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, THE NATIONAL DISABILITY RIGHTS NETWORK, AND THE NATIONAL CENTER FOR LEARNING DISABILITIES IN SUPPORT OF NEITHER PARTY

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for Amici respectfully requests oral argument to assist the Court in resolving the novel and important issues in this case.

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I. 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.

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 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

[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.

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 educational services from public schools.

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.

II. SUMMARY OF ARGUMENT

Regardless of what the correct outcome should be in the instant case, the district court was incorrect to conclude that the factors set out in this Court's

decision in *Cypress-Fairbanks Independent School District v. Michael F.* are consistent with the Supreme Court's recent decision in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*. 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 child's circumstances." Otherwise, a student has been denied a FAPE and 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. Though at points this Court has held that the IDEA requires "meaningful" educational benefits, in application that language amounted 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.[2]

III. Argument

A. The 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 disabled children "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 Cty. v. Rowley*, 458 U.S. 176, 179 (1982) (internal quotation marks 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 only 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 between the circuits. The Tenth Circuit, relying on isolated statements in the

[2] 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.

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.*, 798 F.3d at 1338. 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. Focusing on the word "appropriate," the Supreme Court found the Tenth Circuit's approach insufficient, holding that 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.* at 999. 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 992.

For most children, schools must provide a special education reasonably calculated to allow that child to advance from grade to grade. *Id.* at 1000.[3] Where

[3] *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*,

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. Indeed, "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 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, inexplicably, 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 this Court's prior approach.

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

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.

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declining to hold that "every [child with a disability] who is advancing from grade to grade . . . is automatically receiving a [FAPE]").

The precedential case in this Circuit is *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245,248 (5th Cir. 1997) ("*Michael F.*") 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 benefits." *Id.* at 248. Applying only slightly different language than the Tenth Circuit, this Court also defined the required level of education under the IDEA as only more than de minimis. *Id.* (level of education "cannot be a mere modicum or de minimis . . . .").

This Court, however, further directed that the benefits the IEP is designed to achieve must be "meaningful." *Id.*[4] 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." That additional, seemingly more robust language thus amounts to empty rhetoric because it still reverts back to the same "more than de minimis" language that the Supreme Court has soundly rejected.

[4] *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.

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).[5] Just as in *Michael F.*, however, the Third Circuit in *Polk*, under the IDEA, held that the benefit provided to students with disabilities are "meaningful" so long as they provide a student more than de minimis benefits. *See id.* at 182 ("The use of the term "meaningful" indicates that the [Supreme Court in *Rowley*] expected more than *de minimis* benefit."); *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 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 necessary level of benefits required under the IDEA. *See, e.g., L.E. v. Ramsey Bd. of Educ.*, 435 F.3d at 390 ("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

[5] *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.

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* . . . ." *Id.* at 253 (emphasis added). Thus, the court held that the benefits were meaningful because they produced more than a modicum of educational benefits—essentially collapsing the standard, wholly consistent with the now-rejected Tenth Circuit standard.

While the Third Circuit has since evolved its approach to make clear that "meaningful benefits" is a more demanding standard, that Court's original, 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 has held that an IEP offered more than de

minimis educational benefits yet nevertheless failed the IDEA because the benefits were still not meaningful.[6] Instead, this Court and its lower courts have consistently found IEPs sufficient because they offered "some educational benefits" that are 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);
- *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.");
- *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*

[6] The Third Circuit did exactly that in *T.R. v. Kingwood Tp. Bd. of Educ.*, 205 F.3d 572, 578 (2000) (Alito, J.), where then-Judge Alito 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).

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). 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" means nothing more than just above de minimis progress – a now

defunct standard of analysis, which amounts to "hardly . . . an education at all," *Endrew F.*, 137 S. Ct. at 1001.

Thus, 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, *vacated by Endrew F.*, 137 S. Ct. 988 (2017). As the Supreme Court now requires educational benefits "markedly more demanding than 'merely more than de minimis,'" this Court's prior decisions, including *Michael F.* and its progeny, have been overruled and should no longer be followed.

C. At a Minimum, This Court Must 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 United States Supreme Court.

Thus, even if this Court were to disagree that as a matter of law *Endrew F.* overruled its prior decisions, it must 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.[7] In order to do so, *Michael F.* must be modified and lower courts instructed that they cannot, as the district court here did, apply *Michael F.* or any of this Court's pre-*Endrew F.* case law uncritically.

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

[7] Contrary to the district court's assertion, this Court has yet to address substantively *Endrew F.* The District Court stated that "The 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 Indep. Sch. Dist., No.* 16-20439, 2017 WL 2713431 (5th Cir. June 22, 2017). That is flatly incorrect. The *Waller* Court 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, it held that the District Court's *analysis* of the facts "[was] fully consistent with [the *Endrew F.*] standard." Nowhere, however, does the *Waller* Court articulate what *Endrew F.* required. It does not state that *Endrew F.* requires schools to meet a "markedly more demanding" standard for providing special education to children with disabilities than the "more than de minimis standard. It does not state that *Endrew F.* requires schools to provide special education reasonably calculated to help children with disabilities make progress toward "appropriately ambitious" goals and "challenging objectives." 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* Fed. R. App. P., 47.5.4.

benefits are demonstrated." *Id.* Though this Court has acknowledged that the fourth factor is a critical factor, it has long held that these four factors need not be weighed in any particular 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.").

The 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.[8] But the Supreme Court 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 the fourth *Michael F.* factor that needs to be given its appropriate weight in order for the test to be consistent with this direction. This makes sense, as the other three factors 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

[8] *See, e.g.*, 29 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).

the FAPE requirement unless the IEP gives the child the opportunity to meet "appropriately ambitious" goals and "challenging objectives," and is demonstrated by the child's timely progress, as envisioned in the IEP, toward those appropriate goals and challenging 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.[9] The IDEA demands much more. *See id.*

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 provided an IEP sufficient to provide a student a FAPE.

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. It is plain that the Supreme Court expressly rejected this approach. "Whatever else can be said about it," the appropriate standard is "markedly more demanding" than that. *Id.* at 1000. The IDEA "demands more." *Id.* at 1001. Thus, *Michael F.*'s fourth factor—whether positive academic and non-

[9] *See also Endrew F. v. Douglas County 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).

academic benefits are demonstrated—should be adapted to be consistent with *Endrew*:

> "whether appropriately ambitious academic and non-academic benefits are demonstrated?"

Further, this standard must 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. *Id.* at 999. For most students, what "progress" means is clear— usually 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 "appropriately ambitious in light of his circumstance**s**, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives." *Id.*[10]

[10] *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 must 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.

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

IV. CONCLUSION

This Court should 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,

/s/ Richard Salgado

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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 [Insert] 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 Times New Roman.

/s/ Richard Salgado
Richard 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 [], 2018.

/s/ Richard Salgado
Richard Salgado

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