

**STATE OF OHIO
DEPARTMENT OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

In The Matter of:	*	Case No. SE 3242-2016
The Appeal of	*	
The Due Process Hearing on behalf of Student G	*	Monica R. Bohlen State Level Review Officer
	*	
Petitioner-Appellee,	*	
and	*	
Akron Public Schools	*	
	*	
Respondent-Appellant.		

FINAL DECISION AND ENTRY

I. SUMMARY OF DECISION:

The decision of the Impartial Hearing Officer (IHO) is affirmed, as modified here.

Based on the findings of fact, and considering the Respondent's appeal grounds and relevant law, this review officer concludes that the IHO properly found that Respondent denied Student FAPE by changing Student's placement in the 2015-2016 school year without the prior knowledge that the required notice would have provided to the Petitioners; by failing to reconvene an IEP team meeting, when the Respondent knew that Student's progress was inadequate, to address that issue; by failing to state goals and objectives in Student's 2013-2014, 2014-2015 and 2015-2016 IEPs to address his needs; by failing to use appropriate methods of educational instruction to the extent practicable; and by failing to provide appropriate and intensive intervention aligned to all areas of Student's needs.

Further, the IHO did not err in ordering compensatory education for two years in reading,

math and written expression in the amount of 1,820 total hours over 24 consecutive months, as modified to drop the requirement of one-on-one services for the TouchMath instruction to correct a clerical error. The IHO did not err in ordering 52 total hours of counseling services bi-weekly for 12 month consecutive months.

The IHO's order to convene an IEP meeting within 14 days was found to be moot.

II. PROCEDURAL HISTORY:

This matter comes forward for state level review of the IHO's decision pursuant to an appeal submitted by Respondent.

A. Due Process Hearing

This matter arises from a due process complaint served by Petitioners Donald and Rebecca G on February 15, 2016 on behalf of their son, Student G (Student).

The issue for hearing stated in the Petitioners' due process complaint, under IDEA and the American Disabilities Act, is that the Respondent from February, 2014 through the present denied Student FAPE, by:

- 1). failing to draft measurable goals and objectives to address all areas of need
- 2). failing to provide appropriate and intensive intervention in all areas of need
- 3). failing to implement research-based methods of instruction to the extent practicable
- 4). failing to revise/amend the IEP when it knew adequate progress was not being made
- 5). failing to provide extended school year services (ESY) to prevent/reduce regression over the summer
- 6). failing to provide adequate or accurate data on reporting student progress
- 7). failing to advise the Petitioners of a change in placement in the 2015-16 IEP
- 8). failing to obtain parent consent for the change of placement in the 2015-16 IEP, and

9). changing the placement of the student without parent consent.¹

As relief, Petitioners sought a determination that the Respondent failed to properly address Student's special education needs for portions of the 2013-14 school year, as well as the 2014-15 and 2015-16 school years, compensatory education in the areas of reading, written expression and math, a determination that Student requires, as a component of a FAPE, systematic, sequential, explicit and multisensory instruction in reading, written expression and math taught by an individual properly certified to provide research-based interventions with fidelity, and a declaration that they are the prevailing parties, entitling them to reasonable attorneys' fees and costs.

Prior to the hearing, the IHO granted three joint requests for extensions of time. The due process hearing took place on June 9, 10, 11, 13, 16 and July 18, 2016. At the end of the last hearing, the IHO sought and granted a request for an extension by the Respondent. Petitioners did not object. Both parties filed post-hearing briefs. After the filing of post-hearing briefs, the IHO granted two additional requests for extensions of time that were initiated by the IHO and acquiesced in by the Respondent, over Petitioners' objection, who filed a written opposition.

On November 7, 2016, the IHO issued his 176 page decision, serving the decision by mail on November 10, 2016, finding that Petitioners did not prove by a preponderance of the evidence that the Respondent: 1). failed to provide adequate or current data reporting Student's progress and 2). failed to provide ESY to the Student during the summers of 2014, 2015 or 2016. The IHO found that Petitioners did prove by a preponderance of the evidence that the Respondent denied Student FAPE: 1). by changing Student's placement without the prior knowledge that the required notice would have provided to the Petitioners; 2). by failing to reconvene an IEP team meeting, when the Respondent knew that Student's progress was inadequate, to address that issue; 3). by failing to state goals and objectives in Student's 2013-2014 IEP to address his needs; 4). by failing

¹These issues were restated by the IHO in his decision. IHO Decision, p. 8.

to state goals and objectives in Student's 2014-2015 IEP to address his needs; 5). by failing to state goals and objectives in Student's 2015-2016 IEP to address his needs; 6). by failing to use appropriate methods of educational instruction to the extent practicable; and 6). by failing to provide appropriate and intensive intervention aligned to all areas of Student's needs.

The IHO further found that Petitioners were the prevailing party on Claims ## 2, 3, 4, 5, 6, 8 and 9 and that Respondent was the prevailing party on Claims ##1 and 7.

As relief, the IHO awarded Petitioners and Student with compensatory education as follows:

1. Intensive interventions in Reading, one-on-one, 90 minutes per day, using the Wilson Reading Program (WRP), 12 months per year for two years. This intervention to be provided one-on-one to the Student in a resource room by an individual who is certified in the WRP.
2. To remediate his writing deficiency, one hour per day, five days a week, of one-on-one writing instruction in a resource room with an intervention specialist, utilizing Framing Your Thoughts, 12 months per year for two years.
3. TouchMath instruction 60 minutes per day, five days per week, 12 months per year for two years in a resource room with an intervention specialist one-on-one with the intervention specialist in a small group of up to three students.
4. Counseling services with a licensed social worker, or another licensed professional with comparable expertise as a social worker, to target Student's anxiety. Those counseling services to be provided twice a week, for 30 minutes per session at the counselor's office or in a resource room at the school, whichever the counselor determines, for 12 consecutive months or until the counselor determines that this service is no longer necessary, whichever is sooner. If the counseling service is provided outside of the school, the Respondent shall reimburse Petitioners for their transportation expenses, which expenses shall be reimbursed at the applicable IRS approved mileage rate, upon submission by Petitioners to Respondent of Petitioners' written log of mileage to and from the counselor's office. Respondent shall pay such mileage reimbursement to Petitioners within 30 days after each receipt of Petitioners' mileage logs.

Finally, the IHO also ordered the Respondent to convene a meeting of the Student's IEP team within 14 days to: 1). evaluate Student to determine whether he would benefit from an

assistive technology (AT) to augment his writing instruction, and if the team determines that Student would benefit from such AT, Respondent shall provide the AT as soon as reasonably possible to Student and for so long as the IEP team determines is necessary; and 2). to develop an IEP that will enable the Student to obtain meaningful educational benefit as gauged by his potential. The IHO ordered that Respondent to provide a copy of his Decision and Order to each member of that IEP team not less than seven calendar days prior to that team meeting.

B. State Level Review

On December 28, 2016, the Petitioner appealed the decision of the IHO, asserting the following issues for appeal:²

1. Whether the IHO erred in deciding that Respondent changed the Student's placement without the prior knowledge that the required notice would have provided to the Petitioners and thereby denied the Student FAPE.
2. Whether the IHO erred in deciding that Respondent knew that the Student's progress was inadequate and failed to schedule an IEP team meeting to address that issue and thereby denied the Student FAPE.
3. Whether the IHO erred in deciding that Respondent failed to state goals and objectives in the Student's 2013-2014, 2014-2015 and 2015-2016 IEPs to address his needs, thereby denying Student FAPE.
4. Whether the IHO erred in deciding that Respondent failed to use appropriate methods of educational instruction to the extent practicable, thereby denying Student FAPE.
5. Whether the IHO erred in deciding that Respondent failed to provide appropriate and intensive intervention aligned to all areas of the Student's needs, thereby denying the Student FAPE.
6. Whether the IHO erred in requiring [c]ompensatory [e]ducation be provided to this Student.
7. Whether the IHO inappropriately relied on the testimony of witnesses with minimal and/or zero interaction with the Student, all of whom never participated as a member of the Student's IEP team or consulted with any of the members of the Student's IEP team or consulted with any of the members of the Student's IEP team.
8. Whether the IHO ignored the manifest weight of the evidence that the Student was

²Numerous sub-issues to these ten issues are not repeated here. The issues on appeal as argued in Appellant's brief are considered the more significant issues and are the issues that will be reviewed by this SLRO.

provided with systematic, sequential, explicit and multisensory instruction in reading, written expression and math and he was taught by individuals properly certified to provide researched-based (*sic*) interventions with fidelity.

9. Whether the IHO ignored the manifest weight of the evidence that the Student's educational needs were met for portions of the 2013-2014 school year, as well as the 2014-2015 and 2015-2016 school year (*sic*) and made meaningful educational progress.

10. Whether the IHO inappropriately considered a second due process complaint that was filed by Petitioners prior to the November 7, 2016 due date for the IHO Decision that wrongly indicated that the Student was not progressing when the Student's MAP scores had risen from the previous school year in reading and had risen considerably in math and that the Student had demonstrated progress since the filing of their first due process complaint. Petitioner's (*sic*) complaint was immediately dismissed by Petitioners.

Further, in its Notice of Appeal, Respondent states that the IHO's Orders pertaining to the reconvening of the IEP team are moot because Petitioners have signed in agreement with Student's IEP and Student's new ETR. Finally, the Respondent advises that Petitioners withdrew Student from the Respondent on November 15, 2016, the day after receipt of the IHO's decision, and, in order to receive the compensatory education ordered by the IHO, the Student would have to re-enroll in the Respondent.

A Scheduling Order issued on January 5, 2016, outlining the due date of the decision, deadlines for motions and briefs and other related matters. On January 9, 2017, the parties e-mailed this review officer seeking to modify the briefing deadlines in the Scheduling Order. On January 10, 2017, a conference call took place between this review officer and the parties to discuss the modification request. During the conference call, Respondent requested a one-week extension of the decision deadline so that Respondent could file its brief a week later. Petitioner objected to Respondent's request for an extension based on the history of extensions in the case. Respondent's request was granted and an Order Modifying Scheduling Order and Extending Time was issued on January 11, 2017, granting Respondent's motion, and setting a new decision deadline of February 2, 2017, to allow for the filing of simultaneous briefs. Both parties agreed to

a very short time-line for briefs and submitted them in a timely manner. Petitioners elected to receive their copy of the decision electronically.

III. FINDINGS OF FACT:

The IHO made at least 505 exhaustive findings of fact, supported by citations to the record. The IHO decided not to proceed in a chronological fashion in his findings which made his findings more challenging to review.³ The IHO made some credibility determinations. The IHO's findings of fact, including his credibility determinations, are approved and are adopted for this state level review. Supplemental findings of fact of this review officer are indicated with citations to the record.

BACKGROUND

The facts pertinent to the due process hearing took place in the 2013-2014, 2014-2015 and 2015-2016 school years. Student, a resident in the Respondent, was a nine-year-old third-grader at the time of the hearing. He had attended a Respondent Elementary School, Windemere, since kindergarten.

During the 2013-2014 school year he was enrolled in the first grade as a regular education Student. Early in the first grade, Student's mother expressed concern about her son's reading and writing skills. That led to the Respondent evaluating Student and determining that he was eligible for special education due to a specific learning disability. Student's major learning difficulties were "reading, spelling, math, putting ideas & thoughts on paper." The ETR suggested "TouchMath, multisensory writing activities, modeling, writing [and] one-on-one tutoring" for solving these difficulties.

Student's mother is a pre-school intervention specialist, with an Ohio teacher's license for

³His organizational method appears to have challenged him as well. Petitioners pointed out in their brief that some of his findings of fact are numbered out of order and in some cases he used the same number for different findings.

early childhood-through-three with a reading endorsement. She has no professional experience teaching K through 3. Mother also expressed her concern that Student had dyslexia. Mother requested that an Occupational Therapist also evaluate Student as part of the evaluation.

Before and during the evaluation process, Student had received or was receiving five interventions: Leveled Literacy Intervention (“LLI”) four days a week to address his reading needs; Akron After School program (“AAS”), a one and one-half hour after school program focusing on reading skills; 100 Book Challenge, a voluntary program for children to take books home to be read by their Petitioners; Earobics, a phonics-based computer program of six games to provide children with phonetic awareness and phonics skills; and Math Club. At the time, all of these interventions were available to general education students only.

Bendo, the school psychologist, administered the Weschler Intelligence Scale for Children, 4th Ed. (“WISC-IV”), which showed markedly uneven cognitive development, with high average range verbal skills, average in most other areas, but a very low processing speed score. In summary, the WISC-IV showed that his general cognitive ability is in the Average range, his general verbal comprehension abilities is in the High Average range, general perceptual reasoning abilities are in the Average range, and general working memory abilities are in the Borderline range. His ability to process visual material quickly is a weakness relative to his abilities to sustain attention, concentrate, and exert mental control.

Bendo also administered the Woodcock-Johnston Tests of Achievement, 3rd ed. The test showed that Student's age equivalent for basic reading, reading decoding and comprehension ability, written expression, math problem-solving, number facility, and reasoning was at the late kindergarten level, and for oral language development he was second grade level. R. Ex. 50, pps.1219-1220. Overall, he was found to be one-half grade year behind his same age peers.

The software generated report for the Woodcock-Johnston test included a section on

“instructional recommendations and interventions.” Recommendations from this section were included in the ETR, including that Student will “probably gain the most from reading instruction presented within the middle kindergarten range” and suggestions on ascertaining what capital and lower case letter names that Student can identify. Not included in the ETR or shared with Petitioners were the examples offered about specific reading programs that could assist with Student's test profile: Lindamood Phoneme Sequencing Program for Reading, Spelling, and Speech (LIPS) and Wilson Reading.

Bendo did caution in the ETR that the test results should be interpreted with caution because Student's “test behavior and compliance fell far below age-expected levels”; he was “markedly anxious.” Student did not display anxiety in his classroom.

Student's OT evaluation recommended OT for Student as a result of his needing to improve in the areas of sensory processing and motor coordination as they affect handwriting.

The summary recommendations of the ETR were that Student had educational needs in the areas of reading, writing, mathematical skills, and he needs to manage his anxiety and consistently comply with adult requests at age-appropriate levels. Further, he needs to improve sensory processing and motor coordination skills as they affect handwriting. It was recommended that Student would benefit most from reading instruction within the middle kindergarten range, from explicit instruction in phonics, including about the relationship between phonemes and graphemes, and how to blend sounds together to form words. In math, instruction should be presented in the middle to late kindergarten range, and manipulatives are recommended. Direct instruction was specified as one of the most effective ways for building Student's math calculation and problem-solving skills. R. Ex.50, pps.1227-1228.

In writing, instruction should be presented in the middle to late kindergarten range using multisensory techniques, and OT will help by focusing on sensory processing, motor coordination,

and handwriting skills. R. Ex. 50, p.1228.

The evaluation team met on November 5, 2013 and was immediately followed by an IEP team meeting. Petitioners received copies of the ETR and the IEP at those meetings. The team agreed that Student was eligible for special education services in the areas of reading comprehension, basic reading skills, math problem-solving and calculation, and written expression due to his disability of a Specific Learning Disability. Specific Learning Disability encompasses dyslexia. All team members, including Petitioners, signed in agreement.

The 2013-2014 IEP had four unnumbered goals, two of which had the same name: Sight Recognition (his only reading goal), Operations and Algebraic Thinking, and two goals named Elem. Written Language: 01 Writing. Each goal specified that it was to address a learning deficit that will greatly affect his ability to access the general education curriculum if not corrected and specified that each goal was to be reached by the end of the IEP year.

Student was to receive direct instruction focusing on fluency, word recognition and decoding and spelling by an intervention specialist for 45 minutes per day in a special education classroom and direct instruction on basic math skills focusing on basic addition and subtraction for 45 minutes per day in a special education classroom. In addition, Student was to receive direct OT services in 1-1 or small group setting using sensorimotor approach for 90 minutes monthly.

The IEP also provided that Student was to receive accommodations by his intervention specialist as well as his regular education teacher, described as small group, extended time, frequent breaks and tests read (excluding reading when only questions and answers were to be read). The IEP also provided that Student would participate in classroom, Respondent-wide and state-wide assessments with accommodations. His LRE was described as “outside the general ed class between 21 and 60% of the time.

All participants signed the IEP in agreement. The effective dates of the IEP were November

5, 2013 through November 4, 2014.

Student received educational services in first grade from Edwards, his regular education teacher, Ms. Miller, his intervention specialist, and Amadio, his occupational therapist. After Student's IEP was implemented, the Respondent dropped Student from the LLI program because at that time LLI was an intervention program for the most intensive tier of general education students, not special education students.

Miller used the Benchmark Literacy Program (Benchmark) with Student, including the Benchmark sight word list. This was the same program that all regular education students used for reading.

Much of the testimony focused on Student's MAP scores. MAP stands for The Measures of Academic Progress Assessments (MAP), a computer-based testing that the Respondent uses several times a year to determine its students functioning in reading and math. Student had received a MAP test on September 30, 2013, before the ETR, but these scores were not included in the evaluation because Bendo did not have those scores due to the delay in reporting the scores. Tr. 40. Student was given all first grade MAP tests with accommodations because Edwards had given him the test accommodations all year. Test scores were assigned to different levels; the Intensive level, described those in the 1st to 10th percentile, the Targeted level described those in the 10th to 25th percentile, and Universal described those in the 25th percentile and above. "Universal" described average. Tr. 644.

Student's score on the September MAP in Reading was 158, with a proficiency level of Universal. The nationally-normed reading score for first graders taking that test was 160.3. Student also had MAP assessments in reading on January 31, 2014 and March 31, 2014. His scores on those tests were 166, with a proficiency level of Universal, and 161, with a proficiency level of Targeted, respectively; the national norms on those tests were 170.7 and 176.9 respectively.

Student's scores in Reading showed improvement from the first to the second and decline in the last one.

Student's score on the September MAP in math was 116, with a proficiency level of Intensive. The nationally-normed math score was 162.8. Student also had MAP assessments in Math on January 31, 2014 and March 31, 2014. His scores on those tests were 139, with a proficiency level of Intensive, and 171, with a proficiency level of Universal, respectively; the national norms on those tests were 172.4 and 179.0.

Student started his second grade under his same IEP. None of the goals from Student's first IEP had been met. Student started out with a regular education teacher, who was replaced by Ms. Johnston in October of 2014 for the rest of the year. Miller continued as his intervention specialist, except for a period of about eight weeks in the early Fall of 2014 when she went on maternity leave and Simon, who was not a licensed intervention specialist, replaced her. Amadio continued as his occupational therapist.

The nationally-normed MAP scores show a steadily upward trajectory from the first grade Fall test through the third grade, except for the first test in the second grade when the Reading and Math scores dip slightly in the first test. The Respondent explained that this dip in its own students' scores as well as the nationally-normed scores is due to the fact that MAP disallows accommodations during test administration beyond the first grade for all students.

Student's MAP score in reading dropped 21 points on the September 30, 2014 test, placing Student in the Intensive tier; the nationally-normed drop was one point. Student's MAP score in math dropped 30 points on the September test, placing Student in the Intensive tier; the nationally-normed drop was one point.

In October, 2014, based on the Student's September MAP score in reading, Respondent also provided Student with a Reading Improvement and Monitoring Plan (RIMP). According to

this RIMP, Student's September MAP score in reading was at the kindergarten level.

The 2014-2015 IEP was signed and approved with effective dates of November 7, 2014 to November 6, 2015. This IEP had three goals, in reading, math and writing. All goals specified work at grade level. Reading focused on sight goals again, math on story problems, and writing on spelling. Respondent continued to use Benchmark for student's reading instruction.

The MAP assessments were also used by Respondent to identify students that are “not on track,” pursuant to the Ohio Third Grade Reading Guarantee, and these scores were used to qualify students for the more intensive reading interventions, such as the LLI program. A couple of weeks after the IEP was approved, Respondent and Petitioners signed a document exempting Student's compliance with the Ohio Third Grade Reading Guarantee because of his reading disability. Respondent did not advise Petitioners of the additional reading services they were giving up by signing the exemption.

There was no indication on most of Student's teachers' progress reports on the grade level of the work he was doing.

Student's MAP scores during the second grade in reading increased 13 points in January and didn't change on the March assessment. His scores remained in the “Intensive” tier. His MAP scores during the second grade in math increased 16 points in January and remained the same in March. He remained on the Intensive tier with these scores.

In June, 2015, at Petitioners' request a phonics goal was added to Student's IEP. No additional time was added for the phonics goal, but “decoding skills” were added to the specially-designed instruction” section. The profile section of the amendment stated that Student's inability to decode grade level words prevents him from fully accessing the curriculum. This IEP also memorialized the earlier exemption from the Ohio Third Grade Reading Guarantee.

During second grade, Student's mother expressed her concerns about Student's reading

skills to Student's teacher in April, 2015 requesting additional supports. Johnston responded that Student's level in the Benchmark program at that time was a level D with a grade-level equivalency of beginning first grade. She never considered changing his reading program because Benchmark was the program used by the District.

In third grade, Student's regular education teacher was Ms. Thurman and his intervention specialist was Ms. Dingle. Amadio continued as his occupational therapist. By the time of drafting of the new IEP, Student had met his math goal on his IEP, but was not close to meeting his reading or writing goals. His RIMP plan from second grade continued to be implemented in third grade. Thurman developed a new RIMP for Student in October, 2015. Under the RIMP, Student was to receive two additional interventions, AAS and Earobics.

The 2015-2016 IEP was signed and approved with effective dates of November 2, 2015 to November 1, 2016. The profile section included an extensive discussion of his recent MAP scores and what needed to be accomplished to get Student out of the Intensive tier. This IEP had three goals, one in reading (focusing on phonics), one in math and one in writing. His reading goal specified work at instructional level, as opposed to grade level. His math and writing goals deleted any reference to the level of work. Respondent continued to use Benchmark for student's reading instruction.

This IEP also changed Student's placement for services to a general education classroom full-time with most of his intervention services provided in the regular education classroom, except OT, which continued to be a pull-out service. This was due to a change in Respondent's special education services model to a push-in as opposed to pull-out model. Respondent did not give written notice to Petitioners about this change.

Student's MAP scores at the beginning of the third grade in reading dropped four points in the September assessment. His MAP score in math dropped three points. He remained on the

Intensive tiers with these scores. After this assessment, Petitioners signed a form opting out of any further.

Thurman was not aware that she had responsibilities to implement Student's 2015-2016 IEP. She did not collect any data.

In December, 2015 Petitioners had Student evaluated by a Dr. Cole, but did not furnish Respondent with a copy of this report.

Petitioners filed their due process complaint on February 15, 2016. Also in February, Respondent placed Student back in the LLI program that he had been in briefly in the first grade.

IV. DECISION:

A. Standard of Review

The standard of review by the state level review officer is one of *de novo* review. 20 U.S.C. §1415(g); 34 C.F.R. §300.514(b)(2)(v); *Thomas v. Cincinnati Bd. of Educ.*, 918 F. 2d 618, 621 (6th Cir., 1990). In matters of assessing witness credibility and demeanor, deference must be given to the trier of fact, in this case the IHO. *Bd. of Educ. of the City School Dist. of the City of Cincinnati v. Wilhelmy*, 689 F.Supp.2d 970 (S.D.Ohio 2010).

B. Appeal Issues

In its Brief, the Respondent asserts nine assignments of error:

- I. The Respondent did not change the student's placement on the continuum & the Petitioners were extremely meaningful participants at every IEP team meeting and signed every IEP in agreement.
- II. Student was making adequate progress on his IEP goals and was progressing in the general education curriculum.
- III. Student's 2013-2014, 2014-2015 and 2015-2016 IEPs contained goals and objectives to address his needs.
- IV. Respondent utilized appropriate, scientifically based methodologies of educational instruction.
- V. The Respondent provided appropriate and intensive intervention aligned to all areas

of Student's needs.

- VI. Compensatory education was not warranted.
- VII. The peculiar amount of weight given to experts hired by Petitioners *after* the filing of their due process complaint was inappropriate and in direct conflict with the extrinsic non-testimonial evidence contained in the record.
- VIII. The manifest weight of the evidence produced at the hearing unequivocally demonstrated that the Respondent provided [Student] with systematic, sequential, explicit and multisensory instruction in reading, written expression and math, and he was taught by individuals properly certified to provide research-based interventions with fidelity.
- IX. From [Student's] initial IEP, beginning during the 2013-2014 school year while he was in first grade, and his second and third grade IEPs, met Student's needs, and the extrinsic evidence and testimony demonstrated that [Student] made meaningful progress.

1. Change of Placement

Respondent, in its first issue, a narrow issue, disputes the IHO's finding that the Respondent changed Student's placement from the special education classroom to the regular education classroom during the 2015-2016 IEP meeting without prior notice to Petitioners. Respondent does not dispute that no prior notice was given to Petitioners, nor does it dispute that Petitioners learned of the change first at the November, 2015 IEP meeting. Respondent argues that: 1). that Petitioners were aware of the Respondent's change to a "push-in" versus "pull-out" model in delivering special education services; 2). that this change was not a change of placement; 3). that the push-in model was discussed at the IEP meeting, and Petitioners understood the change and consented to it, and, thus, the IHO is exalting form over substance; 4). Student's specially-designed instruction actually increased slightly in his 2015-2016 IEP; and 5). Student was provided an additional intensive reading intervention, the LLI program, to support his reading, resulting in Student making a half year's growth in just three months.

The IHO found that Respondent violated O.A.C.§ 3301-51-05(H) when it changed

Student's placement for services to a general education classroom (from the previous IEP, where Student's special education services were provided in a resource room) without the required written notice. Because this finding was a procedural violation under IDEA, in order to determine if it was a substantive violation, the IHO determined that Petitioners were required to prove by a preponderance of the evidence that this violation either:

- (a) Impeded the child's right to a FAPE;
- (b) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or
- (c) Caused a deprivation of educational benefit.

O.A.C. § 3301-51-05(K)(13)(a).

The IHO further determined that Petitioners proved by a preponderance of the evidence that this procedural violation caused a deprivation of educational benefit based on the fact that the IEP team articulated no reasoned basis for this sudden, unannounced in advance decision to change the Student's placement. Ms. Amend found that the Student needed to receive his specially-designed instruction in a resource room, and the intensity of the program described by Ms. Green would most likely provide the most benefit if at least some of it was provided in a resource room. IHO Decision, p. 136.

O.A.C. § 3301-51-05(H) requires, in pertinent part, that a **prior** notice by the school Respondent be given to the Petitioners **a reasonable time before** the Respondent “proposes to initiate or change” the educational placement of the child or the provision of FAPE to the child. O.A.C. § 3301-51-05(H)(1)(a). The required notice must include detailed information about the proposed change, including a description of the action proposed, an explanation of why the Respondent proposes such an action, a description of each evaluation procedure, assessment, record, or report the school Respondent used as a basis for the proposed action, a description of

other options that the IEP team considered, and the reasons why those options were rejected, among others. O.A.C. § 3301-51-05(H)(2).

Respondent's first assertion will be considered with the related second assertion. The “push-in” versus “pull-out” model refers to the location of the specially-designed instruction. Respondent, in the 2015-2016 school year, was moving to a “push-in” model with special education services taking place within the classroom as differentiated from the “pull-out” model with services being provided in a resource room. Respondent does not elaborate on its contention that this was not a change of placement for Student.

School districts must ensure that a continuum of alternative placements is available to children, including “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.115(a) and (b)(1). The placement option chosen must be based on the child's IEP. 4 C.F.R. § 300.116. The Act mandates that among “appropriate” placements the least restrictive alternative must be chosen. *Doe v. Bd. of Educ. Of Tullahoma City Schools*, 9 F.3d 455, 460 (6th Cir. 1993).

Student's 2014-2015 IEP that ended on November 5, 2015 provided that all Student's special education services in reading, writing and math occur in the resource room. The 2015-2016 IEP changed the location of Student's services. Even though Student had received instruction in regular classes also, the resource room is a more restrictive placement than the regular education class.

In support of its first assertion, Respondent states that one of the IHO's findings of fact supports her assertion that Petitioners were aware of the Respondent's change to a “push-in” versus “pull-out” model in delivering special education services. FOF 61 does not relate to such an assertion. Even if shown, such an awareness does not relieve Respondent of its responsibility for providing the required notice and for the consequences of failing to provide it.

Respondent next contends that the push-in model was discussed with Petitioners during the IEP meeting and Petitioners understood the change and consented to it, and, thus, the IHO is exalting form over substance. A parent's consent to an IEP is certainly relevant in all due process proceedings under IDEA. On this issue of prior written notice, however, Petitioner's consent to the 2015-2016 IEP does not serve as a waiver of procedural or substantive rights under IDEA. Complying with the due process requirements under IDEA does not constitute putting form over substance.⁴

Respondent also argues that student's specially-designed instruction actually increased in his 2015-2016 IEP, and Student was provided an additional intensive reading intervention, the LLI program, to support his reading, resulting in Student making a half year's growth in just three months. These assertions go to the IHO ruling that the procedural violation caused a deprivation of educational benefit, which is the crux of the matter, as without that there would be no denial of FAPE.

The IHO's rationale for his determination that the IEP caused a “deprivation of educational benefit” was based on three elements: Ms. Amend's recommendation, Ms. Greene's testimony about the level of intensity Student needed, which the IHO determined required at least some of his services to be delivered in a resource room, and the lack of articulation at the IEP meeting, unannounced in advance, of a reasoned basis for this change in his placement.

Respondent's contention that the increase in Student's specially-designed instruction by 10 minutes weekly in his 2015-2016 IEP and the provision of LLI services somehow make up for the inappropriate change of Student's placement is not persuasive. The 10 minute increase in services was negligible, and the LLI services were irrelevant because they were not part of the IEP. The LLI placement was not discussed by the IHO here. The provision by Respondent of LLI services, not

⁴O.A.C. §3301-51-05 (H), in a previous revision, eliminated the former sub-paragraph (H)(4)(c) that specifically permitted the IEP to serve as the written notice unless the parent disagrees with the IEP.

started until February 18 (three months after the implementation of the IEP and after Petitioners' filing of their complaint), indicate, if anything, a recognition by the Respondent that Student's specially-designed instruction in the regular education classroom was not working and that Student required more in the area of reading.

The issue here is not what attempts were made later to cure a deficient IEP, but whether the procedural violation caused a deprivation of educational benefit. Respondent's change of model notwithstanding, the issue is whether such a change of placement was appropriate. These assertions are not persuasive.

The IHO had sufficient evidence to support his finding that Petitioners proved by a preponderance of the evidence that this procedural violation caused a deprivation of educational benefit. Respondent's first assignment of error lacks merit.

2. Meaningful Progress

Respondent in her second and ninth assignments of error contends that Student was making adequate progress on his IEP goals, and was progressing in the general education curriculum, that all three of his IEPs met Student's needs, and the extrinsic evidence and testimony demonstrated that he made meaningful progress. In support of its assertions, Respondent broadly claims that: 1). Student's potential was not average; 2). the manifest weight of the objective data and extrinsic non-testimonial evidence shows Student made meaningful progress in all subject areas based on his potential; 2). the MAP scores were not a valid assessment tool for Student after first grade due to the lack of his accommodations; 3). IDEA does not guarantee any amount of academic proficiency but only that schools make a good faith effort to assist students to achieve a student's goals; and 4). the IHO's reliance on Petitioners' experts obtained after the complaint was filed was erroneous; and 5). an IEP should be evaluated as of the time written. A final assertion about the IHO ignoring his own findings when he ordered compensatory education will be considered below.

The party who challenges an IEP has the burden to prove by a preponderance of the evidence that the IEP is inappropriate. *Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 854 (6th Cir. 2004); *Knable ex rel. Knable v. Bexley Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001).

Student's potential is a preliminary issue to review before the related discussion about his progress. Respondent disputes the IHO's determination about Student's potential. The IHO determined that Petitioners proved by a preponderance of the evidence that Student has the potential of doing grade-level work. The IHO found that Student has an average IQ and has the potential to perform at grade level with his same age non-disabled peers. Respondent disputes that, contending that the IHO relied on Petitioners' expert, Green, who erroneously stated that Student had an average IQ and, instead, the IHO should have relied on the Respondent's expert, Merkle, who pointed out that making a very simple deduction that Student has an average IQ is a flawed interpretation due to the tremendous variability in Student's IQ score.

The IHO's conclusion on grade level was not based solely on Petitioners' expert but was based on the results of the ETR as well as the testimony of the school psychologist, Bendo, who administered the WISC-IV in October of 2013. The WISC-IV showed markedly uneven cognitive development, with high average range verbal skills, average in most other areas, but a very low processing speed score. In summary, the WISC-IV showed that his general cognitive ability is in the average range, his general verbal comprehension abilities is in the high average range, general perceptual reasoning abilities are in the average range, and general working memory abilities are in the borderline range. Bendo concluded that Student was average to high average in all areas except processing speed. According to Bendo, based on the cognitive test he administered Student could participate in grade level curriculum. This evidence led the IHO to conclude that Student has the potential to perform at grade level. IHO Decision 139. He did not by any means conclude that Student was capable of grade level work now without specially-designed instruction addressed to

his needs.

Respondent's contention--that the expert Green's conclusions about Student being able to read at grade-level based on his average IQ were incorrect--are irrelevant because the IHO did not rely on such expert opinion for his conclusion about Student's potential. Later in his opinion, the IHO did recognize that Green also confirmed, based on her review of the ETR, that Student has average abilities overall and high average verbal reasoning skills, and that her conclusions support the determination by Bendo and the 2013 evaluation team that Student has the potential to read at the same grade level as his same-age non-disabled peers.

The IHO chose not to rely on Merkle's opinions. This was well within his discretion to determine which of these qualified expert's opinion he chose to adopt. The IHO's reliance on the ETR and Bendo's opinion is sufficient evidence for his finding that Student has the potential to perform at grade level.

An additional fact that undermines Respondent's argument about Student's potential to perform grade level work is that all the goals in Student's 2013-2014 and 2014-2015 IEPs, drafted by the Respondent, establish goals in reading, math and writing that are grade level work, all indicating that Respondent anticipated that such grade level goals were achievable within a year. IHO Decision, p.145.

Based on his finding about Student's potential, the IHO determined that Petitioners also proved by a preponderance of the evidence that Student was not making adequate and meaningful educational progress, as gauged by his potential, during the 2013-2014 IEP year or during the 2014-2015 IEP year. IHO Decision, pps. 137, 144, 149.

Respondent argues that the manifest weight of the objective data and extrinsic non-testimonial evidence show Student made meaningful progress in all subject areas based on his potential. In support of this assertion, Respondent asserts that all of his educators testified he was

making meaningful progress, there was no evidence that his skills declined, only that his skills improved, and that Respondent references isolated findings of fact of the IHO showing recognition of his progress on his IEP goals and objectives. There is no dispute that Respondent provided Student with intensive intervention for most of the two IEP years on his goal areas and that he was able to show some progress on the instruction that was given to him.

For the IHO the issue of meaningful progress was inextricably linked to the central issue at the hearing of the appropriateness of the IEP goals, the failure to incorporate recommendations of the ETR as to goals and teaching methods, and the failure to reconvene the IEP team when Student was not progressing to change course. There was sufficient evidence, including the testimony of three experts, to support the IHO's conclusion that there was no meaningful progress made on these “inappropriate” goals and objectives stated in these two IEPs. This was, in part, because the reading, math and writing goals, excluding the OT goal, specified grade level work. The educators showed only modest progress on grade level work on all goals in the first, second, and beginning of third grades, and most were unclear on what level of work they were actually working on at any given time.

The IHO found that only one of the goals was reached from the two IEPs and that was the 2014-2015 math goal. The IHO had sufficient evidence to support his conclusion that Student's reading scores were a half-year behind at the time of the ETR, and by the middle of the third grade it was generally agreed by all educators and experts that he was two years behind in reading.

Respondent cites to a number of the IHO's findings of fact on meaningful progress that are inconsistent with the IHO's decision. Of the 17 findings of fact cited, out of the at least 505 findings of fact that the IHO made, only five of these were findings on progress; five offer no support on this issue, four are summaries of witness's testimony only, and several pertain to progress on the 2015-2016 IEP that the IHO declined to evaluate in terms of progress. They do not

support Respondent's contention that the manifest weight of the evidence shows meaningful progress in all subject areas.

Respondent also contends that the MAP scores were not a valid assessment tool for Student after first grade due to the lack of his accommodations. Much of the testimony focused on Student's MAP scores. The IHO based his decision about the lack of meaningful progress on Student's MAP scores, along with other factors. As Respondent points out, first grade students who need accommodations for tests are allowed such accommodations, such as Student, who had a read-aloud accommodation on his first grade IEP. During first grade the evidence showed that Student achieved his highest grade MAP score in reading on the January test and his highest score in math on the March test. These accommodations are only allowed in the first grade.

Respondent asserts that Student's scores dropped as the nationally-normed scores generally drop in the beginning of second grade due to the dropping of the accommodations. This fact was not controverted. What the Respondent in her brief and witnesses during the hearing were not able to explain was why the nationally-normed scores trended steadily upward with each subsequent test after the first second grade test and why Student's did not. As the IHO found, his highest score in reading was in the first grade. His scores went from "Universal" (described as average) in the first grade, to "Intensive" tier soon after and remained at "Intensive" until the testing stopped in the third grade.

Other assertions of Respondent's about the MAP scores were that Green based her testimony about Student's lack of progress on the MAP scores, and these scores should be used only in conjunction with other academic data to develop a comprehensive picture of the student's achievement. The record does reflect that Green based her opinion in part on Student's MAP scores, but she explained that a child's progress in a special education program should be monitored in order to determine the child's progress. She named the MAP assessment as one of the recognized

monitoring methods available along with three others. Her opinion about Student's progress was not solely based on the MAP scores, but included review of other data about Student, including his ETR, his three IEPs, teacher progress reports, and Dr. Cole's evaluation, and was based on her own extensive expertise on the education of students with dyslexia and children with profiles comparable to Student's.

Respondent does not refer to any evidence in the record that would challenge this expert, who relied on a nationally-normed assessment tool, one used by Respondent, as part of the basis of her conclusions. Despite arguing that the expert should not have relied on the MAP scores, Respondent relies on the MAP scores to illustrate Student's meaningful progress on goals, pointing out Student's MAP score in math increased by 38 points between the beginning of the first grade and the beginning of the third grade. Despite this increase, Student remained in the intensive level for all but one of his math MAP scores, that one occurring in the Spring of first grade when he used accommodations.

As Respondent notes, Green does base some of her conclusions about Student's lack of progress on the drop in Student's score in the second grade test without acknowledging the withdrawal of accommodations issue. Even if this opinion is subject to challenge, she also bases her opinion on the MAP scores that followed that first one. Respondent's main point about the unreliability of the MAP scores to assess Student's achievement is that due to the absence of the accommodation after first grade it is not a reliable measure of his total achievement. That may be, but the issue here is not Student's total achievement. The issue is his ability to read, do math and write, and the value of the standardized assessment is to measure both his progress from the previous test and his level compared to national norms.

The evidence showed that Respondent also values the MAP after first grade, particularly the reading assessment, because, if given without accommodations, that allows student to be

identified as “not on track” pursuant to the Ohio Third Grade Reading Guarantee, and these results were used to qualify students for the more intensive reading interventions, such as the LLI program. This purpose was undermined by Respondent, as the IHO notes, when early in Student's second grade, educators signed a document exempting Student's compliance with the Ohio Guarantee. The IHO characterized that as the Respondent's acknowledgment early in second grade that Student would not be reading at grade level by the end of third grade. Also, the Respondent did not return Student to the additional intensive LLI reading program until February of his third grade.

As to Respondent's contention that the manifest weight of the objective data and extrinsic non-testimonial evidence shows Student made meaningful progress in all subject areas based on his potential, first, it is unclear why Respondent contends that the IHO must only rely on the extrinsic, non-testimonial evidence to support his conclusions, and, second, Respondent is unable to convince that the manifest weight of the the objective data and extrinsic non-testimonial evidence support a finding that Student made meaningful progress in all subject areas. Respondent disregards the rest of the evidence, including the documentary evidence of MAP scores, Student's Benchmark reading levels, and progress reports that show very little progress during these two IEP years.

For his analysis of the 2015-2016 IEP, the IHO was unable to assess the issue of meaningful progress due to the fact that the IEP year was only three months into it when Petitioners filed their complaint, and there were no assessments during that three month period because Petitioners opted out of any further Respondent assessments of Student. The IHO's decision about this last IEP will be considered in the next section.

There was sufficient evidence to support the IHO's conclusion that Petitioners proved by a preponderance of the evidence that Student failed to show meaningful progress on his 2013-2014

and 2014-2015 IEPs. Respondent's second and ninth assignments of error lack merit.

3. Appropriateness of Goals and Objectives

Respondent's third and seventh assignments of error are related and will be considered together. Respondent challenges the IHO's conclusion that Student's 2013-2014, 2014-2015, and 2015-2016 IEPs did not include appropriate goals and objectives to address Student's needs and that, in reaching his conclusion on the inappropriateness of the goals and objectives, he gave undue weight to Petitioners' experts and disregarded the extrinsic, non-testimonial evidence contained in the record.

The IHO concluded that Petitioners proved by a preponderance of the evidence that Respondent failed to develop the 2013-2014, 2014-2015 and 2015-2016 IEPs that addressed his needs, that these failures constituted procedural violations of O.A.C. 3301-51-07(H)(1)(c), and, caused a deprivation of educational benefit. IHO Decision, pps. 144, 149 and 158. The IHO further concluded that this failure of Respondent to develop these IEPs that stated goals and objectives with appropriate specially-designed instruction denied Student FAPE.

With respect to the 2013-2014 and 2014-2015 IEPs, the IHO based his decision on the deprivation of of educational benefit on Petitioners' having proved by a preponderance of the evidence that Student did not make meaningful progress as gauged by his potential. IHO Decision, pps. 144 and 149 . For the 2015-2016 IEP, he based his decision on the testimony of the experts, Green, Geib and Amend and other facts related to the failure of his third grade teacher to implement the specially-designed instruction, which he also found to be a procedural violation. IHO Decision, p. 158

FAPE for disabled children is provided pursuant to an IEP that provides special education and related services geared to the unique needs of the child that result from his disability. 20 U.S.C. §1412(a)(4). FAPE cases, thus, tend to be fact-specific cases. This case is no different.

In support of her contentions, Respondent argues that an IEP should not be judged in hindsight, that Petitioners were actively involved in Student's education, that Petitioners, one of whom had special expertise as a special education teacher with a reading endorsement, consented to all IEPs, that Petitioners ambushed Respondent with her late-obtained experts, that the first IEP incorporated the ETR recommendations, that the IHO ignored the extrinsic non-testimonial evidence, and that the IHO made most of his credibility findings to Petitioners' expert Green, who conducted no evaluation of Student.

Respondent further questions the IHO decision as not comporting with IDEA because: 1). IDEA does not guarantee any amount of academic proficiency but only that schools make a good faith effort to assist students to achieve a student's goals and 2). the determination of the reasonableness of an IEP should be evaluated as of the time written.

The IEP is a “written statement ... that is developed, reviewed, and revised in accordance with § 1414(d).” 20 U.S.C. § 1401(14). The Supreme Court in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), established a two-fold procedure for determining whether FAPE has been offered. First, has the state complied with the procedures set forth in the Act? And second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Id.* at 206. The Court went on to establish that IDEA does not require a school Respondent to provide the best possible educational program for a disabled child, but only an appropriate education at the public's expense. (See *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177 (6th Cir. 1996), citing *Rettig v. Kent City School Respondent*, 720 F.2d 463 (6th Cir. 1983). The educational benefit must be “meaningful,” not merely a “*de minimus*” educational benefit. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 853-854 , 862-863 (6th Cir. 2004), *cert. denied*, 546 U.S. 936, 110 LRP 46999 (2005).

In due process hearings, all IEPs are judged in hindsight, as that is typically the vantage

point that a hearing officer or court has. The relevant issue, in this hindsight review, is whether the IEP is reasonably calculated to enable the child to receive educational benefits.

In assessing the appropriateness of the goals and objectives in the 2013-2014 IEP, the IHO analyzed two factors: 1). did the IEP incorporate the recommendations of the ETR; and 2). did the Student achieve meaningful educational progress during the term of the IEP, as gauged by his potential. *Woods v. Northport Public Schools*, 487 Fed.Appx. 968 (6th Cir. 2012) (in order to constitute FAPE, the benefit received by the child must result in progress that is meaningful as gauged by his potential).

The IHO identified the primary consequence of Student's disability to be the inability to read at grade level, which also adversely affects his math ability (word problems). On the first factor, the ETR recommended that Student's needs were in the five areas of: reading comprehension, written expression, basic reading skill, math calculation, and math problem-solving. Further, the ETR recommended "explicit instruction in phonics." The 2013-2014 IEP did not incorporate goals or objectives on reading comprehension, applied math or phonics. The IHO's determination on Student's lack of meaningful progress has already been reviewed above. Based on this failure to incorporate goals addressed to Student's key deficits as identified in his ETR, and the lack of meaningful progress, the IHO determined that the goals and objectives of the 2013-2014 IEP were not appropriate because they failed to address Student's needs and that this was a procedural violation that caused a deprivation of an educational benefit. IHO Decision, p. 144.

In *Cypress-Fairbanks Independent School Respondent v. Michael F.*, 26 IDELR 303 (5th Cir. 1997) *cert. denied*, 522 U.S. 1047, 111 LRP 59224 (1998), a case cited by Respondent, the Fifth Circuit identified four factors to determine whether an IEP is reasonably calculated to enable the child to receive educational benefits:

1. The program is individualized based on the student's assessment and performance;
2. The program is administered in the LRE;

3. The key stakeholders provide the services in a coordinated and collaborative manner;
4. Positive academic and nonacademic benefits are demonstrated.

The Sixth Circuit has also stated that “[a]cademic results have been recognized as an important factor in determining whether an IEP is reasonably calculated to provide educational benefits.” *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 522 (6th Cir. 2003).

Respondent argues that that the first IEP incorporated Student's ETR recommendations and that it is not necessary to include every recommendation. The IHO's decision focused on the omission of key recommendations from the IEP; he did not fault the IEP for not including every recommendation

In assessing the appropriateness of the goals and objectives in the 2014-2015 IEP, the IHO analyzed the same two factors: 1). did the IEP incorporate the recommendations of the ETR; and 2). did the Student achieve meaningful educational progress during the term of the IEP, as gauged by his potential. This IEP profile section failed to describe Student's abilities to decode (phonics), reading comprehension, or fluency. Shortly after the IEP was signed, Respondent and Petitioner signed a document exempting Student from the Third Grade Reading Guarantee program, as previously discussed above. This IEP was amended in June, 2015, to add a phonics goal, but no additional time for his specially-designed instruction in phonics was added. The IHO's determination on Student's lack of meaningful progress for this year also has already been reviewed above.

Based on this failure to incorporate goals addressed to Student's key deficits as identified in his ETR, and the lack of meaningful progress, the IHO determined that the goals and objectives of the 2014-2015 IEP were not appropriate because they failed to address Student's needs and that this was a procedural violation that caused a deprivation of an educational benefit. IHO Decision, p. 149.

In assessing the appropriateness of the goals and objectives in the 2015-2016 IEP, the IHO

declined to review meaningful progress as discussed above, but he did review whether this IEP addressed Student's needs, as identified in his ETR and later assessments. He acknowledged that this IEP continued the phonics goal that had been added at the end of his second grade, but interpreted two remedies that the Respondent added this year as acknowledgment that the IEP did not address Student's needs: the teacher's October 1, 2015 RIMP plan for Student to enhance his reading, and his referral to the intensive LLI program in February. The IHO relied on the testimony of two experts, Green and Amend, and one independent assessor, Geib, to reach his conclusions about the shortcomings of the 2015-2016 IEP.

Green was qualified as an expert in the creation and evaluation of special education programs, the remediation of individuals with phonemic awareness issues and dyslexia, and compensatory education. Geib was a speech language pathologist with a Ph.D in education who treated Student at the KidsLink Neuro Behavioral Center. Amend was qualified as an expert in the teaching of multi-sensory structured language approaches to students with dyslexia. The IHO specifically found these three witnesses to be knowledgeable, confident and assured in their testimony on the educational instruction that would benefit Student and, thus, he gave their testimony significant weight.

Dr. Geib administered two tests to Student in third grade, the Clinical Assessment of Spoken Language (“CASL”) and the Phonological Awareness test (“PAT”). Results of the CASL showed that Student was solidly average to high average in some areas, showing he would have no problem using spoken language to access his curriculum. Results of the PAT showed that his phonemic awareness is way below average and Student is in the range of five years, six months to six years, six months.

In Student's third grade, Amend administered a WIST reading and spelling assessment, an assessment associated with the Wilson Reading Program. The results established that Student's

reading, spelling and sound/symbol knowledge were at a less than second grade level. Amend recommended a structured literacy program, such as Alphabetic Phonics or MTA Structured Literacy Program.

Based on her review of Student's special education history, Green concluded that Student was capable of closing the gap between him and his same-aged peers. Regarding this IEP, Green opined that: 1). the reading goal was not adequate to address the Student's needs in the area of reading because the use of sight words lists was not an appropriate way to teach phonics, there was no baseline data to establish where the Student's instruction should begin, and there was no information about his letter sound correspondence; 2). the reading goal should also have addressed Student's reading comprehension and fluency deficiencies; 3). the math goal lacked baseline data for her to determine whether this goal was appropriate; 4). the writing goal should have included relaying his thoughts on paper, not merely editing a writing; and 5). based on these goal deficiencies, Student would not receive any meaningful educational benefit from the reading, math and writing goals.

For the 2015-2016 IEP, the IHO relied on the history of the prior IEPs and expert opinion to reach his conclusion that Petitioners proved by a preponderance of the evidence that Respondent failed to develop a 2015-2016 IEP that addressed his needs, and that constituted a procedural violation of O.A.C. 3301-51-07(H)(1)(c), and caused a deprivation of educational benefit. IHO Decision, p. 158.

Respondent contends that Petitioners were actively involved in Student's education, that Petitioners, one of whom had special expertise as a special education teacher with a reading endorsement, consented to all IEPs, and that their consent bars them from challenging the IEPs. The IHO did not rule on this issue. In support of this contention, Respondent claims that it is well-established that Petitioners who have actively participated and consented to IEPs cannot later

challenge them.

Respondent cites to a previous case of this review officer (where parent's consent was found to bar an IEP claim), several Massachusetts cases, and a Minnesota case in support of this assertion. The Minnesota case is distinguishable as it interprets compliance with Minnesota statutes regarding conciliation and mediation of IDEA and is not squarely decided on parental consent. Although the Massachusetts cases reflect a view of barring IEP claims regarding appropriateness of goals where Petitioners consented, Petitioners are not barred from pursuing IEP implementation claims. Rather than demonstrating a well-established principle, the authorities cited by Respondent appear to be a minority view on consent. Petitioners cite to a later case of this review officer for the proposition that parents' consent to the IEP does not constitute a waiver of the IEP's deficiencies, particularly where they expressed their dissatisfaction with the IEP. This review officer is not persuaded by Respondent's authorities that IDEA bars Petitioners who have consented to IEPs from later filing due process complaints challenging the IEPs.

Admittedly, the fact that Student's mother had special expertise as a special education teacher with a reading endorsement raises more of a concern, but her expertise or experience was at the pre-school level. It is equally reasonable to conclude that, being a special education teacher, she may have been more likely to rely on the expertise of her fellow special education teachers who were qualified at Student's grade level. The record here showed that the initial evaluation was done at the behest of Petitioners, that they were meaningful participants in the IEP process, and the 2014-2015 IEP was amended to add a phonics goal at their request. In this case, Petitioners' consent to the IEP does not constitute a waiver of the IEPs' deficiencies, particularly here where they expressed their dissatisfaction with the IEPs.

Respondent claims that Petitioners ambushed Respondent with her late-obtained experts. IDEA places the burden of proof on claimants who file due process complaints, whether

Respondents or Petitioners. IDEA does not prohibit these claimants from obtaining experts to assist them in developing their evidence so that they are able to carry their burden of proof at the hearing. Respondent has not shown this to be an ambush. Here, the Petitioners obtained independent assessments and reviews by experts to help them figure out what was wrong with Student's programming and to assist them to prove their case. At the disclosure conference, the IHO specifically instructed the parties to be prepared to introduce evidence on compensatory education in the event that he did find there was a denial of FAPE.

Respondent also repeats her claim that the IHO ignored the extrinsic non-testimonial evidence, and made most of his credibility findings to Petitioners' expert, Green, who conducted no evaluation of Student. The extent of the IHO's review of the evidence has been previously discussed above. There is no merit to this claim. Also, the IHO did not solely make most of his credibility findings about Green. He found the three witnesses, Geib, Green, and Amend to be the witnesses whose testimony he most relied on. It appeared that the IHO was making that determination to distinguish why he relied on the opinions of certain experts or educators over others. That is his duty as a hearing officer. These findings were not unreasonable. His numerous findings of fact arising from the testimony of almost every witness showed that he relied on the credibility of numerous witnesses throughout the case.

Respondent further questions the IHO decision as not comporting with IDEA because: 1). IDEA does not guarantee any amount of academic proficiency but only that schools make a good faith effort to assist students to achieve a student's goals and 2). the determination of the reasonableness of an IEP should be evaluated as of the time written. In support of the first contention, Respondent cites to two 2nd Circuit cases. The IHO did not conclude that IDEA guarantees any amount of academic proficiency, nor did he dispute that an IEP should be evaluated as of the time written.

There is sufficient evidence to support the IHO's conclusion that the Petitioners proved by a preponderance of the evidence that Student's 2013-2014, 2014-2015, and 2015-2016 IEPs did not contain appropriate goals and objectives to address Student's needs, and that these procedural violations caused a deprivation of educational benefits.

4. Specially-designed Instruction

Respondent's fourth, fifth and eighth assignments of error relate to this topic and will be considered together. At the outset, it is noted that these assignments of error are basically statements of what Respondent did, rather than issues or assertions of how the IHO erred. Respondent states that the Respondent used appropriate, scientifically based methodologies of educational instruction, provided appropriate and intensive intervention aligned to all areas of Student's needs, and provided Student with systematic, sequential, explicit and multisensory instruction in reading, written expression and math, and he was taught by individuals properly certified to provide research-based interventions with fidelity.

These statements appear to pertain to the following two conclusions of the IHO. The IHO determined that Petitioners proved by a preponderance of the evidence that Respondent failed to use appropriate methods of instruction to the extent practicable in his 2013-2014 and 2014-2015 IEPs, and that this deprived Student of a meaningful educational benefit.⁵ IHO Decision, p. 161. The IHO in this conclusion incorporated all reasons set forth in his consideration of the issue of whether Student received meaningful educational benefit from his 2013-2014 and 2014-2015 IEPs.

The second relevant conclusion is the IHO's determination that Petitioners proved by a preponderance of the evidence that Respondent failed to provide the specially-designed instruction by an intervention specialist during the period when a substitute teacher, Simon, who was not a licensed intervention specialist, replaced Miller, causing Student to suffer educational harm. This

⁵It appears that the IHO inadvertently dropped the word "appropriate" from one of his conclusions on Issue 8, but the next paragraph clarifies what he meant as the word "appropriate" appears there.

was an eight week period during Student's second grade. For that reason, the IHO concluded that Respondent failed to provide appropriate and intensive intervention aligned to all areas of Student's needs (during that period). IHO Decision, p. 162.

The IHO based his decision on the appropriateness of the instruction on the Sixth Circuit *Deal* decision. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936, 110 LRP 46999 (2005). *Deal*, in considering a dispute between Petitioners and the Respondent over which methodology would be better for the autistic student there, stated “there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of FAPE.” *Id.*, at 861-862. The methodology issue in this case arises for the first time during the due process hearing as a result of witnesses who questioned whether the Respondent's selected methodologies were tailored to his needs. The IHO agreed with these experts that the Respondent's methodologies were not appropriate. The Sixth Circuit upholds his right to make such a determination as the IHO is “a representative of the state presumed to have both the educational expertise and the ability to resolve questions of educational methodology. *Id.*, at 865. This issue will surface again in the remedy section. Petitioners cite to a recent Second Circuit case discussing methodology in the context of IDEA's implementing regulations. *A.M. v. New York City Dep't of Education*, 117 LRP 979 (2d Cir., Jan. 10, 2017) (this inquiry requires courts to determine whether “the content, methodology, or delivery of instruction” have been narrowly tailored to “address the unique needs of the child that result from the child's disability.” 34 C.F.R. §300.39(b)(3)(i)).

In support of her first contention here, Respondent claims that methodologies do not have to be included in the IEP, and that Student's program doesn't have to be the best but only needs to be appropriate to implement the IEP. The Respondent does not relate that argument to any ruling of the IHO's, as the IHO did not reach any conclusion to the contrary.

In further support, Respondent asserts that there were no allegations that the Respondent failed to implement the IEPs, nor that the Respondent failed to do so. This is not accurate. As discussed above, the IHO did determine that during a certain period of time in the second grade the Respondent did not implement Student's IEP, and, in the third grade, his regular education teacher did not furnish Student with specially-designed instruction as the IEP required her to do.

The IHO did find that the Respondent used scientifically-based methodologies of educational instruction, except for sight words, which he found not to be a research-based reading program. But this was not the issue before the IHO. The IHO found that the Respondent used specially-designed instruction, but the IHO concluded that such specially-designed instruction was not appropriate because it did not address Student's needs. The IHO's determination on the issue of whether the Respondent used appropriate methods of instruction was expressly linked to his determination on the appropriateness of the goals and objectives in the IEPs, which has been discussed above. Whether the Respondent used scientifically-based methodologies of educational instruction is not disputed and is not relevant to the issue of whether the Respondent provided Student with specially-designed instruction that was **appropriate** to address Student's needs.

In its second related contention that the Student's IEPs provided appropriate and intensive intervention aligned to all areas of Student's needs, the IHO found that the goals and objectives were inappropriate, not that the teacher's interventions were deficient, other than his determination on the absence of adequate interventions during the eight week period discussed above. Any other ruling on the interventions related to the IHO's ruling on the inappropriateness of the goals and objectives in Student's IEPs.

Respondent further argues on this contention that IEPs were based on information available to the IEP team at the time developed, that Petitioners do not have a right to compel a specific program or employ a specific methodology, that there was no social/emotional goal because there

was no manifestation of those behaviors occurring in the classroom, and Student benefited by the LLI program.

The IHO did not dispute that IEPs were based on information available to the IEP team at the time developed. Respondent had the ETR completed by the time of the first IEP, and as stated above, Respondent did not include key recommendations from the ETR during that IEP. The IHO also noted that Respondent removed a page from the test results that he shared with Petitioners that specifically recommended two programs that would be very appropriate for Student based on his test profile. The IHO did not determine that Petitioners have a right to compel a specific program or employ a specific methodology during IEP meetings. The ability of an IHO to determine appropriate equitable remedies once a denial of FAPE is established is a different issue.

As to Respondent's claim that there was no social/emotional goal in any of his IEPs because there was no manifestation of those behaviors in the classroom, Respondent fails to cite to any part of the decision where the IHO ruled that there should have been. There was no finding that Student did not benefit by the LLI intervention. The decision was based on the preponderance of the evidence that he did not show meaningful educational progress as gauged by his potential, not that Student did not show any progress or that teachers, in general, failed to implement his IEPs.

Respondent's third statement here, that Student was provided with systematic, sequential, explicit and multisensory instruction in reading, written expression and math and that he was taught by individuals properly certified to provide research-based interventions with fidelity, does not directly reference a specific IHO conclusion. It is instead an additional argument about the appropriateness of Student's educational programming, which has been thoroughly discussed above.

There is sufficient evidence to support the IHO's conclusion that the Petitioners proved by

a preponderance of the evidence that Student was denied a FAPE by the Respondent's failure to use appropriate methods of instruction to the extent practicable in his 2013-2014 and 2014-2015 IEPs, that this deprived Student of a meaningful educational benefit; it failed to provide the specially-designed instruction by an intervention specialist during the period when a substitute teacher replaced Miller, causing Student to suffer educational harm. For that reason, the IHO further concluded that Respondent failed to provide appropriate and intensive intervention aligned to all areas of Student's needs (during that period).

5. Compensatory Education

Respondent contends that the IHO's compensatory education award was not warranted because: 1). there was no denial of FAPE; 2). it should only be ordered if a gross violation is established and it was not; 3). the award is arbitrary; 4). it is not supported by case law; 5). the award will harm Student; 6). the award is excessive in length and inconsistent with the IHO's ruling on ESY; and 7). the counseling award was inappropriate when based on an expert who was not a psychologist.

The IHO's compensatory education award has been stated earlier in this opinion in the due process hearing section. In reaching his compensatory education award, the IHO reviewed the applicable case law and reviewed the recommendations of the experts that he had relied on, in part, in resolving the substantive issues in the case. He concluded that the Respondent had denied Student FAPE for the two year period prior to the filing of the due process complaint..

Once a violation of the IDEA is established, Petitioners are entitled to appropriate relief. 20 U.S.C. 1415 (i)(2)(C)(iii). This relief includes compensatory education. An appropriate award of compensatory education is “relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Petitioners of Student W. v. Puyallup Sch. Dist.*, No. 3, 31 F.3d 1489, 1497 (5th Cir. 1994). Courts and hearing officers may award educational services.

Compensatory education is an equitable remedy designed to remedy past deficiencies. Compensatory education is an award of education services that are offered prospectively to compensate for a previously inadequate program. *Reid v. Dist of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005) (reversing a Respondent court's approval of a hearing officer's hour-per-day calculation of the compensatory education award).

Respondent's first contention that there was no denial of FAPE will be disregarded based on this decision affirming the IHO's conclusions that Respondent denied Student FAPE. Respondent next argues that compensatory education should only be ordered if a gross violation is established and it was not, citing to two 1988 and 1990 Second Circuit cases. Respondent, in her brief seems very aware of the applicable standards for compensatory education in this circuit. In his analysis, the IHO relied in his analysis on Sixth Circuit precedent, none of which adopts such a standard. *Bd. of Educ. of Fayette Co.*, 478 F.3d 307 (6th Cir. 2007), relying on *Reid v. Dist of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005); *Woods v. Northpoint Public School*, 487 Fed.Appx. 968 (6th Cir. 2012), citing with approval *McLaughlin v. Holt Pub. Schs. Bd. of Holt Pub. Schs. Bd. of Educ.*, 320 F.3d 663, 673 (6th Cir. 2003); *G ex. rel. G v. Forest Hills Sch. Dist. Bd. of Educ.*, 68 IDELR 33 at p. 5 (6th Cir. July 15, 2016).

Respondent next argues that the the award is arbitrary.. The designing of a remedy requires a fact-specific exercise of discretion either by the Respondent court or a hearing officer tailored to the unique needs of the student. *Reid*, at 524. The IHO carefully reviewed the applicable legal precedent and findings of fact and then reviewed the consistent conclusions of both the school psychologist, Bendo, and the Petitioners' expert Green that, based on his overall average abilities overall and his high average verbal abilities Student has the potential to read at grade level. Only two witnesses testified about what education would be required to remediate Student, or to close the gap with his peers. The IHO considered both somewhat differing opinions, one of which

recommended five days a week remediation in reading for at least four years, 12 months a year, and the other recommending remediation in reading, math and written expression for two to three years, five days a week for 12 months a year, along with considering the Respondent's expert's caution that, based upon his IQ, Student will have a considerably more difficult time than a typically developing student to reach the same level as his academic peers.

Although Respondent challenges the IHO's reliance on Green, Respondent does not point to any place in the record where Green's recommendations were challenged, nor did Respondent offer any recommendations as to what compensatory education award would be appropriate. The IHO chose to follow Green's recommendation, awarding the recommended services over a two year period. This order was not arbitrary, but was based on the IHO's fact-specific exercise of discretion tailored to the unique needs of the student, as IDEA requires.

Respondent next contends that the award is not supported by case law, arguing that the *Wood* court awarded less compensatory education for more egregious violations over two years. As has been stated, these cases require a fact-specific exercise of discretion tailored to the unique needs of the student, as well as the recommendations for what will remediate for the loss of appropriate services. Thus, it would be very difficult to compare an award in one case with another or the level of egregiousness in the denial of FAPE. The IHO did not adopt a rote hour for hour compensatory award, which case law does not support.

Respondent next contends that the award will harm Student because it will remove Student from his core curriculum for more than half of a normal school day, and putting Student alone in a resource room with a for more than three hours per day could lead to Student feeling isolated and unwelcome. As Petitioners point out, reading, writing and math are part of Student's core curriculum also. Respondent distorts the facts of the award here. There is nothing in the award to specify Student is ever alone. The award specifies he must be in a resource room for three-and-a-

half hours per day, and he has 1:1 services with the designated educators (tutors are not mentioned) for some of that time, but 60 minutes is in a small group. This review officer will correct what appears to be a clerical error in the TouchMath portion of the award. Green's recommendation was that Student receive "TouchMath instruction" "with an intervention specialist in a small group of up to three students," and she did not require 1:1. IHO Decision, p. 112. The IHO indicated he was adopting Green's recommendation, and the other provisions were consistent with her recommendation, so the award of TouchMath instruction is modified to reflect the above recommendation of Green.

Respondent next contends that the award is excessive in length and inconsistent with the IHO's ruling on ESY. Green does support her opinion with a recommendation that Student receive ESY services, and Respondent is correct that the IHO found that Petitioners did not prove Student was entitled to ESY services in the past summers. That is a different question than whether the compensatory education award should follow Green's remediation recommendation as stated because the goal here is to remediate in the shortest period of time. Receiving the benefit over a consecutive 24 month period, rather than a 24 month period interrupted by summers would achieve its goal for Student and relieve the Respondent's obligation sooner, which is an advantage.

Finally, Respondent argues the counseling award is inappropriate when based on an expert who was not a psychologist. This award was not sought as a remedy by Petitioners, but is based on Green's recommendation, as an educator and because it is related to her overall recommendation and arises from her review of the record and observations of Student's high level of anxiety by the school psychologist during the conduct of his evaluation, as well as by Geib and Amend during their assessments.

The IHO did not err in his compensatory education award.

Admittedly this is a fairly demanding award for the Student, and it cannot be known for

certain when Student will close the gap with his same-aged peers. Both parties are encouraged to collaborate on this relief award, and make any changes that they agree to in writing during the term of the award.

V. CONCLUSION

Based on the findings of fact, and considering the Respondent's appeal grounds and relevant law, this review officer concludes that the IHO properly determined that Petitioners proved by a preponderance of the evidence that the Respondent denied Student FAPE: 1). by changing Student's placement without the prior knowledge that the required notice would have provided to the Petitioners; 2). by failing to reconvene an IEP team meeting when the Respondent knew that Student's progress was inadequate to address that issue; 3). by failing to state goals and objectives in Student's 2013-2014 IEP to address his needs; 4). by failing to state goals and objectives in Student's 2014-2015 IEP to address his needs; 5). by failing to state goals and objectives in Student's 2015-2016 IEP to address his needs; 6). by failing to use appropriate methods of educational instruction to the extent practicable; and 6). by failing to provide appropriate and intensive intervention aligned to all areas of Student's needs.

The review officer also affirms the IHO's finding that Petitioners are the prevailing party on Claims ## 2, 3, 4, 5, 6, 8 and 9, and that Respondent was the prevailing party on Claims ##1 and 7 (not discussed in this review opinion).

As relief, the IHO's compensatory education awarded Petitioners and Student is modified in Item 3 to delete the reference to "one-on-one services" for the TouchMath instruction and otherwise is affirmed, as follows:.

1. Intensive interventions in Reading, one-on-one, 90 minutes per day, using the Wilson Reading Program (WRP), 12 months per year for two years. This intervention to be provided one-on-one to the Student in a resource room by an individual who is certified in the WRP.
2. To remediate his writing deficiency, one hour per day, five days a week,

of one-on-one writing instruction in a resource room with an intervention specialist, utilizing Framing Your Thoughts, 12 months per year for two years.

3. TouchMath instruction 60 minutes per day, five days per week, 12 months per year for two years in a resource room with an intervention specialist in a small group of up to three students.
4. Counseling services with a licensed social worker, or another licensed professional with comparable expertise as a social worker, to target Student's anxiety. Those counseling services to be provided twice a week, for 30 minutes per session at the counselor's office or in a resource room at the school, whichever the counselor determines, for 12 consecutive months or until the counselor determines that this service is no longer necessary, whichever is sooner. If the counseling service is provided outside of the school, the Respondent shall reimburse Petitioners for their transportation expenses, which expenses shall be reimbursed at the applicable IRS approved mileage rate, upon submission by Petitioners to Respondent of Petitioners' written log of mileage to and from the counselor's office. Respondent shall pay such mileage reimbursement to Petitioners within 30 days after each receipt of Petitioners' mileage logs.

Finally, the IHO's order that Respondent convene a meeting of the Student's IEP team within 14 days is found to be moot, including all aspects of that order, based on the Respondent's statement in her Notice of Appeal that a new IEP has been signed by the parties. Petitioners did not dispute that statement and are found to have waived that issue.

The IHO Decision is affirmed, as modified here.

/s/ Monica R. Bohlen
Monica R. Bohlen 0017983
State Level Review Officer
10 Judith Street
Charleston, SC 29403
(513) 324-3954

CERTIFICATION OF DECISION AND ORDER

I, Monica R. Bohlen, am a State Level Review Officer (SLRO), for the Ohio Department of Education (ODE). I have served as a SLRO in the matter of Student G and the Akron Public Schools, SE 3242-2016. I hereby certify that the attached document is a true, accurate, and complete copy of the Final Decision and Entry which I issued on February 2, 2017, in the matter of the State Level Review regarding Student G and the Akron Public Schools.

/s/ Monica R. Bohlen
Monica R. Bohlen
State Level Review Officer (SLRO)

February 2, 2017
Date

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served on this 2nd day of February, 2017, by ordinary mail upon:

Mr. David James
Superintendent
Akron Public School
70 N. Broadway St.
Akron, OH 44308

and electronically upon:

Rhonda Porter
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Mr. and Mrs. Donald G
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/s/ Monica R. Bohlen
Monica R. Bohlen
State Level Review Officer (SLRO)

NOTICE OF OPPORTUNITY TO BRING CIVIL ACTION TO APPEAL DECISION OF STATE LEVEL REVIEW OFFICER

If you are not satisfied with the findings and decision of the state level review officer, you have the right to bring a civil action to appeal the decision, in writing, under Revised Code Section 3323.05(H) and Rule 3301-51-05(K)(17). You may file your civil action:

- a. In the court of common pleas of the county in which the child's school Respondent of residence is located within **45 days** of notification of the order of the state level review officer, under Chapter 119. of the Revised Code, as specified in Revised Code Section 3323.05(H), **or**
- b. In a Respondent court of the United States within **90 days** from the date of the decision of the state level review officer regardless of the amount in controversy, as specified in 20 U.S.C. 1415(i)(2) and 34 C.F.R.

Filing in Common Pleas Court

If you bring your civil action in Ohio common pleas court, within the **45 days** of notification of the order of the state level review officer, you must file:

1. A Notice of Appeal setting forth the order being appealed from and stating that the SLRO's order is not supported by reliable, probative, and substantial evidence. If you wish, you may provide detail regarding the grounds for your appeal.
2. The Notice of Appeal must be filed with **both** the clerk of the court of common pleas and the Ohio Department of Education **within the 45 day timeline**. The address for the Ohio Department of Education is:

Ohio Department of Education
Office for Exceptional Children
Procedural Safeguards Section
25 South Front Street, Mail Stop #202
Columbus, Ohio 43215-4183

3. You must mail a copy of the notice of appeal to the other party in the due process hearing.

Filing in Federal Respondent Court

If you choose to bring a civil action in the United States Respondent court, **within 90 days from the date of the decision of the SLRO**, you must file your civil action in accordance with the court's requirements. You should call the clerk for the United States Respondent court to determine that court's filing requirements.