No. 18-1780

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

R.F., et al.
Plaintiffs-Appellants,

v.

CECIL COUNTY PUBLIC SCHOOLS,
Defendant-Appellee.

On Appeal from the United States District Court
For the District of Maryland

AMICUS CURIAE BRIEF OF THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW IN SUPPORT OF APPELLANT AND FOR REVERSAL OF THE DISTRICT COURT BELOW

Ira A. Burnim
Lewis Bossing
The Judge David L. Bazelon
Center For Mental Health Law
1101 15th St., N.W., Suite 121
Washington, D.C.
(202) 476-5730

Richard D. Salgado
Counsel of Record
Dentons US LLP
2000 McKinney Ave., Ste. 1900
Dallas, Texas 75201
(214) 259-0900

Peter J. Anthony
A. David Mayhall
Dentons US LLP
1900 K St., N.W.
Washington, D.C. 20006
(202) 496-7961

Attorneys for Amicus Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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Signature: /s/ Richard Salgado Date: September 17, 2018

Counsel for: Amicus

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I certify that on September 17, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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STATEMENT REGARDING ORAL ARGUMENT

Amicus the Judge David L. Bazelon Center for Mental Health Law, which is dedicated to protecting the rights of disabled individuals throughout the Fourth Circuit and elsewhere—requests oral argument to help the Court resolve the novel and important issues presented here.

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INTEREST OF AMICI CURIAE[1]

The *Amicus* organization is a national organization 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. The *Amicus* organization has extensive experience and nationally recognized expertise in interpreting the Individuals with Disabilities Education Act ("IDEA" or "Act") and other disability rights laws. The organization has given counsel permission to file this amicus brief on its behalf.

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center"), is a non-profit legal advocacy organization dedicated to advancing the rights of people with disabilities, including mental disabilities, for over four decades. Ensuring that children with disabilities are provided with a free and public education, as mandated by the IDEA, is a central part of the Bazelon Center's mission.

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *Amicus* 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 *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Determining whether Cecil County Public Schools offered an adequate educational plan for R.F. begins with two questions that are "of critical importance to the life of a disabled child," *Endrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 1001 (2017).

First, what level of educational benefits does the IDEA require? The Supreme Court answered this question in *Endrew F.* In doing so, the Supreme Court rejected this Court's prior "merely more than *de minimis*" standard that set the bar too low for qualified students. Instead, the Court declared a new, more demanding, standard for what qualifies as a "free appropriate public education" ("FAPE"): 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 child's circumstances." *Endrew F.*, 137 S. Ct. at 1000–1001. Yet, this Court has not yet substantively or precedentially addressed how *Endrew F.* impacted its precedents. As a result, the district court applied an outdated and misapplied substantive standard that sets the bar inappropriately low for students such as R.F. In doing so, it ultimately affirmed a hearing officer's holding that "some progress" towards "very basic goals" was enough to offer a FAPE. This was in error.

Second, how much deference should a district court give to the state administrative processes? The Supreme Court also answered that question in *Endrew F.*

There, the Supreme Court endorsed a limited notion of deference that requires school authorities to be able to give a "cogent and responsive" explanation for how the plan they offer provides a qualifying student a FAPE. The federal court then decides whether that is so. This Court, by contrast, has previously endorsed a uniquely high level of deference, presuming all school authorities' regularly made decisions to be correct, even on the legal question of whether a school has met the requirements of the IDEA, a federal statute. The district court here did that by explicitly deferring to the Administrative Law Judge's ("ALJ's") conclusions of law. This is error and this Court should both reexamine the deference it gives to the state administrative process and reverse and remand the district court on this basis.

Finally, the district court also erred in holding that the IDEA requires only "equal access"—a proposition that it, and at least one other district court to date, derive from inapposite dicta in *M.L. v. Smith*, 867 F.3d 487, 495 (4th Cir. 2017). The Supreme Court in *Endrew F.* made clear that the IDEA requires much more than just equal access and this Court should so hold so that future district courts do not continue to cite to and rely on this inaccurate proposition of law.

It is necessary that this Court substantively address these questions here to provide the proper guidance for future district courts and to reverse the decision below so that R.F. may be able to receive the education the IDEA entitles her to.

ARGUMENT

I. The Supreme Court's Decision in *Endrew F.* Sets the Standard For the Level of Educational Benefits Required by the IDEA.

The Supreme Court held in *Endrew F.* that to offer a student a FAPE under the IDEA, a school district must provide that child an IEP that gives the opportunity to meet "appropriately ambitious" goals and "challenging objectives." 137 S.Ct. at 1000. The child's timely achievement of those goals and objectives demonstrates their appropriateness. Anything less defeats the purpose of the IDEA, which Congress enacted to address its 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 omitted); *see also* 20 U.S.C. § 1400(c)(5), (d)(1)(A) (encouraging "high expectations" for students with disabilities, to prepare them for "further education, employment, and independent living").

The Supreme Court's holding resolved a disagreement among the circuits that arose from a lack of statutory direction and limited Supreme Court guidance in *Rowley*. The Tenth Circuit, relying on isolated statements in *Rowley*, had long held that the IDEA required schools to provide only "some educational benefit" that is "merely . . . more than *de minimis*" to students with disabilities. *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 requires

schools to 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. Overruling the Tenth Circuit, the Supreme Court held 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" and give a child with a disability the chance to meet "challenging objectives." *Id.* This substantive standard is required for a child's special education to match "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.[2] *Id.* at 1000. When grade-level achievement is "not a reasonable prospect for a child," however, goals must still be "appropriately ambitious," and the child must have the chance to meet "challenging objectives" that promote more education, work, and independence. *Id.* Progress toward

[2] The Court's insistence on high expectations, including grade level advancement, for students with disabilities is well-grounded in federal law. Congress expressly linked the IDEA to the "No Child Left Behind Act," the 2001 reauthorization of the Elementary and Secondary Education Act ("ESEA"), which requires States to adopt "challenging academic content standards" for all students, including those with disabilities. 20 U.S.C. § 6311 (b)(1)(A)-(D); *see also* 20 U.S.C. § 6311(b)(2) and (c)(4)(A). Further, *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]").

"appropriately ambitious" goals is the touchstone of a court's IEP analysis. *Id.* at 999-1000. "[A] substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Id.* at 999.

In sum, *Endrew F.* "raised the bar," *Z.B. v. District of Columbia*, 999 F.3d 515, 517 (D.C. Cir. 2018), clarifying it is not enough for an IEP to offer only "some educational benefit." Rather, the Supreme Court demands that a child's special education be held to a "markedly more demanding" standard. *Endrew F.*, 137 S. Ct. at 1000.

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

In the past, this Court indisputably applied the same "merely more than *de minimis*" standard that the Supreme Court rejected in *Endrew F.* *See O.S. v. Fairfax Cnty. Sch. Bd.*, 804 F.3d 354, 359–60 (4th Cir. 2015) (holding that "in this circuit, the standard remains the same as it has been for decades: a school provides a FAPE so long as a child receives some benefit, meaning a benefit that is more than minimal or trivial, from special instructions and services.").

The Court has since acknowledged the conflict between this Court's pre-existing standard and *Endrew F.*, but did not resolve it. *See M.L. v. Smith*, 867 F.3d 487, 495 (4th Cir. 2017), *cert. denied* 138 S. Ct. 752 (2018) (recognizing Court's prior FAPE standard "is similar to that of the Tenth Circuit, which was overturned by *Endrew F.*"). The *M.L.* court declined to "delve into how *Endrew F.* affects [this Court's] precedent" because

the "merely more than *de minimis*" standard was not at issue. *Id.* Instead, the only dispute before the Court was whether the IDEA required a school district to provide cultural or religious instruction. *Id.* at 496. The *M.L.* parties also did not raise *Endrew F.* before the ALJ, the district court, or this Court. *Id.*

Because it was unnecessary to resolve that case, the *M.L.* Court's discussion of *Endrew F.* was dicta that does not carry the force of law and is only persuasive authority that might not be followed. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342 n.9 (4th Cir. 1996) (explaining dicta is a statement not essential to the holding and which may be followed if sufficiently persuasive but is not controlling). Technically, therefore, district courts may still view themselves as free to continue applying the "merely more than *de minimis*" precedents.

It is imperative that this Court establish in a published, precedential opinion, that its former "merely more than *de minimis*" standard is no longer good law and declare that the Supreme Court has overruled this Court's prior decisions applying that standard if they are inconsistent. The Court should also clarify that: an IEP does not provide a FAPE unless it is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances;" for most children progress toward "appropriately ambitious" goals means grade level advancement; and school districts must also set appropriately ambitious goals for children like R.F. not fully integrated into the

classroom and must make sure they are timely achieving those goals.[3] The Supreme Court demands nothing less.

III. Particularly After *Endrew F.*, This Court Should Revisit Whether a School District Offers a FAPE is a Finding of Fact That Is Entitled to Deference.

Congress empowers federal courts to resolve disputes under the IDEA and to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). In both *Rowley* and *Endrew F.*, the Supreme Court emphasized that this authority is not an invitation for federal courts to "substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206; *Endrew F.*, 137 S. Ct. at 1001. This deference to school authorities is "based on the application of expertise and exercise of judgment by school authorities." *Endrew F.*, 137 S.Ct. at 1001. After *Rowley*, federal circuit courts crafted a varied set of rules regarding the level and type of deference given to school authorities when reviewing state administrative decisions in IDEA cases.

This Court, however, is unique among its sister circuits because it provides an unusually high level of deference to state administrative decisions. *See, e.g.*, *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). If a state administrative finding of fact is regularly made, it is *prima facie* correct. This presumption of correctness goes

[3] To be clear, this Court's prior emphasis on the importance of actual progress, *see, e.g.*, *M.S. v. Fairfax Cnty. Sch. Bd.,* 553 F.3d 315, 326-27 (4th Cir. 2009), remains valid after *Endrew F.* As the Supreme Court repeatedly emphasized that an IEP must focus on actual progress, it has taken on increased importance after *Endrew F.*

far beyond what other circuits consider a factual finding and includes the ultimate question at issue in most IDEA cases—whether the school has offered the student a FAPE, as required by the IDEA. *See Doyle*, 953 F.2d at 105; *see also S.T. v. Howard Cnty. Public Sch. Syst.,* 627 F. App'x 225, 256 (4th Cir. 2011) ("Whether an IEP is sufficient to provide a FAPE is a question of fact."); *Cnty. Sch. Bd. v. Z.P.*, 399 F.3d 298, 309 (4th Cir. 2005) ("Whether an IEP is appropriate and thus sufficient to discharge a school board's obligations under the IDEA is a question of fact."). This turns district courts into essentially appellate courts that are circumscribed in their ability to, as the statute requires, decide legal questions and fashion what relief they deem appropriate. After *Endrew F.*, this Court should reevaluate this approach.

Every other Court of Appeals provides for a more robust, often de novo, review of IDEA cases either by providing for a more flexible level of deference or by holding that the ultimate question of whether a student has received a FAPE is a mixed question of law and fact. *See, e.g.*, *MS v. Regional Sch. Unit 27*, 829 F.3d 95, 105 (1st Cir. 2016) ("When faced with mixed questions of law and fact, such as whether an IEP is adequate or a student received a FAPE, 'our degree of deference depends on whether a particular determination is dominated by law or fact."); *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217 (2d Cir. 2012) ("Decisions involving a dispute over an appropriate educational methodology should be afforded more deference than determinations concerning whether there have been objective indications of progress."); *K.E. v. Indep. Sch. Dist. No.*

15, 647 F.3d 795, 804 (8th Cir. 2011) ("As we have already said, whether a school district has provided a student with a FAPE is a mixed question of law and fact."); *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 438 (9th Cir. 2010) (adopting First Circuit's standard); *CP v. Leon Cnty. Sch. Bd.*, 483 F.3d 1151, 1155 (11th Cir. 2007) ("whether an IEP provided FAPE is a mixed question of law and fact subject to de novo review."); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (holding that the district court may not defer to a hearing officer's decision interpreting IDEA standards because such a decision "raises an issue of statutory construction, a pure question of law that courts review de novo"); *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 849-50 (6th Cir. 2004) (holding that district courts should give deference to administrative fact findings, but that "the question of whether a child was denied a FAPE" is a "[m]ixed question[] of law and fact"); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 973-74 (10th Cir. 2004) (The district court "looks at the record of the administrative proceedings and decides, based on a preponderance of the evidence, whether the requirements of the IDEA are met."); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) ("we review de novo the appropriateness of an education program"); *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993) ("[T]he district court's review of the hearing officer's decision is virtually *de novo*."); *Lachman v. Ill. State Bd. of Ed.*, 852 F.2d 290, 293 (7th Cir. 1988) ("The district court's determination that the IEP proposed for Benjamin by the school district constituted a [FAPE] as required by the [IDEA] is founded on its application of the relevant provisions of the Act to the facts attendant to Benjamin's circumstance. We

review the determination of that mixed question of law and fact de novo."); *Town of Burlington v. Dep't of Educ. for Com. of Mass.*, 736 F.2d 773, 792 (1st Cir. 1984) ("[T]he court is free to accept or reject the [administrative] findings in part or in whole."); *Klein Indep. Sch. Dist. v. Hovem*, 745 F. Supp. 2d. 700, 706 (S.D. Tex. 2010) ("The decision whether a local district's IEP was appropriate under the IDEA is a mixed question of law and fact.") (*citing Cypress-Fairfanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 252 (5th Cir. 2010)).[4]

A more limited level of deference makes sense because whether a school has provided a student a FAPE is an inherently legal question that involves interpreting a federal statute—something only a federal court should do. While school authorities and administrative law judges might be better positioned than federal judges to evaluate the credibility of witnesses or to apply expertise on questions of educational policy, it is the duty of the federal judiciary to interpret questions of federal law and declare how the law applies to the facts at hand. By imbuing administrative law judges' determinations

[4] There are other circuits who treat the question of whether an IEP is appropriate as a question of fact. However, in those courts, there is a more limited grant of deference to questions of fact and/or the court still exercise de novo review over questions of law. For example, while the Third Circuit now treats whether an IEP is appropriate as a factual question, it still exercises "plenary review over the legal standard relied upon to evaluate the IEP." *Carlisle Area School v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995). Even though it also applies a presumption of correctness to factual questions, the Third Circuit also gives district courts more latitude in rebutting that presumption. Unlike the district court here, who imposed upon R.F. the burden of rebutting this presumption, Dist. Op. at 28, under the Third Circuit's approach, a district court defers to an ALJ's findings "unless it can point to contrary nontestimonial extrinsic evidence in the record." *S.H. v. State-Operated Sch. Dist.,* 336 F.3d 260, 270 (3d Cir. 2003). The deference is not a burden-shifting rule for the litigants, but rather defines the scope of the district court's independent review.

whether a student received FAPE with a presumption of correctness, this Court abdicates the responsibility that Congress conferred exclusively on the federal courts to act as external checks on infringement of the IDEA's core entitlement. *See Kirkpatrick v. Lenoir Cnty. Bd. of Educ.*, 216 F.3d 380, 387 (4th Cir. 2000) ("[T]he procedural scheme established by the IDEA reveals Congress's intent to provide aggrieved persons with an external check on the state administrative action.").

This Court's deference on the ultimate question whether the school provided a FAPE comes from the *Doyle* decision, which concluded, without citation, that the *Rowley* Court held that "whether or not a program [of special education] is appropriate is a matter of fact," and is thus entitled to the same deference as any other finding of fact. 953 F.2d at 105. But that is not what the Supreme Court held. Nowhere does the *Rowley* decision directly or indirectly hold (or even suggest) that whether an IEP is appropriate under the IDEA is a question of fact. If that were true, every circuit court that has held that it is a mixed question of fact and law would—implausibly—be running afoul of Supreme Court precedent.

The deference that this Court gives to state administrative processes is also at tension with this Court's other requirement that a federal court conduct an independent review and make an independent determination, as is implicitly required by the statute. Indeed, this Court also requires a district court make an "independent determination of whether the school complied with the IDEA," albeit giving due weight to the underlying administrative proceedings. *O.S.*, 804 F.3d at 360; *Z.P.*, 399 F.3d at 307. "Courts hearing

IDEA challenges are required to determine independently" whether a proposed IEP satisfies the law and "whether the state has compiled with the IDEA." *Sumter Cty. Sch. Dist. 17 v. Heffernan*, 642 F.3d 478, 484 (4th Cir. 2011) (holding that the district court did not err when it accepted the factual findings but "believed that the evidence considered as a whole pointed to a different legal conclusion than that reached by the [state]."). Yet, how can a district court, such as the one below, both presume that a hearing officer's conclusions are correct and also make its own independent determination? This tension leaves open the possibility that district courts could be evaluating these cases inconsistently with some following the *Doyle* line of deference and others following *Heffernan* and making an independent determination.

Here, the district court chose to follow the *Doyle* line. Relying on it, the district court left the determination whether the school offered R.F. a FAPE to the ALJ and deferred to her conclusion. In no uncertain terms, it held "For these reasons, the ALJ's findings of fact and *conclusions of law* in reference to R.'s progress were detailed, supported by the record and *entitled to deference*." Dist. Op. at 36 (emphases added). This was not an independent review or determination by the district court. It limited its review to the question of whether the ALJ's decisions on the facts and the law were reasonable. In doing so, the district court failed to fulfill its obligations under the IDEA.

Giving a more limited deference to an administrative law judge is consistent with both *Rowley* and *Endrew F.* The *Rowley* Court made particular note of the need for

deference on questions of educational methodology. Significantly, however, it said that deference was owed once courts determined whether the requirements of the IDEA, which would include the FAPE requirement, were met. It held: "[O]nce a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Rowley*, 458 U.S. at 208. Indeed, it described the court's inquiry as involving whether the IEP "developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. It did not say that the court's inquiry is limited, as the district court did so here, to determining, as the district court limited itself here, whether the state's determination that the student was offered a FAPE was reasonable.

The *Endrew F.* Court further clarified the necessary level of deference. As the decision reflects, interpreting IDEA's legal requirements regarding FAPE is the judiciary's responsibility and firmly within its competence. Deference is to be "based on the application of expertise and the exercise of judgment by school authorities," implying that deference is not owed when it does not call for the application of a school or state's expertise, such as questions of law. Furthermore, *Endrew F.* made clear that courts must review whether a "cogent and responsive explanation" from school authorities supports a determination that an IEP provides a FAPE. *Endrew F.*, 137 S.Ct. at 1002. If a court's review were as limited as this Court has held, there would be no need for a school district to offer up such an explanation, including evidence in support. It is up to the court to decide whether the "IEP is reasonably calculated to enable the

child to make progress appropriate in light of his circumstances.," including an "appropriately ambitious" education and the chance to achieve "challenging objectives." The Supreme Court has endorsed a much more limited notion of deference than exists in this Circuit's pre-*Endrew F.* case law, one that leaves an important and independent role to federal courts.

Because this Court's one-size-fits-all, high degree of deference to state administrative proceedings is inconsistent with *Rowley* and, particularly, *Endrew F.*, as well as its sister circuits, this Court should revisit its standard of deference to the state administrative process. The Court should also rule that the district court inappropriately deferred to the ALJ on, among other things, its conclusions of law, and remand so that the district court can conduct the independent review that is required of it.

IV. The District Court Erred and This Court Should Remand This Matter.

In addition to pronouncing the standard for FAPE post-*Endrew F.*, and clarifying that Fourth Circuit district courts must apply this standard, this Court should remand the matter to the district court to correct critical errors in its interpretation and application of this standard. Each error is detailed below.

A. The District Court Incorrectly Held that the IEP Was Substantively Appropriate.

At its core, the district court misapplied *Endrew F.* when it held that the IEP provided R.F. a FAPE. The Supreme Court demands that an IEP provide an

"appropriately ambitious" education, and give each child with a disability the chance to meet "challenging objectives." Otherwise, the child is at risk of just "sitting idly . . . awaiting the time when [the child was] old enough to 'drop out.'" *Endrew F.*, 137 S. Ct. at 1001. An IEP that carries the same goals with little to no change year after year shows that the child's IEP is not reasonably calculated to enable to the child to make sufficient progress and must be revised. *See Endrew F. v. Douglas Cnty. Sch. Dist RE-1*, 290 F. Supp. 3d 1175, 1183–86 (D. Colo. 2018) (holding that an IEP that had carried the same goals year after year showed only minimal progress and provided no FAPE).

R.F. did not make progress towards her academic or behavioral goals during the academic year in question here. Even the hearing officer acknowledged that. J.A.I. 49. More concerning, several goals are essentially identical to academic objectives from R.F's 2015-2016 IEP. *Compare* J.A.I. 25-28 (2015-2016 IEP) *with* J.A.I. 31-40 (2016-2017 IEP); *see Endrew F.*, 137 S. Ct. at 996 ("Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress.").

R.F.'s progress was minimal at best. In summing up R.F.'s progress, the ALJ held that "R made some progress towards very basic goals and very little progress towards others." J.A.I. 87. R.F. made minimal advancement in using a communication device, watching and catching a ball, and navigating stairs. The "very basic goals" provided for in the IEP are not the "challenging objectives," the Supreme Court requires, as part of the "appropriately ambitious" education R.F. has the right to receive. *See, e.g.*, *Endrew F.*

v. Douglas Cty. Sch. Dist RE-1, 290 F. Supp. 3d 1175, 1183– (D. Colo. 2018) (" [T]he Supreme Court was clear that every child, including Petitioner, should have the chance to meet challenging objectives. In this case, Petitioner's past educational and functional progress—as evidenced by the changes to his yearly IEPs after second grade—was minimal at best.").

R.F. was receiving instruction that "aim[ed] so low that it was tantamount to 'sitting idly . . . awaiting the time when [she was] old enough to drop out.'" *Id.* at 1001 (quoting *Rowley*, 458 U.S. at 179) (internal quotation marks omitted). R.F. was not achieving ambitious goals, nor was she given the opportunity to meet challenging objectives. Had the District Court correctly applied *Endrew F.*, even with deference to the ALJ's factual findings, it should have held that "the evidence considered as a whole pointed to a different legal conclusion than that reached by the [ALJ]," *Heffernan*, 642 F.3d at 484, and found the IEP inappropriate. No matter the severity of R.F.'s impairments, allowing her academic goals to remain unchanged and unmet after two years of schooling runs counter to the IDEA's mandate, affirmed by *Endrew F.*, that "if a child is not making expected progress toward his or her annual goals, the IEP Team must revise, as appropriate, the IEP to address the lack of progress." U.S. Dep't of Educ., Questions and Answers (Q&A) on *U.S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1* at 6-7 (Dec. 7, 2017), https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf, (last visited Sept. 16, 2018) (citing 20 U.S.C. § 1412(d)(4)(A)).

B. The District Court Erred by Holding that the IDEA Requires Only "Equal Access."

Following *M.L.*, at least two district courts in this Circuit, including the district court below, have held that "a school is required only to provide equal access" under the IDEA. Dist. Op. at 35; *E.P. v. Howard Cnty. Public Sch. Sys.*, 2017 WL 3608180, at *4 (D. Md. Aug. 21, 2017). These courts rely on an out-of-context quotation from *M.L.*, *see id.* (citing *M.L.,* 867 F.3d at 495), which itself relies on an out-of-context quotation from *Rowley*, *see M.L.*, 867 F.3d at 495 (quoting *Rowley*, 458 U.S. at 200). These courts are wrong.[5] The IDEA requires much more than "access" to, and not exclusion from, schools.

The *Rowley* Court did not announce that "equal access" is the "only" thing the IDEA requires. Moreover, the *Rowley* Court explained that "equal access" was not the standard for whether a FAPE was provided, but what Congress thought was required to ensure the IDEA comported with equal protection principles. *Rowley*, 458 U.S. at 199. As the Court made clear in *Endrew F.,* the IDEA requires more and something different than "equal access."

[5] These district courts were also wrong to imply that *M.L.* holds that *Rowley*, post-*Endrew F.*, continues to be the leading case on the substantive standard for FAPE. Although in its description of the background leading up to *Endrew F.*, this Court in *M.L.* described *Rowley* as "the leading IDEA case," it did not mean to suggest that *Endrew F.* is not controlling. Particularly as it relates to the substantive standard for evaluating the adequacy of a child's special education, *Endrew F.* provides the direction lower courts must now follow.

This Court has not used or relied on *Rowley's* description of equal access in the IDEA context before its statement in *M.L.*[6] Indeed, none of this Court's sister circuits have held that the IDEA requires only "equal access," as *Rowley* uses that term. Those courts that have examined the *Rowley* Court's use of the term "equal access" have drawn conclusions from it that are now moot, post-*Endrew F.* For example, the Third Circuit interpreted the term as suggesting that the Supreme Court in *Rowley* focused on physical access to special education, not on any particular level of benefits. That court noted that the Supreme Court "focused on access to special education rather than the content of that education." *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 179 (3d Cir. 1988).

But *Endrew F.* changed this. As the Supreme Court recognized in *Endrew F.*, *Rowley* had no occasion to provide concrete guidance for students, such as R.F., not fully integrated into the regular classroom. But *Endrew F.* did. It promulgated "general guidance" on, and a substantive standard for, the necessary level of educational benefits that an IEP must provide. An IEP does not pass muster unless it offers students educational programs that are appropriately ambitious (for most children, grade level advancement), focused on challenging objectives and "reasonably calculated to enable a

[6] *Amicus* has only been able to locate one additional case in this court that has relied on this passage from *Rowley*. In *Commissioner of Virginia Department of Education v. Riley*, 106 F.3d 559, 564 (4th Cir. 1997), then-Judge Luttig dissented from a per curiam en banc decision. In his dissent he relied on the above-cited language to support the proposition that "As the Supreme Court has recognized, the statute's purpose was to ensure that disabled students are not denied access to a free public education because of their disabilities . . . ." *Id.* at n.2.

child to make progress appropriate in light of the child's circumstances." "Equal access" does not sufficiently capture these requirements.[7]

It is important and necessary for this Court to correct the district court's errors of law. Otherwise future courts in this Circuit will continue to cite to and rely on this erroneous standard. Also, it is a standard that threatens to create a conflict with the Supreme Court in *Endrew F.* and with the very purpose of the IDEA. To say that the IDEA requires only equal access is to say that a school district discharges its duties by opening the school house doors to qualifying disabled students as it does to all students, and that the district's obligations end once those students walk through their doors. This is wrong. Creating an IEP reasonably calculated to allow a child to achieve "appropriately ambitious" goals and meet "challenging objectives" is central to a school's obligations under the IDEA. *Endrew F.*, 137 S. Ct. at 999–1000. A "substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Id.* at 999. Unless this Court acts to correct this misimpression now, district courts may continue to rely on *M.L.* for this incorrect proposition, which will create conflict with the U.S. Supreme Court and may deny worthy students of the special education to which they are entitled.

[7] *Endrew F.* mentions the concept of access with reference to *Rowley*. The decision states that "access to an education" is what the IDEA promises but it also plainly says that yearly advancement to higher grade levels in the regular classroom "is what our society generally means by an 'education.'" 137 S. Ct. at 999. The Supreme Court in *Endrew F.* does not use the phrase "equal access," or suggest that a school is only requires to provide "equal access," as the *Rowley* Court used the term, to comply with the IDEA.

CONCLUSION

Amicus requests that this Court hold that *Endrew F.* overruled this Court's prior approach and prior cases to the extent they are inconsistent, and vacate and remand this case to the district court.

Respectfully Submitted,

/s/ Richard D. Salgado
Richard D. Salgado
Counsel of Record
Dentons LLP
2000 McKinney Ave., Ste. 1900
Dallas, TX 75201
(214) 259-0900

Ira A. Burnim
Lewis Bossing
The Judge David L. Bazelon
Center For Mental Health Law
1101 15th St., N.W., Suite 121
Washington, D.C.
(202) 476-5730

Peter J. Anthony
A. David Mayhall
Dentons LLP
1900 K St., N.W.
Washington, D.C. 20006
(202) 496-7961

Attorneys for Amicus Curiae

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 5672 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.

/s/ Richard D. Salgado
Richard D. Salgado

CERTIFICATE OF SERVICE

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 September 17, 2018.

/s/ Richard D. Salgado
Richard D. Salgado