IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-20750

RENEE J., et al.
Plaintiffs-Appellants,

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of Texas

AMICUS CURIAE BRIEF OF THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW; DISABILITY RIGHTS TEXAS, DISABILITY RIGHTS MISSISSIPPI; THE NATIONAL DISABILITY RIGHTS NETWORK; THE NATIONAL CENTER FOR LEARNING DISABILITIES; THE NATIONAL CENTER FOR YOUTH LAW; ADVOCACY CENTER OF LOUISIANA, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER THE LAW AND ASSOCIATION OF UNIVERSITY CENTERS ON DISABILITIES IN SUPPORT OF NEITHER PARTY

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for *Amici*—nine organizations dedicated to protecting the rights of disabled individuals throughout the Fifth Circuit and elsewhere—respectfully requests oral argument to assist the Court in resolving a novel and important issue presented in this case. Participation of *Amici* at oral argument is of particular importance here because *Amici* address a significant issue of law (the overruling of this Court's precedent by the United States Supreme Court) that Appellants do not directly address in their opening brief. This Court's treatment of that issue is not only important to the correct resolution of this appeal, but is also of great importance to protecting the rights of students with disabilities throughout the Fifth Circuit.

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief as required by Fifth Circuit Rule 29.2. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Amici Curiae

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The National Center for Learning Disabilities
Disability Rights Mississippi
National Center for Youth Law
Advocacy Center of Louisiana
The Association of University Centers on Disabilities
The Lawyers' Committee for Civil Rights Under Law

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INTEREST OF AMICI CURIAE[1]

The *Amici* organizations are national and state organizations dedicated to advancing and protecting the civil rights of students with disabilities, fostering their integration into all aspects of school and adult life, and furthering their ability to live full and independent lives. *Amici* organizations have extensive experience and nationally recognized expertise in the interpretation of the Individuals with Disabilities Education Act ("IDEA" or "Act") and other disability rights laws. Each organization has given counsel permission to file this amicus brief on their behalf.

Based on their extensive experience in this area of law, *Amici* believe that this appeal presents an issue that is of critical importance to students with disabilities in the Fifth Circuit, but which is not directly addressed by the Appellant: the effect of the Supreme Court's recent holding in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), on this Court's existing standard for Individuals with Disabilities Education Act ("IDEA") compliance as set forth twenty years ago in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997).

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center"), is a non-profit legal advocacy organization that has been dedicated to advancing the rights of people with disabilities, including mental disabilities, for over

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *Amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

four decades. Ensuring that children with disabilities are provided with a free and appropriate public education, as mandated by the IDEA, is a central part of the Bazelon Center's mission.

Disability Rights Texas ("DRTx") is the federally designated legal protection and advocacy agency for people with disabilities in Texas, and a registered 501(c)(3) nonprofit organization. DRTx's mission is to help people with disabilities understand and exercise their rights under the law and ensure their full and equal participation in society. DRTx accomplishes its mission by providing direct legal assistance to people with disabilities, protecting the rights of people with disabilities through the courts and justice system, and educating and informing policy makers about issues that impact the rights and services for people with disabilities. A significant portion of DRTx's work is representing students with disabilities and their families throughout the state of Texas to secure appropriate special education services from public schools.

Disability Rights Mississippi ("DRMS") is the federally designated legal protection and advocacy organization for people with disabilities in Mississippi, and a registered 501(c)(3) nonprofit organization. DRMS's mission is to advocate for the legal rights of people with disabilities and advocate for their full inclusion in all facets of society and their communities. DRMS provides direct legal representation to people with disabilities, training and educational programs on the rights of people with disabilities under state and federal law, and works to strengthen policies and

programs that serve people with disabilities in the state. DRMS provides information and direct representation to children with disabilities across the state of Mississippi to ensure their access to a free and appropriate public education in the least restrictive environment possible.

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") and Client Assistance Program ("CAP") agencies located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories, with a Native American Consortium affiliate located in the Four Corners region. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN provides to its members training and technical assistance, legal support, and legislative advocacy. It works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Education-related cases under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act make up a large percentage of the P&A/CAP system's caseload, with over 10,000 such matters handled in the most recent year for which data is available.

The National Center for Learning Disabilities ("NCLD") is a parent-founded and parent-led non-profit organization. NCLD's mission is to advocate for, and

empower those with learning and attention issues so that every individual possesses the academic, social and emotional skills needed to succeed in school, at work, and in life. NCLD has more than 40 years of experience disseminating essential information, promoting research and effective programs, and advocating for policies to protect and strengthen educational rights and opportunities. On behalf of 15 nonprofit partners, NCLD manages and operates Understood.org – a free, comprehensive resource that provides 2 million parents per month with personalized resources, daily access to experts, interactive tools, and a supportive community. NCLD also implements national campaigns to advance systemic change, engages policymakers at all level of government, and leads knowledge-building initiatives to build consensus around best practices for children and adults with learning and attention issues.

The Advocacy Center of Louisiana ("AC") is the federally designated legal protection and advocacy organization for people with disabilities in Mississippi, and a registered 501(c)(3) nonprofit organization. AC has authority to pursue legal and administrative remedies to protect and advocate for the rights of persons with disabilities. Like many other protection and advocacy organizations, AC considers that an integral part of its work involves educating policy makers about issues that impact the rights and services for people with disabilities. Also, like many other protection and advocacy organizations, every year AC provides assistance to hundreds of students with disabilities and their families throughout Louisiana in order to ensure

that they are provided with a free appropriate public education in the most integrated setting.

The National Center for Youth Law ("NCYL") is a private, non-profit organization that uses the law to help children in need nation-wide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities necessary for healthy and productive lives. NCYL provides representation to children and youth in cases that have a broad impact and has represented many children with disabilities in litigation and class administrative complaints to ensure their access to appropriate and non-discriminatory services. NCYL engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL pilots collaborative reforms with state and local jurisdictions across the nation to improve educational outcomes of children in the foster care and juvenile justice systems, with a particular focus on improving education for system-involved children with disabilities.

The Association of University Centers on Disabilities ("AUCD") is a nonprofit membership association of 130 university centers and programs in each of the fifty States and six Territories. AUCD members conduct research, create innovative programs, prepare individuals to serve and support people with disabilities and their families, and disseminate information about best practices in disability programming, including educational instruction from preschool to postsecondary education.

The Lawyers' Committee for Civil Rights Under Law, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The mission of the Lawyers' Committee is to secure equal justice under law, through the rule of law, targeting in particular the inequities confronting African-Americans and other racial and ethnic minorities. The principal mission of the Educational Opportunities Project at the Lawyers' Committee is to ensure that all children have access to quality educational opportunities and to enforce civil rights protections for all students. The Educational Opportunities Project achieves its mission by advocating on behalf of students of color and students with disabilities though litigation, public policy advocacy, and know your rights trainings. The Committee is interested in ensuring a robust application of *Endrew F.'s* higher standard for providing services and support to students with disabilities because students of color can greatly benefit from the demanding educational standards set by *Endrew F.* Students of color are disproportionately classified as needing special education services in many jurisdictions and encounter unnecessary school push-out. Students of color also face a disproportionate risk if districts fall short of the higher bar set by *Endrew F.* by denying such students the services and supports they need to make meaningful progress. The markedly higher standard set by *Endrew F.* provides a particularly vital tool for students of color to advocate for the services they require to excel in school and prevent unnecessary school push-out.

SUMMARY OF ARGUMENT

Before the Court are serious questions about whether pursuant to the IDEA, the Houston Independent School District offered an adequate educational plan for CJ, an autistic child. Resolution of those questions necessarily begins with this Court first establishing what level of educational benefits the IDEA requires.

The district court below built its entire analysis atop the incorrect conclusion that the Supreme Court's recent holding in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017), has no effect on this Court's existing standard for IDEA compliance as set forth twenty years ago in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 248 (5th Cir. 1997):

> The four-factor test from *Michael F* remains valid in this circuit to assess whether a student with disabilities received a free appropriate public education.

Dist. Op. at 7. The district court based this threshold determination, from which all of its subsequent determinations flowed, on this Court's unpublished decision in *C.G. v. Waller Indepependent School Distrist*, 697 F. App'x 816 (5th Cir. 2017), which the Court heard oral argument on before the Supreme Court issued its decision in *Endrew F.*

This Court, however, has yet to substantively and precedentially address the impact of the Supreme Court's decision on this Court's approach. Both to correctly resolve the issues presented in this case and to align this Court's precedent with the Supreme Court, this Court should do so now. Otherwise, district courts—as here—

will continue applying an incorrect standard that fails to comply with the Supreme Court's mandate, thereby denying school children with disabilities the educational benefits to which they might otherwise be entitled.[2]

Regardless of what the correct outcome should be in the instant case, the district court plainly erred in concluding that the factors set out in this Court's decision in *Michael F.* are consistent with the Supreme Court's decision in *Endrew F.* They are not. Instead, *Endrew F.* establishes a new, higher standard with which this Court's precedent must now conform.

For decades, this Court and many others have held that schools provide students a "free appropriate public education" ("FAPE"), thus complying with the IDEA, by providing them some educational benefits that were merely more than *de minimis*. The Supreme Court's decision in *Endrew F.* changed that by declaring a new, more robust, standard: schools must offer educational programs for qualifying students that are "appropriately ambitious," focused on "challenging objectives," and "reasonably calculated to enable a child to make progress appropriate in light of the

[2] That the Appellant did not directly address the legal arguments raised in this brief is of no consequence. This Court is permitted to consider purely legal arguments first raised by amicus. *See Bridges v. City of Bossier*, 92 F.3d 329, 334 n.8 (5th Cir. 1996) (holding that issue raised for first time by *Amic*i on purely legal issue was properly before Court). Indeed, it is the very role of *Amici* "to bridge gaps in issues initially and properly raised by parties." *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1208 (5th Cir. 1991); *see also* 5th Cir. R. 29.2 (requiring *Amici* to "avoid the repetition of facts or legal argument contained in the principal brief . . . and focus on points . . . no adequately discussed" therein).

child's circumstances." *Endrew F.*, 137 S. Ct. at 1000–1001. Otherwise, the school has denied the student a FAPE and the student is entitled to relief.

Much more than a slight adjustment, this new standard marks a significant course correction and is an unequivocal rejection of this Court's prior case law, which had universally held that some educational benefits above a trivial level were sufficient. Although this Court's holdings have made passing reference that the IDEA requires "meaningful" educational benefits, that language amounted—in application—to nothing more than superficial gloss that collapsed back into the same "more than *de minimis*" standard the Supreme Court has now rejected.

Nevertheless, the district court below continued to apply the old, now overruled, approach and held that the educational plan at issue need only provide more than *de minimis* benefits. The district court plainly erred and this Court must now remand this matter back to the district court.[3]

[3] Though this matter must be remanded to the district court in light of its error of law, *Amici* take no position as to whether the specific plan at issue satisfies the FAPE requirement. That is a matter that should be decided by the district court in the first instance.

ARGUMENT

I. The Supreme Court's Decision in *Endrew F.* Resolved Disagreement Among the Circuits About the Level of Educational Benefits Required by the IDEA.

Congress enacted the IDEA in response to the concern that many children with disabilities "were either totally excluded from schools" or were "sitting idly in regular classrooms until they could drop out." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 179 (1982) (internal quotation marks and citation omitted). But the IDEA did not contain any language "prescribing the level of education to be accorded handicapped children." *Id.* at 189. In the absence of statutory direction and with limited Supreme Court guidance, circuit courts developed different, inconsistent standards for the level of educational benefits the IDEA requires.

The Supreme Court's decision in *Endrew F.* resolved the disagreement among the circuits. The Tenth Circuit, relying on isolated statements in the decades-old *Rowley* decision, had long held the IDEA required schools to provide only "some educational benefit" to students with disabilities that was "merely more than *de minimis*." *Endrew F., v. Douglas Cnty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015) (internal quotation marks and citation omitted). The Supreme Court rejected this approach, holding that the IDEA instead required the school offer an IEP "reasonably calculated to enable a child to make progress appropriate in light of the

child's circumstances." *Endrew F.*, 137 S. Ct. at 999. The Supreme Court found the Tenth Circuit's approach insufficient, holding that a school applying the merely more than *de minimis* standard "can hardly be said" to be "offer[ing] an education at all." *Id.* at 1001.

Instead, the IDEA requires a substantive standard for evaluating an IEP that is "markedly more demanding than the 'merely more than *de minimis*' test applied by the Tenth Circuit." *Id.* at 1000. An educational program must be "appropriately ambitious in light of [a child's] circumstances" and give a child the chance to meet "challenging objectives." *Id.* This substantive standard is required in order for it to be consistent with "the purpose of the IDEA, an 'ambitious' piece of legislation." *Id.* at 999.

For most children, schools must provide a special education reasonably calculated to allow that child to advance from grade to grade. *Id.* at 1000.[4] Where grade-level achievement is "not a reasonable prospect for a child," goals must still be "appropriately ambitious," and the child must have the chance to meet "challenging objectives," that promote further education, work, and independence. *See id.* Progress toward "appropriately ambitious" goals is the touchstone of a court's IEP analysis. *Id.* at 999-1000. Indeed, "a substantive standard not focused on student

[4] *Endrew F.* does not foreclose the prospect that, for some children, "appropriately ambitious" goals may exceed grade level expectations. *See* 137 S. Ct. at 1000 n.2 (quoting *Rowley*, declining to hold that "every [child with a disability] who is advancing from grade to grade . . . is automatically receiving a [FAPE]").

progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Id.* at 999.

In short, *Endrew F.* raised the bar. It is no longer sufficient for an IEP to offer only "some educational benefit" just beyond trivial levels. Yet, the district court below continued to apply this approach, holding that C.J.'s IEP need only provide benefits that were "more than *de minimis*," Dist. Op. at 19, failing to recognize (or even meaningfully consider) that the Supreme Court has rejected that approach.

II. This Court Applies the Same Standard as the Now-Overruled Tenth Circuit.

At first blush it may appear that the Fifth Circuit's existing standard is different—and, indeed, more demanding—than the Tenth Circuit standard the Supreme Court rejected. Upon closer review, however, any perceived differences are merely cosmetic.

The precedential case in this Circuit is *Michael F.*, 118 F.3d at 248, which set effectively the same standard as the Tenth Circuit. In *Michael F.* this Court held that the IDEA only guarantees a "basic floor of opportunity consisting of . . . instruction . . . designed to provide educational benefit." *Id.* at 248 (internal quotation marks and citations omitted). Applying only slightly different language than the Tenth Circuit, this Court also defined the required level of educational benefits under the IDEA as only more than *de minimis*. *Id.* (level of benefits "cannot be a mere modicum or *de minimis* . . . .") (citation omitted).

This Court, however, further directed that the benefits the "IEP is designed to achieve must be 'meaningful.'" *Id.* (citation omitted).[5] At first blush it may appear that this reference to "meaningful" benefits elevates this Court's standard above that of the Tenth Circuit and perhaps even brings it into alignment with the Supreme Court's holding in *Endrew F.* Closer scrutiny, however, reveals that the "meaningful benefit" is circularly defined as meaning only "more than *de minimis*" benefits, which leads back to the standard the Supreme Court has soundly rejected. That additional, seemingly more robust language thus amounts to empty rhetoric.

Specifically, this Court derived the "meaningful benefit" language from the Third Circuit's decision in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988).[6] *Id.* at 248 & n.9. Just as in *Michael F.*, however, the Third Circuit in *Polk*, held that the educational benefit provided to a student with disabilities is "meaningful" under the IDEA so long as they are more than *de minimis*. *See Polk*, 853 F.2d at 182 ("The use of the term "meaningful" indicates that the [Supreme Court in *Rowley*] expected more than *de minimis* benefit."); *see Oberti v. Bd. of Edu. Clementon Sch. Dist.*, 995 F.2d 1204, 1213 (3rd Cir. 1993) ("This court in turn interpreted *Rowley* to require the state to offer children with disabilities individualized education programs

[5] *Michael F.* also introduced the four factors that serve as "indicators" of whether an IEP is reasonably calculated to provide benefits, which is discussed in more detail below.

[6] *Polk* in turn drew the term "meaningful" from *Rowley*, where the Court held that the IDEA required that students with disabilities receive "meaningful" "access" to education. *Rowley*, 458 U.S. at 192, 201.

that provide more than a trivial or *de minimis* educational benefit." (citing *Polk*, 853 F.2d at 180–185)).

The Third Circuit has since abandoned this errant interpretation, candidly acknowledging that the "more than a trivial educational benefit" standard was insufficient to provide the required level of benefits.[7] *See, e.g.*, *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3rd Cir. 2006) ("At one time, we only required that a child's IEP offer more than a trivial or *de minimis* educational benefit; more recently, however, we have squarely held that the provision of merely more than a trivial educational benefit does not meet the meaningful benefit requirement of *Polk*.") (internal quotation marks and citations omitted). This Court, however, has never made this necessary course correction.

This is not simply about a choice of words, but instead goes directly to the substantive application of this incorrect standard. In *Michael F.*, the Court did not hold that the student's IEP's benefits were sufficient because they were "meaningful" as that term might be otherwise understood. Rather, the Court affirmed the IEP because the school district had demonstrated that the IEP provided more than a modicum of benefits. It held: "objective indicia of educational benefit identified by the district court are significant . . . and was reasonably calculated to, and in fact did *produce more than a modicum of educational benefit* . . . ." *Michael F.*, 118 F.3d at 253

[7] *Amici* takes no position on whether the Third Circuit's "meaningful benefit" standard is consistent with *Endrew F.*

(emphasis added). Thus, the court held that the benefits were meaningful because they produced more than a modicum of educational benefits—essentially conflating the standard in a manner wholly consistent with the now-rejected Tenth Circuit approach.

This now discarded approach still infects this Court's precedent. While mechanically reciting the "meaningful" language in most IDEA cases, neither this Court nor its lower courts have ever held that language to demand *anything* more than just above trivial levels. In fact, no court in this Circuit has held that an IEP offered more than *de minimis* educational benefits yet nevertheless failed the IDEA because the benefits were still not meaningful.[8] Instead, this Court and its lower courts have consistently found IEPs sufficient because they offered "some educational benefits" that were just more than trivial. For example:

- *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012) ("rather, the question is whether [the student] demonstrated *more than de minimis positive academic and non-academic benefits*.") (citing *Michael F.*);
- *Houston Indep. Sch. Dis. v. V.P.*, 582 F.3d 576, 590 (5th Cir. 2009) ("HISD did not need to provide V.P. with the best possible education or one that will maximize her potential; however, *the education benefits it provides cannot be de minimis*.") (citing *Michael F.*) (cited by the district court below);

[8] In *T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3rd Cir. 2000) (Alito, J.), then-Judge Alito engaged in the sort of analysis one would expect if meaningful benefits were not just more than de minimis ones. There, the Third Circuit held that the district court "applied the incorrect legal standard" when it focused its review on whether the benefits conferred were nontrivial but did not consider "whether the Board's IEP would confer a *meaningful* education benefit." *Id.* (emphasis in the original).

- *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2008) ("[T]he IDEA is aimed at providing disabled children 'access' to a public education, though that access must still "be sufficient to confer *some educational benefit* upon the handicapped child.");

- *E.M. v. Lewisville Indep. Sch. Dist.*, 15-CV-00564 (ALM), 2018 U.S. Dist. LEXIS 50237, at *46 (E.D. Tex. Mar. 27, 2018) (failing to cite *Endrew F.*, instead relying on *Michael F.* to hold that "the core of the IDEA is to provide . . . some meaningful educational benefits more than *de minimis*");

- *Lauren C. v. Lewisville Indep. Sch. Dist.*, 2017 U.S. Dist. LEXIS 101389, at *30 (E.D. Tex. June 29, 2017) (failing to cite *Endrew F.*, instead relying on *Michael F.* to hold that the "core of the IDEA is to provide . . . only the 'basic floor of opportunity,' and some meaningful educational benefits more than *de minimis*");

- *Shafi v. Lewisville Indep. Sch. Dist.*, 2016 WL 7242768, at *9 (E.D. Tex. Dec. 15, 2016) ("The core of the IDEA is to provide . . . some meaningful educational benefits more than *de minimis*.");

- *B.B. v. Catahoula Parish Sch. Dist.*, 2013 WL 5524976, at *13 (W.D. La. Oct. 3, 2013) ("It is not necessary for a child to improve in every area to receive an educational benefit; rather, a child's improvements must be more than trivial.") (citing *Bobby R.*);

- *R.C. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718, 736 (N.D. Tex. 2013) ("the core of the IDEA is to provide access to educational opportunities, and requires only the basic floor of opportunity and *some meaningful educational benefits more than de minimis*, not a perfect education . . . ." (emphasis added));

- *Clear Creek Indep. Sch. Dist. v. J.K.*, 400 F. Supp. 2d 991, 996 (S.D. Tex. 2005) (finding an IEP sufficient because the parents had "not shown that [the student] received *no benefit* from the training provided" and that "[t]he standard for an IEP is whether the instruction and services provide *some benefit* to the student." (emphases added)).

The Northern District of Texas's decision in *K.C.* illustrates the point. In no uncertain terms it held:

> Courts that have used the term "meaningful" in interpreting *Rowley* are simply acknowledging that the Supreme Court meant what it said—

> disabled children must receive a fair appropriate public education *with some benefit*. That is, a child's IEP must be likely to produce *progress that is neither trivial or de minimis* and certainly not produce regression.

K.C. v. Mansfield Indep. Sch. Dist., 618 F. Supp. 2d 568, 576 (N.D. Tex. 2009) (emphasis added). Further demonstrating the hollowness of the "meaningful benefits" language, on occasion this Court and its lower courts have omitted any reference to it, instead articulating the standard as one that requires only benefits above *de minimis*. *See e.g.*, *R.H. v. Plano Indep. Sch. Dist.*, 607 F.3d 1003, 1008 (5th Cir. 2010) ("The educational benefit, however, cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement." (internal quotation marks omitted)). Clearly, in this Circuit "meaningful" benefit means nothing more than "just above *de minimis* progress" —a now defunct standard of analysis, which often can lead to "hardly . . . an education at all," *Endrew F.*, 137 S. Ct. at 1001.

In sum, as has the Tenth Circuit, this Court has "long subscribed to the *Rowley* Court's 'some educational benefit' language in defining a FAPE, and interpreted it to mean that 'the educational benefits mandated by the IDEA must be merely more than *de minimis*.'" *Endrew F.*, 798 F.3d at 1338. As the Supreme Court now requires educational benefits "markedly more demanding than that," this Court's prior decisions, including *Michael F.* and its progeny, have been overruled to the extent they are inconsistent with this standard, and should no longer be followed.

III. At a Minimum, This Court Should Clarify Its Standard in Light of *Endrew F.*

As the above demonstrates, this Court and its lower courts have routinely held that educational benefits satisfy the FAPE requirement of the IDEA so long as they provide a benefit above a *de minimis* level, an approach now flatly rejected by the Supreme Court.

Additionally, and contrary to the district court's assertion, this Court has yet to address substantively *Endrew F.* The District Court stated that "[t]he Fifth Circuit, however, has found that *Michael F.* is consistent with *Endrew F.*," citing to this Court's unpublished decision in *C.G. v. Waller Independent School District*, 697 F. App'x 817 (5th Cir. 2017). That is incorrect. The *Waller* panel did not hold, or even state, that the *Michael F.* standard is consistent with *Endrew F*—it did not because it could not, as they are markedly different. Rather, the *Waller* panel held that the district court's *analysis* of the facts "[was] fully consistent with [the *Endrew F.*] standard." *Id.* at 819. Nowhere, however, does the *Waller* panel articulate what *Endrew F.* required. It only holds that the particular IEP before it satisfied *Endrew F.* It otherwise provides no guidance to lower courts. Regardless, because that decision is not precedential, it is not binding on this panel or on lower courts and is of limited value. *See* 5th Cir. R. 47.5.4.[9]

[9] In addition, this Court did not address the substantive requirements of *Endrew F.* in *Dallas Independent School District v. Woody*, 865 F.3d 303, 317–318 (5th Cir. 2017), which only addressed the question of whether the school district had failed to timely offer a FAPE—not

Thus, even if this Court were to disagree that as a matter of law *Endrew F.* overruled its prior decisions, it should clarify its standard for determining the adequacy of a student's special education, in order to bring it into compliance with the Supreme Court's mandate. In order to do so, *Michael F.* should be modified and lower courts instructed that they should approach pre-*Endrew F.* authority cautiously, ensuring that if they choose to rely on it, they do so in a manner that is consistent with *Endrew F.*

Bringing *Michael F.* into compliance with *Endrew F.* requires modifying how the four indicators are weighed and what those indicators analyze. As described above, the *Michael F.* court held there were four factors that served as "indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA." 118 F.3d at 253. Those factors are: (1) whether the [student's] "program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." *Id.* Though this Court has acknowledged that the fourth factor is a critical factor, *see R.P.*, 703 F.3d at 813-14, it has long held that these four factors need not be weighed in any particular

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whether the IEP offered the appropriate level of benefits, noting that the school district did not offer "any educational benefit upon [the student] at all." *Id.* at 317.

manner. *See, e.g.*, *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 293 (5th Cir. 2009) ("We have never specified precisely how these factors must be weighed.").

All four *Michael F.* factors are important in assessing the adequacy of a student's special education; for the most part, they are clearly required by the IDEA.[10] But the Supreme Court now has directed lower courts to ask whether the student is making progress towards "appropriately ambitious" goals. Indeed, any other standard "would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Endrew F.*, 137 S. Ct. at 999.

It is, therefore, the fourth *Michael F.* factor that must be of prime importance in order for the test to be consistent with this direction. An IEP that fails the fourth *Michael F.* factor does not provide a FAPE. This makes sense, as the other three factors, while required by the IDEA and important considerations in their own right, focus more on *how* or *where* a school provides special education to a child, and not whether the school has set, and helped the child meet, appropriately ambitious goals. Thus, an IEP that is individualized, administered in the least restrictive environment, and the product of extensive collaboration cannot satisfy the FAPE requirement unless the IEP gives the child the opportunity to meet "appropriately ambitious"

[10] *See, e.g.*, 20 U.S.C. §§ 1401(29), (14) (special education must include "*specially* designed" instruction that meets a child's "*unique* needs," through an "*individualized* education program"(emphases added)); *id.* at § 1412(a)(5)(A) (special education must be provided in the least restrictive environment; to the maximum extent appropriate, students with disabilities must be educated with non-disabled students in regular classrooms); *id.* at § 1414(d) (describing stakeholder members of IEP team; requiring that school have student's IEP in place at beginning of school year, and revised at least annually).

goals and "challenging objectives," and is demonstrated by the child's timely progress, as envisioned in the IEP, toward those goals and objectives. An IEP that sets the same goals year after year would not pass muster and be tantamount to letting that child sit "idly . . . awaiting the time when they [are] old enough to drop out." *Endrew F.*, 137 S. Ct. at 999 (internal quotation marks and citation omitted).[11] The IDEA demands much more.

Furthermore, the factors themselves must be modified in light of *Endrew F.* Nowhere does any factor consider, as is now required, whether the school has set appropriately ambitious goals for the student and whether the student has made progress towards those goals.

Indeed, the only factor that conceivably touches on this—but which must now be modified—is the fourth factor. As currently articulated this factor requires only a positive benefit, which is tantamount to an improper "more than *de minimis*" level of benefits. Indeed, it is in the analysis of this factor that this Court often cites to and relies upon *Michael F.*'s "more than *de minimis*" standard. *See, e.g.*, *R.P.*, 703 F.3d at 814. Now that the Supreme Court has expressly rejected that approach, this factor must be modified to incorporate the dictates of *Endrew F.* It must be understood in terms of the Supreme Court's requirement for schools to provide an IEP that sets

[11] *See also Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, No. 12-cv-2620-LTB, 2018 WL 828019, *7 (D. Colo. Feb. 12, 2018) (on remand from Supreme Court and Tenth Circuit, holding that IEP "carrying over the same goals from year to year" evidenced only "minimal" progress not satisfying IDEA).

appropriately ambitious goals towards satisfying challenging objectives.

It must also be understood in terms of the Supreme Court's requirements for schools educating students for whom advancement from grade to grade may not be an appropriate benchmark of progress. Through *Endrew F.*, the Supreme Court made clear the importance of the IDEA's central goal of "progress" toward appropriately ambitious goals for every child. 137 S. Ct. at 999. For most students, what "progress" means is unambiguous—advancement from grade to grade. But in Endrew's case, as here, his unique needs required some alternate achievement benchmarks. The Court admonished that whatever those may be, Endrew's educational program must be as ambitious as advancement from grade to grade is for most children in the regular classroom. The goals may differ, but every child "should have the chance to meet challenging objectives." *Id.* at 1000.[12]

To be clear, *Endrew F.* did not reject, and can be read to support, this Court's long-standing approach of examining a student's actual progress in evaluating an IEP. In *Michael Z.*, for example, this Court held that the district court did not err when it analyzed whether the student had made progress. 580 F.3d at 293–95. Such positive

[12] *Endrew F.* may also require modification of the analysis under the first *Michael F.* factor (whether the program is individualized). While retaining its emphasis on individualization, this factor should incorporate the central lesson of *Endrew F.,* i.e., that regardless of the unique circumstances of any individual child, they must not be warehoused or condemned to repetitive educational plans that do not include "appropriately ambitious" goals and measures of progress or benchmarks for achievement. Indeed, a school district cannot set an *appropriately* ambitious goal for a student without considering the student's unique circumstances—including the student's "potential for growth." 137 S. Ct. at 999.

outcomes "can signal that an IEP is appropriate under the IDEA . . . ." *S.H. v. Plano Indep. Sch. Dist.*, 487 F. App'x 850, 858 (5th Cir. 2012). *Endrew F.* does not disturb that approach and instead affirms the importance of progress in substantively analyzing an IEP. *Endrew F.*, 137 S. Ct. at 999 ("The IEP must aim to enable the child to make progress.") ("A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.").

After *Endrew F.*, a student's timely progress towards an IEP's appropriately ambitious goals and challenging objectives would evidence an appropriate IEP. Thus, regardless of whether *Michael F.* is determined to be overruled, as it should be, or modified, as it must be, progress remains a critical component to analyzing the adequacy of an IEP.

IV. The District Court Explicitly Applied the Same Standard the Supreme Court Rejected.

The district court applied the *Michael F.* standard and other pre-*Endrew F.* precedents to hold that the school district offered an appropriate IEP by providing C.J. educational benefits that were only just above trivial. In no uncertain terms, the court said "[t]he benefits must be more than *de minimis*." Op. at 19. This is the same standard that the Supreme Court explicitly rejected in *Endrew F.* Providing a "meaningful" benefit, it held, "requires a school district to provide a basic floor of opportunity that consists of access to specialized instruction . . . designed to provide

the student with educational benefit." *Id.* (internal quotation marks and alterations omitted) (citing *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 396 (5th Cir. 2012) (IDEA's purpose is to "confer *some* educational benefit upon the handicapped child") (emphasis added and other emphases omitted)). Though ultimately the district court said the benefits were "meaningful," its articulation of the standard makes that conclusion suspect. To the district court, as was correct pre-*Endrew F.*, the benefits were meaningful if they provided some benefit. That is no longer the standard and, thus, the district court clearly erred.

It is telling that *Endrew F.*'s requirement that each child be given goals that are appropriately ambitious in light of a child's circumstances is not acknowledged in the district court's opinion. Indeed, the district court never considered whether the IEP was sufficiently "challenging" or "ambitious." Its failure to include that language signals that the district court articulated and applied the wrong standard.

Because the district court applied the wrong standard, its analysis is tainted and must be vacated and remanded for further consideration under the proper standard. Regardless, this Court should clarify that the appropriate standard to apply is one consistent with *Endrew F.*

CONCLUSION

Amici respectfully requests that this Court hold that *Michael F.* and its progeny are overruled, to the extent they are inconsistent with *Endrew F.*, and remand this matter to the district court for application of a standard consistent with *Endrew F.*

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond.

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I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on April 9, 2018.

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