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**STATE OF ARIZONA**  
**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

█, a Student, by and through Parent  
█,  
Petitioners,  
v.  
PHOENIX UNION High School District,  
Respondent.

No. 15C-DP-040-ADE

**ADMINISTRATIVE  
LAW JUDGE DECISION**

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**HEARING:** Hearing session convened and concluded on May 26, 2015; the 45th day was calculated as June 13, 2015.

**APPEARANCES:** █ Student's Mother ("**Mother**"), represented herself and Student. Denise Lowell-Britt, Esq., represented Phoenix Union High School ("School" or "PUHSD").

**WITNESSES:**<sup>1</sup> Mother; Cheryl Haist, School Psychologist.

**ADMINISTRATIVE LAW JUDGE:** Kay A. Abramsohn

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Parent brings this due process action, on behalf of Student, seeking one on one ("1:1") instruction for the entire school day to work on goals of learning and writing numbers and letters and learning colors. Parent alleged that Respondent failed to offer or provide a free and appropriate public education ("FAPE") when it failed to provide Student with 1:1 instruction for the entire school day.

**PROCEDURAL HISTORY**

On March 30, 2015, the Tribunal received Petitioners' due process complaint notice ("Complaint"). The Complaint was noticed for a formal due process hearing regarding Petitioners' Complaint. On April 3, 2015, the Administrative Law Judge issued a pre-hearing order setting forth due process information, hearing procedures, pre-hearing dates for telephonic conference and disclosure, and representation information. On April 9, 2015, PUHSD filed its Response to the Complaint ("Response").

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<sup>1</sup> Throughout this Decision, proper names of Parents and Student's teachers are not used in order to protect confidentiality of Student and to promote ease of redaction. Pseudonyms (appearing above in bold type) will be used instead. Proper names of administrative personnel, service providers, and expert witnesses are used.

1 On April 30, 2015, the Administrative Law Judge convened a telephonic pre-  
2 hearing conference. A second telephonic pre-hearing conference was convened on  
3 May 11, 2015.

4 The sole issue identified as having been raised in Petitioners' Complaint was  
5 Parent's allegation that Student requires 1:1 instruction for the entire school day to  
6 work on the goals of learning and writing his numbers and letters and learning his  
7 colors and alleges the failure of Respondent to provide 1:1 instruction.

8 The law governing these proceedings is the Individuals with Disabilities  
9 Education Act ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-  
10 authorized and amended in 2004),<sup>2</sup> and its implementing regulations, 34 Code of  
11 Federal Regulations ("C.F.R.") Part 300, as well as the Arizona Special Education  
12 statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and  
13 implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through R7-2-  
14 406.

15 Hearing Evidence and Proceedings

16 The parties presented testimony and exhibits at a formal evidentiary closed  
17 hearing held on May 26, 2015, beginning at approximately 9:00 a.m.<sup>3</sup>

18 Parent indicated at the outset that she was expecting the arrival of an assisting  
19 advocate, Dr. Ann Hart, at 11:00 a.m.; however, in the interim, Parent testified  
20 regarding her claim and positions. Based on discussion at the pre-hearing conference,  
21 it was expected that Parent would have the opportunity to ask questions of any of the  
22 PUHSD witnesses and also present further clarification.<sup>4</sup>

23 During her testimony, Parent utilized several of PUHSD's exhibits and those  
24 exhibits were admitted to the hearing record.<sup>5</sup> Parent did not specifically present any of  
25

26 \_\_\_\_\_  
27 <sup>2</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of  
28 2004," IDEA 2004 became effective on July 1, 2005.

29 <sup>3</sup> The hearing was scheduled to begin at 8:30 a.m.; however, Parent arrived late for the hearing.

30 <sup>4</sup> While Parent listed some witnesses on her disclosure, no witnesses arrived at the hearing with  
Petitioner. Parent listed the names of three of PUHSD listed witnesses; each of those persons was  
present at the hearing at the time the hearing convened.

<sup>5</sup> While Parent referenced Student's IEPs on her disclosure, at hearing, Parent relied on PUHSD's  
exhibits for reference thereto, as had been discussed at the prehearing conference.

1 the exhibits noted on her disclosure nor any of the exhibits in her prepared proposed  
2 exhibits.<sup>6</sup>

3 During the testimony of School Psychologist Cheryl Haist, Parent became upset,  
4 gathered her belongings, documents, and exhibits and left the hearing room.  
5 Additionally, upon specific request by the Administrative Law Judge, Parent would not  
6 agree to come back into the hearing room and remain while the hearing proceeded.<sup>7</sup>

7 PUHSD declined to further question Ms. Haist, and moved to dismiss the  
8 Complaint with prejudice, further indicating that it did not see the need for any further  
9 testimony. In its motion to dismiss the Complaint, PUHSD argued that Parent had had  
10 the opportunity to present her case and chose to leave the hearing, and that Parent's  
11 evidence failed to meet the burden of proof in this matter. PUHSD argued that the  
12 matter should be dismissed with prejudice.

13 The Administrative Law Judge indicated that such a motion would be taken  
14 under consideration, and inquired whether PUHSD wanted to complete Ms. Haist's  
15 testimony to have that testimony complete on the hearing record. PUHSD did not take  
16 the opportunity to complete Ms. Haist's testimony.

17 On the record, PUHSD made its offer of proof regarding the evidence it would  
18 have provided to the hearing record had it continued to present its evidence. PUHSD  
19 requested the admission of all of its exhibits, which request was granted.

20 The audio recording made of the hearing is the official record of the hearing.<sup>8</sup>

21 The hearing record concluded on May 26, 2015, with a determined 45<sup>th</sup> day of  
22 June 13, 2015.

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27 <sup>6</sup> At the pre-hearing conference, PUHSD offered to provide Parent's disclosure to the Tribunal. Prior to  
28 the hearing, Parent had disclosed an exhibit list and some documents to PUHSD, and PUHSD provided  
29 the Tribunal with Petitioner's disclosure. Parent's proposed exhibits A through L consists of  
30 correspondence dated from December 14, 2014 to May 11, 2015; there was no prepared exhibit list for  
exhibits A through L. Parent's proposed exhibits A through L were not admitted to the hearing record.

<sup>7</sup> See May 26, 2015 Hearing Record (H.R.) at 00:54:15 – 00:55:10, and 00:55:24 – 00:57:30.

<sup>8</sup> Pursuant to Parent's request to have an electronic hearing record, the due process hearing was  
recorded by the Tribunal on the Tribunal's digital audio recording system.

1  
2 Introduction

3 The Administrative Law Judge has considered the entire record, including the  
4 testimony and Exhibits,<sup>9</sup> and now makes the following Findings of Fact, Conclusions of  
5 Law, and Order finding that Parent has failed to demonstrate that PUHSD failed to offer  
6 Student FAPE. Petitioners' remedy request for 1:1 instruction for the entire school day  
7 is, therefore, denied.

8 FINDINGS OF FACT

9 1. Student is receiving special education services under the primary  
10 eligibility category of Multiple Disability and a secondary eligibility category of Moderate  
11 Intellectual Disability.<sup>10</sup> Student has been attending PUHSD schools during the two  
12 year period prior to filing the Complaint. At the time of the Complaint, Student was [REDACTED]  
13 years old.<sup>11</sup> Student is currently in the community skills program at the Betty Fairfax  
14 campus location.<sup>12</sup>

15 2. Student's most recent three-year evaluation for special education  
16 purposes was conducted in April 2014. See Exhibit 7. At that time, Student's eligibility  
17 categories remained unchanged from the previous multidisciplinary evaluation team  
18 ("MET") evaluation in April 2011.

19 3. Student's individualized education program ("IEP") dated October 3, 2014  
20 calls for Student to receive related services in the community setting as he practices  
21 and learns some life skills. See Exhibit 12, Transition Services.

22 4. Student's October 3, 2014 IEP contained several goals, one in particular  
23 for Student to be able to print his name. At that time, Student was able to print his first  
24 name with 100% accuracy when given a model. A new goal created under the October  
25

26 <sup>9</sup> The Administrative Law Judge has reviewed 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 <sup>10</sup> Student's third and fourth eligibility categories are Visual Impairment and Speech/Language  
30 Impairment, respectively. See Exhibit 15.

<sup>11</sup> Student was born in [REDACTED] he was born 24 weeks prematurely. See MET information in  
Exhibit 6 and Exhibit 7. In the past, Student had been diagnosed with developmental delay, asthma, and  
attention deficit hyperactivity disorder (ADHD).

<sup>12</sup> Student was previously in a community skills program at another of PUHSD schools.

1 3, 2014 IEP for Student to be able to print both his first and last name with 50%  
2 accuracy when given a model. By January 15, 2015, Student was able to perform this  
3 action with 40% accuracy.<sup>13</sup>

4 5. PUHSD convened a meeting on February 18, 2015 to review and revise  
5 Student's individualized education program ("IEP"). Parent had been requesting  
6 changes in Student's IEP, particularly for Student to have "more" 1:1 instruction to work  
7 on goals related to letters, colors, numbers and his name. At this meeting, PUHSD  
8 agreed to provide 1:1 assistance for one hour a day until the end of the school year  
9 and to collect data to be reviewed.<sup>14</sup> The IEP Team agreed to review, in May 2015, the  
10 data collected to determine whether the 1:1 assistance was helping Student meet his  
11 goals and to make a decision regarding whether or not to provide a 1:1 aide. See  
12 Exhibit 15 (Prior Written Notice).

13 6. Parent filed the Complaint in March 2015.

14 7. At hearing, Parent's position was that Student should have been taught  
15 the alphabet in order, going from the letter A to the letter Z, so that he could write and  
16 say the letters in order.<sup>15</sup> Parent indicated that she has been asking for Student to  
17 learn the alphabet that way, *i.e.*, "the right way," for many years, even before they  
18 moved to Arizona and before Student became enrolled at PUHSD.<sup>16</sup> Parent indicated  
19 that Student is not able to pick out letters or words from a word or story puzzle because  
20 such an activity is too advanced for him.<sup>17</sup> Parent believes that if Student knew the  
21 alphabet from A to Z, then he would be able to start to put the letters together to form  
22 words. Parent argued that there should be someone to help him learn his letters "the  
23 right way." Parent argued that she knows her son and believes that, if he had been  
24 taught that way, he would learn the letters.

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26  
27 <sup>13</sup> At hearing, PUHSD indicated that Student only knows two letters (his initials) consistently and cannot  
write his name independently, needing modeling for writing his name and other words.

28 <sup>14</sup> The hearing record reflects that PUHSD was providing 1:1 assistance/instruction for the one hour per  
day since sometime in January 2015. See Exhibit 17, Student worksheets with teacher comments.

29 <sup>15</sup> This type of learning or recitation can be described as memorization or learning by rote, which for  
some individuals may result in routine recitation without full comprehension.

30 <sup>16</sup> Parent was reminded that the relevant time period for consideration in this Complaint was the two  
years before filing the Complaint.

1           8.       With regard to learning colors, Parent's position was that School should  
2 be doing more to help Student learn colors. Parent explained that "two years ago" she  
3 had offered some suggestions to his teacher but that the teacher had either not agreed  
4 to or not been able to do it that way.<sup>18</sup> Parent indicated that, at home, she lays out  
5 [inferred, various colors of] things for him.<sup>19</sup> Parent believes that Student knows some  
6 colors and can learn more colors. Parent is not aware of methods the School is using  
7 to teach colors to Student.

8           9.       With regard to learning numbers, Parent indicated that Student knows his  
9 numbers from one to ten (1-10), but only one time has she heard him recite from one to  
10 fifteen (1-15). Parent did not have any particular suggestion as to "the right way" to  
11 teach numbers and also indicated that she did not know how Student was doing at  
12 school on this activity.

13          10.      Parent disagrees with the 2014 MET report which she argued "labeled"  
14 Student with "moderate mental retardation."<sup>20</sup> Parent acknowledged that Student has  
15 "some little bit delays" but argued that Student is not mentally retarded and that he can  
16 learn if he is taught "the right way." Parent also acknowledged that Student has speech  
17 impairment and vision impairment.<sup>21</sup>

18          11.      PUHSD exhibits contain a copy of each known evaluation in Student's  
19 educational records. Parent offered no additional evaluations of Student.

20          12.      School Psychologist Cheryl Haist reviewed Student's educational records  
21 including each of the available evaluations.<sup>22</sup> Ms. Haist spoke with Student's teacher

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23 <sup>17</sup> Parent indicated that she had observed Student being given a word or letter search activity and opined  
24 that Student would not learn from such an activity.

25 <sup>18</sup> Parent was not more specific as to the date and further indicated that she had not mentioned this  
26 suggestion to Student's current teacher. Regarding her suggestions to the previous teacher, Parent  
27 indicated that Student likes Nickelodeon and that she had asked the teacher to use cartoon characters  
28 (mentioning SpongeBob, Clifford, Dora, Blues Clues) and then use various other like-color items next to  
29 the character depictions to help Student learn colors.

30 <sup>19</sup> Parent did not elaborate on her exact methods and efforts with Student to learn or know colors at  
home. However, Parent did indicate that he "sometimes gets it at home," which the Administrative Law  
Judge understood to mean that Student sometimes correctly identifies an item by its color at home.

<sup>20</sup> See Exhibit 7. The MET report notes one of Student's eligibility categories is Moderate Intellectual  
Disability.

<sup>21</sup> Student wears glasses with corrective lenses. Parent indicated that Student is not color blind.

<sup>22</sup> The evaluations included: a 2009 MET from Indianapolis, Exhibit 5; a 2011 MET from PUHSD, Exhibit  
6; and, the 2014 MET from PUHSD, Exhibit 7.

1 and conducted observations of Student in the classroom. Ms. Haist compiled a  
2 summary listing of the various assessments previously conducted and a listing of  
3 typical developmental milestones. See Exhibit 8.

4 13. **Student's cognitive level:** In 2008 at the chronological age of [REDACTED] the  
5 Naglieri Nonverbal Ability test indicated Student's age-equivalency at preschool level.  
6 In 2000 at the chronological age of [REDACTED] the Slosson Intelligence Test  
7 indicated Student's mental age at [REDACTED] months. Based on her review of the  
8 various cognitive assessments over the years, Ms. Haist opined that Student's  
9 cognitive ability is significantly below that of a [typical] [REDACTED] year old.

10 14. **Student's academic/achievement level:** In 2008 at the chronological  
11 age of 14, the Weschler Individual Achievement Test (word reading, numerical  
12 operations, and spelling) indicated Student's grade equivalent at preschool level. In  
13 2006 at the chronological age of [REDACTED], the Peabody Individual Achievement (reading,  
14 math and spelling) indicated Student's grade equivalent at less than Kindergarten level.

15 15. **Student's adaptive behavior level:** In 2006 at the chronological age of  
16 11, the Vineland Adaptive Behavior Scales–Interview Edition indicated scoring below  
17 the first percentile, demonstrating moderate deficits. In 2000 at the chronological age  
18 of [REDACTED] the Developmental Profile II test indicated Student's  
19 developmental levels (in self-help, social, academic, and communication) to fall  
20 between [REDACTED].

21 16. **Student's social, emotional and behavioral level:** In 2000 at the  
22 chronological age of [REDACTED] under the Connors rating scales, Student's  
23 teacher noted significant problem areas of hyperactivity, social problems,  
24 inattentiveness, ADHD, and restless-impulsive. Parent noted significant problem areas  
25 of hyperactivity, restless-impulsive, cognitive and inattentive. Behaviorally, teacher also  
26 noted restlessness, forgetfulness, excitability, impulsivity, difficulty in engaging in tasks  
27 requiring sustained mental effort, distractibility and difficulty waiting his turn. However,  
28 based on her review of the assessments over the years, the education records, and her  
29 recent observations, Ms. Haist opined that Student's behavior issues are improved and  
30 "under control" at this time. Ms. Haist also described Student's strengths as being a

1 sweet child who enjoys school, who engages with others and who wants to participate  
2 in the activities.

3 17. The evaluations within the education records document that Student has  
4 consistently, over many years, scored academically and cognitively at either a  
5 preschool level or a two-year old to three-year old level. Based on her review of the  
6 assessments over the years, Ms. Haist opined that Student, with his multiple disabilities  
7 and impairments, has significant problems with memory, learning curve, generalization  
8 and motivation, which when combined with his communication (speech/language) and  
9 vision impairments and attention deficit issues, severely impact his ability to learn. Ms.  
10 Haist opined that Student's biggest challenges regarding access to education are his  
11 significantly delayed cognitive and academic levels, his inattention and impulsivity, and  
12 his vision impairment.

13 18. Since January of 2015, PUHSD provided one hour per day of 1:1  
14 assistance to Student and has been tracking the data. Exhibit 17 contains Student's  
15 worksheets from the 1:1 sessions. Ms. Haist's observations documented that Student  
16 would lose focus/attention after about one minute on a task and needed to be  
17 redirected. Ms. Haist observed that, unless an activity was changed, Student would  
18 lose interest. Student's teacher observed that Student could not tolerate the intense  
19 activity. The School indicated that Student, unfortunately, is not capable of learning  
20 through use of a rote method as Parent requests. The School further indicated that  
21 Student regressed rather than made progress during the time frame when they were  
22 providing the one hour 1:1 sessions.

23 19. PUHSD conducted an IEP meeting on May 18, 2015. At that meeting, the  
24 IEP Team was scheduled to review the data collected regarding the one hour sessions  
25 of 1:1 assistance that PUHSD had provided to Student since January of 2015. PUHSD  
26 indicated that the IEP Team was in consensus that the 1:1 assistance had not helped  
27 Student progress and did not support the continuation of 1:1 assistance. The hearing  
28 record would indicate that Parent was likely not in agreement with such a conclusion.  
29 PUHSD further indicated that when/while they reviewed the collected data, Parent  
30



1 became upset and left the meeting before the data was fully reviewed and before the  
2 meeting ended.

3 20. Parent abruptly left the due process hearing during Ms. Haist's testimony  
4 regarding Ms. Haist's review of all of Student's evaluations. As Parent was picking up  
5 her items to leave, she was making various statements demonstrating her  
6 disagreement with Ms. Haist's statements and opinions, such as: "she doesn't know  
7 what she's talking about;" "she has not worked with [Student];" and, "she just read some  
8 stuff."<sup>23</sup>

9 21. Parent failed to present any expert or supportive testimony regarding  
10 Student's special education instructional needs and the impact of either having or not  
11 having 1:1 assistance. Other than alleging that Student's IEP should contain 1:1  
12 assistance/instruction for learning the alphabet, numbers and colors, Parent did not  
13 contest the remainder of Student's existing IEP. Essentially, Parent simply argued that  
14 Student should be given 1:1 instruction so that he can (a) learn the alphabet in order  
15 from A to Z; (b) be able to write and say the alphabet from A to Z; (c) learn more colors;  
16 and (d) learn more numbers.

## 17 **CONCLUSIONS OF LAW**

### 18 **APPLICABLE LAW**

#### 19 **Free and Appropriate Public Education - FAPE**

20 1. Through the IDEA, Congress has sought to ensure that all children with  
21 disabilities are offered a free appropriate public education that meets their individual  
22 needs.<sup>24</sup> These needs include academic, social, health, emotional, communicative,  
23 physical, and vocational needs.<sup>25</sup> To do this, school districts must identify and evaluate  
24 all children within their geographical boundaries who may be in need of special  
25 education and services. The IDEA sets forth requirements for the identification,  
26 assessment and placement of students who need special education, and seeks to  
27 ensure that they receive a free appropriate public education. A FAPE consists of

28 <sup>23</sup> See HR at 00:54:15 – 00:54:58.

29 <sup>24</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

30 <sup>25</sup> *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106)).

1 “personalized instruction with sufficient support services to permit the child to benefit  
2 educationally from that instruction.”<sup>26</sup> The IDEA mandates that school districts provide  
3 a “basic floor of opportunity,” nothing more.<sup>27</sup> It does not require that each child’s  
4 potential be maximized.<sup>28</sup> A child receives a FAPE if a program of instruction “(1)  
5 addresses his unique needs, (2) provides adequate support services so he can take  
6 advantage of the educational opportunities and (3) is in accord with an individualized  
7 educational program.”<sup>29</sup>

### 8 The Individualized Education Program - IEP

9 2. Once a child is determined eligible for special education services, a team  
10 composed of the child’s parents, teachers, and others formulate an IEP that, generally,  
11 sets forth the child’s current levels of educational performance and sets annual goals  
12 that the IEP team believes will enable the child to make progress in the general  
13 education curriculum.<sup>30</sup> The IEP tells how the child will be educated, especially with  
14 regard to the child’s needs that result from the child’s disability, and what services will  
15 be provided to aid the child. The child’s parents have a right to participate in the  
16 formulation of an IEP.<sup>31</sup> The IEP team must consider the strengths of the child,  
17 concerns of the parents, evaluation results, and the academic, developmental, and  
18 functional needs of the child.<sup>32</sup> Annually, the IEP team must review the student’s IEP to  
19 determine whether the annual goals are being achieved and to revise the IEP as  
20 appropriate to address the lack of progress toward the annual goals, the results of any  
21 re-evaluation, information about the child provided by parents, the child’s anticipated  
22 needs and any other relevant matters.<sup>33</sup> To foster full parent participation, in addition to  
23 being a required member of the team making educational decisions about the child,  
24 school districts are required to give parents written notice when proposing any changes  
25

26 <sup>26</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

27 <sup>27</sup> *Id.* at 200.

28 <sup>28</sup> *Id.* at 198.

29 <sup>29</sup> *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9<sup>th</sup> Cir. 2006) (citing *Capistrano Unified*  
30 *Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9<sup>th</sup> Cir. 1995)).

31 <sup>30</sup> 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

32 <sup>31</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(1).

33 <sup>32</sup> 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).

<sup>33</sup> 20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.324(b)(1).

1 to the IEP,<sup>34</sup> and are required to give parents, at least once a year, a copy of the  
2 “procedural safeguards,” informing them of their rights as parents of a child with a  
3 disability.<sup>35</sup>

#### 4 The IEP Team

5 3. The IDEA provides that the public agency, the school, must “ensure” that  
6 the IEP team includes certain persons, typically those with specific and/or particular  
7 knowledge of the student and the types of resources and services available for a child  
8 with that student’s disabilities.<sup>36</sup> Additionally, a parent has the discretion to include  
9 other persons “who have knowledge or special expertise regarding the child, including  
10 related services personnel as appropriate.<sup>37</sup> The determination of knowledge and  
11 expertise is made by the party who invited the other person to be a member of the IEP  
12 team.<sup>38</sup> When conducting MET and IEP meetings, and other administrative matters  
13 regarding the IDEA procedural safeguards, the parties “may agree to use alternative  
14 means of meeting participation, such as video conferences and conference calls.”<sup>39</sup>  
15 Finally, an IEP meeting may take place in the absence of parents if the public  
16 agency/school is unable to convince the parents to attend; the public agency/school  
17 must keep a record of its efforts to arrange “a mutually agreed time and place” for the  
18 meeting.

#### 19 Prior Written Notice- PWN

20 4. The IDEA process for making changes to an IEP, including identification,  
21 eligibility and changing educational placements, requires a school district to give  
22 parents written notice before taking the proposed action.<sup>40</sup> Designated as the Prior  
23 Written Notice (or PWN), that notice must contain certain information specified by the  
24 IDEA, such as an explanation of why that decision is being made, the documentation  
25 used to make the decision, and a reminder of parents’ procedural rights. Of particular

26 <sup>34</sup> 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

27 <sup>35</sup> 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.  
28 20 U.S.C. § 1415(d)(B).

29 <sup>36</sup> 20 U.S.C. § 1414(d)(1)(B) - (D); 34 C.F.R. § 300.321(a).

30 <sup>37</sup> 20 U.S.C. § 1414(d)(1)(B)(vi); 34 C.F.R. § 300.321(a)(6).

<sup>38</sup> 34 C.F.R. § 300.321(c).

<sup>39</sup> 20 U.S.C. § 1414(f); 34 C.F.R. § 300.322(c); see also 34 C.F.R. § 300.328.

<sup>40</sup> 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).

1 note is the requirement that the PWN contain '[a] description of other options that the  
2 IEP Team considered and the reasons why those options were rejected. . . ."<sup>41</sup> Thus,  
3 the PWN is issued after an IEP team decision with regard to identification, eligibility or  
4 educational placement has been made, not before.

5 Burden of Proof

6 5. A parent who requests a due process hearing alleging non-compliance  
7 with the IDEA through a failure to provide FAPE must bear the burden of proving that  
8 claim.<sup>42</sup> The standard of proof is "preponderance of the evidence," meaning evidence  
9 showing that a particular fact is "more probable than not."<sup>43</sup> Therefore, in this case,  
10 Petitioners bear the burden of proving by a preponderance of evidence that PUHSD  
11 failed to offer or provide Student FAPE under the IEP's of the applicable Complaint  
12 period. Stated another way under the facts in this case, Petitioners bear the burden to  
13 demonstrate by a preponderance of the evidence that Student requires 1:1 assistance  
14 to benefit educationally.

15 DECISION

16 6. A FAPE consists of "personalized instruction with sufficient support  
17 services to permit the child to benefit educationally from that instruction."<sup>44</sup> A child with  
18 a disability receives a FAPE if the educational program of instruction "(1) addresses his  
19 unique needs, (2) provides adequate support services so he can take advantage of the  
20 educational opportunities and (3) is in accord with an individualized educational  
21 program."<sup>45</sup>

22 7. Based on the hearing record in this case, Petitioners have failed to  
23 demonstrate that Student requires a 1:1 ratio of staff during the entire school day for  
24 specialized instruction services for access to educational benefit. PUHSD has been  
25 providing one hour per day of 1:1 assistance since January of 2015 and its data

26 <sup>41</sup> 20 U.S.C. § 1415(c)(1)(E); 34 C.F.R. § 300.503(b)(6).

27 <sup>42</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

28 <sup>43</sup> *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).

<sup>44</sup> *Rowley*, 458 at 204.

<sup>45</sup> *Anaheim Union High Sch. Dist.*, 464 F.3d at 1033 (citing *Capistrano*, 59 F.3d at 893).

1 demonstrated that the intense 1:1 sessions were not helping Student progress and, in  
2 fact, demonstrated to PUHSD that Student was regressing. While it was clear that  
3 Parent has faith and belief that Student can learn more, the hearing record showed  
4 that, for years, Student has not progressed beyond the cognitive and academic levels  
5 documented in the multiple evaluations showing either pre-school or two-year old to  
6 three-year old levels.

7 The hearing record demonstrates that Student has multiple disabilities and impairments  
8 and significant problems with memory, learning curve and generalization which  
9 significantly impact his ability to learn. Overall, in this case, Parent failed to present  
10 any supporting evidence regarding Student's instructional needs requiring the use of  
11 1:1 instruction/assistance for the entire school day and supporting a demonstration of  
12 benefit to Student from such educational instruction. Therefore, the Administrative Law  
13 Judge concludes that Petitioners have failed to meet the burden to demonstrate by a  
14 preponderance of the evidence that Student requires 1:1 instruction/assistance to  
15 benefit educationally from the specialized instruction PUHSD has provided. Petitioners  
16 have not demonstrated by a preponderance of evidence that PUHSD failed to offer or  
17 failed to provide Student with FAPE when PUHSD was not providing 1:1  
18 instruction/assistance to Student for the entire school day under the IEP's of the  
19 applicable Complaint period.

20 8. Given the conclusions herein, finding that Petitioners have failed to meet  
21 the burden of proof, which results in the dismissal of Petitioners' Complaint and the  
22 resulting res judicata of the issue, Respondent's motion to dismiss with prejudice is  
23 moot.

24 **ORDER**

25 Based on the findings and conclusions above,  
26 IT IS ORDERED Petitioners' Complaint is dismissed.  
27 ORDERED this 12th day of June, 2015.

28 **OFFICE OF ADMINISTRATIVE HEARINGS**

29 /s/ Kay A. Abramsohn

Administrative Law Judge

**RIGHT TO SEEK JUDICIAL REVIEW**

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

Copy sent by fax, electronic mail and regular mail  
this 12<sup>th</sup> day of June, 2015 to:



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By: Cruz Serrano