

1 Code (“U.S.C.”) §§ 1400-1482 (as re-authorized and amended in 2004),³ and its
2 implementing regulations, 34 Code of Federal Regulations (“C.F.R.”) Part 300, as well
3 as the Arizona Special Education statutes, Arizona Revised Statutes
4 (“A.R.S.”) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative
5 Code (“A.A.C.”) R7-2-401 through R7-2-406.

6 Procedural History

7 Petitioners filed the Due Process Complaint on October 30, 2014. The
8 Complaint alleged that Respondent School “ratified” the August 2014 IEP before the
9 IEP Team had discussed and agreed to all parts of the August 2014 IEP, and as a
10 result, Parents were denied an opportunity to meaningfully participate in the creation of
11 the August 2014 IEP. The Complaint also alleged that Respondent School failed to
12 include a copy of the IEP with the August 15, 2014 PWN and that the failure to do so
13 denied Parents “the ability to exercise their procedural safeguards.” Petitioners’
14 proposed remedy was the creation of a new annual IEP to be completed during three
15 two-hour IEP meetings to be held under the supervision of a third-party facilitator.

16 Evidence and Issues at Hearing

17 The parties presented testimony and exhibits at a formal evidentiary hearing on
18 January 30, 2015. When the hearing convened, the issues to be addressed had been
19 identified as follows:

- 20 1. Whether Parents were afforded the opportunity to meaningfully participate in
21 the creation of the August 2014 IEP.
- 22 2. Was Respondent School required to have included a copy of the incomplete
23 IEP with the PWN issued on August 15, 2014.

24 The parties presented testimony from the witnesses listed above⁴ and offered
25 into evidence Petitioners’ Exhibits A through AZ and Respondent School’s Exhibits I
26 through V, including all subparts.

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29 ³ By Public Law 108-446, known as the “Individuals with Disabilities Education Improvement Act of
2004,” IDEA 2004 became effective on July 1, 2005.

30 ⁴ Transcripts of the testimony have been added to the record. The transcripts are the official record of
the hearing.

1 The Administrative Law Judge has considered the entire record, including the
2 testimony and Exhibits,⁵ and now makes the following Findings of Fact, Conclusions of
3 Law, and Order.

4 **FINDINGS OF FACT**

5 1. Student has Autism, Moderate Intellectual Disability, and non-verbal
6 speech. During the 2013 – 2014 school year, Student received special education
7 services in a self-contained setting for most of the day, but was included with his
8 general education peers for part of the day.

9 **Creation of the August 2014 IEP**

10 2. The IEP process for the 2014 – 2015 school year began in May 2014.
11 During an IEP meeting on May 15, 2014, the Special Education Teacher presented
12 suggested areas on which Student's goals should focus.⁶ Also during that meeting,
13 Parent presented 14 suggested annual goals to be considered for Student's IEP.⁷

14 3. Following the May 15, 2014, meeting, Respondent School had regular
15 contact with Parents during the summer months.

16 4. On August 7, 2014, the Special Education Teacher had a parent-teacher
17 conference with Parents. During the conference, Student's progress on the 2013 –
18 2014 goals was discussed as well as goals being considered for the upcoming school
19 year. Parents requested a copy of the draft IEP prior to the IEP meeting scheduled for
20 August 12, 2014. The Special Education Teacher indicated that because it was only
21 the second day of school, she would have to work over the weekend to complete the
22 draft IEP to get a copy to Parents before the IEP meeting.

23 5. On Sunday, August 10, 2014, Parents were provided via email with a draft
24 of the PLAFFP and Goals for the 2014 IEP. The email also included a request that
25 Parents "provide parental input on the sections labeled Parent Input on Student's
26 current academic and functional achievement" and stated that the Special Education
27

28 ⁵ The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned in
29 this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if
30 the witness is not specifically mentioned in this Decision.

⁶ Exhibit I.2.

⁷ Exhibit I.3.

1 Teacher “can include that information into the draft and the team can hear from you
2 during the meeting.”⁸

3 6. Also on August 10, 2014, the Special Education Teacher emailed Parents
4 an update of Student’s ABBLS assessment.

5 7. On Monday, August 11, 2014, Mr. Keller emailed Parents the datasheets
6 recording Student’s performance from March 2014 through May 2014. Also included
7 was the draft IEP, excluding the pages setting forth the Special Education Services to
8 be provided.

9 8. On August 12, 2014, the IEP team reconvened to continue working on the
10 annual IEP. The agenda for the meeting⁹ included the following items:

- 11 1) Introductions
- 12 2) PLAFFP – Review Present Levels and Student Needs
- 13 3) Goals – Review Draft Goals that address needs
- 14 4) Services – Discuss level of Services
- 15 5) Placement – Discuss LRE
- 16 6) Adjourn

17 9. While the agenda included the entire IEP creation process, based on
18 experience in prior years, Respondent School anticipated that the IEP team would not
19 complete the process on that day. Another IEP meeting was already planned for
20 August 19, 2014.¹⁰

21 10. Because it was understood the IEP team would not get through the entire
22 agenda, the draft IEP that was distributed to all the participants, including Parents,
23 during the August 12, 2014 IEP meeting did not include the pages addressing Special
24 Education Services to be provided.

25 11. During the August 12, 2014 IEP meeting, the IEP team received the draft
26 goals and held substantial discussions about the goals. The goals included in the draft
27 IEP were agreed upon during the meeting with no one present expressing they
28 disagreed that the goals were appropriate. Notably, of the 14 annual goals Parents

29 ⁸ Exhibit I and J.

30 ⁹ Exhibit II.5.

¹⁰ Exhibit III.1.

1 suggested during the May 15, 2014 IEP meeting, 8 of them were incorporated in the
2 draft IEP presented at the August 12, 2014 IEP meeting.

3 12. Each of the witnesses who testified at the hearing in this matter stated
4 that Parents had extensive input during the August 12, 2014 IEP meeting.

5 13. Following the August 12, 2014 IEP meeting, Respondent School realized
6 the IEP would not be completed prior to the annual IEP being due on August 15,
7 2014.¹¹

8 14. The Special Education Teacher experienced a death in the family and
9 had to travel out of state for the funeral and was not expected to return in time for the
10 August 19, 2014 IEP meeting. Respondent School informed Parents that the Special
11 Education Teacher was not available and offered to have a different special education
12 teacher present during the meeting. Parents indicated they preferred that the Special
13 Education Teacher be present at the meeting and agreed to postpone the meeting until
14 August 20, 2014.

15 15. On Friday, August 15, 2014, Respondent School issued a PWN that
16 provided as followed:

17 **Description of the action proposed:**

18 The IEP team convened to initiate a review of [Student's] IEP. The annual IEP is
19 due to [expire] August 15, 2014 and the IEP will be implemented as written. An
20 additional review of the IEP is scheduled for the following week. Items reviewed
21 after the [implementation] date, will be documented in an addendum to the IEP.
22 The district's responsibility is to implement an annual IEP and permit full
23 participation of all members of the team in the review/revision process. [Student]
24 will receive special education services in the areas of basic reading skills, social
25 skills, math reasoning, workplace skills. [Student] will receive Occupational
26 Therapy and Speech services. [Student] will receive special education
27 transportation services twice daily. [Student] will have access to his PECS book
28 for 1200 minutes/ week. [Student] will have paraprofessional support 1200
29 minutes/ week.

26 **Explanation of why the agency proposes to take this action:**

28 ¹¹ There was some disagreement as to when the 2013 – 2014 IEP ended. On the cover page, of the
29 August 2013 IEP, the anticipated duration of the IEP was listed as 8/19/2013 to 8/15/2014. On the
30 services page, the duration/end date was listed as 8/19/2014. Based on prior experience with
Petitioners, Respondent School determined it would be prudent to use the earlier date as the end date to
avoid any allegations that it failed to implement a new annual IEP in a timely fashion.

1 Public education agencies have an affirmative obligation to implement an annual
2 IEP, while permitting full participation in the review and revision of the document.
3 In order to meet these responsibilities, the initial review and changes will be
4 include[d] in the annual IEP. Those section of the IEP scheduled for review
5 during the week of the 18th meeting will be documented in an addendum, as
6 warranted. [Student's] educational needs require that he receive special
7 education services in the listed areas. [Student's] fine motor and communication
8 needs require that he receive Occupation Therapy and Speech services.
9 [Student's] inability to understand his environment require that he receive
10 special education transportation services. [Student's] lack of verbal speech
11 requires that he have access to his PECS book at all times during the school
12 day. [Student] requires a paraprofessional in order to assist him in movement
13 across the school campus as well as to support and encourage the use of his
14 PECS book and social interactions.¹²

15 16. Those elements of the IEP referenced in the August 15, 2014 PWN were
16 to be implemented on Monday, August 18, 2014.

17 17. On August 20, 2015, the IEP team reconvened to finalize the 2014 – 2015
18 IEP. The final IEP created through the consensus of the IEP team included the goals
19 agreed upon during the August 12, 2014 IEP meeting. An additional goal addressing
20 Student's fine motor control was added and an additional short-term objective was
21 added to Student's goal addressing toothbrushing. One sentence was added to the
22 PLAFFP section at Parents' request. The remaining items on the agenda were
23 addressed including the review and approval of the accommodation section of the IEP,
24 which did not change from the draft version that was distributed prior to the August 12,
25 2014 meeting, and the special education services section of the IEP, which included
26 the same number of service minutes as the 2013 – 2014 IEP but listed fewer, more
27 broad categories.

28 18. Mr. Keller testified that on Monday, August 18, 2014; Tuesday, August 19,
29 2014; and Wednesday, August 20, 2014, Respondent School implemented only the
30 new goals that were agreed upon during the August 12, 2014 IEP meeting.
Respondent School employed the accommodations and special education service
minutes from the 2013 – 2014 IEP as the default requirements.

¹² Exhibit II.9.

1 19. Following the August 20, 2014 IEP meeting Respondent School
2 implemented the 2014 – 2015 IEP as developed during the IEP team meetings on
3 August 12, 2014, and August 20, 2014.

4 20. During the hearing, Parents did not testify. Nothing in Parents' opening
5 statement, questioning of witnesses, or closing arguments alleged any substantive
6 shortcomings with the 2014 – 2015 IEP as ultimately developed and adopted.

7 21. Petitioners argued in their closing arguments that inconsistencies in the
8 date/time stamp printed on some of Respondent School's exhibits called into question
9 the authenticity of the exhibits. Mr. Keller testified during the hearing that depending
10 on what browser was used, what printer was used, and what defaults were set affected
11 what size and what additional information was included on the documents printed from
12 the IEPPro program.

13 22. Petitioners also argued in their closing arguments that Respondent
14 School did not give Parents "meaningful" participation in the IEP process rather than
15 "perfunctory" participation. Petitioners' argument relied on the amount of notes Mr.
16 Keller recorded in the conference summaries during each of the relevant meetings in
17 relation to the length of the meeting. Petitioners also asserted that the August 15, 2014
18 PWN meant that Respondent School "was done with the parental participation with the
19 annual IEP, because by implementing the IEP[,] it changed the current IEP from a draft
20 annual IEP to an implemented IEP, which [Respondent School] had no intention in
21 changing further and under federal statute had no legal necessary [sic] to do so."

22 23. With respect to the August 15, 2014 PWN, Petitioners maintained that the
23 PWN was insufficient in that it was not "written in a language understandable to the
24 general public" because a copy of the IEP was not attached to the PWN. Petitioners
25 drew out the reference in the PWN that "the IEP will be implemented as written" to be
26 vague. Petitioners also argued this PWN was evidence that Parents were not granted
27 meaningful participation because Respondent School unilaterally decided those parts
28 of the IEP that had not been previously agreed upon.

29 24. Respondent School argued that Parents were provided ample
30 opportunities to meaningfully participate in the development of the 2014 – 2015 IEP

1 including Parents having provided the framework of numerous goals that were
2 ultimately adopted, robust discussion during the August 12, 2014 IEP meeting of
3 numerous goals, and multiple questions and concerns raised by Parents during the IEP
4 meetings and considered by the IEP team. Mr. Keller testified that it was not his normal
5 practice to take formal notes during IEP meetings, but that he did so during Students'
6 IEP meetings with Parents to refresh his memory of what was discussed in the event of
7 future proceedings such as this due process complaint hearing. Mr. Keller testified the
8 notes were not intended to be a verbatim account of the discussion that was held.

9 CONCLUSIONS OF LAW

10 1. A parent who requests a due process hearing alleging non-compliance
11 with the IDEA must bear the burden of proving that claim.¹³ The standard of proof is
12 "preponderance of the evidence," meaning evidence showing that a particular fact is
13 "more probable than not."¹⁴ Therefore, Petitioners bear the burden of proving their
14 claims and complaints by a preponderance of evidence.

15 2. This tribunal's determination of whether or not Student received a FAPE
16 must be based on substantive grounds.¹⁵ If a procedural violation is alleged and found,
17 it must be determined whether the procedural violation either (1) impeded the child's
18 right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the
19 decision-making process; or (3) caused a deprivation of educational benefit.¹⁶ If one of
20 the three impediments listed has occurred, the child has been denied a FAPE due to
21 the procedural violation.

22 FAPE

23 3. Through the IDEA, Congress has sought to ensure that all children with
24 disabilities are offered a FAPE that meets their individual needs.¹⁷ These needs
25 include academic, social, health, emotional, communicative, physical, and vocational
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27 ¹³ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

28 ¹⁴ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
29 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action*
30 *No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

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

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

1 needs.¹⁸ To do this, school districts must identify and evaluate all children within their
2 geographical boundaries who may be in need of special education and services. The
3 IDEA sets forth requirements for the identification, assessment, and placement of
4 students who need special education, and seeks to ensure that they receive a free
5 appropriate public education. A FAPE consists of “personalized instruction with
6 sufficient support services to permit the child to benefit educationally from that
7 instruction.”¹⁹ The IDEA mandates that school districts provide a “basic floor of
8 opportunity,” nothing more.²⁰ It does not require that each child’s potential be
9 maximized.²¹ A child receives a FAPE if a program of instruction “(1) addresses his
10 unique needs, (2) provides adequate support services so he can take advantage of the
11 educational opportunities and (3) is in accord with an individualized educational
12 program.”²²

13 4. Procedural violations of the IDEA do not require a remedy unless the
14 procedural violation impeded Student’s right to a FAPE, significantly impeded Parents’
15 opportunity to participate in the decision-making process, or caused a deprivation of
16 educational benefit that denied Student a FAPE.²³

17 Parents’ Meaningful Participation

18 5. Petitioners claim that Respondent School violated the IDEA by unilaterally
19 implementing the goals that were previously agreed upon due to the approaching
20 annual IEP date. Petitioners argued that Respondent School could not implement an
21 incomplete IEP and therefore, in sending the August 15, 2014 PWN was intending to
22 implement a “complete” IEP, including those sections that had not been considered by
23 the IEP team.
24

25 ¹⁷ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

26 ¹⁸ *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).

27 ¹⁹ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

28 ²⁰ *Id.* at 200.

29 ²¹ *Id.* at 198.

30 ²² *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)).

²³ 20 U.S.C. § 1415(f)(3)(E); *Bd. Of Educ. of the Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S.
176, 206-07 (1982).

1 6. Petitioners relied on the decision in *Doug C. v. State of Hawaii Dept. of*
2 *Educ.*²⁴ in support of their position that Respondent School cannot act unilaterally in
3 implementing a new IEP.

4 7. Respondent School argued that *Doug C.* was distinguishable on its face
5 because Parents meaningfully participated in the IEP meetings that led to the creation
6 of the 2014 – 2015 IEP.

7 8. Parents provided no evidence to establish that they were not afforded an
8 opportunity to meaningfully participate in the decision-making process. Each witness
9 that testified indicated that Parents had ample opportunity to participate during the IEP
10 meetings and did in fact participate through discussion and questions raised. Parents'
11 allegation that Respondent School unilaterally implemented a complete IEP ignores the
12 facts surrounding the events present in this case. An IEP meeting was scheduled to be
13 held on August 20, 2014, to finalize those portions of the IEP that could not be
14 completed prior to the annual IEP date.

15 9. The Administrative Law Judge finds the ruling of the Ninth Circuit Court of
16 Appeals in *Doug C.* instructive:

17 When confronted with the situation of complying with one procedural
18 requirement of the IDEA or another, we hold that the agency must make a
19 reasonable determination of which course of action promotes the
20 purposes of the IDEA and is least likely to result in the denial of a FAPE.
21 In reviewing an agency's action in such a scenario, we will allow the
22 agency reasonable latitude in making that determination.²⁵

23 10. Here, Respondent School made a reasonable decision under the
24 circumstances and based on prior experience to implement Student's goals that
25 already been agreed upon at the August 12, 2014 IEP meeting and to allow the IEP
26 team to consider the remaining portions of the IEP at the August 20, 2014 IEP meeting.
27 The additional meeting was known to the parties and was scheduled for three days
28 after the new agreed upon goals were implemented by Respondent School.

29
30 ²⁴ 720 F.3d 1038, 1046 (9th Cir. 2013).

²⁵ 720 F.3d 1038, 1046 (9th Cir. 2013).

1 11. It is further noted that Petitioners' proposed resolution, that a new annual
2 IEP be created under the direction of an independent third-party trained facilitator
3 during at least three two-hour meetings has no relation to the alleged violation in that
4 Petitioners have not raised any substantive issues with the final 2014 – 2015 IEP. If
5 the 2014 – 2015 IEP provides FAPE, there is no logical reason to require the IEP team
6 to meet for at least six hours to create a new IEP that would also presumably provide
7 FAPE.

8 12. While Parents seemed to imply a “slippery slope” argument in which
9 Respondent School could delay an IEP meeting intended to complete an IEP process
10 in subsequent years to weeks or months later and effectively prevent Parents'
11 participation. The possibility of future violations of the IDEA cannot be adjudicated by
12 this tribunal.

13 PWN

14 13. The IDEA process for making changes to an IEP requires a school district
15 to give parents written notice within a reasonable time before taking the proposed
16 action.²⁶ Pursuant to 34 C.F.R. § 300.503(b), the PWN must contain the following:

- 17 (1) A description of the action proposed or refused by the agency;
18 (2) An explanation of why the agency proposes to take the action;
19 (3) A description of each evaluation procedure, assessment, record, or
20 report the agency used as a basis for the proposed or refused action;
21 (4) A statement that the parents of a child with a disability have protection
22 under the procedural safeguards of this part and, if this notice is not an
23 initial referral for evaluation, the means by which a copy of a description
24 of the procedural safeguards can be obtained;
25 (5) Sources for parents to contact to obtain assistance in understanding
26 the provisions of this part;
27 (6) A description of other options that the IEP Team considered and the
28 reasons why those options were rejected; and
29 (7) A description of other factors that are relevant to the agency's
30 proposal or refusal.

14. Nothing in the regulation itself requires a PWN to have a copy of the IEP
attached to be considered valid.

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

1 15. Parents' argument that the August 15, 2014 PWN was required to have a
2 copy of the IEP attached in order to be "written in language understandable to the
3 general public" is disingenuous. Given the circumstances surrounding the creation of
4 the 2014 – 2015 IEP and the language used in the PWN, it is understandable to
5 general public that those parts of the IEP that were agreed upon during the August 12,
6 2014 IEP meeting were to be implemented on August 18, 2014, and that the remaining
7 portions of the IEP would be reviewed during the August 20, 2014 IEP meeting.

8 **ORDER**

9 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
10 that the relief requested in the due process complaint is **denied**.

11 Done this day, March 27, 2015.

12 /s/ Tammy L. Eigenheer
13 Administrative Law Judge
14

15 **RIGHT TO SEEK JUDICIAL REVIEW**

16 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this Decision and
17 Order is the final decision at the administrative level. Furthermore, any party aggrieved
18 by the findings and decisions made herein has the right to bring a civil action, with
19 respect to the complaint presented, in any State court of competent jurisdiction or in a
20 district court of the United States. Pursuant to Arizona Administrative Code § R7-2-
21 405(H)(8), any party may appeal the decision to a court of competent jurisdiction within
22 thirty-five (35) days of receipt of the decision.

23 Copy mailed/e-mailed/faxed March 27, 2015 to:
24

25 [REDACTED]
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