL was not eligible for special education services under the IDEA and accordingly never provided CL with an IEP. JA15.

CL's record at Greenacres Elementary demonstrated consistent learning disability-related difficulties. While CL performed satisfactory work in some areas, he had significant difficulty in others, such as writing and maintaining attention. JA9-13.

During his second and third grade years, CL's parents sought to determine the extent of his disabilities through private testing. A psychoeducational evaluation revealed weaknesses in the areas of "attention, executive functions, and

[1] "JA_" refers to the Joint Appendix.

language processing." JA11. The evaluator recommended that CL's parents "(1) consult with a doctor about CL's attention disorder; (2) confer with the school to obtain services such as an aide and time in the [Learning Resource Center]; (3) monitor CL's emotional development; and (4) ensure CL receives 'educational therapy,' [occupational therapy], and [speech and language therapy]." The evaluation also revealed that CL functions intellectually "within the upper end of the Low Average range." JA11. A neurodevelopmental evaluation reported that CL had demonstrated an ability to meet academic standards, but the evaluating doctor also expressed concern about CL's ability to succeed academically. JA12. The doctor also expressed concern about CL's emotional well being and self esteem. JA12. The doctor ultimately recommended that CL's parents consider sending CL to a specialized private school. JA12. She further recommended, if CL returned to Greenacres Elementary, continuation of the supports he was receiving, and also "various other classroom accommodations, an after-school tutor, [and] an auditory processing dysfunction evaluation." JA12.

Despite these recommendations, at the beginning of CL's third grade year, the Section 504 Committee met and decided to continue the same Section 504 services CL received in second grade. JA11-12. As he began third grade, CL became more reluctant to attend and resisted attending the Learning Resource Center because of anxiety about being pulled out of the regular classroom. JA12.

In November of that year, CL's parents asked the District's Committee on Special Education to evaluate CL to determine whether he qualified under the IDEA for an Individualized Educational Program. JA12. The Committee observed CL in the classroom, interviewed his parents and teachers, and administered tests and evaluations. CL scored in the average range for most of the areas in which he was tested, and he was observed functioning in the classroom with the help of an aide. JA12-13. The Committee concluded that CL "does not have a significant disability" and thus was not eligible for special education services under the IDEA. JA13. The Committee also reduced CL's time in the resource room from four to two days per week. JA13. In May of CL's third grade year, the District's Section 504 Committee recommended continuation of the Section 504 services CL received in third grade, including the reduction in Learning Resource Center time. JA13-14.

CL's parents disagreed with the proposed plan and decided to place CL in a specialized private school called the Eagle Hill School. JA14. On June 19, 2008, immediately after CL finished third grade, CL's parents informed the District that CL would attend Eagle Hill the following year. JA14. A year later, CL's parents filed a request for an impartial hearing and sought reimbursement from the District for the tuition they paid Eagle Hill for the 2008-2009 school year. JA14.

3. Procedural History

a. The hearing before New York's impartial hearing officer (IHO) was held on September 24th-25th, and October 8th- 9th of 2009. JA14. The IHO concluded, on December 21, 2009, that the District violated CL's IDEA rights and that CL's educational program in the Eagle Hill School was appropriate, and accordingly awarded tuition reimbursement to CL's parents. JA14-15.

Specifically, concerning appropriateness, the IHO concluded that:

> among other things, Eagle Hill "addresses self-esteem and confidence building in addition to academic remediation, and C.L. has needs in these areas"; Eagle Hill's curriculum and accommodations are tailored to the needs of each student and progress is checked and adjustments made on a daily basis; the process through which CL applied and was admitted to Eagle Hill was "likely to result in an appropriate placement"; teachers at Eagle Hill use "instructional strategies" to address many of CL's needs, including "language issues, anxiety, self-confidence, and difficulty working independently"; CL participated in a small group tutorial class two periods per day to focus on written expression and study skills, and the rest of his classes were relatively small as well; CL had an advisor who met with him daily, observed him, and participated in staff meetings concerning CL's progress; and CL "plainly made significant progress" at Eagle Hill both personally and academically.

JA15 (citation omitted).

b. The District appealed to the State Review Officer (SRO). JA15. On March 10, 2010, the SRO affirmed the IHO's determination that the District denied CL a FAPE, but reversed the IHO's determination that CL's placement at Eagle Hill was appropriate, and accordingly reversed the tuition reimbursement award.

JA15. According to the district court, "the SRO found Eagle Hill to be inappropriate because (1) CL did not 'require' an environment that 'provided no opportunity for the student to interact with nondisabled peers'; (2) CL was successful in, and in fact benefitted from, a general education program among nondisabled peers; and (3) Eagle Hill did not offer appropriate OT services." JA15-16.

c. CL's parents then filed suit in federal district court seeking review of the SRO decision. JA8. The district court granted the District's motion for summary judgment. JA8-9. Because the District did not challenge the finding that it violated the IDEA, the issue before the district court was whether placement of CL in the Eagle Hill School was "appropriate."

The district court upheld the SRO's determination that Eagle Hill was not "appropriate" because it was not the least restrictive environment for CL. In making this determination, the district court focused on whether CL could benefit from education in a regular education classroom in public school. JA28-29. The court considered evidence that CL had struggled to learn in large group settings in public school, but concluded that "[n]otwithstanding CL's evident difficulties in the classroom, based on the totality of the evidence in the record, * * * CL indeed made meaningful progress among his peers at Greenacres." JA28. This fact, in the district court's view, "negate[d] the argument that [CL] required placement among

students with learning disabilities and attentional issues in order to receive an appropriate education." JA28. The court agreed with the IHO that CL benefitted from placement at Eagle Hill, but ultimately concluded that those benefits did not justify a private placement that was more restrictive than that at Greenacres. JA 31. Noting "the IDEA's preference for mainstreaming to the maximum extent possible," the court upheld SRO's denial of tuition reimbursement. JA29.[2]

SUMMARY OF ARGUMENT

The IDEA's least restrictive environment (LRE) requirement, 20 U.S.C. 1412(a)(5), applies to school districts' placements of children with disabilities. It does not apply directly to parents who are forced to move their child with a disability to a private school because the school district violated the child's IDEA rights by failing to provide the child with appropriate special education and related services. This Court nonetheless considers restrictiveness as a factor that may be relevant in determining the appropriateness of a private parental placement. But this Court should make clear here that when courts consider the restrictiveness of

[2] The court also agreed with the SRO's statement that Eagle Hill was not appropriate because it did not provide services related to CL's fine motor skills needs. JA29. The court noted, however, that CL was receiving private occupational therapy while attending Greenacres, and observed that this fact "arguably weakens the SRO's point." JA30. The court also acknowledged that, while Eagle Hill did not have an occupational therapist on staff, it did have a "'motor training specialist' with a degree in adaptive physical education." JA30.

the parents' private placement, along with other relevant factors, they should look at the private school options the parents had. Courts should not compare the restrictiveness of the private school placement to the public school that denied the child a FAPE.

In this case, the school district does not dispute that it failed to provide CL with a FAPE. The school district nevertheless argues, and the district court found, that the private placement CL's parents selected was not appropriate, and thus the school district properly denied tuition reimbursement, because CL was placed in a specialized school that did not provide the LRE; that is, CL was not being educated with children who do not have disabilities. This interpretation of the LRE factor is erroneous for several reasons.

First, the district court improperly treated the LRE analysis as dispositive, rather than as one factor among others in determining whether CL's private placement was appropriate. Second, the district court erroneously compared the restrictiveness of CL's private placement with his placement in the public school that had denied CL a FAPE. Instead, the court should have inquired whether the record supports a finding that there were other, less restrictive *private* school options available to CL's parents and capable of educating CL, and if so, whether the availability of such options rendered the private placement his parents selected inappropriate.

Affirming the district court's erroneous interpretation of the IDEA's LRE requirement would frustrate the purposes of the IDEA by effectively taking the right to tuition reimbursement away from parents of students with disabilities who could be educated in a regular education classroom but whose public schools denied them that option by failing to provide the special education and related services the IDEA requires.

ARGUMENT

THE IDEA'S LRE REQUIREMENT SHOULD NOT PRECLUDE TUITION REIMBURSEMENT FOR PARENTS WHO PLACE A CHILD WITH A DISABILITY IN A SPECIALIZED PRIVATE SCHOOL AFTER BEING DENIED A FAPE AT THE PUBLIC SCHOOL

A. Legal Framework

Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs * * * [and] to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. 1400(d)(1)(A) & (B). See also *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239 (2009) (discussing the purposes of the IDEA). To satisfy their obligation to provide a free appropriate public education, local school districts must annually develop an "individualized education program," or IEP, designed to meet the child's unique needs. 20 U.S.C. 1412(a)(4) and 1414(d)(2)(A). The IEP, "the centerpiece of the [IDEA]'s education delivery system, * * * sets out the

child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Honig* v. *Doe*, 484 U.S. 305, 311 (1988); see also 20 U.S.C. 1414(d)(1)(A).

In developing the IEP, school districts have a statutory obligation to ensure that, "[t]o the maximum extent appropriate," a child with disabilities is educated with students without disabilities. 20 U.S.C. 1412(a)(5). This is the LRE component of IDEA. Specifically, the school district must "[t]o the maximum extent appropriate" educate "children with disabilities * * * with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment [shall] occur[ ] 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." *Ibid.*

Parents should collaborate with schools in the preparation of their child's IEP. See 20 U.S.C. 1414(c)-(e); *Schaffer* v. *Weast*, 546 U.S. 49, 53 (2005). If parents object to their child's IEP they may request an impartial due process hearing in accordance with the IDEA's complaint process. See 20 U.S.C. 1415(b)(6) & (f). In New York, these hearings are conducted by an Impartial

Hearing Officer, and may be appealed to the State Review Officer. See N.Y. Educ. Law § 4404 (McKinney 2012); 20 U.S.C. 1415(g)(1). An aggrieved party may challenge a final administrative decision in federal court. 20 U.S.C. 1415(i)(2)(A).

Where a child's parents place the child in a private school because they feel the proposed IEP is inadequate or the child was improperly denied an IEP, a court may require the district to reimburse the parents. See 20 U.S.C. 1412(a)(10)(C)(i) & (ii); *Florence Cnty. Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 13 (1993) (where the child is denied a FAPE, parents have "the right of unilateral withdrawal"). Parents may be reimbursed for the cost of the private placement if (a) the public school did not provide the child with a FAPE, and (b) the private program provided the child with educational services appropriate to meet the child's needs. See *Forest Grove*, 557 U.S. at 232; *Carter*, 510 U.S. at 10; *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369-371 (1985). To determine whether a placement – public or private – is appropriate under the IDEA, courts examine whether the educational program provides the child a "meaningful" educational benefit. *Board of Educ.* v. *Rowley*, 458 U.S. 176, 192 (1982); *Walczak* v. *Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998). Without tuition reimbursement in such circumstances, "a 'child's right to a *free* appropriate education [under the IDEA] . . . would be less than complete.'" *Forest Grove*, 557 U.S. at 244-245 (quoting *School Comm. of Burlington*, 471 U.S. at 370).

B. The LRE Standard Does Not Justify Denying Tuition Reimbursement For A Private Parental Placement Unless Parents Chose, Without Sufficient Justification, A Private School That Was Significantly More Restrictive Than Other Available Private School Options

1. The IDEA defines the LRE requirement as one of several conditions that school districts must meet when developing the child's IEP. 20 U.S.C. 1412(a)(5). Specifically the statute requires that "the State ha[ve] in effect policies and procedures to ensure that the State meets" the LRE requirement. 20 U.S.C. 1412(a)(5); see also 34 C.F.R. 300.114-300.120 (requiring States, not parents, to ensure LRE).

The Supreme Court has recognized that the statutory requirements for a FAPE do not apply directly to parents' private placements. See *Carter*, 510 U.S. at 12-14 (parents not required to place child in private school that meets state educational standards); *Burlington*, 471 U.S. at 372-374 (parents not required to keep child in current educational placement under the IDEA's "stay put" requirement); see also *Honig* v. *Doe*, 484 U.S. 305 (1988) ("stay put" requirement applies to school district, not state court). In *Carter*, the Court explained that many of the IDEA's requirements, such as the IEP requirement, "do not make sense in the context of a parental placement." 510 U.S. at 13. The Court rejected the notion that the same requirements applicable to public schools also apply to parental placements, because applying those requirements "to parental placements

would effectively eliminate the right of unilateral withdrawal recognized in *Burlington*." *Ibid.*

Moreover, the complex educational factors courts apply in making an LRE determination do not readily apply in the context of private school placements by parents. When courts apply the LRE requirement to a public school's development of an IEP for a child with a disability, the evaluation of the LRE requirement is multifaceted. This Court assesses, among other factors: "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class." *P. ex rel. Mr. & Mrs. P.* v. *Newington Bd. of Educ.*, 546 F.3d 111, 120 (2d Cir. 2008) (citing *Oberti* v. *Board of Educ.*, 995 F.2d 1204, 1217-1218 (3d Cir. 1993)). Courts also require the school district to assess and compare the educational and socialization benefits of education in the regular classroom with education in a classroom limited only to other children in need of special education. *Ibid.* These assessments make sense in the varied classroom circumstances, and in light of the varied educational expertise, available in a public school. It would be difficult, if not impossible, for parents to perform this type of analysis when placing their child in a private school.

Cf. *Carter*, 510 U.S. at 13 (many IDEA requirements "do not make sense in the context of a parental placement").

2. While LRE requirements do not apply directly to parental placements, the restrictiveness of a parental placement may be considered as a factor in determining whether the private placement is providing an "appropriate" special education. In *M.S. ex rel. S.S.* v. *Board of Education of the City School District of Yonkers*, 231 F.3d 96, 105 (2d Cir. 2000), cert. denied, 532 U.S. 942 (2001), this Court explained "that parents seeking an alternative placement may not be subject to the same mainstreaming requirements as a school board." See also *R.E.* v. *New York City Dep't of Educ.*, 694 F.3d 167, 187 n.3 (2d Cir. 2012) ("[A] private placement need not meet the IDEA requirement for a FAPE and is not subject to the same mainstreaming requirement as a public placement."). This Court concluded, however, that the "IDEA's requirement that an appropriate education be in the mainstream to the extent possible * * * remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate." *Yonkers*, 231 F.3d at 105.[3]

[3] Although the Court noted in *Yonkers* that the private school placement was not the least restrictive environment for the child, the primary reason for denying tuition reimbursement was that the child's "reading level had not improved and his

(continued…)

While this Court has stated that tuition reimbursement may not be denied merely because the private parental placement is more restrictive than a regular education classroom at a public school, see *Muller ex rel. Muller* v. *Committee on Special Education of East Islip Union Free School District*, 145 F.3d 95 (2d Cir. 1998), the Court has not had occasion to explain precisely *how* the LRE concept is relevant to determining the appropriateness of a parental placement. In *Muller*, this Court rejected a restrictiveness-based challenge to a private placement. *Id.* at 105. This Court concluded that the child's private school placement in "a more restrictive environment" was appropriate, noting that the record "demonstrate[d] that [the student] could not succeed in the public school system and that [the student's] behavior and academic performance improved considerably once she was removed from the public school setting." *Ibid.*

3. Other circuits similarly have held that the LRE requirement does not apply directly to parental placements, and that tuition reimbursement may not be denied simply because the child would have been in a more integrated setting in a

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(…continued)
spelling level had declined" during his time at the private school, and the plaintiff "failed to demonstrate that the school addressed his son's special education needs," making the program educationally inappropriate. *Id.* at 104.

regular education classroom had the public school provided appropriate special education services.[4]

The Eighth Circuit recently held "that a private placement need not satisfy a least-restrictive environment requirement to be 'proper' under the [IDEA]." *C.B. ex rel. B.B.* v. *Special Sch. Dist. No. 1*, 636 F.3d 981, 991 (8th Cir. 2011). The district court had concluded that the school district failed to offer the plaintiff a FAPE, but denied tuition reimbursement for a specialized private school on LRE grounds. *Id.* at 986-987. The Eighth Circuit reversed, stressing that the relevant issue was *not* whether the public school could have offered the plaintiff an appropriate education; rather, it was whether the private placement the parents chose after the school district failed to provide a FAPE provided appropriate educational services. *Id.* at 991 ("[O]nce the School District failed to fashion an IEP that made available a free appropriate public education, it did not frustrate the purposes of the Act for C.B.'s parents to enroll him at [the specialized private

[4] This Court has held that the IDEA's LRE standard may be considered as a factor in assessing the appropriateness of a private placement. *Yonkers*, 231 F.3d at 105. Other courts of appeals, particularly the Sixth Circuit, see *Cleveland Heights-University Heights City School District* v. *Boss ex rel. Boss*, 144 F.3d 391 (6th Cir. 1998), discussed, p. 20, *infra*, have held that the LRE standard is simply not applicable to a private placement parents made when a school district failed to comply with the IDEA. This brief discusses the way in which the LRE standard should be considered when assessing the appropriateness of a private placement, if it is considered at all. The United States does not take any position here on the question whether the LRE standard should be considered at all in assessing the appropriateness of a private placement.

school], where he could receive the educational benefit that was lacking in the public schools.").

The Sixth Circuit has also rejected the argument "that the failure of a parentally selected private placement to satisfy the [LRE] requirement bars reimbursement under the IDEA." *Cleveland Heights-Univ. Heights City Sch. Dist.* v. *Boss ex rel. Boss*, 144 F.3d 391, 399 (6th Cir. 1998). The court explained that such a view would "read the IDEA to say, in effect: 'If [the district] fail[s] to provide a disabled child with an appropriate education, the parents must pay for a private education, or let their child languish in our institution if the only placement more suitable to her needs and more closely approximating the ideal envisioned by the IDEA than what we offer is a specialized private school that admits only learning disabled students.'" *Id.* at 400. The court concluded that "Congress did not intend to place beneficiaries of the IDEA in the position of having to choose only among these unpalatable alternatives." *Ibid.* Additionally, the court observed that "[i]t will commonly be the case that parents who have not been treated properly under the IDEA, and who exercise the right of parental placement, will place their child in a school that specializes in teaching children with disabilities and thus will not satisfy the mainstreaming requirement." *Id.* at 400 n.7. The court determined that applying the LRE requirement to parental placements "would therefore effectively vitiate that remedy." *Ibid*; see also *Knable ex rel. Knable* v.

Bexley City Sch. Dist., 238 F.3d 755, 770 (6th Cir. 2001); *Warren G. ex rel. Tom G.* v. *Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999) ("An appropriate private placement is not disqualified because it is a more restrictive environment than that of the public placement.").

Finally, the Fourth Circuit has held that "while a parental placement is not inappropriate simply because it does not meet the least-restrictive-environment requirement, it is nonetheless proper for a court to consider the restrictiveness of the private placement *as a factor* when determining the appropriateness of the placement." *Sumter Cnty. Sch. Dist. 17* v. *Heffernan ex rel. TH*, 642 F.3d 478, 488 (4th Cir. 2011). The court concluded that the restrictiveness of the parents' home placement was properly considered "as a factor, but not the dispositive factor" in determining the appropriateness of the placement. *Ibid*; see also *M.S.* v. *Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009). The court recognized that the LRE requirement "was aimed at preventing *schools* from segregating handicapped students from the general student body," and was not intended "to restrict parental options when the public schools fail to comply with the requirements of the Act." *Sumter County*, 642 F.3d at 487 (citation omitted; emphasis added). The court recognized further that "[w]here necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program." *Ibid.* (citation omitted).

4. Consistent with these authorities, when a public school has failed to provide a FAPE and parents therefore are forced to pursue a private placement, the IDEA's LRE requirement should not be construed or applied in a manner that, as a practical matter, bars tuition reimbursement whenever the private placement is more restrictive than the public school. Courts should not compare the restrictiveness of the private school to that of the public school as the public school's failure to provide a FAPE renders any such comparison inappropriate.

Instead, the restrictiveness of a private school in the context of a parental placement should be considered only to determine whether the private education chosen by the parents is overly restrictive as compared to other private school options available to the parents once the public school failed to provide a FAPE. At that point, education in a regular public education classroom with appropriate supports and services simply is no longer an option. The LRE requirement would justify a denial of tuition reimbursement only if a less restrictive option was available to the parents, and the parents rejected it for insufficient educational reasons.[5]

Indeed, where a school has disregarded its obligation under the IDEA to provide the child a FAPE, denying tuition reimbursement because the private

[5] Of course, the educational program of the private school must meet the child's specific educational needs or else it could not be "appropriate."

placement is not the least restrictive environment as compared to the public school would perversely incentivize violations of the IDEA. Although the School District here failed to provide CL a FAPE, the district court's decision has nonetheless relieved the District of all financial responsibility for the cost of educating CL. Upholding this result would give school districts an incentive to violate the IDEA in order to avoid the burden of educating students needing special education who they perceive to be too demanding or too costly, particularly where private school options are limited. The IDEA was enacted to ensure that school districts provide a FAPE to *all* children with disabilities. It should not be interpreted to absolve a school district of financial responsibility for a child's private education where the school district violated its legal obligations.

Denying tuition reimbursement based on restrictiveness is particularly unfair where, as here, the school district not only failed to provide a FAPE but also failed, even in the context of the litigation, to identify to the court any alternative private placement available to the parents that was less restrictive than the parents' choice or to show that the restrictiveness of the parents' choice denied the child a meaningful educational benefit. This failure is significant because the reality is private schools with the resources to provide an effective education to students with serious educational difficulties often are established to educate *only* those students, see *Boss*, 144 F.3d at 400 n.7, and other private schools often do not

provide the specialized services students with serious educational disabilities need. See, *e.g.*, Shanon S. Taylor, *Special Education, Private Schools, and Vouchers: Do All Students Get a Choice*, 34 J.L. & Educ. 1 (2005). Thus, a specialized private school is very often the only real option for parents whose children with serious disabilities are not provided a FAPE in the public school.

C. The District Court Erroneously Applied The LRE Standard Here[6]

The record in this case supports a finding that Eagle Hill's educational program was "specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction," and therefore an appropriate placement for CL. *Rowley*, 458 U.S. at 188-189 (internal quotation marks omitted). The IHO found that, at Eagle Hill, CL had an individualized, research-based curriculum that included specific remediation in important areas in which CL struggled and that would be adjusted based on CL's progress. JA15. The IHO also found that CL made significant gains at Eagle Hill; he "plainly made significant progress at Eagle Hill both personally and academically." JA15 (internal quotation marks omitted).

[6] This Court reviews the district court's decision *de novo*, engaging in an independent review of the record while giving due weight to the administrative findings, especially on matters of educational policy. See *Cerra* v. *Pawling Cent. Sch. Dist.*, 427 F.3d 186, 191-192 (2d Cir. 2005).

The district court did not dispute these findings, but instead concluded that Eagle Hill was not appropriate because it was more restrictive than classes at the public school. See JA28 (fact that CL "made meaningful progress among his peers at Greenacres * * * negates the argument that [CL] required placement among students with learning disabilities and attentional issues in order to receive an appropriate education").[7] Indeed, the district court specifically credited the IHO's findings that "CL was progressing at Eagle Hill and that he benefitted from the small class size, individualized teaching strategies, and tutorial periods." JA31. The district court also acknowledged "that Eagle Hill tailors its curriculum to each student, and places children in classes with others who have similar skills." JA31 (citation omitted).

Significantly, the record suggests that CL benefitted not only educationally, but also socially, from his placement at Eagle Hill. The IHO found that CL made progress at Eagle Hill "both personally and academically," and CL's parent "testified that CL was happier, more self-confident, and less anxious when attending Eagle Hill." JA29 n.17. The record also indicates that CL is able to interact socially with peers his age. JA28. And Eagle Hill is a school for children,

[7] The United States takes no position on the question whether Eagle Hill failed to meet CL's needs in the area of fine motor skills, or whether the education at Eagle Hill was inappropriate on that basis. Our purpose is only to discuss the restrictiveness issue.

like CL, with language-based learning disabilities. See JA27 n.13. There is no evidence to suggest that Eagle Hill's students do not interact socially at an age-appropriate level or that they lack opportunities to participate in age-appropriate co-curricular activities. Cf. *Sumter Cnty. Sch. Dist. 17*, 642 F.3d at 488; *Oberti*, 995 F.2d at 1216.

The district court's assessment of the LRE factor in this case was erroneous. The district court concluded that Eagle Hill was inappropriate by comparing it to a regular education classroom at the public school. See JA26 (concluding that whether CL's parents are entitled to tuition reimbursement "boils down to one central issue: the degree to which CL was progressing at Greenacres versus his need for a small, special education setting"). The court noted that CL had some success at the public school in a regular education classroom with supports and services, and concluded that, because the education at Eagle Hill was more restrictive, it was inappropriate. JA26-32. This analysis ignores the fact that the very reason CL's parents had to put him in a private school was that the public school refused to classify him as a child with a disability under the IDEA, refused to provide him an IEP, and thus indisputably denied him a FAPE. That CL could have been appropriately educated in a regular education classroom if the school had complied with the IDEA cannot mean that CL's parents can send him to a private school and obtain tuition reimbursement *only if* the private school can

educate him in precisely the same inclusive manner as a public school regular education classroom with the necessary supports and services. See *Boss*, 144 F.3d at 400.

Instead, any evaluation of "restrictiveness" for the purpose of assessing the appropriateness of a private parental placement should focus on the private school options available to the parents once the public school failed to provide a FAPE. Here, there is no evidence that Eagle Hill is a more restrictive environment than other private school options CL's parents could have selected after the District failed to provide CL a FAPE. Accordingly, tuition reimbursement should not have been denied on LRE grounds.

CONCLUSION

This Court should reverse the district court's ruling on the IDEA issue.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 29(d). This brief was prepared with Microsoft Word 2007 and contains 6175 words of proportionately spaced text. The typeface is Times New Roman, 14-point font.

Dated: January 9, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2013, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Six copies of the same were sent by first class mail to the Court.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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