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3 [REDACTED], a Student, by and through Parent
4 [REDACTED],
5 Petitioners,
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7 v.
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9 Isaac Elementary School District,
10 Respondent.

4 Petitioners,
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1 meeting, and failed to provide proper meeting notice. Parent also requested
2 compensatory education based on Respondent School District's failure to comply with
3 stay put. The law governing these proceedings is the Individuals with Disabilities
4 Education Act ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-
5 authorized and amended in 2004),² and its implementing regulations, 34 Code of
6 Federal Regulations ("C.F.R.") Part 300, as well as the Arizona Special Education
7 statutes, Arizona Revised Statutes ("A.R.S.") §§ 15-761 through 15-774, and
8 implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through R7-2-
9 406.

10 Procedural History

11 Petitioners filed the due process complaint on August 7, 2014. The complaint
12 alleges that Respondent School District did not offer Student a free appropriate public
13 education ("FAPE") following a June 3, 2014 IEP meeting, focusing particularly on the
14 proposed move from Student's current school to a different school and the method
15 used to make that decision. Petitioners seek an order that Student remain at the
16 private day school placement in effect before the proposed move at Respondent
17 School District's expense. Respondent School District denies the claims. When the
18 parties could not resolve the matter during the resolution period, the matter proceeded
19 to hearing.

20 Evidence and Issues at Hearing

21 The parties presented testimony and exhibits at a formal evidentiary hearing
22 held on February 4, 5, 6, and 25, 2015. The parties presented testimony from the
23 witnesses listed above³ and offered into evidence Petitioners' Exhibits 1 through 18,
24 22, 30 through 36, 40 through 45, and selected pages of 20⁴ and 21⁵ and Respondent
25 School District's Exhibits A, D, F, G, H, J through O, Q, R, T through V, and selected
26 pages of Exhibits S⁶ and W.⁷ Following the hearing, Respondent School District filed a
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28 ² By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of
29 2004," IDEA 2004 became effective on July 1, 2005.

30 ³ Transcripts of the testimony have been added to the record.

⁴ Pages 1-10, 41, 46-47, 49-50, 95, 99, 103, 105 of Exhibit 20 were admitted.

⁵ Pages 177-89 of Exhibit 21 were admitted.

⁶ Pages 483 and 487 of Exhibit S were admitted.

1 Motion to Supplement in which Respondent School District sought to have Exhibits X
2 and Y admitted to rebut arguments Petitioners presented on the last day of the hearing
3 that had not previously been raised. Respondent School District's motion was granted
4 and the Exhibits were made part of the record. However, these exhibits did not affect
5 the outcome of this decision.

6 After the Exhibits and testimony were admitted, the parties argued to the
7 tribunal, in written memoranda, the following issues:

8 1) Whether Desert Oasis, a private day school operating on a
9 Respondent School District campus, is an appropriate placement/location
10 for Student.

11 2) Whether Respondent School District predetermined Student's move
12 from [REDACTED] ([REDACTED]) to Desert Oasis starting in
13 the fall of 2014.

14 3) Whether Respondent School District failed to provide a proper
15 Meeting Notice of the June 3, 2014 IEP meeting at which the move from
16 [REDACTED] to Desert Oasis was decided.

17 4) Whether the June 3, 2014 IEP meeting was properly constituted.

18 5) Whether Respondent School District denied Parent meaningful
19 participation in the June 3, 2014 IEP meeting.

20 During the pendency of this matter, an alleged violation of stay put was also
21 raised. After discussion at a prehearing conference, the parties agreed that the issue
22 of a stay put violation would be considered as part of the decision in this matter without
23 Petitioners having to amend the due process complaint.

24 Parent argued that there were both procedural and substantive violations of the
25 IDEA resulting in the denial of a FAPE. Her main contentions were that the
26 determination regarding which school Student would attend after the June 3, 2014 IEP
27 meeting was predetermined, that she was not able to participate in making the
28 decision, and that the placement/location chosen by Respondent School District for
29 Student at that meeting was not appropriate. Respondent School District defends its
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⁷ Pages 1 through 15 of Exhibit W were admitted.

1 actions, arguing that a FAPE has been offered to Student and that there has been no
2 IDEA violation.

3 The Administrative Law Judge has considered the entire record, including the
4 testimony and Exhibits,⁸ and now makes the following Findings of Fact, Conclusions of
5 Law, and Order finding both a procedural and substantive violation of the IDEA.

6 **FINDINGS OF FACT**

7 1. Student is a seventh-grader who has been diagnosed with Autism
8 Spectrum Disorder.⁹

9 2. Student has been a student at Respondent School District for a number of
10 years. In 2011, the IEP Team determined that Respondent School District could no
11 longer provide an appropriate education for Student at any of its schools and agreed
12 that Student should be placed in a Level D placement.¹⁰ Level D placement is defined
13 by the Arizona Department of Education ("ADE") as "Public or Private Separate Day
14 School for greater than 50% of the school day."¹¹

15 3. Student was placed at [REDACTED] [REDACTED] is primarily a facility for
16 [REDACTED], but it also operates a program certified by the ADE as a private day
17 school.¹² [REDACTED] provides services for approximately 230 disabled adults and 25
18 students in the same building.¹³

19 4. Student's 2012 and 2013 Annual IEPs also provide for a Level D
20 placement.¹⁴

21 5. In 2013, Student was reevaluated to determine his ongoing eligibility for
22 special education services. It was determined that Student remained eligible for
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26 ⁸ The Administrative Law Judge has considered each admitted Exhibit, even if not mentioned in this
27 Decision. The Administrative Law Judge has also considered the testimony of every witness, even if the
28 witness is not specifically mentioned in this Decision.

29 ⁹ Exhibit G.

30 ¹⁰ Exhibit 8 at Lomeli0403.

¹¹ Exhibit 35 at 3.

¹² TR 1 at 25:3-21.

¹³ TR 1 at 28:19-24.

¹⁴ Exhibit A at IESD349; Exhibit F at IESD382.

1 special education with a primary eligibility category of Autism and a secondary category
2 of Speech/Language Impairment.¹⁵

3 6. In January 2014, the Student's IEP Team met for an annual review and all
4 members agreed to the IEP drafted at that time. The January 2014 IEP provided for a
5 Level D placement.¹⁶ The IEP provided 30 minutes of daily instruction in each of the
6 following areas: Math, Language, Reading, and Writing. The IEP also provided for
7 related services in the following areas: Speech Therapy for 120 minutes per month and
8 Occupational Therapy for 30 minutes per month.¹⁷

9 7. In the Spring of 2014, Respondent School District contracted with Desert
10 Heights Academy (DHA) to open a location on a Respondent School District campus.¹⁸
11 DHA operates several locations, including Desert Oasis, a school for children with
12 developmental disabilities. Desert Oasis was scheduled to open in time for the 2014 –
13 2015 school year.¹⁹

14 8. On May 20, 2014, the District issued a Meeting Notice to Parent
15 indicating an IEP meeting would be held on June 3, 2014, "to Review the IEP" and that
16 Respondent School District "anticipate[d] that the following people may be in
17 attendance": Parent/Guardian/Surrogate, Special Education Teacher, General
18 Education Teacher, PEA Representative, Individual to interpret instructional
19 implications, Agency Representative, and Agency Representative.²⁰

20 9. On June 3, 2014, an IEP meeting was held with Parent. In attendance
21 were Parent, DO Special Education Teacher, Erica Avila Hlavaty, Susan McDevitt, [REDACTED]
22 [REDACTED] Special Education Teacher, and Lindsay Perez.²¹

23 10. At the June 3, 2014 IEP meeting, Parent was provided information
24 relating to the Desert Oasis program and Respondent School District proposed moving
25 Student from [REDACTED] to Desert Oasis. At the meeting, no changes were made to
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27 ¹⁵ Exhibit 10.

28 ¹⁶ Exhibit G at IESD402.

29 ¹⁷ Exhibit G at IESD411.

30 ¹⁸ Exhibit 21 at IESD177.

¹⁹ Exhibit 21 at IESD178-180

²⁰ Exhibit J.

²¹ Exhibit K.

1 Student's IEP. His goals, service minutes, related services, and accommodations
2 remained the same.²²

3 11. At the meeting, Parent raised concerns that Student had been poorly
4 treated when he was placed at a district campus before being placed at [REDACTED]
5 Respondent School District assured Parent that Desert Oasis hired its own teacher and
6 paraprofessionals. Parent did not raise any other concerns or objections and asked no
7 further questions.²³

8 12. On July 1, 2014, Respondent School District issued a Prior Written Notice
9 ("PWN") to Parent stating "[t]he team proposes to change the LOCATION of [Student's]
10 special education services for the 2014 – 2015 school year."²⁴

11 13. In July 2014, the Desert Oasis Program Director contacted Parent to fill
12 out paperwork and schedule a visit. After several attempts to make arrangements,
13 Parent told the Desert Oasis Program Director that she would not allow Student to
14 attend Desert Oasis for the 2014 – 2015 school year.²⁵

15 14. On August 7, 2014, Counsel for Petitioners filed the instant Due Process
16 Complaint.

17 15. After filing the complaint, Student attended [REDACTED] for approximately 11
18 days in the fall semester.²⁶ Petitioners raised the issue of stay put with counsel for
19 Respondent School District.

20 16. Because Respondent School District maintained that the move from
21 [REDACTED] to Desert Oasis was a change in location instead of a change of placement,
22 counsel for Respondent School District asserted that Student's stay put placement
23 while this matter was pending was at Desert Oasis. Therefore, Respondent School
24 District refused to pay for Student's attendance at [REDACTED]

25 17. On or about August 30, 2014, Counsel for Petitioners sent an email to
26 Counsel for Respondent School District stating that "I don't agree that Desert Oasis is
27

28 ²² Exhibit L and Exhibit M.

29 ²³ Exhibit L.

30 ²⁴ Exhibit M.

²⁵ TR 1 at 108:22-109:6.

²⁶ TR 3 at 718:16-24.

1 the stay put placement. Thus, I will proceed by way of motion since the district will not
2 agree to fund [REDACTED] as the stay put placement."²⁷

3 18. On or about October 14, 2014, Counsel for Petitioners sent a letter to
4 Counsel for Respondent School District indicating that she would be proceeding with
5 the motion for stay put based on some documents she had received in response to a
6 subpoena. Counsel also advised that because Parent was unable to provide
7 transportation, Student had missed the majority of the fall semester.²⁸

8 19. On October 24, 2014, Counsel for Petitioners filed a motion for stay put.

9 20. Following subsequent responses and a motion to strike, this tribunal
10 issued an order that the stay put placement for Student during the pendency of this
11 matter was at [REDACTED]
12 [REDACTED]

13 21. Student's classroom at [REDACTED] has students aged 5 to 12, and Student
14 is one of the oldest in the class.²⁹

15 22. Special Education Teacher testified that students in the classroom had
16 different disabilities and levels of performance, but Student preferred to interact with
17 students at his level.³⁰ Student tends not to interact with students who have emotional
18 disabilities or are considerably younger than him.³¹

19 23. [REDACTED] had a "Best Buddies" program in which general education
20 students came into the classroom. Student was offered the opportunity to interact with
21 the general education students, but he refused.³²

22 24. [REDACTED] students take field trips into the community, such as to
23 WalMart.³³ Student attends monthly assemblies with over 100 people present,
24 including adults, that could be very loud.³⁴

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27 ²⁷ Exhibit 42.

²⁸ Exhibit 43.

²⁹ TR 3 at 586:11-14.

³⁰ TR 3 at 536:19-537:10.

³¹ TR 3 at 558:5-7.

³² TR 3 at 590:15-22.

³³ Exhibit S at IESD487.

³⁴ TR 3 at 627:6-13; 668:16-20.

1 25. Student had experienced a great deal of change during his time at
2 [REDACTED] including monthly rotation of aides,³⁵ substitute teachers,³⁶ four different
3 occupational therapists,³⁷ and at least four different speech-language therapists.³⁸ At
4 [REDACTED] Student would also transition to a different classroom during the 2015 – 2016
5 school year, if not before.³⁹ Throughout these changes, Student was described as
6 “behavior-free” in the two preceding years in addition to being “very agreeable” and
7 able to “go with the flow.”⁴⁰

8 26. While Student has been attending [REDACTED] Respondent School District
9 has been providing transportation to and from school.⁴¹

10 Desert Oasis

11 27. At the time of the hearing, Desert Oasis had students in 7th and 8th
12 grade.⁴² The students have intellectual or developmental delays, two of which have
13 autism.⁴³

14 28. Desert Oasis, while on a campus within Respondent School District, has a
15 separate bus stop away from the other students on campus.⁴⁴ The students enter and
16 exit the Desert Oasis classrooms through a separate entrance not available to the
17 general education students.⁴⁵ Desert Oasis has two private classrooms that are
18 attached through a private restroom.⁴⁶ The other classroom is a sensory room to help
19 students obtain needed stimulation or deescalate if necessary.⁴⁷ Desert Oasis has a
20 dedicated playground for the students that is not accessible to the general education
21 students.⁴⁸

22
23 ³⁵ TR 2 at 604:20-605:8.

24 ³⁶ TR 3 at 69:1-5.

25 ³⁷ TR 3 at 597:4-598:13.

26 ³⁸ TR 3 at 597:4-598:13.

27 ³⁹ TR 3 at 598:23-599:5; TR 3 at 700:7-18.

28 ⁴⁰ TR 2 at 509:6, 15-16.

29 ⁴¹ TR 2 at 434:1-7.

30 ⁴² TR 2 at 430:2-4.

⁴³ TR 2 at 429:23-430:1.

⁴⁴ TR 1 at 170:17-23.

⁴⁵ TR 1 at 170:17-23.

⁴⁶ TR 1 at 168:10-12.

⁴⁷ TR 1 at 168:19-169:1.

⁴⁸ TR 1 at 169:2-13.

1 29. Desert Oasis has one teacher and two paraprofessionals to staff the
2 classroom.⁴⁹ The Desert Oasis classroom has computers and assistive technology
3 available for the students.⁵⁰

4 30. Students at Desert Oasis have the opportunity to interact with general
5 education peers, but are not required or forced to do so.⁵¹ The students who were
6 placed at Desert Oasis had been gradually increasing their exposure and interaction
7 with general education students during the school year.⁵²

8 31. Desert Oasis is closer to Student's home than [REDACTED] Respondent
9 School District would continue to provide transportation to Student when he attends
10 Desert Oasis.⁵⁴

11 32. The Desert Oasis Teacher testified Desert Oasis would be able to
12 implement Student's IEP.⁵⁵

13 33. DHA is a limited liability corporation registered in Arizona.⁵⁶ Dr. Redivo,
14 the Executive Director of DHA, is not associated with Respondent School District as an
15 employee or agent.⁵⁷ No employee or governing board member of Respondent School
16 District is a member of DHA or the DHA leadership team.⁵⁸ DHA does not employ any
17 employees or governing board members of Respondent School District.⁵⁹

18 34. The contract between Respondent School District and DHA identifies
19 DHA as an independent contractor.⁶⁰ DHA employs the Desert Oasis teacher and
20 instructional aides.⁶¹ DHA provides the training for the Desert Oasis staff.⁶²

21 35. On the final day of hearing, Petitioners raised an argument that Desert
22 Oasis had not been approved as a private day school by the ADE. Counsel

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24 ⁴⁹ TR 1 at 171:4-7.

⁵⁰ TR 1 at 248:17-249:1; TR 2 at 424:18-24.

⁵¹ TR 1 at 132:17-18.

⁵² TR 1 at 130:6-7.

⁵³ TR 2 at 455:5-14.

⁵⁴ TR 2 at 434:1-7.

⁵⁵ TR 1 at 244:1-6.

⁵⁶ TR 1 at 73:11-13.

⁵⁷ TR 1 at 80:18-20.

⁵⁸ TR 1 at 73:17-25.

⁵⁹ TR 1 at 74:1-4.

⁶⁰ Exhibit 21 at IESD184.

⁶¹ Exhibit 21 at IESD185.

acknowledged that this issue had not been raised at any time following the filing of the due process complaint and had not been discussed during any resolution sessions.

36. The contract between Respondent School District and DHA required that Desert Oasis receive approval from ADE.⁶³ At hearing Dr. Redivo testified that DHA had complied with the contract and that Desert Oasis was an approved private day school.⁶⁴ Dr. Avila also testified that Desert Oasis was, to her knowledge, an approved private day school.⁶⁵

37. Dr. Avila also testified that Respondent School District had received state funding for the students in private placement at Desert Oasis, which would not occur if Desert Oasis was not approved by ADE.⁶⁶

38. Petitioner presented a document purported to be a printout from the ADE website listing the "Approved Private Day Schools" for the 2014 – 2015 school year.⁶⁷ The document includes DHA, but does not include Desert Oasis. Petitioner did not call any witnesses from ADE to testify as to the veracity and accuracy of the list or to explain how the relationship between DHA and Desert Oasis may affect the approval status of Desert Oasis.⁶⁸

CONCLUSIONS OF LAW

1. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.⁶⁹ The standard of proof is "preponderance of the evidence," meaning evidence showing that a particular fact is "more probable than not."⁷⁰ Therefore, Petitioners bear the burden of proving their claims and complaints by a preponderance of evidence.

⁶² TR 1 at 167:13-25.

⁶³ Exhibit W at DHS000001.

⁶⁴ TR 1 at 82:1-12.

⁶⁵ TR 4 at 801:8-10; 807:2-6, 17-19.

⁶⁶ TR 4 at 800:22-801:2.

⁶⁷ Exhibit 40.

⁶⁸ Petitioners indicated they attempted, days before the final day of hearing, to subpoena an employee of ADE to testify regarding the list, but that the employee had left ADE suddenly and no other employee was able to give testimony about the list.

⁶⁹ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

⁷⁰ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,

2. This tribunal's determination of whether or not Student received a FAPE must be based on substantive grounds.⁷¹ If a procedural violation is alleged and found, it must be determined whether the procedural violation either (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit.⁷² If one of the three impediments listed has occurred, the child has been denied a FAPE due to the procedural violation.

FAPE

3. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a FAPE that meets their individual needs.⁷³ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.⁷⁴ To do this, school districts must identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification, assessment and placement of students who need special education, and seeks to ensure that they receive a free appropriate public education. A FAPE consists of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."⁷⁵ The IDEA mandates that school districts provide a "basic floor of opportunity," nothing more.⁷⁶ It does not require that each child's potential be maximized.⁷⁷ A child receives a FAPE if a program of instruction "(1) addresses his unique needs, (2) provides adequate support services so he can take advantage of the

437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

⁷¹ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

⁷² 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

⁷³ 20 U.S.C. § 1400(d); 34 C.F.R. § 300.1.

⁷⁴ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

⁷⁵ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

⁷⁶ *Id.* at 200.

⁷⁷ *Id.* at 198.

educational opportunities and (3) is in accord with an individualized educational program.”⁷⁸

The IEP

4. Once a child is determined eligible for special education services, a team composed of the child’s parents, teachers, and others formulate an IEP that, generally, sets forth the child’s current levels of educational performance and sets annual goals that the IEP team believes will enable the child to make progress in the general education curriculum.⁷⁹ The IEP tells how the child will be educated, especially with regard to the child’s needs that result from the child’s disability, and what services will be provided to aid the child. The child’s parents have a right to participate in the formulation of an IEP.⁸⁰ The IEP team must consider the strengths of the child, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the child.⁸¹ To foster full parent participation, in addition to being a required member of the team making educational decisions about the child, school districts are required to give parents written notice when proposing any changes to the IEP,⁸² and are required to give parents, at least once a year, a copy of the parents’ “procedural safeguards,” informing them of their rights as parents of a child with a disability.⁸³

5. The IEP team must consider the concerns of a child’s parents when developing an IEP.⁸⁴ In fact, the IDEA requires that parents be members of any group that makes decisions about the educational placement of a child.⁸⁵

Educational Placement versus Location

⁷⁸ *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006) (citing *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995)).

⁷⁹ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

⁸⁰ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

⁸¹ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

⁸² 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

⁸³ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.

20 U.S.C. § 1415(d)(B).

⁸⁴ 20 U.S.C. § 1414(d)(3)(A)(ii); 34 C.F.R. §§ 300.324(a)(1)(ii).

⁸⁵ 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.327 and 300.501(c)(1).

1 6. Before Petitioners' other allegations may be addressed, it is necessary to
2 determine whether a move from [REDACTED] to Desert Oasis constitutes a change of
3 educational placement or a change of location.

4 7. It is settled law that a Student's "educational placement" is an IEP Team
5 decision, whereas the physical "location" is an administrative decision. See *Deer*
6 *Valley Unified School District v. L.P.*, 942 F.Supp.2d 880 (D. Ariz. 2013).

7 [T]he term "educational placement" in the regulations refers only to the
8 general type of educational program in which the child is placed.
9 "Educational placement" refers to the general educational program – such
10 as the classes, individualized attention and additional services a child will
11 receive – rather than the "bricks and mortar" of the specific school.
12 [T]here is no requirement in the IDEA that the IEP name a specific school
13 location. [A]n IEP's failure to identify a specific school location will not
14 constitute a per se procedural violation of the IDEA. The location of
15 services in the context of an IEP generally refers to the type of
16 environment that is the appropriate place for provision of the service. For
17 example, is the related service to be provided in the child's regular
18 classroom or resource room?

19 *Id.* at 887 (alterations in original) (citations and quotations omitted).

20 8. The IDEA requires that every local educational agency ("LEA") "must
21 ensure that a continuum of alternative placements is available to meet the needs of
22 children with disabilities for special education and related services" including "regular
23 classes, special classes, special schools, home instruction, and instruction in hospitals
24 and institutions." 34 C.F.R. § 300.115(a)-(b)(1).

25 9. It is possible for a change in location to constitute a change of
26 educational placement. To determine whether such a change has occurred, the effect
27 of the change in location on the following factors must be considered:

- 28 a. whether the educational program set out in the child's IEP has
29 been revised;
- 30 b. whether the child will be able to be educated with nondisabled
children to the same extent;
- c. whether the child will have the same opportunities to participate
in nonacademic and extracurricular services; and
- d. whether the new placement option is the same option on the
continuum of alternative placements.

1 *Letter to Fisher*, 21 IDELR 992 (OSEP July 6, 1994).

2 10. Throughout this process, Petitioner sought to characterize Desert Oasis
3 as a self-contained classroom on a general education campus rather than as a private
4 day school.

5 11. Arizona statute defines a private day school as a "nonpublic institution
6 where instruction is imparted." A.R.S. § 15-101(20). Nothing in the statute identifies
7 where the private day school must be located.

8 12. Petitioners argue that, based on the factors set forth by the Office of
9 Special Education Programs ("OSEP") in *Letter to Fisher*, moving Student from
10 [REDACTED] to Desert Oasis was a change in educational placement from a special school
11 to a special class that Respondent School District had predetermined without allowing
12 meaningful parental input.

13 a. As to the first factor, no evidence was submitted to demonstrate that the
14 educational program set out in Student's IEP was revised. The testimony
15 of the Desert Oasis teacher established that Desert Oasis was able to
16 and would implement Student's IEP as written. Thus, this factor weighs
17 against the proposed move being considered a change in educational
18 placement.

19 b. As to the second factor, the evidence submitted established that Student
20 would be *educated* with nondisabled children to the same extent at Desert
21 Oasis as he was at [REDACTED]. While Student may have the opportunity to
22 interact with nondisabled peers to the same extent or more at Desert
23 Oasis than at [REDACTED] those interactions will not occur during
24 instructional periods. Thus, this factor weighs against the proposed move
25 being considered a change in educational placement.

26 c. As to the third factor, no evidence was submitted regarding Student's
27 opportunity to participate in nonacademic and extracurricular services at
28 [REDACTED] or at Desert Oasis. Testimony was offered that both schools
29 take students on regular field trips. Thus, this factor weighs against the
30 proposed move being considered a change in educational placement.

1 d. As to the fourth factor [REDACTED] and Desert Oasis are both private day
2 schools and Student would attend the school for greater than 50% of the
3 school day, a Level D placement. Thus, this factor weighs against the
4 proposed move being considered a change in educational placement.

5 13. The Administrative Law Judge concludes that based on the four factors,
6 the proposed move from [REDACTED] to Desert Oasis is not a change in educational
7 placement, but is a change in location from one private day school to another private
8 day school.

9 Appropriateness of Desert Oasis

10 14. Because the proposed move from [REDACTED] to Desert Oasis was a
11 change in location and not a change of educational placement, the decision was an
12 administrative decision that may be made by Respondent School District. However, the
13 new location must be an appropriate location for the student.

14 15. Parent testified that she hoped Student would one day be able to move
15 back to a classroom in a public school, but she believed that he was not ready for such
16 a change. Parent cited her concerns regarding Student's problems with anxiety,
17 interacting with nondisabled people, large crowds, and loud noises.

18 16. As to the general claim that Student suffered from anxiety that would
19 render Desert Oasis an inappropriate placement, Student had not been diagnosed with
20 anxiety. No prior IEP or discussion regarding Student had addressed anxiety as an
21 area of concern, and no goals or related services related to anxiety had been written.

22 17. The evidence established that Student interacted with nondisabled people
23 when he went on field trips with [REDACTED] and when the participants of the "Best
24 Buddies" program came to the school. Parent did not object to those field trips or to
25 Student engaging in the "Best Buddies" program.

26 18. The evidence also established that Student attended large monthly
27 assemblies with other students and disabled adults that could get very loud without
28 excessive problems. Student may have been somewhat uncomfortable during the
29 assemblies, but not to an extent that he was unable to participate. Parent did not
30 object to Student attending the monthly assemblies at [REDACTED]

1 19. The testimony established that Desert Oasis would be able to implement
2 Student's IEP as written including related services.

3 20. On the final day of hearing, Petitioners raised an argument that Desert
4 Oasis had not been approved as a private day school by ADE, which would render it an
5 inappropriate placement. The testimony from Dr. Avila and Dr. Redivo establish that
6 Desert Oasis was an approved private day school. Petitioners did not present any
7 credible evidence that Desert Oasis was not an approved private day school.
8 Therefore, Petitioners failed to sustain their burden of proof as to this matter.

9 21. No evidence was presented to establish that Desert Oasis was not an
10 appropriate placement for Student.

11 Remaining Claims

12 22. Petitioners' remaining claims are premised on the argument that the move
13 from [REDACTED] to Desert Oasis was a change of educational placement, rather than a
14 change of location. Because that argument has failed, Petitioners' remaining claims
15 also fail as set forth below.

16 Predetermination

17 23. The IDEA requires that parents be allowed "to participate in meetings with
18 respect to the identification, evaluation, and educational placement of the child."⁸⁶
19 However, a school district may discuss placement options in preparing for an IEP
20 meeting in that "preparatory activities that public agency personnel engage in to
21 develop a proposal or response to a parent proposal that will be discussed at a later
22 [IEP] meeting" do not constitute an IEP meeting.⁸⁷ "[S]chool officials must come to the
23 IEP table with an open mind. But this does not mean they should come to the IEP table
24 with a blank mind."⁸⁸

25 24. Petitioners alleged that Respondent School District predetermined
26 Student's move from [REDACTED] to Desert Oasis without considering Parent's input.
27 Because the move from [REDACTED] to Desert Oasis was an administrative decision and
28

29 ⁸⁶ 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(c)(1).

30 ⁸⁷ 34 C.F.R. § 501(b)(3).

⁸⁸ *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 253 (2d Cir. 2009).

1 not an IEP team decision, Respondent School District was not required to consider
2 Parent's input.

3 25. Nevertheless, Respondent School District held an IEP team meeting with
4 Parent to explain the program at Desert Oasis and how it would be appropriate for
5 Student to transfer to that location. Parent was allowed an opportunity to discuss her
6 concerns, that Student had been mistreated by Respondent School District staff prior to
7 being placed at [REDACTED] but she did not raise any concerns with the Desert Oasis
8 program.

9 26. Petitioners failed to sustain their burden of proof that Respondent School
10 District improperly predetermined Student's move from [REDACTED] to Desert Oasis.

11 Meeting Notice

12 27. The IDEA requires that each public agency must ensure that one or both
13 of the parents of a child with a disability are present at each IEP team meeting or are
14 afforded the opportunity to participate by providing notification of the meeting early
15 enough to ensure the parents have the opportunity to attend. 34 C.F.R. §
16 300.322(a)(1). The meeting notice must include the purpose, time, and location of the
17 meeting and who will be in attendance. 34 C.F.R. § 300.322(b)(i).

18 28. Petitioners alleged that Respondent School District failed to issue an
19 appropriate Meeting Notice prior to the June 3, 2014 IEP team meeting because the
20 people expected to be in attendance were not identified by name, but by title.

21 29. Nothing in the IDEA requires that the meeting notice must identify the
22 specific people who will be in attendance, and Petitioners cite no authority for such a
23 proposition.

24 30. Additionally, as the decision to move Student from [REDACTED] to Desert
25 Oasis was not an IEP team decision, the June 3, 2014 IEP team meeting was not
26 convened to make any decisions regarding Student's educational program, but was to
27 inform Parent of the details of the Desert Oasis program.

28 31. Therefore, Petitioners failed to meet their burden to establish that the
29 meeting notice was improper.

30 Participants at the IEP meeting

1 32. The IDEA requires that the IEP team for each child with a disability must
2 include, at a minimum, the following people: the parents of the child, at least one
3 general education teacher, at least one special education teacher, a representative of
4 the public agency, and an individual who can interpret the evaluation results. 34
5 C.F.R. § 300.321(a).

6 33. Petitioners alleged that because Ms. Stake was not a certified general
7 education teacher in Arizona, the IEP team meeting was not properly constituted.

8 34. Nothing in the IDEA requires that the entire IEP team must be present at
9 meetings in which no decisions about the Student's educational program are being
10 made, and Petitioners cite no authority for such a proposition.

11 35. Therefore, Petitioners failed to meet their burden to establish that the
12 meeting notice was improper.

13 Meaningful Participation

14 36. Parental participation "in the IEP process is an integral part of the
15 IDEA."⁸⁹ In the instant matter, there was no allegation that Parent was not fully
16 involved in the development of Student's January 2014 IEP, his then current IEP.

17 37. Petitioners alleged that because the meeting notice did not identify
18 specifically who would be present at the meeting and indicated that the purpose of the
19 meeting was to review the IEP instead of to discuss the move from [REDACTED] to Desert
20 Oasis, Parent was not prepared to participate during the meeting.

21 38. The June 3, 2014 IEP meeting did not involve a change to Student's IEP
22 and the ultimate decision to move Student from [REDACTED] to Desert Oasis was an
23 administrative decision that did not require Parent to participate in the decision.

24 39. Therefore, Petitioners failed to meet their burden to establish that Parent
25 was denied meaningful participation.

26 Compensatory Education

27 40. 20 U.S.C. § 1415(j) provides that "during the pendency of any proceeding
28 conducted pursuant to this section, unless the State or local educational agency and
29

30 ⁸⁹ *K.D. v. Dept. of Educ., State of Hawaii*, 665 F.3d 1110, 1123 (9th Cir. 2011).

1 the Parents otherwise agree, the child shall remain in the then-current educational
2 placement of the child."

3 41. 34 C.F.R. § 300.518 provides that "during the pendency of any
4 administrative or judicial proceeding regarding a due process complaint notice
5 requesting a due process hearing under § 300.507, unless the State or local agency
6 and the parents of the child agree otherwise, the child involved in the complaint must
7 remain in his or her current educational placement."

8 42. The purpose of the stay put provision is to ensure that the student is
9 maintained in what the parties had previously agreed was an appropriate placement
10 and location until a determination can be made as to the appropriateness of the
11 proposed placement or location.

12 43. Regardless of whether the move from [REDACTED] to Desert Oasis was a
13 change in educational placement or merely a change in location, Student's stay put
14 location was at [REDACTED] the last placement and location that was agreed upon as
15 being appropriate for Student.

16 44. Of great concern to the Tribunal is that both parties, represented by
17 counsel, were unable to resolve the raised issue of stay put in a more timely fashion. It
18 is especially noteworthy that Petitioner's counsel filed the due process complaint on
19 August 7, 2014, and indicated to opposing counsel as early as August 30, 2014, that
20 she intended to file a motion for stay put, but waited until October 24, 2014, to do so.

21 45. Respondent School District's refusal to maintain Student at [REDACTED] in
22 the fall semester of 2014 constituted a denial of a FAPE. Therefore, Student is entitled
23 to compensatory education and compensatory related services in accordance with his
24 then operant IEP.

25 46. According to Student's then operant IEP, Student was to receive 30
26 minutes of daily instruction in each of the following areas: Math, Language, Reading,
27 and Writing; 2 hours of speech therapy services per month; and 30 minutes of
28 Occupational Therapy per month. Based on the testimony provided, Student missed
29 approximately 80 days or four months of school during the fall semester of 2014.
30 Therefore, Administrative Law Judge finds that Student is entitled to compensatory

1 education in the amount 160 hours, compensatory speech therapy services in the
2 amount of 8 hours, and compensatory occupational therapy services in the amount of 2
3 hours.

4 Conclusion

5 47. Respondent School District did not deny Student a FAPE when it decided
6 to move Student from [REDACTED] to Desert Oasis. Such a change in location is an
7 administrative decision that does not require the consensus of the IEP Team.
8 However, there was no evidence that the IEP Team developed a transition plan to
9 enable Student to smoothly transition from [REDACTED] to Desert Oasis, which should be
10 done.

11 48. Respondent School District denied Student a FAPE during the fall
12 semester of 2014 when it failed to maintain Student at [REDACTED] as his stay put
13 placement during the pendency of this matter.

14 ORDER

15 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
16 that the compensatory education and related services requested by Petitioners is
17 **granted**. All other relief requested in the due process complaint is **denied**. The IEP
18 Team should develop a transition plan to enable Student to smoothly transition from
19 [REDACTED] to Desert Oasis. Respondent School District shall make available to Student
20 compensatory education in the amount 160 hours, compensatory speech therapy
21 services in the amount of 8 hours, and compensatory occupational therapy services in
22 the amount of 2 hours.

23 Done this day, August 28, 2015.

24 /s/ Tammy L. Eigenheer
25 Administrative Law Judge
26

27 RIGHT TO SEEK JUDICIAL REVIEW

28 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3),
29 this Decision and Order is the final decision at the
30 administrative level. Furthermore, any party aggrieved by

1 the findings and decisions made herein has the right to bring
2 a civil action, with respect to the complaint presented, in any
3 State court of competent jurisdiction or in a district court of
4 the United States. Pursuant to Arizona Administrative Code
5 § R7-2-405(H)(8), any party may appeal the decision to a
6 court of competent jurisdiction within thirty-five (35) days of
7 receipt of the decision.

8 Copy mailed/e-mailed/faxed August 28, 2015 to:

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