

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 Hearing Officer

Final Decision and Order

Closed Hearing

ODR No. 27636-22-23

Child's Name:

C.V.

Date of Birth:

[redacted]

Parent:

[redacted]

Counsel for Parent:

Pro Se

Local Education Agency:

Philadelphia City School District
440 N. Broad St., Suite 313
Philadelphia, PA 19130

Counsel for LEA:

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Hearing Officer:

Joy Waters Fleming, Esq.

Date of Decision:

4/15/23

INFORMATION AND PROCEDURAL HISTORY

The student in this matter (Student)¹ is a [teenage] student in the (District) who is eligible for special education under the Individuals with Disabilities Education Act (IDEA) as a child with a primary disability of Autism.² The Parent filed this due process Complaint on the grounds that the District denied Student a FAPE when it failed to provide appropriate programming from the commencement of the 2022-2023 school year until January 2023.

Following a review of the record and for the reasons set forth below, the claims of the Parent cannot be sustained and must be denied.

ISSUE

Between September 2022 and January 2023, during the 2022-2023 school year, did the District deny Student a free appropriate public education (FAPE) by placing the Student in a low-incidence classroom?

¹ In the interest of confidentiality and privacy, Student's name, gender, and other potentially identifiable information are not used in the body of this decision. All personally identifiable information, including details appearing on the cover page of this decision, will be redacted prior to its posting on the website of the Office for Dispute Resolution in compliance with its obligation to make special education hearing officer decisions available to the public pursuant to 20 U.S.C. § 1415(h)(4)(A) and 34 C.F.R. § 300.513(d)(2).

² 20 U.S.C. §§ 1400-1482. The federal regulations implementing the IDEA are codified in 34 C.F.R. §§ 300.1 – 300. 818. The applicable Pennsylvania regulations are set forth in 22 Pa. Code §§ 711.1 – 711.62.

FINDINGS OF FACTS

1. The Student is currently [teenaged], enrolled in the [redacted] grade and eligible for special education and related services as a child with a primary disability category of Autism and a secondary disability category as Other Health Impaired (OHI). (S-4)

2021-2022 School Year

2. During the 2021-2022 school year, the Student was enrolled in the [redacted] grade in the District and received supplemental autistic support, general education reading and math, occupational therapy and 1:2 adult assistance. (S-4, p. 2)
3. In November 2021, the District reevaluated the Student and issued its report (RR). (S-4)
4. In past aptitude and achievement tests reported in the RR, the Student's FSIQ was 111 (high average). (S-4, p. 4)
5. Academic and behavioral strengths indicated the Student could do grade-level work with little to no academic support. Academic needs indicated Student was a strong reader who could respond to and ask higher-order thinking questions and struggled to stay engaged with work; prompting and redirection were needed. (S-4)
6. Behavioral assessments indicated that the Student typically maintained appropriate social and emotional behaviors but experienced some challenges related to ASD and ADHD diagnoses. (S-4, p. 18)
7. The RR recommended that the Student continue to receive special education services under the criteria for Autism and OHI. (S-4, p. 18)

8. The RR recommended that the IEP team consider programming and specially designed instruction that included social decision-making, coping skills, and organizational skills. (S-4)
9. On December 16, 2021, the IEP team met to discuss educational programming for the Student. The December IEP indicated that Student required an adult assistant to help with non-compliant behaviors demonstrated during the school day and to ensure FAPE. The Parent reported concerns of signs consistent with high-functioning Autism and handwriting improvement. (S-5, p. 7-8)
10. The transition services section of the Student's December 2021 IEP indicated that the Student would graduate by successfully completing IEP goals and objectives instead of accumulating academic credits. No credits would be earned during the year. (S-5, p. 10; N.T. 76-77)
11. The December IEP offered goals to address sleeping in class, time management, social expression, organization, post-secondary education and training, and career exploration. (S-5, p. 22-25)
12. The IEP offered no academic goals and was slated for implementation for the Student's transition to [redacted] grade through December 2022. (P-5, S-5; N.T. 74, 80)
13. The December 2021 IEP offered SDI and related services, including special transportation and a 1:2 adult assistant. The team determined the Student was eligible for ESY for summer 2022. (S-5, p. 27-28)
14. The December 2021 IEP proposed that the Student receive supplemental autistic support. (S-5; N.T. 75)
15. The December 2021 IEP was implemented for the remainder of the 2021-2022 school year. (S-5)

16. In the District, a student must earn at least 23.5 credits to graduate from high school. Promotion from ninth to tenth grade requires five credits. Promotion from tenth to eleventh grade requires eleven credits. Promotion from eleventh to twelfth grade requires 17.5 credits. (S-10; N.T. 26)

2022-2023 School Year

17. At the commencement of the 2022-2023 school year, the Student entered the [redacted] grade with the December 2021 IEP in place and was provided with a supplemental level of autistic support services. (S-5; N.T. 21-22, 74-75)
18. During the first and second marking periods of the school year, the Student was enrolled in interpersonal communication skills, modified literacy, modified math, unified sports and earned grades of "A" and 92 percent. The Student did not earn academic credit for the assigned classes. (P-11, P-12)
19. To update the Student's present levels of academic achievement for inclusion in the annual IEP, the District administered KeyMath and Woodcock Johnson reading tests. The Student's performance was above grade level in reading and math. Behaviorally, the Student had no incidents. (S-7, p. 9)
20. The team indicated the Student would attend modified classes for 3 out of 4 periods a day, and if everything "worked out" the modified classroom setting, the Student would switch from graduating with goals to graduating with credits. (S-7, p. 9)
21. In December 2022, the IEP team met to discuss the Student's programming. The Student's present level of performance indicated

- above-grade-level reading and math achievement. The Parent attended the meeting. (P-13, S-7; N.T. 71-72)
22. Parent concerns expressed to the IEP team included that Student graduate from high school with academic credit so that college attendance could occur. (P-13, S-7)
 23. The transition services section of the IEP indicated the Student would graduate by successfully completing IEP goals and objectives. The post-secondary education and training goal indicated that for 90 minutes during an IEP term, the Student would receive assistance reviewing college catalogs in the guidance office. (S-7, p. 10-11)
 24. The December IEP offered goals designed to address sleeping in class, time management, organization, writing, researching colleges, and locating items. (S-7, p. 16-24)
 25. The December 2021 IEP offered SDI and related services, including special transportation and a 1:2 adult assistant. The team determined the Student eligible for ESY for summer 2023. The team proposed Student receive supplemental learning support. (P-13, S-7)
 26. On January 13, 2023, through a NOREP, the Parent disapproved of the proposed program for the Student. (P-13)
 27. In January 2023, in consultation with the Parent, the District changed the Student's classes to English 1-modified, World History-modified, Algebra 1, and Physical Science-modified. All classes earn academic credit. In the third marking period, the Student earned grades of an A in each of the classes. (P-12, P-13, S-7, S-9; N.T. 220)
 28. The student will earn [the required number of] academic credits during the 2022-2023 school year when all classes are successfully completed. (S-9; N.T. 25-27, 81)

DISCUSSION AND CONCLUSION OF LAW

General Legal Principles

The Burden of Proof

The burden of proof 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). Because the Parent was pro se, the Hearing Officer assigned the production burden to the District. The Parent, as the party seeking relief, bore the burden of persuasion.

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 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).

All three witnesses testified credibly and shared their recollection of facts and opinions, making no effort to withhold information or deceive me. To the extent that my findings of fact are derived from testimony alone (as opposed to documentary evidence or a combination of both), the weight that I assign to each witness's testimony is reflected in my findings of fact.

General IDEA Principles: Substantive 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 the 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. The United States Supreme Court in *Endrew F. v. Douglas Cnty* confirmed this long-standing Third Circuit standard. *Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). The *Endrew* decision was the Court's first consideration of the substantive FAPE standard since the *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 satisfied 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.* The 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 *Endrew* 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 requires 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 or 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 *Endrew*, the Supreme Court effectively agreed with the Third Circuit by rejecting a "merely more than de minimis" standard, holding 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."

Endrew F., 137 S. Ct. 988, 1001 (2017). 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.

General IDEA Principles: Procedural FAPE

From a procedural standpoint, the family has "a significant role in the IEP process." *Schaffer, supra*, 546 U.S. at 53. Consistent with these principles, a denial of FAPE may be found to exist if there has been a significant impediment to meaningful decision-making by parents. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2). Procedural deficiencies might warrant a remedy if they resulted in a "significant impediment" to parental participation or in a substantive denial of FAPE. 20 U.S.C. § 1415(f)(3)(E).

Parent Claims

In the due process complaint, the Parent contended that during a portion of [redacted] grade during the 2022-2023 school year, the District denied Student a FAPE through its placement of Student in classes that did not earn academic credits. According to the Parent, graduation from high school based on IEP goal progress instead of earned credits would compromise the Student's ability to attend college. Before the hearing commenced, the Parent modified this issue and indicated a concern with the Student in a "low incidence" classroom during the first two marking periods. The Parent has not met the burden of proof, and no relief is due.

The Parent failed to establish that the District denied Student a FAPE. Although this pro se parent was provided with the opportunity to present witnesses and evidence, the record in this matter was relatively sparse.

Aside from the Parent, only a high school teacher and a school psychologist testified. The [redacted]-grade teacher met the Student for the first time this school year and was not involved in the development of the IEP at issue, which carried over from [redacted] grade. Her involvement appeared limited to administering achievement testing that was ultimately used as the basis to change the Student's classes to those that earned academic credit, which is what the Parent wanted. The second witness, requested by the Parent for testimony, was the school psychologist that evaluated the Student in 2021 and had no involvement with the Student since that time or the issue at hand. The Parent's testimony, although heartfelt, did not address the issue raised for resolution and provided no explanation for the contention that Student's classroom was "low incidence" and how that related to an alleged denial of FAPE. At times, the Parent's testimony was unclear, and memory of events regarding participation and agreement to the implemented and proposed IEPs faltered. If anything, the testimony served to underscore the District's position that the concern raised by the Parent was addressed, and the Student now had access to credit-bearing classes. The Parent clearly had concerns for this academically capable Student and wisely wanted to ensure that post-secondary educational opportunities remained viable.

Although this Student demonstrated academic achievement at impressive levels, the identified behavioral needs required the team to consider various course scheduling options to ensure a FAPE. What was established is that the [redacted] grade IEP remained in place for the Student's transition to [redacted] grade. That IEP was developed to address behavioral as opposed to academic needs. The historical behavioral concerns necessitated the assignment of a 1:2 aide to provide school-day assistance to the Student. It is not clear why the Student was scheduled for [redacted]-grade classes that did not award academic credit and who participated in that planning. The elicited testimony and documentary evidence did not

explain the decision-making process, but the Parent did not present evidence that participation in this process was hindered or denied. Although the production burden was assumed by the District, the burden of persuasion remained with the Parent. The introduced evidence was far from preponderant that a denial of FAPE occurred. Although the transition to [redacted] grade resulted in Student's assignment to classes that did not earn credits as preferred by the Parent, the IEP in place during the period at issue was reasonably calculated to offer an appropriately ambitious education in light of the Student's known circumstances. In January 2023, Student's classes were changed to those that now earn sufficient academic credit for promotion to the [redacted] grade.

In sum, the IEP the Parent was provided with an opportunity to participate in the Student's education, those concerns were heard and heeded, and this Student is on a trajectory for continued academic success. No denial of FAPE occurred.

ORDER

AND NOW, this 15th day of April 2023, in accordance with the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Parent's claim that the District failed to provide a free appropriate public education to the Student between September 2022 and January 2023 is DENIED. No remedy is due the Parent.

It is **FURTHER ORDERED** that any claims not specifically addressed by this decision and order are DENIED and DISMISSED.

/s/ Joy Waters Fleming, Esquire

HEARING OFFICER
ODR File No. 27636-22-23