CASE NO. 17-3065

In the United States Court of Appeals for the Third Circuit

K.D., by and through her parents, Theresa and Jonathan Dunn; THERESA DUNN; JONATHAN DUNN, individually,
Plaintiffs – Appellants

v.

DOWNINGTOWN AREA SCHOOL DISTRICT,
Defendant – Appellee

On Appeal from the
United States District Court for the Eastern District of Pennsylvania
No. 16-0165
The Honorable Lawrence F. Stengel

APPELLANTS' PETITION FOR REHEARING *EN BANC*

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REQUIRED STATEMENT OF COUNSEL FOR REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgment, that the panel decision (Op.)[1] is contrary to the decision of the United States Court of Appeals for the Third Circuit in *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171 (3d Cir. 1988), and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court. Further, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance, because the Individuals with Disabilities Education Act (IDEA or Act) vests school "officials with responsibility for decisions 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), "[t]his is a profound responsibility, with the power to change the trajectory of a child's life," *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3d Cir. 2015), and the panel decision failed to consider adequately the extent to which K.D.'s Parents were denied the critical right to participate in the decision making process regarding the provision of a free appropriate public education (FAPE) to their daughter.

[1] The panel decision is attached hereto as Exhibit 1.

ARGUMENT

I. THE PANEL DECISION CREATES AN INTRA-CIRCUIT SPLIT BY DISREGARDING PARENTS' PRESERVED CLAIM THAT THE SCHOOL DISTRICT VIOLATED IDEA IN THE SPRING OF 2015 WHEN IT FAILED TO CONSIDER INFORMATION DEMONSTRATING K.D.'S PROGRESS WITH MORE INTENSIVE PROGRAMMING

As discussed more fully in Section II, *infra*, the decision in this case conflicts directly with *Polk*. The panel decision acknowledges that there were two distinct periods of time. The first period ran from September 2011 through December 2014, when Downingtown Area School District (District or Downingtown) provided educational programming within the District. *Op.* at 5-9. In December 2014, Downingtown offered a new Individualized Education Program (IEP). *Id.* at 8. Parents withdrew K.D. at that time, providing notice that they would seek reimbursement for her private school placement. *Id.* at 9.

The second period of time began in January 2015, when K.D. began attending a private school for children with learning disabilities, AIM Academy (AIM). In May 2015, Parents provided the following information to the District:

> Since beginning at AIM Academy, K.D. has begun to make improvements in reading skills, which at this point are manifested in phonological processing and decoding skills. While not yet mastered, she remains slow with reading labored, although she is showing significant progress in this area. This type of response is often typical of the dyslexic learner, as K.D. has begun to read controlled text with accuracy in this manner, although this

> has not yet generalized to longer and uncontrolled text. This would be expected to improve over time.
>
> Overall, given the continued need for the significant amount of explicit and implicit interventions, supports, accommodations, and scaffolding she receives throughout her educational day, K.D. requires on-going placement at the AIM Academy where she is responding to the research-based literacy instruction throughout her full day. Currently, K.D. is beginning to show benefit from her instruction . . . She continues to require her current level of intensive instruction as she has begun to respond to instruction, while her needs were unable to be accommodated at her public-school setting.

JA 257 (J-108); ECF No. 13-1 at 15, ¶56.. This information was material to understanding K.D.'s ongoing programming needs. It also demonstrated that Downingtown had underestimated K.D.'s potential for growth based on her lack of progress in prior less intensive programming provided in the District.

As was the case with Christopher Polk, K.D.'s parents provided evidence of remarkable improvements with appropriately intensive interventions in a short period of time. As was the case with Christopher Polk, the school district ignored that input from Parents. As discussed more fully in Section II, *infra., Polk* teaches that failing to consider this type of information violates IDEA because it seriously infringes upon parental participation rights.

The panel decision ignores that significant substantive violation notwithstanding the fact that Parents preserved the issue below. Parents argued in the due process hearing and in the district court that a local education agency must

make changes in the goals or the services in the IEP to enable the student to make progress, in accordance with 34 C.F.R. § 300.324. ECF No. 13-1 at 19. This regulation requires review and revision of IEPs "as appropriate to address "information about the child provided to, or by, the parents." 34 C.F.R. 300.324(b)(1)(ii)(C).

On April 23, 2015, Parents filed their initial petition for due process. At that time, they sought tuition reimbursement for placement at AIM Academy based upon the unilateral placement in December 2014. *See* Administrative Record, Petition for Due Process, dated April 23, 2015. On August 12, 2015, Parents filed their First Amended Petition for Due Process, adding two averments:

- On May 26, 201[5],[2] by telephone and email, counsel for Parents notified counsel for the District that, after ten business days, Parents would be placing K.D. at AIM Academy for ESY 2015 and the 2015-2016 school year and seeking reimbursement. JA 65 at ¶66.
- After ten business days had passed, Parents enrolled K.D. at AIM for ESY 2015 and the 2015-2016 school year. *Id.* at ¶67.

The District and the hearing officer knew that this was an issue in the case. The parties even stipulated that "based upon exhibit J-111 and telephone

[2] The Amended Petition refers to May 26, 2016, but that is an obvious typographical error, as the Petition was dated August 2015.

conversations between counsel for Parents and the District, Downingtown Area School District had notice on May 26, 2015 of the Parents' intent to place K.D. in AIM Academy for the extended school year 2015 and the 2015-2016 school year and seek reimbursement." N.T. (11.24.2015) at 5.

Parents argued in the administrative proceeding that Downingtown improperly failed to reconsider the December 2014 IEP in light of Dr. Kelly's report provided to the District by the Parents. The hearing officer ignored the argument, merely stating that "the Student was not available for ESY after enrolling in the Private School." JA 116. He never engaged the question of whether the District inappropriately ignored the additional information that it received in the spring of 2015 and left the December 2014 IEP in place without making revisions based upon more recent progress reporting.

Likewise, Parents made the following arguments in the district court:

- On May 6, 2015, Parents provided an updated report (J-108, JA 255-258) from Dr. Kelly regarding K.D. Based upon that updated testing, Dr. Kelly recommended to Parents and the IEP Team continued placement at AIM for the 2015-2016 school year. ECF No. 13-1 at 15, ¶56; JA 257.
- Consistent with her report, Dr. Kelly testified at the hearing that K.D. made appropriate progress in literacy while attending AIM. And, more

importantly, had K.D. been making that type of progress in the District, she would not have had the deficits she exhibited in December 2014. ECF No. 13-1 at 15, ¶60.

- On May 7, 2015, Parents specifically asked for an offer for extended school year (ESY) for the summer of 2015. ECF No. 13-1 at 15, ¶ 55. Parents also pointed out to the district court that they provided notice of intent to continue the placement at AIM for the 2015-2016 school year, giving the District ten days to revise the December 2014 IEP in light of the new progress reporting from the private placement. The District failed to revise the December 2014 IEP. ECF No. 13-1 at 15, ¶ 57.

The district court, like the hearing officer, never addressed Parents' argument that the District had an obligation to revise the December 2014 offer of FAPE based upon new information provided by Parents in May 2015. The fact that the district court and hearing officer failed to engage the argument does not mean Parents did not preserve it.[3] Importantly, as discussed more fully, *infra*, the panel's failure to address this crucial issue created an intra-Circuit split on an issue of exceptional importance to children with disabilities.

[3] Parents raised this issue in their opening brief in this Court at 41 – 43.

II. THE PANEL DECISION CONFLICTS WITH *POLK V. CENTRAL SUSQUEHANNA INTERMEDIATE UNIT*

Almost 30 years prior to *Endrew F.*, in *Polk, supra,* this Court "examine[d] the contours of the [FAPE] requirement" of IDEA, as it touched on the intensity of educational services requested by Christopher Polk's parents. 853 F.2d at 172. Christopher's parents sought direct "hands-on" physical therapy from a licensed physical therapist for their son. 853 F.2d at 172. The Intermediate Unit (IU), the educational agency serving Christopher, provided only consultative physical therapy. *Id.* at 176. Similarly, in this case, K.D.'s parents sought reading instruction delivered with more intensity than that proposed by the District.

In *Polk*, the parents adduced evidence "concerning Christopher's remarkable improvements in a short period of time [with hands-on therapy]." *Id.* at 185. Christopher's parents contended "that significant improvements attributable to the private services they provided "contrast[ed] markedly with the trivial advancement in fine and gross motor control that Christopher experienced as a result of seven years of public education under the consultative model." *Id.* Like Christopher's parents, K.D.'s parents provided their child's educators with evidence that, in a short time, from January to May 2015, the more intensive program at AIM had resulted in more rapid improvement in K.D.'s foundational reading skills.

In *Polk*, the district court held: "The fact that Christopher would advance more quickly with intensive therapy rather than the therapy he now receives does not make

the School District's program for Christopher defective. Programs need only render some benefit; they need not maximize potential." *Id.* at 180. This Court reversed, because the Polks, "by virtue of the evidence they adduced concerning Christopher's remarkable improvements in a short period of time at [Parents' private provider], have provided at least some indication that his education may be inappropriate." *Id.* at 185.

Similarly, in this case, Parents undeniably provided evidence to the District in the spring of 2015 that, given a more intensive reading program, K.D. demonstrated a potential for growth that District programming had not unlocked. Contrary to the panel decision's suggestion, it is not "hindsight", Op. at 13-14, for Parents to point to K.D.'s demonstrable progress at AIM in the Spring of 2015 to show that the District should have revised the December 2014 offer of FAPE. On clear notice that AIM's intensive literacy instruction provided educational benefit not available from Downingtown's own prior *ad hoc* interventions, the District could not leave the December 2014 IEP unchanged.

An IEP does not "aim to enable a child to make progress," Op. at 13, when the school district ignores relevant data provided by the parents. The panel decision's endorsement of Downingtown's refusal to consider the information of K.D.'s progress at AIM not only conflicts with *Endrew F.,* it is inconsistent with *Polk*. Further, as discussed in the next section, the panel decision will not only cause

confusion because it creates an intra-circuit conflict. It will undermine IDEA's broad remedial purpose by thwarting the ability of any parents to participate meaningfully in educational programming for their children, providing further basis for *en banc* review. *Cf. Pfizer, Inc. v. Apotex, Inc.*, 488 F.3d 1377, 1380-81 (Fed. Cir. 2007) ("function of *en banc* hearings . . . is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong") (quoting Letter dated Aug. 21, 1998, *Hearing before the S. Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 72 (1999)).

III. THE PANEL'S DECISION PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE BECAUSE IT VITIATES PARENTAL RIGHTS TO PARTICIPATE IN THE EDUCATIONAL DECISION MAKING PROCESS

The panel decision states flatly: "When schools use their expertise to address each child's distinct educational needs, we must give their judgments appropriate deference." Op. at 4. This unconditional statement fails to acknowledge that, in order for an IEP to be "reasonably calculated to enable a child to make progress appropriate in light of [her] circumstances," the fact-intensive exercise of developing an educational program must "be informed not only by the expertise of school officials, but also by the input of the child's parents." 137 S. Ct. at 999.

Endrew F. stated:

> [D]eference is based on the application of expertise and the exercise of judgment by school authorities . . . The nature of the IEP process, from the initial consultation through state

> administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue [citations omitted]. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

137 S. Ct. at 1001-1002.

In *Endrew F.*, as in this case, the school district never revised the IEP to reflect the child's improved performance with the use of different interventions. 137 F. S. Ct. at 997 (parents "were particularly concerned that the stated plan for addressing Endrew's behavior did not differ meaningfully from his fourth grade IEP, despite the fact that his experience at [the private school] suggested that he would benefit from a different approach"). By ignoring this information, the school district failed to draft an IEP "reasonably calculated to enable [Endrew] to make progress appropriate in light of [his] circumstances." 137 S. Ct. at 999. The panel decision makes precisely the error that led to reversal in *Endrew F.* Characterizing an IEP as providing "meaningful benefit" cannot change the fact that an IEP fails to take into account material information offered by the parents. *Endrew F.* simply does not support deference in this situation.

Polk also counseled against unfettered deference to educational authorities: "Although the tenor of [*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*,

458 U.S. 176 (1982)] reflects the Court's reluctance to involve the courts in substantive determinations of appropriate education . . . , it is clear that the Court was not espousing an entirely toothless standard of substantive review." 853 F.2d at 179. *Rowley* "did not abdicate responsibility for monitoring the substantive quality of education under [IDEA]." *Id.* But the panel decision in this case does just that.

Since *Polk*, this Court and the Supreme Court have repeatedly recognized the vital importance of meaningful parental participation in the IEP process. "Because Congress was aware that schools had 'all too often' denied a free appropriate public education to children with disabilities 'without in any way consulting' the children's parents, the Act also 'establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate.'" *H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch.*, 873 F.3d 406, 408 (3d Cir. 2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)); *see also Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007) (IDEA requires that parents play a significant role in IEP process); *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (core of statute is significant role that parents play in IEP process); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) ("Congress incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents"); *Pardini v.*

Allegheny Intermediate Unit, 420 F.3d 181, 189 n.10 (3d Cir. 2005) (to the extent district court decision suggests marginalized or diminished role for parents in decision making progress, "the court's assessment of the respective roles is erroneous"); *Polk*, 853 F.2d at 177 ("an essential protection of [IDEA] stems from the parental participation in the formulation of an IEP for the child's special education"); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82 (3d Cir. 1996); *cf. D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 565 (3d Cir. 2010) (initial unresponsiveness to parental concerns did not violate IDEA only because parents ultimately had opportunity to participate meaningfully in creation of an IEP that responded to parent's input) The Act's "elaborate and highly specific procedural safeguards," including procedures guaranteeing meaningful parental participation, "provide parents with a means of enforcing the Act's 'general and somewhat imprecise substantive admonitions.'" *H.E.*, 873 F.3d at 408 (quoting *Rowley*, 458 U.S. at 205). The panel decision vitiates the right to parental participation, thereby eliminating a fundamental feature designed to ensure the provision of FAPE. This presents an issue of exceptional importance to all children with disabilities.

CONCLUSION

Unconditional deference to school personnel who have excluded parents from participating meaningfully in the educational decision making process is inconsistent with *Polk* and contrary to IDEA's "broad remedial goals," *G.L.*, 802

F.3d at 601, insofar as IDEA depends upon parental participation to ensure the delivery of FAPE. IDEA does not support such deference. The panel decision is inconsistent with *Endrew F.,* creates an intra-circuit conflict with *Polk*, ignores decades of precedent, and undermines IDEA's broad remedial purpose. For all of these reasons, this Court should rehear this case *en banc*.

Respectfully submitted,
REISMAN CAROLLA GRAN LLP

Date: October 2, 2018

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Exhibit 1

Petition for Rehearing *En Banc*

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3065

K.D., by and through her parents, Theresa and Jonathan Dunn;
THERESA DUNN AND JONATHAN DUNN, individually,
Appellants

v.

DOWNINGTOWN AREA SCHOOL DISTRICT

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2:16-cv-00165)
District Judge: Honorable Lawrence F. Stengel

Argued June 19, 2018

Before: GREENAWAY, JR., RESTREPO, and BIBAS,
Circuit Judges

(Filed: September 18, 2018)

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OPINION OF THE COURT

BIBAS, *Circuit Judge*.

When schools use their expertise to address each child's distinct educational needs, we must give their judgments appropriate deference. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001-02 (2017). The Individuals with Disabilities Education Act (IDEA) "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001. But we may not "substitute [our] own notions of sound educational policy for those of the school authorities which [we] review." *Id.* (internal quotation marks omitted). Our precedents already accord with the Supreme Court's guidance in *Endrew F.*, so we continue to apply them. Under both *Endrew F.* and our precedents, Downingtown Area School District followed the law in educating K.D. So we will affirm.

I. BACKGROUND

A. Facts

1. *Kindergarten and testing.* K.D. attended public school in the Downingtown Area School District from preschool through the first semester of third grade. Halfway through kindergarten, Downingtown assigned an Instructional Support Team to monitor K.D.'s educational progress and give her extra support.

After kindergarten, over the summer of 2012, K.D., her parents, and her teachers completed a battery of tests. The psychologist found that K.D. had a low-average IQ (87) and Attention Deficit Hyperactivity Disorder (ADHD). K.D. scored below average in early reading skills, basic reading, total reading, writing, and math, and average in oral language. She could not read any common grade-level sight words nor the oral-reading passages. In writing letters of the alphabet, she scored in the first percentile. She scored much lower than average on executive function, and struggled with impulsivity and organization.

2. *The first IEP*. After completing these tests, Downingtown offered K.D. an individualized education program (IEP) in 2012, at the start of first grade. It set measurable goals for letter naming, letter sounds, writing, rhyming, reading comprehension, math, and on-task behavior. The program's specially designed instructions provided for audiobooks, extra time for tests and quizzes, a quiet place to take tests, and using visual

images and thinking aloud to promote recall of text. It also provided for three hours of learning-support instruction every school day.

3. *First grade*. K.D. started first grade. She spent part of her time with the regular teacher and part with her special education teacher, Ms. Smith. Ms. Smith was unhappy with K.D.'s progress in naming and sounding out letters, so she changed K.D.'s homework and sent home a packet of stories to help her improve. Because K.D.'s visual and motor skills were lagging, Downingtown asked for an occupational-therapy screening. And to keep K.D. from regressing over the summer, the school changed the first IEP, arranging for three hours of academic support, three days per week, during July.

4. *The second IEP*. The summer before second grade, in 2013, Downingtown developed K.D.'s second IEP. It increased her baselines for letter naming, letter sounds, reading comprehension, writing, and math calculation. Her goals for writing letters, rhyming, math facts, and on-task behavior remained unchanged. Downingtown added "an evidence based multi sensory reading and writing program" for two and a half hours. JA 98. It retained her supplemental learning support and extended-school-year services.

5. *Summer before second grade*. K.D.'s parents were dissatisfied with K.D.'s summer schooling. They asked about testing K.D. for dyslexia and dysgraphia, and about the Wilson reading program for struggling readers. Ms. Smith replied that school psychologists do not diagnose those conditions, but offered to put them in touch with the school psychologist any-

way. She also said that Downingtown did not (yet) offer Wilson before middle school, but that K.D. would receive a similar program geared toward elementary-school students.

6. *Second grade and updating the second IEP*. Just as K.D. started second grade, Downingtown switched to the Wilson program for kindergarteners through third graders. K.D. mastered 4 of 11 units in Wilson's Level 1 by the end of second grade. Downingtown also updated K.D.'s second IEP to reflect the results of her occupational-therapy evaluation.

7. *The third IEP*. At the end of second grade, in 2014, Downingtown developed K.D.'s third IEP, for third grade. Reflecting K.D.'s progress, it increased her goals or baselines for letter naming, reading, writing, comprehension, and on-task behavior. And it kept her occupational-therapy goals and specially designed instruction.

K.D.'s parents were dissatisfied with the new IEP, so they met with school officials to discuss it. They did not reject it after the meeting, so the IEP took effect. They also hired Ms. Smith to tutor K.D. over the summer, while K.D. continued in the school's extended-school-year program.

8. *Dr. Kelly's independent evaluation*. In July 2014, K.D.'s parents hired Dr. Karen Kelly to do a neuropsychological evaluation. Dr. Kelly diagnosed K.D. with dyslexia, ADHD, "mathematics disorder, … organizational deficits, memory impairment, [and] executive function[] impairments." JA 192. She also found that K.D. was reading below first-grade level.

Beyond diagnosing K.D., Dr. Kelly criticized Downingtown's programming. She stated that K.D.'s poor achievement

showed that K.D. could not benefit from the school's program, evidencing the school's "global disregard for this level of impairment." JA 191. K.D.'s parents did not immediately notify Downingtown of the evaluation.

9. *Third grade and updating the third IEP*. To prepare for third grade, Downingtown tested K.D. again. She had advanced in all aspects of reading and writing. It also tested her vision and found that she qualified for vision services. Two months after the fact, K.D.'s parents told Downingtown that Dr. Kelly had evaluated K.D. and that they had hired an educational advocate.

Downingtown met with K.D.'s parents to discuss the upcoming school year. It then performed more evaluations, added vision services, and offered a one-on-one aide. K.D.'s parents rejected the aide, for fear that it would make K.D. stand out. The latest IQ test showed that K.D.'s IQ had risen into the average range.

Downingtown presented K.D.'s parents with the IEP as modified. They checked both the boxes for approving and for disapproving the IEP. They did not explain which parts they disliked, but expressed both hope for progress and concern about how appropriate her programming was.

10. *The fourth IEP and withdrawal*. In the middle of third grade, Downingtown's team met again. Based on their own and Dr. Kelly's evaluations, as well as K.D.'s progress, Downingtown increased her goals for writing and on-task behavior. It added new goals for math, reading fluency, and reading comprehension. It added an hour of direct math instruction, forty-

five minutes of direct writing instruction, and fifty-five minutes of "multisensory reading instruction" per day, all in "evidence based" programs. JA 104. Downingtown also took Dr. Kelly's advice to replace Wilson with "SRA/Corrective Reading and FastForward," two other "research-based programs that provide phonics and reading comprehension instruction." *Id.*

In December 2014, midway through third grade, Downingtown offered K.D.'s parents the new program. But they rejected it, withdrew K.D., and placed her in private school.

B. Procedural History

1. *The administrative hearing*. K.D.'s parents filed a complaint with Pennsylvania's Office of Dispute Resolution, seeking reimbursement for private-school tuition. They argued that Downingtown had denied K.D. a free appropriate public education under the IDEA. They also alleged that, by not adequately addressing K.D.'s needs, Downingtown had discriminated against K.D. based on her disability, in violation of the Rehabilitation Act and the Americans with Disabilities Act (ADA).

The administrative officer found that the IEPs were adequate and that Downingtown had provided K.D. with a free appropriate public education. Because the officer decided the case before *Endrew F.*, he applied the Third Circuit's meaningful-benefit test. *See Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 268 (3d Cir. 2012) (explaining meaningful-benefit test). He found that Downingtown remained aware of K.D.'s slow progress and kept trying to improve her programming in response

to K.D.'s performance and Dr. Kelly's report. And while it repeated some goals, Downingtown "did not simply hand out the same IEP year after year," but repeated foundational skills where needed to address "the challenge of teaching even fundamental skills to [K.D.]." JA 115. Downingtown had explained clearly why it chose the programs it did and how they addressed K.D.'s needs.

The officer disagreed with Dr. Kelly's criticisms of Downingtown. He found that Downingtown had acted reasonably in giving the Wilson program time to work and in pursuing occupational therapy and vision services. He held that all the IEPs were "reasonably calculated to provide a meaningful educational benefit to [K.D.] when they were issued." JA 116. So he rejected the claims based on the IDEA. The ADA and Rehabilitation Act claims rested on the same theory as the IDEA claim, so the officer rejected those claims as well.

2. *The District Court*. K.D.'s parents then filed a complaint in District Court, bringing the same three claims. *K.D. v. Downingtown Area Sch. Dist.*, No. 16-0165, 2016 WL 4502349, at *3 (E.D. Pa. Aug. 29, 2016). They moved to supplement the administrative record with new evidence, including AIMSweb reports comparing K.D. with her peers, Downingtown's interrogatory answers, and a Wilson program teacher's manual. *Id.* at *2-3.

The District Court denied the motion. It reasoned that the ADA and Rehabilitation Act claims rested on the same grounds as their IDEA claim, that the new evidence was only minimally relevant, and that K.D.'s parents should have introduced the evidence before the hearing officer. *Id.*

On cross-motions for judgment on the administrative record, the District Court granted judgment for Downingtown. *K.D. v. Downingtown Area Sch. Dist.*, No. 16-0165, 2017 WL 3838653, at *13 (E.D. Pa. Sept. 1, 2017). Because *Endrew F.* came down before it decided the case, the District Court first held that *Endrew F.* "simply confirm[ed] the standard that has been used in the Third Circuit for years." *Id.* at *7 n.7. It went on to apply *Endrew F.* alongside our precedents, holding that "the IEPs contained meaningful changes" and that "in light of her circumstances, K.D. made appropriate and meaningful progress." *Id.* at *8-9 (capitalization removed).

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291.

II. DISCUSSION

Downingtown complied with the IDEA. It gave K.D. a free appropriate public education by developing tailored IEPs. And though K.D.'s parents claim disability discrimination under the ADA and Rehabilitation Act, their theory is indistinguishable from their IDEA claim. So all three claims fail together.

A. Downingtown complied with the IDEA

First, K.D.'s IDEA claim fails. K.D.'s parents argue that the Supreme Court, in *Endrew F.*, implicitly overruled the Third Circuit's meaningful-benefit test. And they argue that under *Endrew F.*, Downingtown did not do enough with its IEPs to provide a free and appropriate public education. But *Endrew F.* did not overrule our precedent. And their claim fails under Supreme Court and Third Circuit decisions.

Whether *Endrew F.* implicitly overruled Third Circuit precedent is a question of law, which we review de novo. *Ridley*, 680 F.3d at 268. Whether an IEP is appropriate is a question of fact, which we review for clear error. *Id.*

1. Endrew F. *did not overrule Third Circuit precedent*. In *Endrew F.*, the Tenth Circuit had read the IDEA to require only that students make "merely … more than *de minimis*" progress. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329, 1338 (10th Cir. 2015) (internal quotation marks omitted). The Supreme Court rejected the Tenth Circuit's standard, not ours. *See* 137 S. Ct. at 1000-01. On the contrary, *Endrew F.*'s language parallels that of our precedents.

The Court held that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001. That language mirrors our longstanding formulation: the educational program "must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities." *Ridley*, 680 F.3d at 269 (internal quotation marks and citation omitted). Our test requires an educational program "likely to produce progress, not regression or trivial educational advancement." *Id.* (internal quotation marks omitted).

Like our precedents, *Endrew F.* treated a child's intellectual abilities and potential as among the most important circumstances to consider. 137 S. Ct. at 999. And we have contrasted our standard with that applied by the Tenth Circuit: "the provision of merely more than a trivial educational benefit does not meet the meaningful benefit requirement …." *L.E. v. Ramsey*

Bd. of Educ., 435 F.3d 384, 390 (3d Cir. 2006) (internal quotation marks omitted); *see also T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000) ("[A] satisfactory IEP must provide significant learning and confer meaningful benefit." (internal quotation marks omitted)). So we see no conflict between *Endrew F.* and our precedent.

2. *K.D.'s IEPs were reasonably calculated to enable her to make appropriate progress*. The IDEA required Downingtown to work with K.D.'s parents to develop IEPs that "aim[ed] to enable [K.D.] to make progress." *Endrew F.*, 137 S. Ct. at 999. Those aims must be "reasonably calculated" and formulated "in light of the child's circumstances." *Id.* Downingtown did so.

Downingtown had significant foundational work to do with K.D. She had ADHD, vision problems, and poor motor skills. She was quite challenged in perceptual reasoning and processing speed. Her reading, writing, and math skills were well below average. And she suffered from dyslexia and mathematics disorder. Given her impairments and circumstances, the District Court did not clearly err in finding that "this kind of fragmented progress could reasonably be expected." 2017 WL 3838653, at *12.

i. *IEPs must be reasonable, not ideal.* Though her parents argue otherwise, K.D.'s slow progress does not prove that her IEPs were deficient. "Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Endrew F.*, 137 S. Ct. at 999 (emphasis in original). "The IEP *must aim* to enable the child to make progress." *Id.* (emphasis added). We may not

rely on hindsight to second-guess an educational program that was reasonable at the time.

While courts can expect fully integrated students to advance with their grades, they cannot necessarily expect the same of less-integrated students. As *Endrew F.* explained, "for a child fully integrated in the regular classroom, an IEP typically should … be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 137 S. Ct. at 999 (internal quotation marks omitted). But the District Court found that K.D. was *not* fully integrated into the regular classroom. 2017 WL 3838653, at *2-3, *12. Instead, she received supplemental learning support for much of the day. So there is no reason to presume that she should advance at the same pace as her grade-level peers.

Still, K.D.'s parents seek to extend the presumption beyond fully integrated students. They point to a regulatory guidance letter from the Department of Education's Office of Special Education and Rehabilitative Services. It states: "Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided." U.S. Dep't of Educ., Dear Colleague Ltr., at 1 (Nov. 16, 2015). It also instructs that "the annual goals … should be sufficiently ambitious to help close the gap" between the child's current and grade-level achievements. *Id.* at 5.

K.D.'s parents overread the letter. The letter sets forth research and aspirational goals, which may be helpful for some children. But while it aspires to "close the gap," it does not

specifically require grade-level goals for children who are not and cannot be fully integrated into regular classrooms. It never mentions a presumption. Nor does it suggest that all (or even most) disabled children can advance at a grade-level pace.

Even if the letter could be read as relevant, it would neither bind nor persuade us. Guidance letters do not enjoy *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000) (discussing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)). And this guidance letter does not address the IDEA's language, let alone parse it. The IDEA contemplates educational programs tailored to "how the child's disability affects the child's involvement and progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa). Rather than presuming grade-level advancement, the Act requires revisions to education programs "*as appropriate* to address any lack of expected progress toward the annual goals and in the general education curriculum, *where appropriate*." *Id.* § 1414(d)(4)(A)(ii), (ii)(I) (emphases added).

Because the letter neither "thorough[ly] … consider[s]" nor "valid[ly] … reason[s]" about the meaning of the statute, we find it unpersuasive on this issue. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

ii. *Downingtown reviewed and revised the IEPs to keep them appropriately rigorous.* K.D.'s slow progress does not prove that her IEPs were not challenging enough or updated enough. The hearing officer found that Downingtown did not simply repeat educational programs. The District Court agreed. The Court also rejected Dr. Kelly's assertion that K.D. was not making meaningful progress. 2017 WL 3838653, at *9-12. We

defer to both sets of findings on appeal. *See S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 270 (3d Cir. 2003) (treating the hearing officer's factual findings as "prima facie correct"); *Ridley*, 680 F.3d at 268 (reviewing the District Court's findings for clear error).

Both the hearing officer and the District Court found that Downingtown was willing and able to review and revise K.D.'s IEPs throughout her education. After K.D.'s parents notified Downingtown of Dr. Kelly's evaluation and recommendations, Downingtown responded within a week. It scheduled a meeting, sought more assessments, and offered a one-on-one aide. And it developed a fourth IEP, which incorporated many of Dr. Kelly's recommendations, including adopting a new reading program.

Finally, K.D.'s parents advance arguments not made below. They claim that Downingtown did not offer K.D. an IEP for 2015. And, at oral argument, they asserted that K.D.'s IEPs were not intense enough and did not strike the right balance between regular and special education. But "[a]bsent exceptional circumstances, this Court will not consider issues raised for the first time on appeal." *Del. Nation v. Pennsylvania*, 446 F.3d 410, 416 (3d Cir. 2006). We see no exceptional reason to excuse their failure. And in any event, Downingtown offered K.D. a fourth IEP in December 2014, which would have run for almost all of 2015.

In sum, the District Court did not err in finding that Downingtown set appropriately challenging goals for K.D.

B. No basis to supplement the record

Nor did the District Court abuse its discretion in rejecting irrelevant and cumulative evidence. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 253-54 (3d Cir. 2012). Though the AIMSweb evidence charted K.D.'s progress on school-district benchmarks, the administrative record already contained ample evidence of how K.D. compared to her peers. Downingtown's interrogatory answers add no facts to what is elsewhere in the record. And K.D.'s parents should have introduced the Wilson teacher's manual earlier, before the hearing officer. They gave no good reason for not doing so.

C. No disability discrimination under the ADA or Rehabilitation Act

K.D.'s parents also assert disability discrimination under the Rehabilitation Act and ADA. They allege that Downingtown did not use "appropriate research-based interventions" to "teach a student like K.D. to read." Appellants' Br. 45. Though they deny it, their allegations simply repackage those underlying the IDEA claim. So the District Court properly rejected these claims when it rejected the IDEA claim.

* * * * *

K.D.'s parents understandably want only the best opportunities for their daughter. But Downingtown followed the law by individualizing her education programs to help her make progress appropriate to her circumstances. So we will affirm the District Court's judgment in favor of Downingtown.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

K.D., *et al.*, v. Downingtown Area School District	No. 17-3065

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2018, I electronically filed the foregoing Appellants' Petition for Rehearing *En Banc* with the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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