

*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

Student's Name: E. G.

Date of Birth: [redacted]

ODR No. 16459-1415AS

### CLOSED HEARING

#### Parties to the Hearing

Parent[s]

Great Valley School District  
47 Church Road  
Malvern, PA 19355

#### Representative

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Dates of Hearing: 02/19/2016, 04/07/2016, 04/21/2016, 05/13/2016,  
06/10/2016

Record Closed: 07/06/2016

Date of Decision: 07/20/2016

Hearing Officer: Brian Jason Ford, JD, CHO

## **Introduction and Procedural History**

This special education due process hearing concerns the educational rights of the Student, who resides within the boundaries of the District.<sup>1</sup> The hearing was requested by the Parents, who allege that the District denied the Student a free appropriate public education (FAPE) from 3<sup>rd</sup> grade (2012-13 school year) through the present. The Parents demand compensatory education to remedy this denial. The Parents also allege that they enrolled the Student in a private school when the District failed to offer FAPE for the 2015-16 school year. The Parents demand tuition reimbursement for the 2015-16 school year.

The Parents' Complaint raises claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and the Americans with Disabilities Act as Amended (ADA), 42 U.S.C. § 12101 *et seq.* While all three laws are listed in the Complaint, all remedies demanded come from the IDEA, and so analysis will proceed under that law.

The Parents' Complaint was filed on June 12, 2015, and then amended on August 18, 2015 and again on October 13, 2015. Each time the Complaint was amended, the timeline for this hearing reset. Throughout the hearing, there were multiple motions for continuances and multiple hearing sessions, each accompanied by a motion to extend the statutory decision due date.

At the outset of the hearing, the District moved to strike a portion of the Complaint as untimely. The District argues that some of the Complaint is barred by the IDEA's statute of limitations. After a pre-hearing conference call, the parties agreed that the evidence establishing the timeliness or untimeliness of the claims significantly overlapped with the evidence for the substantive claims. As a result, a separate timeliness hearing was not held, and all evidence was presented over five hearing sessions.

For reasons described below, I find in favor of the District regarding the timeliness of the Complaint. For the portion of the Complaint that is timely, I find in favor of the District.

### **Issues**

The issues presented are:

1. Is any portion of the Complaint untimely?
2. Did the District offer a FAPE from the start of the liability period through the start of the 2015-16 school year? If not, is the Student owed compensatory education?
3. Are the Parents entitled to tuition reimbursement for the 2015-16 school year?

### **Timeliness**

I make findings of fact only as necessary to resolve the issues presented. Therefore, it is appropriate to resolve the dispute concerning the scope of the hearing before anything else. To the extent that resolving the scope of the hearing is a fact-specific inquiry, facts related to the scope of the hearing are presented in this section.

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<sup>1</sup> Except for the cover page of this Decision and Order, identifying information is omitted to the greatest extent possible.

The IDEA includes a two-year statute of limitations. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601 (3d Cir. 2015). The first step to determine the timeliness of an IDEA complaint is to establish the date when the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C). This date is referred to as the KOSHK date. Parents have two years from the KOSHK date to request a due process hearing. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d above. If the complaint was filed within two years of the KOSHK date, it is timely. *Id.* If the complaint is timely, the IDEA imposes no limitation on remedies. *Id.* However, if the complaint (or any portion of the complaint) was filed more than two years after the KOSHK date, it is untimely. *Id.*

The parties present different legal interpretations of *G.L.* In general, the Parents argue that the KOSHK date is the date that they discovered that the District's actions resulted in a denial of FAPE. In general, the District argues that the KOSHK date is the date that the Parents knew what the District was doing. I agree with the District.

In the *G.L.* case, the Hearing Officer made a KOSHK determination. That determination was never appealed. As a result, questions about how to find the KOSHK date were not before the court in *G.L.* Consequently, *G.L.* is precedent only to the extent that it holds that the IDEA does not limit remedies when complaints are timely. Any *dicta* in *G.L.* about how to find the KOSHK date is just that. To find out how the KOSHK date is determined, I turn to the statute.

The word "action" is not defined in the IDEA. See 20 U.S.C. § 1401. As instructed in *G.L.*, I look to the context of the statutory scheme to determine what "action" means. *G.L.*, 802 F.3d above at 616 (citing *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000), *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988).) Indeed, the *G.L.* court recognized that "it is '[a] standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning.'" *G.L.*, 802 F.3d above at 617 (citing *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007)).

The word "action" in subsection 1415(f)(3)(C) comes in the context of the IDEA's procedural safeguards section, 20 U.S.C. § 1415. In the procedural safeguards section, the word "action" refers to deeds, conduct or behaviors of the local education agency that require prior written notice to the Parents. In 20 U.S.C. 1415(b)(3), the statute requires that the local education agency provide Parents with written prior notice whenever it:

- a. proposes to initiate or change; or
- b. refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

*Id.* Immediately following this subsection, another subsection establishes the parental right to request a due process hearing. This subsection uses the word "action" in the same context. 20 U.S.C. 1415(b)(3)(B) (referring to "the alleged action which forms the basis of the complaint."); 20 U.S.C. §1415(b)(6)(A) (matters subject to complaint and request for due process); 20 U.S.C. §1415(b)(6)(B) ("alleged action").

The *G.L.* court referred to 20 U.S.C. § 1415(b)(6)(B) as "an inartful attempt to mirror § 1415(f)(3)(C)'s two-year statute of limitations." *G.L.* at 605. But the word "action" used in § 1415(f)(3)(C) comes in an identical context. In fact, every instance of the word "action" in the

procedural safeguards section – and especially in those subsections concerning due process complaints – is used the same way. See 20 U.S.C. §1415(c)(1)(A),(B) (“a description of the action proposed or refused by the agency”).

The IDEA regulations also use the word “action” in the same context. In 34 C.F.R. §300.507(a)(1), the regulation explicitly interprets the scope of a permissible due process Complaint Notice as co-extensive with the scope of the written prior notice requirement, providing a right to file a due process complaint “on any of the matters described in §300.503(a)(1) and (2) ...”. This reference is to the written prior notice subsection that delineates the agency’s duty in terms of its proposed or refused initiation or change to evaluation, identification, placement or provision of FAPE to the child. See *also*, 34 C.F.R. §300.503(b)(1)(2) (tracking statutory language for written prior notice that impliedly refers to initiation or change as “action”), 34 C.F.R. §300.507 (impliedly equating initiation or change in these services with “action”).

I conclude that the word “action” in section 1415(f)(3)(C) refers to the local education agency’s initiation or change of the identification, evaluation, placement or provision of a FAPE to the child. Once a parent knows or should know what the agency has done or not done with regard to initiating or changing the student’s identification, evaluation, or educational placement, or the provision of a FAPE to the student, the two years start to run within which the parent must file a complaint for due process to challenge such action.

Said more simply, the statute refers to knowledge of the *action* forming the basis of the complaint – not knowledge that the action amounts to a violation. See 20 U.S.C. § 1415(f)(3)(C).

The record of this case, taken as a whole, unambiguously yields the conclusion that the Parents had actual knowledge of the District’s actions every step of the way. The record reveals no instance of the Parents learning of the District’s actions sometime after they occurred. The Parents always received prior written notice, via a Notice of Recommended Educational Placement (NOREP), every time that the Student’s IEP was altered. The Parents and District were in frequent communication with each other, and the Parents often expressed concerns about the services that the Student was receiving. See, e.g. J-11, J-13, J-14, J-16, J-19, J-20.

I find that the Parents had contemporaneous knowledge of the District’s actions as they occurred. The Parents testify that they did not understand that the District’s actions amounted to violations until much later, but that fact is irrelevant.

The period of time starting two years before the complaint is filed is timely *per se*. For that entire period of time, the KOSHK date (or dates) necessarily fails within the IDEA’s two-year filing deadline. In this case, claims arising out of actions occurring on or after June 12, 2013 are timely. Claims arising out of actions occurring before June 12, 2013 are untimely and are dismissed for that reason. Consequently, I will not consider the Parents’ demand for compensatory education to remedy an alleged denial of FAPE during the 2012-13 school year.

## Findings of Fact

I find as follows:

### ***Background***

1. It is not disputed that the Student is a “student with a disability” as defined by the IDEA. The Student is classified as a student with a Specific Learning Disability (SLD). Historically, the Student has struggled with reading, writing, and math. J-97.
2. It is not disputed that the Student attended kindergarten in the District, and a private school for 1<sup>st</sup> grade (2010-11 school year).
3. In 2011, the Student received a private educational evaluation. The private evaluation revealed that the Student had strong listening comprehension abilities, but had significant difficulty reading. J-5.
4. It is not disputed that the Student re-enrolled in the District for 2<sup>nd</sup> grade (2011-12 school year) and remained in the District until 6<sup>th</sup> grade (2015-16 school year).
5. Upon reentry into the District, the Student received intensive reading remediation. NT 42-43.
6. The Student was evaluated by the District, resulting in an evaluation report (ER) issued on February 4, 2012. At the time, the Student struggled “with decoding, phonics, and phonemic awareness which make reading comprehension a challenge”. J-11.
7. Intellectual ability testing was conducted as part of the ER (WISC-IV). The Student was found to have average intelligence. J-11.
8. Academic achievement testing was completed as part of the ER (WJ-III, KTEA-2). The Student was found to have below average academic skills across the board, but especially in reading, writing, and math. This academic testing was consistent with benchmark testing (DIBELS, MAP, QRI). J-11.
9. After the ER, the Student received an initial Individualized Education Program (IEP), which was implemented for the remainder of 2<sup>nd</sup> grade into 3<sup>rd</sup> grade (2012-13 school year). The IEP included one goal each for reading, written expression, and math (three goals total). J-13.
10. The Student received reading instruction through a program called Reading Mastery. See, e.g. NT 69.
11. In November 2012, the Parents were concerned that the Student had difficulty writing even when the Student could correctly show understanding of class work verbally. The Parents shared this concern with the District and, ultimately, the IEP was modified so that the Student could answer test questions verbally and a scribe would write the responses. J-15, J-16.
12. In December 2012, the Parents and District participated in an annual IEP team meeting. The Student’s IEP was revised at that meeting. The resulting IEP still included a reading,

written expression, and math goal (three goals total), but the goals were revised to set higher expectations. The Student's reading goal was revised so that the Student was expected to read at the 3<sup>rd</sup> grade level by the end of the IEP (December 2013, half way through 4<sup>th</sup> grade). J-19

13. In March 2013, the Student's Math teacher recommended extended school year (ESY) services to maintain the Student's progress towards the math IEP goal. The Student's Language Arts teacher determined that the Student was not eligible for ESY in Language Arts, given the sufficiency of the Student's progress. J-21, J-22.
14. The District offered ESY programming in math, but not in reading or written expression, for summer 2013. J-21, J-22.

***June 12, 2013 to 2013-14 School Year***

15. The Parents rejected the District's ESY offer. At that time, the Parents were primarily concerned with the Student's reading ability. NT 56-57.
16. The Parents contacted the organization that conducted the 2011 private evaluation, and asked for recommendations for the summer of 2013. The private organization recommended a tutor. NT 56-57.
17. The Student received tutoring using the Wilson Reading System (Wilson) during the summer of 2013. J-31.
18. An accurate description of Wilson is seeded throughout the record. The following finding, concerning what Wilson is, is taken from the record as a whole: Wilson is a reading program based in the Orton-Gillingham methodology. As such, it is an intensive phonics-based, multisensory program. Wilson is also structured and sequential. It is broken into steps. Steps are numbered 1 through 12, but these steps correspond to discrete phonics-based reading skills, and not to grade levels. For this reason, a student may progress from level to level within Wilson without a corresponding increase in benchmark tests or standardized, normative tests. However, Wilson steps 1 through 6 are generally considered to provide the foundational phonics-based reading skills, while Wilson steps 7 through 12 are generally considered to provide more advanced reading and writing skills. Wilson teaches to automaticity, meaning that a student masters each step before moving to the next. Assuming that Wilson is delivered with fidelity, a student's progression from level to level indicates progress through Wilson itself.
19. The publishers of Wilson also publish the WADE, which is a test of the skills that Wilson teaches. The WADE is often used as a Wilson placement test. The WADE is not designed for progress monitoring. In this case, the WADE was also used to assess the Student's progress towards Wilson skills. See, e.g. J-97.
20. The Wilson tutor told the Parents that the Student did not have good foundational skills for reading. This concerned the Parents. This prompted the Parents to request an IEP meeting on August 14, 2013. J-25

### **2013-14 School Year (4<sup>th</sup> Grade)**

21. From the summer of 2013 through the 2013-14 school year, the Parents expressed their belief that the Student required Wilson. See, e.g. NT 378-379, 388-389, 934; J-25, J-35
22. On September 10, 2013, the Student's IEP team convened and revised the Student's IEP. J-27. The Parents approved the revisions. J-37. The parties also agreed to certain "action items." J-29.
23. In response to the discussion during the IEP team meeting and the "action items," the District sought parental consent to reevaluate the Student. The Parents provided consent and the Student was reevaluated, resulting in a reevaluation report (RR) issued on November 21, 2013.<sup>2</sup> J-29, J-30, J-40.
24. According to the RR, at that time, the Student had "made very minimal growth toward [the] current goal. However, as demonstrated through [the Student's] movement across levels of Reading Mastery, [the Student] is making some progress overall, albeit less than desired." J-40.
25. Also according to the RR: "The team is encouraged to review progress monitoring data and current test scores in determining whether current interventions remain appropriate or if modification of [the Student's] instructional program is required. Of note, [the Student's] substantial struggles with phonological awareness and lack of progress related to [the] decoding and fluency goal should be considered." J-40.
26. The Parents agreed with the RR.<sup>3</sup> J-40.
27. After the RR was issued, the Parents continued to request Wilson and, after some time and debate, the District agreed to provide Wilson. J-43
28. On December 6, 2013, the IEP team met again, and revised the IEP goals in reading and math to reflect the Districts' switch to AIMSweb monitoring. J-29, J-41. The Student's progress towards goals was also updated. *Id.* The reading goal showed that the Student's oral reading fluency was at the 2<sup>nd</sup> grade level, reading comprehension was at the 3<sup>rd</sup> grade level, written expression was at a 4<sup>th</sup> grade level, and math was at a 3<sup>rd</sup> grade level. J-41.
29. The District offered Wilson when it proposed the December 2013 IEP. J-41. The Parents did not return a NOREP issued with the December 2013 IEP. J-42.
30. On January 17, 2014, the IEP team met again. Goals and specially designed instruction ("SDI") were revised. Wilson was added as SDI in the IEP. J-45. The Student's reading goal was not revised. J-44, J-45. This created a disjunction between the progress monitoring embedded in the reading goal and the Student's reading program. See *id.*

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<sup>2</sup> The Parents presented no testimony or argument concerning the appropriateness of the RR. Given the Parents' burden of proof, the RR was appropriate.

<sup>3</sup> There is no doubt that the Parents agreed with the RR at the time it was offered. The Parent's testimony to the contrary was not credible. See NT 168-169.

31. The Parents approved the January 2014 IEP by signing a NOREP on January 17, 2014. J-46. The Student began receiving Wilson in school the same day. NT 392-393.
32. The Student started Wilson instruction at step 1.3. NT 764, 802.
33. On February 28, 2014, the District started a SETT evaluation, which is an evaluation of how the Student may benefit from assistive technology. Rather than a single evaluation, SETT is a process or “framework” through which the Student’s assistive technology needs are assessed and technology is trialed. The concern prompting the SETT evaluation was that the Student’s listening comprehension was significantly better than the Student’s reading comprehension. J-48.
34. As a result of the SETT process, the Student was given an iPad. J-48. The Student had use of an iPad from this time through the end of 5<sup>th</sup> grade (2014-15 school year). However, the Student’s access to and use of the iPad was inconsistent, and the Parents frequently expressed their frustration about the iPad not working.<sup>4</sup> J-48, J-65, J-78, J-79, J-90, J-91; NT p. 93, 103.
35. On May 22, 2014, the IEP team convened to offer ESY. J-53. For ESY, District offered 12 sessions of Wilson, instructed one-to-one (1:1), for 90 minutes per session. *Id.* The District did not offer ESY for math because the Student was making progress towards or had met the math goal. NT 390.
36. The Parents approved the ESY recommendation via a NOREP. J-54.
37. On June 10, 2014 the IEP team revised the IEP. J-55. The math goal was updated to reflect the Student’s progress. J-55, J-57; NT 392-393. The Parents approved the update by a NOREP signed on June 12, 2014. J-56.

### **2014-15 School Year (5<sup>th</sup> Grade)**

38. Around the start of the 2014-15 school year, the Parents retained a non-attorney advocate. J-72. Based on the record *in toto*, I find that the tone of the discussions between the Parent and District changed for the worse around this time. Issues that the parties had been able to resolve quickly and without much discord became protracted and acrimonious. Many emails sent by the Parents from this time forward were actually drafted by the advocate.<sup>5</sup>
39. Shortly before the 2014-15 school year started, the Parents requested a meeting. J-60. At that time, both parties were concerned how Wilson would fit into the Student’s schedule in 5<sup>th</sup> grade. An informal meeting convened with the Parent, advocate, and some District personnel. NT *passim*; see, e.g. *id.*

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<sup>4</sup> This frustration was particularly pronounced when the iPad was used to access the primary technology used in the classroom, Google Apps for Education.

<sup>5</sup> As the District notes in its closing brief, the overt hostility in the advocate-drafted emails stands in sharp contrast to the direct interactions between the parties. Further, the District is not incorrect to characterize the advocate’s demands as absurd, obnoxious, and a blatant attempt to set up a tuition reimbursement demand. The advocate’s characterization of meetings and events in “agendas” and follow-up emails, therefore is given little weight and, to the extent possible, not relied upon for fact-finding.



40. During the meeting, the District suggested that the Student receive Wilson during Science and Social Studies so that the Student would not miss Language Arts. NT 86-89. The Parents objected to this. Their concern was that the Student would miss instruction with regular peers. *Id.* Ultimately, the District acquiesced and the Student received Wilson during the Language Arts period. *Id.* See also J-61. Consequently, the Student received Language Arts instruction with a group of five other students, two days per week, for 105 minutes per session. The Student also received Wilson instruction, 1:1, three days per week, for 90 minutes per session. J-97.
41. On September 11, 2015, the IEP team (including the Parents' advocate) convened and revised the Student's math goal, based on math probes taken as school started. J-72. See also, J-74. The Parents approved the revision via a NOREP. J-82.
42. During the September 2015 IEP team meeting, the Parents requested a reevaluation. In response, the District issued a PTRE, which the Parents signed. J-81.
43. The Student was reevaluated and the District issued a RR on December 8, 2015. The RR was revised on January 20, 2016 when the evaluator discovered some scoring errors on standardized tests. J-97. The revision did not significantly alter the testing results, and had no substantive impact upon either the evaluator's analysis or the RR's conclusions and recommendations. NT 817-819, 841.
44. The 2016 RR included a report of the Student's performance on MAP testing from the fall of 2014 (the start of 5<sup>th</sup> grade). The MAP is a computerized benchmark test that measures a student's progress relative to Pennsylvania reading standards. The MAP is administered as part of District-wide benchmark testing. According to the Student's MAP score, the Student's instruction reading level was 2<sup>nd</sup> grade.<sup>6</sup> J-97.
45. The 2016 RR also reported AIMSweb assessments. AIMSweb is also a computerized, curriculum based, benchmarking tool. The AIMSweb assessments indicated that the Student could read orally "comfortably" when presented with 2<sup>nd</sup> grade material. AIMSweb assessments also showed that the Student's reading comprehension was average when presented with 3<sup>rd</sup> grade material.<sup>7</sup> J-97.
46. The 2016 RR summarized information derived from the Student's progress in Read Naturally, the reading program administered in the Student's Language Arts class. This information shows that the Student was using 2<sup>nd</sup> grade level material in Language Arts, but was applying Wilson strategies to that material. Application of those strategies reduced the Student's reading fluency (speed in this context) but increased the Student's reading accuracy. J-97.
47. The 2016 RR reports the results of a WADE administered on November 10, 2014. In contrast to the MAP and AIMSweb, the Student received high marks on the WADE. On a WADE oral reading sub-test, the Student could read real words with 85% accuracy, and

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<sup>6</sup> The MAP score (reading at a 2<sup>nd</sup> grade level in the fall of 5<sup>th</sup> grade) is shocking when viewed in isolation. As discussed below, this result is meaningful only in context.

<sup>7</sup> This means that the Student could orally read 2<sup>nd</sup> grade material and show average reading comprehension when presented a 3<sup>rd</sup> grade reading passage. This does not mean that the Student's overall reading was at the 2<sup>nd</sup> or 3<sup>rd</sup> grade level.

could read nonsense words (made up words that follow phonetic rules – fake words that can be sounded out) with 80% accuracy. On a WADE spelling sub-test, the Student spelled 75% of words correctly without a spell checker. On a different WADE spelling sub-test (one that asks the Student to write sentences), the Student spelled with 80% accuracy. On a WADE sight-word sub-test, the Student was 85% accurate in reading and 75% accurate in spelling. J-97

48. The WADE also reported the Student's progress towards mastery of the then-current Wilson level (level 5). Generally, the WADE suggested that the Student was ready to advance, having mastered level 5 reading and spelling skills.<sup>8</sup> J-97.
49. The 2016 RR included standardized, normative intelligence testing (WISC-IV). This testing placed the Student in the average range, consistent with prior administrations. J-97.
50. The 2016 RR included standardized, normative academic achievement testing (KTEA-II and WJ-III). These tests compare the Student to same-age peers. J-97.
51. The KTEA-II showed some discrepancy between phonics-based reading skills and other reading skills. For example, the Student's nonsense word decoding was in the average range, and phonological awareness was in the above average range. Those skills are closely associated to the skills that Wilson teaches. The Student's reading fluency, in contrast, was below average. (Wilson values accuracy over speed, something that the Language Arts teacher observed in the same report). J-97.
52. On the KTEA-II, the Student's total Reading Composite score was in the below average range. Some reading composite scores were in the average range (Sound-Symbol, Oral Fluency). Other composite scores were in the below average range (Decoding, Reading Fluency). The Student's total Written Language Composite was in the below average range. J-97.
53. On the WJ-III, the Student's total Academic Fluency was tested in the average range. This composite score includes various reading, writing, and math assessments. The Student's Written Expression, Math Fluency, and Writing Fluency were all in the average range. The Student's Reading Fluency and Writing Samples were both in the low average range. The Student's Letter-Word identification was in the low range. The Student's spelling was in the very low range. J-97.
54. The 2016 RR included a comprehensive review of the Student's records. These records, and the Student's test results, prompted the evaluator to conclude that the Student was making progress towards all academic goals with the exception of reading fluency. J-97.
55. Reading fluency is expected to improve as basic reading skills improve. J-97; NT 346, 501, 514-515, 783, 839-841.
56. After the 2016 RR was presented, the Parents sent many advocate-drafted emails of the same tone and tenor described above. These are largely characterized by baseless requests for additional testing, demands for explanations of what had already been

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<sup>8</sup> Level 5 is Wilson Level 5, not 5<sup>th</sup> grade.

explained numerous times, and characterizations of informal meetings that were blatantly drafted for litigation. See, e.g. J-100, J-101.

57. On January 29, 2016, the IEP team met again (with Parents and the advocate present). From January 29, 2016 through February 12, 2016, the District revised the IEP to incorporate input from the advocate. The final IEP is in the record at J-106.
58. The 2016 IEP includes an accurate, detailed description of the Student's present levels of academic achievement and functional performance, incorporating nearly all of the 2016 RR. J-106 at 4-13.
59. The 2016 IEP includes accommodations for state testing (the PSSAs). J-106 at 15.
60. The 2016 IEP includes a math computation goal. Specifically, given timed, eight minute math computation assessments at the 4<sup>th</sup> grade level, the student will improve from a baseline of 45 points to 57 points (equivalent to the spring norm) over three consecutive assessments to be administered twice per month.<sup>9</sup> J-106 at 16.
61. The 2016 IEP includes a math concepts and applications goal. This goal essentially called for the Student to demonstrate mastery of the concepts taught in geometry. J-106 at 17.
62. The 2016 IEP includes a reading decoding goal. This goal is aligned to Wilson, and calls for the Student to decode 15 of 15 real words and 13 of 15 nonsense words after receiving Wilson instruction. In essence, the goal is for the Student to keep mastering Wilson steps. WADE data is used as a baseline for the goal. J-106 at 18.
63. The 2016 IEP includes a reading encoding (word writing) goal. This goal is also aligned to Wilson, but less directly. It calls for the Student to correctly spell a list of words that fall under the same phonics rules that are instructed in Wilson. The Student would be tested on 20 words every week, and was expected to spell 80% of those words correctly. Again, WADE data is used as a baseline. J-106 at 19.
64. The 2016 IEP includes a reading comprehension goal. This goal calls for the Student to read passages at the Student's instructional level, and then answer comprehension questions. The goal calls for the Student to read the passage with 95% accuracy (regardless of fluency) and then answer comprehension questions with 80% accuracy over three consecutive probes. The baseline for this goal notes that, based on the RR, the Student could read with 100% accuracy and answer comprehension questions with 80% accuracy when presented 2<sup>nd</sup> grade level texts. J-106 at 20.
65. The 2016 IEP includes a written expression goal. This goal, generally, called for the Student to write with proficient organization, style, and conventions, as measured by the District's 4<sup>th</sup> grade writing rubric. Probes were to be taken monthly after direct instruction, and the Student could use a graphic organizer. J-106 at 21.
66. The 2016 IEP included a significant amount of SDI. Specifically, the IEP includes testing accommodations, a special education math program (5 days per week, 70 minutes per

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<sup>9</sup> Both parties give short shrift to the Student's potential math needs. Reading was the focus. The transcript is comparatively *silent* about math.

session), a special education reading program (delivered in Language Arts, 2 days per week, 105 minutes per session), Wilson (actually, education-speak code for Wilson – 3 days per week, 90 minutes per session), supplemental academic support (3 days per week, 45 minutes per day), a continuing SETT process, assistive technology (mostly text to speech and speech to text programs on the iPad), and modification to content area courses. J-106 at 24

67. The 2016 IEP was presented with a NOREP on February 12, 2016. J-107. The Parents rejected the NOREP on February 20, 2016. J-107.
68. The Student continued to receive Wilson instruction, 1:1, 90 minutes, 3 times per week. The Student finished the school year at Wilson step 8.1. NT 802.
69. On May 8, 2016, the Parents enrolled the Student in a summer program run by a private school for student with learning disabilities that teaches Wilson. J-112.
70. It is not disputed Student attended the private school summer program in the summer of 2015. See J-112.

### **2015-16 School Year (6<sup>th</sup> Grade)**

71. Sometime between May 8, 2016 and September 28, 2016, the Parents applied for admission to the private school for the 2015-16 school year.<sup>10</sup>
72. It is not disputed Student has attended the private school since the start of the 2015-16 school year.

## **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 their 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 particular case, the Parents are the party seeking relief and must bear the burden of persuasion.

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<sup>10</sup> The District vigorously argues that the Parents decided to send the Student to the private school at least by May 8, 2015, and – likely – well before then. The Parents dispute this, providing their own testimony as the only evidence to the contrary. It is more likely than not that the Parents decided that they would not send the Student back to the District even before they decided to place the Student in the private school's summer program, and finalized that decision when they were happy with the summer program. Yet there is no strong evidence in the record about this particular moment in time and, as discussed below, it is irrelevant to the ultimate analysis.

### ***Free Appropriate Public Education (FAPE)***

The IDEA requires the states to provide a “free appropriate public education” to a student who qualifies for special education services. 20 U.S.C. §1412. Local education agencies, including school districts, meet the obligation of providing FAPE to eligible students through development and implementation of an IEP, which is “‘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 the child’s identified educational needs. 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324.

More specifically, in *Board of Educ. of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034. 3051 (1982), the U.S. Supreme Court articulated for the first time the IDEA standard for ascertaining the appropriateness of a district’s efforts to educate a student. It found that whether a district has met its IDEA obligation to a student is based upon whether “the individualized educational program developed through the Act’s procedures is reasonably calculated to enable the child to receive educational benefits.”

Benefits to the child must be ‘meaningful’. Meaningful educational benefit must relate 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) (district must show that its proposed IEP will provide a child with meaningful educational benefit).

However, 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). The Third Circuit has adopted this minimal standard for educational benefit, and has refined it to mean that more than “trivial” or “*de minimis*” benefit is required. See *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180 (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), quoting *Rowley*, 458 U.S. at 201; (School districts “need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a “basic floor of opportunity”). 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).

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 a meaningful educational benefit to the Student in the least restrictive environment.

### ***Tuition Reimbursement***

To determine whether parents are entitled to reimbursement from their school district for special education services provided to an eligible child at their own expense, a three part test is applied based upon *Burlington School Committee v. Department of Education of Massachusetts*, 471

U.S. 359 (1985) and *Florence County School District v. Carter*, 510 U.S. 7 (1993). This is referred to as the “*Burlington-Carter*” test.

The first step is to determine whether the program and placement offered by the LEA is appropriate for the child. The second step is to determine whether the program obtained by the parents is appropriate for the child. The third step is to determine whether there are equitable considerations that counsel against reimbursement or affect the amount thereof. *Lauren W. v. DeFlaminis*, 480 F.3d 259 (3rd Cir. 2007). The steps are taken in sequence, and the analysis ends if any step is not satisfied.

## Discussion

The parties agree that the Student has a significant reading disability. The parties also agree that Wilson is the right program for the Student. The Parents argue that the District did not deliver Wilson with fidelity and that the Student did not make progress. The District argues to the contrary. The case, therefore, turns on how the Student’s progress is measured.

The Parents highlight the 2016 RR’s finding that the Student, then a 5<sup>th</sup> grader, was instructional at the 2<sup>nd</sup> grade level. In doing so, the Parents take a single data point out of context, and elevate it to draw a false conclusion. It is not surprising that the Student performed poorly on the MAP test. The MAP test measures progress towards state benchmarks (that is, PSSA content). At the time of testing, the Student had been either out of, or missing at least two thirds (2/3) of the classes that teach those benchmarks. By mutually-agreed to design (and ultimately at the Parent’s/advocate’s insistence) the Student missed the majority of Language Arts instruction to receive Wilson. Other options were considered and rejected due to parental concerns about the Student’s socialization. The same is true for AIMSweb, which measured the Student’s progress through a curriculum that, for the most part, the Student was not participating in. Although the analogy is flawed, this is like giving a student a summative calculus test before ever teaching calculus to the student. The fact that the student will likely bomb the test says nothing about the student’s abilities.

This stands in sharp contrast to tests that measure the things that the Student was actually receiving instruction in. On those measures (the WADE, and portions of standardized, normative tests that align with the concepts that Wilson teaches), the Student’s performance was significantly better. All tests show that there is still significant work to be done, but they also show that the Student is learning that which is being taught.

By design, the Parents and District placed the Student into a reading program in which advancement through the program is the best measure of progress. This is true as long as Wilson is implemented with fidelity. The Parents argue that advancement from Wilson step to Wilson step does not indicate progress in this case, because the District did not implement Wilson with fidelity. I reject the Parents’ claim that the District did not implement Wilson with fidelity. The evidence in the record to support this is not preponderant. The Student started at Wilson step 1.3 and ended at 8.1. This, and the WADE itself, are the most meaningful indications of progress, given what both parties acknowledge is appropriate for the Student.

Beyond the sheer numbers, the record supports a conclusion that the Student made meaningful real-world progress relative to the severity of the Student’s disability. The significance of the Student’s ability to generalize Wilson skills into the Language Arts classroom cannot be

understated. Applying Wilson skills across all settings strongly indicates that Wilson instruction is working – even when speed is sacrificed to apply those skills.<sup>11</sup>

I also empathize with the Parents' desire for the Student to progress faster. The Student's rate of progress on some measures is maddeningly slow. Under different circumstances, a Student's stagnation on tests that link ability to grade level (or at least purport to do so) would be a strong indication that progress was not made. Maintaining the same program when such stagnation is evidenced usually proves a denial of FAPE. But, again, in this case the parties agree that the Student requires a reading program that is linked to skill acquisition, not grade level. The parties, together, have deliberately chosen a program in which progress is not evidenced through the most common testing. In light of this, and the progress that the Student made through Wilson itself, I reject the Parent's claim that the Student did not make meaningful progress in the District.<sup>12</sup>

The Parents' demand for compensatory education is denied on these bases.

The Parents' demand for tuition reimbursement is denied on similar grounds. The Parents argue, in essence, that the 2016 IEP offers more of the same ineffectual programming that the District offered previously. I agree that the 2016 IEP is, fundamentally, a continuation of prior IEPs. I disagree that the prior IEPs were ineffectual.

The parties agree that Wilson is the right program for the Student. I have found that the District implemented Wilson with fidelity. Consequently, the most meaningful indication of progress is the Student's advancement within Wilson itself, and also the WADE.

Prior to the 2016 IEP, the Student made substantial progress as measured by Wilson itself and the WADE. The 2016 IEP keeps the same amount of Wilson in place, while closely aligning goals and progress monitoring to the skills that Wilson teaches. There is no reason to believe that the Student would make less progress under the 2016 IEP than in prior IEPs. As such, the 2016 IEP was reasonably calculated to provide a meaningful educational benefit to the Student. For this reason, the Parents' demand for tuition reimbursement does not move past the first prong of the *Burlington-Carter* analysis.

### **Conclusion**

The Parents are the "loving parents" contemplated in the FAPE standard above. They simply want what is best for the Student, and genuinely believe that the best placement is the private school. The District's legal obligation is different. The District must provide FAPE through IEPs that are reasonably calculated to provide a meaningful educational benefit. As explained above, the most valid metric of the benefit that the Student received was generated by the Student's reading program itself. That metric establishes both that the Student received a meaningful

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<sup>11</sup> I note that application of Wilson skills across settings is, to the Parents, one of the most attractive aspects of the private school. This makes the Student's ability to apply Wilson skills across settings in the District, without prompting, even more significant.

<sup>12</sup> As explained below, the Parents' claim for tuition reimbursement does not survive the first prong of the *Burlington-Carter* test. If it had, the record generally indicates that the Student is learning faster at the private school. This is an unquestionable benefit to the Student. However, my inquiry does not concern which program is better. Rather, my inquiry begins with an assessment of whether the District offered a legally appropriate program. In this case, my inquiry ends there as well.

educational benefit, and that the District's last-offered IEP was calculated to continue that meaningful benefit. Therefore, the Parents have not established entitlement to the relief that they demand.

An Order consistent with the foregoing follows.



## ORDER

Now, July 19, 2016, it is hereby **ORDERED** as follows:

1. Claims arising prior to June 12, 2013 are dismissed as untimely.
2. Between June 12, 2013 and the end of the 2014-15 school year, the District provided a FAPE to the Student. The Student is not entitled to compensatory education.
3. The IEP offered on February 12, 2016 was reasonably calculated to provide a meaningful educational benefit. The Parents are not entitled to tuition reimbursement.

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

/s/ Brian Jason Ford  
HEARING OFFICER