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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

J.T. on her own behalf, on behalf of her minor :  
child, A.T., and on behalf of all others similarly :  
situated, :  
 :  
 : *Plaintiffs* :  
 :  
 v. :  
 :  
 Dumont Public Schools; *et al.*, : 09 Civ. 4969 (FSH) (PS)  
 :  
 : *Defendants* :  
 :  
 :  
 : **MOTION DAY:**  
 : **APRIL 18, 2011**

**BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT  
ATTORNEYS AND ADVOCATES, EDUCATION LAW CENTER, NEW  
JERSEY SPECIAL EDUCATION PRACTITIONERS, STATEWIDE  
PARENT ADVOCACY NETWORK, SPECIAL EDUCATION CLINIC OF  
RUTGERS UNIVERSITY- NEWARK, AND THE ARC OF NEW JERSEY  
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

**Table of Contents**

Preliminary Statement ..... 1

Identity and Interest of *Amici Curiae* ..... 2

Summary of Argument ..... 5

Argument ..... 6

1. The Law Itself Makes Very Clear That If Children Without Disabilities Are Assigned To Neighborhood Schools, Then Children With Disabilities Must Also Be Assigned To Neighborhood Schools..... 6

2. Uncontroverted Research Demonstrates The Value Of True Inclusion In A Child’s Neighborhood School ..... 8

3. A Fully Inclusive Educational Environment Benefits Typically Developing Children in the Inclusive Class ..... 16

Conclusion ..... 19

**Table of Authorities**

**Cases**

*Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993)..... 6

**Statutes**

**Federal**

Individuals with Disabilities Education Act, 20

U.S.C. § 1400, *et seq.* ..... 2

29 U.S.C. §794..... 5

20 U.S.C. §1400(c)(1) ..... 2

20 U.S.C. §1400(c)(5)(A) ..... 9

20 U.S.C. § 1412(a)(5)(A) ..... 6

20 U.S.C. § 1482..... 3

**State**

N.J.S.A. §10:5-1 ..... 5

**Regulations**

**Federal**

34 C.F.R. §300.116(b)(3) ..... 7,8

34 C.F.R. §300.116(c) ..... 2, 7, 8

**State**

N.J.A.C. 6A:14-4.2(a)(6) ..... 7,8

**Books and Articles**

Evans, et al., *Children’s Perception of Fairness in Classroom & Interpersonal Situations Involving Peers with Severe Disabilities*, 19 JOURNAL OF THE ASSOCIATION OF PERSONS WITH SEVERE HANDICAPS 326-32 (1004)..... 17

Fisher & Meyer, *Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs*, 27 RESEARCH & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 165 (2002) .. 13

Giangreco, et al., “I’ve Counted Jon;” *Transformational Experiences of Teachers Educating Students with Disabilities*, 59 EXCEPTIONAL CHILDREN 364, 368 (1983) ..... 17

Helmstetter, Peck & Giangreco, *Outcomes of Interactions with Peers with Moderate or Severe Disabilities: A Statewide Survey of High School Students*, 19 JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS 263-76 (1994) ..... 17, 18

Hunt, et al., *Evaluating the effects of placement of students with severe disabilities in general education versus special classes*, JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, 19(3) 200-214 (1994) ..... 11

Kohler & Strain, *Promoting Positive And Supportive Interactions Between Preschoolers: An Analysis Of Group-Oriented Contingencies*, JOURNAL OF EARLY INTERVENTION, 14(4), 327-341 (1990)..... 15

Lipsky & Gartner, *National Study on Inclusion: Overview & Summary Report*, National Center on Educational Restructuring and Inclusion Bulletin 2(2) (1995) ..... 19

McDonnell, et al., *Academic engaged time of students with low-incidence disabilities in general education classes*, MENTAL RETARDATION, 35(1), 18-26 (1997) ..... 12

McDonnell, et al., *Educating Students With Severe Disabilities in Their Neighborhood School: The Utah Elementary Integration Model*, in REMEDIAL AND SPECIAL EDUCATION 12:34 (1991)..... 12

National Ass’n of School Psychologists, *Position Paper on Inclusive Programs for Students with Disabilities* ..... 12

Piuma, *Benefits and Costs of Integrating Students with Severe Disabilities into Public School Programs: A Study Summary of Money Well Spent*. (San Francisco State University, 1989) ..... 16

Saint-Laurent, *et al.*, *Academic Achievement Effects of an On-Class Service Mode on Students with and without Disabilities*, 64 *EXCEPTIONAL CHILDREN* 239-253 (1998) ..... 18

Stainback, et al., *Concerns About Full Inclusion: An Ethnographic Investigation*, *IN CREATING AN INCLUSIVE SCHOOL* (R.A. Villa & J.S. Thousand Eds., 1995) . 18

Turnbull, Turnbull, Shank & Smith, *Exceptional Lives: Special Education in Today's Schools* (Merrill/Prentice Hall 2004) ..... 14

Waldron & Cole, *The Indiana Inclusion Study Year One Final Report*, Indiana Institute on Disability & Community, Bloomington, IN (2000)..... 19

Weiner, *Impact on Schools*, Capitol Publications (1985)..... 14

### **Preliminary Statement**

The Council of Parent Attorneys and Advocates (“COPAA”), the Education Law Center (“ELC”), the New Jersey Special Education Practitioners (“NJSEP”), Statewide Parent Advocacy Network (“SPAN”), Special Education Clinic of Rutgers University School of Law-Newark (“Rutgers Clinic”), and The Arc of New Jersey (“the Arc”) (collectively “*amici*”) respectfully submit this brief as *amici curiae* in order to place before the Court some of the extensive empirical research which demonstrates the efficacy of providing education to children with disabilities in neighborhood schools.

Federal and state laws require that children with disabilities be **included**, to the greatest extent possible, in the **same classrooms** to which they would be assigned but for their disabilities. The Dumont Public Schools place their Kindergarten students **without disabilities** in four **neighborhood** elementary schools, as determined by their place of residence. All four Dumont neighborhood elementary schools include Kindergarten classes. However, Dumont Kindergarten students who are able to participate in a general education classroom, but who also require assistance from a special education teacher, are **not included** in a Kindergarten class at their own neighborhood school. These children are assigned, without regard to their place of residence, to a single classroom in one elementary

school, which the Dumont Public Schools have labeled, ironically, as the “Inclusion Kindergarten.”

COPAA, ELC, NJSEP, SPAN, Rutgers Clinic and The Arc urge this Court to uphold the right of a child with disabilities to be placed – in the words of the binding federal regulation discussed further below – “in the school that he or she would attend if nondisabled,” 34 C.F.R. §300.116I.

### **Identity And Interest Of Amici Curiae**

**COPAA** is an independent, nonprofit organization of attorneys, non-attorney advocates, and parents in forty-three states (including New Jersey) and the District of Columbia who are routinely involved in special education due process hearings throughout the country.

The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 U.S.C. §1400(c)(1). Children with disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (“IDEA”) requires.

**ELC** is a not-for-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. ELC seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. ELC provides a full range of direct legal services to parents involved in disputes with public school officials. ELC serves approximately 600 individual clients each year, primarily in the area of special education law, and prioritizes advocating for the education of children with disabilities in the least restrictive environment.

**NJSEP** is an association of attorneys and non-attorney advocates who practice in the area of special education in New Jersey. The NJSEP is primarily focused on matters related to the representation of parents and children whose IDEA rights have been violated. Membership in the NJSEP is limited to attorneys and non-attorney advocates who represent parents and students in matters related to special education and the rights of individuals with disabilities.

**SPAN** is New Jersey's federally-funded Parent Training and Information Center pursuant to 20 U.S.C. § 1482. SPAN's mission is to empower and support families and inform and involve professionals and others interested in the healthy development and education of children and youth. SPAN provides training and

technical assistance to over 30,000 parents and professionals each year, on issues such as special education, school reform, rights of homeless and immigrant children, bilingual services, discipline and positive behavioral supports, parent involvement, and parent-professional collaboration.

The **Rutgers Clinic** provides free legal services to indigent parents of children with disabilities in special education matters, trains law students in this vital area and educates parents and other professionals regarding the educational rights of the disabled.

**The Arc** is the largest statewide advocacy organization for individuals with intellectual and other developmental disabilities and their families. The Arc was founded in 1947 by a group of parents, with the mission of enhancing quality of life of children and adults with intellectual and developmental disabilities and their families through advocacy, empowerment, education, and prevention. In addition to the statewide office, The Arc has twenty local county chapters and is affiliated with The Arc of the United States. Through the Department of Education Advocacy, The Arc assists its member families in obtaining appropriate educational services. The Arc's formally adopted position on education is that "students with disabilities have the right to attend the same neighborhood schools, classrooms, extra-curricular and recreational activities and community programs as they would if they did not have a disability," and "students with disabilities belong

in age-appropriate integrated environments and/or classrooms with peers who are not disabled.”

### **Summary of Argument**

As set forth in detail in plaintiffs’ summary judgment brief, defendant Dumont Public Schools has four neighborhood elementary schools. Elementary school children attend the neighborhood school in whose pre-defined residential zone or “catchment” area they reside. However, if a Kindergarten student is classified as having special education needs, he or she is either assigned to a self-contained classroom (*i.e.*, a classroom in which all of the students are classified as having special needs), or is assigned to a so-called “Inclusion Kindergarten,” located in only one of the four schools and without regard to where the child lives. In short, Kindergarten students in Dumont attend their neighborhood school, unless they have a disability.

By assigning children to an arbitrarily located “Inclusion Kindergarten,” the Dumont Public Schools are simply disregarding over thirty years of federal and state legislation which plainly require that children with disabilities be treated the same as peers who are developing typically. Plaintiffs have demonstrated in their brief that this is against the law, including not only the IDEA, but also Section 504 of the Rehabilitation Act, 29 U.S.C. §794, and the New Jersey Law Against Discrimination (“NJLAD”), N.J.S.A. §10:5-1, *et seq.* *Amici* submit this brief to

place before the Court empirical evidence that supports the specific application of these laws to assignment of Kindergarten students with disabilities to their neighborhood school.

### Argument

**1. The Law Itself Makes Very Clear That If Children Without Disabilities Are Assigned To Neighborhood Schools, Then Children With Disabilities Must Also Be Assigned To Neighborhood Schools.**

The “least restrictive environment” provision of IDEA, provides in language that is clear and unmistakable:

To the maximum extent appropriate, **children with disabilities**, including children in public or private institutions or other care facilities, **are educated with children who are not disabled**, and special classes, separate schooling, or other **removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.**

20 U.S.C. § 1412(a)(5)(A) (emphasis added.) In the words of the Third Circuit, “this provision sets forth a ‘strong congressional preference’ for integrating children with disabilities in regular classrooms.” *Oberti v. Board of Education*, 995 F.2d 1204, 1213-14 (3d Cir. 1993).

This “least restrictive environment” or “LRE” requirement is implemented in regulations, which expressly require that:

- A child with disabilities must be placed in the school which is “as close as possible to the child’s home,” 34 C.F.R. §300.116(b)(3), N.J.A.C. 6A:14-4.2(a)(6); and
- A child with disabilities should generally be “educated in the school that he or she would attend if nondisabled,” 34 C.F.R. §300.116I.<sup>1</sup>

As explained in greater detail in plaintiffs’ brief, the Dumont “Inclusion Kindergarten” plainly violates all of these requirements. Students are assigned to the “Inclusion Kindergarten” without regard to whether they could be genuinely included in a regular Kindergarten class in their own neighborhood school “with the use of supplementary aids and services,” thereby violating IDEA’s “least restrictive environment” requirement.<sup>2</sup> For Dumont Kindergarten students with disabilities who live in the residential catchment areas for the other three neighborhood schools, the school building in which the “Inclusion Kindergarten”

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<sup>1</sup> There is an exception to subsection (c) for cases in which “the IEP of a child with a disability requires some other arrangement.” This exception does not apply here, however, for the Dumont IEP teams have no discretion to assign Kindergarten children to any class other than a “self-contained” class or the “Inclusion Kindergarten.”

<sup>2</sup> Not only does the District fail to make the requisite individualized assessment regarding placement, but it justifies this failure by stating that certain children are “not mainstreamable” and therefore not entitled to an individualized placement assessment. This of course is the antithesis of the *Individuals with Disabilities Education Act* that requires an individualized assessment for *each* child and establishes the general education classroom in the neighborhood school as the (rebuttable) presumption.

is housed is not the school that is closest to the child's home<sup>3</sup>, thereby violating 34 C.F.R. §300.116(b)(3) and N.J.A.C. 6A:14-4.2(a)(6). And for the same Dumont Kindergarten students with disabilities, the school building in which the "Inclusion Kindergarten" is housed is plainly not the school they would attend if nondisabled, thereby violating 34 C.F.R. §300.116(c). Moreover, as explained in more detail in the plaintiffs' briefs, all children, including those who live in the catchment area where the "Inclusion Kindergarten" is located, are negatively affected as the "Inclusion Kindergarten" itself may be more restrictive than a general education kindergarten in the same building.<sup>4</sup>

## **2. Uncontroverted Research Demonstrates The Value Of True Inclusion In A Child's Neighborhood School.**

By labeling the discriminatory classroom placement of children requiring special education services as an "Inclusion Kindergarten," defendant Dumont Public Schools is paying lip service to the legal mandates relating to placement of children in the "least restrictive environment," while ignoring their plain meaning.

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<sup>3</sup> Notably, Dumont reserves the right to move the "Inclusion Kindergarten" from one building to another in any given year. Consequently, all future kindergarteners with disabilities (the vast majority of the proposed Class) are at risk of adverse consequences from Dumont's improper policies.

<sup>4</sup> There is also a question as to whether any of the children in the "Inclusion Kindergarten" are even receiving the free and appropriate public education to which they are entitled as the Plaintiffs learned in depositions that, incredibly, the special education teacher only spends 90 minutes per week in the "Inclusion Kindergarten."

As discussed in plaintiffs' brief, Dumont's Director of Special Services has even contended that a so-called "inclusion" class with as many as 80 percent disabled students would qualify as a "regular" class for LRE purposes. *See* plaintiffs' brief at 9.

The IDEA and its implementing regulations, as well as the other laws prohibiting segregation of children with disabilities on which plaintiffs rely, reflect Congressional commitment to placement of students with disabilities in truly inclusive classrooms, not to meaningless lip service. As Congress declared in enacting the 2004 IDEA amendments:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by —

(A) having high expectations for such children and ensuring their access to the general education curriculum **in the regular classroom, to the maximum extent possible**, in order to —

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible. . . .

20 U.S.C. §1400(c)(5)(A) (emphasis added).

As Congress recognized, time spent with non-disabled peers enhances academic achievement for students with disabilities, that is, inclusion and achievement are positively correlated. Placement of a child in his or her own

neighborhood elementary school has just as much value for a child with a disability as for a child who does not have a disability.

“Inclusion” is not just a label, it is an integrated educational practice mandated by law, and calling a class into which children with disabilities are arbitrarily segregated “inclusive,” when it is not, is at least misleading, if not improper. In Dumont, every Kindergarten student who does not have a disability attends his or her neighborhood elementary school. Arbitrary assignment of students with disabilities to a so-called “Inclusion” class, which in most cases will not be the child’s own neighborhood school, is not true inclusive education. As the research cited on the following pages demonstrates:

- Children attending their own neighborhood school have the opportunity to interact in the classroom with the children whom they are most likely to encounter outside of school. Children who are taken away from their neighborhood school do not have this opportunity.
- The opportunity for such interaction provides tangible, measurable benefits for both children with disabilities and children who do not have disabilities.

Currently, for Kindergarten students, Dumont provides these benefits to children who do not have disabilities by maintaining a system of neighborhood

elementary schools. The law requires that it provide these same benefits to children with disabilities.

As long as Dumont educates Kindergarten students without disabilities in their own neighborhood schools, the law plainly requires that an inclusive class for Dumont Kindergarten student with disabilities must necessarily and by definition be an inclusive class in the neighborhood elementary school. When the research, which demonstrates the benefits of inclusive education, is combined with the LRE requirement of federal and state law, and the uncontroverted fact that Dumont Kindergarten students who do not have disabilities are assigned to their neighborhood elementary schools, it is clear that Dumont Kindergarten students with disabilities are also entitled to placement in their neighborhood schools.

Much of the research on inclusive education has been summarized by the New Jersey Council on Developmental Disabilities in its 2004 report, “Still Separate and Unequal,” which is available at <http://www.njcd.org/InclusiveEducation/sep-uneq.htm>. The studies cited by the Council show that, “[c]ompared to students in segregated settings, students with disabilities who are full time members of general education classrooms show significantly higher levels of engagement in school activities, higher levels of participation in integrated school environments and initiate and engage in social interactions with peers and adults to a greater degree.” *Id.* at 9, citing Hunt, *et al.*, *Evaluating the effects of placement of students with*

*severe disabilities in general education versus special classes*, JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, 19(3) 200-214 (1994).

Another study cited by the Council shows that “[s]tudents with disabilities in inclusive placements have had more frequent interactions and larger, more durable networks of peers without disabilities.” *Id.* at 9, citing McDonnell, *et al.*,

*Academic engaged time of students with low-incidence disabilities in general education classes*, MENTAL RETARDATION, 35(1), 18-26 (1997).

The National Association of School Psychologists recognizes “the development of natural friendships within the child’s home community” as a benefit of inclusive education. National Ass’n of School Psychologists, *Position Paper on Inclusive Programs for Students with Disabilities*, available at [http://www.nasponline.org/about\\_nasp/pospaper\\_ispd.aspx](http://www.nasponline.org/about_nasp/pospaper_ispd.aspx) (last viewed Mar. 14, 2011). In addition, a study that focused specifically on children with disabilities who were assigned to neighborhood schools showed clear positive results. *See* McDonnell, *et al.*, *Educating Students With Severe Disabilities in Their Neighborhood School: The Utah Elementary Integration Model*, in REMEDIAL AND SPECIAL EDUCATION 12:34 (1991). This study examined the effect of assigning children to neighborhood schools, including changes in “adaptive” behavior (such as social and communication skills), and the degree of interaction with non-disabled peers (“level of integration”). The study found that:

- Children with disabilities experienced especially significant improvements in motor skills, social interaction and community living skills. *Id.* at 39.
- Frequency of out-of-school contacts with neighborhood school peers without disabilities increased from an average of 6.6 per month during the initial review, to 9.5 per month during the final review. *Id.* at 40.
- General education teachers in the program found that **both** the students with disabilities and the students without disabilities benefited from being in the classroom together. *Id.* at 40.

Another study compared results on measures of child development and social competence over a 2-year study period. The children enrolled in inclusive programs achieved statistically significant better results than the children in the segregated programs. Fisher & Meyer, *Development and Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs*, 27 RESEARCH & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 165, 166, 169-73 (2002). The authors concluded:

The results of this study point to greater gains on psychometrically valid measures for students who were included in general education settings in comparison to matched peers who were segregated. Moving instruction into inclusive environments, rather than providing instruction in isolation from normalized learning opportunities ([such as are] provided in social contacts)

seems to be beneficial for individual child learning outcomes. . . .

. . . At the very least, these data reveal that the vast majority of students do show gains over time that can be related to their educational program. When an individual student does not make progress, the education team should be challenged to alter the program until progress is achieved – rather than allowing failure to be justified by the level of a student’s disabilities.

*Id.* at 172-73.

Research also shows that students with disabilities who are educated in general education classes do better academically and socially than comparable students in noninclusive settings, regardless of the type of disability or grade level. Turnbull, Turnbull, Shank & Smith, *Exceptional Lives: Special Education in Today’s Schools* (Merrill/Prentice Hall 2004) at 238.

In 50 research studies since the 1980’s comparing the academic performance of integrated and segregated students with mild disabilities, the mean academic growth of the integrated group was in the 80<sup>th</sup> percentile, while that of the segregated students was in the 50<sup>th</sup> percentile. Weiner, *Impact on Schools*, Capitol Publications (1985).

Another study of a genuinely integrated program describes four kinds of effective interactions that are found when children with disabilities are educated with children who do not have disabilities:

- Peers provide suggestions, encouragement, and related forms of support for one another's behaviors. For example, a peer may initiate play by specifying an activity or suggesting a play idea.
- Peers model appropriate responses for a child with special needs to imitate, such as engaging in activity-related play behavior.
- Peers act as tutors and provide instructions and feedback to teach specific academic or developmental skills. In this particular study, the entire class received social skills training so that the peers were able to initiate and continue positive social interactions with all peers, including students with disabilities.
- Peers participate in cooperative activities and group-oriented reinforcement contingencies with other children. Students with and without disabilities responded to contingency plans (both individual and group) wherein they earned Happy Faces for exchanging play organizers, offering or requesting to share, and offering or requesting assistance.

Kohler & Strain, *Promoting Positive And Supportive Interactions Between Preschoolers: An Analysis Of Group-Oriented Contingencies*, JOURNAL OF EARLY INTERVENTION, 14(4), 327-341 (1990).

Cost justifications for non-inclusive classes are also suspect, and most particularly so in this case where (i) the District has admitted that the cost of educating a child in the “Inclusion Kindergarten” is the same as in a regular kindergarten class in the neighborhood school; and (ii) the effect of placing students in the so-called “inclusive” class outside their own residential area may be to require that the district provide bus transportation that would not be otherwise required. *See generally, Piuma, Benefits and Costs of Integrating Students with Severe Disabilities into Public School Programs: A Study Summary of Money Well Spent.* (San Francisco State University, 1989).<sup>5</sup>

**3. A Fully Inclusive Educational Environment Benefits Typically Developing Children in the Inclusive Class.**

In addition to the enormous benefits provided by inclusion to children with disabilities, typically developing children also receive great advantages and benefits from inclusive settings. It is uncontroverted that typically developing students experience no negative academic effects from being part of an inclusion placement. Moreover, students who do not have experience great social benefits including developing a genuine capacity for friendship and greater acceptance of individual differences.

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<sup>5</sup> Any claims of the District’s inexperience in providing inclusive services are also suspect as the Plaintiffs learned in depositions that the District currently has teachers who provide in-class resources to students with disabilities in the general education classroom.

Research clearly establishes that students who do not have disabilities and are educated in an inclusive environment experience substantial social and developmental benefits. Numerous studies have examined the attitudes and relationships stemming from inclusion, and found that students without disabilities experience positive gains in such settings. *See, e.g., Evans, et al., Children's Perception of Fairness in Classroom & Interpersonal Situations Involving Peers with Severe Disabilities*, 19 JOURNAL OF THE ASSOCIATION OF PERSONS WITH SEVERE HANDICAPS 326-32 (1004) (finding that children without disabilities who attended a fully inclusive program were able to display “sophisticated judgments and suggestions” when dealing with common scenarios involving peers with severe disabilities); Giangreco, *et al.*, “I’ve Counted Jon;” *Transformational Experiences of Teachers Educating Students with Disabilities*, 59 EXCEPTIONAL CHILDREN 364, 368 (1983) (assessing teachers who had a student identified as having a severe disability in their class for a year and noting that the teachers reported that “the participation of a student with severe disabilities in their class had a positive impact on the child with disabilities, as well as on the child’s classmates.”)

Besides improved social interaction and development, research also reveals that students develop “positive attitudes” toward students with disabilities based on the experience of learning in an inclusive environment. *See, e.g., Helmstetter,*

Peck & Giangreco, *Outcomes of Interactions with Peers with Moderate or Severe Disabilities: A Statewide Survey of High School Students*, 19 JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS 263-76 (1994); Stainback, et al., *Concerns About Full Inclusion: An Ethnographic Investigation*, IN CREATING AN INCLUSIVE SCHOOL (R.A. Villa & J.S. Thousand Eds., 1995). Hence, inclusion can lead to enhanced student relationships and greater understanding and empathy between students without disabilities and their peers with disabilities. Helmstetter, Peck & Giangreco, *Outcomes of Interactions with Peers with Moderate or Severe Disabilities: A Statewide Survey of High School Students*, *supra*, at 273-76.

Moreover, several studies suggest that inclusion provides significant academic benefits to students who do not have disabilities. *See, e.g.*, Saint-Laurent, et al., *Academic Achievement Effects of an On-Class Service Mode on Students with and without Disabilities*, 64 EXCEPTIONAL CHILDREN 239-253 (1998). The findings of this study of third grade students revealed that the reading and mathematics performances of the students without disabilities from the inclusion program were substantially better than that of their typically developing peers who were educated in a traditional, segregated classroom. *Id.* A two-year study that investigated the effects of inclusive programs for students without disabilities revealed that students with and without disabilities educated in inclusive settings made greater, or at least as great, academic gains than students

educated in segregated schools, and that students without disabilities made significantly greater academic progress in mathematics. Waldron & Cole, *The Indiana Inclusion Study Year One Final Report*, Indiana Institute on Disability & Community, Bloomington, IN (2000); *see also*, Lipsky & Gartner, *National Study on Inclusion: Overview & Summary Report*, National Center on Educational Restructuring and Inclusion *Bulletin* 2(2) at 1-8 (1995) (outcomes for all students in inclusive education programs and for teachers were positive).

### Conclusion

Real inclusive education – not the partially segregated class that defendants have mislabeled as “inclusive” – is effective and the law requires it. When a school district chooses, as Dumont has chosen, to educate its non-disabled students in neighborhood schools, nothing less can be considered inclusive, and the law requires that students with disabilities also have the opportunity to attend their neighborhood schools. Therefore, and for all of the foregoing reasons, *amici* respectfully request that plaintiffs’ motion for summary judgment be granted.

Respectfully submitted,

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