20-50373

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

AMANDA P., as Parent/Guardian/Next Friend of T.P., a Minor Individual with a Disability; CASEY P., as Parent/Guardian/Next Friend of T.P., a Minor Individual with a Disability,

Plaintiffs-Appellants,

—v.—

COPPERAS COVE INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Amanda P. et. al. v. Copperas Cove Independent School District: The following statement is made pursuant to Federal Rules of Appellate Procedure 26.1 and 29(C) and 5th Cir. R. 26.1.1.

Amicus Curiae has no parent corporation, subsidiaries or affiliates that has issued shares to the public.

Amicus Curiae has no direct or indirect interest associated with the parties to this matter, or to their attorneys or counsel, though it and its members have a general interest in the issue and outcome of the case. Attorneys for Appellants and other putative *amicus* are independent members of COPAA, an organization which opens membership to attorneys who are interested in and/or represent parents and children with disabilities. COPAA has not contributed in any way to the Appellants or their pursuit of this matter.

Amicus Curiae adopts the statements of the Appellee and Appellant concerning the parties, trial judge(s), persons, firms, partnerships or corporations who have an interest in the outcome of the case.

Pursuant to 5th Cir. R. 26.1.1, as this brief is filed by *amicus* the following is list of all entities known to have an interest in the outcome of this appeal which has been "omitted from the certificate contained in the first brief filed and in any other brief that has been filed":

Amicus Curiae: Council of Parent Attorneys and Advocates, Inc., a non-profit organization.

Respectfully submitted, this the 3rd day of August 2020.

/s/ Selene Almazan-Altobelli
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INTERESTS OF *AMICUS CURIAE*

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation but provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*. (IDEA). COPAA also supports individuals with disabilities, their parents and advocates, in efforts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. (ADA).

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom*

F., 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), and in numerous cases in the United States Courts of Appeal.[1]

COPAA 's interest in this case stems from its deep commitment to all children with disabilities to obtain needed special education services. COPAA seeks to have the *Endrew F.* decision and its clarified FAPE standard implemented fully and consistently nationwide for all students with disabilities regardless of the amount of time they spend in the general education curriculum. Further, COPAA is concerned that a student's eligibility for special education under IDEA is an important substantive legal determination, not merely a procedural determination.

Appellants have consented to this filing; Appellees, through counsel, declined to give consent.

FACTUAL BACKGROUND

Amicus adopts fully by reference herein the Statement of the Case in the Brief for Appellants at pp.2-12.

[1] Pursuant to Fed. R. App. P. 29, *Amicus* certify that no party's counsel in this matter authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus* and its members and counsel contributed money intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

Since 1975, Congress has acted to guarantee that children with disabilities receive a quality public education, just as their non-disabled peers do. This right was termed a "free appropriate public education" under that law, and this nomenclature has remained ever since. Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (EHA). After the EHA was passed, Congress and the courts have, on a number of occasions, clarified and updated what the student with a disability's right to a "free appropriate public education" means.

Early on, the most prominent clarification came in the Supreme Court's decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In *Rowley,* the Court held that a "free appropriate public education is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. Therefore, the Court concluded that the "'basic floor of opportunity' provided by the Act simply consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.*

However, in the decades since the guarantee of a FAPE was created and then clarified through *Rowley*, special education policy and education policy as a whole have developed and shifted to keep up with our changing world and advancements in educational research. Indeed, the educational landscape today is one that, because

of the data and evidence-based developments in general education instruction and specialized academic intervention, provides much higher possibilities and expectations for our students. In 2017, the Supreme Court issued a landmark decision in *Endrew F.,* acknowledging the broader education policy scheme at play for nearly all students (with and without disabilities), and further clarifying the right to a FAPE for all students eligible under IDEA regardless of the severity of their disabilities. 137 S. Ct. at 1000.

In *Endrew F.,* the Court clarified that, just as their non-disabled peers are challenged by rigorous general education standards, all children with disabilities are to be challenged to reach their own potential *regardless* of the severity of their disabilities. *Id.* at 999 (citing *Rowley*, 458 U.S. at 202-03). Thus, for most children "being educated in regular classrooms, . . . the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 992 (quoting *Rowley*, 458 U.S. at 204). But for students whose education cannot (with accommodations or modifications) track the grade-level general education curriculum instruction to which they would otherwise be entitled, the Court held that IDEA still "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," keeping grade-level academic content standards and general education curriculum in mind to the maximum extent possible. *Id.* at 1001.

The Supreme Court's decision in *Endrew F.* thus clarified two prevalent issues in the post-*Rowley* special education arena: (1) the Court corrected those who had misread the *Rowley* educational benefit standard under IDEA, 458 U.S. at 200-02, to mean students were entitled to "merely more than *de minimis*" educational benefit; and (2) the Court reiterated the importance of complying with all aspects of IDEA's procedures as critical for ensuring, and for evaluating whether a child has received "sufficient educational benefits." *Endrew F.*, 137 S. Ct. at 998 (citing *Rowley*, 458 U.S. at 200 and 202). These two principles are fundamental to evaluating FAPE claims for students under IDEA. Unfortunately, the district court in this case failed to take these two *Endrew F.* principles into consideration and therefore committed legal error that this Court must rectify.

In this case, Copperas Cove Independent School District (CCISD) denied T.P., a child who, with the appropriate accommodations and supports, is cognitively capable of grade level achievement in the general education curriculum, appropriate special education services, specifically for reading intervention, and failed to assess T.P. in all areas of need. Had the district court applied the appropriate measure for progress under *Endrew F.* when examining T.P.'s IEP for substantive compliance, it would have clearly found that T.P. was denied FAPE because, although he was capable of grade-level achievement, the gap between his achievement in reading and that of his non-disabled peers had widened rather than narrowed. ROA.2999 and

ROA.3011. Clearly, such results do not meet IDEA's appropriately ambitious standard for measuring progress in light of this child's unique circumstances, and as such, the district court's decision requires reversal.

ARGUMENT

I. COURTS MUST APPLY THE *MICHAEL F.* FACTORS IN A MANNER THAT IS CONSISTENT WITH *ENDREW F.*

A. *Endrew F.* Clarified the Robust Substantive Standard for Evaluating FAPE Claims

Congress passed IDEA's predecessor, the EHA, in part, to end the exclusion of most students with disabilities from public schools. Perhaps because the backdrop for the passage of this landmark legislation was the 1960s and 1970s trend towards remediation of exclusionary policies based on race and disability, educational policy for students with disabilities at this time was focused primarily on *access* rather than on what actually *happened* in the classroom. Through this lens, the Supreme Court's conclusion that the 'basic floor of opportunity' provided by the Act consists of *access to specialized instruction and related services* which are individually designed to provide educational benefit to the handicapped child," *Rowley*, 458 U.S. at 201 (emphasis added), is understandable.

But since the early 1980s, our nation's broader education policy has matured from one seeking mere access to education to one that requires substantive and achievement-driven measures to ensure that our students receive a quality and

effective education. *See* Brief for Council of Parent Attorneys and Advocates, et al. as Amici Curiae in Support of Petitioner, *Endrew F. v. Douglas Cent. Sch. Dist. RE-1*, at 10-17.[2]

Thus, in 2017, when the Supreme Court decided *Endrew F.*, it clarified that IDEA requires a more robust standard for the level of educational benefit in order for a student to receive a FAPE. *Endrew F.*, 137 S. Ct. at 1000. In requiring "an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," the Supreme Court soundly rejected the Tenth Circuit's incorrect lower "merely more than *de minimis*" standard. *Id.* at 1001. Further, the Court emphasized that in order for a student to receive FAPE, the IEP must be "appropriately ambitious," and the objectives must be "challenging." *Id.* at 999-1000. Accordingly, courts that do not apply the more demanding *Endrew F.* standard, commit legal error.

Endrew F. had a profound impact on the FAPE standard application across the country. For consistency, the U.S. Department of Education has taken post-decision steps to provide clarification to parents and educators alike. On December 7, 2017, the U.S. D.O.E. released a Questions and Answers (Q&A) document on the *Endrew F. v. Douglas County School District RE-1* decision, *available at*

[2] Available at https://www.scotusblog.com/wp-content/uploads/2016/11/15-827-amicus-petitioner-Council_of_Parent_Attorneys_and_Advocates.pdf (last viewed July 31, 2020).

https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-endrew case-12-07-2017.pdf (last viewed July 31, 2020). As the Q&A acknowledged, the Court's clarification of a school's substantive obligation under IDEA, "reinforced the requirement that 'every child should have the chance to meet challenging objectives.'" (Q&A No. 3). The use of the word "*reinforced*" by the Department demonstrates that the substantive standard clarified by the Court in *Endrew F* is a standard that schools should have been providing all along to every child with a disability. *Id.*

The guidance from the Department of Education also makes clear that "[t]here is no 'one-size-fits-all' approach to educating children with disabilities." (Q&A No. 17). Instead, as the Court acknowledged in *Endrew F.*, education planning requires a process of considering students' individual potential, presentation, and needs against their ability to meet the rigorous state educational standards established for all students and for IEP teams to determine when adherence to those general education standards may not be a reasonable expectation at that given time. 137 S. Ct. at 994. Moreover. the Court specifically noted IDEA's procedural requirements that IEP teams consider the child's "present levels of academic achievement and functional performance" and describe "how the child's disability affects the child's involvement and progress in the general education curriculum." *Id.* Examining IDEA's procedural requirements is not solely for the purpose of determining

procedural compliance with IDEA, *but rather,* to evaluate whether a child has, substantively, received a FAPE.

Thus, while the procedural inquiry remains the same, *Endrew F.* made clear that there were distinct measures to be considered when evaluating whether an individual student had, substantively, been denied a FAPE. *Id.* at 999-1000. Specifically, *Endrew F.* made clear that for those students with disabilities who are able to make grade level progress in the standard general education curriculum required of all students, the *Rowley* guidance for measuring progress remains appropriate in evaluating whether meaningful educational benefit was conferred. *Id.* at 999. As set forth in *Rowley,* students accessing the general education curriculum rely on the fact that "[r]egular "examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit." 458 U.S. at 203. Indeed, the Court acknowledged that with the general education curriculum framework, "the system itself monitors the educational progress of the child." *Id.* As a result, for children with disabilities who can be educated in the regular classroom, IDEA "*typically* aims for grade level advancement." *Id.* at 1000-01 (emphasis added). However, the Supreme Court specifically reiterated the caveat previously stated in *Rowley* and noted that it had "declined to hold in Rowley, and

do no hold today, that 'every handicapped child who is advancing from grade to grade is automatically receive a [FAPE].'' *Endrew,* 137 S. Ct. at n.2, *quoting Rowley,* 458 U.S. at 203, n.25. Thus, as the Supreme Court made clear, passing grades in general education classes *alone* does not establish that a student is receiving FAPE. *Id.*

In this case, CCISD relied upon the fact that T.P. moved through the levels of reading intervention he received from CCISD. However, as the Supreme Court made clear, passing through levels does not establish a student is receiving FAPE and that is particularly true in this instance as T.P.'s teacher testified that she moved *everyone* through the levels at the same time, without an individualized assessment as to whether *any* particular student had met the requirements to progress. ROA.2267, 2291-2291. Thus, the alleged "progress" touted by CCISD with regard to T.P.'s movement through the reading intervention levels is meaningless. ROA.2999. Accordingly, the district court erred in finding that T.P. did not suffer any educational injury from their IDEA violations.

B. *Endrew F.* Requires that the *Michael F.* Factors Be Applied so as to Require IEPs to Contain Ambitious Objectives and Challenging Goals with Progress Evaluated in Light of a Student's Unique Circumstances

In 1997, this Court set out a four-factor test for determining whether a school district had complied with the FAPE requirement, with the fourth factor focusing on the substantive standard for FAPE. The four factors are: "(1) the 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." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253 (5th Cir. 1997). This Court previously held "*Endrew F.* provides more clarity for what constitutes an appropriate IEP, but it does not render the *Michael F.* factors inapplicable." *See E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 765 (5th Cir. 2018).

While this Court recognized in *E.R.* that *Endrew F.* provides "more clarity for what constitutes an appropriate IEP," it has not yet incorporated that additional clarity into the *Michael F.* factors. In particular, the first and fourth factors must be applied consistently with *Endrew F*'s requirements in mind.

1. *Endrew F.* requires that the first *Michael F.* factor include evaluation of whether the IEP had appropriately ambitious goals and challenging objectives

The first factor in *Michael F.* requires a court to assess whether an IEP was individualized to fit the student's assessments and performance. But *Endrew F.* has made clear that merely being "individualized" is not a sufficient indicator of FAPE. Rather, the IEP must "be appropriately ambitious in light of [the student's] circumstances." 137 S. Ct. at 1001. And the student must also "have the chance to meet challenging objectives." *Id.* at 1000.

Post *Endrew F.*, the way a school district offers an IEP reasonably calculated to enable the child to obtain meaningful benefit in light of the child's circumstances is by following the procedures set out in 20 U.S.C. § 1414. These "procedures are there for a reason, and their focus provides insight into what it means, for purposes of the FAPE definition, to 'meet the unique needs' of a child with a disability." 137 S. Ct. at 1000. Thus, the *Endrew F.* court soundly rejected the school district's argument that "these provisions impose only procedural requirements—a checklist of items the IEP must address—not a substantive standard enforceable in court." *Id.*

Instead, to determine whether an IEP is appropriately individualized, courts must assess whether the IEP takes into account the child's unique circumstances, "constructed only after consideration of the child's present levels of achievement, disability, and potential for growth." 137 S. Ct. at 999.

In this case, the district court was required to examine, *substantively*, whether T.P. received a program that would provide *him* with *meaningful benefit* that was *appropriately ambitious in light of his circumstances* as determined by the "assessments, performance information, and evaluations" CCISD compiled for him, including the Independent Educational Evaluation (IEE) provided by his parents. *Id.* The district court failed to undertake this proper examination to determine whether T.P.'s educational program *actually* provided him with *meaningful benefit* in light of his unique circumstances (i.e. to achieve grade level achievement). Instead, in

one cursory paragraph the district court determined that CCSID met its FAPE obligation by examining T.P.'s IEP for compliance with IDEA's procedural requirements—noting that his IEP contained present levels, annual goals, and provision of services, along with a modification of goals once the IEE was completed. *Amanda P.*, 2020 U.S. Dist. LEXIS 65016 at ** 24-25 (W.D. Tex. Apr. 14, 2020). However, is it precisely *this* "checklist" of procedural IEP requirements which *Endrew F.* soundly rejected in determining whether FAPE was provided in the form of providing a meaningful level of benefit to a child in light of their unique abilities. *Endrew F.*, 137 S. Ct. at 1000.

2. *Endrew F.* requires that the fourth *Michael F.* factor assess whether, if there were any positive academic and non-academic benefits, those benefits provided sufficient progress in light of the student's circumstances

The fourth *Michael F.* factor asks whether positive academic and non-academic benefits have been demonstrated, but it does not provide any requirement for actually assessing whether the amount of those academic and non-academic benefits is sufficient in light of the child's unique circumstances. *Endrew F.*'s specific guidance on this point must be incorporated into *Michael F.'s* fourth factor.

As set forth in *Endrew F.*, the Supreme Court clarified that for those students with disabilities who are able to make grade level progress in the standard general education curriculum required of all students, the focus is on whether the student is making grade level advancement. *Id.* at 1000. As discussed in *Rowley,* students

accessing the general education curriculum rely on the fact that "[r]egular "examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. *Rowley*, 458 U.S. at 203. In this case, CCISD acknowledges that T.P. has the cognitive ability to meet grade level standards. Thus, an appropriately ambitious program would aim to narrow the gap between T.P. and his peers without disabilities in order for T.P. to meet grade level educational standards. *Endrew F.*, 137 S. Ct. at 1000.

Indeed, IDEA imposes obligations on schools to "remedy the pervasive and tragic academic stagnation" that prompted the "ambitious" IDEA. *Id.* As the Supreme Court said, IDEA "demands more." *Id.* at 1001. After *Endrew F.*, courts applying the fourth *Michael F.* standard cannot point to merely any "positive academic and non-academic benefits." Rather, the factor needs to assess, for students like T.P. who are capable of grade level advancement, whether the student has made adequate progress toward grade level advancement, considering the student's potential and unique circumstances.

Here, the district court erred in not conducting a thorough and data-driven evaluation of the student's progress toward grade level *advancement* in light of T.P.'s unique circumstances. In fact, the district court opinion completely ignored the Supreme Court's clear mandate that IDEA requires substantive progress

"appropriately ambitious in light of [a student's] circumstances." *See Endrew F.*, 137 S. Ct. at 1000. In holding that T.P. "demonstrated positive academic and non-academic benefits" sufficient to satisfy the fourth *Michael F.* factor, the district court clearly did not consider T.P.'s potential, nor his progress toward, narrowing his gap to meet grade level standards.

Further, with regard to T.P.'s progress, the court acknowledged that T.P.'s parents presented evidence that the *de minimis* improvement in reading was not consistent with T.P.'s potential. *Amanda P. v. Copperas Cove Indep. Sch. Dist.*, 2020 U.S. Dist. LEXIS 65016 at *29 (dyslexia expert testified that, in light of T.P.'s cognitive ability, she would have expected more progress than what CCISD documented). In fact, the record reflects that T.P. began second grade reading one year behind at an early first grade level. A year and a half later, in the middle of third grade, he was only reading at a mid-year first grade level, thus, increasing the gap to two years behind his same age peers. *Id.* at *28.

In erroneously analyzing the fourth *Michael F.* factor, the district court relied on a pre-*Endrew F.* decision, *Houston Indep. Sch. Dist. v. Bobby R.,* 200 F.3d 341, 349 (5th Cir. 2000), noting that the "*Bobby R.* court found that academic benefits were shown where the student's test scores improved and the student progressed grade levels each year." *Id.* at *27 (citing *Bobby R.*, 200 F.3d at 349-50). However, *Endrew F.* makes clear that *de minimis* improvement in test scores combined with

advancement from grade to grade does not alone signify provision of a FAPE. Gains that are merely more than trivial do not meet the test set forth in *Endrew*—that the program be "appropriately ambitious" and "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" 137 S. Ct. at 1000, 1001—when, as is the case here, the student has the capacity to make more significant progress toward grade level advancement.

Here, the district court found that T.P. began second grade reading at a beginning first grade level and halfway through third grade was reading only at a mid-first grade reading level. *Amanda P.*, 2020 U.S. Dist. LEXIS 65016, at *28. Moreover, T.P.'s parents presented unrebutted expert testimony that with appropriate specially designed instruction calculated to remediate his disability, T.P. had the capacity to make greater progress toward grade level achievement. *Id.* at *29. Accordingly, under these circumstances, the district court erred in concluding that the fourth *Michael F.* factor weighed in favor of finding that CCISD's IEP provided T.P. with sufficient academic benefit to confer a FAPE. *Id.*

II. CCISD's FAILURE TO COMPLY WITH EVALUATION PROCEDURES UNDULY DELAYED THE PROVISION OF APPROPRIATE SERVICES TO T.P., AND THEREBY VIOLATED IDEA

IDEA sets forth evaluation procedures in intricate detail. And as set forth in *Endrew F.*, the Supreme Court made abundantly clear that IDEA's evaluation procedures are not meaningless technicalities, and failure to comply with those

procedures can constitute a significant violation. *Endrew F.*, 137 S. Ct. at 998. The team and other qualified professionals, as appropriate, must review existing evaluation data for the child, including evaluations and information provided by the parents. The team must then use that data to review, with input from the parents, in order to identify any additional data that may be required:

> (1) In interpreting evaluation data for the purpose of determining if a child is a child with a disability under Sec. 300.8, and the educational needs of the child, each public agency must—
> (i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
> (ii) Ensure that information obtained from all of these sources is documented and carefully considered.
> (2) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Sec. Sec. 300.320 through 300.324. [3]

34 C.F.R. 300.306.

Here, CCISD was woefully deficient in failing to identify and evaluate T.P.'s obvious need for reading and writing interventions for over eight months after he arrived in the district.

In *Krawietz v. Galveston Independent School District,* 900 F.3d 673, 677 (5th Cir. 2018), this Court held that a four-month delay in evaluating a student for a suspected disability was unreasonable, given the school district's inaction during

[3] 20 U.S.C. §1414(b)(4) and (5).

that time period. *Id.* In contrast, however, in *Dallas Independent School District v. Woody*, 865 F.3d 303, 320 (5th Cir. 2017), this Court found an 89-day delay in evaluation reasonable because the school district spent that time requesting and gathering information to complete the evaluation, including more than a month that was spent waiting for the student's parents to provide the district with specific information needed to complete the evaluation. *Id.*

As this Court has summarized:

> Taken together, *Krawietz* and *Woody* stand for the proposition that the reasonableness of a delay is not defined by its length but by the steps taken by the district during the relevant period. A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities. Conversely, a time period is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps.

Spring Branch Indep. Sch. Dist. v. O.W., 961 F.3d 781, 793 (5th Cir. 2020).

Additionally, a school district's failure to pursue evaluations, even when providing other special education services, amounts to an actionable procedural violation. In *Spring Branch*, for example, the school district was providing response to intervention services and Section 504 accommodations. Nonetheless, the delay in evaluating to determine whether O.W. needed special education amounted to a substantive violation of IDEA. *Id.* Similarly, in *Phyllene W. v. Huntsville City Board of Education*, the school district was providing the student with special education services for a specific learning disability (dyslexia), but failed to evaluate

the student for a hearing impairment despite being on notice for a number of years of the student's hearing loss. *Phyllene W. v. Huntsville City Bd. of Educ.*, 630 F. App'x 917, 921 (11th Cir. 2015). The Eleventh Circuit held that the district's failure to timely evaluated the student for *all* suspected areas of disability was a denial of FAPE notwithstanding the fact that the parent never requested a hearing evaluation. *Id.* at 926 ("The Board had a separate and independent responsibility to propose an evaluation when faced with evidence of M.W.'s hearing loss and subpar academic performance.") (citing *M.C. ex rel. J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) (same)).Thus, as *Woody, Krawietz, Phyllene*, and *Spring* Branch all recognize, an undue delay in evaluation to identify a student's potential area of need results in a substantive deprivation under IDEA.

In this case, T.P. arrived in September 2017 at CCISD with an out-of-state IEP indicating significant literacy deficits. *Amanda P.*, 2020 U.S. Dist. LEXIS 65016 at * 13 (citing ECF No. 35 at 18). In January 2018, T.P.'s parents requested a dyslexia evaluation. ROA.1378. For no reason other than an internal policy, CCISD did not evaluate but instead performed a "dyslexia screener" at that time. ROA.2261-2261. *Amanda P.*, 2020 U.S. Dist. LEXIS 65016 at *14. Once he had been screened, CCISD did not immediately proceed to dyslexia testing, but instead took months before completing a dyslexia assessment, which still was not a full evaluation for a specific learning disability. *Id.* ROA.1390. Consequently, T.P. was

not appropriately evaluated to determine if he had needs related to dyslexia until the summer of 2018 and did not begin receiving dyslexia services until September 2018, resulting in an over eight-month delay in receiving any dyslexia specific services. *Id.* at **14-15; 17.

The failure of CCISD and its staff to use technically sound assessment procedures to evaluate all areas of suspected disability violated the IDEA. As a direct result of that violation, there was at least an eight-month delay before T.P. received services to which he was entitled. CCISD's failure to pursue a needed evaluation "can be described as nothing less than a delay or denial" amounting to a substantive violation of IDEA. *E.g., Spring Branch Indep. Sch. Dist.*, 961 F.3d at 794.

CONCLUSION

For the forgoing reasons, COPAA respectfully requests that the Court reverse the district court's decision.

Respectfully submitted this the 3rd day of August 2020.

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 4,621 words.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli

CERTIFICATE OF CONFERENCE

In accordance with 5th Cir. R. 27.4, the undersigned certifies that on July 29, 2020, consent to file an amicus curiae brief was sought from parties' counsel. Only counsel for Appellants consents.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli

CERTIFICATE OF SERVICE

I certify that on August 3, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/ Selene Almazan-Altobelli
Selene Almazan-Altobelli