

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 File Number: 20469-17-18 AS

Child's Name: S.D.

Date of Birth: [redacted]

Parents:
[Parents]

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Hearing Officer: Linda M. Valentini, Psy.D
Certified Hearing Official

Date of Decision: October 20, 2018

Background

Student¹ is a pre-teen aged student who was formerly enrolled in a District school. Student is identified as eligible for special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* and its Pennsylvania implementing regulations, 22 Pa. Code § 14 *et seq.* (Chapter 14), as a child with specific learning disabilities. As such, Student is also regarded as an “individual with a disability” as defined by Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 701 *et seq.*, and as a “protected handicapped student” under the Pennsylvania regulations implementing Section 504 in schools, 22 Pa. Code § 15 *et seq.* (Chapter 15).

The Parents requested this hearing, alleging that the District denied Student a free, appropriate public education (FAPE) in the area of reading instruction during 3rd grade, the 2014-2015 school year. Specifically, the Parents allege that Student did not receive “a Wilson-based program² with fidelity to the Wilson program, for the amount of time that [Student] was supposed to be [receiving it]”³. The Parents are seeking a compensatory education remedy. The District maintains that it provided FAPE to Student in the area of reading instruction during the school year in question and that therefore no remedy is due.

In light of the evidence before me I find in favor of the District.

Procedural History

The parties to this dispute engaged in a six-session due process hearing before Hearing Officer McElligott that began in November 2017 and ended in March 2018. Hearing Officer McElligott issued a Final Decision and Order on May 1, 2018. [HO-1: ODR File Number 19721/17-18/AS]

Student transferred into the District at the beginning of third grade from a private school for children with learning differences; there was a brief period of home-schooling between leaving the private school in spring of second grade and starting in the District. During the initial IEP

¹ In the interest of confidentiality and privacy, Student’s name and gender, and other potentially identifiable information, are not used in the body of this decision. The identifying information appearing on the cover page or elsewhere in this decision will be redacted prior to posting on the website of the Office for Dispute Resolution as part of 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 The Wilson program is an Orton-Gillingham based program for teaching corrective reading that teaches to automaticity. It is an organized, structured, sequential, and step-by-step methodology. There are 12 Steps and each Step has a series of lessons. Progress monitoring, as such, is built in, with progress noted by progression through the 12 Wilson Steps. Wilson is mastery-based, in that students must demonstrate a criterion level of performance before advancing to the next Step. Each of the 12 Wilson Steps has a series of sub-steps, and each sub-step is taught multiple times using the Wilson lesson plan. The lesson plan itself includes 10 lesson steps, with each of the 10 lesson steps including multiple activities. At times, given the difficulty of skill targeted in a specific level, all 10 lesson steps with all activities need to be repeated two to three times before moving on. There is no requirement that all 10 lesson steps be implemented in one session; the lesson can be broken up and carried over to the next session. The recommendation from Wilson is that the instruction range from 2 to 5 days per week, with 40-60 minutes per session and 60-90 minutes per 1 to 10 segment lesson step (not per session). [NT 133-137, 198; S-19, HO-2 pp. 23, 26-28, 34 (1273-1281, 1306-1307)]

³ Parents’ opening statement on May 22, 2018. [NT 16]

process the Parents had emphasized their desire that Student be instructed in the Wilson reading program, but the District declined to specifically name the Wilson program in the initial or subsequent IEPs covering third grade. Nevertheless the District assigned Student to two reading Instructors, both of whom were Wilson-certified. At the January 3, 2018 session of the previous hearing, one of the reading Instructors testified about the manner of delivery of special education reading instruction to Student in third grade. During the last session of that hearing, on March 15, 2018, the other reading Instructor testified about how she delivered special education reading instruction to Student in third grade. The Parents asserted that it was only during the second reading Instructor's March 15th testimony that they first learned how reading instruction was being delivered to Student, and that there were, in fact, two reading Instructors⁴. Based upon that second reading Instructor's testimony which came at the last of six hearing sessions the Parents concluded that Student's reading program was not appropriate with regard to the method of delivery and the amount of time allotted.

Believing that Student was not provided with an appropriate reading program, at that final hearing session the Parents requested that Hearing Officer McElligott expand the relevant period for their claim back one additional year, thus piercing the IDEA's 2-year statute of limitations on the basis of their lack of knowledge of the District's actions. 20 U.S.C. §1415(f)(3)(C)⁵ Their request made so late in the proceedings was denied, so they filed for the instant due process hearing which is now under my jurisdiction.⁶

The District moved to dismiss the Parents' new due process complaint, arguing that it was barred by the IDEA's statute of limitations. I deferred ruling on the District's motion, and convened a hearing on May 22 and May 31, 2018 for the sole purpose of receiving evidence regarding the date the Parents knew or should have known of the District's action that formed the basis of their complaint (the KOSHK hearing). After the KOSHK hearing I concluded that the matter was not barred by the IDEA's two-year statute of limitations and was ripe for adjudication.

Despite its addressing only one school year, the record in this matter is extensive, as it includes transcripts from the previous hearing, my KOSHK hearing, and my FAPE hearing as well as numerous exhibits and the parties' written closing arguments. This entire record was carefully considered, but I make findings only as necessary to resolve the limited issue presented.

⁴ There is considerable testimony in the record about whether or not, and if so, when, the Parents knew there were two reading Instructors rather than one. For purposes of reaching my decision on the provision of FAPE, I find that this issue is not relevant.

⁵ The Parents are not claiming either of the two statutory exceptions to the IDEA's statute of limitations.

⁶ In his decision, Hearing Officer McElligott specifically stated that he was not addressing the Parents' claim for third grade, the 2014-2015 school year and wrote: "Questions of FAPE which arose prior to September 2015 are not considered as a matter of fact-finding or determination through this decision. The student's IEPs for 3rd grade (S-4, S-5) [were introduced] and the student's 3rd grade teacher testified (NT at 323-479), but that evidence was not weighed in reaching this decision... to the extent that [a] follow-on complaint may implicate fact-finding as to the student's educational programming prior to September 2015, the undersigned hearing officer wishes it to be clear that he has not made findings of fact, or drawn legal conclusions, as to such programming." [HO-1]

Issue

Did the District deny Student FAPE in third grade by not providing an appropriate program of reading instruction? If the District failed to provide FAPE in the area of reading instruction, is Student entitled to compensatory education, and if so of what type and in what amount?

Findings of Fact⁷

1. Student has a specific learning disability (reading, mathematics, and written expression) and a speech/language impairment, and was diagnosed with dyslexia in kindergarten. [S-1, S-3, HO-3 p.6 (328), HO-13 pp.4-6 (1487-1492)]
2. Across private and District evaluations, Student's cognitive ability has been found to be at the middle to lower end of the low average range which covers IQ scores from 80 to 89. Student's measured cognitive levels were as follows: IQ 84 in 2012; IQ 84 in 2014; IQ 81 in 2017⁸. [S-1, S-3, S-15]
3. A District evaluator found that in May 2014 (Student's second grade year) Student had not yet mastered a number of reading skills that should have been mastered by second grade. [HO-13 p.7 (1496)]
4. In the private school, at the middle of second grade, receiving small-group Wilson instruction, Student was reading at the pre-primer level. [HO-1, HO-3 p.24 (406)]
5. As recorded in May 2014 at the end of second grade, other than a standard score of 91 at the lowest end of the average range (SS 90-109) in early reading skills, Student scored in the well below average range (SS 70-79) to the below average range (SS 80-89) with standard scores from 75-82 on measures of word reading, pseudoword decoding, oral reading fluency on first grade passages, oral reading accuracy on first grade passages, oral reading rate on first grade passages, and reading comprehension. Student's scores in these deficit areas ranged from the 5th to the 19th percentile. [S-3]

Previous Education and Entrance into the District

6. Student entered the District for the first time at the beginning of the 2014-2015 school year (third grade). Prior to enrolling in the District Student attended a private school for children with learning differences. The Parents were unhappy with some of Student's progress at the private school in second grade; another unrelated serious issue led to their removing Student from the private school in the spring of second grade. [NT 42-45]

⁷ "NT" references the transcripts for the two-session KOSHK hearing I held in May 2018 and the one-session FAPE hearing I held on September 6, 2018. When transcripts from Hearing Officer McElligott's hearing are cited, they are HO exhibits; for these, in addition to giving the exhibit page number, I follow with the transcript page number(s) in parentheses.

⁸ The drop in IQ from 84 to 81 does not represent a significant change. The scores are all within the standard error of measurement; the grouping over three different test administrations with different examiners demonstrates that Student was consistently testing in the low average range of cognitive ability.

7. Student was home-schooled from April 2014 through August 2014. Part of the home schooling consisted of two hours per week of Wilson reading instruction with a private provider. [NT 42, 45, 317; S-3]
8. Student reportedly made progress with the private Wilson instruction, and the Parents were adamant about having the District provide Student with Wilson instruction upon entering third grade because they didn't want "to lose the momentum". Continuation of Wilson was very important to the Parents. [NT 49, 57-58, 289]
9. Private Wilson tutoring for two hours per week ended when Student entered the District because Parents assumed Student was going to continue receiving Wilson in third grade and private Wilson tutoring would be redundant. [NT 42, 46]
10. The Parents were "100 percent committed to Wilson being implemented with fidelity with the way it's been implemented prior to [Student's] entering the district". [NT 297]
11. From conversations with the District psychologist who evaluated Student prior to entry into the District, and at the initial and subsequent IEP meetings for third grade, the Parents assumed that Wilson would continue/continued, provided through the District. [NT 47-49]
12. Although reading instruction was put into the IEP, the specific program name, 'Wilson' was not included in the IEP.⁹ Nevertheless, Student had two credentialed Wilson Instructors in 3rd grade. Both taught Student using the Wilson reading program. [NT 49-50]
13. The Parents "sort of inferred" that the Wilson program [delivered by the District] was "the way it was before".¹⁰ [NT 289]
14. At Meet the Teacher night in August 2014 the Parents met with one of Student's reading Instructors and were shown the reading materials that would be used with Student. The Parents asked questions, and were insistent about their concern that Student have Wilson from the beginning of the year. [NT 143-144]

⁹ Although the District had informed the Parents that names of specific methodologies were not going to be put into IEPs covering third grade, the Parents prevailed upon the District to have 'Wilson' named in subsequent IEPs. [NT 292-293] However, unless there is a "clear consensus" that a student would only benefit from a particular methodology, naming a specific program in a student's IEP is not necessary. *See A.M. v. New York City Dep't of Educ.*, 63 IDELR 31 (2d Cir. 2017); *K.G. v. Cinnaminson Twp. Bd. of Educ.*, 118 LRP 38595 (D.N.J. 09/19/18)(IEP's silence on reading methodology does not establish denial of FAPE). When addressing parental requests for a specific intervention, the comments to the IDEA's implementing regulations specifically state that "there is nothing in the [IDEA] that requires an IEP to include specific instructional methodologies." 71 Fed. Reg. 46,665 (2006); 34 CFR 300.320 (d)(1).

¹⁰ It is not clear if by "the way it was before" referenced the small group Wilson instruction at the previous school or the two-hours-per-week private Wilson instruction Student received when being home-schooled.

15. Student's mother had familiarized herself with the Wilson program through attending workshops and purchasing Wilson products. [NT 74-75]
16. Student's mother knew that Student was receiving Wilson instruction in the District in third grade because Student would come home with homework sheets or lists of words that mother recognized from being previously familiar with the Wilson program. At the first parent-teacher conference the Parents were shown binders and colored charting which also indicated Student was receiving Wilson instruction. [NT 50, 68, 112-113, 120; HO-2 at 13 (1223)]
17. Charting is done when a student gets to the dictation section of a lesson sub-step depending on a student's instructional needs. Charting may or may not be done on a daily basis. [NT 173-174]
18. The Parents assumed that Student was receiving Wilson instruction every day, "because that's what it is. It's a daily program." The Parents also assumed that Student was receiving Wilson instruction daily for 45-60 minutes per day. [NT 58-59, 72]
19. Throughout the year, in addition to asking to have the specific methodology 'Wilson' written into the IEP, in conversations and meetings the Parents asked how Student was doing in the Wilson program. [NT 50-53]
20. The Parents took third grade "at face value". They enjoyed the time they spent with the case manager/Wilson Instructor, and they thought the IEP meetings were constructive, Student seemed to be happy, and they believed everybody was telling them the truth. [NT 69-70]

Student's Third Grade Reading Instructors

21. How many teachers, or who the teachers will be, is not something that is typically put into an IEP. [NT 208-209]
22. In third grade Student received Wilson on a daily basis, one day with Instructor A and one day with Instructor B. [NT 183-186]
23. The two reading Instructors split the Wilson group into smaller groups of three students and four students based on level of ability. Instructor A worked through the Wilson lesson steps 1 through 8 and sometimes step 9; Instructor B worked through the Wilson comprehension material in lesson step 9 (usually) and step 10. The two teachers alternated days, and Student received Wilson instruction daily. [NT 301-303, 493-495, 497; HO-3 p 31-32 (431-433)]
24. Student's two Wilson Instructors, A and B, worked together very closely during Student's third grade year and were "in constant communication". [NT 148, 153, 168, 177, 203-204]

25. Instructor A holds an undergraduate degree in psychology, a Master's degree in education and has Pennsylvania teaching certification in regular education and special education. She is a certified Wilson Instructor, having begun her Wilson training in 2004 and receiving her Level 1 Wilson certification in June 2005; she is also a Wilson Dyslexia Practitioner. [HO-2 p.6 (1192-1195)]
26. When Instructor A testified in the previous due process hearing she was largely only talking about what she did with Student, and not what she did in conjunction with Instructor B.¹¹ [NT 499]
27. In the opinion of Instructor B, Instructor A is "by far probably one of the most thorough Wilson Instructors ... within the building as far as ...following the sub-steps and implement(ing) the scope and sequence of the curriculum". [NT 147]
28. Instructor B, who was also Student's case manager in third grade, holds an undergraduate degree in special education, a Master's degree in special education, and a Doctorate in educational leadership. She has been Wilson-certified since the 2004-2005 school year, and holds certification in other reading intervention programs as well. [NT 131]

What the District Provided

29. Student's initial third grade IEP provides Specially Designed Instruction (SDI) for Student to receive replacement instruction to address reading decoding, fluency and comprehension for 60 minutes daily. Three programs were used to implement that SDI: Wilson (an Orton-Gillingham based program for teaching corrective reading that teaches to automaticity, described in more detail above), as well as Wonderworks (a research-based intervention program that focuses on building foundational skills, developing reading skills, differentiating instruction with scaffolding support, and providing instruction through assessment, and that was used to complete step 10 of the Wilson program) and Fountas & Pinnell Leveled Literacy (a research-based supplementary literacy intervention designed to help struggling readers). [NT 138-139, 141, 144, 212, 216-217; S-4, S-19]
30. Student's schedule, provided to Student's mother in November 2014, reflects that for 105 or 115 minutes a day, from 10:20 or 10:30 to 12:15, Student was receiving this replacement reading instruction. [NT 98, 116, 217-221; S-8]
31. Instructor B's Wilson training included the recommendation that because of students' attention spans, lesson steps 1 through 8 (teaching the skill, working with the skill, and student demonstrating understanding of the skill in isolation) should be completed in one session, and that lesson steps 9 and 10 (applying the skill for comprehension) should be completed in another session. [NT 135]

¹¹ Instructor A knew that Instructor B had testified, but she was not present for that testimony. Instructor A's testifying only about the work she personally had done with Student led in large part to the Parents' concerns that Student had not received FAPE in third grade.

32. Instructor B's Wilson trainer counseled that for lesson steps 9 and 10 (comprehension) the Wilson Instructor may need to branch out to other readings, perhaps related to a student's interests, because the Wilson comprehension passages themselves were "not very beefy", were "black and white" and "very simple". Instructor B used Wonderworks as supplemental readings when instructing Student on lesson steps 9 and 10. [NT 136-137, 563-565]
33. According to the Wilson Instructor Manual, "[t]he Wilson Reading System (WRS) can be taught in small groups. When it is implemented as a remedial reading program, the groups should be limited to 3-5 students." Instructor A provided Wilson to Student in a group of four children every other day while Instructor B instructed the same group on the alternate days. [HO-14]
34. The group of children did not do all ten steps of each lesson in every session. [HO-2 p.7-34 (1196-1307)]
35. The Wilson Instructor Manual specifically states: "[t]he pace will vary throughout the program. Some sub-steps will require several lessons while many others may take only one or two sessions to complete. The pace must be individualized to each student's performance." Further the Wilson Instructor Manual notes that small groups have greater scheduling flexibility: "[i]t is impossible to complete an entire lesson unless students are scheduled for double period block of time. The [group] schedules provide a framework for instruction." [HO-14]
36. The Wilson Instructor Manual notes that pacing should be according to a student's ability. Student required a considerable amount of repetition. [NT 504-505; HO-14]
37. Following the scope and sequence and methods of the Wilson program, Instructor A provided Wilson lesson steps 1 through 8 or 9 to Student and then on the next day Instructor B provided lesson steps 9 and 10, or sometimes just 10 if Instructor A had covered lesson step 9. Student received Wilson-based instruction daily from 10:20 or 10:30 to 11:45. In addition reading intervention continued each day in Leveled Literacy from 11:45 to 12:15. [NT 149-151, 172, 174, 177, 191, 492, 511]
38. Instructor B continued using Wilson principles to cover step 10, teaching comprehension skills using Wonderworks, supplementing the less difficult / less interesting Wilson passages as had been recommended by her Wilson trainer. [NT 152-153]
39. Student's third grade regular education teacher recalled that at the November 2014 parent/teacher meeting there was a discussion with Student's case manager/Wilson Instructor B who provided a description specifically in regard to Wilson, Wonderworks and Leveled Literacy. [NT 227-228]
40. Student's speech/language therapist was present at the November 2014 parent/teacher conference and recalled Student's case manager/Wilson Instructor B talking about Wonderworks and how it was complementing Wilson. [NT 250-254]

41. Student's third grade regular education teacher recalled discussing with the Parents that Student was receiving replacement reading instruction close to two hours a day. [NT 228, 236]

Progress in Third Grade¹²

42. A cognitive score is a good predictor of what a student's rate of acquisition or rate of retention might be. It does not mean that Student cannot learn, but an IQ in the low average range would predict that the Student is going to have a slower rate of progress. [HO-11 p.21 (764), HO-13 p.7 (1498-1500)]
43. When Student entered the District in third grade, Student was reading at a pre-primer to primer level. [S-3]
44. Based on the Fountas & Pinnell ("F & P") assessment tool, Student progressed from an independent level G to independent level H in third grade. [S-18]
45. Student progressed from Wilson step 2.4 to Wilson step 3.4 from the beginning to the end of third grade. [NT 508, 549; S-19]
46. Although the Wilson manual explains that the pace of instruction from step to step differs and as such cannot be compared, Student's rate of progress in third grade (steps 2.4 to 3.4) with small group instruction was consistent with Student's rate of progress in both fourth grade (steps 3.1 to 4.2)¹³ and fifth grade (steps 4.2 to 5.4) with 1:1 instruction. [S-18]

Legal Basis

Burden of Proof: The burden of proof, generally, consists of two elements: the burden of production [which party presents its evidence first] and the burden of persuasion [which party's evidence outweighs the other party's evidence in the judgment of the fact finder, in this case the hearing officer]. In special education due process hearings, the burden of persuasion lies with the party asking for the hearing. If the parties provide evidence that is equally balanced, or in "equipoise", then the party asking for the hearing cannot prevail, having failed to present weightier evidence than the other party. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005); *L.E. v. Ramsey Board of Education*, 435 F.3d 384, 392 (3d Cir. 2006); *Ridley S.D. v. M.R.*, 680 F.3d 260 (3rd Cir. 2012). In this case the Parents asked for the hearing and thus assumed the burden of proof.

Credibility: During a due process hearing the hearing officer is charged with the responsibility of judging the credibility of witnesses, weighing evidence and, accordingly, rendering a decision

¹² I note and acknowledge the District's extensive analysis of progress from 3rd through 5th grades, but except for a comparison of rate of progress in third, fourth and fifth grades, I choose to cite only progress during third grade. However, it is true that a structure's higher floors will sag and crumble without a firm first floor, and steady progress commensurate with Student's circumstances continued after third grade.

¹³ At the beginning of fourth grade lesson steps 3.1 to 3.4 were repeated to account for summer regression; Student did not attend an offered ESY program following third grade. Step 3.1 is especially difficult as it begins two-syllable words and involves learning the rules for dividing syllables. [NT 586-587, 590-591; S-9]

incorporating findings of fact, discussion and conclusions of law. Hearing officers have the plenary responsibility to 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); The District Court “must accept the state agency's credibility determinations unless the non-testimonial extrinsic evidence in the record would justify a contrary conclusion.” *D.K. v. Abington School District*, 696 F.3d 233, 243 (3d Cir. 2014); *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).

Although I found all witnesses to be credible, that is they were testifying truthfully to the best of their knowledge and recollection, I could assign the reading expert’s testimony little weight. This witness’ clearly stated charge and objective was to render an expert opinion about what reading instruction Student required going into third grade. The witness fulfilled this charge and objective, stating succinctly: “[Student] required a program that delivered systematic instruction in the alphabetic system. Something like Wilson. [Q] Very sequential, intensive, repetitive as needed, follows a clear progression of skill development. [Q] There are many programs developed to teach structured phonics but Wilson is sort of the flagship, and [Student] had been receiving Wilson in [Student’s] summer school program, so it would continue.” [NT 379]

I accept her expert opinion quoted above as to Student’s needs, but I cannot accept her criticisms about the Wilson reading program that the District delivered to Student. The witness had not spoken with Student’s Wilson Instructors at the District, was not certified in or ever provided instruction in Wilson, was uncertain about key Wilson elements of charting/graphing/progress monitoring and student notebooks, and gave conflicting testimony about the scheduling of Wilson delivery and the use of outside reading resources that in fact was not in line with the Wilson Instructor Manual’s guidelines. Further, some of her testimony under cross-examination was not internally consistent with her own previous statements. On the several occasions when information from the Wilson Instructor Manual was offered to challenge her testimony in various areas, the witness conceded. In one particular instance this reversal was quite striking: after stating that decoding had to be taught/completed before moving on to any other reading programs, she later testified that supplemental activities and programs for comprehension should be used while providing decoding instruction.¹⁴ Although unfamiliar with Wonderworks or Leveled Literacy, on the basis of a proffer of approval from the What Works Clearinghouse, the witness opined that these “may have potential positive effects”. Overall the reading expert, although certainly well-credentialed, was ultimately unable to offer me reliable opinions regarding this District’s specific Wilson programming for this specific Student and how it, in concert with Wonderworks and Leveled Literacy, did or did not meet this Student’s specific needs appropriately. [See testimony NT 365-479]

FAPE: Student is entitled by federal law, the Individuals with Disabilities Education Act 20 U.S.C. Section 600 *et seq.* and Pennsylvania Special Education Regulations at 22 PA Code § 14 *et seq.* to receive a free appropriate public education (FAPE). ‘Special education’ is defined as

¹⁴ Wilson provides both decoding and reading comprehension instruction.

specially designed instruction...to meet the unique needs of a child with a disability. ‘Specially designed instruction’ means adapting, as appropriate to the needs of an eligible child ...the content, methodology, or delivery of instruction to meet the unique needs of the child that result from the child’s disability and to ensure access of the child to the general curriculum so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children. C.F.R. §300.26. FAPE “consists of educational instruction specifically designed to meet the unique needs of the handicapped child supported by such services as are necessary to permit the child to benefit from the instruction.” *Ridley School District v. M.R.*, 680 F.3d at 268-269, citing *Board of Education v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982). The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education*). The Third Circuit has ruled that special education and related services are appropriate when they are reasonably calculated to provide a child with “meaningful educational benefits” in light of the student’s “intellectual potential.” *Shore Reg’l High Sch. Bd. f Ed. v. P.S.* 381 F.3d 194, 198 (3d Cir. 2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir. 1988)); *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted).

The central mechanism by which the IDEA secures the right to a FAPE for all children is the "Individualized Education Program," 20 U.S.C. §§ 1412(a)(4), 1414(d), which is "the package of special educational and related services designed to meet the unique needs of the disabled child." *Ferren C.*, 612 F.3d at 717 (quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995)). “[A]n Individual Education Program (IEP) is the primary vehicle for providing students with the required free and appropriate education.” *S.H. v. State-Operated School District of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

A child’s special education program must be reasonably calculated to enable the child to receive meaningful educational benefit at the time that it was developed. *Rowley*. In *Andrew F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988 (2017), the U.S. Supreme Court considered a lower court’s application of the *Rowley* standard, observing that an IEP “is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” The Court concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. This standard is consistent with the above interpretations of *Rowley* by the Third Circuit which recently clearly reiterated that *Andrew* did not overrule Third Circuit precedent. *Dunn v. Downingtown Area Sch. Dist.* (In re K.D.), ___ F.3d ___, 2018 U.S. App. LEXIS 26379, 2018 WL 4441134 (3d Cir. 2018).

The issue of whether an IEP is appropriate is a question of fact. *S.H.* The determination of whether an IEP is appropriate may rely only on evidence that was available to a district when it made its program and placement decisions. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3d Cir. 1993) ("Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.") Evidence of a child's subsequent educational progress (or lack thereof) may be considered only insofar as it bears on the issue of whether the IEP was appropriate when it was created. *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 762 (3d Cir. 1995) (approving ruling in *Fuhrmann*). A district’s actions must be

evaluated for appropriateness based upon what it knew at the time it took those actions. *Carlisle v. Scott P.* The analysis is prospective, and the success or failure of the District's actions, while they may raise relevant inferences, is not determinative. *T.M v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 812 (E.D. Pa. 2017) The District is not a guarantor of success in a certain amount for any child. An eligible student is not entitled 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).

Parameters of FAPE: As the IDEA, *Rowley*, and *Endrew*, make clear, a student's IEP must be responsive to his or her identified educational needs. *See* 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. School districts need not provide the optimal level of service, maximize a child's opportunity, or even set a level that would confer additional benefits. *Ridley*. An LEA is not required to provide the "best" program, but rather one that is appropriate in light of a child's unique circumstances. *Endrew* did not disturb the standard which entitles a child to what is reasonable, not to what is ideal.

A district has the discretion under the IDEA to make judgments as to the type of appropriate services it will deliver. *K.C. v. Nazareth Area Sch. Dist.*, 806 F. Supp. 2d 806, 813-814 (E.D. Pa. 2011). The IDEA does not deprive educators of the right to apply their professional judgment. *Leighty v. Laurel School Dist.*, 457 F.Supp.2d 546 (W.D. Pa. 2006). The IDEA does not preclude a district and its experienced educators from determining the methodology to be employed in educating a child enrolled in its schools. *T.L. v. Lower Merion Sch. Dist.*, No. 15-0885, 2016 U.S. Dist. LEXIS 80315 (E.D. Pa. June 20, 2016)

The IDEA requires the IEP team, which includes the parents as members, to take into account any concerns parents have "for enhancing the education of their child" when it formulates the IEP. *Winkelman v. Parma City School District*, 550 U.S. 516, 530 (2007). Full parental participation in the IEP process does not mean, however, that LEAs must defer to parents' wishes. *See, e.g., Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 657-58 (8th Cir.1999) (noting that IDEA "does not require school districts simply to accede to parents' demands without considering any suitable alternatives"; *see also Yates v. Charles County Board of Education*, 212 F.Supp.2d 470, 472 (D.Md.2002) (explaining that "parents who seek public funding for their child's special education possess no automatic veto over" an LEA's decision).

The IDEA entitles a student to an appropriate educational opportunity, but an IEP is not required to incorporate every program, aid, or service that parents desire for their child. *Mary Courtney T; Ridley*. 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). *See also Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp.2d 880, 885 (D. Minn. 2003)(no parent of a public school child -- whether the child is disabled or not -- is entitled to select every component of the child's education); *G.K. ex rel. C.B. v. Montgomery Cty. Intermediate Unit*, Civ. A. No. 13-4538, 2015 U.S. Dist. LEXIS 94667, 2015 WL 4395153 (E.D. Pa. July 17, 2015).

Discussion

The Parents' Position: The Parents assumed that in 3rd grade Student was being provided with “full on” Wilson “in a group setting” but later came to conclude that Student was receiving what the mother characterized as “a modified Wilson program” that was being “curtailed or shortened outside of what was stated in [Student’s] IEP”. Mother said she was “under the assumption that [Student] had a full Wilson Instructor, who was trained in Wilson, giving [Student] a full Wilson program, going through each step on a regular basis, and then [Student] would complete a step, do whatever charting that they do, and then when [Student] finished one step [Student] would go on to the next step, as [Student] had done in the past with prior teachers and tutors”. Student’s mother said she based her assumption on “what was discussed at IEP meetings and parent-teacher conferences”. The mother assumed that “We would continue the Wilson program that [Student] was in as [Student] had been getting full time [Wilson] throughout [Student’s] summer months...”¹⁵ In summary the Parents asserted that 1) Student was not receiving a “full on Wilson program”; 2) with a “full Wilson Instructor, who was trained in Wilson”; 3) “going through each step on a regular basis”; 4) “when [Student] would complete a step, doing whatever charting that they do”; and, 5) “receiving [Wilson] daily for 60 minutes [believing] that was what was in the IEP”. [HO 4 pp. 4-5 (1314-1316)]

Reading Instructor A’s Initial Testimony Led to Parents’ Confusion: Reading Instructor A’s testimony on March 15, 2018 was quite confusing because she was largely only talking about what she did with Student, and not what she did in conjunction with reading Instructor B. [NT 499]. When answering questions about days and times she sometimes referenced only her own every-other-day work with Student, but then in response to other questions she also talked about the alternate days’ work with reading Instructor B (“We followed the Wilson steps 1 through 10”). She later testified “Did I follow the steps, yes, but not necessarily 1 through 10 steps”. At times she (understandably) said she could not remember the answers to specific questions because she taught Student in third grade three years before, and some of her later answers supplemented or contradicted her earlier answers. [HO-2 pp. 6- 34 (1194-1307)]

Based on what Student’s mother heard on March 15, 2018 the Parents concluded that Student was not receiving appropriate reading instruction, specifically using the Wilson program, going though step by step, daily for the amount of time they considered necessary. Given that reading Instructor B had testified about Student’s reading program several months earlier without raising the Parents’ alarm, and that there had been interactions during third grade between reading Instructor B and the Parents about Student’s Wilson program, it is most unfortunate that rather than engage in the current due process dispute, the parties did not conference together and determine why, at the 11th hour, there seemed to be a discrepancy between what the Parents assumed was happening when the Mother heard Instructor A testify and what the District was actually providing.

¹⁵ Of note, in their testimony, the Parents emphasized that they wanted, and assumed Student was going to receive, the Wilson program that Student had been receiving privately over the summer before third grade. However the “full on” Wilson instruction Student had been getting privately was, actually, only two hours a week and was not delivered daily.

The IEP and What the District Provided: Under the third grade IEPs, Student had no entitlement whatsoever to the Wilson program. As much as the Parents wished it to be so, or thought that it must be so, Student's IEPs covering third grade did not provide for Student to receive the Wilson program. Had the evidence shown that Student received appropriate specially designed instruction in reading, but not using the Wilson program at all, the Parents' claim would fail. As it happened, however, the District did use the Wilson program with Student and after hearing testimony and carefully reviewing the evidence I have no basis upon which to conclude that it was delivered in such a way as to deny Student FAPE. Student was receiving daily instruction using the Wilson program, delivered by Wilson certified Instructors, going through the Wilson steps. Furthermore, in addition to receiving daily Wilson instruction, Student was receiving two other research-based reading interventions, Wonderworks taught using Wilson principles to address Wilson lesson step 10 and Fountas & Pinnell Leveled Literacy. All told, Student was receiving approximately 105 to 115 minutes of replacement reading instruction daily as opposed to the 60 minutes provided in the IEP.

In accord with the *Rowley* and *Endrew* standards, the District provided Student with appropriate reading instruction and Student made adequate progress in light of Student's circumstances: Student's cognitive ability has consistently been assessed to be within the low average range. Student was diagnosed with dyslexia as early as kindergarten. Student had been suddenly removed from a small private school in the spring of second grade predominantly due to a traumatic experience. Student had been home-schooled for five months between leaving the private school and starting in a public elementary school building in the District. Student entered third grade not having previously attended public school. As a third grader, Student had to face a major transition with regard to Student's educational setting. Remarkably, according to the Parents, Student seemed to be happy. Student progressed in the small group Wilson reading program during third grade at the same rate as Student progressed in individual sessions in fourth and fifth grades. I conclude that the District provided Student with FAPE in the area of reading during Student's third grade year.

Order

It is hereby ordered that:

1. The District did not deny Student FAPE in third grade in the area of reading instruction. As the District provided FAPE to the Student in the area of reading instruction in third grade, no compensatory education remedy is due.

Any claims not specifically addressed by this decision and order are denied and dismissed.

Linda M. Valentini, Psy.D., CHO

October 20, 2018

Linda M. Valentini, Psy.D. CHO
Special Education Hearing Officer
NAHO Certified Hearing Official