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

BRIEF OF APPELLANTS AND VOLUME I OF JOINT APPENDIX (A-001 TO A-041)

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Subject Matter Jurisdiction

Plaintiffs-Appellants Theresa and Jonathan Dunn (Parents) brought this action on behalf of their daughter K.D., asserting violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1401, *et seq.* (IDEA), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.* (Section 504), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* (ADA). Jurisdiction is based upon 28 U.S.C. §§ 1331and 1343 and the aforementioned statutory provisions.

Appellate Jurisdiction

On September 20, 2017, Parents filed this timely appeal from a final Order, dated August 31, 2017 granting the Motion for Judgment on the Administrative Record of Defendant-Appellee Downingtown Area School District (DASD or District) and an interlocutory Order, dated August 29, 2016, denying Parents' Motion to Supplement the Administrative Record. Joint Appendix (JA) 1. This Court has jurisdiction under 28 U.S.C. § 1291.

RELATED CASES AND PROCEEDINGS

None.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1:

Did the district court and hearing officer err in finding that DASD offered appropriate Individualized Educational Programs (IEPs) when those IEPs failed to comply with explicit statutory requirements, resulting in programming that was not reasonably calculated to result in progress appropriate in light of K.D.'s circumstances?

Suggested Answer: Yes.

Appellants raised this issue in the Memorandum of Law in Support of Motion for Judgment on the Administrative Record, dated September 28, 2016 (ECF No. 13) at 3-24, their Memorandum of Law in Opposition to DASD's Motion for Judgment on the Administrative Record, dated October 28, 2016 (ECF No. 15) at 4-12, and their Supplemental Memorandum of Law in Support of Motion for Judgment on the Administrative Record, dated August 9, 2017 (ECF No. 18). The district court ruled on this issue in its opinion dated September 1, 2017 (ECF No. 20), JA 11 – JA 39.

Issue 2:

In Pennsylvania administrative due process hearings under IDEA, Parents are not entitled to discovery, but may request the student's own educational records. For an IDEA-eligible student, Parents must present their Section 504 and

ADA claims in the IDEA due process hearing, although Pennsylvania hearing officers only exercise jurisdiction of 504/ADA claims that are co-extensive with IDEA free appropriate public education (FAPE) claims. Under these circumstances, did the district court err in denying a motion to supplement the administrative record to include documents relevant to 504/ADA discrimination claims that were neither relevant to nor available to the Parents in the administrative hearing?

Suggested Answer: Yes

Appellants raised this issue in the Memorandum of Law in Support of Motion to Supplement the Administrative Record, dated June 10, 2016 (ECF No. 8-1), The district court ruled on this issue in its opinion dated August 29, 2016 (ECF No. 10), JA 3 – JA 9.

Issue 3:

Did the hearing officer and district court err in entering summary judgment in DASD's favor on K.D.'s discrimination claims under Section 504 and the ADA?

Suggested Answer: Yes.

Appellants raised this issue in the Memorandum of Law in Support of Motion for Judgment on the Administrative Record, dated September 28, 2016 (ECF No. 13) at 3-16 and 24-28 and their Memorandum of Law in Opposition to

DASD's Motion for Judgment on the Administrative Record, dated October 28, 2016 (ECF No. 15) at 12-15. The district court ruled on this issue in its opinion dated September 1, 2017 (ECF No. 20), JA 39 – JA 40.

Standard of Review

Issue 1:

When deciding cases under IDEA, federal district courts apply a nontraditional standard of review, referred to as "modified *de novo*" review. *D.S. v. Bayonne Bd. of Educ.*, 602 F.3d 553, 564 (3d Cir. 2010). Using this standard:

> a district court must give "due weight" to the findings of the state hearing officer. *Bd. of Educ. v. Rowley,* 458 U.S. 176, 206 (1982). "Factual findings from the administrative proceedings are to be considered *prima facie* correct. 'If a reviewing court fails to adhere to them, it is obliged to explain why. The court is not, however, to substitute its own notions of sound educational policy for those of local school authorities.'" *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 270 (3d Cir. 2003) (quoting *M.M. v. Sch. Dist. of Greenville Cnty*., 303 F.3d 523, 531 (4th Cir. 2002)). "Within the confines of these standards, a district court is authorized to make findings based on the preponderance of the evidence and grant the relief it deems appropriate." *D.S.*, 602 F.3d at 564 (citations omitted); *see also Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004) (describing a district court's burden as "unusual" in that it must make its own findings by a preponderance of the evidence, but nevertheless afford "due weight" to the administrative officer's determinations).

Ridley Sch. Dist. v. M.R., 680 F.3d 260, 268 (3d Cir. 2012). This Court reviews a district court's findings of fact for clear error, but exercises "plenary review over the legal standards that a district court applies and over its legal conclusions." *D.S.*,

602 F.3d at 564; *see also Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 528 (3d Cir. 1995); *H.E. v. Walter D. Palmer Learning Partners Charter Sch.*, 873 F.3d 406, 412 (3d Cir. 2017); *McGann v. Cinemark USA, Inc.*, 873 F.3d 218, 224 (3d Cir. 2017). "A finding of fact is clearly erroneous when it is 'completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data.'" *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 283 (3d Cir. 2014).

Issue 2:

Appellate review of the decision to admit or exclude additional evidence is plenary. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 758 (3d Cir. 1995).

Issue 3:

This Court has not determined the standard of review applicable to Section 504/ADA claims decided by an administrative hearing officer. *T.F. v. Fox Chapel Area Sch. Dist.*, 589 F. App'x 594, 598 (3d Cir. 2014) (unpublished) (assuming *arguendo* that *de novo* standard applies to 504/ADA claims). However, some Pennsylvania hearing officers have ruled that they do not have jurisdiction of ADA claims. *S.S. v. Radnor Twp. Sch. Dist.*, No. 17367-15-16, at 2 (Pa. ODR[1] Nov. 6, 2016) (Jelley), available at http://bit.ly/kd17367 (last viewed Feb. 17, 2018).

[1] ODR is the Office of Dispute Resolution, the entity responsible for special education due process hearings in Pennsylvania.

Others, including the hearing officer in this case, assert that they only have jurisdiction of ADA claims "insofar as they are 'derivative' claims that assert issues and request relief that is identical with the issues and relief requests advanced pursuant to the IDEA." *See H.B. v. Abington Sch. Dist.*, No. 18081-16-17 at 1 n.2 (Pa. ODR March 21, 2017) (Culleton), available at http://bit.ly/kd18081 (last viewed Feb. 17, 2018); *M.D. v. Cent. Bucks Sch. Dist.*, No. 15949-14-15, at 2 n.4 (Pa. ODR Jan. 19, 2016) (Valentini), available at http://bit.ly/kd15949; *see also* JA 112. The hearing officer expressly held that he only had jurisdiction of "ADA claims that are derivative of IDEA or Section 504 claims." JA 112; JA 113 (noting that hearing officer only "has jurisdiction to the extent that the ADA claims and remedies overlap completely with the other claims in this case"). The administrative tribunal neither heard nor ruled upon ADA discrimination claims that did not arise out of the denial of a FAPE. With no administrative ruling to which it can defer, this Court must address *de novo* the discrimination claims that do not "overlap completely" with the IDEA claims.

STATEMENT OF THE CASE

With the administrative action in this case, Parents alleged that DASD failed to offer K.D. an appropriate education as defined by IDEA and Section 504. JA 65-66, ¶¶ 68-73. In addition, they asserted independent claims under Section 504 and the ADA. Specifically, they alleged that the services K.D. needed to ensure that

she enjoyed meaningful access to the benefits of a public education were available as a reasonable accommodation. Nonetheless, DASD failed and refused to provide those services. JA 67, ¶ 76. The hearing officer erred that he only had jurisdiction of the ADA claims to the extent they "overlap completely" with the IDEA/504 FAPE claims JA 113.

The district court acknowledged that the parties' dispute centers around application of the law to the facts. JA 12 n.2.[2] Parents maintain that the facts establish that K.D.'s IEPs did not aim for educational progress appropriate in light of K.D.'s circumstances, as required by IDEA. Further, they assert that the district court committed legal error in entering summary judgment on K.D.'s discrimination claims under Section 504 and the ADA.

STATEMENT OF FACTS

A. K.D.'s Kindergarten (2011-2012) School Year and Subsequent Identification as a Student Eligible for Special Education

K.D. began kindergarten in DASD in September 2011. JA 12 (citing JA 95, FF[3] 4). At the end of K.D.'s kindergarten year, DASD's school psychologist evaluated her for eligibility for special education. On cognitive testing, K.D. scored in the average range for verbal comprehension and working memory and the

[2] There is one exception. Parents maintain that findings that K.D. had a reading (as opposed to listening) comprehension goals are clear error.
[3] FF refers to the hearing officer's findings of fact.

borderline range for perceptual reasoning and processing speed. JA 13 (citing JA 95, FF 3). On achievement testing, K.D. achieved an average score on the oral language composite. JA 14 (citing JA 96, FF 6). However, she was below average in Total Reading and Basic Reading composite scores and had extremely low basic reading skills. K.D. could not read any of the passages presented on the Oral Reading Fluency subtest. JA 14 (citing JA 96, FF 6, 7). K.D. scored below average in math and written expression. JA 14 (citing JA 96, FF 8, 9). Her alphabet writing fluency was in the 1st percentile because she reversed several letters when writing and could not write others. JA 96, FF 8. The school psychologist concluded that K.D. qualified for special education, with a primary disability category of Specific Learning Disability (SLD). Because she also met diagnostic criteria for Attention Deficit Hyperactivity Disorder (ADHD), K.D. had a secondary category of Other Health Impairment (OHI). JA 14; JA 96, FF 10. DASD presented these results to Parents at a feedback meeting on August 29, 2012. JA 95, FF 1.

DASD's 2012 Evaluation Report identified "verbal reasoning abilities" and "oral language skills" as strengths. JA 168. The report identified the following needs:

- Identify rhyming sounds and rhyming words
- Pair letters with their corresponding sounds
- Identify beginning sounds in words

- Identify ending sounds in words
- Develop skills in reading comprehension
- Increase reading fluency to grade level expectations
- Improve decoding, word attack and word analysis skills
- Write all the letters in the alphabet
- Construct grade level sentences
- Complete math problems involving patterns and simple graphs
- Learn addition math facts
- Increase on-task behaviors
- Develop independent learning behaviors

JA 169.

B. K.D.'s First Grade (2012-2013) and Second Grade (2013-2014) School Years

DASD offered K.D. an IEP on September 14, 2012 and Parents agreed to its implementation. JA 14 (citing JA 96, FF 12). The IEP reiterated the strengths and needs from the evaluation report. ECF No. 13-3 at 7, 8. The IEP contained eight goals. The district court characterizes the goals in the 2012-2013 IEP as "measurable," even though only one goal had a baseline. JA 14-15; JA 96, FF 13.

Given her language based learning disability, two of K.D.'s most significant needs identified by DASD were "develop skills in reading comprehension" and

"increase fluency to grade level expectations." However, the proposed IEP did not contain a reading comprehension goal. In fact, none of K.D.'s IEPs contained a reading comprehension goal. The comprehension goals in all IEPs are the same and test for listening comprehension, not reading comprehension. *Compare* ECF No. 13-3 at 15 (2012 IEP) *with* ECF No. 13-4 at 14 ("given an oral reading probe on the first second grade level, K.D. will verbally answer literal and inferential questions") (2013 IEP) *with* ECF No. 13-5 at 14 ("given a story on her instructional level, K.D. will be able to answer both literal and inferential comprehension questions") (May 2014 IEP). The hearing officer acknowledged the nature of this goal, when analyzing the May 2014 IEP, he found that K.D. "consistently achieved very high scores on both literal and inferential comprehension questions *after hearing a passage read aloud.*" JA 99, FF 39.[4]

For oral reading fluency, none of the IEPs had goals designed to allow K.D. to meet grade-level standards in fluency, which DASD monitored via AIMSweb. Rather than aim for grade-level oral reading fluency, K.D.'s IEPs aimed for skills well below that level. DASD acknowledges as much in its opposition to Parents' Motion for Judgment on the Administrative Record, arguing that the district court

[4] The hearing officer specifically asked K.D.'s teacher whether the passage and questions were read out loud to K.D. The teacher answered in the affirmative. K.D. then would choose multiple choice answers, but consistently did better when the answers were read out loud as well as the questions. JA 250-252.

should disregard the AIMSweb benchmark testing because it was at grade level and DASD was monitoring K.D.'s progress at a much lower level. ECF No. 14 at 7. However, with appropriate instruction, a student with K.D.'s cognitive ability could be expected to achieve at grade level in this area.

In the spring of 2013, for extended school year (ESY) programming, DASD offered three hours of academic support, three days a week, from July 1 to August 1, 2013. JA 16 (citing JA 97, FF 20). K.D. attended the ESY program.

During 2012-2013, for reading, writing, and math, DASD was instructing K.D. in the learning support room using a portion of the general education curriculum (as opposed to a special education curriculum designed specifically for students with language based learning disabilities). ECF No. 13-3 at 6. The proposed 2013-2014 IEP still contained no reading comprehension goal and no fluency goal aligned to grade level standards. Probes to monitor letter naming and sound fluency showed very little progress and the IEP continued the same goals for second grade. JA 16 (citing JA 97, FF 22). K.D.'s letter writing, rhyming, starting and completing tasks, and math goals[5] remained the same. *Id.* For math calculation, the short-term objective of counting to 20 was eliminated, because

[5] The 2013-2014 IEP continued a "patterns and simple graphs" goal from the 2012 IEP. *Compare* ECF No. 13-3 at 17 *with* ECF No. 13-4 at 16. However, K.D. had already met that goal at the end of the 2012-2013 school year. ECF No. 13-4 at 6.

K.D. had met that objective, but the math calculation goal remained the same. *Compare* ECF No. 13-3 at 16 with ECF No. 13-4 at 15.

The IEP continued the same level of learning support, but added "evidence-based multi-sensory reading and writing program" as specially designed instruction. JA 16 (citing JA 98, FF 23). In August 2013, Parents inquired about use of a special education reading program designed for students with specific learning disabilities, such as Wilson reading.

In the 2013-2014 school year, DASD began using Wilson Fundations, a general education reading program designed for struggling readers who have not yet fallen behind. JA 17 (citing JA 98, FF 30, 31).[6] This program is distinct from the Wilson Reading Program requested by the Parents, which is a special education program designed for individuals, like K.D., with learning disabilities. *See* https://www.wilsonlanguage.com/programs/ (last visited Feb. 12, 2018). On the Fundations placement test, K.D. placed at Level 1. K.D. did not meet required criteria for mastery in 7 of the 11 units worked on in second grade. JA 17 (citing JA 98, FF 33). In August 2014, after a year of Fundations, K.D. was still at Level 1 in skills assessed for naming letters, writing letters/words and reading words. JA 17-18; JA 99, FF 34. At the end of the 2013-2014 school year, an Informal

[6] On November 25, 2013, DASD amended the IEP to include the results of an occupational therapy evaluation and to reflect K.D.'s receipt of Fundations. JA 18; JA 99, FF 36.

Reading Inventory indicated that K.D. was functioning at the pre-primer level. ECF No. 13-5 at 6. For writing, K.D. participated in the regular education program, "Being a Writer." JA 99, FF 35; JA 17.[7] DASD offered ESY services for the summer of 2014. JA 18 (citing JA 99, FF 37).

C. Evaluations Completed and IEPs Proposed in 2014 and Eventual Unilateral Placement in January 2015

In May 2014, the IEP Team met to design K.D.'s third grade IEP. The IEP Team made slight changes to the goals, JA 19-20, but K.D. was still performing well below grade level. Most concerning to Parents was K.D.'s performance on AIMSweb testing showing that K.D. could only read 4 words correct per minute, when the benchmark for her grade was 89 words correct per minute.

In addition, Parents were concerned with K.D.'s lack of progress. The goals that had baselines in 2012 remained the same in 2014 and K.D. had made minimal progress. For the goals in the IEPs that lacked baselines, the only way to analyze progress is to compare the present levels of performance in succeeding IEPs.[8] The chart below summarizes K.D.'s performance on a sample of her goals while in the District.

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[7] There is a typographical error in the district court opinion, which identifies "Being a Writer" as a reading program rather than a writing program.

[8] Because the 2012-2013 IEP had no baselines, it is impossible to know how much progress K.D. made from September 2012 to June 2013. However, for the most part, the goals remained unchanged.

	June 2013 IEP Present Levels	May 2014 IEP Present Levels
Reading	DASD measured K.D.'s ability to comprehend stories read to her at a first-grade level. When only questions were read to her, and she had to read the answers herself, K.D. averaged 58% correct on the comprehension probes. When both questions and answers were read to her, she averaged 88% correct. ECF No. 13-4 at 5. The listening comprehension goal was changed to a first/second grade level. ECF No. 13-4 at 14.[9]	DASD continued to measure K.D.'s ability to comprehend stories read to her at a first-grade level. On the reading selection tests, questions *and* answers were read aloud to K.D., and she averaged 93% correct (as opposed to 88% on the previous IEP). ECF No. 13-5 at 5. An Informal Reading Inventory placed K.D. at a frustrational level on pre-primer material.
Writing	When given a writing prompt, K.D. was able to construct one sentence and able to use a capital letter and punctuation mark with reminders to review her work. ECF No. 13-4 at 6.	When given a writing prompt, K.D. is able to construct an average of 2-3 sentences. She needs reminders to review her work for correct capitalization and punctuation. ECF No. 13-5 at 6.
Writing letters	When given a model, K.D. is able to write all letters correctly. Without a model, K.D. frequently writes reversals and incorrectly writes the letters M, W, N, and U. ECF No. 13-4 at 6.	K.D. still needs a model for G, N, U, and W and sometimes reverses D. ECF No. 13-5 at 6.

[9] The district court and hearing officer found K.D. was no longer expected to answer both literal and inferential questions, but this is not consistent with the goal as written. *Compare* JA 16; JA 97, FF 22(d) *with* ECF No. 13-4 at 14.

	June 2013 IEP Present Levels	May 2014 IEP Present Levels
Math	K.D. mastered the short-term objective of counting from 1 to 20. ECF No. 13-4 at 6. There is no progress reporting on the goal of completing addition facts using manipulatives in the 2012 IEP. ECF No. 13-3 at 16.	K.D. met her goal of solving addition and subtraction facts up to 10 with 80% accuracy. Achievement testing in the summer of 2014, K.D.'s math fluency was at the 5th percentile. _____ math was at the 12th percentile, and calculation at the 18th. JA 187.

In the summer of 2014, Parents retained a neuropsychologist, Dr. Kelly, to evaluate K.D. JA 19. Her testing confirmed that K.D. had overall intellectual functioning in the average range. JA 19. However, K.D. continued to exhibit severe reading deficits. Going into third grade, K.D. was reading at a lower than first grade level. JA 19. Dr. Kelly found K.D.'s AIMSweb scores to be "clearly representative of [K.D.'s] inability to benefit from the program delivered by the school and further representative of global disregard for this level of impairment, without recommendations of more intensive or alternative instruction, given her flattened response to the instruction." JA 20.

After receiving Dr. Kelly's report, DASD conducted its own testing and issued a Reevaluation Report. JA 264-307. DASD's own testing confirmed that K.D. had mostly average cognitive ability.

	2012 JA 279	**2014** JA 221
Verbal Comprehension Index	108 / 70th percentile Average	106 / 66th percentile Average
Perceptual Reasoning Index	79 / 8th percentile Borderline	102 / 55th percentile Average
Working Memory Index	91 / 27th percentile Average	94 / 36 th percentile Average
Processing Speed Index	75 / 5th percentile Borderline	85 / 16th percentile Low Average

Notwithstanding her average cognitive ability, K.D. remained below average in all areas of academic achievement, as summarized below.

	2012 JA 229	**2014** JA 285
Total Reading Basic Reading	78 / 7th percentile 77 / 6th percentile Below Average	68 / 2nd percentile Low 78 / 7th percentile Below Average
Reading Comprehension		51 / 0.5th percentile[10] Low
Written Expression	71 / 3rd percentile Below Average	74 / 4th percentile Below Average
Mathematics Math Fluency Index	70 / 2nd percentile 74 / 4th percentile Below Average	83 / 13th percentile 74 / 4th percentile Below Average

In the fall of 2014, K.D.'s literacy skills continued on the same trajectory. On DASD assessments, her oral reading fluency was 6 and grade-level performance was 87. Her comprehension was 2 and grade-level performance was

[10] The hearing officer noted that the validity of the reading fluency and comprehension scores in the 2014 report was questionable, because K.D. was tested below grade level. JA 103, FF 72.

33. JA 204. On the Comprehensive Test of Phonological Processing (CTOPP), K.D. did well in testing of phonological awareness. This was consistent with cognitive testing showing that this was an area of relative strength for K.D. JA 220. She demonstrated weaknesses in phonological memory, which impairs reading and listening comprehension for more complex sentences. *Id.* K.D.'s rapid naming skills were severely impaired. *Id.* Based on the new testing, DASD revised K.D.'s IEP in December 2014, offering a program that would run from December 2014 to December 2015. JA 22. However, Parents, based on Dr. Kelly's recommendations, sought language-based instruction across the entire day. The December 2014 IEP did not address the concerns outlined in Dr. Kelly's report from the summer of 2014. K.D. needed much more than the "research based multisensory instruction" specified in the IEP. At that point, given K.D.'s unremediated deficits, and her potential for growth, she needed instruction that, among other things, was "grounded in a theoretical framework for how reading skills are acquired;" "language-based, explicitly instructing students in the structure of language;" "code-based," to help K.D. learn to break the code behind reading through phonemic awareness, phonics, and fluency rather than relying on guessing or memorization; intensive, giving her extra practice through daily reviews, guided and independent practice and targeted small group instruction. JA 193. At that point, K.D. needed more than regular education accommodations and periodic

pullouts. K.D. required that her entire school program be specifically designed to address the extent of her needs. JA 194. "In other words, in order for K.D. to make effective educational progress and allow her meaningful access to public education consistent with her educational potential, she [needed] specialized instruction in small classes for all academic subjects, utilizing explicit and consistent language-based instruction in all academic settings throughout the day, with other students who have similar learning profiles." *Id.*

Therefore, Parents timely notified DASD of their intent to place K.D. in a private school for students with learning disabilities and seek tuition reimbursement. JA 22; JA 104, FF 87. K.D. began attending the private school in January 2015. JA 104, FF 89.[11]

In May 2015, in support of their request for an offer of program and placement, Parents provided updated information from Dr. Kelly. JA 255-258. Dr. Kelly noted that K.D. was benefitting from the research-based literacy instruction and, given the significance of her deficit, needed continued placement at the private school. JA 257. In spite of receiving new information, DASD did not revise its offer of FAPE for the summer of 2015 or the 2015-2016 school year. JA 82, ¶ 56 (Complaint); JA 139, ¶ 56 (Answer).

[11] The district court erroneously found that K.D. did not begin attending the private school until June 2015, JA 22, but the hearing officer found (and it is undisputed) that K.D. left the public school in January 2015.

D. Procedural History

Parents filed a complaint for due process and amended the complaint in August 2015. JA 45 – 67. A Pennsylvania special education hearing officer found that DASD did not violate IDEA in connection with K.D.'s educational programming. He also denied relief for the Section 504 and ADA claims overlapping with the IDEA claims. JA 114-117. Parents timely commenced a civil action seeking review of the hearing officer's decision. JA 068-128. Parents sought reversal of the administrative decision, compensatory education and tuition reimbursement. JA 91.

The district court denied Parents' motion to submit additional evidence, JA 3-9, and ultimately affirmed the hearing officer's decision. JA 11-40. This appeal followed.

SUMMARY OF ARGUMENT

The district court erred in its application of the "meaningful benefit" test because it did not engage in the rigorous inquiry required by *Endrew F.* – were K.D.'s IEPs reasonably calculated to result in progress that is appropriate in light of her circumstances. *Endrew F.*, the first Supreme Court case to address the definition of FAPE since *Rowley*, did not cite to any of the hundreds of court of appeals cases interpreting *Rowley.* Instead, the Court focused on a detailed inquiry tied directly to the statutory requirements for a FAPE. Applying that test to the

undisputed facts of this case, DASD did not offer K.D. a FAPE and the district court committed legal error holding otherwise.

The district court erred in precluding admission of additional evidence relevant to ADA/504 discrimination claims that was neither relevant to nor available during the administrative hearing. In addition, the district court erred as a matter of law in failing to analyze the ADA/504 discrimination claims separately from the IDEA FAPE claim.

ARGUMENT

I. The District Court Erred in the Application of *Endrew F.*

A. The District Court Erred as a Matter of Law in Applying a "Meaningful Benefit" Test Without Engaging in the Detailed and Rigorous Inquiry Required by *Endrew F.*

Endrew F.'s reasoning compels the conclusion that the district court erred in holding that a "meaningful benefit" test that does not strictly apply *Endrew F.*'s guidance survives this most recent decision. JA 26 n.7 (*Endrew F.* "simply confirms the standard that has been used in the Third Circuit for years"). In rejecting the school district's "*any* educational benefit" standard, *Endrew F.* states:

> the school district's reading of these isolated statements runs headlong into several points on which *Rowley* is crystal clear. For instance – just after saying that the Act requires instruction that is "sufficient to confer some educational benefit" – we noted that "[t]he determination of when handicapped child children are receiving *sufficient* educational benefits . . . presents a . . . difficult problem . . . And then we expressly declined "to establish any one test for determining the *adequacy*

> of educational benefits" under the Act. It would not have been "difficult" for us to say when educational benefits are sufficient if we had just said that *any* educational benefit was enough. And it would have been strange to refuse to set out a test for the adequacy of educational benefits if we had just done exactly that.

137 S. Ct. at 998 (citations omitted) (emphasis in original). The Court then goes on immediately to state: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. Just as it would have been strange for *Rowley* to establish an "any educational benefit" test after explicitly refusing to set out a test, it would be exceedingly odd for the Court to adopt the "meaningful benefit" standard by articulating a test that carefully does not use any of those words, followed by several pages of instruction in how to follow that test.[12]

Indeed, at oral argument in the *Endrew F.* case, the Solicitor General urged the Court not to adopt a "meaningful educational benefit" test, because it "has

[12] This Court has recognized that a Supreme Court opinion may implicitly reject a standard by adopting a test that differs from the prior standard. For example, *Century Indem. Co. v. Certain Underwriters of Lloyd's,* 584 F.3d 513 (3d Cir. 2009) held that the Supreme Court implicitly rejected the Third Circuit's standard for interpreting arbitration agreements set forth in *Kaplan v. First Options*, 19 F.3d 1503 (3d Cir. 1994). Although the Court had affirmed *First Options*, it did so without approving the substantive standard. Instead, the Supreme Court articulated specific guidelines that created a test entirely different from the Third Circuit *First Options* standard. 584 F.3d at 531. In light of this fact, the Court was compelled to follow the more concrete guidance of the Supreme Court case.

baggage in various courts of appeals" and "means different things to different courts." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, No. 15-827, Transcript of Oral Argument, at 21 (Jan. 11, 2017), available at http://bit.ly/kd15827 (last viewed Feb. 15, 2018). The United States advocated the standard eventually adopted by the Court – appropriate progress in light of the child's circumstances. *Id.*; *see also* Brief for the United States as Amicus Curiae, at 16, *Endrew F.*, available at http://bit.ly/kdusac (last visited Feb. 19, 2018). Rather than invoking any of the standards previously used in the lower federal courts, *Endrew F.* provided concrete guidance and direction tied directly to the statutory provisions.

Courts and administrative hearing officers cannot avoid the inquiry mandated by *Endrew F.* by invoking "meaningful benefit" as a talismanic incantation precluding liability. *Cf. Connick v. Thompson*, 563 U.S. 51, 74 (2011) (Scalia, J., concurring) (rejecting use of phrase "failure to train" as a talismanic incantation producing municipal liability). *Endrew F.*'s rigorous inquiry – did the IEP aim for progress appropriate in light of the child's circumstances – is necessary to protect fundamental civil rights of children with disabilities to an appropriate education.

IDEA was "enacted not only pursuant to Congress' Spending Clause authority, but also pursuant to § 5 of the Fourteenth Amendment." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305 (2006) (Ginsburg, J.,

concurring in part and concurring in the judgment). When Congress passed IDEA in 1975, it "had before it ample evidence" that civil rights protections for children with disabilities "were sorely needed: 21 years after [the] Court declared education to be 'perhaps the most important function of state and local governments,' *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), congressional studies revealed that better than half of the Nation's children were not receiving appropriate educational services." *Honig v. Doe*, 484 U.S. 305, 309 (1988). These failings reflected more than a lack of funding, but arose from state statutes or local rules and policies. *Id.* (citing *Pa. Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1972) and 347 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Bd. of Educ. of Dist. of Columbia*, 348 F. Supp. 866 (D.D.C. 1972); *see also Rowley*, 458 U.S. at 191 (Act passed to address exclusion of millions of children with disabilities); *cf. Tennessee v. Lane*, 542 U.S. 509, 525 (2004) (recognizing pattern of discrimination in public education against individuals with disabilities). "Indeed, by the time of the [IDEA]'s enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States." *Honig*, 484 U.S. at 310. "In responding to these problems, Congress did not content itself with passage of a simple funding statute. Rather, the [IDEA] confers upon disabled students an enforceable substantive right to public education in participating States . . .and

conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Id.*

The Supreme Court has a long history of issuing transformative civil rights decisions with unanimous opinions authored by the Chief Justice. *See, e.g., Shelley v. Kraemer*, 334 U.S.1 (1948) (Vinson, C.J.) (equal protection clause precludes enforcement of racially restrictive covenants in state courts); *Sweatt v.* Painter, 339 U.S. 629 (1950) (Vinson, C.J.) (discrimination on the basis of race in admission to professional and graduate education violates equal protection clause); *McLaurin v. Oklahoma St. Regents for Higher Educ.*, 339 U.S. 637 (1950) (Vinson, C.J.) (disparate treatment of students in graduate school on the basis of race violates the equal protection clause); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Warren, C.J.) (systematic exclusion of jurors on the basis of national origin violates the equal protection clause); *Brown, supra* (racial segregation in public schools violates the equal protection clause); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Warren, C.J.) (racial segregation in the District of Columbia violates the fifth amendment); *Loving v. Virginia*, 388 U.S. 1 (1967) (Warren, C.J.) (anti-miscegenation laws violate equal protection clause); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (Burger, C.J.) (busing of students to promote racial integration is constitutional); *Reed v. Reed*, 404 U.S. 71 (1971) (Burger, C.J.) (state cannot discriminate on the basis of sex in naming administrators of estates); *Griggs v.*

Duke Power Co., 401 U.S. 424 (1971) (Burger, C.J.) (employment practice with disparate impact based on race violates Civil Rights Act).

Endrew F., a unanimous opinion written by the Chief Justice interpreting a civil rights statute, follows in that tradition. Notwithstanding the fact that there are literally hundreds of courts of appeals decisions following *Rowley*, *Endrew F.* did not cite, or even refer to, any of the appellate cases interpreting that seminal decision. *Endrew F.* does not endorse a "meaningful educational benefit" or "some educational benefit" test. Rather, it provides a detailed guide to determine whether an IEP is appropriate. Applying *Endrew F.*'s guidance to this case compels the conclusion that DASD denied K.D. a FAPE.

B. K.D.'s IEPs Were Not Reasonably Calculated to Result in Progress Appropriate in Light of K.D.'s Circumstances

1. The Colorado district court decision on remand illustrates appropriate application of the *Endrew F.* test

The *Endrew F.* decision on remand recognized that the Supreme Court had in fact adopted a different test and explained the "contours of this new legal standard." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, No. 12-cv-2620-LTB, 2018 U.S. Dist. LEXIS 22111, at *12 (D. Colo. Feb. 12, 2018). For a child not "fully integrated in the regular classroom and not able to achieve on grade level," the IEP "must be appropriately ambitions in light of [her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in

the regular classroom. *Id.* at *12-*13 (quoting *Endrew F.*, 137 S. Ct. at 1000); *see also* U.S. Dep't of Educ., *Q&A on U.S. Supreme Court Decision: Endrew F. v. Douglas County School District RE-1*, at 3 (2017) (*Q&A*), available at http://bit.ly/kdqanda (last viewed Feb. 19, 2018) ("Court held that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances").

The IEP "must also enable a child to 'make progress,' which reflects 'the essential function of an IEP [which is] to set out a plan for pursuing academic and functional advancement." *Id.* at *13 (quoting *Endrew F.*, 137 S. Ct. at 999) (citing 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV); *Rowley*, 458 U.S. at 179). For a child for whom grade-level advancement is not a reasonable prospect, "the general standard is that: '[her] educational program must be appropriately ambitious in light of [her] circumstances, 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.* at *14 (quoting *Endrew F.*, 137 S. Ct. at 1000).

The Court did not elaborate on what appropriate progress will look like in every case because the adequacy of an IEP turns on the unique circumstances of a particular child. Instead, the Court spent multiple pages describing the inquiry

necessary to determine if a school district had offered a FAPE. *See id.* at 999–1001. It explained that a child's IEP must be "constructed only after careful consideration of" her circumstances: her "present levels of achievement, disability, and potential for growth." *Id.* at 999. And the IEP must be "appropriately ambitious in light of [those] circumstances," providing the child "the chance to meet challenging objectives." *Id.* at 1000. For children not fully integrated in the regular education program, "[t]he goals may differ" but the goals must nevertheless be challenging given the child's potential for growth. *See id.* at 1000–01.

In the original *Endrew F.* district court decision, the court found that Endrew made sufficient progress, as "evidenced by small advances or alterations to [his] IEP objectives starting in the second grade IEP through the proposed objectives contained in the April 2010 IEP." 2018 U.S. Dist. LEXIS 22111, at *19. Endrew's second grade (2007-2008) IEP set forth six broad annual goals, implemented by detailed corresponding objectives. His third grade (2008-2009) IEP "contained the same six annual goals, but with modified objectives." *Endrew F. v. Douglas County Sch. Dist. No. RE-1*, 2014 U.S. Dist. LEXIS 128659, at *4 (D. Colo. Sept. 15, 2014). The fourth grade IEP was the same, except that the school added an annual goal in the area of self-advocacy. *Id.* The Tenth Circuit Court of Appeals held that successive IEPs that included the same annual goals but with modified

objectives conferred an educational benefit that was "more than merely de minimis," which satisfied IDEA's FAPE standard. *See* 798 F.3d 1329, 1341-1342 (10th Cir. 2015).

The Supreme Court rejected the reasoning that IEPs containing the same annual goals but slightly modified objectives were reasonably calculated to result in educational benefit, stating:

> The IEP must enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement . . . This reflects the broad purpose of the IDEA, an "ambitious" piece of legislation enacted "in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when there were old enough to 'drop out'" . . . A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

137 S. Ct. at 999 (citations omitted).

The district court's decision on remand in *Endrew F.* illuminates the problems with the hearing officer's and district court's reasoning in this case. As did DASD in this case, Endrew F.'s school district pointed to slight increases in various objectives in succeeding IEPs. 2018 U.S. Dist. LEXIS 22111, at *18. The school district also argued that, given Endrew F.'s circumstances – his autism, ADHD, "exceedingly low cognitive skills," serious behavior problems and pronounced sensory needs – the educational and functional objectives in the April

2010 IEP were sufficiently challenging. *Id.* The school district argued that viewing the progress/goals relative to the severity and impact of Endrew's disabilities, the IEP offered a FAPE. *Id.* at *18-*19.

The district court forcefully rejected this argument:

> While [Endrew's] educational program must be appropriately ambitious in light of his circumstances, the Supreme Court was clear that every child, including [Endrew], should have the chance to meet challenging objectives. In this case, [Endrew]'s past educational and functional progress - as evidenced by the changes to his yearly IEPs after second grade - was minimal at best. Those changes consisted of only updates and minor or slight increases in the objectives, or carrying over the same goals from year to year, or abandonment if they could not be meet. The April 2010 IEP was clearly just a continuation of the District's educational plan that had previously only resulted in minimal academic and functional progress.

Id. at *20-*21. Most importantly, after *Endrew F.*, courts cannot characterize such progress as meaningful. *Id.* at *24 (rejecting school district's argument that prior findings of fact amounted to a determination that Endrew made "meaningful" progress).

2. *Endrew F.* requires that federal courts measure IEPs against IDEA's explicit requirements

The legal mandate to identify children with special educational needs and design programs calculated to result in educational benefit "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). One of the most

important activities a school district can do is ensure that the IEPs it is writing are reasonably calculated to result in progress.

The fact that a student's disabilities make it difficult to remediate her weaknesses does not give a school district license to repeat the same ineffective programming year after year. *Endrew F.* explained:

> Every IEP begins by describing a child's present level of achievement, including explaining "how the child's disability affects the child's involvement and progress in the general education curriculum." §1414(d)(1)(A)(i)(I)(aa). It then sets out "a statement of measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum," along with a description of specialized instruction and services that the child will receive. §§1414(d)(1)(A)(i)(II), (IV). The instruction and services must likewise be provided with an eye toward "progress in the general education curriculum." §1414(d)(1)(A)(i)(IV)(bb).

137 S. Ct. at 1000. The Court rejected the school district's argument that "these provisions impose only procedural requirements . . . not a substantive standard enforceable in court." *Id.* "[T]he 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." *Id.*

FAPE requires an IEP "designed to enable the child to be involved in and make progress in, the general education curriculum." *Q&A*, *supra*, at 7 (question 13) (citing 20 U.S.C. § 1414(d)(1)(A) and 34 C.F.R. § 300.320(a)). "General education curriculum" means "the same curriculum as for nondisabled children,"

the curriculum based on a State's academic content standards. *Id.* (citing 20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa) and 34 C.F.R. § 300.320(a)(1)(i).

Further, the school district must plan for the student to make reasonable progress toward the goals in the student's IEP, and, if the student fails to make reasonable progress, must make changes in the goals or the services in the IEP to enable the student to make progress. 20 U.S.C. §§ 1414(c)(1)(B), 1414(d)(4); 34 C.F.R. § 300.324. It is crucial to review progress (or lack thereof) to determine "whether the child is offered an IEP reasonably calculated to enable a child to make progress that is appropriate in light of the child's circumstances." *Q&A* at 7 (question 15). In some circumstances, lack of progress mandates revision even prior to the annual review and "if a child is not making expected progress toward his or her annual goals, the IEP Team must revise, as appropriate, the IEP to address the lack of progress." *Id.* (citing 20 U.S.C. § 1412(d)(4)(A)).

All the above requirements are necessary components of a free, appropriate public education or FAPE. As discussed in the following sections, DASD's efforts fell far short.

3. From June 2012 through December 2014, K.D.'s IEP goals were deficient and not appropriately ambitious in light of her circumstances

"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." United States Dep't of Educ., Dear Colleague Letter (Nov. 16, 2015), at 1, available at http://bit.ly/112015dcl (last viewed Feb. 15, 2018) (*2015 DCL*); *see also* Sharon Vaughn, et al., *Why Intensive Interventions are Necessary for Students with Severe Reading Difficulties*, 47(5) Psychology in the Schools 432 (2010), available at http://bit.ly/kdvaugn (last viewed Feb. 15, 2018); Jeanne Wanzek, et al., *Response to Varying Amounts of Time in Reading Intervention with Low Response to Intervention*, 41(2) J. of Learning Disabilities 126 (2008), available at http://bit.ly/kdwanzek (last viewed Feb. 15, 2018) (study suggests that more of the same intervention was not beneficial for these students who demonstrated previous low response to intervention).

Endrew F. confirms that the purpose of special education is, when possible, to ensure access to the general education curriculum for students with disabilities. Scientific research establishes that, for a student like K.D., it is possible to narrow the gap between her performance and grade level reading skills, with appropriate research-based reading interventions. *See 2015 DCL*, *supra*. DASA simply did not consider K.D.'s potential for growth in designing her programs. JA 194.

The hearing officer acknowledged that the testing completed by the Parents' neuropsychologist was valid. JA 105. Cognitively, K.D. had intact and above-

average Verbal Ability, with a standard score[13] of 107, placing her at the 68th percentile. JA 248, 263. She also had above-average Thinking Ability, with a standard score of 104, the 60th percentile. *Id.* Her subtest scores also showed significant strengths in verbal comprehension (SS 107, 68th percentile), spatial relations (SS 103, 59th percentile), sound blending (SS 99, 48th percentile), and higher level concept formation (SS 117, 86th percentile). JA 248, 264. Her scores on tasks of visual auditory learning, working memory, higher level visual processing speed were "[l]ess developed, yet not impaired." *Id.* She was very impaired in areas of retention of learned information over time and rote processing speed. *Id.*

Both DASD's school psychologist and the Parents' neuropsychologist agreed that K.D. had a specific learning disability because there was an unexpected discrepancy between her aptitude and her achievement in school. "Under this model, evaluators compare a measure of a child's cognitive skills – usually an IQ score – to a measure of the child's achievement in a particular area of concern, such as reading or math." Genna Steinberg, *Amending § 1415 of the IDEA: Extending Procedural Safeguards to Response-to-Intervention Students*, 46 Colum. J. L. & Soc. Probs. 393, 401 (2013).

[13] Standard scores (SS) have an average of 100 and a standard deviation of 15. JA 247.

In several ways, the district court completely ignored all of K.D.'s cognitive strengths and analyzed the appropriateness of her program and justified the lack of progress based on only her challenges. First, the court stated that K.D.'s "progress must necessarily be considered in light of the fact that she suffers from a severe learning disability and ADHD." JA 70. Just because K.D. has a learning disability and ADHD does not mean that she was not entitled to expect to make progress on challenging goals and objectives. *See Endrew F.*, 137 S. Ct. at 1000 ("The goals may differ, but every child should have the chance to meet challenging objectives"); *Endrew F.*, 2018 U.S. Dist. LEXIS 22111, at *20-*21.

Second, the district court relied on subjective reports of progress, clearly erroneous interpretations of the facts, or evidence of progress on K.D.'s goals that were neither challenging nor designed to close the gap between K.D.'s cognitive ability and her achievement. For example, to document progress, the district court relied upon the subjective testimony of K.D.'s second grade teacher that her progress was "amazing." JA 30. Similarly, the court relied on the testimony of the school psychologist regarding K.D.'s performance on the CTOPP showing improvement in phonological processing. However, the areas on which K.D. performed well were in her areas of relative cognitive strength. In rapid naming, which contributed greatly to her deficits, K.D. performed very poorly.

The finding that K.D. was "making progress in literal and inferential comprehension, is clear error." JA 18 (citing JA 99, FF 39); JA 19 (citing JA 99, FF 41). The comprehension goal measured K.D.'s abilities "after hearing a passage read aloud." JA 99, FF 39. It did not test her area of need – reading comprehension. It tested her area of strength, verbal comprehension. The district court cited to an average of 87% on Fundations phonics tests. JA 18 (citing JA 99, FF 39). However, the district court ignores its own finding (based upon the hearing officer's findings) that K.D. "did not meet the required criteria of 7 of the 11 units" of Fundations taught in second grade. JA 17 (citing JA 98, FF 33). The district court cited to DASD's cognitive testing (of K.D.'s IQ) as an area of improvement. JA 21. However, K.D. had average to high-average cognitive ability when tested in kindergarten. The fact that her IQ remained the same is not an indication of academic progress.

Third, the district court erred in relying on K.D.'s minimal progress in her ability to perform certain literacy skills that were well below her grade level (kindergarten through first grade) to find appropriate progress under the circumstances. When a student is receiving academic instruction in a special education classroom, "high scores achieved in special education classrooms are" not "unambiguous evidence of an IEP's sufficiency. . . . when the 'mainstreaming' preference has not been met so that high grades are achieved in classes with only

special education students set apart from the regular classes of a public school system." *D.S.*, 602 F.3d at 567. Indeed, the Third Circuit Court of Appeals has stated that "it is clear that a court should not place conclusive significance on special education classroom scores, a conclusion that we believe is reinforced by the circumstance that, as here, there may be a disconnect between a school's assessment of a student in a special education setting and his achievements in that setting and the student's achievements in standardized testing." *Id.* at 568.

Criterion-referenced testing relied upon by the hearing officer and the district court showed minimal progress on skills that were increasingly below grade level. Standardized, norm-referenced testing showed larger and larger gaps between K.D. and her peers. The hearing officer acknowledged that norm-referenced testing can provide evidence of progress or regression, stating:

> Norm-referenced testing yields statistically standardized scores that place students on a bell curve. Generally, if a student tests in the middle of the bell curve two years in a row, the student has made progress. In essence, the Student has kept up with peers. At the low end of the curve, obtaining the same score two years in a row may indicate regression. The opposite is true at the top end of the curve, where obtaining the same score . . . two years in a row may indicate greater progress than peers over time.

JA 114. Leading reading researchers agree with this analysis of the utility of norm-referenced testing:

> Standard scores are an excellent metric for determining the "success" or "failure" of interventions for children with reading

> disabilities, because they describe the child's relative position within the distribution of reading skills in a large standardization sample. If standard scores improve, it means the child has narrowed the gap with age or grade level peers. By the same token, if standard scores stay the same over time, or decrease, it means that the reading gap has remained stable or increased.

Joseph K. Torgesen, *Remedial Interventions for Students with Dyslexia: National Goals and Current Accomplishments* at 2, in Richardson, S., & Gilger, J. (Eds.) *Research-Based Education and Intervention: What We Need to Know*. (pp. 103-124) Boston: International Dyslexia Association, 2005, available at http://bit.ly/kdfcrr (last visited Feb. 18, 2018).

The district court's finding that, on norm-referenced achievement testing, K.D. "improved in some areas and did worse in others," JA 21, is also clearly erroneous. K.D. actually remained at the same level – Below Average – in all areas, with the exception of Total Reading. In Total Reading, her performance declined, as she went from Below Average to Low (7^{th} percentile to 2^{nd} percentile). Thus, on the only objective measure, the norm-referenced achievement testing, K.D., a student with average to high-average cognitive ability, made no progress in her areas of need.

DASD's position in the district court actually proves that K.D.'s goals were not appropriately ambitious in light of her circumstances. In the district court, DASD argued that the AIMSweb testing goes to outcome and comparison to

K.D.'s peers and K.D. is not guaranteed any particular outcome. ECF No. 14 at 7. *Endrew F.* does say that IDEA does not guarantee a particular outcome. "No law could do that – for any child." 137 S. Ct. at 998.

But *Endrew F.* also says that the IEP must "aim to enable the child to make progress." *Id.* at 999. DASD admits that was not its aim. An AIMSweb assessment "is simply not a measure of the skills K.D. was working to learn through her IEP." ECF No. 14 at 8. *That* is the problem. Notwithstanding the fact that research establishes that, properly instructed, children like K.D. can meet (or at least come close to) reading fluently and comprehending on grade level, DASD never aimed for her to make that kind of progress. The District ignored K.D.'s potential for growth, which led to inappropriate programming.

4. The district court's finding that K.D.'s 2012-2013 had measurable goals was clearly erroneous

IDEA's procedures are there to ensure that the IEP aims "to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Endrew F.*, 137 S. Ct. at 999. "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.* If you do not know where you are starting, it is impossible to know if you are aiming for, or if you have made, progress.

Thus, when goals do not have baselines, then by definition, progress is not measurable. *See S.M. v. Sch. Dist. of Phila.*, No. 15378-14-15, at 5, FF 30 (Pa. ODR Jan. 31, 2015) ("None of the goals in the District's proposed September 2014 IEP have baselines and therefore progress is not measurable"), available at http://bit.ly/kd15378 (last viewed Feb. 18, 2018); *see also id.* at 9, FF 62 (teacher could not explain how to assess progress on IEP goals and objectives without baselines provided in IEP); at 14 (referencing non-measurability of goals based on lack of baselines); *C.J. v. Penn Manor Sch. Dist.*, No. 17382-15-16, at 20, 21 (Pa. ODR July 11, 2016) (goals without baseline data not objectively measurable), available at http://bit.ly/kd17382 (last viewed Feb. 18, 2018). When a school district fails to obtain baseline data, the goals are "insufficient to provide guidance to teachers regarding [a] Student's specific instruction needs based on [the] Student's disabilities, and the expected progress." *Methacton Sch. Dist. v. D.W.*, No. 16-2582, 2017 U.S. Dist. LEXIS 166716, at *19 (E.D. Pa. Oct. 6, 2017). In this case, as in *Methacton*, the District had no baseline data on the goals in the initial IEP.[14]

[14] *Methacton* indicates that whether the baseline data must be included in the IEP is an open question in this Circuit. Parents argue that the baselines should be in the IEP to allow them to monitor progress. Putting that issue aside, *Methacton* makes clear that progress is not measurable when a school district lacks baseline data.

Measurability of progress on goals is crucial to the provision of FAPE. Under IDEA, "parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to monitor and enforce the services that their child is to receive." *M.C. v. Antelope Valley Union High Sch. Dist.*, 852 F.3d 840, 849 (9th Cir.), *cert. denied*, 138 S. Ct. 556 (2017). Parents cannot monitor progress when presented with no baseline data. In June 2012, DASD presented Parents with an IEP that had no baselines. As a consequence, progress was immeasurable.

5. DASD failed to follow regulations requiring periodic review of the IEP to address lack of progress

In the 2013 and 2014 IEPs, the present levels provide baseline information, but also establish that K.D. was not progressing appropriately in light of her circumstances. When a student's skills have stagnated, IDEA imposes a duty on the school district to address the situation through some change in educational programming. By definition, educational programming that failed to achieve the enumerated goals in the past does not constitute a program "likely to produce progress, not regression or trivial educational advancement." *M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 393 (3d Cir. 1996); *See also Endrew F.,* at *20-*21. Thus, in *L.O. v. New York City Department of Education*, 822 F.3d 95, 117 (2d Cir. 2016), the court of appeals held that the administrative hearing officer erred in concluding that, in light of limited progress, a school district acted reasonably in carrying over the same services. Given that the student's needs

remained unchanged, it is not reasonable to conclude that the same services will result in progress in the future. *Id*.

The hearing officer *found as a fact* that in 2013 and 2014, the IEP goals were mostly unchanged. JA 97, FF 22, 25; JA 99-100, FF 40 – 45; JA 103, FF 76, 77, 80. He also *found as a fact* that, in 2013 and 2014, Downingtown provided substantively unchanged educational programming and recommended the same placement. JA 98, FF 23, 25; JA 100, FF 46; JA 104, FF 84. The district court erred as a matter of law in holding that these facts established compliance with 34 C.F.R. 300.324.

6. DASD did not offer K.D. any program for ESY 2015 and the 2015-2016 school year

When a student is enrolled in a private school at parental expense, and her parents make a request for an offer of FAPE, the school district must respond with a proposed IEP. *Moorestown Twp. Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1068-1069 (D.N.J. 2011). Residency, rather than enrollment triggers a school district's IDEA obligations. *Id.* at 1069; *see also I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762, 772 (M.D. Pa. 2012) (enrollment in private school does not obviate public school's obligation to provide an IEP); *Shane T. v. Carbondale Area Sch. Dist.*, No. 3:16-0964, 2017 U.S. Dist. LEXIS 163683, at *30 (M.D. Pa. Sept. 28, 2017).

In this case, it is undisputed that Parents sought reimbursement for ESY 2015 and the 2015-2016 school year, in addition to reimbursement from January 1, 2015 through the end of the 2014-2015 school year. JA 94 (Issue 2). On May 6, 2015, Parents provided DASD with updated information from Dr. Kelly recommending continued placement at the private school. JA 255-258. On May 26, 2015, Parents provided the District with notice of their intent to place K.D. at the private school for ESY 2015 and the 2015-2016 school year and seek reimbursement. There is no dispute that DASD did not respond to parental requests for an offer of program and placement in the spring of 2015.

IDEA requires that a school district revise the IEP, as appropriate, to address information about the child provided by the parents. 34 C.F.R. § 34.324(b)(1)(ii)(C). Neither the hearing officer nor the district court addressed the fact that DASD never revised its offer of FAPE for ESY 2015 or the 2015-2016 school year after receiving updated evaluation information from the Parents.

The failure to propose an IEP, even for a student not currently enrolled in the school district, is a procedural violation that results in substantive harm because it impedes the parents' opportunity to participate in the decision-making process regarding the provision of FAPE. *Sch. Dist. of Phila. v. Kirsch*, 2018 U.S. App. LEXIS 2819, at *16 (3d Cir. Feb. 5, 2018) (unpublished); *see also Dallas Indep.*

Sch. Dist. v. Woody, 865 F.3d 303, 310-313 (5th Cir. 2017) (school district obligated to make timely offer of FAPE to student enrolled in private school).

Because Parents had no offer of an IEP, they rightly exercised the option of continuing the placement at the private school and seeking reimbursement.

II. The District Court Erred in Refusing to Admit Additional Evidence Submitted by Parents

A. The Appropriate Test is Whether the Evidence is Relevant, Non-Cumulative and Useful in Determining Whether Congress' Goals Have Been Reached for the Child

IDEA provides that a district court reviewing administrative IDEA decisions "shall hear additional evidence at the request of a party." 20 U.S.C. § 1415(i)(2)(C)(ii). Although the district court has discretion to refuse to admit evidence, it should not automatically disallow new evidence. The "court need not consider evidence that is irrelevant or cumulative." *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 253 (3d Cir. 2012) (citing *Susan N.*, 70 F.3d at 760); *see also Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1220 (3d Cir. 1993) ("district court makes fact findings in an IDEA case not only on the administrative record, but also on any new evidence presented by the parties").

"Congress expressly rejected provisions [of the Act] that would have . . . severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by the evidence, the Conference Committee explained that

courts were to make 'independent decision[s] based upon the preponderance of the evidence'" from the record of the proceeding and, if submitted, additional evidence. *Rowley*, 458 U.S. at 205 (*quoting* S. Rep. No. 94-455, at 5 (1975)). The focus is on whether the information is relevant to the questions before the court. If the evidence is not relevant, or is cumulative, it should not be admitted. *See, e.g. R.K. & D.K. v. Clifton Bd. of Educ.*, 587 F. App'x 17, 22 (3d Cir. 2014) (unpublished) (evidence properly excluded because not relevant or useful). But if the evidence is probative of an issue properly before the district court, IDEA mandates its admission. *See Susan N.*, 70 F.3d at 760.

This is especially true when the school district had the information in its possession, so cannot claim that there is undue prejudicial surprise.

B. The District Court Erred in Refusing to Supplement the Record with Evidence Relevant to the ADA/504 Discrimination Claims But Not Relevant to the IDEA FAPE Claims

In this case, the Pennsylvania Hearing Officer did not have jurisdiction of K.D.'s ADA/504 discrimination claims that were not derivative of the IDEA FAPE claims. *See* ECF No. 14 at 8 n.2 (DASD's argument that hearing officers have no jurisdiction of ADA claims). K.D.'s Title II ADA claim is that DASD denied her meaningful access to the District's educational programming. *See A.G.*, 815 F.3d at 1205. "[A] plaintiff may establish denial of 'meaningful access' under Section 504 and Title II by showing that there was 'a violation of one of the regulations

implementing' Section 504, if such violation denied the plaintiff meaningful access to a public benefit." *Id.* (citing *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010).

In *A.G.*, the court of appeals held that a student who alleged that the failure to provide appropriate behavioral supports in her IEP stated a discrimination claim under the ADA. The court reasoned that the school district failed in its duty to gather sufficient information to determine if behavioral support services that would have allowed access to the general education curriculum were reasonable, necessary, and available accommodations. *Id.* at 1207; *see also Wormuth v. Lammersville Union Sch. Dist.*, No. 2:15-cv-01572, 2018 U.S. Dist. LEXIS 9990, at *35 (E.D. Cal. Jan. 22, 2018) (because bullying was interfering with educational access, school had to undertake a fact-specific investigation as to what constitutes a reasonable accommodation).

In this case, K.D. asserted a similar discrimination claim:

- With the use of appropriate research-based interventions, schools can teach a student like K.D. to read. *Compl.*, ¶68.
- With the use of appropriate research-based interventions, a student like K.D. can access the general education curriculum. *Id.*, ¶69.
- Because Downingtown failed to provide appropriate research-based interventions, known to educators and available as a reasonable accommodation, K.D. was unable to access the general education curriculum. *Id.*, ¶70.

- Because Downingtown failed to provide appropriate research-based interventions, available as a reasonable accommodation, the District did not provide K.D. with instruction that was as effective as instruction provided to her peers, as evidenced by the fact that she still had kindergarten and first grade level goals in the middle of third grade. *Id.*, ¶71.

JA 90.

These claims are not derivative of her FAPE claims. They are separate and distinct claims. More importantly, they require presentation of evidence comparing K.D.'s progress to her peers, and that evidence would not be relevant to her IDEA FAPE claims, because IDEA does not require equal educational opportunity. *See Endrew F.,* 137 S. Ct. at 1001.

Contrary to DASD's representations in the district court, *see* ECF No. 9, K.D. did not have access to the records through discovery in the administrative hearing. In order to secure a subpoena for documentary evidence, a party must explain, in writing, "how the evidence is relevant and material to the issues in the hearing." Office for Dispute Resolution Manual, at 22, available at http://bit.ly/kdodr (last viewed Feb. 17, 2018). Because Pennsylvania hearing officers only have jurisdiction of ADA/504 claims that are derivative of IDEA FAPE claims, the comparative evidence that Parents sought to admit was not relevant to the administrative hearing, was not available in discovery, and would not have been admitted. The evidence is relevant, however, to K.D.'s discrimination claims.

III. The District Court Erred in Ruling Against K.D. on Her Discrimination Claims

A. K.D. Has 504/ADA Rights That Are Distinct from Her IDEA Rights

IDEA "guarantees individually tailored educational services," whereas the ADA and Section 504 specifically aim "to root out disability-based discrimination, enabling each covered person . . . to participate equally to all others in public facilities and federally funded programs." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017); *see also J.S. v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017).

K.D. is a qualified individual with a disability protected by Section 504 and Title II of the ADA. *See* 29 U.S.C. § 705(20); 22 Pa. Code § 15.2. Pennsylvania regulations implementing Section 504 state: "A school district shall provide each protected handicapped student enrolled in the district, without cost to the student or family, those related aids, services or accommodations which are needed to afford the student *equal opportunity* to participate in and obtain the benefits of the school program and extracurricular activities without discrimination and to the maximum extent appropriate to the student's abilities." 22 Pa. Code § 15.3 (emphasis supplied).[15] The ADA provides that "no qualified individual with a disability shall,

[15] This mirrors Section 504's mandate that schools provide "regular or special education services . . . designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are

by reason of such disability be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by such entity. The ADA, enacted in 1990 "is the Federal Government's most recent and extensive endeavor to address discrimination against persons with disabilities." *Olmstead v. L.C.*, 527 U.S. 581, 589 n.2 (1999). The ADA "is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" 527 U.S. at 589; *McGann*, 873 F.3d at 221.

Section 504 and the ADA impose liability when (1) a child needs disability-specific services to enjoy meaningful access to the benefits of a public education; (2) the school district was on notice that the child needed those disability-specific services but did not provide the services, and (3) disability specific services were available as a reasonable accommodation. *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010); *see also* Mark Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. Nat'l

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met." 34 C.F.R. § 104.33(b)(1). There is no question that IDEA does not impose such a standard. *See Endrew F.*, 137 S. Ct. at 1001. But Section 504 is a separate statute with distinct requirements. "Moreover, even if the implementation of the standard is challenging, it remains true that Congress is free to impose such challenges on courts." Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 Tex. J. on C.L. & C.R. 1, 15 (2010).

Ass'n L. Jud. 611, 623 (2012). As discussed in the next section, K.D. is entitled to relief under these statutes.

B. DASD Violated K.D.'s Rights Under Section 504 and the ADA

There is no question that, since kindergarten, the District failed to provide programming designed to allow K.D. to access the general education curriculum as adequately as her peers. DASD's programming did not even try to provide K.D. with access to the general education curriculum. As the private neuropsychologist noted, perpetuation of goals with no empirical support of their utility and the lack of meaningful progress monitoring did not just deny K.D. a FAPE. These actions discriminated against her.

The hearing officer and district court made no factual findings related to K.D.'s performance on AIMSweb, by which Downingtown measured students' progress in the general education curriculum. DASD argues this is irrelevant to K.D.'s IDEA claims, because it is not IEP-based progress monitoring. JA 135, ¶45. But, because AIMSweb is a progress monitoring system that measures and documents a student's response to interventions in the school district's chosen curriculum, it allows one to compare K.D.'s performance to that of her peers. *See* http://www.aimsweb.com/about/faqs (last visited Feb. 18, 2018). This is directly relevant to her ADA discrimination claim of lack of meaningful access to programming.

In the spring of 2014 a school-administered AIMSweb reading fluency probe, K.D. was reading 4 words correct per minute (wcpm) in the spring of 2014. This was an increase of 2 wcpm during the course of the entire second grade school year. Using research-based norms, an end of year second grade student should be reading 89 wcpm, with an average weekly growth of one or two words per week. JA 191.

At the hearing, Dr. Kelly testified that the goal of a progress monitoring tool such as AIMSweb is to inform you if instruction is not working. She testified that if the child is not making progress after even three probes, the instruction should be changed. N.T. 311. That would be a reasonable accommodation for a student like K.D. Instead, DASD continued with the same programming, year after year, until K.D.'s need for intensive remediation required enrollment in a school specifically geared toward children with learning disabilities.

CONCLUSION

Based upon the foregoing, Parents respectfully request that this Honorable Court reverse the decision of the lower court and remand with directions to enter judgment for K.D. and her Parents on all claims.

Respectfully submitted,
REISMAN CAROLLA GRAN LLP

Date: February 21, 2018

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e) because, excluding the parts of the document exempted by Fed R. App. P. 32(f), this document contains 11,918 words.

I certify that this document complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure because the document is in a proportionately spaced typeface, Times New Roman, 14-point, using Microsoft Word for Mac.

I also certify, pursuant to Third Circuit Local Appellate Rules, that the text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies, and further that our virus protection program, Bitdefender Virus Scanner Plus, has been run on the electronic version of the brief and no virus was detectd.

s/ Catherine Merino Reisman
Catherine Merino Reisman

CERTIFICATE OF SERVICE

I, Catherine Merino Reisman, hereby certify that on February 21, 2018, I electronically filed the foregoing Brief with the Clerk of Court by using the appellate CM/ECF system, will cause seven paper copies to be served on the Court within five days of filing. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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