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STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

L.S., Student, by and through Parents
S.V.W. and S.S.,
Petitioners,
v.
Khalsa Montessori School,
Respondent.

No. 21C-DP-050-ADE

ADMINISTRATIVE LAW JUDGE
DECISION

HEARING: Conducted on September 30, 2021, followed by post-hearing legal memoranda submission and review of the entire record; the record closed on November 17, 2021.¹

APPEARANCES: [REDACTED], and [REDACTED] represented Student and themselves.

[REDACTED] Esq., and [REDACTED] Esq., represented Khalsa Montessori School ("Respondent"); Counsel were accompanied by [REDACTED] Director of Respondent.

WITNESSES:²

- [REDACTED] ("Mother").³
- [REDACTED] ("Father").
- [REDACTED] Director of Respondent.
- [REDACTED] Respondent's Special Education Director; former Director of Respondent.
- [REDACTED] School Psychologist.
- [REDACTED] Speech Language Pathologist.

HEARING RECORD: Certified Court Reporter Christine Johnson recorded the proceedings as the official record of the hearing.⁴

¹ Based on the original Complaint filing and a close of the record designated for November 17, 2021, the 45th day is December 16, 2021 – the date by which a decision is due.

² Although identified in the caption and heading, throughout the body of this Decision, proper names of Student and Parents are not used to protect the confidentiality of Student and to promote ease of redaction. Where necessary, pseudonyms (designated here in bold typeface) will be used instead. Pseudonyms are not used for administrators, service providers, evaluators, and other professionals.

³ Mother is a Doctor of Audiology, a Rehabilitative Audiologist, and Speech Language Pathologist; she is in private practice in Arizona. See Exhibit E.

⁴ The parties stipulated that the court reporter's transcript would be the official record of the proceedings. The Tribunal does not begin its review process with the use of a transcript until the hearing sessions are complete and the post-hearing submissions are complete for the reason that parties may stipulate, concede, and/or withdraw issues that, therefore, would not be considered or addressed in a final decision.

1
2 **ADMINISTRATIVE LAW JUDGE:** Kay A. Abramsohn

3
4 Parents brought this due process action on behalf of Student, claiming that
5 Respondent violated the Individuals with Disabilities Education Act (IDEA) and alleging
6 that Respondent failed to provide a free and appropriate public education (FAPE) when,
7 (a) Respondent failed to evaluate Student in all areas of suspected disability in the
8 absence of an evaluation for an auditory processing disorder prior to exiting Student from
9 special education at the April 3, 2020 multidisciplinary evaluation team (MET) meeting;
10 (b) Respondent failed to consider Mother's September 2019 Auditory Processing
11 Evaluation of Student as parental input at the individualized education program (IEP)
12 meeting(s), thus, impeding parental participation in the decision-making process; and, (c)
13 Respondent did not approve a request for a speech language independent educational
14 evaluation (IEE).

15 The law governing these proceedings is the IDEA found at 20 United States Code
16 (U.S.C.) §§ 1400-1482 (as re-authorized and amended in 2004),⁵ and its implementing
17 regulations, 34 Code of Federal Regulations (C.F.R.) Part 300, as well as the Arizona
18 Special Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774,
19 and implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-
20 406.

21 **Procedural History**

22 The due process complaint notice (Complaint) in this matter was filed on June 2,
23 2021.⁶ Respondent filed a June 14, 2021 Motion to Dismiss the entire Complaint, arguing
24 that Student was not currently identified as a child with a disability under the IDEA and
25 that Petitioners had not presented an IDEA claim. Parents filed a June 14, 2021
26 Response, arguing that, at the time of the actions complained of, Student was identified

27 ⁵ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"
28 IDEA 2004 became effective on July 1, 2005.

29 ⁶ Pursuant to 34 C.F.R. § 300.507(a)(2), a complaint must allege a violation that occurred not more than 2
30 years before the date the parent "knew or should have known about the alleged action that forms the
basis of the due process complaint."

1 as a child with a disability under the IDEA and had been receiving services. By ORDER
2 dated July 9, 2021, the parties were noticed that Respondent's motion would be
3 considered as argument at the hearing in the event the matter proceeded to hearing. A
4 mediation on July 27, 2021 was unsuccessful. After a continuance, the due process
5 hearing was conducted followed by post-hearing written legal argument/closing statements.

6 The due process timeline is recalculated by the Administrative Law Judge after a
7 due process hearing and taking into account any further proceedings including post-
8 hearing legal memoranda in lieu of oral closing argument. Based on Petitioners' request
9 for a written record, the request for post-hearing written legal memorandum submission
10 following the parties' receipt of the due process hearing court reporter's transcript, the
11 Tribunal's receipt of the due process hearing court reporter's transcript (*i.e.*, the official
12 hearing session record), and the deadline for parties' submitted written arguments to the
13 Tribunal and review of the entire hearing record thereafter, the calculated 45th day is
14 December 16, 2021.

15 **Evidence and Issues at Hearing**

16 **EXHIBITS**

17 Petitioners had pre-marked Exhibits 1 through 31 and Respondent had pre-marked
18 Exhibits A through CC.⁷ While Petitioners had no objection to Respondent's proposed
19 exhibits, Respondent had objections to several of Petitioners' proposed exhibits.⁸

20 At the hearing, the following of Petitioners' exhibits were admitted: 1,⁹ 3, 4, 5,¹⁰ 6,
21 7, 8, 9, 10, 11,¹¹ 12,¹² 13,¹³ 14, 16, 20A (page 6 only), 21 (excluding page 7), 26, 27
22 (certain portions played and transcribed into transcript), and 28 (certain portions played
23 and transcribed into transcript).¹⁴

24 ⁷ At hearing, specific portions of audio Exhibit 27 and audio Exhibit 28 were played into the record; those
25 portion are transcribed within the transcript.

26 ⁸ The objections and concerns were addressed throughout the hearing when an exhibit was presented.

27 ⁹ Respondent noted: (a) that Exhibit 1 was a revised version of the report Mother had provided to
28 Respondent in November of 2019; and (b) that the original version was contained in Exhibit E.

29 ¹⁰ Respondent noted that the complete e-mail chain is contained in Exhibit P.

30 ¹¹ Respondent noted that the complete e-mail chain is contained in Exhibit S.

¹² Respondent noted that the complete e-mail chain is contained in Exhibit U.

¹³ Respondent noted that the complete e-mail chain is contained in Exhibit S.

¹⁴ This is a corrected list based on review of the hearing transcript; at the hearing, as reflected in the
hearing transcript, the Administrative Law inadvertently left off Exhibits 7, 27, and 28 as noted above.

1 At the hearing, all of Respondent's proposed exhibits were admitted. Additionally,
2 Respondent presented Exhibit DD to fill out a missing page of Petitioners' Exhibit 9 and
3 Exhibit EE to complete an e-mail chain in Petitioners' Exhibit 3.

4 **ISSUES**

5 Based on discussion at the July 1, 2021 pre-hearing conference, the issues for the
6 due process hearing were culled from Petitioners' Complaint to be as follows:¹⁵

- 7 1. Whether, at the time Student was eligible for IDEA special education
8 services as a child with a disability, Respondent evaluated Student in all
9 areas of suspected disability in the absence of an evaluation for auditory
10 processing disorder.
- 11 2. Whether Student is entitled to an IEE for speech and language due to
12 disagreement with Respondent's March 2020 speech and language
13 evaluation (conducted in the IDEA triennial evaluation process).
- 14 3. Whether Respondent's MET/IEP Team's failure to consider "[Parent's]
15 APD report" denied parental participation in the April 3, 2020 MET/IEP
16 meeting.¹⁶

17 **DISCUSSION**

18 The Administrative Law Judge has considered the entire hearing record including
19 the testimony and the admitted exhibits,¹⁷ and now makes the following Findings of Fact,
20 Conclusions of Law, and Decision that Petitioners failed to demonstrate that Respondent
21 failed to provide FAPE in any violation of the IDEA.

22 **FINDINGS OF FACT**

23 **Background**

24 1. Student was eligible for special education services under the eligibility
25 category of Speech Language Impairment.¹⁸ Under his March 15, 2019 IEP, effective for
26

27 ¹⁵ Using the Complaint and the pre-hearing discussion as the base, the Administrative Law Judge culled
28 from the document the concerns most closely resembling IDEA complaints and set forth those issues to
29 the parties. Petitioners' stated Complaint #2 (regarding sound-based therapy) was not brought forward
30 for due process hearing as it relates to events after Student was exited from special education eligibility.
During the hearing, the nuances of the culled issues was further clarified considering the evidence
Petitioners presented for consideration.

¹⁶ In this Decision, this report is referred to as Mother's "APE"; see Finding of Fact #3.

¹⁷ The Administrative Law Judge has read and considered each page of each admitted exhibit, 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.

¹⁸ See Exhibit C.

1 April 1, 2019, Student was receiving 30 minutes a week of speech therapy. Student's
2 IEP contained two communication goals: one for deciphering "implied meanings" in
3 conversations/statements by peers and responding appropriately and the other for
4 articulation in producing the "/r/" phenome in all words.

5 2. In May 2019, Tera C. Donegan, M.Ed., BCBA, conducted a functional
6 behavioral assessment (FBA) of Student in order "to gain perspective on where [Student]
7 is struggling in school."¹⁹ Ms. Donegan reviewed prior diagnoses and assessments (from
8 2018), a prior FBA (from 2017), the resultant behavior intervention plan (BIP),²⁰ a MET
9 report (from April 2017), and an IEP (presumably the then-current IEP from 2016).²¹ In
10 her report, Ms. Donegan referred to the BIP's accommodations of "clear/concise
11 directions, frequent reminders/prompts, closer teacher/staff proximity, review of
12 rules/expectations, and communication with parents."²² Ms. Donegan recommended
13 additional speech and language goals, and mentioned the need for support in how to
14 advocate for himself in peer interactions, and continuing the BIP accommodations for
15 student to garner skills in self-advocacy in peer interactions. Ms. Donegan also
16 recommended that Student continue to have "redirection," noting that Student "responds
17 well to having conversations when he does not understand expectations or he is given
18 corrective feedback."

19 3. In September 2019, Mother completed an auditory processing evaluation
20 of Student herself and drafted her own report (APE).²³ Mother concluded that Student
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26 ¹⁹ See Exhibit D.

27 ²⁰ The BIP is not a part of the hearing record.

28 ²¹ Ms. Donegan noted that the April 2017 referenced an "assessment completed by [Student's] mother."
Id. at bates 037). The hearing record does not contain an assessment by Mother earlier than the
September 2019 assessment.

29 ²² *Id.*

30 ²³ See Exhibit E.

1 had an auditory processing disorder based on the various testing results and finding a
2 prosodic deficit,²⁴ decoding deficit,²⁵ and a tolerance fading memory deficit.²⁶

3 4. On November 1, 2019, Respondent convened an IEP meeting at the
4 request of Mother (to address her concerns regarding the speech therapy Student was
5 receiving).²⁷ At that meeting, Mother provided her APE to Respondent.²⁸ However,
6 Respondent had concerns about possible professional conflicts in Mother having
7 evaluated her own child and, therefore, determined to consider Mother's APE as parental
8 input for the upcoming triennial reevaluation in the Spring of 2020.²⁹

9 5. Respondent scheduled a review of existing data (RED) meeting for January
10 23, 2020.³⁰ Mother cancelled out due to car trouble; however, Mother and her advocate
11 also agreed at that time that the RED was not necessary because they agreed that
12 additional information was needed for the reevaluation.³¹

13 6. The February 6, 2020 PWN reflected that the IEP Team would convene on
14 March 6, 2020 to review and revise Student's IEP and that the IEP Team would meet
15 again on March 27, 2020 "to review the evaluation results, make an eligibility
16 determination and complete an IEP addendum to incorporate any necessary changes."³²

17 7. Respondent completed evaluations on February 11, 2020, on February 27,
18 2020, March 3, 2020, and on March 6, 2020.³³

20
21 ²⁴ Mother wrote: "A prosodic deficit is characterized by misunderstanding the intent of a message rather
22 than the content" which caused misunderstandings in social circumstances. *Id.*

23 ²⁵ Mother wrote: "A decoding deficit is characterized by difficulty quickly and accurately processing
24 speech" which may result in reading inaccuracies, receptive language issues and confusion; she noted
25 that a person may have better success when visual input is provided. *Id.* at bates 055.

26 ²⁶ Mother wrote: "tolerance fading memory deficit is characterized by poor short term memory and
27 difficulty in listening in noise. *Id.*

28 ²⁷ See Exhibit F. The November 6, 2019 prior written notice (PWN) indicated that Mother came with
29 multiple questions regarding Student's speech therapy insisting that only the actual provider could answer
30 their questions, despite Student's teacher being present. While the Speech Language Assistant was not
permitted to attend the IEP meeting, Respondent's Speech Language professional was present.

²⁸ See Exhibit E.

²⁹ See Exhibit F.; see also Exhibit J at bates 087.

³⁰ See Exhibit J.

³¹ Mother had consented to evaluation of Student on February 6, 2020. See Exhibit I.

³² *Id.* at bates 087.

³³ See Exhibit K; see also Exhibit M.

1 8. On March 4, 2020, Respondent sent a draft IEP to Parents for the March 6,
2 2020 MET Meeting; Mother's ADE was summarized therein as parental input.³⁴

3 9. On March 12, 2020, Respondent issued a PWN indicating that it would
4 continue to implement Student's current IEP until March 27, 2020, the date on which the
5 IEP Team was scheduled to reconvene.³⁵ However, in mid-March 2020, schools were
6 shut down across the state due to the COVID-19 pandemic; as a result, the School had
7 to cancel the March 27, 2020 IEP meeting. In its place, Respondent scheduled a MET
8 meeting for April 3, 2020 to discuss Student's reevaluation. Respondent convened the
9 MET meeting on April 3, 2020, in a virtual format due to the COVID closure of schools.

10 10. On April 3, 2020, the MET team completed Student's triennial reevaluation,
11 reviewing a psychoeducational evaluation, a speech and language evaluation and an
12 occupational therapy evaluation.³⁶ The Psychoeducational Evaluation prepared by
13 Respondent's School Psychologist was reviewed in depth.³⁷ Considering Student's
14 performance on all of the assessments and in conjunction with the classroom teacher's
15 observations provided at the meeting, the MET Team determined that Student did not
16 meet the IDEA eligibility criteria as a student with a disability and that he no longer needed
17 individualized special education instruction.³⁸

18 11. The MET Team found that the results of the speech and language
19 evaluation indicated that Student no longer needed continued speech services because
20 his current level of skills were not adversely impacting his educational performance.³⁹
21 The Speech Language therapist reviewed the all the assessments that had been done
22 and opined that such results demonstrated that Student was not performing at a level that
23 would identify any language disorder. Mother's APE was considered at the MET.

24 ³⁴ See Exhibit H. In its Closing Brief, Respondent noted the following: Mother was unexpectedly unable
25 to attend the March 6th MET; a March 12, 2020 PWN reset the meeting for March 27, 2020; and, then
26 COVID shut down and that the

27 ³⁵ Respondent's Closing Brief at 3.

28 ³⁶ Respondent's evaluations (drafts) had been provided to Parents ahead of the meeting and, at the
29 meeting, Parents indicated they had reviewed the Psychoeducational Evaluation prior to the meeting.
30 See Exhibit N at bates 127.

³⁷ See Exhibit L. The April 9, 2020 PWN indicates that Mother complimented the School Psychologist on
the "thoroughness" of her Psychoeducational Evaluation. See Exhibit N at bates 128.

³⁸ *Id.*

³⁹ *Id.*

1 Student's teacher indicated that she had not seen Student struggle with auditory
2 processing in the classroom. Mother disagreed, and she verbally requested an IEE in the
3 area of speech language.⁴⁰

4 12. While Mother questioned why the Occupational Therapist (OT) had not
5 used a SCAN-3 measure to assess Student's auditory processing, and Mother stated that
6 an OT could conduct such assessment, neither Mother nor Father disagreed with the
7 results of the OT evaluation.⁴¹

8 13. At the April 3, 2020 MET meeting, Mother disagreed with the MET in that
9 she opined that Student, in fact, had a social language disability (*i.e.*, an auditory
10 processing disorder) and needed to be assessed specifically in that area.⁴²

11 14. At the April 3, 2020 MET meeting, Father indicated that Student needed
12 some work in "some areas," but opined that Student did not have a disability and was "a
13 normal kid with age appropriate deficits and it is clearly not affecting his school
14 performance."⁴³

15 15. On April 9, 2020, Respondent issued a PWN reflecting that Student was no
16 longer eligible for special education and related services.⁴⁴ In that PWN, Respondent
17 noted, as it had in the February 6, 2020 PWN, that Respondent had determined to
18 consider Mother's [September 2019] APE as parental input for purposes of the
19 reevaluation.

20 16. On April 9, 2020, Respondent issued a separate PWN approving Parent's
21 [verbal] request for an IEE in the area of speech and language.⁴⁵ In this PWN,
22 Respondent noted the following:

23 The School does not believe that [an auditory processing
24 evaluation] is warranted nor relevant for school-based speech
25 services; *however, in the spirit of working with the Parent, the*

26 ⁴⁰ Mother requested that the IEE be completed by Dr. Dana Day.

27 ⁴¹ See Exhibit N at bates 128. This is specifically noted herein, as Mother argued at hearing that only a
28 few audiologists were qualified to assess and diagnose an auditory processing disorder.

29 ⁴² *Id.*

30 ⁴³ *Id.*

⁴⁴ See Exhibit N.

⁴⁵ See Exhibit O.

1 *school has agreed the IEE can contain an evaluation by an*
2 *audiologist as it relates to Student's auditory processing skills.*

3 Emphasis added here. Respondent provided Mother with the IEE requirements and a
4 requisite parental release of information form to be executed.

5 17. On April 13, 2020, Mother e-mailed Respondent indicating in writing that
6 she had issues with the speech/language evaluation and assessments that had been
7 done.⁴⁶ Mother indicated that Student had only been assessed "in auditory memory, in
8 auditory comprehension and following directions." Mother stated that the Respondent's
9 evaluation had not been comprehensive. Additionally, Mother stated that her APE had
10 not been given to "the school SLPs, OT or psychologist" and opined that the absence of
11 those persons' review and discussion at a MET meeting "directly denies parents the
12 pivotal role in the development of their child's placement."⁴⁷ Mother formally requested
13 "an IEE for a comprehensive auditory processing disorder evaluation from Landon's
14 father and myself by a licensed certified audiologist. . . ."⁴⁸

15 18. Respondent did not respond to Mother's April 13, 2020 e-mail because
16 Respondent had already approved an IEE including auditory processing evaluation in its
17 April 9, 2020 PWN.⁴⁹

18 19. Respondent did not receive any further information from Parents until January
19 7, 2021.⁵⁰ Prior to January 7, 2021, to Respondent's knowledge, Parents did not pursue
20 the approved IEE.

21 20. On January 7, 2021, Mother e-mailed Respondent and attached an
22 Audiologic Report completed by Dr. Diana Day on October 18, 2020.⁵¹ Mother noted that
23 they had obtained the evaluation at their own expense. In her e-mail, Mother states:

24 As previously reported, [Student] has a diagnoses [sic] of a
25 significant auditory processing disorder. I provided my

26 ⁴⁶ See Exhibit P.

27 ⁴⁷ *Id.* at bates 134.

28 ⁴⁸ *Id.* at bates 135.

29 ⁴⁹ Respondent's Closing Brief at 4.

30 ⁵⁰ Respondent's Closing Brief at 4.

⁵¹ See Exhibit Q. Mother also provided the invoice dated October 15, 2020 demonstrating that the evaluation had been paid for privately.

1 diagnosis and report to you last year where it was merely
2 admitted into his record as 'parental input' ...

3 Mother continues, in pertinent part: "my report was not considered by the school." Mother
4 requested that Respondent convene an eligibility meeting for Student, stating that Student
5 was "struggling with his on line learning platform with his ability to process auditory
6 information appropriately." Mother proceeded to suggest some things she believed could
7 be done to support Student in the virtual learning setting.

8 21. On January 19, 2021, Respondent issued a PWN refusing to conduct a
9 reevaluation.⁵² Respondent noted that Dr. Day's evaluation had stated that the deficits
10 she had identified "likely contributed to [Student's] measures difficulty understanding
11 speech in noise and general problems in processing auditory and linguistic information
12 with efficiency and speed."⁵³ However, Respondent also noted that Dr. Day's report did
13 not contain any "current information from the School or from [Student's] classroom
14 teachers as to his performance and functioning [within] the educational environment."⁵⁴
15 Further, Respondent noted that Dr. Day had only recommended "accommodations for the
16 school setting. Finally, Respondent noted that Dr. Day's recommendation for sound-
17 based therapy was not "a reasonable or necessary school-based service under the IDEA
18 or Section 504."⁵⁵ Respondent suggested that Parents could contact Respondent's
19 Section 504 coordinator if they wanted to pursue a meeting "to address potential eligibility
20 and need for supports under Section 504..."⁵⁶

21 22. In the January 19, 2021 PWN, Respondent also noted the following:

22 Parent has also requested reimbursement for the audiological
23 evaluation she obtained at her own expense in October 2020.
24 The School is not certain why the parents obtained the
25 evaluation at their own expense when School had approved
26 an IEE for the exact evaluation they obtained. The type of
27 evaluation completed was not in reference to school-based
28 services and did not include any current input from the
29 teachers or the School as to how [Student] processed

27 ⁵² See Exhibit R.

28 ⁵³ *Id.* at bates 149

29 ⁵⁴ *Id.*

30 ⁵⁵ *Id.*

⁵⁶ *Id.* at bates 150.

1 information in the classroom. Because there was no current
2 school-based information included other than a review of
3 records that were provided by the Parent, the outside
4 evaluation does not meet the School's criteria for an IEE.
5 *Nevertheless, since the School had already approved an IEE,*
6 *the School is willing to reimburse the parents for the cost of*
7 *the outside evaluation* upon presentation of documentation
8 (i.e., an invoice paid by the parents) showing the total cost,
9 dates of evaluation, administrator's name and contact
10 information and date the evaluation was paid in full by the
11 parents. If the provider of the evaluation has not been paid in
12 full as of the date of the notice, then the School will require the
13 parents to provide a signed release of information so the
14 School may contact the provider directly to arrange for
15 payment.

16 Emphasis added here.

17 23. After a series of e-mails and receiving documentation, Respondent made
18 reimbursement to Parents for the Dr. Day evaluation, which Parents negotiated in March
19 of 2021.⁵⁷

20 24. On March 12, 2021, Mother e-mailed Respondent asserting that
21 Respondent had not approved an audiological evaluation and Mother queried whether it
22 April 2020 "speech and language" IEE approval was still valid.⁵⁸ Mother was concerned
23 about being able to confirm an appointment she had made for a speech evaluation in the
24 coming week.

25 26. On March 26, 2021, Respondent notified Mother, by e-mail, that
26 Respondent had already reimbursed parents for the previously-requested and approved
27 IEE and that parents were not entitled to another IEE until the time that parents disagreed
28 with another school evaluation.⁵⁹

29 27. On June 1, 2021, following a Section 504 meeting, Respondent again
30 notified Mother, through e-mail, regarding Mother's past requests, the approval, and

⁵⁷ See Exhibit T; also Respondent's Closing Brief.

⁵⁸ See Exhibit U.

⁵⁹ *Id.*

1 future entitlement to an IEE would be only at the time parents disagreed with another
2 school evaluation.⁶⁰

3 28. In a PWN dated September 7, 2021, Respondent notified Parent that it had
4 determined Respondent would fund the requested speech and language IEE.⁶¹ The
5 reason given by Respondent was that, on review of the prior documents regarding its IEE
6 determinations, Respondent could have been more clear as to exactly what the [February
7 6, 2020] IEE approval was for.

8 **CONCLUSIONS OF LAW**

9 **APPLICABLE LAW**

10 **FAPE**

11 1. Through the IDEA, Congress has sought to ensure that all children with
12 disabilities are offered a free appropriate public education (FAPE) that meets their
13 individual needs.⁶² These needs include academic, social, health, emotional,
14 communicative, physical, and vocational needs.⁶³ To provide a FAPE, a school district
15 must identify and evaluate all children within their geographical boundaries who may be
16 in need of special education and services. The IDEA sets forth requirements for the
17 identification, assessment, and placement of students who need special education, and
18 seeks to ensure that they receive a FAPE. A FAPE consists of “personalized instruction
19 with sufficient support services to permit the child to benefit educationally from that
20 instruction.”⁶⁴ The FAPE standard is satisfied if the child’s IEP sets forth his or her
21 individualized educational program that is “reasonably calculated to enable the child to
22 receive educational benefit.”⁶⁵ The IDEA mandates that school districts provide a “basic

23
24 ⁶⁰ See Exhibit V. Neither party provided further information at the hearing regarding consideration of, or
25 any determined eligibility for, a Section 504 Plan for Student; however, in Petitioners’ Complaint, Mother
26 noted that a Section 504 Plan was developed on May 3, 2021.

27 ⁶¹ See Exhibit W.

28 ⁶² 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

29 ⁶³ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983
30 U.S.C.C.A.N. 2088, 2106).

⁶⁴ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

⁶⁵ *Id.*, 485 U.S. at 207. In 2017, in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. ____, 137 S. Ct.
988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard, adding
that a school “must offer an IEP that is reasonably calculated to enable a child to make progress appropriate

1 floor of opportunity.”⁶⁶ The IDEA does not require that each child’s potential be
2 maximized.⁶⁷ A child eligible for special education services receives a FAPE if a program
3 of specialized instruction “(1) addresses the child’s “unique” needs, (2) provides adequate
4 support services so that child can take advantage of the educational opportunities and (3)
5 is in accord with that child’s individualized educational program.”⁶⁸

6 **Substantive versus Procedural**

7 2. A determination of whether a student, who is eligible for special education
8 services, has received a FAPE must be based on substantive grounds.⁶⁹ For a substantive
9 analysis of an IEP, the review of the IEP is limited to the contents of the document.⁷⁰

10 3. Procedural violations in and of themselves do not necessarily deny a student
11 a FAPE. If a procedural violation is alleged and found, it must be determined whether the
12 procedural violation (1) impeded the student’s right to a FAPE; (2) significantly impeded the
13 parents’ opportunity to participate in the decision-making process regarding the provision
14 of a FAPE to the child; or (3) caused a deprivation of educational benefit.⁷¹ If one of those
15 three impediments occurred, the student was denied a FAPE due to the procedural
16 violation. Procedural violations that “result in the loss of educational opportunity, or
17 seriously infringe the parent’s opportunity to participate in the IEP formulation process,
18 clearly result in the denial of a FAPE.”⁷²

19
20
21 in light of the child’s circumstances,” but the Court declined to elaborate on what “appropriate progress”
22 would look like case to case (*i.e.*, in light of a child’s circumstances).

23 ⁶⁶ *Rowley*, 458 U.S. at 200.

24 ⁶⁷ *Id.* at 198.

25 ⁶⁸ *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006) (citing *Capistrano Unified*
26 *Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995)).

27 ⁶⁹ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

28 ⁷⁰ *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) (“only those services identified or
29 described in the . . . IEP should have been considered in evaluating the appropriateness of the program
30 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)).

⁷¹ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2). This provision was enacted in the 1997
amendments to IDEA.

⁷² *Capistrano*, 556 F.3d at 909 (citing *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479,
1484 (9th Cir 1992) (superseded on other grounds by IDEA Amendments 1997, Public Law 105-17, §
614(d)(B), 111 Stat. 37)).

1 4. "Educational opportunity" is lost, "where, absent the error, there is a strong
2 likelihood that alternative educational possibilities for the student would have been better
3 considered."⁷³

4 5. Once a procedural error is found, it must be determined whether that
5 violation affected the substantive rights of the parent or the child.⁷⁴

6 **Burden of Proof and Basis of Decision**

7 6. A parent who requests a due process hearing alleging non-compliance with
8 the IDEA must bear the burden of proving that claim.⁷⁵ The standard of proof is
9 "preponderance of the evidence," meaning evidence showing that a particular fact is "more
10 probable than not."⁷⁶

11 7. Therefore, in the matter at hand, Petitioners bear the burden of proving by a
12 preponderance of evidence: (1) Respondent violated the IDEA, and failed to provide a
13 FAPE, through the alleged failure to have evaluated Student in all areas of suspected
14 disability; (2) Respondent violated the IDEA, and failed to provide a FAPE, through the
15 alleged failure to have allowed an IEE because Parents disagreed with the March 2020
16 speech and language evaluation; and (3) Respondent violated the IDEA, and failed to
17 provide a FAPE, through the alleged failure to consider Mother's APE in the April 3, 2020
18 MET/IEP meeting.

19 **DECISION**

20 **ISSUE #1**

21 8. Petitioners alleged that Respondent failed to evaluate Student in all areas
22 of suspected disability. Petitioners argued that the failure to have an audiology evaluation
23 as a part of Respondent's speech and language evaluation was a violation of the IDEA
24

25 ⁷³ *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir. (2004, amended 2005).

26 ⁷⁴ *Capistrano*, 556 F.3d at 910; *see also Federal Way*, 394 F.3d at 652 and *Target Range*, 960 F.2d at
27 1484.

28 ⁷⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 ⁷⁶ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
30 (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).

1 and prevented Parents from having the opportunity to participate in the MET/IEP
2 development.

3 9. The hearing record demonstrates that Respondent's speech and language
4 evaluation included multiple assessments and Mother noted that the evaluation had
5 included auditory memory and auditory comprehension review.⁷⁷ Mother's APE and her
6 opinion as to a diagnosis of auditory processing disorder were known to Respondent in
7 November 2019. Student's speech and language evaluations took place on February 11,
8 2020, February 27, 2020 and March 3, 2020. In this case, the speech pathologist
9 documented that Student's receptive language index was scored at 89, which score fell
10 in the average range.⁷⁸ The speech and language evaluation was thorough in assessing
11 Student's skills and needs.

12 10. Therefore, the Administrative concludes that Respondent did not fail to
13 evaluate Student in all areas of suspected disability.

14 11. Petitioners have not met their burden to demonstrate an IDEA violation by
15 Respondent regarding Issue #1.

16 **ISSUE #2**

17 12. Petitioners alleged that they were entitled to an IEE for speech and
18 language based on disagreement with Respondent's March 2020 speech and language
19 evaluation.

20 13. The hearing record clearly demonstrates that Respondent approved an IEE
21 for speech and language in the April 9, 2020 PWN. In that PWN, Respondent noted the
22 following:

23 The School does not believe that [an auditory processing
24 evaluation] is warranted nor relevant for school-based speech
25 services; *however, in the spirit of working with the Parent, the
26 school has agreed the IEE can contain an evaluation by an
27 audiologist as it relates to Student's auditory processing skills.*

28 ⁷⁷ The evaluation process also includes observational information from teachers and therapists.

29 ⁷⁸ See Exhibit K at bates 092. The receptive language index is noted to be a measure of a person's
30 listening and auditory comprehension skills.

1 Emphasis added here. Thereafter, in January 2020, when Parents requested
2 reimbursement for Dr. Day's evaluation, Respondent advised that, with the appropriate
3 documentation, Respondent would reimburse Parents for that outside evaluation.⁷⁹
4 Additionally, Respondent allowed an unprecedented second IEE to Parents, springing
5 from Mother's disagreement with Respondent's March 2020 speech and language
6 evaluation, when it notified Parents in the September 7, 2021 PWN that Respondent
7 would fund another IEE in the area of speech and language.

8 14. Therefore, the Administrative concludes that Respondent did not violate the
9 IDEA as to allowance to Parents of an IEE when Mother disagreed with Respondent's
10 March 2020 speech and language evaluation.

11 15. Petitioners have not met their burden to demonstrate an IDEA violation by
12 Respondent regarding Issue #2.

13 **ISSUE #3**

14 16. Petitioners alleged that Respondent failed to consider Mother's APE thus
15 denying parental participation in the April 3, 2020 MET/IEP meeting.

16 17. The hearing record demonstrates that Respondent utilized Mother's APE
17 and included the APE as parental input during the April 3, 2020 MET. The hearing record
18 demonstrated that the draft IEP provided to Parents and the team on March 4, 2020
19 contained a summary of Mother's APE under parent input. Additionally, the
20 Psychoeducational Evaluation prepared by the School Psychologist contains Mother's
21 statements regarding her opinions and observations, as were also reflected in the APE.⁸⁰

22 18. Therefore, the Administrative concludes that Respondent considered
23 Mother's APE for purposes of the MET and reevaluation and Respondent did not violate
24 the IDEA with regard parental participation in the April 3, 2020 MET/IEP meeting.

25 19. Petitioners have not met their burden to demonstrate an IDEA violation by
26 Respondent regarding Issue #3.

27
28

⁷⁹ See Exhibit R.

29 ⁸⁰ Both Parents participated in the April 3, 2020 meeting, which lasted one hour and thirty-three minutes.
30 See Exhibit N.

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