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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

P.T., a Student, by and through parents
S.T. and K.T.
Petitioners

No. 19C-DP-026-ADE

ADMINISTRATIVE LAW JUDGE
DECISION

vs

Peoria Unified School District
Respondent

HEARING: February 7, 2019, February 8, 2019, and February 22, 2019, with the record left open to receive transcripts and post-hearing submissions.¹

APPEARANCES: Attorney Hope N. Kirsch, KIRSCH-GOODWIN & KIRSCH, PLLC, appeared on behalf of Petitioners, accompanied by Parent S.T. and Parent K.T.; attorney David D. Garner, OSBORN MALEDON, P.A., appeared on behalf of Peoria Unified School District (Respondent School District), accompanied by school representative Holly Harper, Director of Special Education. Certified Court Reporters Colette E. Ross and Meri Coash, COASH & COASH, INC., were present and recorded the proceedings as the official record of the hearing.

WITNESSES:² Breann Whitford, Behavior Interventionist; Erin Monroe, School Psychologist; Melissa Cetta, Guidance Counselor; [REDACTED] Special Education Teacher; Christina Katen, Ph.D., Psychologist; Sylvia Cohen, Ph.D., School Psychologist and Consultant; Sonia Gonzales, Founder of AZ Aspire Academy; [REDACTED] Father; [REDACTED] Stepmother; Stephen Udowitz, Special Education Coordinator.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

Parents bring this due process action, on behalf of Student, challenging an Individualized Educational Program (IEP) and amendments adopted by Respondent School District, and alleging predetermination regarding placement, a failure to collect data, a failure to conduct a Functional Behavioral Analysis (FBA), and a failure to develop a Behavior Intervention Plan (BIP). The law governing these proceedings is the Individuals with Disabilities Education Act (IDEA), 20 United States Code (U.S.C.)

¹ Following the hearing, the parties agreed to an extension of the 45th day to July 29, 2016.

² 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

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

6 Procedural History

7 At IEP meetings on August 23, 2018, and September 13, 2018, the IEP team
8 considered amendments to Student's February 28, 2018 IEP to address Student's
9 increasing school aversion. Unsatisfied with the proposed changes at the September
10 13, 2018, Parents provided notice of their intent to unilaterally place Student in a private
11 day school and seek reimbursement. Petitioners filed the Due Process Complaint on
12 November 14, 2018 (Complaint). The Complaint set forth the following issues:

- 13 1. Did Respondent School District predetermine placement at the August 2018
14 and September 2018 Individualized Educational Program (IEP) meetings?
- 15 2. Was the February 28, 2018 IEP reasonably calculated to provide Student a
16 meaningful educational benefit?
- 17 3. Were the August 23, 2018 and September 13, 2018 amendments to the
18 February 28, 2018 IEP reasonably calculated to provide Student a
19 meaningful educational benefit?
- 20 4. Did Respondent School District deny Student a FAPE by failing to collect
21 data on goals during the 2017 – 2018 school year and the 2018 – 2019
22 school year?
- 23 5. Did Respondent School District deny Student a FAPE when it did not conduct
24 an FBA at the time of Student's triennial reevaluation in January 2018?
- 25 6. Did Respondent School District deny Student a FAPE when it did not develop
26 a BIP during the 2017 – 2018 school year or the 2018 – 2019 school year?

27 Petitioners sought an order for compensatory services, including reimbursement
28 for tuition at the private day school from October 2018 through the date of the decision
29

30 type) will be used instead. Proper names of administrative personnel, service providers, and expert
witnesses are used.

1 in this matter, a one-time supply fee for the private day school, and transportation to
2 and from the private day school twice a day on the days Student attended. Respondent
3 School District denied any violations of the IDEA.

4 *Evidence and Issues at Hearing*

5 The parties presented testimony and exhibits at a formal evidentiary hearing held
6 on February 7, 2019, February 8, 2019, and February 22, 2019. The parties presented
7 testimony from the witnesses listed above⁴ and offered into evidence Petitioners'
8 Exhibits 1 through 80, and Respondent School District's Exhibits A through Q.⁵

9 After the exhibits and testimony were admitted, the parties submitted written
10 arguments to the tribunal.

11 The Administrative Law Judge has considered the entire record, including the
12 testimony and exhibits,⁶ and now makes the following Findings of Fact, Conclusions of
13 Law, and Order.

14 **FINDINGS OF FACT**

15 1. Student, now age [REDACTED] will be entering [REDACTED] grade during the 2019 –
16 2020 school year. Student has been diagnosed with different conditions at various
17 points in his life including [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 2. Student began attending Respondent School District in January 2011,
21 when he was in [REDACTED] grade. Due to Student's aggression and self-harming
22 behaviors, Student was placed in Respondent School District's PBS (Positive Behavior
23 and Supports) self-contained program. Student returned to his home school during the
24 2014 – 2015 school year, when he was in [REDACTED] grade.

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

27 ⁴ Transcripts of the testimony have been added to the record.

28 ⁵ The parties stipulated to the admission of all the submitted exhibits with the understanding that, while
29 they were available to the Administrative Law Judge for review, the Administrative Law Judge would not
30 necessarily read every document and it was left to the parties to draw attention to those exhibits that
should be reviewed.

⁶ The Administrative Law Judge has considered the exhibits referenced at hearing, even if not mentioned
in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even
if the witness is not specifically mentioned in this Decision.

3. On March 13, 2017, Student's transition IEP was developed to address his transition to high school during the 2017 – 2018 school year (2017 IEP). The 2017 IEP identified Student's areas of eligibility as Other Health Impairment (OHI) (Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), and insomnia) and Speech and Language Impairment (SLI).⁷ The 2017 IEP included one math goal, one communication goal, and one social-emotional goal. The goals were identified as follows:

Skill Area: Math

Annual Goal: By March, 2018 [Student] will solve equations that include three or more steps on 4 out of 5 problems on three out of 5 progress monitoring periods, from a baseline of 40%, as measure by work samples. Data will be collected monthly and kept in student folder.

Skill Area: Communication

Annual Goal: Given training in a self-advocacy routine, such as Plan-Check-Act, [Student] will plan out what work he has to do, check his work for difficult problems or portions he does not understand, then act by asking the teacher for help in order to get the help he needs in 8 successful attempts as measure by therapist made data collection monthly.

Skill Area: Social Emotional

Annual Goal: In the general education setting, [Student] will utilize coping skills (i.e. take a break, take deep breaths, etc.) when he is upset/frustrated with one teacher prompt. Mastery will be shown over 6 successful times from a baseline of 0. Data will be collected monthly using student self monitoring system.⁸

4. When Student began [REDACTED] at Sunrise Mountain High School in August 2017, Student was to begin receiving 45 minutes per week of specialized instruction in math, 90 minutes per month of speech, 90 minutes per quarter of behavior support in a special education classroom from the psychologist, and 90 minutes per month of counseling in the special education classroom by the behavioral health support person.⁹

⁷ Exhibit B at 23, 25.

⁸ Exhibit B at 29-31.

⁹ Exhibit B at 35.

1 5. On or about January 17, 2018, Respondent School District convened a
2 Review of Existing Data (RED)/Multi-disciplinary Evaluation Team (MET) meeting to
3 consider reevaluation data as part of Student's triennial review. At that meeting, the
4 2017 IEP was reviewed with the included progress updates. The math goal had an
5 October 11, 2017 progress update indicating Student had 60 percent mastery. The
6 communication goal had a December 21, 2017 progress update indicating that Student
7 was able to plan out what was needed to do in 8 out of 8 attempts but "continue[d] to
8 have difficulty following through on those plans." The social emotional goal had a
9 December 19, 2017 progress update indicating that Student was able to state three
10 coping skills that he was willing to use in the general education setting, demonstrated
11 use of those coping skills in meetings with Ms. Whitford, and was able to use the coping
12 strategies in three successful times that quarter.¹⁰

13 6. During the January 17, 2018 RED/MET meeting, Parents reported a new
14 diagnosis of migraines which they asserted were being caused by stress.¹¹ Student
15 earned a D in Algebra I and Cs in Art I, Biology, and English I in the Fall 2017
16 semester.¹² Student had been absent 10.25 days of the school year.¹³

17 7. According to the information reviewed, Student's Intelligence Quotient (IQ)
18 was average with processing speed and working memory falling in the low average to
19 average range. In the area of social/emotional functioning, Student displayed
20 significant weakness in regard to his cognitive control/executive functioning with limited
21 attention and concentration skills and delays in transferring information from short-term
22 to long-term memory for daily use.¹⁴

23 8. Student withdrew or acted out with defiance when tasks become difficult
24 or challenging for him. Student would cover his face, avoid eye contact, or try to
25 engage on activities on his cellular phone. Student was described as displaying an
26 emotionally-guarded disposition with strong feelings of frustration, work avoidance, and
27

28 ¹⁰ Exhibit B at 48-50.

29 ¹¹ Exhibit B at 59.

30 ¹² Exhibit B at 64.

¹³ Exhibit B at 64.

¹⁴ Exhibit B at 69.

1 helplessness concerning academic and social situations. Concentration and task
2 persistence were delayed compared to same-age peers.¹⁵

3 9. The IEP Team also reviewed a prior Functional Behavior Assessment
4 (FBA), which concluded that “[w]hen [Student] is asked to complete tasks that are
5 undesired or are perceived as too difficult . . . , [Student] will disengage from the task,”
6 functioning as an “escape from the task or interaction at hand.”¹⁶

7 10. The IEP Team concluded that the existing data was sufficient to decide
8 eligibility and need for special education.¹⁷ Parents acknowledged they were notified of
9 their rights to request additional assessments to determine whether Student was
10 eligible for and in need of Special Education Services. Parents did not request any
11 additional assessments, including an additional FBA.¹⁸

12 11. At the conclusion of the RED/MET meeting, the IEP Team concluded that
13 Student was eligible for special education in the categories of [REDACTED]

14 [REDACTED]¹⁹

15 12. On or about February 28, 2018, the annual IEP Team meeting convened.
16 At the time of the IEP Team meeting, Student’s grades were Fs in Child Development,
17 English I (academic), Personal Fitness (P.E.), Algebra I, and Algebra I (elective) and a
18 D in English I (elective).²⁰

19 13. The February 2018 IEP included one math goal, one general academic
20 goal, and one social emotional goal. The goals were set forth as follows:

21 Skill Area: Math

22 Annual Goal: [Student] will independently solve word problems with
23 related to real world applications with 50% accuracy, from a baseline of
24 20% as measured by teacher made assessments, quizzes, tests, and
25 work samples. Data will be collected monthly.

26 Skill Area: General Academic

27 Annual Goal: To increase his self-advocacy skills, [Student] will meet with
28 case manager and/or support staff, at minimum, weekly to review and
29 determine plan for grades including communication with teachers, missing
30 assignments and upcoming projects, quizzes and tests as demonstrated

15 Exhibit B at 69.

16 Exhibit B at 59.

17 Exhibit B at 66-67.

18 Exhibit B at 68.

19 Exhibit B at 72.

20 Exhibit B at 82-83.

1 by an increase in his self-advocacy rubric score from a 1 to a 3 (rubric is
2 located in supporting documentation). This goal will be considered
3 mastered when [Student] maintains a score of 3 over 2 consecutive
4 quarters. Data will be taken weekly and reported quarterly to coincide
5 with progress reports.

6 Skill Area: Social Emotional

7 Annual Goal: [Student] will increase his coping skills by working with staff
8 to identify and develop a plan to address issues, challenges or stressors
9 that interfere with his motivation to attend and perform at school
10 consistently as demonstrated by increasing his behavior rubric score from
11 a 2 to a 4. This goal will be considered mastered when he maintains a
12 score of 4 over 2 consecutive quarters.²¹

13 14. Student was to receive 60 minutes per month of specialized instruction in
14 math problem solving, 90 minutes per quarter for Behavior Support with the
15 psychologist, and 120 minutes per month of counseling by the behavioral health
16 support person.²²

17 15. Parents posited that Student was emotionally overwhelmed trying to keep
18 up with the pacing of the curriculum in his coursework. Therefore, the IEP Team
19 decided to modify Student's schedule from a full-time class load taking four classes to a
20 part-time class load taking Algebra 1 and P.E.²³

21 16. Accommodations and modifications were also put into place including:

- 22 • Break test and quizzes into chunks or sections, due to him becoming
23 overwhelmed – no more than 5 questions per page;
- 24 • Reduce assignments and/or tests when Student is frustrated, to show
25 mastery of concepts only;
- 26 • Check in/check out with staff to help organize homework and projects in a
27 daily folder system;
- 28 • Positive reinforcement, Student does better with positive comments and
29 actions; and
- 30 • Student will have access to resource lab for small group setting for
tests/quizzes, projects, and assignments.²⁴

²¹ Exhibit B at 86-88.

²² Exhibit B at 96.

²³ Exhibit B at 94, 99.

²⁴ Exhibit B at 90.

1 17. Following the February 28, 2018 IEP Team meeting, Student's attendance
2 vastly improved. Student missed only one day of school in March, April, and May due
3 to illness.²⁵

4 18. As the 2017 – 2018 school year ended, Student had failed both Algebra 1
5 and P.E.²⁶ Further, Student made limited progress on his goals.²⁷

6 19. During Summer 2018, Student took Algebra as a credit-recovery class
7 online. Student was able to complete the course and passed it earning a credit towards
8 graduation.²⁸ Father sat with Student while he took the course. While Father did not
9 do any of the work, he did ensure Student remained on task.²⁹

10 20. The 2018 – 2019 school year began on August 8, 2018. Student was
11 returned to a full class load of four classes. Student attended 8 of the first 11 days of
12 school.³⁰ Of the 8 days he attended, he spent 3 days in Ms. Whitford's office refusing
13 to go to class. Student told Ms. Whitford that he did not want to be at school.

14 21. Parents requested a meeting with the school to address Student's
15 issues.³¹

16 22. On August 23, 2018, the IEP Team convened. Parents invited Student's
17 outside therapist, Dr. Christina Katen, and the family's advocate, David Jefferson.
18 Steven Udowitz was present as the District Representative. Student was also in
19 attendance.³²

20 23. Recapping the prior school year, Ms. Whitford outlined the supports and
21 strategies used to help reduce Student's feelings of being emotionally overwhelmed,
22 including the following:

- 23 • Individual counseling;
- 24 • Small group to address social skills;
- 25 • Check in/check out;

26
27 ²⁵ Exhibit E at 3.

28 ²⁶ Exhibit D at 5.

29 ²⁷ Exhibit B at 114-16.

30 ²⁸ Exhibit D at 17.

²⁹ Testimony of Father.

³⁰ Exhibit E at 6.

³¹ Exhibit F at 142.

³² Exhibit B at 103.

- Folder system where the co-teachers in each of his classes to identify the one assignment he should be focusing on;
- Check out with his case manager the last five minutes of every day to make sure he was getting the assignments and completing them.

24. Ms. Whitford stated that Student's level of anxiety was "almost at panic level" and that she could not give Student skill instruction when he was at that panic level.

25. Mr. Jefferson addressed Respondent School District's efforts during the meeting by saying, "It does sound like we've done a tremendous amount here to meet him where he is at and I commend you guys because I think you guys have done a great job."

26. Father addressed Respondent School District's efforts during the meeting by saying, "I think the team that we have right here has done everything humanly possible to help. There's no doubt in my mind of that."

27. Teachers' comments included that Student did not engage with peers, even when in a group, and struggled to get his work done.

28. Father described his concern with how the stress of attending school affected Student physically as follows:

Well, the stress of school at home before I bring him in, he is so stressed out that he's physically making himself ill. I mean yesterday, we didn't have a headache, we had so much stress that it was causing digestive issues so, and other times it goes into a full grown migraine because of his amount of stress just thinking about going to school and having to deal with people and things.

29. Father also told the IEP Team that he was concerned because Student had expressed a desire to quit school because it was more than he could handle.

30. Ms. Whitford also indicated she was worried about Student's mental health, but stated she was at a loss as what she could do to help him.

31. Mr. Udowitz acknowledged that the techniques used by Respondent School District did not seem to be working to get Student on campus. When Mr. Udowitz asked Father what they felt would work, Father said that he did not know, but suggested home instruction, online classes, or a smaller environment.

1 32. Mr. Jefferson did not believe homeschool/home instruction would be
2 appropriate because, as the most restrictive setting, it would not help Student deal with
3 his anxiety or prepare him for the workplace, trade school, or college. Mr. Udowitz
4 agreed that home instruction impacted the ability to maintain positive peer relationships.

5 33. When Ms. Whitford had asked Student what his ideal day of school would
6 be, Student told her that it would be him with no other students, on campus with
7 teachers but with no other students, or at home with Father because Father knew how
8 to deal with him best.

9 34. When considering the continuum of placements, Mr. Jefferson requested
10 that Respondent School District look into private placements that may be able to
11 address Student's needs. Mr. Jefferson specifically suggested AZ Aspire Academy
12 (Aspire) and Banner Children's Academy (Banner). Dr. Katen expressed concern about
13 Student suffering "psychological regression" if he experienced a wholesale change of
14 his educational environment. Mr. Udowitz also expressed concerns with the drastic
15 jump from Student's current placement to a private day school, but stated that he would
16 look into whether Respondent School District had purchase orders with either Aspire or
17 Banner.

18 35. At the conclusion of the meeting, the IEP Team proposed the following
19 amendments to the 2018 IEP:

- 20 • Doubling counseling services to 240 minutes per month;
- 21 • Adding 45 minutes per month of support services by the Behavior
22 Interventionist or psychologist;
- 23 • Moving Student to a more restrictive Level B placement (inside the
24 general education class not more than 79% of the day and no less than 40% of
25 the day);
- 26 • Adding accommodations recommended by Dr. Katen for sensory
27 processing: 1) allow one earbud in; 2) speak to Student's side; 3) allow Student
28 to communicate via email.
- 29 • Adding an accommodation for physical movement (distribute materials,
30 run errands, etc.)

- Allowing Student to enter the classroom before other students
- Changing schedule by moving nonpreferred math from the first class in the morning to the end of the day, putting Student in an LSC math class, dropping Criminal Justice, and adding e-Campus P.E.³³

36. The IEP Team agreed to meet again in September to allow Respondent School District time to collect data and then the team could review how the changes were working.

37. After the meeting, Student returned to class and had a very successful day. However, Student did not return to school any day thereafter.

38. On or about August 28, 2018, Student had an appointment with Dr. Katen for a “crisis intervention” because of his high level of anxiety. Dr. Katen encouraged Student to return to Sunrise Mountain. Dr. Katen would also have provided Father with tools and recommendations about how to get Student to school.³⁴

39. Ms. Whitford repeatedly reached out to Petitioners to offer support and assistance getting Student back to school.³⁵

40. With respect to the e-Campus P.E. class, following the August 23, 2018 IEP Team meeting, Respondent School District sent Student an email, which was copied to Father, stating, “[I]t is very important you get in contact with your instructor immediately” and provided the instructor’s contact information. Student was notified that he needed to complete the online student orientation course and Father was notified of the parent obligation to verify Student’s time each week including the link to the parent verification site. Neither Student nor Father responded to the email or followed up on the instructions included.³⁶

41. On or about September 11, 2018, Mr. Mendivil, e-Campus coordinator, called Father about Student’s lack of participation in the e-Campus course. On or about September 11, 2018, Mr. Mendivil left a message for Father indicating the

³³ Exhibit B at 130-31. Moving Student from World History into LSC World History with a smaller class size was also considered, but Petitioners did not want to make that change because Student liked, both the class and the teacher.

³⁴ Testimony of Dr. Katen.

³⁵ Exhibit F at 180-81a.

³⁶ Exhibit F at 167-68.

1 instructor had also reached out to Student and Father regarding Student's lack of
2 participation. Father ignored the phone calls and did not respond.³⁷

3 42. On or about September 6, 2018, Father emailed Ms. Whitford that
4 "[Student] is shut down and we believe he needs more help than [Respondent School
5 District] can provide. We need to schedule an IEP meeting to develop a new plan
6 ASAP."³⁸

7 43. On or about September 12, 2018, Parents and Student toured Aspire.

8 44. On or about September 12, 2018, Student had an appointment with Dr.
9 Katen. That was the first contact from Student or Parents since the August 28, 2018
10 appointment. Dr. Katen read her notes of the session into the record as follows:

11 Met with [Student] and dad, report that still refused to go to school,
12 worried about changes, being behind, not feeling heard or understood, too
13 many kids in school, not friends, feel isolated, not willing to talk to
14 teachers because feel less than, made fun of. Reported that visited
15 Aspire school because feel overwhelmed in typical high school, four to six
16 kids, one teacher for subject, increased social problem solving because
17 one on one. Easy and talk with peers about – clan. That must be a
18 game. Work on the idea of happiness, visualization of a learning
19 environment, positive growth with choices and thoughts, maintaining
20 during class increased desire to learn and trust self to learn, to be his best
21 self.³⁹

22 45. The follow-up IEP Team meeting convened on September 13, 2018.
23 Student was not present at the meeting.

24 46. During the meeting, Father recounted Student's experience during the
25 tour of Aspire. According to Father, Student took off his hood, walked around, engaged
26 with other students, and started talking with other boys about video games. Father
27 reported that Student stayed throughout the tour and said, "Yeah, I think I can do this"
28 as he left the school with a smile.

29 47. At the September 13, 2018 IEP Team meeting, Father stated that
30 "[Student] is not coming back to campus. . . . He wants off this campus. Period. That's
what needs to happen. And if it doesn't, it's going to be a problem."

³⁷ Exhibit F at 210.

³⁸ Exhibit F at 190.

³⁹ Testimony of Dr. Katen.

1 48. Petitioners proposed that Student's school refusal stemmed from
2 Student's fear of encountering "Mrs. O.," a teacher at Sunrise Mountain High School
3 who had previously worked with Student in a behavior program at Pioneer Elementary.
4 Neither Parents nor Student had ever mentioned any concerns regarding Mrs. O. prior
5 to the September 13, 2018 IEP Team meeting. During all the time Student spent in Ms.
6 Whitford's office, Student had never indicated any concern over a possible encounter
7 with Mrs. O. Student had also never shared with Dr. Katen, who had worked with him
8 since 2011, that he had any anxiety over possibly running into Mrs. O. on campus.⁴⁰

9 49. In response to the concerns regarding Mrs. O., Respondent School
10 District proposed moving Student to Cactus High School, which was roughly half the
11 size of Sunrise Mountain High School.

12 50. Parents rejected a move to Cactus High School, asserting that Student
13 might run into students who also attended the Pioneer Elementary behavior program
14 with him and he would feel uncomfortable. Father admitted he never toured Cactus
15 High School, never asked Student about his willingness or ability to attend Cactus High
16 School, and never tried to get Student's "buy-in" to the change of location.

17 51. Mr. Udowitz presented a variety of options as a means of "working
18 towards [Student] coming back." Mr. Udowitz stated the following:

19 If you're talking about . . . where he's at right now – not being able to get
20 out of the house – and taking that step back and saying: Let's get a
21 teacher to school to work on these social skills . . . to be able to work
22 towards him coming back – we can 100 percent do that. Even combined
23 with e-campus courses. . . . If you guys are interested in having someone
24 to come out to work on these things in the home environment; to progress
25 him to get back, we can 100 percent do that.

26 52. Mr. Udowitz suggested a hybrid of options that could combine home
27 instruction, virtual/e-campus courses, and LSC courses. Mr. Udowitz indicated, "If we
28 need to make that adjustment to a hybrid of any number of things: LSC courses,
29 combined with e-campus, combined with some home instruction – whatever that needs
30 to look like, we can make that happen."

⁴⁰ Given that Student did not return to campus after the August 23, 2018 IEP Team meeting, no encounter with Mrs. O. could have occurred between the two IEP Team meetings that would explain the issue being raised for the first time in September 2018.

1 53. During the course of the meeting, Mr. Jefferson acknowledged that, with
2 respect to the changes proposed at the August 23, 2018 IEP Team meeting, "[t]he
3 family never believed your plan was going to work."

4 54. Respondent School District proposed that they implement the August 23,
5 2018 IEP for a short 10-day window, collect data, and hold an IEP review meeting on
6 September 27, 2018, as previously scheduled to assess progress and consider further
7 options, as needed.

8 55. Respondent School District provided several strategies to help get
9 Student to school, but Petitioners informed the IEP Team that that they intended to
10 enroll Student in Aspire.

11 56. On or about September 14, 2018, Respondent School District issued a
12 Prior Written Notice outlining the proposed changes to the IEP as discussed at the
13 September 13, 2018.⁴¹

14 57. Student began attending Aspire on September 25, 2019.⁴²

15 58. Aspire is a K through 12 school approved by the Arizona Department of
16 Education as a private special education day school serving students with ADHD,
17 Autism Spectrum Disorder, anxiety, and others.

18 59. Students at Aspire have one-to-one instruction for core academic classes,
19 and small groups of six-to-one for elective courses – STEAM (Science, Technology,
20 Engineering, Art, and Mathematics), Yoga, P.E., Music, and Art.

21 60. Student's school day is from 9:00 a.m. to 2:00 p.m. As of the date of the
22 hearing, Student was physically absent six days. On three of those days, he "met" with
23 a teacher via Google Hangouts, resulting in three recorded absences.⁴³ Mornings are
24 especially difficult for Student as he comes to school very lethargic and disengaged and
25 can take 10 to 20 minutes to "warm up." Student also had numerous days during which
26 he slept a substantial amount of time. As of the hearing, Student still had days during
27 which he was disengaged throughout the day and kept his head down on his desk.

28
29 ⁴¹ Exhibit B at 162.

⁴² Exhibit J at 1.

30 ⁴³ Exhibit 59 at AZAsub_0089. However, the accuracy of Aspire's records is in question as the Student Attendance record indicated that Student was present every weekday in November 2018, even though

61. As of the hearing, Student had earned .5 credit for a semester of English 10 (getting a B), .5 credit for a semester of STEAM, and .5 credit of social skills. Student started in physical science, but he asked to be moved, and was transferred to biology. Student had completed 15 percent of his biology class with an A-, 83 percent of his geometry class with an A-, and 53 percent of his world history class with no current grade provided.⁴⁴

62. Student went on a field trip with his class the week before the hearing during which he engaged with classmates.⁴⁵

63. Dr. Cohen observed Student at Aspire on January 25, 2019. During her observation, Dr. Cohen spoke to Student who reported he liked Aspire because he could work individually with a teacher, he got to take breaks between classes, and he could go for a walk when he finished a subject. Dr. Cohen's observation of Student included an English class, a lunch period during which he did not eat and spent disengaged from others, and a social skills session, which Dr. Cohen was told "sometimes he doesn't go" but on that day he went. During that brief time, Dr. Cohen observed Student as being engaged in his classes and with peers.⁴⁶

CONCLUSIONS OF LAW

APPLICABLE LAW

FAPE

1. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a FAPE (free appropriate public education) that meets their individual needs.⁴⁷ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.⁴⁸

2. To provide a FAPE, a school district must identify and evaluate all children within their geographical boundaries who may be in need of special education and

Ms. Gonzales acknowledged Aspire did not have classes on Thanksgiving or the day after Thanksgiving, November 22, 2018, and November 23, 2018.

⁴⁴ Testimony of Ms. Gonzales.

⁴⁵ Testimony of Ms. Gonzales.

⁴⁶ Testimony of Dr. Cohen.

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

⁴⁸ *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).

1 services. The IDEA sets forth requirements for the identification, assessment, and
2 placement of students who need special education, and seeks to ensure that they
3 receive a FAPE.

4 3. A FAPE consists of “personalized instruction with sufficient support
5 services to permit the child to benefit educationally from that instruction.”⁴⁹ The FAPE
6 standard is satisfied if the child’s IEP sets forth his or her individualized educational
7 program that is “reasonably calculated to enable the child to receive educational
8 benefit.”⁵⁰ The IDEA mandates that school districts provide a “basic floor of
9 opportunity.”⁵¹ The IDEA does not require that each child’s potential be maximized.⁵²
10 A child receives a FAPE if a program of specialized instruction “(1) addresses the
11 child’s “unique” needs, (2) provides adequate support services so the child can take
12 advantage of the educational opportunities and (3) is in accord with the child’s
13 individualized educational program.”⁵³

14 ***The IEP***

15 4. Once a student is determined eligible for special education services, a
16 team composed of the student’s parents, teachers, and others familiar with the student
17 formulate an IEP (individualized education program) that generally sets forth the
18 student’s current levels of educational and functional performance and sets annual
19 goals that the IEP team believes will enable the student to make progress in the general
20 education curriculum.⁵⁴

21 5. The IEP tells how the student will be educated, especially with regard to
22 the student’s unique needs that result from the student’s disability, and what services
23 will be provided to aid the student. The student’s parents have a right to participate in
24

25 ⁴⁹ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

26 ⁵⁰ *Id.*, 485 U.S. at 207. In 2017, in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. ___, 137 S.
27 Ct. 988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard,
28 adding that a school “must offer an IEP that is reasonably calculated to enable a child to make progress
appropriate in light of the child’s circumstances,” but the Court declined to elaborate on what “appropriate
progress” would look like case to case (*i.e.*, in light of a child’s circumstances).

⁵¹ *Rowley*, 458 U.S. at 200.

⁵² *Id.* at 198.

⁵³ *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)).

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

the formulation of an IEP.⁵⁵ The IEP team must consider the strengths of the student, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the student.⁵⁶

6. IEPs are to be evaluated by the courts using the “snapshot rule”. That is, the IEP should not be scrutinized using hindsight, but in light of the circumstances existing at the time the IEP was developed.⁵⁷

7. 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,⁵⁸ 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.⁵⁹

8. The IEP team must consider the concerns of a child’s parents when developing an IEP.⁶⁰ In fact, the IDEA requires that parents be members of any group that makes decisions about the educational placement of a child.⁶¹

Substantive Violations versus Procedural Violations

9. A determination of whether a student received a FAPE must be based on substantive grounds.⁶² For a substantive analysis of an IEP, the review of the IEP is limited to the contents of the document.⁶³ Therefore, any question regarding whether an IEP is reasonably calculated to provide educational benefit to a student must be decided on the basis of the content of the IEP itself.

10. Procedural violations in and of themselves do not necessarily deny a student a FAPE. If a procedural violation is alleged and found, it must be determined whether the procedural violation either (1) impeded the student’s right to a FAPE; (2)

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

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

⁵⁷ See *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010).

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

⁵⁹ 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).

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

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

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

⁶³ *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) (“only those services identified or described in the . . . IEP should have been considered in evaluating the appropriateness of the program

significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit.⁶⁴ If one of those three impediments has occurred, the student has been denied a FAPE due to the procedural violation.

Least Restrictive Environment (LRE)

11. The IDEA does not provide an absolute right to a particular placement or location as a child's LRE. Each proposed or alternative placement is simply required to have been "considered" by the IEP Team with regard to potential harmful effect on the student or potential harmful impact on the quality of the services that the child needs.⁶⁵ Therefore, LRE and placement are required to be determined only after analyzing the student's unique needs (and the nature and severity of disabilities) against the federal mandate to educate disabled children "to the maximum extent appropriate" with his or her nondisabled peers. The IDEA preference for mainstreaming is also not an absolute.⁶⁶

12. The Administrative Law Judge acknowledges that the IDEA creates tension between provisions that require education to the maximum extent appropriate with nondisabled students and those that require meeting all the student's unique needs.

FBA's and BIP's

13. Neither FBAs nor BIPs are required components of an IEP under the IDEA. 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. However, nothing in the regulations "shall be construed to require . . . [t]hat additional information be included in a child's IEP beyond what is explicitly required in section 614 of the [IDEA]."⁶⁷

offered) (relying on *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (IDEA requirement of a formal, written offer should be enforced rigorously)).

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

⁶⁵ See 34 C.F.R. § 300.116(d).

⁶⁶ See 34 C.F.R. §§ 300.114(a)(1) and (2). A school may, and should, remove a child from the regular educational environment if the nature and severity of the child's disability is such that, even with supplemental aids and services, the education of the disabled child cannot be satisfactorily achieved. See 34 C.F.R. §§ 300.114(a)(2)(ii) and 300.116(d).

⁶⁷ 34 C.F.R. § 300.320(d).

14. An FBA is an option, but it is not “inexorably a hard-and-fast requirement.”⁶⁸

Burden of Proof and Basis of Decision

15. 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, in this case Petitioners bear the burden of proving by a preponderance of evidence that Respondent substantively violated the IDEA through the alleged actions or inactions. If a procedural violation is alleged and demonstrated, Petitioners must then show that the procedural violation either (1) impeded Student’s right to a FAPE, (2) significantly impeded Parents’ opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit to Student.⁷¹

DECISION

Issue 1: Predetermination

16. The IDEA requires that parents be allowed “to participate in meetings with respect to the identification, evaluation, and educational placement of the child.”⁷² However, “preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later [IEP] meeting” do not constitute an IEP meeting.⁷³

17. “[S]chool officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind.”⁷⁴

18. Petitioners asserted that Respondent School District predetermined Student’s placement prior to the August 2018 and September 2018 IEP meetings.

⁶⁸ *Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR 271 (E.D. Pa 2018).

⁶⁹ *Schafer 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, 371-72 (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 No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

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

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

⁷³ 34 C.F.R. § 501(b)(3).

⁷⁴ *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 253 (2d Cir. 200a9).

Petitioners argued that Respondent School District failed to fairly consider placement at Aspire.

19. During the August 2018 IEP Team meeting, Parents brought up Banner and Aspire as potential private placements. At that time, Respondent School District indicated they would look into the placement and whether purchase orders existed that would allow Student to be placed there. The IEP Team meeting continued and the team decided to try a variety of changes to Student's schedule and accommodations for a brief period to allow Respondent School District to collect data and come back to the IEP Team with additional information to consider.

20. Student did not return to Sunrise Mountain after the August 2018 IEP Team meeting. Therefore, Respondent School District could not collect data regarding the changes discussed and agreed upon during the meeting.

21. Respondent School District did not tour Banner or Aspire following the August 2018 IEP Team meeting.

22. At the September 2018 IEP Team meeting, Parents were adamant that nothing Respondent School District could offer would be suitable to meet Student's needs and that they believed Student would never set foot on the campus again. In fact, during the meeting, Parents provided notice of their intention to unilaterally place Student in Aspire.

23. While Respondent School District could have done more to explore the options presented, they listened to Petitioners questions and observations and were willing to consider Aspire or Banner.

24. Thus, Petitioners failed to sustain their burden of proof that Respondent School District predetermined Student's placement.

Issue 2: February 28, 2018 IEP

25. Parents asserted that the February 28, 2018 IEP was not reasonably calculated to provide Student a meaningful educational benefit. Parents' argument rests in large part on the fact that Student "did not receive any educational benefit during the 2017-2018 school year as required under *Endrew F.*"⁷⁵

⁷⁵ Petitioners' Post-Hearing Reply Memorandum at p. 14.

1 26. As previously noted, the appropriateness of an IEP is not to be analyzed
2 with the benefit of hindsight, that is how much progress the student made while the IEP
3 was in place, but based on the information known to the parties at the time, that is
4 whether the student was provided a framework *to enable* the student to make
5 meaningful progress under the IEP.

6 27. Petitioners cite to no authority holding that a specific level of progress is
7 guaranteed under the IDEA. In fact, the opposite is true. Courts have routinely held
8 that a certain level of progress is not a guarantee and schools will not be found to have
9 failed to provide FAPE because a student made only *de minimus* progress under an
10 IEP.⁷⁶ Again, the question to be considered is whether the goals, as written, were
11 appropriately ambitious in light of the student's unique circumstances.

12 28. At the time of the February 28, 2018 IEP, Student's difficulties were
13 known to Respondent School District. Student was exhibiting school aversion and an
14 unwillingness or inability to go to class on a regular basis.

15 29. The IEP Team agreed that reducing Student's school day from four
16 academic classes to two academic classes was an appropriate response to Student's
17 school aversion. The desire was to reduce Student's anxiety to a point where he would
18 be capable of attending school regularly, then transition back to a full schedule.

19 30. Prior to the February 28, 2018 IEP Team meeting, Student had missed 12
20 full days in the first two months of the second semester. Following the meeting through
21 the end of the school year, Student missed only 3 days due to illness.

22 31. Thus, the changes to the IEP achieved the initial goal of getting Student to
23 go to school more often. However, Student continued to struggle going to class and/or
24 engaging in class once on campus. Ms. Whitford continued to focus on getting Student
25 to attend classes during that semester.

26 32. Given the sudden onset of Student's school aversion, the decision to
27 reduce Student's class load in the short term was an appropriate response.

28
29 ⁷⁶ See *Rowley*, 458 U.S. at 192; *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 815 (9th Cir. 2007)
30 ("the child's educational progress, or lack of it, may be probative of whether there has been more than a
minor shortfall in the services provided"); see also *Questions and Answers on U.S. Supreme Court Case
Decision Endrew F. v. Douglas County School District Re-1*, 117 LRP 50044 (OSEP, Dec. 7, 2017).

1 33. Petitioners further argued that other accommodations, modifications, and
2 goals should have been included in the 2018 IEP to offer Student a FAPE. Petitioners
3 specifically referenced the lack of a goal to address executive functioning skills, social
4 skills, peer interactions, and anxiety. Petitioners argued that the goals in the February
5 2018 IEP were essentially carried over from the previous year, indicating a lack of
6 progress.

7 34. Given Student's unwillingness or inability to attend class during the Spring
8 2018 semester, it is difficult to imagine appropriate social skills or peer interaction goals
9 that could have been attempted to be implemented. Although Student may not have
10 had a specific goal relating to anxiety or executive functioning, Student was receiving
11 services, through Ms. Whitford and others to aid Student in dealing with his anxiety to
12 enable him to attend school.

13 35. As Petitioners repeatedly noted throughout the hearing, if Student was not
14 at school, he could not access the general education curriculum. Getting Student to
15 attend school was the most significant and pressing issue at the time of the February
16 2018 IEP.

17 36. The hearing record established that with the various accommodations put
18 into place, Student's attendance vastly improved, but Student still had difficulty getting
19 to and engaging in class.

20 37. One would presume that if Student's willingness or ability to attend school,
21 go to class, and engage in class improved during the IEP's effective time period, the
22 IEP Team would amend the IEP to add goals that Student could then work towards.

23 38. Therefore, Petitioners failed to establish that the February 2018 IEP was
24 not reasonably calculated to provide Student a meaningful educational opportunity.

25 **Issue 3: August 23, 2018 and September 13, 2018 Amendments to the IEP**

26 39. Parents asserted that the August 23, 2018 and September 13, 2018
27 amendments to the February 28, 2018 IEP were not reasonably calculated to provide
28 Student a meaningful educational benefit.

29 40. At the August 23, 2018 IEP Team meeting, Dr. Katen, Student's
30 psychologist since 2011, warned that too many changes to Student's educational

1 program may cause him to regress emotionally. While Parents and Mr. Jefferson
2 asked that Respondent School District consider a private day school, Dr. Katen
3 expressed her concerns as to what a wholesale change in every aspect of Student's
4 program would do to him.

5 41. Thus, the IEP Team agreed to change Student's schedule so Student had
6 a preferred class with a preferred teacher during his first class period. Other changes
7 were discussed and rejected by the IEP Team, including switching to more LSC classes
8 that were smaller in size in light of Dr. Katen's advice and Student's expressed
9 preferences. Dr. Katen observed that such changes were reasonable based on her
10 knowledge of Student.

11 42. The IEP Team agreed that the amendments would be implemented for
12 approximately one month, data would be collected, and then the team would reconvene
13 to discuss further amendments to the IEP as needed.

14 43. Student did not return to Respondent School District after the August 23,
15 2018 IEP Team meeting. Accordingly, the effectiveness of the changes could not be
16 considered by the IEP Team.

17 44. As to the September 13, 2018 amendments to the February 28, 2018 IEP,
18 Mr. Udowitz offered a "hybrid" of approaches during the IEP Team meeting and
19 repeatedly stated that, whatever Student needed, Respondent School District was "100
20 percent" prepared to provide. Those options, including e-campus courses, homebound
21 instruction, counseling, and small classes, were similar to those options available at
22 Aspire.

23 45. Petitioners criticized that the homebound instructor would not be the same
24 instructor that would then teach Student should he return to the classroom on campus.
25 While it is possible that continuity of personnel may be the best approach when working
26 with a student with school aversion, nothing in the IDEA requires the best approach in
27 every situation.

28 46. In total, Petitioners simultaneously argued that Respondent School District
29 tried to change too many things in Student's school day during the August 23, 2018 IEP
30 Team meeting, which in part led to him not returning to school, and that Respondent

1 School District should have more seriously considered the private day school
2 placement in which every aspect of Student's school day would have been different.

3 47. The Administrative Law Judge notes that Parents were purportedly not
4 able to get Student to leave the house during the time between the August 23, 2018
5 IEP Team meeting and the September 12, 2018 visit to Aspire. However, during that
6 time, Student met with Dr. Katen on August 28, 2018, and on September 12, 2018,
7 after his visit to Aspire. At no point between those two appointments did Parents reach
8 out to Dr. Katen regarding Student's reported refusal to leave the house, much less to
9 go to school. During that time, Parents also ignored Respondent School District's
10 attempts to engage Parents and Student to help get Student back to campus.

11 48. As Father stated during the September 13, 2018, IEP Team meeting
12 Student wanted off the campus and if that did not happen, "it's going to be a problem."
13 Despite Student wanting off the Sunrise Mountain High School campus, Father never
14 mentioned the option of attending Cactus High School to Student.

15 49. Based on the information provided, it is difficult to determine what
16 accommodations and modifications Respondent School District could have offered that
17 Petitioners would have deemed appropriate for Student absent a placement at Aspire.

18 50. The main thrust of Petitioners' argument as to the February 28, 2018 IEP,
19 the August 23, 2018 amendments to the IEP, and the September 13, 2018
20 amendments to the IEP were that Respondent School District was responsible for
21 getting Student to campus.⁷⁷

22 51. Petitioners did not identify any provision of the IDEA that specifically
23 requires a school district to ensure a child attends school. Rather, the IDEA provides
24 that a FAPE must "be available to all children."⁷⁸ Further, the Supreme Court has held
25 that schools must "offer" a FAPE to students.⁷⁹

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27
28 ⁷⁷ Stepmother acknowledged at the hearing that the proposed amendments to the February 28, 2018 IEP
29 were reasonable "if we had a way to get him to school."

⁷⁸ 34 C.F.R. § 300.101(a).

30 ⁷⁹ See *Endrew F.*, 580 U.S. at 11 ("a school must offer an IEP that is reasonably calculated to enable a
child to make progress appropriate in light of the child's circumstances").

1 52. While Parents clearly wanted more from Respondent School District,
2 Petitioners failed to establish that the August 23, 2018 and September 13, 2018
3 amendments to the February 28, 2018 IEP were not appropriate.

4 **Issue 4: Collection of Data**

5 53. Petitioners alleged that Respondent School District denied Student a
6 FAPE by failing to collect data on goals during the 2017 – 2018 and 2018 – 2019
7 school years.

8 54. The IDEA provides that the IEP must include a “description of . . . [h]ow
9 the child’s progress toward meeting the annual goals . . . will be measured.”⁸⁰ The
10 IDEA has no provisions regarding how the data is to be collected or if it is to be
11 maintained by the school.

12 55. Petitioners argued that they knew Respondent School District did not
13 collect any data “because requests were made for ‘progress monitoring data’,”
14 Respondent School District “responded by saying all data has been provided,” and the
15 data provided by Respondent School District did “not contain any of the data described
16 in the IEPs.”⁸¹

17 56. Petitioners argued that, without the collection of data, the IEP Team could
18 not make informed decisions as to whether the goals were appropriate and/or whether
19 the goals needed to be amended.

20 57. Respondent School District provided quarterly progress reports on the
21 annual goals in the IEP as required by the IDEA.⁸² Absent a malicious intent to deceive
22 on the part of Respondent School District, one must conclude that the quarterly
23 progress reports were based on data collected during the relevant time period.

24 58. Therefore, Petitioners failed to establish that Respondent School District
25 failed to collect data as required by the IDEA.

26 **Issue 5: FBA**

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28
29 ⁸⁰ 34 C.F.R. § 300.320(a)(3)(i).

30 ⁸¹ Petitioners’ Post-Hearing Memorandum at p. 43.

⁸² Petitioners did not allege that Respondent School District failed to comply with the IDEA by failing to provide quarterly progress reports.

59. Petitioners asserted that Respondent School District denied Student a FAPE when it failed to conduct an FBA in January 2018 during Student's triennial reevaluation.

60. Student had a prior FBA that was reviewed during the January 2018 RED/MET meeting. At the conclusion of the meeting, the IEP Team unanimously agreed that the existing data was sufficient to assess Student's progress and to make decisions about Student's eligibility and need for special education services.

61. Petitioners specifically acknowledged, by initialing the statement, that they were advised of their right to request additional assessments to determine if Student was eligible for and in need of special education services. Parents did not request an FBA at that meeting.

62. While an FBA may be considered "pedagogically preferred or wise," that "is not the same as statutorily required." As it is, "the IDEA does not generally require any specific way to address a student's behavior."⁸³

63. Therefore, Petitioners failed to establish that Respondent School District failed to offer Student a FAPE when it did not conduct an FBA in connection with the January 2018 RED/MET meeting.

Issue 6: BIP

64. Petitioners argued that Respondent School District denied Student a FAPE when it failed to develop and implement a BIP during the 2017 – 2018 school year or the 2018 – 2019 school year.

65. Similar to FBAs, BIPs are not required under the IDEA. Rather, "[i]n the case of a child whose behavior impedes the child's learning or that of others, [the IEP Team must] consider the use of positive behavioral interventions and supports, and other strategies to address that behavior."⁸⁴

66. Given Student's existing FBA and Student's behaviors well-known to Respondent School District, the circumstances did not warrant the development or implementation of a BIP.

CONCLUSION

⁸³ *Pottsgrove Sch. Dist.*, 72 IDELR at 271.

1 67. Petitioners failed to establish by a preponderance of the evidence that
2 Respondent School District violated the IDEA or failed to offer Student a FAPE at all
3 times relevant to this proceeding.

4 68. Under the IDEA, parents are entitled to reimbursement for the costs of a
5 private placement or services they had secured for their child when the school district
6 failed to offer a FAPE and the private placement or services secured are proper under
7 the IDEA and are reasonably calculated to provide educational benefit to the child. 20
8 U.S.C. § 1412(a)(10)(C).

9 69. As described above, Respondent School District did not fail to offer
10 Student a FAPE; therefore, Petitioners are not entitled to reimbursement for Student's
11 unilateral private placement at Aspire.

12 ORDER

13 Based on the findings and conclusions above, **IT IS HEREBY ORDERED** that
14 that the relief requested in the Complaint is **denied** as set forth above and Petitioners'
15 Complaint is dismissed.

16 Done this day, July 30, 2019.

17 /s/ Tammy L. Eigenheer
18 Administrative Law Judge

19 RIGHT TO SEEK JUDICIAL REVIEW

20 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this
21 Decision and Order is the final decision at the administrative level.
22 Furthermore, any party aggrieved by the findings and decisions made
23 herein has the right to bring a civil action, with respect to the complaint
24 presented, in any State court of competent jurisdiction or in a HUSD court
25 of the United States. Pursuant to Arizona Administrative Code § R7-2-
26 405(H)(8), any party may appeal the decision to a court of competent
27 jurisdiction within thirty-five (35) days of receipt of the decision.
28
29
30

⁸⁴ 34 C.F.R. § 300.624(a)(2).

Transmitted by mail or e-mail on July 30, 2019 to:

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