

This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.

Pennsylvania Special Education Due Process Hearing Officer Final Decision and Order

ODR No.

25024-20-21

CLOSED HEARING

Child's Name:

K.T.

Date of Birth:

[redacted]

Parents:

[redacted]

Pro Se

Local Education Agency:

Norristown Area School District
401 N. Whitehall Road
Norristown, PA 19403

Counsel for the LEA:

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Hearing Officer:

Brian Jason Ford, JD, CHO

Date of Decision:

02/18/2022

Introduction

This special education due process hearing concerns the educational rights of a student (the Student). This hearing was requested by the Student's parents (the Parents) against the Norristown Area School District (the District). The Parents are not represented by an attorney.

The Parents' claims arise under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its federal and Pennsylvania implementing regulations. The parties agree that the Student is a "child with a disability" and that the District is the Student's "local educational agency" (LEA) as those terms are defined in the IDEA. 20 U.S.C. § 1401.

The Parents claim that the District violated their right to meaningfully participate in the development of an Individualized Education Program (IEP) for the Student. This includes an allegation that the District refused to consider input from third parties who work with the Student. The Parents also claim that the April 2021 IEP was not reasonably calculated to provide a free appropriate public education (FAPE) at the time it was offered. This includes an allegation that the Student received appropriate services from the District several years ago, but those services were never written into the Student's IEP. The Parents allege that the District will not draft those services into the Student's IEP or provide them now. This also includes a claim that the District failed to consider the progress that the Student has made because of services from third parties outside of school.

As explained below, I find in favor of the District.

Procedural History

The Parents filed a due process complaint against the District on June 6, 2021. The Parents amended their complaint on July 10, 2021. The amended complaint expanded the original complaint. The Parents also filed a document to clarify their claims and demands.

I granted several scheduling motions while the parties attempted to resolve their dispute through various alternative dispute resolution methods. When those efforts failed, the District filed affirmative defenses on October 12, 2021, moving to dismiss many of the Parents' claims. Many of the issues that the Parents raised in this matter were also raised in a prior complaint filed with the United States Department of Education, Office for Civil Rights (OCR). The prior OCR complaint ended when the parties signed a settlement agreement.¹ The District correctly argued that the OCR settlement agreement prohibited the Parents from raising the same claims in this hearing. The Parents responded to the District's motion. On October 25, 2021, I issued a pre-hearing order dismissing nearly all of the Parents' claims.²

The pre-hearing order prompted the District to seek guidance as to what specific issues remained. This resulted in a round of email correspondence in which the District stated its understanding of the surviving issues and I confirmed that the District's statement was correct.

¹ The OCR settlement agreement was entered into evidence as S-23. That document is titled "Facilitated Resolution Between the Parties Agreement" for OCR Complaint No. 03-20-1218.

² This did not prevent the Parents from making arguments about the dismissed claims throughout the hearing or in their closing statement.

The hearing convened over two remote sessions. The parties chose to file written closing briefs in lieu of oral closing statements. Both parties filed closing briefs on February 1, 2022.

Issues

The surviving issues presented for adjudication are:

1. Did the District violate the Parents' right to meaningfully participate in the development of an IEP dated April 23, 2021?
2. Was the IEP dated April 23, 2021, reasonably calculated to provide a FAPE when the District offered it?

Findings of Fact

The pre-hearing order included findings of fact. The bases of those findings are explained in the pre-hearing order. I include many of the same facts here with citation to the pre-hearing order (PHO). Those facts are interspersed with other findings derived from the record, and so the numbering will not align with the PHO.³

One finding in the PHO ultimately was not supported by the record. FF 16 on page 4 of the PHO says that the parties met at an IEP team meeting on May 25, 2021. The record now reveals that there was no meeting on May 25, 2021. Rather, after a series of meetings ending on May 20, 2021, the

³ Not every fact found in the PHO is reprinted here. While the PHO speaks for itself, I have omitted findings that were necessary for the resolution of the District's motion but that are not relevant to the Parents' substantive claims.

District finalized an IEP and sent that IEP with a NOREP to the Parents on May 25, 2021. That distinction in no way impacts upon the outcome of the PHO or this case, but I correct myself for the sake of accuracy.

I reviewed the entire record. I make findings of fact, however, only as necessary to resolve the issues presented for adjudication. I find as follows:

The 2019-20 School Year

1. I take judicial notice that Governor Wolf closed all Pennsylvania school on March 13, 2020, to mitigate the spread of COVID-19. The Governor extended the school closure order through the end of the 2019-20 school year.
2. Sometime in or around April 2020, the District offered an IEP to the Parents with a Notice of Recommended Educational Placement (NOREP).⁴ The Parents approved the IEP via the NOREP. PHO at 2.

The 2020-21 School Year

3. The 2020-21 school year was the Student's [redacted] grade year. *Passim.*
4. The District started the 2020-21 school year with all students receiving remote instruction. NT at 198.

⁴ In most instances, a NOREP is a form through which schools provide prior written notice before changing a student's special education program. In Pennsylvania, the NOREP is also the form through which schools seek parents' approval to implement IEPs.

5. On October 21, 2020, the District proposed IEP revisions with a NOREP. Ten days later, the District did not have a response from the Parents and took the lack of a response as consent to implement the revisions. The April 2020 IEP, as revised in October 2020, was the Student's operative program from November 1, 2020, onward. PHO at 2-3.⁵
6. During the 2020-21 school year, the Student actively engaged in the District's remote instruction. The District was able to monitor the Student's progress and provide accommodations and specially designed instruction remotely. N.T. at 199-200, 227, 259-269, 285, 427, 454; S-9.
7. Around October 25, 2020, the Student started to receive Therapeutic Staff Support (TSS) from a third-party company. That company provided in-person support for the Student for approximately 3.5 hours per day, sometimes while the Student received remote instruction from the District. The company conducted its own evaluations, collected its own data and developed its own goals that were different from the Student's IEP goals. The company's personnel did not review the Student's IEP and were not aware of the special education and related services that the Student received from the District. N.T. at 440, 445, 462, 468, 469-70, 480; *see also* S-18, S-19.
8. In February 2021, the District sought the Parents' consent to reevaluate the Student. The Parents provided consent on February 24,

⁵ Ultimately, the Parents returned the NOREP rejecting the changes. The Parents aver that the COVID-related school building closures prevented them from returning the NOREP sooner, but there is no dispute that the District has implemented the April 2020 IEP as revised in October 2020. The Parents raised several issues concerning IEP implementation. Those issues were dismissed in the PHO.

2021. The District completed its reevaluation report on April 12, 2021 (the 2021 RR). S-18.

9. The 2021 RR included background information, written input from the Parents, and a summary of previous evaluations. The previous evaluations included evaluations conducted by the TSS company that the Parents had provided to the District. S-18 at 1-12.
10. The 2021 RR did not include a Functional Behavioral Assessment (FBA) conducted by the District. Instead, the Parents sent the District a copy of an FBA conducted by the TSS company, and the District incorporated that FBA into the 2021 RR. S-18 at 1-12.
11. The 2021 RR included multiple observations of the Student during instructional time and input from several teachers. The observations were conducted remotely through District-controlled software. See S-18 at 12-14.
12. The 2021 RR included an in-person Occupational Therapy (OT) reevaluation. The OT reevaluation itself included multiple standardized OT assessments. The OT reevaluation concluded with a recommendation for the District to provide monthly consultative occupational therapy to address the Student's sensory needs. S-18 at 14-17.
13. The 2021 RR included in-person behavioral observations of the Student obtained when the Student came to the District for testing. S-18 at 17-18.

14. The 2021 RR included an in-person administration of the WISC-V, which is a standardized, normative measure of intellectual functioning. The Student's Full Scale IQ, General Ability Index (GAI), and Processing Speed Index (PSI) all fell within the average range. Index scores all fell within the average range as well except for the Verbal Comprehension index, which fell in the "low average" range. S-18 at 18-20.
15. The 2021 RR included an in-person administration of the WIAT-III, which is a standardized, normative measure of academic achievement. The Student's Oral Language, Total Reading, and Mathematics composite scores all fell within the average range. Nearly all subtest scores fell within the average range as well, with a few in the "below average" range. S-18 at 20-21.
16. The 2021 RR included a Connors-3 behavior rating scale. The Connors-3 calls for multiple raters to score the Student's behavior corresponding to ADHD symptoms. Three regular education teachers, one special education teacher, and one Parent assessed the Student. The Student also completed a self-rating. S-18 at 21-22.
17. The Parent's rating on the Connors-3 triggered the assessment's rater reliability warnings because of internal inconsistencies in the Parent's responses. Nevertheless, the evaluator reported the Parent's responses, including "very elevated" measures. The evaluator also included comments from the Parent that the rating was completed while the Student worked with the TSS, and that the Student was better regulated while working with the TSS. S-18 at 21-22.

18. The three regular education teachers' ratings placed the Student in the average range on the most global measure of symptoms, with a few elevations in specific domains. The special education teacher rated the Student in the "very elevated" to "elevated" range in many domains. None of the teachers triggered the test's reliability warnings. S-18 at 21-22.
19. The Student's self-rating indicated a high probability of ADHD symptoms. The Student's responses were "on the cusp" of triggering the test's reliability warnings but did not fall over that threshold. S-18 at 21-22.
20. The 2021 RR included a BASC-3 rating scale. The BASC-3 is a standardized, broad ranged behavioral rating scale. The same Parent and four teachers rated the Student's behavior using the BASC-3. The Student completed a self-assessment using the BASC-3 as well. S-18 at 22-25.
21. In contrast to the Connors-3, the Parent's ratings on the BASC-3 did not trigger reliability warnings. The Parent's ratings placed the Student in the clinically elevated range for multiple scales (hyperactivity, conduct problems, depression, attention problems, atypicality). The Parent also reported several of the BASC-3's "critical items" and rated the Student's executive functioning problems in the "extremely elevated" range. S-18 at 22-25.
22. None of the teachers' ratings triggered the BASC-3's reliability warnings. As with the Connors-3, the three regular education teachers rated the Student mostly in the average range with some minor

elevations and some behavioral problems noted, but the special education teacher's ratings were more like the Parent's ratings. S-18 at 22-25.

23. The Student's self-rating on the BASC-3 was like the self-rating on the Connors-3. S-18 at 22-25.
24. The 2021 RR included a BRIEF-2 rating scale. Like the BASC-3, the BRIEF-2 is a standardized, broad ranged behavioral rating scale. The same Parent and four teachers rated the Student's behavior using the BRIEF-2. The Student completed a self-assessment using the BRIEF-2 as well. S-18 at 25-26.
25. The Parent's rating on the BRIEF-2 did not trigger the assessment's reliability warnings. The Parent rated the Student in the "potentially clinically elevated" or "clinically elevated" range across all index scores yielding a Global Executive Functioning (GEC) score in the clinically elevated range. S-18 at 25-26.
26. Two of the regular education teacher's BRIEF-2 ratings place the Student's GEC below the "potentially clinically elevated" range despite some variation in sub-test and index scores. One of the regular education teachers and the special education teacher's ratings on the BRIEF-2 placed the Student's GEC in the "potentially clinically elevated" range. None of the teachers' ratings triggered reliability warnings. S-18 at 25-26.
27. The Student's BRIEF-2 self-assessment produced a GEC below the "potentially clinically elevated" range. S-18 at 25-26.

28. The 2021 RR included an ASRS rating scale. The ASRS is a standardized rating system used to quantify observations of autism-related behaviors in children. The same Parent and four teachers rated the Student's behavior using the ASRS. S-18 at 26-27.
29. The Parent's rating on the ASRS placed the Student in the Elevated range, indicating that the Student had symptoms directly related to a medical diagnosis of autism and was exhibiting many of the features of Autism Spectrum Disorder. S-18 at 26-27.
30. Two of the regular education teachers' ratings on the ASRS placed the Student in the Average range, indicating that the Student had few of the symptoms directly related to a medical diagnosis of autism and was not exhibiting many of the features of Autism Spectrum Disorder. S-18 at 26-27.
31. One of the regular education teachers' ratings on the ASRS placed the Student in the "Slightly Elevated" range, indicating that the Student had symptoms directly related to a medical diagnosis of autism and was exhibiting many of the features of Autism Spectrum Disorder – but not to the same degree as rated by the Parent. S-18 at 26-27.
32. The special education teacher's rating on the ASRS placed the Student in the Elevated range, indicating that the Student had symptoms directly related to a medical diagnosis of autism and was exhibiting many of the features of Autism Spectrum Disorder. The evaluator's analysis of the Parent's ASRS scores and the special education teacher's ASRS scores were similar. S-18 at 26-27.

33. The 2021 RR included an in-person Speech/Language (S/L) reevaluation. The S/L reevaluation itself included multiple standardized S/L assessments. The S/L reevaluation concluded that the Student's speech and language abilities were all assessed in the average range relative to the Student's age and grade. School-based S/L therapy was not recommended. S-18 at 28-29.
34. The 2021 RR concluded that the Student continued to be a child with a disability. The Student's primary disability category was Other Health Impairment (OHI) and secondary disability category was Autism. The 2021 RR included recommendations for the Student's IEP team to consider. S-18 at 30-33.
35. In April 2021, (around the time that the 2021 RR was completed) the District moved from fully remote instruction to hybrid instruction. Under this model, half of all students in the District would receive in-person instruction on Mondays and Tuesdays and the other half would receive in-person instruction on Thursdays and Fridays. Despite this general rule, the District offered the Student to come to school all four days. The Parents declined this offer and the Student continued to receive remote instruction through the end of the 2020-21 school year. N.T. at 245-46, 270-71, 480; P-41.
36. The District provided a copy of the 2021 RR to the Parents on or around April 12, 2021. S-18.
37. On April 23, 2021, the Student's IEP team was scheduled to convene to review the 2021 RR and draft an IEP. The Parent brought a Board

Certified Behavior Analyst (BCBA), a community-based Blended Case Manager, and an advocate with her to the meeting. The Parent's advocate is also a licensed Pennsylvania attorney. The District's policy or practice is to bring its own attorney to team meetings whenever Parents bring an attorney. The meeting ended very shortly after it began upon the District's realization that the Parent brought an attorney to the meeting.⁶ *See, e.g.* P-5, S-19.

38. The District prepared a draft IEP based on the 2021 RR and intended to distribute the draft IEP during the April 23, 2021, meeting. There is some ambiguity in the record as to whether the District distributed the draft IEP during the meeting before it abruptly ended. I make no finding as to whether a draft IEP was provided to the Parents on April 23, 2021. *See, e.g.* S-19, PHO at 4.
39. The Student's IEP team reconvened on May 4, 2021, for the same purposes as the April 23 meeting. At the District's suggestion, the Parents provided question about the 2021 RR in writing in advance of the May 4, 2021, meeting. The District attached those questions to the 2021 RR. S-18 at 35-36, S-19.
40. During the May 4, 2021, meeting, the IEP team (which included the same people as the April 23 meeting plus the District's attorney) discussed the 2021 RR. The District also distributed a copy of the draft

⁶ The Parent testified that the advocate was not engaged in the practice of law but rather was working for the Parents as a non-attorney advocate. It is not for me to decide whether the advocate's work constituted the practice of law. Moreover, the distinction is irrelevant to the District's policy – which is to have an attorney present whenever parents bring an attorney. Whatever her role in the meeting, the Parents' advocate is an attorney and so the District was acting consistently with its own policy. Even more importantly, this case does not turn on the District's adherence with its own policies. The issues concern the District's compliance with the IDEA, not its own practices.

IEP. The meeting lasted about two hours, but the team did not complete its work. The meeting was then scheduled to resume on May 20, 2021. S-18, pp.35-36; N.T. at 132, 269, 345-346, 348, 361, 365-66.

41. Between May 4 and May 20, 2021, the Parents discussed the 2021 RR and the 2021 RR and the draft IEP “line by line” with their advocate and Blended Case Manager. NT at 368; see *also* NT 362-363.
42. The IEP team then reconvened on May 20, 2021, for another two hours with the same participants as the May 4, 2021, meeting. During this time, the Parents and the District discussed the 2021 RR and the draft IEP. See, e.g. NT 362-63, 368, 370-72.
43. After the May 20, 2021, meeting, the Parent sent the District detailed information about what the Parents wanted to have included in the IEP. That information was sent by email from the Parents’ advocate to the District’s attorney. The District noted that communication in the parental input section of the IEP (S-19 at 32) and attached the emails to the IEP itself. S-19 at 49-57.⁷ The primary concern raised in these emails was the provision of one-to-one (1:1) support during times that the Student would not have a TSS in school. See *id.*
44. On May 25, 2021, the District finalized the IEP and sent that with a NOREP to the Parents. See S-19, PHO at 4. The Parents rejected the District’s proposal. *Passim*.⁸

⁷ The Parent’s emails concerning the 2021 RR were also attached in this section.

⁸ The record does not contain a signed NOREP through which the Parents rejected the proposed IEP. However, there is no dispute that the Parents rejected the District’s proposal.

45. The proposed IEP included a statement of the Student's then-present levels of academic achievement and functional performance. That section of the IEP includes parental input and (substantively) the entire 2021 RR. S-19 at 7-33.
46. The proposed IEP called for the Student to participate in statewide assessments with accommodations (an environment with reduced distractions and frequent breaks). S-19 at 35.
47. The proposed IEP included an annual goal to improve the Student's peer interactions as measured through behavior charting. This goal was individualized, measurable, and baselined. S-19 at 37.
48. The proposed IEP included an annual goal to improve the Student's classroom behavior as measured through behavior charting. This goal was individualized, measurable, and baselined. S-19 at 38.
49. The proposed IEP included an annual goal to improve the Student's attention and executive functioning (maintaining attention and completing tasks) as measured through behavior charting and assignment completion. This goal was individualized, measurable, and baselined. S-19 at 39.
50. The proposed IEP included an annual goal to improve the Student's ability to cope with unexpected events or changes to the Student's routine. The goal would measure the Student's responses to both real and contrived (in this context, meaning social skills roleplay) scenarios as measured by behavior charting. This goal was individualized, measurable, and baselined. S-19 at 40.

51. All four annual IEP goals were directly related to needs identified in the 2021 RR. *c/f* S-18, S-19.
52. The proposed IEP included 35 program modifications or items of specially designed instruction (SDI). S-19 at 41-43. The number of modifications and SDI is never proof of the quality of those items. However, in this case, the SDI were all directly related to the Student's needs and the IEP's goals. These were individualized and, taken as a whole, paint a clear picture as to what special education the District would provide to enable the Student to achieve the IEP's goals. *Id.*
53. Comparing IEP drafts reveals that several of the SDI and modifications were added to the proposed IEP based on feedback and requests from the Parent. *c/f* P-5, S-19.
54. The proposed IEP include 30 minutes per week of group counseling services. The intention was for the District to teach the social skills that the IEP would measure during this time. Group instruction would enable the Student to discuss social situations and practice with peers. *See, e.g.* S-19 at 43.
55. The proposed IEP included curb to curb transportation. S-19 at 43.
56. The proposed IEP included the OT consultation that was recommended in the OT evaluation. S-19 at 43.
57. The proposed IEP included time for the Student's special education and regular education teachers to consult with each other. S-19 at 43.

58. The proposed IEP included the District's conclusion that the Student was eligible for Extended School Year (ESY) during summer 2021. The IEP specified that the District would continue to work towards IEP goals and continue to provide group counseling during summer ESY. S-19 at 44.
59. The Student ended the 2020-21 school year on the District's honor roll based on academic performance and was promoted to [the next] grade. S-26.
60. The Parents requested this due process hearing on June 6, 2021.⁹

Witness Credibility

During a due process hearing, the hearing officer is charged with the responsibility of judging the credibility of witnesses, and must make "express, qualitative determinations regarding the relative credibility and persuasiveness of the witnesses." *Blount v. Lancaster-Lebanon Intermediate Unit*, 2003 LEXIS 21639 at *28 (2003). One purpose of an explicit credibility determination is to give courts the information that they need in the event of judicial review. *See, D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014) ("[Courts] must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record

⁹ Both parties presented evidence concerning events after June 6, 2021. This included the District's effort to conduct its own FBA (S-37) and the Student's progress during the 2021-22 school year up to the date of the hearing. As explained below, my task is to assess the appropriateness of the IEP at the time it was drafted. A school's failure to take action based on the data it collects after an IEP is implemented may violate a student's right to a FAPE – but that violation is separate and distinct from a dispute about the appropriateness of an IEP at the time it was offered.

would justify a contrary conclusion.”). See also, generally *David G. v. Council Rock School District*, 2009 WL 3064732 (E.D. Pa. 2009); *T.E. v. Cumberland Valley School District*, 2014 U.S. Dist. LEXIS 1471 *11-12 (M.D. Pa. 2014); *A.S. v. Office for Dispute Resolution (Quakertown Community School District)*, 88 A.3d 256, 266 (Pa. Commw. 2014); *Rylan M. v Dover Area Sch. Dist.*, No. 1:16-CV-1260, 2017 U.S. Dist. LEXIS 70265 (M.D. Pa. May 9, 2017).

I find that all witnesses testified credibly in that all witnesses candidly shared their recollection of facts and their opinions, making no effort to withhold information or deceive me. To the extent that witnesses recall events differently or draw different conclusions from the same information, genuine differences in recollection or opinion explain the difference.

Applicable Legal Principles

The Burden of Proof

The burden of proof, generally, consists of two elements: the burden of production and the burden of persuasion. In special education due process hearings, the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006). The party seeking relief must prove entitlement to its demand by preponderant evidence and cannot prevail if the evidence rests in equipoise. See *N.M., ex rel. M.M. v. The School Dist. of Philadelphia*, 394 Fed.Appx. 920, 922 (3rd Cir. 2010), citing *Shore Reg'l High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In this case, the Parents are the party seeking relief and must bear the burden of persuasion.

Free Appropriate Public Education (FAPE)

The IDEA requires the states to provide a “free appropriate public education” to all students who qualify for special education services. 20 U.S.C. §1412. Local education agencies meet the obligation of providing a FAPE to eligible students through development and implementation of IEPs, which must be “‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’” *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Substantively, the IEP must be responsive to each child’s individual educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

This long-standing Third Circuit standard was confirmed by the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew F.* case was the Court’s first consideration of the substantive FAPE standard since *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034 (1982).

In *Rowley*, the Court found that a LEA satisfies its FAPE obligation to a child with a disability when “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.” *Id* at 3015.

Third Circuit consistently interpreted *Rowley* to mean that the “benefits” to the child must be meaningful, and the meaningfulness of the educational benefit is relative to the child’s potential. See *T.R. v. Kingwood Township Board of Education*, 205 F.3d 572 (3rd Cir 2000); *Ridgewood Bd. of*

Education v. N.E., 172 F.3d 238 (3rd Cir. 1999); *S.H. v. Newark*, 336 F.3d 260 (3rd Cir. 2003). In substance, the *Andrew F.* decision is no different.

A school district is not required to maximize a child's opportunity; it must provide a basic floor of opportunity. See, *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). However, the meaningful benefit standard required LEAs to provide more than "trivial" or "de minimis" benefit. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 1179 (3d Cir. 1998), *cert. denied* 488 U.S. 1030 (1989). See also *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533-34 (3d Cir. 1995). It is well-established that an eligible student is not entitled to the best possible program, to the type of program preferred by a parent, or to a guaranteed outcome in terms of a specific level of achievement. See, e.g., *J.L. v. North Penn School District*, 2011 WL 601621 (E.D. Pa. 2011). Thus, what the statute guarantees is an "appropriate" education, "not one that provides everything that might be thought desirable by 'loving parents.'" *Tucker v. Bayshore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

In *Andrew F.*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than *de minimis*" standard, holding instead that the "IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. 988, 1001 (2017). Appropriate progress, in turn, must be "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000. In terms of academic progress, grade-to-grade advancement may be "appropriately ambitious" for students capable of grade-level work. *Id.* Education, however, encompasses much more than academics. Grade-to-grade progression, therefore, is not an absolute

indication of progress. Rather, I must consider the totality of a child's circumstances to determine whether the LEA offered the child a FAPE.

In sum, the essence of the standard is that IDEA-eligible students must receive specially designed instruction and related services, by and through an IEP that is reasonably calculated at the time it is issued to offer an appropriately ambitious education in light of the Student's circumstances.

Evaluation Criteria

The IDEA establishes requirements for evaluations. Substantively, those are the same for initial evaluations and reevaluations. 20 U.S.C. § 1414.

Evaluations must "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining" whether the child is a child with a disability and, if so, what must be provided through the child's IEP for the child to receive a FAPE. 20 U.S.C. § 1414(b)(2)(A).

Further, the evaluation must "not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child" and must "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors". 20 U.S.C. § 1414(b)(2)(B)-(C).

In addition, the District is obligated to ensure that:

assessments and other evaluation materials... (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer; (iii) are used for purposes for which the assessments or measures are valid and reliable; (iv) are administered by trained and knowledgeable personnel; and (v) are administered in accordance with any instructions provided by the producer of such assessments.

20 U.S.C. § 1414(b)(3)(A).

Finally, evaluations must assess “all areas of suspected disability”. 20 U.S.C. § 1414(b)(3)(B).

Meaningful Parental Participation / Predetermination

By statutory definition, parents of children with disabilities are members of IEP teams. 20 U.S.C. § 1414(d)(1)(B). Parents must have an opportunity to meaningfully participate in the development of special education programming for their children. 34 C.F.R. § 300.501(b). Schools may not predetermine a child’s special education program or placement. *See, e.g. D.B. v. Gloucester Twp. Sch. Dist.*, 751 F. Supp. 2d 764, 771 (D.N.J. 2010).

Predetermination by schools strips parents of their right to meaningfully participate in the IEP development process. However, a school’s obligation to ensure meaningful parental participation does not preclude the school from

bringing a draft IEP to an IEP team meeting. Rather, the analysis concerns the extent to which parents have a voice during IEP development and the extent to which LEAs seriously consider parental input.

Discussion

The District Did Not Violate the Parents' Right to Meaningfully Participate in IEP Development

There is no evidence to support the Parent's claim that the District violated their right to meaningfully participate in the development of the Student's special education program. To the contrary, all evidence illustrates that the District not only gave the Parent multiple methods to provide input, but that the District listened to that input and then acted in response.

The District carefully considered all information provided by the parents as part of the 2021 RR. This included multiple forms of narrative parental input and outside evaluations that the Parents sent to the District. This also included the Parent's response on multiple rating scales. The information that the Parents provided as part of the 2021 RR directly contributed to the findings and recommendations of that report. In turn, the District used the 2021 RR to develop the Student's IEP. In this way, meaningful parental input was reflected even in the first draft of the proposed IEP.

After that work was done, the Parents and District sat for hours as part of an IEP team that also included the Parents' advocate and third parties that the Parents invited to the meetings. Through those meetings, the District gave the Parents and their team ample opportunity to discuss the 2021 RR and draft IEP in minutia. The District also encouraged the Parents to put their

thoughts in writing. The Parents worked with their team to do that, and the District incorporated their submission into the 2021 RR and the IEP. On the District's end, this was more than copy/paste. The District made substantive changes to the Student's proposed special education based directly on the Parents' comments and concerns.

The record reveals that not every question the Parents asked was answered and that not every request was granted. The record in its totality compels the conclusion that those facts are not evidence of predetermination or a denial of meaningful parental participation.

For these reasons, the Parents' claim that the District violated their right to meaningfully participate in IEP development is denied.

The Proposed IEP Was Appropriate at the Time It Was Offered

In a technical sense, questions concerning the appropriateness of the 2021 RR are not before me. However, the proposed IEP was derived from the 2021 RR. The proposed IEP cannot be appropriate if the 2021 RR was inappropriate. Therefore, I must determine if the 2021 RR was appropriate as a threshold matter.

The 2021 RR was procedurally appropriate, satisfying all evaluation criteria described above. The 2021 RR was also substantively appropriate. The District's evaluator carefully considered all sources of information, and the reliability of various evaluations, when making her conclusions and recommendations. The record reveals no claim that the conclusions reached in the 2021 RR were erroneous.

The Parents allege that the District failed to evaluate all the Student's suspected areas of disability. I disagree. The 2021 RR was comprehensive, using both broad and targeted assessments that were selected based on the Student's observed and reported disabilities, needs, and strengths. As a result, the 2021 RR produced actionable information for the IEP team.

Having found that the 2021 RR was appropriate, I turn to the proposed IEP. While no IEP is perfect, I find that the proposed IEP was reasonably calculated to provide a FAPE when it was offered.

The District scrupulously avoided pitfalls that could have easily resulted in violations, particularly during the transition from remote to in-person instruction. The Student's needs were identified in the 2021 RR, and those flowed directly into the proposed IEP's goals. Those goals were measurable, baselined, and included plans for progress monitoring.

The quantum of progress that each goal called for is small. There is no evidence in the record, however, that the amount of progress anticipated by the IEP is anything other than meaningful for the Student.¹⁰ Of equal importance, the IEP included SDI and related services that were individualized for the Student and related to the IEP's goals. The SDI and related services, in essence, are the special education that the District would provide to enable the Student to meet the goals. The direct line linking the RR, goals, SDI, and related services underscore the proposed IEP's substantive appropriateness.

¹⁰ The IEP was designed to be implemented during a time of significant transitions for a Student who, historically, has difficulty with transitions. The record could support an affirmative determination that the amount of progress expected by the IEP was meaningful under the *Andrew* standard. However, under *Schaffer*, my decision is based on a lack of evidence to the contrary.

The Parent's primary criticism of the proposed IEP is not what it contains, but what it lacks. They argue that the Student used to receive a higher level of support in smaller classrooms, and that the Student currently has a need for one-to-one (1:1) support throughout the school day. While I make no specific findings about the services that the Student received previously, I will accept the Parents' statements about the Student's prior services as true for purposes of discussion. For the same purpose, I will also accept the Parents' statement that the Student received supports from the District in the past that were not listed in the Student's prior IEPs. Those assumptions do not change the result.

The Parents correctly argue that the services a student receives outside of school may be a factor in deciding what special education a school must provide. *See generally, Breanne C. v. S. York Cty. Sch. Dist.*, 732 F. Supp. 2d 474 (M.D. Pa. 2010). There is more than preponderant evidence in this case that the District carefully considered the Student's outside services, particularly those from the TSS company. The District did not disregard the Student's potential need for 1:1 support, the Student's receipt of 1:1 support in the past, or the Student's receipt of TSS. Rather, the District was aware of the services that the Student received. The District had that information through its own records, parental input, receipt of reports from outside agencies, and the direct participation of outside agencies in the IEP development process.¹¹ The District used that information to craft the special education that the Student would receive in school. There is no preponderant evidence that the Student required anything beyond what the District offered when the District proposed the IEP.

¹¹ A provision in the SDI section contemplates the District's ongoing receipt of information from third parties. S-19 at 43.

None of this removes the District's obligation to progress monitor and then act on the data it collects. It is possible that an IEP can be reasonably calculated to confer a meaningful educational benefit at the time it is offered, but then fail to work as expected. Should that happen, the District is obligated to call the IEP team back together to make necessary changes or to reevaluate if necessary.¹² The issue before me, however, is whether the proposed IEP was appropriate on May 25, 2021. I find that it was.

ORDER

Now, February 18, 2022, it is hereby **ORDERED** that the Parents' claims are **DENIED** and **DISMISSED**.

It is **FURTHER ORDERED** that any claim not specifically addressed in this order is **DENIED** and **DISMISSED**.

/s/ Brian Jason Ford

HEARING OFFICER

¹² The District drafted this obligation into the IEP itself. The IEP calls for additional meetings if the Student's behaviors fall below baseline. S-19 at 43