

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

Student, by and through Parents
Petitioners,
v.
CREIGHTON Elementary School District,
Respondent.

No. 20C-DP-072-ADE

**ADMINISTRATIVE LAW
JUDGE DECISION**

HEARING: Conducted on September 8, 2020, September 9, 2020, and September 10, 2020, followed by post-hearing legal memoranda submission and extended review.

APPEARANCES: Hope Kirsch, Esq. represented Petitioners (Student) and Parents (collectively, Parents).

Jennifer N. MacLennan, Esq., represented Creighton Elementary School (District); Counsel was accompanied by co-representatives Kristin Hartsuff, District Special Education Director, and Ericka Risko, District School Psychologist.

WITNESSES:¹

- (Mother).²
- (Father).
- District Special Education Director.
- a District School Psychologist.
- Licensed Clinical Social Worker,
- Academic Director,
- Coordinator, Children's System of Care, at Mercy Care.³

HEARING RECORD: Certified Court Reporter Jeri F. Barbin recorded the proceedings as the official record of the hearing.⁴

¹ 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.

² Mother is a neuropsychologist in private practice. See Due Process Hearing Court Reporter's Transcript (TR) at 345 and 367.

³ Mercy Care Plan is Arizona's largest Medicaid plan, sponsored by Dignity Health and Carondelet Health Network and managed by Aetna Medicaid. Mercy Care RBHA is Arizona's state-contracted Regional Behavioral Health Authority (RBHA), sponsored by Mercy Care Plan.

⁴ The parties stipulated that the court reporter's transcript would be the official record of the proceedings; the three volume transcript contains successive pagination over the three hearing sessions. The Tribunal does not begin its review process with the use of a transcript until the hearing sessions are complete and

ADMINISTRATIVE LAW JUDGE: Kay A. Abramsohn

Parents brought this due process action on behalf of Student, claiming that District violated the Individuals with Disabilities Education Act (IDEA) and alleging that Respondent failed to provide a free and appropriate public education (FAPE) for the time period between determining eligibility and the development/offer of an individualized education program (IEP). The law governing these proceedings is the IDEA found at 20 United States Code (U.S.C.) §§ 1400-1482 (as re-authorized and amended in 2004),⁵ and its implementing regulations, 34 Code of Federal Regulations (C.F.R.) Part 300, as well as the Arizona Special Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.

Procedural History

The due process complaint notice (Complaint) in this matter was filed on March 17, 2020. After a continuance and a time period regarding consideration whether an in-person hearing was possible (due to COVID), a three-day due process hearing was conducted through virtual means followed by post-hearing written legal argument. The due process timeline is typically recalculated by the Administrative Law Judge after a multiple-day due process hearing, taking into account any further proceedings including post-hearing legal memoranda in lieu of closing argument. Based on Petitioners' request for a written record, the request for post-hearing written legal memorandum submission following the parties' receipt of the due process hearing court reporter's transcript, the parties' submitted written arguments to the Tribunal, and finally, the Tribunal's receipt of the due process hearing court reporter's transcript (*i.e.*, the official hearing session record) thereafter, there is no calculated 45th day.

Evidence and Issues at Hearing

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.

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

EXHIBITS

The parties stipulated to admission of their proposed exhibits.⁶ Petitioners had pre-marked Exhibits A through K and District had pre-marked Exhibits 1 through 42.⁷ The parties had filed pre-hearing memorandum (with District's referencing back to its April 13, 2020 Motion to Dismiss) and post-hearing memorandum.

ISSUES

Based on discussion at the June 5, 2020 pre-hearing conference, the issues for the due process hearing were clarified to be as follows:

- i. Whether Respondent failed to provide a free and appropriate public education (FAPE) when it failed, *until May of 2020*, to develop an individualized education program (IEP) for Student after determining Student to be eligible for special education services at the multidisciplinary evaluation team (MET) meeting held on October 22, 2019.⁸
- ii. Whether the parentally-placed residential treatment center (RTC), [REDACTED] was the appropriate *placement* for Student.⁹

Petitioners requested remedies as follows:

- i. Reimbursement for tuition, transportation, and other related expenses incurred for Student's placement at [REDACTED];
- ii. Student to remain at [REDACTED] at District expense until District IEP team convenes and determines by consensus that another placement or location is appropriate for Student to receive a FAPE;¹⁰

⁶ There are duplicative exhibits. Exhibit A is 269 pages containing a combination of various documents, some of which are also duplicative; while the consecutive page numbering within Exhibit A contains zeroes, those zeroes are disregarded in the references herein (for example, page A000232 will be cited at A232).

⁷ The parties each submitted audio recordings of two meetings: October 16, 2019, and October 22, 2019; District submitted prepared transcripts of those meetings. See Exhibits B and C, respectively; see also Exhibits 25 and 26 respectively. District also submitted an audio recording and a prepared transcript from a September 16, 2019 meeting. See Exhibit 27. When the parties referenced discussion at these meetings, the transcripts were utilized for reference as the Administrative Law Judge would not be able to determine the speakers by their voice.

⁸ At the June 5, 2020 pre-hearing conference, Petitioners clarified that the time period, for which they claim the alleged failure to provide a FAPE, was between the time District determined eligibility on October 22, 2019, and District's offer of an IEP, the parties both indicating that an IEP had been developed; the IEP was dated May 7, 2020 and the PWN was dated May 11, 2020. See Exhibits 20 and 22, respectively. At the June 2020 pre-hearing conference, Student remained in the private placement. At that pre-hearing conference, Petitioners further indicated that they were not going to amend the Complaint as to whether the offered IEP was or was not appropriate, noting that they had a 2-year claim period.

⁹ A prior ORDER from the Tribunal had characterized this issue using the term "least restrictive environment" instead of "placement" because Petitioners had mentioned both "location" and "LRE" in the Complaint.

¹⁰ At the June 2020 per-hearing conference, Petitioners clarified the claimed time period.

- iii. Attorney's fees and expenses, including costs and expert fees at due process and appeals, or deferring to U.S. District Court for such determination; and
- iv. Any other and further relief the Tribunal deems just and proper.

DISCUSSION

The Administrative Law Judge has considered the entire hearing record including the testimony and the admitted exhibits,¹¹ and now makes the following Findings of Fact, Conclusions of Law, and Decision that Petitioners demonstrated that District failed to provide a FAPE, *i.e.*, violated the IDEA procedurally, by failing to develop and offer an IEP until May of 2020, after having determined Student's eligibility on October 22, 2019.

FINDINGS OF FACT

Prior Periods/Background

1. In March of 2020 when Petitioners filed the due process complaint notice (Complaint), Parents resided within the boundaries of District and Student's home school would have been [REDACTED] within District.¹² Student had never attended a District public school; she had been enrolled in parochial schools since she began attending school.

2. In March of 2020, Student was nearly [REDACTED] years old and, academically, would have been in the [REDACTED] grade. Student had attended [REDACTED] for 7th grade during the 2018-2019 school year.¹³

3. Student experienced multiple behavioral issues during parochial school attendance; her struggles with behavioral and emotional issues continued and intensified

¹¹ 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. The preparation of the Findings of Fact without “characterization,” and geared to set an entire backdrop for the issues, necessitated a page by page review.

¹² District serves students in Kindergarten through 8th grade. The boundaries of Phoenix Union School District includes Parents' residence; Phoenix Union services students in 9th through 12 grade.

13 [REDACTED] is located within the Madison Elementary School District (Madison). See TR at 49. Pursuant to A.A.C. R7-2-401(D)(4)(b), Madison would have been responsible for child identification activities had parents not contacted District. Student had attended 6th grade at [REDACTED]; she then transferred to [REDACTED] to repeat 6th grade.

1 in █ grade with an injury preventing her from a preferred activity, the loss of a cousin to
2 cancer, the prior loss of her grandmother, and Mother's struggle with a medical condition.

3 4. In May of 2019, Student experienced a behavioral health crisis, in which
4 both she and her family were in danger; the next day, she was hospitalized overnight and
5 then admitted to █ where she remained for 8 days.

6 5. While at █, Student was diagnosed with █
7 █
8 █.¹⁴

9 6. While Student was at █, Parents looked into programs that would be
10 short-term intensive therapeutic treatment. Parents continued to advise professional staff
11 at █ that they wanted Student discharged to an "RTC," which was against the
12 recommendations of █ professionals who believed that Student could engage in
13 outpatient services with the █ team and other supplemental services."¹⁵

14 7. At or about that time, Parents hired a consultant, Gail Curran, of Optimal
15 Options Educational Consulting¹⁶ to assist them in finding a bed in a place with the right
16 fit for Student's treatment needs.¹⁷

17 8. Student discharged to home on May 15, 2019.¹⁸ Despite tutoring and other
18 supports, Student was apparently unable to complete the remaining █ grade
19 coursework.¹⁹ Parents continued to work with Ms. Curran seeking another program for
20 Student.

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22
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24 ¹⁴ See Exhibit 35 (█ medical records) at CESD529-817; see also Exhibit A at A70-73.

25 ¹⁵ See Exhibit 35 at CESD719-28. At the time, Parents were insisting that Student discharge from █ and
26 they would place her at an RTC in Utah, for a longer period of treatment (*i.e.*, longer than the █ stay). At
27 that time, Student wanted to go home and did not want to go to an RTC. *Id.* At hearing, Mother testified
28 that, at that time, essentially they did not understand that an "RTC" would involve something longer than a
29 short-term placement, although they were, in fact, seeking something for during the summer or about 4
30 weeks. See TR at page 360-61 and page 430.

¹⁶ See Exhibit 42.

¹⁷ See TR at Page 360-61; see also Exhibit 35 at CESD722.

¹⁸ See Exhibit 35 at CESD719-20.

¹⁹ See TR at 433.

1 9. With the assistance of Ms. Curran, Parents found and subsequently placed
2 Student at [REDACTED], a Hawaiian wilderness program, on June 10, 2019.²⁰

3 10. While at [REDACTED], Kathryn Kasenchak, Psy.D., evaluated Student. Mother
4 indicated that the purpose of the evaluation was to gain “greater insight into the
5 psychological aspect of what [Student] was going through.”²¹ Dr. Kasenchak summarized
6 the referral as follows:

7 [Student] was referred for psychological testing by her parents, [REDACTED]
8 therapists, and educational consultant, in order to develop a better
9 understanding of her current cognitive and emotional functioning, aid in
10 diagnostic clarification, and generate recommendations for ongoing
11 treatment and schooling.

12 Dr. Kasenchak diagnosed Student with Major Depressive Disorder, single episode,
13 moderate, Other Specified Anxiety Disorder with attachment insecurity and social
14 anxiety), Unspecified Eating Disorder, and ADHD (by history).²²

15 11. While Petitioners characterized this evaluation as a psychoeducational
16 evaluation in their post-hearing memorandum, Dr. Kasenchak conducted an evaluation
17 that comprised a psychological evaluation and titled it as such. Within the report, Dr.
18 Kasenchak made specific psychological treatment recommendations. Of the twenty-five
19 (25) treatment recommendations in Dr. Kasenchak’s report, only two provided any
20 suggestions regarding “schooling”: that an ideal academic environment would have a low
21 student-teacher ratio and that Student be given extra time on tests, with encouragement
22 to slow down and recheck her work for careless errors.²³

23 12. During this time, Parents continued to work with Ms. Curran to locate further
24 “options” for Student following [REDACTED]. According to Mother, Ms. Curran had located three
25

26 ²⁰ In Student’s Discharge Summary, under Summary of Therapeutic Progress, [REDACTED] described its program
27 as follows: “an intensive outdoor behavioral health assessment and treatment program that utilizes an
28 integrative clinical model that combines health and wellness, horticultural therapy, rites of passage,
29 experiential education and evidence-based clinical interventions to achievable sustainable growth.” See
30 Exhibit D.

²¹ See TR at 363; see also Exhibit 4.

²² See Exhibit 4 at CESD49.

²³ *Id.* at CESD49-53

1 options: two in Utah (one of which was [REDACTED]) and one in North Carolina.²⁴ Mother
2 indicated that an RTC in Sedona, Arizona, was also discussed; however, Parents
3 determined it would not be a “good fit” for Student because the children at the RTC were
4 aged 15 to 17.

5 13. While Ms. Curran recommended the placement in North Carolina, Father
6 was against North Carolina due to the distance.²⁵

7 14. After a visit to [REDACTED], Parents determined to have Student discharge
8 from [REDACTED] to [REDACTED].²⁶

9 15. When asked at hearing whether the determination to take Student to
10 [REDACTED] had to do with her education or behavioral health, Mother specified that
11 Student going to [REDACTED] “had to do with her going somewhere where she could be
12 educated while simultaneously getting the work that she need[ed] to build the skills. I
13 knew that Student needed a set of skills that she didn’t have that she wasn’t working
14 towards. . . . [S]he needed skills for everything.”²⁷

15 16. On August 10, 2019, [REDACTED] Konik, Ph.D., discharged Student from [REDACTED] with
16 five (5) behavioral treatment goals.²⁸ In addition to the considerations regarding safety,
17 peers, individual and group therapies, family therapies and related services, medical and
18 self-wellness, positivity and community, medications and testing, Dr. Konik indicated
19 recommended environments for Student as follows:

20 Treatment Environment and Structure Needed:

21 Placement in residential and therapeutic academic setting, in which she can
22 receive combine [*sic*] support for her emotional needs, working to develop
23 a stronger sense of self and more adaptive coping strategies in a safe and
24 structure environment. It is important that the milieu is monitored closely in
25 that [Student] does not have the opportunity to learn habits from peers in a
26 way where she mirrors their negative behaviors.

27 Educational Environment and Structure Needed:

28 ²⁴ See TR at 365. Ms. Curran recommended RTCs to Parents; she did not recommend any “less restrictive
29 options.”

30 ²⁵ *Id.*

²⁶ See *Id.* at 366; see also Exhibit D.

²⁷ See TR at 367.

²⁸ See Exhibit D.

Enrollment in a small, structured academic environment with clear boundaries and immediate and relative rewards and consequences.

17. Because they lived “right down the street” from [REDACTED], Mother believed that [REDACTED] would have been the [elementary] school Student “would have gone to.”²⁹

18. District’s [REDACTED] first day of academic year 2019-2020 was August 5, 2019.³⁰ Student had not yet discharged from [REDACTED] as of August 5, 2019.

19. On August 8, 2019, Mother emailed [REDACTED], requesting that [REDACTED] conduct a “special education evaluation” for Student.³¹ After providing information regarding Student’s recent past-year struggles, Mother wrote, in pertinent part:

As we have talked with people in the community . . . it was recommended, we contact our school district and inquire about special education services. It is our understanding that public schools provide a continuum of services to students with disabilities so that they can get an education despite their struggles. *We are writing you in hopes that you can help us pull together an IEP team to conduct a special education evaluation so that we can understand what the school could offer [Student].*³²

20. According to [REDACTED] records, Student was admitted to [REDACTED] on August 12, 2019.³³

21. Communications between Mother and Ms. Risko in August 2019 regarding setting up a meeting and/or gathering documents culminated in Mother providing an executed release of information (ROI) to Ms. Risko on September 5, 2019.³⁴ Mother had signed the ROI on August 29, 2019.³⁵ Mother specified thereon “Parents are to be included in any phone calls between Creighton and other professionals. All records provided to Creighton School District should be simultaneously sent to parents.”

22. On September 9, 2019, Ms. Risko requested records/information from [REDACTED], [REDACTED], and [REDACTED].³⁶

²⁹ See TR at 367-68. Mother indicated that she knew the “Director of Special Education.” *Id.*

³⁰ See Exhibit G.

³¹ See Exhibit 1.

³² Emphasis added.

³³ See Exhibit A at A117-21 (Master Treatment Plan) and Exhibit F at F53-61 (Progress Notes).

³⁴ See Exhibit A at A40-41.

³⁵ See Exhibit 37 at CESD927.

³⁶ See Exhibit A at A45, A49, A53, and A57, respectively.

1 23. The September 12, 2019 Prior Written Notice (PWN) memorialized that
2 District received Mother's request for an evaluation, that Student had been privately
3 placed by Parents at [REDACTED], and that Parents were "uncertain of when [Student] will
4 meet exit requirements and will be stable enough to return home."³⁷ The PWN indicated
5 that, based on District's discussions with Parents, District would move forward with
6 developing a plan to support Student as she transitioned home from the RTC. District
7 noted the plan to be "gathering educational records, previous evaluations and diagnosis,
8 and meeting the parents."³⁸ The next step in the process was stated to be: "*once Student*
9 *has transitioned home and is enrolled in the [District], the district will move forward with*
10 *the special education evaluation process.*"³⁹ The parties agreed to meet on September
11 16, 2019.

12 24. On September 12, 2019, [REDACTED] developed Student's Master Treatment
13 Plan (MTP).⁴⁰ The MTP described [REDACTED] therapy treatment as follows:

14 [REDACTED] is a residential treatment center for adolescent girls aged 11-15.
15 Group therapy is provided daily to all students and is on a regular schedule
16 for approximately 1-2 hour per day with Wednesdays being longer (Monday
17 is experiential therapy; Tuesday is a Dialectical Behavior Therapy group;
18 Wednesday is an all day adventure group, including equine therapy
19 recreation, art therapy, yoga, etc; Thursday is a treatment team feedback
20 and processing group; Friday is smaller individualized topic groups such as
21 body image, social skills, trauma and recovery, communication skills, etc.).
22 Group therapy sessions are designed to strengthen social skills and
23 relationships, while still enabling students to process and get help for their
24 differing issues. Family therapy is provided weekly to all student and is
25 individualized based upon the goals determined by the client, family and
26 therapist. Generally speaking, all students receive one individual therapy
27 session and one family session per week for an hour each session. This is
28 adjusted as clinically needed, with additional sessions added if necessary.
29 All individual and family sessions are individualized to the student's
30 particular needs and abilities.

25 25. The MTP gave the reason for Student's admission as follows:

27 ³⁷ See Exhibit A at A61-62.

28 ³⁸ *Id.*

29 ³⁹ Emphasis added.

30 ⁴⁰ See Exhibit A at A117-21. However, the goals and objectives stated therein indicate they were created on September 13, 2019.

1 [Student] presents with significant symptoms of depression and anxiety,
2 with suicidal and homicidal ideations. [Student's] parents report she has
3 difficulty talking about issues that are difficult for her, such as her adoption
4 process. [Student] reports difficulties getting along with others and often
5 feeling like she does not belong. She expresses worried [sic] about many
6 things such as what people think of her, people feeling she is awkward, and
7 the future.⁴¹

8 26. The MTP contained three "problems" to be addressed: development
9 trauma; family conflict; and, emotional literacy. The MTP set forth several long-
10 term/discharge/graduation goals:⁴²

11 (1) Student will allow the development of an acceptable self-identity that
12 includes herself, biological parents, adoptive parents, as well as exploration
13 of the role of her biological family in her life;

14 (2) Student will explore the underlying feelings and thought surrounding her
15 adoption that lead to difficult relationships and develop many coping skills
16 to manage the resulting anxieties and doubt around her worthiness for love
17 and acceptance;

18 (3) Come to identify better who she is and how past traumas may have
19 shaped her life;

20 (4) Reduce frequency and intensity of uncomfortable feeling and
21 dysfunctional coping mechanism related to past traumas;

22 (5) Improve relationship with parents. Create a more open and warm
23 environment free from physical aggression and unhealthy patterns of
24 escalating conflict;

25 (6) Demonstrate improvement in the ability to regulate her emotions as
26 demonstrated by practicing and applying DBT and other skills effectively. In
27 the past, [Student] has struggled to attend school due to feelings of shame,
28 anxiety, being overwhelmed. Being able and willing to regulate and
29 articulate emotions is a key for her to be successful with her education.

30 27. At hearing, Ms. Mackert indicated that the number one goal at [REDACTED]
was to "return a child home in a healthy productive way so that they can participate in life
in a way that's productive and healthy."⁴³ Ms. Mackert added: "But the education piece,

⁴¹ *Id.* at A117.

⁴² The MTP also contains short-term objectives related to the one or more of the goals. None of these short-term objectives are related to academics.

⁴³ See TR at 313.

1 we want to give them the skills to transfer home as well so that they can be successful in
2 their home school.”⁴⁴

3 28. Student’s MTP contained no individualized academic, educational, or
4 instructional goals. Under the Discharge Planning section in the MTP, in the line
5 regarding “Education,” the MTP simply contained a note that stated “smaller class
6 sizes.”⁴⁵

7 29. Academically, [REDACTED] used a “traditional classroom model,” with small
8 classes.⁴⁶ The academic setting was stated to be “structured and predictable and all
9 instruction is given in small, manageable units.” The schedule included frequent breaks
10 and study halls following academic class session; supports were available in study halls
11 to assist students with homework. Core classes (Math, English, Science, Social Studies)
12 were taught on Monday, Tuesday, Thursday and Friday; Wednesday was set aside as
13 “adventure day” for projects or off-campus field trips.

14 30. Student’s class schedule included U.S. History, Science, English, and
15 Algebra for a total scheduled classroom hours of 7.3 a week.⁴⁷ Student’s schedule
16 included 7.3 hours per week of study hall, during which she might have accessed
17 individual tutoring. Additionally, Student was scheduled for 1.8 hours per week of math
18 tutoring. On classroom days, Student’s schedule included lunch breaks of 55 minutes
19 and included “physical education” in unspecified amounts.

20 31. On September 16, 2019, District conducted the referral meeting. Mother,
21 Ms. DeMar ([REDACTED] Principal), Ms. Hartsuff, and Ms. Risko met at [REDACTED] to gather and review
22 available information with regard to Student, with the stated purpose of being able to plan
23 to support Student when she transitioned home to public school.⁴⁸

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26 ⁴⁴ *Id.*

27 ⁴⁵ See Exhibit A at A117. The Discharge Planning section of the MTP contained the date of August 12,
28 2019, the same date on which Student had been admitted, as the projected discharge date; therefore, the
29 stated discharge date therein was likely a typographical error.

30 ⁴⁶ See Exhibit A at A206-09. Only 20 students were in the [REDACTED] program at any time.

⁴⁷ *Id.*

⁴⁸ See Exhibit 27 at CESD193-248.

32. Mother was provided with a copy of Procedural Safeguards at the meeting.⁴⁹

33. The weekend before the September 16, 2019 meeting, Parents had a visit with Student.⁵⁰ At the referral meeting, Mother provided the following information both about the visit and about Student:

I mean, like I said, my kid is in a residential treatment center. She doesn't want to be there. We don't necessarily want her there. We do for purposes of getting better, but she wants to come home. And she made a big plea to come home and . . . I mean, *we know she has to be there . . . until she gets better, that's where she has to be.*⁵¹

I think she wants to work the program. I think she wants to get out of there, and I want her out of there.⁵²

She did this whole big plea of wanting to come home. . . . And when I stood firm and I said, "*well, you know, you're going to have to go through this program and graduate.*" . . . [A]nd she goes, "Okay, Mom. Okay, Mom, I can do this."⁵³

I mean *we want her home. If, you know, we can find a place that's really good for her. I want her to get the skills that she needs and then be able to come home and be healthy. I know that it's still up and down, I mean, that's just life. But we want her under my roof.*⁵⁴

[As to a projection of when Student might be able to come home, Mother indicated:] They say an average of 12 months, and I'm going to tell you that I'm not – of course, we will do whatever it takes, but I am of the belief that I'm going to be a squeaky wheel, and I want my kid to move through that program as fast as she's willing to move through it.⁵⁵

⁴⁹ *Id.* at CESD194. Mother expressed that she had seen the Procedural Safeguards before, but that it had been a long time; as Student had never been in a public school, the Administrative Law Judge must presume that Mother was familiar with such document simply through some other exposure.

⁵⁰ *Id.* at CESD199-200. Given that Student's MTP was developed on September 12th or 13th, Parents likely participated in the development; hence, the statement therein about Parents wanting to have a goal for Student to work to manage her anxiety for school.

⁵¹ *Id.* (emphasis added).

⁵² *Id.* at CESD204.

⁵³ *Id.* at CESD204-05 (emphasis added).

⁵⁴ *Id.* at CESD206.

⁵⁵ *Id.* at CESD206-07. At hearing, Ms. Perez indicated that "[O]ur average stay is 12 to 16 months. See TR at 284.

1 I want her home, but I'm not going to let the program – you know what I'm
2 saying? Anything that the program has structured I'm going to be up there
3 pushing because I think she – I think, at some point, it's going to be
4 detrimental that she comes home.⁵⁶

5 So, um, *I would like to have her home by May*. I mean, that's just – I'm just,
6 you know, putting that in my head because . . . I mean, we'll see. *It depends*
7 *on what she's willing to do . . .*⁵⁷

8 And *I guess I want to get the IEP and get her in – you know, under [District]*.
9 Do I need to enroll her? I mean even though she's – how does that work?⁵⁸

10 So, if she were to come home, and I mean, I just say this because I don't
11 know. There's [sic] so many variables. I want, I mean, *obviously I want her*
12 *to stay there, to graduate, to see way through in terms of getting the skills*
13 *and being successful there*. But, that being said, anything is possible. *If she*
14 *were to come home, does [District] have a place and they can meet her*
15 *mental health needs for where she's at?*⁵⁹ Just in general. I mean, I guess
16 anyway. You know, what would that be[?].⁶⁰

17 34. At the meeting, Ms. Risko responded that all the available options would be
18 looked at, indicating, in part:

19 [I]t's a team decision after we review [indistinguishable]. We make that
20 eligibility decision which drives that IEP, minutes, services, all that. Then we
21 would get to, OK, based on these minutes and . . . these services and this
22 plan that we feel meets her needs, this is – these are the programs that we
23 can discuss.⁶¹

24 35. At the meeting, Mother queried whether there was a way, "since [Student]
25 lives in this District, to have funds to help kids who go to RTCs like this?"⁶²

26 ⁵⁶ *Id.* at CESD207.

27 ⁵⁷ *Id.* at CESD208 (emphasis added).

28 ⁵⁸ *Id.* at CESD220. Ms. Hartsuff informed Mother that she would follow up on the "enrollment" piece. *Id.* at
29 CESD221

30 ⁵⁹ *Id.* at CESD228 (emphasis added). The clear inference of "where she's at" was as to Student's mental
health needs at that time.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at CESD233. It is noted that, at some point, the transcriber stopped identifying all the speakers. *Id.*
at CESD227. Based on the statements in the transcript and, in reviewing the statements/information being
provided, the transcriber also began to misidentify the speaker, often attributing Mother's statements to Ms.
Risko.

36. District personnel then generally explained to Mother about the referral process and the mental health system, which through the State and not District, may cover the cost for RTC placement for referred children.⁶³

37. At the meeting, Ms. Risko indicated, in part:

You know, there are so many different supports available, you know, for her if she does become a child who qualifies because, first, she would qualify for special education services. And so if she became a child who qualified for special education services and we wrote that IEP, based on her needs and us wanting to meet her needs, there are so many different ways that you can be creative in supporting a child's needs and making sure those needs are being met. And so the hard part for me – and I know we'll work all this out – but the hard part for me is you, is – you know – not truly knowing what her needs are going to look like until she makes that transition home.⁶⁴

38. At the meeting, one or more of District personnel pondered the next steps of the process, mentioning the following: figuring out a way to get the evaluation done; seeing if they needed more information; making an eligibility determination; writing the IEP; and, *“then when she comes back [home], you know, we do whatever we need to do to gather a little more information to determine where she's at and what she needs.”*⁶⁵

39. One of District personnel continued:

[W]hat I think we would do in that case is we would write the IEP for what we know at this point in time – . . . any of that additional information that [Mother was] getting for us would be really helpful and goals that she's currently working on⁶⁶ . . . write [it] for what it is and then, as she progressed, we can always come back and rewrite the IEP. We can write a new IEP.⁶⁷

40. They continued:

This is in preparation. *Once she returns, I would suggest then we would come right back to the table even before she gets here. If [we] know it's*

⁶³ The information exchanged at this time was neither specific nor all-encompassing. After the September 16, 2019 meeting, Ms. Risko reached out to the Arizona Department of Education (ADE) for information regarding RTC placement and the process. See Exhibit 30 at CESD266-67 (October 9, 2019 email).

⁶⁴ *Id.* at CESD221.

⁶⁵ *Id.* at CESD234-35 (emphasis added). At about this time during the meeting, District acknowledged a 30-day period after an eligibility determination within which to write an IEP.

⁶⁶ At her request, Mother was copied on contacts (with few exceptions) by District regarding Student's past schools, treatment providers, records, personnel from [REDACTED], and persons from whom District sought information (such as the mental health system and Arizona Department of Education). District relied on Mother to secure/obtain much of Student's data as the evaluation and IEP processes proceeded.

⁶⁷ *Id.* at CESD235.

gonna [be] two weeks and she's gonna be home, that we would come back to the table, we would review the IEP – what was the exit criteria? – what do we need to adjust? – what do we need to add? – what do we need to change? And sometimes it's just easier to write a new one from there. But that way we've done the – you know we've met the requirements of the thirty days.”⁶⁸

41. At the September referral meeting, the parties selected October 16, 2019, as the next meeting date for review of existing data (RED).⁶⁹

42. On October 16, 2019, Mother, Ms. Risko, Ms. Hartsuff, Ms. Ragsdale (special education/resource teacher at [REDACTED]), Ms. Vasta (general education teacher at [REDACTED]), Ms. DeMar (Principal at [REDACTED]), and Ms. Perez were present for the RED meeting.

43. At the RED meeting, Ms. Perez presented her impressions of Student's behavioral needs and progress.⁷⁰

44. At hearing, Ms. Perez indicated that she had not been informed by any of the [REDACTED] teachers of any substantive academic struggles for Student and further indicated that Student's issues, academically, were the level of work and organizing.⁷¹ Ms. Perez noted that when Student was depressed or anxious, it became hard for her to focus on the academic work. Regarding Student's goals, and the exit criteria, Ms. Perez indicated that, once [REDACTED] felt Student had “done all the work that she can while she's here with completing those goals, that would be kind of an indicator that . . . she'd be ready to move on . . . from [REDACTED].”⁷² Ms. Perez did not know whether Student had been at grade level when she was admitted, deferring such questions to Ms. Mackert; however she did indicate that it seemed like Student was doing the work an 8th grader would be expected to do.⁷³

⁶⁸ *Id.* (emphasis added). Based on the meeting, Mother was going to obtain the exit criteria, the Level criteria, and Student's percentages of “growth” (*i.e.*, progress) from [REDACTED]. *Id.* at CESD238.

⁶⁹ *Id.* at CESD239-42.

⁷⁰ See Exhibit B at B4-5 [RED meeting transcript (RMT) pages 12-15].

⁷¹ The Administrative Law Judge understood Ms. Perez's reference to “level of work” to be the amount of work rather than the difficulty, as there was no evidence that Student was not achieving passing, and above, grades at [REDACTED].

⁷² *Id.* at B7 [RMT pages 20-21].

⁷³ *Id.* at B7 [RMT page 22].

1 45. At the RED meeting, Ms. Risko reviewed for the team the available
2 assessment and/or evaluation information.⁷⁴ Among prior assessments/evaluations, Ms.
3 Risko noted that while Student was at [REDACTED] she had a “student support plan”⁷⁵
4 which was based on a 2015 evaluation⁷⁶ and which was comparable to a Section 504
5 plan because it contained accommodations and basic support for Student but contained
6 no modified instruction.⁷⁷

7 46. Ms. Risko pushed for an interview with Student to obtain Student’s
8 perspective.⁷⁸ Mother was reluctant to allow District to interview Student because it was
9 her opinion that they had sufficient information and that Student had already been through
10 enough evaluations.⁷⁹ Additionally, Mother was equally frustrated with the process,
11 stating, through discussion:

12 So my only problem is that I’m . . . I want her home. I want eligibility today.
13 I want to know where she can go. . . . I reached out in August trying to start
14 this program. I didn’t know where else to put her. I didn’t know what was
15 available.⁸⁰

16

17 So I want to bring her home. I don’t want to wait another four weeks for
18 more information and for eligibility. . . . [W]hat would we do if she came
19 home tomorrow?

20

21 We want her home. We want her placed appropriately. We want her to have
22 the supports that she needs.

23

24 I came to you guys in August, so I want to know what is – what should we
25 be doing – what should we be doing as a school district, as a team? . . .
26 [W]here can we go with this?⁸¹

27 ⁷⁴ Regarding Student’s “classroom work and performance,” Ms. Risko had only received the [REDACTED]
28 information. Id. at B16 [RMT pages 57-58].

29 ⁷⁵ See Exhibit 37 at CESD925-26.

30 ⁷⁶ See Exhibit 3, [REDACTED] Baker, Ph.D., Psychoeducational Evaluation dated November 18, 2015.

⁷⁷ See Exhibit B at B8 [RMT pages 27-28].

⁷⁸ Id. at B18 [RMT pages 65-66].

⁷⁹ See Exhibit B at B18-25 [RMT pages 67-97]. Parent felt that the process should be further along by this
date and had wanted to have eligibility determined at this meeting.

⁸⁰ However, Parents had been working with Ms. Curran, their educational consultant, since at least May of
2019 to find a program for Student, and Ms. Curran had assisted parents in choosing the [REDACTED]
program in June 2019 and the [REDACTED] program in August of 2019.

⁸¹ Id. at B18 [RMT pages 67-68].

1 47. Ms. Risko responded:

2 So a part of figuring out the program that she's going . . . to be the most
3 successful in is gathering all of this information up from and being very, very
4 thorough in that. I know, and I can completely understand that you want her
5 back. . . . I can definitely empathize with that. But a part of making sure that
6 we're doing the best we can to make those decisions on what programs are
7 most appropriate for her is in the information-seeking part. And
8 unfortunately, we don't have her here. So, it's not as easy as you guys
9 coming tomorrow and me doing a structured interview and giving her a
10 BASC Self, which is another thing I was going to recommend⁸²

11 48. After the team determined that a structured interview would provide
12 Student's perspective and provide information that was required for a more complete
13 picture, Mother did relent and she signed a written consent for evaluation on October 16,
14 2019.⁸³ The consent designated permission to conduct a structured interview with
15 Student.

16 49. At the October 16, 2019 RED meeting, Mother specified that Student would
17 not be going back to [REDACTED] and that she was going to enroll Student in District.⁸⁴
18 However, Mother then queried whether they "needed" to enroll her and stated that they
19 could pull her out of [REDACTED] at any time but insisted that they wanted to know in
20 advance about where Student would go and what were the available services.⁸⁵

21 50. Ms. Hartsuff responded that District would not do the IEP until District knew
22 Student was coming because District would need to consider Student's then-present
23 levels, academically and therapeutically, to develop an IEP as to her needs.⁸⁶

24 51. Ms. Risko conducted the structured interview with Student on October 21,
25 2019. Ms. Risko discussed the interview in depth at the October 22, 2019 MET meeting.⁸⁷

26 ⁸² *Id.* at B18-19 [RMT pages 68-69]. The RED meeting included ongoing discussion regarding the team
27 process. *Id.* at B24 [RMT pages 90-91]; [RMT pages 94-95]; [RMT pages 98-99]; [RMT pages 103-105].

28 ⁸³ See Exhibit 8; see also 34 C.F.R. § 300.300(a) (The school must obtain informed consent to conduct an
29 initial evaluation of a child to determine if the child qualifies as a child with a disability).

30 ⁸⁴ See Exhibit B at B21 [RMT pages 79-80].

⁸⁵ *Id.* Mother's mixed messages regarding either enrolling Student and/or bringing Student home continued
during the RED and MET meetings, as eventually demonstrated by the enrollment of Student on May 27,
2020 and, at that time, Student not yet being discharged from [REDACTED].

⁸⁶ *Id.* at B21 [RMT page 81].

⁸⁷ See Exhibit C at CESD2-5. The interview is also reflected in the MET Report. See Exhibit 12.

52. Mother, Ms. Risko, Ms. Hartsuff, Ms. Ragsdale (special education/resource teacher at [REDACTED]), Ms. Vasta (general education teacher at [REDACTED]), and Ms. DeMar (Principal at [REDACTED]) were present for the October 22, 2019 MET meeting.⁸⁸

53. At the MET meeting, District determined Student's eligibility as, primary, Emotional Disability, and secondary, Other Health Impaired.⁸⁹

54. At the MET meeting, Ms. Hartsuff provided the following information:

There's no straight line from point A to point B, meaning, if the – for us to come together as an IEP team, which would be the next step – there is no straight line without a gap in time that wouldn't happen – and let's say she needs the residential treatment center – and I can't really determine that because I would be pre-determining until we come together. And the data we have is so solid now. So I feel much better about what we have collected. So let's say - So, I am going to give that scenario. Let's say the IEP team comes together. We have the people at the table that needs to be at the table. The team determines it's an RTC. There's still a gap in time from where she's at now to that RTC. The reason for some of that would be having the [RBHA] person here being part of that decision-making. They do an evaluation like her behavioral evaluation. Even though we have a lot of data, it's part of their requirements. So that would have to happen. And then we say this is where the placement is going – yes we agree to the placement. Then there's like 15 more days to figure out which placement, which RTC.

. . . .

So basically the next step would be that for her – you would enroll her into the district, you would bring her home, and then we would pull a team together instantly to say what's the transition look like – what is the transition going to consist of while, then we are putting this piece in place to hold an IEP meeting, to write an IEP, to make a placement decision. Placement decision is the very last thing that comes at the end of all this.

. . . .

Let's say the [RBHA] person comes and they do their own assessment and they say we wouldn't recommend an RTC. There's that possibility as part of the team.⁹⁰

55. Mother replied:

⁸⁸ The team did not have current classroom functioning for student from [REDACTED] at this meeting. See Exhibit A at A111.

⁸⁹ See Exhibit 13.

⁹⁰ See Exhibit C at C10-11 [MET meeting transcript (MET) pages 36-40].

1 And I think you know where we are. We would love to have her home. But
2 I'm also not going to do that when it's not in her best interest and everybody
3 here sees her needs and we are on the precipice of getting in there and
4 helping her heal. So, um, *I'm not going to bring her home if it's not safe for
5 her.*⁹¹

6 56. At the time of the MET meeting, Student was at Level 2 of the [REDACTED]
7 exit criteria.⁹²

8 57. The team discussed possible visits to RTCs and Mother again raised the
9 issue of funding, asking: "if she were here right now and she was in RTC" whether that
10 funding could be used to keep her at [REDACTED].⁹³ Ms. Risko understood Mother's query
11 to be, essentially, asking whether District could/would keep Student at [REDACTED] and
12 use the available funding for [REDACTED]; that was her question, and Mother responded
13 "Yeah, if we don't have anything here, for sure."⁹⁴

14 58. The [REDACTED] special education teacher indicated that, in her experience, as to
15 involving the RBHA, there was a "dual track where the school district had to be on one
16 track but then also the parent had to do a separate intake."⁹⁵ She indicated that ADE
17 could be consulted about that process.

18 59. After a discussion regarding the ADE empowerment scholarship program,
19 Mother indicated she would fill out that scholarship information but would not commit to
20 going through ADE about the RBHA process.⁹⁶

21 60. Finally, Ms. Risko wrapped up the sense of the discussion as follows:

22 So ideally it would be find – because she's being successful at her current
23 placement, . . . it would be something to find something similar to support
24 her needs here in the state of Arizona that would be the most beneficial,
25 best possible scenario, *if that's what the team determines at the IEP*

26 ⁹¹ *Id.* at C11 [MET page 40 (emphasis added)].

27 ⁹² *Id.* at C5 [MET page 15].

28 ⁹³ *Id.* at C13 [MET page 46].

29 ⁹⁴ *Id.* at C14 [MET page 50].

30 ⁹⁵ *Id.* at C13 [MET page 48].

⁹⁶ *Id.* Overall, it must be noted that Mother was very protective of Student's personal, behavioral health and education information, as she had previously indicated that she was to be a part of any conversation about Student and wanted to approve any release of information. Thus, Mother's referenced statement at the meeting coincides with such protection, and also appeared to signal an unwillingness to access the mental health care system for the opportunity for RBHA services.

1 *meeting*. And then second best case would be is there a way that she could
2 stay there with the court for funding.⁹⁷

3 61. District's concern at the end of the meeting was how to go from Point A to
4 Point B directly, *i.e.*, without a lengthy gap for the possible RBHA-RTC piece in the event
5 the IEP team determined RTC placement as the LRE, and Ms. Hartsuff was going to
6 reach out to ADE again.⁹⁸ There was no specific discussion of a next meeting date.

7 62. On October 23, 2019, Mother forwarded to Ms. Risko a "compilation" of
8 undated information she had received from [REDACTED] regarding Student's academic
9 status.⁹⁹ As to academic progress, the information simply states, in pertinent part from
10 one email:

11 She is doing fine with her math and science homework, but puts a bit less
12 time into English and Social studies. Teachers are sometimes challenged
13 with her exaggerates stories and excuses for not completing homework. . .
14 . She seems to only struggle with wanting to put the time into her homework.

15 As to a second email, the information states:

16 I just wanted to let you know how [Student] is doing in science class.
17 [Student] has been doing very well and always does her homework.

18 63. The PWN dated October 29, 2019, reiterated Student's eligibility
19 categories.¹⁰⁰ The PWN set forth, *as was discussed at the October 22, 2019 MET*
20 *meeting*, that once student was coming home and enrolled, that the IEP team would come
21 together and develop an IEP and then determine an LRE, which LRE could not be
22 determined until the IEP was developed.

23 64. After the MET meeting, Ms. Hartsuff obtained information for Mother
24 regarding RBHA involvement.¹⁰¹

25 ⁹⁷ *Id.* at C14 [MET page 52 (emphasis added)]. Ms. Risko's last statement was not more fully explained.

26 ⁹⁸ *Id.* at C12 [MET pages 44-45] and C14 [MET pages 51-52].

27 ⁹⁹ See Exhibit A at A122-A123.

28 ¹⁰⁰ See Exhibit 13. A.A.C. R7-2-401(E)(3) provides that an initial evaluation of a child being considered for
29 special education "shall be completed as soon as possible, but shall not exceed 60 calendar days from
30 receipt of informed written consent." See *also* A.R.S. § 15-766(B). In this case, District completed its
evaluation within 60 days of Mother providing written consent to interview Student.

¹⁰¹ See Exhibit A at A127.

1 65. On October 31, 2019, Ms. Hartsuff provided to Mother the information she
2 had obtained, as follows:

3 If the District is considering a [RTC] it must invite representatives of the
4 [RBHA] to the IEP meeting. For Maricopa County, this is Mercy Care RBHA
5 Member Services. From there, if the recommendation is made, the RBHA
6 will make the final decision re placement. ADE will only approve vouchers
7 for in state placements.

8 66. On November 25, 2019, Mother reached out to Ms. Risko indicating her
9 confusion about the October 29, 2019 PWN.¹⁰² Mother indicated:

10 I want [Student] home but I don't know what's available for her here in
11 Arizona. I'm most concerned about where she can attend school now if she
12 was home.¹⁰³

13 Mother further indicated that she did not know that an IEP could not be developed until
14 student was enrolled.¹⁰⁴

15 67. Ms. Risko responded indicating:

16 Yes, we discussed that we are not aware of a program like [REDACTED].
17 Which is why [Ms. Hartsuff] and I wanted to do some research and visit
18 programs. We . . . are attempting to set up visits.

19 Yes, we all agreed that she was doing well at [REDACTED] and that she is
20 happy there. We [can't] determine [LRE] (LRE placement program) until we
21 meet for the IEP.

22 Yes, she would need to be enrolled to develop the IEP.

23 The MET (evaluation) "drives" the IEP, which is why it sounds like it will
24 happen in the future (even though, she is currently benefiting from the
25 recommendations listed at [REDACTED].¹⁰⁵ The MET recommendations
26 would be a part of her special education program (IEP).¹⁰⁶

27 ¹⁰² *Id.* at A130.

28 ¹⁰³ Based on Mother's statements therein, it appeared that Parents were no longer working with Ms. Curran
29 in October of 2019.

30 ¹⁰⁴ However, District had previously so advised Mother in the September 12, 2019 PWN and at the October
22, 2019 MET meeting.

¹⁰⁵ *Id.* at A133.

¹⁰⁶ Ms. Risko's responses, as stated herein, were determined by comparing the text of Mother's email to
the text of Ms. Risko's response email; Ms. Risko indicated her responses were in the color red, which was
not apparent on the exhibit document.

1 68. As she had at the MET meeting on October 22, 2019, Ms. Hartsuff again
2 advised Mother on December 2, 2019, that Student must be enrolled before District would
3 develop an IEP.¹⁰⁷

4 69. On December 6, 2019, Ms. Risko reached out to ADE regarding scheduling
5 visits at RTCs.¹⁰⁸ In response, ADE provided a list of the nine (9) state-approved RTCs
6 and indicated that each had their own policies.

7 70. The hearing record demonstrated the parties' efforts to schedule more
8 conversations in December; however, the parties' schedules did not mesh and then
9 District's semester was over.¹⁰⁹

10 71. On January 14, 2020, Mother emailed Ms. Hartsuff wondering whether Ms.
11 Hartsuff had been able to find any "in-state placement options" to be considered.¹¹⁰

12 72. Once District's new semester began in January, Ms. Hartsuff reached out
13 to Mother on January 27, 2020, to schedule a conversation in early February.¹¹¹

14 73. During their conversation on February 6, 2020, Mother indicated to Ms.
15 Hartsuff that she wanted to move forward with an IEP.¹¹²

16 74. Despite Student not yet being enrolled, as the district had previously been
17 advising Parent, District moved forward to develop an IEP.

18 75. On February 20, 2020, Ms. Risko reached out to [REDACTED] regarding
19 conferencing to discuss Student's present academic, social emotional, and behavioral
20 levels for the purpose of Ms. Risko beginning to draft an IEP.¹¹³

21
22 ¹⁰⁷ See Exhibit 28 at CESD249, Exhibit 29 at CESD258, and Exhibit H at H7-8.

23 ¹⁰⁸ See Exhibit 32 at CESD311A-H.

24 ¹⁰⁹ See Exhibit A at A135-44.

25 ¹¹⁰ *Id.* at A253. It seems odd that Mother made such an inquiry, given the information Ms. Risko provided
26 to Mother on October 31, 2019, clearly indicating that the RBHA makes the determination of any RTC
27 location after the IEP team might recommend such a placement. Based on Mother's statement therein,
28 Mother apparently felt that District was assisting in locating possible Arizona RTC placements in lieu of
Student's Utah RTC placement versus the District developing information on special education services
that would be available to Student through a District IEP. The Administrative Law Judge was unable to
locate a response from Ms. Hartsuff among the documents in Exhibit A or among Ms. Hartsuff's documents
in Exhibit 30.

29 ¹¹¹ *Id.* at A145.

30 ¹¹² See Exhibit 28 at CESD252; *see also* Exhibit 29 at CESD261, and TR at 39-40.

¹¹³ See Exhibit A at A165-A66

1 76. On February 28, 2020, Ms. Risko reached out to schedule a conversation
2 with Mother in March.¹¹⁴ They had a conversation about the RTC process.¹¹⁵

3 77. On March 6, 2020, Mother queried whether there was written information
4 that Parents could obtain on the RTC process and “how they could better understand this
5 process.”¹¹⁶ Mother reiterated that what they wanted was “an IEP meeting and to know
6 what services can be provided to [Student] now.”

7 78. On March 11, 2020, Ms. Risko queried whether Parents no longer wanted
8 an RTC, noting that, if they did want an RTC to be considered, that the RBHA had to be
9 included with Student being involved at the RBHA.¹¹⁷

10 79. On March 12, 2020, in response, Mother indicated:

11 [W]hat [Parents] want is an IEP meeting and to know what services can be
12 provided to [Student] now. Certainly RTC services would be an important
13 part of any discussion because [Student] is at a RTC currently, and the team
14 felt the RTC was meeting her needs when we met for the MET meeting.¹¹⁸

15 80. Ms. Risko responded that same day to Mother that the next step was to get
16 Student connected with the RBHA.¹¹⁹ Ms. Risko requested Mother’s consent to move
17 forward with that contact to the RBHA¹²⁰ and, when Mother responded “yes,” Ms. Risko
18 indicated to Mother that she would provide the RBHA with contact information for Mother
19 and Student.

20 81. On March 17, 2019, Petitioners filed the Complaint.

21 82. On April 14, 2020, District requested from [REDACTED] more recent data (i.e.,
22 present levels) regarding Student.¹²¹

23 83. On April 14, 2020, [REDACTED] advised Ms. Risko that it did not have
24 Mother’s “current” permission to share academic information but such information could
25

26 ¹¹⁴ *Id.* at A147-48.

27 ¹¹⁵ *Id.* at A152.

28 ¹¹⁶ *Id.*

29 ¹¹⁷ *Id.* at A151.

30 ¹¹⁸ *Id.* at A150.

¹¹⁹ *Id.*

¹²⁰ *Id.* at A149-50.

¹²¹ *Id.* at A165.

1 be forwarded as soon as permission was received.¹²² Later that day, Mother notified Ms.
2 Risko that she would have [REDACTED] prepare the information regarding Student's
3 present levels.¹²³

4 84. District issued Webex IEP meeting notices on April 14, 2020 (for April 20th),
5 April 20, 2020 (for [illegible date]), April 24, 2020 (for April 30th), and April 24, 2020 (for
6 May 7th).¹²⁴

7 85. On April 15, 2020, Mother advised Ms. Risko that Student had been at Level
8 3 before Christmas, came home from the holiday, struggled when back at [REDACTED] in
9 January, and dropped back to Level 2, but was back to Level 3 at that time.¹²⁵

10 86. After a brief delay, Student's intake with the RBHA was completed on April
11 17, 2020.¹²⁶

12 87. Following a series of IEP Webex meetings, District finalized an IEP for
13 Student on May 7, 2020.¹²⁷ Because the data demonstrated that Student was
14 academically performing at grade level, the IEP team wrote no academic goals but wrote
15 goals regarding Social Emotional Skills (5 goals) and Workplace Behaviors (2 goals). The
16 IEP team determined to offer specially-designed instruction in the amounts of 1,060
17 weekly minutes for Social Emotional Skills and 200 weekly minutes for Workplace
18 Behaviors. As related services, the IEP team set forth curb-to-curb transportation and 60
19 minutes per week of counseling. As supportive services, the IEP team set forth daily
20 behavior support (consistent and regular feedback), bi-weekly consultations of the special
21 education teacher with school-based team, and team meetings at the beginning of an
22 academic year or when a new team member was added. The IEP team determined to
23 offer accommodations for testing. Finally, the IEP team determined that the services
24 Student needed could not be provided at [REDACTED] and that the LRE that would best meet
25

26 ¹²² *Id.* at A175-80 and A263-67.

27 ¹²³ *Id.* at A266 and A175-80

28 ¹²⁴ See Exhibits 14, 15, 16, and 17, respectively.

29 ¹²⁵ See Exhibit A at A184.

30 ¹²⁶ *Id.* at A176; see also *Id.* at A260.

¹²⁷ See Exhibit 20.

1 Student's needs would be a public or private separate day school (*i.e.*, a Level D
2 placement).

3 88. Additionally, the IEP team determined that, due to Student's stage of
4 development in social emotional area, Student was eligible for extended school year
5 (ESY) services.¹²⁸ District offered ESY placement from June 1, 2020, through July 17,
6 2020 at Banner Academy, which was described as follows:

7 [S]mall, supportive, nurturing environment, established behavior support
8 plan system, identified case manager to provide emotional support and
9 connection, small campus with small population of students attending ESY,
10 daily small group social skills, and access to 1:1 therapy.

11 89. The IEP team considered, but rejected, providing services at an RTC
12 because, based on the [REDACTED] present level/progress information available, Student
13 did not exhibit physical or verbal aggression, elopement, self-harm or suicidal ideations,
14 *or any other significant behaviors* that would warrant that type of more restrictive
15 setting.¹²⁹

16 90. At the time of the IEP meetings, Student remained in the private placement,
17 at [REDACTED].

18 91. Parents disagreed with the determined LRE and, thus, declined District's
19 offer of a FAPE as developed in the May 7, 2020 IEP.¹³⁰ The May 11, 2020 PWN stated
20 that Mother believed Student needed to be closely monitored and Student needed access
21 to in-person therapy every day.¹³¹

22 92. District's academic year 2019-2020 ended on May 21, 2020.¹³²

23 93. Parents enrolled Student at [REDACTED] on May 27, 2020.¹³³

24
25
26
27 ¹²⁸ *Id.*

28 ¹²⁹ See Exhibit 22 (emphasis added).

29 ¹³⁰ See Exhibit 21.

30 ¹³¹ See Exhibit 22.

¹³² See Exhibit G.

¹³³ See TR at 83.

1 94. The [REDACTED] MTP progress sheets provided to the hearing record
2 indicated that, as of June 11, 2020, Student was at "Stage 3."¹³⁴

3 95. As of the hearing session on September 9, 2020, Student had just
4 completed Stage 3 work and was ready to apply for Stage 4.¹³⁵

5 96. During the hearing session on September 9, 2020, Mother indicated that
6 Student was going into the 9th grade, as a freshman.¹³⁶ Mother further indicated that
7 Student would be attending school in the Phoenix Union School District "soon."¹³⁷

8 97. During the hearing session on September 10, 2020, Mother indicated that
9 Student was coming home "next weekend" and Student would be "going to a private day
10 placement."¹³⁸

11 98. [REDACTED] was part of the Certified Educational, Recreational, Therapeutic
12 Schools and Programs (CERTS) facilities and was a member of the National Association
13 of Therapeutic School and Programs.¹³⁹ [REDACTED] was a residential behavioral
14 treatment center that offers comprehensive behavioral treatment in one location to
15 teenage girls with serious emotional or behavioral issues which often need attention from
16 many different professionals, such as child development specialists and psychiatrists who
17 specialize in teenage behavioral problems.¹⁴⁰ [REDACTED] admitted a limited number of
18 students, all adolescent girls aged 11 through 15, and specialized in working with trauma
19 and attachment struggles.¹⁴¹

20 99. Based on the evidence of record, Student's admittance to [REDACTED] on
21 August 12, 2019, was a unilateral private placement by Parents solely for behavioral
22 health (social, emotional) concerns and purposes so that Student could learn and

23 ¹³⁴ See Exhibit 36 at CESD835-61. Based on evidence presented in the hearing record, the "stage"
24 designation in these documents is a synonym reference to what has also been referred to as the exit levels.
The Stage 3 level had also been Student's level as of April 15, 2020.

25 ¹³⁵ See TR at 282.

26 ¹³⁶ See TR at 344.

27 ¹³⁷ See TR at 345.

28 ¹³⁸ See TR at 511. The hearing record does not indicate whether, following Student's May 27, 2020
enrollment of Student at [REDACTED], parents contacted another public school district, provided District's IEP, and
obtained IEP placement at a private day school.

29 ¹³⁹ See TR at 311.

30 ¹⁴⁰ CERTS Internet description.

¹⁴¹ See TR at 233.

1 successfully master skills, which she did not have at that time, and be prepared and able
2 to participate in life in a healthy and productive way, not just at school.

3 100. [REDACTED] was neither a Utah-approved nor an Arizona-approved special
4 education placement and was not an Arizona RBHA-approved placement.¹⁴² [REDACTED]
5 employed an academic director, had a teaching staff, had dedicated classrooms, and had
6 a weekly/daily schedule that includes academic classwork periods. The licensure of
7 teachers in the State of Utah had changed in July of 2020 from state-licensure to local
8 education agency licensure; prior to this change, while the teachers were state-licensed,
9 [REDACTED] did not employ educators who were state-licensed/certified in special
10 education.¹⁴³

11 101. During Student's enrollment at [REDACTED], [REDACTED] did not implement
12 any individualized education plan for Student and did not conduct any behavioral
13 assessment of Student.¹⁴⁴ Student received academic supports and some tutoring,
14 Student received no modified academic curriculum or modified academic instruction at
15 [REDACTED]; Student received "the academic rigor that the other students get in a regular
16 school setting."¹⁴⁵

17 **CONCLUSIONS OF LAW**

18 **APPLICABLE LAW**

19 **FAPE**

20 1. Through the IDEA, Congress has sought to ensure that all children with
21 disabilities are offered a free appropriate public education (FAPE) that meets their
22 individual needs.¹⁴⁶ These needs include academic, social, health, emotional,
23

24 ¹⁴² See TR at 321 and 415; see *also* Exhibit 32 at CESD311F-G. There was no evidence regarding how
25 the State of Utah categorized [REDACTED] as any type of educational institution. See 34 C.F.R. § 300.36.
26 Neither Ms. Perez nor Ms. Mackert were able to state with certainty whether [REDACTED] was a for-profit
27 entity. See TR at 275-74 and TR at 322.

28 ¹⁴³ See TR at 310 and 320-21. It is noted that Ms. Mackert testified that some of its students were placed
29 at [REDACTED] by school districts and that, if so, [REDACTED] did "follow the IEPs" for those students. *Id.* at
30 309-10.

¹⁴⁴ *Id.* at 286.

¹⁴⁵ See TR at 339.

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

communicative, physical, and vocational needs.¹⁴⁷ 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 services. The IDEA sets forth requirements for the identification, assessment, and placement of students who need special education, and seeks to ensure that they receive a FAPE. A FAPE consists of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”¹⁴⁸ The FAPE standard is satisfied if the child’s IEP sets forth his or her individualized educational program that is “reasonably calculated to enable the child to receive educational benefit.”¹⁴⁹ The IDEA mandates that school districts provide a “basic floor of opportunity.”¹⁵⁰ The IDEA does not require that each child’s potential be maximized.¹⁵¹ A child eligible for special education services receives a FAPE if a program of specialized instruction “(1) addresses the child’s “unique” needs, (2) provides adequate support services so that child can take advantage of the educational opportunities and (3) is in accord with that child’s individualized educational program.”¹⁵²

The IEP

2. Once a student is determined eligible for special education services, a team composed of the student’s parents, teachers, and others familiar with the student formulate an individualized education program (IEP) that generally sets forth the student’s current levels of educational and functional performance and sets annual measurable goals that the IEP team believes will enable the student to make progress in the general education curriculum.¹⁵³ The IEP tells how the student will be educated, especially with

¹⁴⁷ *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).

¹⁴⁸ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

¹⁴⁹ *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 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).

¹⁵⁰ *Rowley*, 458 U.S. at 200.

¹⁵¹ *Id.* at 198.

¹⁵² *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)).

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

1 regard to the student's unique needs that result from the student's disability, and what
2 instructional and related services will be provided to aid the student.¹⁵⁴ The student's
3 parents have a right to participate in the formulation of an IEP.¹⁵⁵ The appropriately
4 composed IEP team must consider the strengths of the student, concerns of the parents,
5 evaluation results, and the academic, developmental, and functional needs of the
6 student.¹⁵⁶ The local education agency is required to have, at the beginning of each
7 school year, an IEP in effect for each eligible student that resides in the agency's
8 jurisdiction.¹⁵⁷

9 **Substantive versus Procedural**

10 3. A determination of whether a student eligible for special education services
11 has received a FAPE must be based on substantive grounds.¹⁵⁸ For a substantive analysis
12 of an IEP, the review of the IEP is limited to the contents of the document.¹⁵⁹ Therefore,
13 any question regarding whether an IEP is reasonably calculated to provide educational
14 benefit to a student must be decided on the basis of the content of the IEP itself.

15 4. Procedural violations in and of themselves do not necessarily deny a student
16 a FAPE. If a procedural violation is alleged and found, it must be determined whether the
17 procedural violation (1) impeded the student's right to a FAPE; (2) significantly impeded the
18 parents' opportunity to participate in the decision-making process regarding the provision
19 of a FAPE to the child; or (3) caused a deprivation of educational benefit.¹⁶⁰ If one of those
20 three impediments occurred, the student was denied a FAPE due to the procedural
21 violation.

22
23
24 ¹⁵⁴ *Id.*

25 ¹⁵⁵ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(1).

26 ¹⁵⁶ 20 U.S.C. § 1414(d)(1)(B) and (3)(A); 34 C.F.R. § 300.324(a).

27 ¹⁵⁷ 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).

28 ¹⁵⁸ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

29 ¹⁵⁹ *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
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)).

30 ¹⁶⁰ 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.

1 5. Procedural violations that “result in the loss of educational opportunity, or
2 seriously infringe the parent’s opportunity to participate in the IEP formulation process,
3 clearly result in the denial of a FAPE.”¹⁶¹

4 6. “Educational opportunity” is lost, “where, absent the error, there is a strong
5 likelihood that alternative educational possibilities for the student would have been better
6 considered.”¹⁶²

7 7. Once a procedural error is found, it must be determined whether that
8 violation affected the substantive rights of the parent or the child.¹⁶³

9 **Reimbursement for Parental Private School Placement**

10 8. Parents who dispute whether a student’s current IEP offers a FAPE to a
11 student and who, as a result of that dispute, enroll the student in a private program, may
12 receive reimbursement for the costs of that private enrollment under certain
13 circumstances.¹⁶⁴ Generally, an IEP developed by the school must fail to offer a FAPE
14 to the child prior to the private placement enrollment *and* the private school must be an
15 “appropriate” placement.¹⁶⁵ A private school placement may be appropriate even if it
16 does not operate under public school standards.¹⁶⁶

17 9. When parents dispute that an existing IEP has offered a FAPE, parents may
18 “enroll the child in a private preschool, elementary school, or secondary school without
19 the consent of or referral by the [school district]” and seek reimbursement from the school
20 for the expense of that enrollment from a court or hearing officer.¹⁶⁷ Indeed, parents have
21 “an equitable right to reimbursement for the cost of providing an appropriate [private]
22 education when a school district has failed to offer a child a [free appropriate public
23

24
25 ¹⁶¹ *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)).

26 ¹⁶² *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir. (2004, amended 2005).

27 ¹⁶³ *Capistrano*, 556 F.3d at 910; *see also Federal Way*, 394 F.3d at 652 and *Target Range*, 960 F.2d at
1484.

28 ¹⁶⁴ 34 C.F.R. § 300.148(c) and (d).

29 ¹⁶⁵ *Id.*

30 ¹⁶⁶ *Id.*

¹⁶⁷ 34 C.F.R. § 300.148(b) and (c).

education].”¹⁶⁸ Furthermore, the private placement does not have to meet IDEA requirements.¹⁶⁹ However, an award for reimbursement can be reduced or denied in various circumstances.¹⁷⁰

Burden of Proof and Basis of Decision

10. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.¹⁷¹ The standard of proof is “preponderance of the evidence,” meaning evidence showing that a particular fact is “more probable than not.”¹⁷²

11. Therefore, in the matter at hand, Petitioners bear the burden of proving by a preponderance of evidence: (1) District violated the IDEA, and failed to provide a FAPE, through the alleged inaction, from October 22, 2019, until May 7, 2020, to develop an IEP after finding Student eligible for special education services at the MET meeting on October 22, 2019, and (2) Parents are entitled to reimbursement for the unilateral placement period at issue (*i.e.*, October 22, 2019, to May 21, 2020) for the reason that [REDACTED] was an appropriate placement.¹⁷³

DECISION

Procedural Violation Constituting Substantive Failure to Provide a FAPE

12. Petitioners alleged that District failed to provide a FAPE when it failed to develop an IEP, until May of 2020, after determining Student to be a child with a disability and eligible for special education and related services under the IDEA at the October 22,

¹⁶⁸ *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *W.G. v. Bd. of Tr. Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1485 (9th Cir. 1992)).

¹⁶⁹ *Florence County. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

¹⁷⁰ 34 C.F.R. § 300.148(d). An award may be reduced or denied if the Parents have not given adequate notice as set forth in the IDEA. 34 C.F.R. § 300.148(d)(1). See *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1059 (9th Cir. 2012) listing other equitable factors that might reduce reimbursement: notice to the school district before initiating private placement; the existence of other, more suitable, placements; the parents’ efforts in securing the alternative placement; and the level of cooperation of the school district.

¹⁷¹ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

¹⁷² *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).

¹⁷³ Petitioners assert that the May 11, 2020 PWN was emailed to Mother on May 15, 2020, and further assert that the IEP could not have been implemented by May 21, 2020, the last day of that academic year. See Post-hearing Memorandum at 58 (Footnote 430).

1 2019 MET meeting. Petitioners argued that District violated 34 C.F.R. § 300.323(c) by
2 failing to develop the IEP within 30 days of the eligibility determination on October 22,
3 2019.

4 13. 34 C.F.R. § 300.323(c) provides that, for an initial IEP, a public education
5 agency must develop the IEP within 30 days of the eligibility determination and, “as soon
6 as possible following the development of the IEP” make special education and related
7 services available to the eligible child.

8 14. The U.S. District Court in *Hack v. Deer Valley Unified Sch. Dist.*, No. CV-
9 15-02255-PHX-JJT (D. Ariz. 2017), addressed the school district’s failure to offer an IEP
10 after the parents requested one. In *Hack*, the parents contacted the school district in
11 August of 2014 to request a FAPE for that next academic year and the school district
12 responded that they were “ready, able, and willing” to provide a FAPE when parents re-
13 enrolled the child, at which time, the school district would convene an IEP team.¹⁷⁴ In
14 discussing cases from other jurisdictions, the Court indicated that those cases were in
15 line with the Hack family position that “a school violates IDEA when it withholds an offer
16 of a FAPE from a student residing in that district until parents enroll the student.”¹⁷⁵

17 15. The *Hack* Court found that the procedural error of failing to develop an IEP
18 for the 2014-2015 academic year had left parents without “an IEP to consider against
19 alternative possibilities,” and that such failure had resulted in a “loss of educational
20 opportunity,” denying the child a FAPE.¹⁷⁶ Factors considered by the Court were: the
21 school district was aware that the child was a child eligible for special education; child
22 had already received special education services from the school district; and, child had
23 had a prior IEP.¹⁷⁷ Additionally, the Court noted that the school district had been informed
24

25 ¹⁷⁴ *Hack*, CV-15-02255-PHX-JJT at 9.

26 ¹⁷⁵ *Id.* at 10. The Court cited *Dist. of Columbia v. Vineyard*, 971 F. Supp. 2d 103,111 (D.D.C. 2013) (finding
27 that while receipt of a FAPE is predicated on enrollment, an offer of a FAPE is not) and *Moorestown*
28 *Township Bd. of Ed. v. S.D.*, 811 F. Supp. 2d 1057, 1072 (D.N.J. 2001) (finding that upon the request of a
parent, a school district is required to evaluate a disabled child in its district and make a FAPE available to
him, even if he is enrolled in a private school in another district).

29 ¹⁷⁶ *Hack*, CV-15-02255-PHX-JJT at 11 (citing *Capistrano*, 556 F.3d 900 and *Federal Way*, 394 F.3d 634).

30 ¹⁷⁷ *Id.* at 10. Thus, the “identification” process was unnecessary.

1 by the parents, and likely believed, that parents had no intent to enroll child in
2 Kindergarten until he was 6-years old, which he was at that time in August of 2014.¹⁷⁸

3 16. The court in *Hack* determined that the failure to offer an IEP until the child
4 was re-enrolled was a procedural violation that constituted a substantive failure to provide
5 a FAPE.

6 17. In the instant matter, Student was unknown to District on August 8, 2019,
7 when Mother requested a “special education evaluation”, as Student had previously
8 attended only parochial schools.¹⁷⁹ Student had never been enrolled in District and there
9 were no District educational plans or educational plans from any prior school or placement
10 available to be reviewed.¹⁸⁰

11 18. On October 22, 2019, Student was determined to be a student eligible for
12 special education during the MET meeting. At that point, District was obligated to develop
13 an IEP for Student within 30 days.

14 19. The hearing record delineates, in great detail, the various actions of the
15 parties between October 22, 2019, and May 7, 2020. Generally, Mother was gathering
16 additional information and District had offered to provide additional information regarding
17 RTCs and possible visits. Emails between the parties abounded during that time;
18 however, District was not able to schedule IEP meetings to begin until April of 2020.

19 20. Throughout the process, Mother made statements indicating both that she
20 wanted Student to stay at [REDACTED] and to come home. At the time of the September
21 16, 2019 referral meeting, Mother indicated to District that she “would like to have
22 [Student] home by May.”¹⁸¹ Mother had been adamant that Student would graduate from
23 [REDACTED] (typically a 12 to 16 month program) and that Student would have to
24 demonstrate she was working to gain the skills she needed. Mother also insisted that
25

26 ¹⁷⁸ *Id.*

27 ¹⁷⁹ The hearing record does not demonstrate that Parents had ever sought public education opportunities
28 while Student attended parochial schools.

29 ¹⁸⁰ A.A.C. R7-2-401(G)(7) provides: “A parent . . . may request a review of [an existing] IEP. Such review
shall take place within 15 school days of the receipt of the request or at a mutually agreed upon time but
not to exceed 30 school days.” As Student had no existing IEP, A.A.C. R7-2-401(G)(7) is not applicable.

30 ¹⁸¹ See Exhibit 27 at CESD208.

1 Student would have to be “safe” when she came home¹⁸² because the only
2 placement/services they would consider must be “the right fit” for Student. Mother’s
3 requests for knowing what “services” District could offer were all based on “if” Student
4 was home; however, Mother was also adamant in wanting to know what District could
5 offer. Taking Mother’s early statements at face value regarding Student needing to
6 remain at [REDACTED] until Student graduated/completed the program in order to gain the
7 skills Student needed for “everything” and that [REDACTED] was a 12-16 month program, it
8 was understandable that District was looking for a plan or a date certain when Student
9 would enroll or arrive home.¹⁸³

10 21. On May 7, 2020, over six months after the October 22, 2019 eligibility
11 determination, District offered a FAPE and a transitional plan (*i.e.*, the ESY offer) to
12 Parents, both of which Mother declined.¹⁸⁴ Therefore, District failed to develop an IEP for
13 Student within 30 days of the October 22, 2019 eligibility determination.

14 22. Even assuming, *arguendo*, that Mother’s specific request on February 6,
15 2020, that she wanted to move forward with an IEP, initiated District’s responsibility to
16 develop an IEP, 30 days from that date was March 7, 2020, and District failed to develop
17 an IEP within that 30-day period. Having been asked by Parents to develop an IEP for
18 Student, District had an obligation to develop an IEP and offer that FAPE to Student so
19 that Parents could consider the offered District placement for Student in lieu of their
20 unilateral private placement.

21 23. In the instant matter, the parties argued Parents’ intent or lack of intent to
22 enroll Student should be a factor to be considered. However, the *Hack* decision does not
23 stand for the proposition that the parents’ intent to enroll the student has any impact on
24 the school’s obligation under the IDEA to develop an IEP upon request for a student
25 eligible for special education living in the district.

26 ¹⁸² See Exhibit C at C11 [MET page 40].

27 ¹⁸³ At no time between the August 2019 request for an initial evaluation and the April and May 2020 IEP
28 meetings was there any specific statement that Student had completed the [REDACTED] program, had met
29 [REDACTED] exit criteria, would be discharged on any particular date, or was coming home to receive District
30 services and would be enrolled.

¹⁸⁴ See Exhibit 21.

24. Petitioners argued herein that each of Mother's statements at each meeting with District, that she/they wanted to have Student "home," was an indication that she/they "wanted to bring Student home without having her remain at [REDACTED]," *i.e.*, that they did not "intend" to maintain Student at [REDACTED].¹⁸⁵ However, District received mixed messages from Mother. Parents could have enrolled Student at any time before, or while, Student was at [REDACTED]. Therefore, the evidence was inconsistent as to Parents' plans or "intent" to enroll Student in District.

25. The time period for which Petitioners alleged District failure's to have provided a FAPE encompassed the time between District's determination of Student's eligibility on October 22, 2019, and District's offer of an IEP on May 21, 2020. While Mother had significant *involvement* in the referral, the RED, the MET, and the IEP meetings to the point that, as District correctly noted, Mother controlled the availability of information regarding Student that was required for District consideration at the RED, the MET, and the IEP processes, District's delay in development of an IEP significantly impeded Parents' decision-making as to the provision of a FAPE for Student. Therefore, the Administrative Law Judge concludes that District's failure to have offered Student an IEP resulted in an impediment for Parents in "participation in the decision-making process," which was having insufficient information to consider possibilities other than the then [REDACTED] placement of Student.

26. Accordingly, the Administrative Law Judge concludes that District's requirement that Student be enrolled before District would develop an IEP was a misjudgment in light of *Hack*. The District's inaction was a procedural violation constituting a substantive failure to provide a FAPE.

Available Remedies

27. Pursuant to the IDEA, Student, just as any other child once identified and determined to be a child eligible for special education and related services under the IDEA, had a right to a FAPE under the IDEA provisions. In the matter at hand, once identified, Student was entitled to an offer of a FAPE. Thus, the final consideration must

¹⁸⁵ Petitioner's Post-hearing Memorandum at 21.

1 be whether Parents are entitled to reimbursement for tuition and expenses incurred at
2 [REDACTED] during the at-issue period of October 22, 2019, to May 21, 2020, in the event
3 that [REDACTED] was an appropriate placement.

4 28. Because the matter in *Hack* was remanded for further proceedings and
5 subsequently settled by the parties, the Court's decision provides no guidance as to
6 determination of remedies for procedural violations such as the one presented in this
7 matter.

8 29. 20 U.S.C. § 1412(a)(10)(C) and 34 C.F.R. § 300.148(c) provide that a
9 hearing officer may require the public school to reimburse parents for the costs of private
10 preschool elementary or secondary placement, when the parent enrolls an eligible child,
11 *i.e., one who previously received special education and related services*, in a private
12 preschool, private elementary school, or a private secondary school in the absence of
13 consent or referral by the public school.

14 30. However, in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009), the
15 Court determined that these provisions do not impose a categorical bar on reimbursement
16 to parents when the child had not previously received special education and related
17 services under the authority of a public education agency. In discussing prior cases, the
18 Court stated that "when a child requires special education services, a school district's
19 failure to propose an IEP of any kind is at least as serious a violation of its responsibilities
20 under IDEA as a failure to provide an adequate IEP."¹⁸⁶ In affirming the 9th Circuit
21 determination, which reversed the U.S. District Court's finding that the IDEA contained a
22 bar to reimbursement when a child had not previously received such services, the Court
23 further indicated:

24 When a court of hearing officer concludes that a school district failed to
25 provide a FAPE and the private placement was suitable, it must consider all
26 relevant factors, including the notice provided by the parents and the school
27 district's opportunities for evaluating the child, in determining whether
28 reimbursement for some or all of the cost of the child's private education is
29 warranted.¹⁸⁷

30
¹⁸⁶ *Forest Grove*, 557 U.S. at 238-39.

¹⁸⁷ *Id.* at 247-48.

31. In *C.B. v. Garden Grove*, 635 F.3d 1155, 1159-60 (9th Cir. 2011), the 9th Circuit adopted the following standard as to what constitutes a “proper placement” under the IDEA:

To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child’s potential. *They only need demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child*, supported by such services as are necessary to permit the child to benefit from instruction.¹⁸⁸

32. In *Garden Grove*, the 9th Circuit affirmed the lower court’s award of full reimbursement for a private placement because the child had received educational services meeting some, even if not all, of the child’s needs, and had received “significant educational benefit” from the private school services.¹⁸⁹

33. In *Ashland Sch. Dist. v. Parents of Student E.H. (Student E.H.)*, 587 F.3d 1175 (9th Cir. 2009), the court found that, where the private residential treatment placement was necessitated by medical, rather than educational concerns, the school district was not responsible for reimbursement to the parents. The Court noted the focus of the placement review had to be “whether [the residential] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process.”¹⁹⁰ In this case, the Court affirmed the U.S. District Court denial of reimbursement (*i.e.*, the U.S. District Court’s reversal of the hearing officer’s award of reimbursement).

34. In *Ashland Sch. Dist. v. Parents of Student R.J. (Student R.J.)*, 588 F.3d 1004 (9th Cir. 2009), the 9th Circuit reiterated “[i]f ‘the placement is a response to medical, social, or emotional problems . . . quite apart from the learning process,’ then it cannot be

¹⁸⁸ *Garden Grove*, 635 F.3d at 1159-60 (citing *Frank G. v. Board of Education*, 459 F.3d 356, 365 (2d. Cir. 2006)). 34 C.F.R. § 300.39 defines “special education” to be “specially designed instruction . . . to meet the unique needs of a child with a disability”

¹⁸⁹ *Id.* at 1158-59.

¹⁹⁰ *Student E.H.*, 587 F.3d at 1185 (citing *Clovis Unified Sch. Dist. v Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990)).

considered necessary under the IDEA.”¹⁹¹ The 9th Circuit upheld the District Court reversal of the hearing officer’s award of reimbursement.

35. In the instant matter, Student had never been identified as a child with a disability eligible for special education and related services when she was admitted to [REDACTED]. Student was not placed by Parents at [REDACTED] based on a disagreement with District’s offer of a FAPE or a disagreement with services being provided by any public school. [REDACTED] was not known to be categorized by the State of Utah as a private elementary school or a private secondary school, which possibly would cloak it with the same categorization in Arizona. Parents placed Student at [REDACTED] to address her mental health and her specific behavioral health needs; the [REDACTED] MTP clearly stated Student’s admission needs and the [REDACTED] therapeutic and behavioral focus. Parents believed that [REDACTED] was the best place for Student to meet her mental health needs and wanted to know if there was a place in Arizona that was similar to meet her mental health needs at that time; Mother was adamant that they would not bring Student home unless she was “safe” and the “fit” was right. While [REDACTED] provided academic instruction to the adolescent girls admitted to its therapeutic program, including Student, [REDACTED] provided the same academic rigor that any student might receive in a public school.¹⁹² The academic supports that Student received at [REDACTED] aligned with what, in the public school setting, would be “universal” accommodations.¹⁹³ While Student received supports and some tutoring, [REDACTED] did not implement any individualized education program or plan for Student, and Student received no modified academic curriculum or modified instruction at [REDACTED]; [REDACTED] was not a Utah-approved special education placement. The hearing record demonstrated that, but for the private behavioral therapeutic setting, Student academically received what was otherwise a typical academic education. Petitioners have not demonstrated that Student’s medical

¹⁹¹ *Student R.J.*, 588 F.3d at 1010.

¹⁹² See TR at 339.

¹⁹³ See TR at 175.

1 (i.e., behavioral), social or emotional problems were so inextricably interwoven that they
2 could not be separated from her educational needs.¹⁹⁴

3 36. On consideration of whether [REDACTED] was the appropriate placement for
4 educational purposes for Student and whether Petitioners were entitled to the remedy
5 requested for reimbursement of tuition, transportation, and other related expenses, the
6 hearing evidence demonstrated multiple competing factors, but the equities weigh against
7 financial reimbursement because the unilateral placement at [REDACTED] was
8 necessitated for behavioral treatment reasons and purposes and not for educational
9 reasons and purposes.

10 **Conclusion**

11 37. While the evidence clearly demonstrated District failed to provide a FAPE
12 through its failure to offer an IEP within the applicable time frame, the evidence weighs
13 against reimbursement of the incurred expenses at [REDACTED] because the [REDACTED]
14 residential behavioral treatment placement was necessitated by medical, social, and
15 emotional concerns rather than educational concerns. Therefore, District is not
16 responsible for reimbursement to Parents for the tuition, transportation, and other related
17 expenses incurred for Student's placement at [REDACTED].

18 38. However, in crafting a remedy for District's failure to have timely offered an
19 IEP, the Administrative Law Judge has reviewed the May 7, 2020 District-offered IEP and
20 concludes that, due to the updates regarding Student's developmental stage(s) at the
21 time of the April 2020 IEP meetings, District shall be ordered to make available to Student
22 compensatory relief in the form of an ESY program for Student for summer of 2021 to
23 address educational needs due to lagging social, emotional development that Student
24 continues to experience.

25 **RULING**

26 Based on the findings and conclusions above,

27 **IT IS ORDERED** that Petitioners have demonstrated District's IDEA violation in
28 District's failure to timely offer an IEP, resulting in a failure to provide a FAPE to Student;

29 ¹⁹⁴ [REDACTED] did not conduct any functional behavioral assessment from which such information may have
30 been more succinctly culled.

1 **IT IS FURTHER ORDERED** that District make available to Student compensatory
2 relief in the form of a 2021 ESY program for Student for summer of 2021 to address
3 lagging social, emotional development that Student continues to experience; and

4 **IT IS FURTHER ORDERED** that Petitioners are the prevailing party.

5 **ORDERED** this day, February 22, 2021.

6
7 /s/ Kay A. Abramsohn
8 Administrative Law Judge
9

10
11 **RIGHT TO SEEK JUDICIAL REVIEW**

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

20 Transmitted by either mail, e-mail, or facsimile February 22, 2021 to:

21 Lori B. Kirsch-Goodwin, Esq.
22 KIRSCH-GOODWIN & KIRSCH, PLLC
23 lkq@kgklaw.com
24 Counsel for Petitioners

25 Jennifer MacLennan, Esq.
26 Gust Rosenfeld
27 maclennan@gustlaw.com
28 Counsel for Respondent

29 Lori Bird, Dispute Resolution
30 Arizona Department of Education
 Lori.Bird@azed.gov