

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

a Student, by and through Parents
 Petitioners,
 v.
 American Leadership Academy, Inc.
 Respondent

No. 22C-DP-024-ADE

ADMINISTRATIVE LAW JUDGE DECISION

HEARING: May 11, 2022, May 12, 2022, July 11, 2022, July 15, 2022, and August 16, 2022, with the record held open for the receipt of the court reporter's transcript and written closing arguments.

APPEARANCES: Attorney Lori Kirsch-Goodwin, KIRSCH-GOODWIN & KIRSCH, PLLC, appeared on behalf of Petitioners, accompanied by Parent [REDACTED] attorneys David D. Garner, Shannon Mataele, and Heather Robles, OSBORN MALEDON, P.A., appeared on behalf of American Leadership Academy, Inc. (Respondent School District or ALA), accompanied by school representative Sarah Gamble, Director of Exceptional Student Services. Certified Court Reporters Carolyn T. Sullivan and Meri Coash, COASH & COASH, INC., were present and recorded the proceedings as the official record of the hearing.

WITNESSES:¹ [REDACTED] **Mother; Sonia Gonzales, AZ Aspire Academy;**
Sarah Gamble, ALA Director of Exceptional Student Services; [REDACTED] **Richins, ALA**
Assistant Director of Student Services and Curriculum Specialist; [REDACTED] **Pemberton,**
ALA Assistant Director of Exceptional Student Services; [REDACTED], **ALA Special**
Education Teacher (First Special Education Teacher); [REDACTED], **ALA Special**
Education Teacher (Second Special Education Teacher); [REDACTED], **ALA**
Special Education Teacher (Third Special Education Teacher)

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

Parents brought this due process action, on behalf of Student, alleging a change of placement without parental input and a failure to provide a free appropriate public education (FAPE). The law governing these proceedings is the Individuals with Disabilities Education Act (IDEA), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-

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

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

5 *Procedural History*

6 Petitioners filed the Due Process Complaint on March 21, 2022 (Complaint). The
7 Complaint set forth the following issues:

- 8 1. Whether Respondent School District made a change in placement from Level
9 D to Level H without parental input.
- 10 2. Whether Respondent School District failed to provide a FAPE for the 2021 –
11 2022 school year by:
 - 12 a. Failing to provide the instruction and minutes as set forth in Student's
13 IEP;
 - 14 b. Modifying Student's curriculum without noting such modifications in her
15 IEP from August 2021 to February 27, 2022; and
 - 16 c. Passing Student through the lessons.

17 Petitioners sought an order for compensatory education services and that FAPE
18 be provided at AZ Aspire at ALA's expense for at least three years. Respondent School
19 District denied any violations of the IDEA.

20 *Evidence and Issues at Hearing*

21 The parties presented testimony and exhibits at a formal evidentiary hearing held
22 on May 11, 2022, May 12, 2022, July 11, 2022, July 15, 2022, and August 16, 2022. The
23 parties presented testimony from the witnesses listed above³ and stipulated to the
24 admission into evidence Petitioners' Exhibits A through UU and Respondent School
25 District's Exhibits 1 through 205.⁴

26 After the exhibits and testimony were admitted and the official transcripts received,
27 the parties submitted written arguments to the tribunal.

28 ² By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"
29 IDEA 2004 became effective on July 1, 2005.

30 ³ Transcripts of the testimony have been added to the record.

⁴ The parties stipulated to the admission of all the submitted exhibits with the understanding that, while they
were available to the Administrative Law Judge for review, the Administrative Law Judge would not
necessarily read every document and it was left to the parties to draw attention to those exhibits that should
be reviewed.

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

4 **FINDINGS OF FACT**

5 1. Student, now age [REDACTED] was in [REDACTED] grade at the time the due process
6 complaint was filed during the 2021 – 2022 school year. Student had been diagnosed
7 with different medical conditions including [REDACTED]
8 [REDACTED]
9 [REDACTED].⁶

10 2. Student began attending Respondent School District in August 2019 and
11 enrolled with an IEP from her prior school.

12 3. An IEP meeting was held on August 20, 2019, and a new IEP was written.
13 The August 20, 2019 IEP included Student's LRE as a Level B placement, in the general
14 education classroom no more than 79 percent and no less than 40 percent of the day.
15 Student was to receive special education services for math in the resource setting and
16 had two math goals in her IEP. The IEP included accommodations, but no curriculum
17 modifications. Student was to receive 60 minutes of special education services per week,
18 30 minutes for math problem solving and 30 minutes for math calculation.⁷

19 4. An IEP Addendum was written on September 25, 2019, changing Student's
20 stated LRE to a Level H (Hospital or Home Instruction) placement as Student was not
21 able to attend classes at Respondent School District due to her disabilities and health
22 issues.⁸

23 5. Another IEP Addendum was written on October 25, 2019, leaving Student's
24 LRE at Level H placement, but changing Student's location to "homebound outside
25

26
27 ⁵ The Administrative Law Judge has considered the exhibits referenced at hearing, even if not mentioned
28 in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even
29 if the witness is not specifically mentioned in this Decision.

⁶ Exhibit 3 and 8.

⁷ Exhibit 44.

⁸ Exhibit 41.

1 placement with AZ Aspire.” A goal was also added regarding Student’s ability to retain
2 information.⁹

3 6. Student did not earn any credits during the first semester of the 2019 – 2020
4 school year.¹⁰

5 7. On May 18, 2020, Respondent School District held the annual IEP meeting
6 during which Student’s state LRE was changed to Level D, Public or Private Day School
7 for greater than 50% of the school day.¹¹ It was noted that Student “currently receives
8 special education services as a student with OHI in an off-campus setting through the
9 private day school.”¹²

10 8. Respondent School District placed Student at AZ Aspire for three full
11 semesters, the second semester of the 2019 – 2020 school year and both semesters of
12 the 2020 – 2021 school year. During that time, Student earned 9.5 credits towards
13 graduation.¹³

14 A. 2019 – 2020 Semester 2

- 15 i. Art – 1 credit
- 16 ii. English 9 – 1 credit
- 17 iii. World History – 1 credit

18 B. 2020 – 2021 Semester 1

- 19 i. Advanced Art - .5 credit
- 20 ii. English 10 – 1 credit
- 21 iii. Humanities - .5 credit
- 22 iv. Pre Algebra – 1 credit
- 23 v. Visual Arts – 1 credit

24 C. 2020 – 2021 Semester 2

- 25 i. Earth Science – 1 credit
- 26 ii. Humanities - .5 credit

27 ⁹ Exhibit 37.

28 ¹⁰ Exhibit 12.

29 ¹¹ No evidence was presented that the parties discussed this change in placement during the IEP meeting.

30 ¹² Exhibit 34.

¹³ Exhibit 10.

iii. Visual Arts – 1 credit

9. At no time during her enrollment at AZ Aspire did Student ever attend a physical AZ Aspire campus. Her instruction was always provided while she was at home and she had no interaction with her non-disabled peers.

10. During her time at AZ Aspire, Student missed 17 days of class.¹⁴ On most days she attended, she did not attend the full session. There were times Student would only attend to class 20 – 30 minutes per session and would sometimes fall asleep during the sessions.¹⁵

11. During the time Student was at AZ Aspire and as a result of the COVID-19 pandemic, Respondent School District expanded its placement options to include ALA Virtual.

12. Student's triennial evaluation was due in May 2021, and the IEP Team decided that no additional data was needed as Student remained eligible for special education services.¹⁶

13. On May 13, 2021, Respondent School District held the annual IEP meeting during which Student's stated LRE was changed back to a Level H and the location was changed to ALA Virtual for the 2021 – 2022 school year. The IEP stated that Student "currently receives special education services as a student with OHI as a Homebound student in a virtual setting." It was also noted that Student had been unsuccessful since the previous change in placement. The IEP set forth accommodations, but no curriculum modifications. The IEP goals from the May 14, 2020 IEP were not included and three new goals, all Social Emotional, were added. The IEP also contained a Transition Plan, and under the Graduation Plan section, it stated that it was anticipated Student would earn a High School diploma without modifications in May 2025.¹⁷

14. The May 13, 2021 IEP also set forth that Student was to receive 150 minutes per week of specially designed home instruction by a Special Education teacher

¹⁴ Exhibit 47 and 48. See Tr. 179:21-24 (If Student logged on, it was recorded that Student was present, regardless of how long she remained in the session.)

¹⁵ Tr. 179:15-18.

¹⁶ Exhibit 30.

¹⁷ Exhibit 29.

1 and 150 minutes per week of instructional support from a Homebound teacher.¹⁸ Mother
2 requested that Respondent School District provide 10 hours per week of specially
3 designed instruction, but the request was denied.¹⁹

4 15. The May 13, 2021 IEP did not include any modifications.²⁰

5 16. In the Evaluation Information of the May 13, 2021 IEP, Student's academic
6 performance was documented as follows:

7 The degree to which her health condition adversely affects educational
8 performance is further documented by a comparison of [Student] to her
9 same-age and same-grade peers. [Student] does not exhibit comparable
10 ability to complete educational tasks within routine timelines, as indicated
11 by her lack of school attendance and inability to complete a full day in the
12 educational environment, limited strength resulting in decreased capacity to
13 perform school activities, limited endurance resulting in decreased stamina
14 and decreased ability to maintain performance, diminished alertness
15 resulting in impaired ability to concentrate and sustain focus on tasks,
16 initiate and complete tasks, and complete academic tasks within expected
17 timelines. Since onset, [Student]'s health conditions have resulted in
18 inadequate academic progress, as evidenced by her grades have continued
19 to drop and have been consistently in the failing range this year and her
20 inability to complete work in a timely manner, if at all, which has contributed
21 to [Student]'s failing grades. [Student]'s access to the general curriculum
22 and ability to progress towards meeting expected academic standards
23 requires specially designed instruction that adapts the content,
24 methodology, and delivery of instruction to meet her unique needs resulting
25 from an Other Health Impairment (OHI).²¹

26 17. The May 13, 2021 IEP also included Mother's Input on Student's then-
27 current academic achievement as follows:

28 Parent reports that it is difficult for [Student] to retain information relating to
29 math and has been that way for a while. She says this is likely related to
30 executive functioning disorder. Parent understands that [Student] is
struggling greatly in school, and she is hard on herself when she is not doing

¹⁸ Exhibit 29.

¹⁹ At the hearing, Mother acknowledged that Student lacked the stamina to engage in 10 hours of instruction per week. Mother stated that on a good day, Student could focus on instruction one to one and a half hours a day, or a maximum of five to seven and a half hours a week if she had five good days in a week.

²⁰ Exhibit 29.

²¹ Exhibit 29. Petitioners erroneously identified this language as being in "the last paragraph of the Present Levels of the May 21, 2021, IEP" and therefore argued that because this statement was included "verbatim" in the August 20, 2019 IEP, it did not constitute current information for purposes of the May 13, 2021 IEP.

1 well, which can become a cycle. Parent reports that [Student] is more likely
2 to retain information if it pertains to her interests.²²

3 18. On May 25, 2021, Mother emailed Ms. Gamble, in pertinent part, as follows:

4 [Student] has multiple complex medical needs. Her current alertness
5 window – when she can function and is able to engage in academic
6 instruction – is from approximately 4:30 P.M. until 7:30 P.M. Since her
7 placement at AZ Aspire, this is the only time of day she has shown that she
8 is physically and cognitively available for instruction. In addition, [Student]
9 has demonstrated over time that she has a limited capacity to function
10 independently. She is not able to access the curriculum without direct 1:1
11 instruction support. When left to work independently, she is not able to
12 maintain her alertness and vitality and as a result she cannot complete
13 work.²³

14 19. On May 27, 2021, Ms. Gamble replied to Mother's email, in pertinent part,
15 as follows:

16 ALA will provide [Student] a special education teacher/homebound teacher
17 to provide the 2.5 and [sic] hours a week of special education services
18 documented in the IEP that can be provided in the afternoon/evening hours.
19 In addition, she will have access to instructional support provided by a
20 homebound teacher for up to 150 minutes per week (see supplementary
21 aids and services in the IEP).

22 There are *no modifications to the curriculum content* in the IEP however, it
23 is our understanding that [Student] is working on a *modified schedule* that
24 includes only 2 classes/credits at a time with instructional support. ALA
25 Virtual can do the same. We will rely on the homebound teacher to support
26 [Student] in mastering the essential standards for each class.²⁴

27 20. On June 1, 2021, Mother replied to Ms. Gamble's email, in pertinent part,
28 as follows:

29 After reading your email I reviewed [Student]'s IEP. I see that modifications
30 have been omitted from the draft. It is my understanding that [Student]
currently receives modifications. Based on her disability, [Student] is not
able to remember content she learns. As a result, the curriculum must be
modified to limit the standards she is taught. AZ Aspire understands this

22 Exhibit 29.

23 Exhibit 109.

24 Exhibit 109 (emphasis added).

and has been doing this since [Student] enrolled. I believe this must be written into her IEP since this is what she requires.²⁵

21. On June 2, 2021, Respondent School District issued a PWN indicating Student would receive 150 minutes per week of specially designed instruction and 150 minutes per week of instructional support. The PWN did not reference a change in placement from a Level D placement to a Level H placement.²⁶

22. On June 15, 2021, Mother emailed Ms. Richins, in pertinent part, as follows:
Who will be her 1:1 teacher? How will the teacher contact [Student]?
She cannot just be given videos to watch. She won't learn that way.
Some kind of art should be integrated into all her subjects.
[Student] needs to talk to her daily session teacher prior to the start of school.²⁷

23. On August 6, 2021, First Special Education Teacher reached out to Mother regarding the upcoming school year. During the call, Mother expressed her frustration with Respondent School District's proposed implementation of Student's IEP. First Special Education Teacher asked Mother if there was anything she could do to help Mother at that time, and Mother replied that she could put Student "back in the school that she likes."²⁸

24. At the beginning of the 2021 – 2022 school year, Student was enrolled in multiple classes with teachers who taught the classes during the day, but then had 1:1 instruction with the special education teacher during her "alertness window" in the evening.

25. Student had access to the materials through the virtual campus and was able to engage in synchronous or asynchronous virtual learning as she wanted.

26. On August 13, 2021, Ms. Richins emailed a subject matter teacher regarding the grading of Student's assignments and stated, in pertinent part, as follows:

As you begin grading, please be aware that [Student] is working on a very modified curriculum. Please do not mark her assignments as missing or

²⁵ Exhibit 109.

²⁶ Exhibit 23.

²⁷ Exhibit 117.

²⁸ Exhibit 16 at 149.

late at this time. Her special education case manager will be working with her to get them adjusted and turned in.²⁹

27. On August 25, 2021, Ms. Richins emailed Mother as follows:

As of this week I have removed all content except those things that are absolutely necessary for course credit. [Student] is very capable of grade level material, but as you know does not have the stamina to study for long periods of time, so removing the length of assignments and content was crucial. . . . This course still presents grade level material, however the amount is greatly reduced and assignments are still adjusted as needed to meet [Student]'s needs.³⁰

28. On September 10, 2021, Second Special Education Teacher emailed Mother as follows:

I wanted to reach out to you to let you know that this week I met with [Student] once. She has expressed that she feels overwhelmed with how information is being presented to her. I never want her to feel that way, I would love to adjust my teaching style to match her learning style better. I know that as an educator it is my job to adjust to her, I am reaching out to you to see if you have some suggestions on how to make this a better experience for [Student].³¹

29. During the time that Second Special Education Teacher was working with Student, she would “skip over” some material that she deemed to be “filler” or repetitive of material she had already gone over with Student.³²

30. On September 21, 2021, an IEP meeting was held at which Mother stated that Student was not connecting with the teachers and was not learning at ALA Virtual. Respondent School District explained during the meeting how Student’s courses were streamlined and Student was tested on the information soon after it had been taught. Respondent School District acknowledged that Student had a difficult time retaining information.³³

²⁹ Exhibit 119.

³⁰ Exhibit 70.

³¹ Exhibit 71.

³² Exhibit NN.

³³ Exhibit OO.

1 31. At the September 21, 2021 IEP Meeting, Parent reported that the teachers
2 were incorporating art into too many of her assignments, which was “killing” her creativity.
3 Parent also indicated that Student needed one consistent person to work with rather than
4 multiple teachers. At the conclusion of the IEP meeting, Parent’s advocate had
5 suggested that Respondent School District look at the IEP and see if it was the right plan,
6 because if not, it needed to be changed because we “don’t want to be sitting here in
7 December, halfway through and still haven’t figured it out.”³⁴

8 32. No changes were made to the IEP at that time. A PWN dated September
9 24, 2021, stated that Respondent School District would collect data “over the next couple
10 of weeks to assess current goals prior to considering revisions.” Additionally, the PWN
11 stated that “[t]he team will work to collect data towards [Student’s] IEP goals, draft up
12 proposals to share with the team prior to meeting to discuss her present levels as they
13 related to her current IEP services.”³⁵

14 33. On September 24, 2021, Second Special Education Teacher emailed Ms.
15 Pemberton as follows:

16 After meeting with the IEP team on Tuesday, I implemented the changes
17 that were proposed by the team while meeting with [Student]. This week so
18 far we have met twice, Tuesday we went over how to access everything on
19 CANVAS, where to log in, how to get notes, how to complete assignments,
20 and introduced an attendance form for her when she doesn’t make it, a
21 menu when frustrated, and an exit ticket for her to tell me how the lesson
22 went. She continues to tell me she is overwhelmed by the information given
23 to her when in reality we are doing one assignment of 4-5 questions in a 45-
24 minute session. I continue to make myself available and she doesn’t show
or it is very spotty. [Student’s] family continues to tell me that [Student] is
not connecting with me. So I am thinking it may be better for her to work
with a different teacher. I would like to end my role in homebound services
upon the return of fall break. I am sorry for the position this may leave things
in but I feel like I am hitting a dead end with trying to help her at this point.³⁶

25 34. Second Special Education Teacher testified that the change in the amount
26 of content offered to Student was not a modification, but was an accommodation to meet
27

28 ³⁴ Exhibit OO.

29 ³⁵ Exhibit 22.

30 ³⁶ Exhibit 68.

1 Student's needs; Student was still receiving the same American History content as other
2 students. Second Special Education Teacher compared it to a summer school course in
3 which the students learn the same required material, but may only spend one day on a
4 topic instead of during the school year spending a week on a topic that would allow them
5 to "enrich the understanding further."³⁷

6 35. Third Special Education Teacher acknowledged that during the time she
7 worked with Student, the amount of content she covered was reduced and Student did
8 not cover as much content as other students taking the same course because she had to
9 cover the material in a shorter amount of time.³⁸

10 36. Third Special Education Teacher also stated that she attempted to discuss
11 Student's transition goals with Student, but when the teacher brought it up, Student would
12 be "very resistant."³⁹ Third Special Education Teacher stated that she learned ways to
13 incorporate it naturally into the conversation when Student would bring up an art project
14 she was working on and they could discuss ways to advertise and monetize her art.⁴⁰ If
15 Third Special Education Teacher attempted to introduce the topic, Student would question
16 why she wanted to know, state that it was none of the teacher's business, and state that
17 it was personal and private.⁴¹

18 37. Third Special Education Teacher would message Student and Mother in a
19 group text daily to see if Student would attend the session that evening. Most messages
20 were sent 20 to 30 minutes prior to the scheduled session. On several occasions, Student
21 indicated she was unable to participate due to medical issues but asked for a video or
22 notes to review before the next session. Third Special Education Teacher would send a
23 link to notes to Student to have.⁴²

26 ³⁷ Tr. 976:22 - 978:11

27 ³⁸ Tr. 1177:4-12.

28 ³⁹ Tr. 1152:13-14.

29 ⁴⁰ Tr. 1152:6-12.

30 ⁴¹ Tr. 1151:21-1152:5, 654:17-22.

⁴² Exhibit 151.

1 38. Suggestions were made to Student about ways she could set alarms on her
2 Google calendar or phone to remind her of the scheduled sessions, but Student asserted
3 those measures would not work for her and refused to try.

4 39. From August 9, 2021, through February 22, 2022, Student's attendance at
5 ALA Virtual was documented as follows.⁴³

6 A. Attended 48 sessions for anywhere from 9 minutes to 60 minutes.

7 i. Of the 2880 minutes possible during the 48 sessions attended,
8 Student was present for 1526 minutes, or 53 percent of the time.

9 B. Absent 62 sessions for the following reasons:

10 i. Illness – 42

11 ii. No Show – 9

12 iii. Doctor Appointment – 5

13 iv. No Reason Logged – 3

14 v. Halloween Shopping with Mother – 1

15 vi. Asleep – 1

16 vii. Trouble Logging In – 1

17 C. Teacher cancelled 5 sessions

18 i. Teacher Illness – 3

19 ii. Flat tire – 1

20 iii. Vacation – 1

21 D. Mutually cancelled 2 sessions

22 E. Missing Log Entry for 1 session

23 40. Respondent School District made a teacher available to Student at least
24 one hour a day during her alertness window except for the five sessions that were
25 cancelled by the teacher. Student availed herself of the entire hour only six times from
26 August 9, 2021, through December 2, 2021. Student attended no more than three
27 sessions in any given week.⁴⁴

28 _____
29 ⁴³ Exhibit 16.

30 ⁴⁴ Exhibit 16.

41. Between the 48 sessions attended and the 62 sessions absent, Respondent School District offered Student 6600 minutes of instruction. Student was present for 1526 minutes, or approximately 23 percent of the time.⁴⁵

42. Mother acknowledged that Student did not always sign on to the virtual sessions at ALA Virtual and, when she would, she would only remain logged on for an average of 15 minutes. The special education teachers agreed that Student would not always sign on, and when she did, she rarely ever attended an entire session.

43. While Student was provided a Chromebook to enable her to attend the sessions and access the materials, Student used it only once to connect. Student used her phone to attend the sessions and never turned on her camera. Also, because Student used her phone, she requested that the notes be simplified and altered so they would fit on the screen without her having to scroll through them.

44. From August 9, 2021, through February 22, 2022, Student earned .5 credits for American History at ALA Virtual.⁴⁶

45. With respect to Student's memory and ability to learn, the following evidence was presented at hearing:

- A. “[Student] is unable to remember content she learns.”⁴⁷
- B. Student’s “ability to retain information” is “severely” and “biologically” limited.⁴⁸
- C. Student “never remember[s] anything from a day ago or 5 minutes ago.”⁴⁹
- D. Student had limited ability to “meaningfully attend and participate in academic instruction.”⁵⁰
- E. Student has limited ability to spend “time on task.”⁵¹
- F. Student was “[unable] to follow directions.”⁵²

⁴⁵ Exhibit 16.

46 Exhibit 10.

⁴⁷ Exhibit 109 at 1587.

⁴⁸ Exhibit OO at 6:40-7:02; Tr. 116:1-8.

⁴⁹ Exhibit 153 at 1:43-1:56.

⁵⁰ Exhibit 27 at 683; Tr. 114-115.

⁵¹ Exhibit 27 at 683; Tr. 114-115.

⁵² Exhibit 27 at 683; Tr. 114-115.

1 G. Student “has a stamina issue” and she only has “an hour to an hour and a
2 half of stamina per day.”⁵³

3 H. Student’s limitations are “medical realities” that are “biologically”
4 determined.⁵⁴

5 46. The February 28, 2022 IEP Addendum included a section entitled
6 Modifications. The IEP set forth the definition of modifications as follows:

7 **Modifications** means substantial changes in what a student is expected to
8 lean and to demonstrate. Changes may be made in the instructional level,
9 the content or the performance criteria. Such changes are made to provide
10 a student with meaningful and productive learning experiences,
11 environments, and assessments based on individual needs and abilities.⁵⁵

12 47. The modification in the February 28, 2022 IEP Addendum was listed as
13 follows:

14 [Student] will be graded on mastery-based instruction: [Student] provides
15 the instructor with verbal response to instructional material presented to her
16 verbally and visually. Notes are adjusted to focus on targeted standards to
17 aid in retention.⁵⁶

18 **ARGUMENTS**

19 ***Change of Placement***

20 48. During the hearing, Petitioners did not identify any way in which the program
21 of instruction at ALA Virtual differed from the program of instruction at AZ Aspire.
22 Petitioners noted that under the October 25, 2019 IEP Addendum that placed Student at
23 AZ Aspire, the original intention was that a teacher would come to Student’s home to
24 provide the required instruction; however, no explanation was made as to why that in-
25 person instruction was not provided prior to March 2020 when the COVID-19 pandemic
26 effectively shut down in-person instruction in the state.⁵⁷

27 ⁵³ Exhibit 189 at 49:05-50:02.

28 ⁵⁴ Tr. 114-116.

29 ⁵⁵ Exhibit EE.

30 ⁵⁶ Exhibit EE.

⁵⁷ See Petitioners’ Post-Hearing Memorandum p. 5.

1 49. Petitioners argued that AZ Aspire and ALA Virtual were “so dissimilar that it
2 is clear they are not the same placement.”⁵⁸ To that point, Petitioners argued the following
3 supported their conclusion:

4 A. At AZ Aspire, Student did not participate with non-disabled peers in the
5 general curriculum, extracurricular, and nonacademic activities for the
6 entirety of her day. At ALA Virtual, Student was offered synchronous or
7 asynchronous learning during which she *could* be interacting with non-
8 disabled students.⁵⁹

9 B. At AZ Aspire, Student was offered 10 hours per week of 1:1 instruction. At
10 ALA Virtual, Student was offered 5 hours per week of 1:1 instruction.

11 C. At AZ Aspire, Student was offered 3.7 hours per week of specially designed
12 instruction and 6.3 hours of general instruction hours. At ALA Virtual,
13 Student was offered 2.5 hours per week of specially designed instruction
14 and up to 2.5 hours per week to access her instructional content.

15 50. Assuming the move from AZ Aspire to ALA Virtual was a change of
16 placement, Petitioners asserted the decision was made without parental input.

17 51. Respondent School District argued that the change from AZ Aspire to ALA
18 Virtual was not a change in placement, but was a change in location and/or service
19 provider, which is a decision that is at the discretion of the school district.⁶⁰

20 52. Respondent School District noted that, prior to the COVID-19 pandemic, it
21 did not have the capabilities to meet the needs of students requiring remote instruction,
22 like Student. Therefore, Respondent School District paid AZ Aspire to provide
23 educational services to Student consistent with her IEP.⁶¹

24 53. Respondent School District asserted that both before and after the change
25 from AZ Aspire to ALA Virtual, the following remained the same:

26
27 ⁵⁸ Petitioners’ Post-Hearing Memorandum p. 16.

28 ⁵⁹ No evidence was presented that Student availed herself of the synchronous or asynchronous learning at
29 ALA Virtual.

30 ⁶⁰ Respondent School District’s Post-Hearing Memorandum p. 2.

⁶¹ Respondent School District’s Post-Hearing Memorandum p. 6.

- 1 A. Student's placement or LRE remained at a Level H, Hospital or home
2 instruction.
- 3 B. Student continued receiving services: in her home, via virtual instruction,
4 and without interaction with non-disabled peers.
- 5 C. Student continued to receive all specially designed instruction in a 1:1
6 setting.
- 7 D. Student continued to receive and have access to instructional support in the
8 general education curriculum, including 1:1 support.⁶²

9 54. In response to the allegation that the reduction from 10 hours per week at
10 AZ Aspire to 5 hours per week at ALA Virtual of 1:1 instruction constituted a change of
11 placement, Respondent School District argued that both AZ Aspire and ALA Virtual were
12 required to provide 100 percent of Student's instruction in a 1:1 setting.⁶³

13 55. Respondent School District also noted that, as a practical matter, Student
14 did not participate in 10 hours per week of 1:1 instruction while at AZ Aspire in light of the
15 testimony that Student would sometimes log on for only 20 to 30 minutes and would
16 occasionally fall asleep during instruction.⁶⁴

17 56. Respondent School District also argued that Petitioners acknowledged that
18 Student lacked the stamina necessary to engage in 10 hours of 1:1 instruction per week.
19 Specifically, Mother indicated that Student had only 1 to 1.5 hours of stamina on a "decent
20 day" and therefore would have a maximum of 5 to 7.5 hours of stamina per week if all five
21 days were "decent."⁶⁵

22 ***Failure to Provide FAPE***

23 ***Failing to Provide Instruction and Minutes***

24 57. Petitioners argued that Respondent School District's failure to implement
25 the IEP was a denial of FAPE pursuant to 34 C.F.R. § 300.17(d).

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28 ⁶² Respondent School District's Post-Hearing Memorandum p. 9.

29 ⁶³ Respondent School District's Post-Hearing Memorandum p. 10.

30 ⁶⁴ Respondent School District's Post-Hearing Memorandum p. 10.

⁶⁵ Respondent School District's Post-Hearing Memorandum p. 10.

1 58. Petitioners responded to the argument that the IEP could not be
2 implemented because Student did not attend the sessions with an assertion that
3 Respondent School District did not convene an IEP meeting or revise the IEP to address
4 Student's lack of attendance. Petitioners concluded that, if Respondent School District
5 "could not implement it as written, [the IEP] should have been amended."⁶⁶

6 59. During the hearing, Petitioners questioned whether Respondent School
7 District had ever made any attempt to make up the 5 sessions that were cancelled by the
8 special education teachers because of their inability to participate that day.

9 60. Petitioners also addressed the failure of Respondent School District to
10 provide any transition activities as required by the IEP and a two-day window during which
11 Ms. Richins conducted Student's sessions and may not have provided any specially
12 designed instruction.

13 61. Respondent School District argued that it was ready, willing, and able to
14 provide, and made available to Student, all the services required by her IEP.

15 62. Respondent School District noted that Student failed to attend over half of
16 the scheduled sessions for reasons including illness, doctor appointments, and
17 Halloween shopping; lacked sufficient stamina to complete most of the sessions she did
18 attend; declined to use the Chromebook provided by the school; limited her engagement
19 by refusing to turn on her camera; and routinely showed up late and ended sessions
20 early.⁶⁷

21 63. Respondent School District highlighted the ways it attempted to serve
22 Student's individualized needs including the following:

- 23 A. Hiring staff specifically to offer services during her "alertness window";
- 24 B. Being flexible in offering services outside scheduled service times;
- 25 C. Texting daily reminders and check-ins to encourage Student's attendance;
- 26 D. Modifying notes to make it easier for Student to view on her phone;
- 27 E. Changing special education teachers in an effort to facilitate a greater
28 interpersonal connection with Student;

29 ⁶⁶ Petitioners' Post-Hearing Memorandum p. 20.

30 ⁶⁷ Respondent School District's Post-Hearing Memorandum p. 3-4.

- F. Offering 1:1 tutoring;
- G. Providing direct asynchronous access to teachers via Clever;
- H. Inviting Student to teacher office hours;
- I. Giving Student access to synchronous and asynchronous instruction; and
- J. Making a robust library of digital content and instructional support available at all times to Student.⁶⁸

64. Respondent School District defended the special education teachers' decision to prioritize core content instruction with embedded specially designed instruction over transition activities given Student's lack of attendance and resistance to discussing the matter.

65. Respondent School District also noted that the five sessions cancelled by the teachers and the two-day window during which Ms. Richins conducted Student's sessions were, at most, minor implementation issues. In light of the number of sessions Student failed to attend for her own reasons, Respondent School District was unable to make up the missed time.

Modifying the Curriculum from August 2021 to February 2022

66. Petitioners asserted that Respondent School District made substantial changes in what Student was expected to learn and demonstrate while attending ALA Virtual. Petitioners' position was predicated on the reduction of content and the nature of the assessments used to test Student's mastery.

67. Petitioners cited to two cases in which the IEPs at issue listed as modifications the reduction of answers to multiple choice questions to three choices and giving a second try after an incorrect answer and "teacher modeling and scaffolding of how to locate clues and make inferences . . . break assignments into manageable chunks of work . . . highlight important information and text . . . highlight key information and questions."⁶⁹

⁶⁸ Respondent School District's Post-Hearing Memorandum p. 4-5.

⁶⁹ See Petitioners' Post-Hearing Memorandum p. 19 (citing *Groveport Community School*, 122 LRP 3274 (2021) and *In re: Student with a Disability, Delaware State Educational Agency*, 121 LRP 13623 (2021)).

68. Respondent School District acknowledged that it adjusted the way in which it presented content to Student, but denied that it “modified” the curriculum as that term is defined by the IDEA or Arizona regulation.

69. Respondent School District argued that the adjustments were a result of the selection of instructional methodologies that were within the discretion of the special education teachers as educational professionals and were the implementation of existing accommodations in Student’s IEP.⁷⁰

70. Respondent School District also stated that, the mere fact that the February 28, 2022 IEP Addendum erroneously included strategies under the Modifications heading did not “change the substance of what they are or create basis for parents to mount a viable legal challenge.”⁷¹

71. Respondent School District argued that “the use of these strategies did not effect any ‘substantial changes in what [Student] is expected to learn and to demonstrate.’”⁷² Rather, Respondent School District asserted that no changes were made to the instructional level, content, and performance criteria. Student was taught to the same course standards applicable to any eleventh grade student; the curriculum remained fully aligned with grade-level content and met national accreditation standards; and the coursework met state standards and qualified for graduation credit.⁷³

Passing Student Through the Lessons

72. Petitioners argued that Respondent School District made it impossible for Student to fail and merely passed her through her lessons and gave her credit, in an effort to get Student to graduation.

73. Petitioners asserted that the method by which the special education teachers highlighted the notes, directed Student’s attention to the correct answer in the

Notably, neither of the cases cited made any ruling as to whether the identified strategies were, in fact, modifications. Rather, the cases merely indicated that the modifications sections of the relevant IEPs included these approaches.

⁷⁰ Respondent School District’s Post-Hearing Memorandum p. 5.

⁷¹ Respondent School District’s Post-Hearing Memorandum p. 23.

⁷² Respondent School District’s Post-Hearing Memorandum p. 24 (quoting A.A.C. R7-2-401(B)(17)).

⁷³ Respondent School District’s Post-Hearing Memorandum p. 24-25.

notes after she provided a wrong answer, and in some cases, provided her with the correct answer were all attempts to move to the next lesson without any expectation that Student would recall the information beyond the lesson.

74. Respondent School District denied that Student was merely passed through her lessons, but argued that Student was required to demonstrate mastery of grade-level content, consistent with the circumstances of her disability.⁷⁴

75. Respondent School District asserted that it met Student where she was in light of the “biological” and “medical realities” of her disability in an effort to enable her to make progress appropriate to her specific circumstances.⁷⁵

CONCLUSIONS OF LAW

APPLICABLE LAW

FAPE

1. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a FAPE (free appropriate public education) that meets their individual needs.⁷⁶ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.⁷⁷

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

3. A FAPE consists of “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.”⁷⁸ The FAPE standard is satisfied if the child’s IEP sets forth his or her individualized educational program that is

⁷⁴ Respondent School District’s Post-Hearing Memorandum p. 5.

⁷⁵ Respondent School District’s Post-Hearing Memorandum p. 29.

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

⁷⁷ *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).

⁷⁸ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

1 “reasonably calculated to enable the child to receive educational benefit.”⁷⁹ The IDEA
2 mandates that school districts provide a “basic floor of opportunity.”⁸⁰ The IDEA does not
3 require that each child’s potential be maximized.⁸¹ A child receives a FAPE if a program
4 of specialized instruction “(1) addresses the child’s “unique” needs, (2) provides adequate
5 support services so the child can take advantage of the educational opportunities and (3)
6 is in accord with the child’s individualized educational program.”⁸²

7 ***The IEP***

8 4. Once a student is determined eligible for special education services, a team
9 composed of the student’s parents, teachers, and others familiar with the student
10 formulate an IEP (individualized education program) that generally sets forth the student’s
11 current levels of educational and functional performance and sets annual goals that the
12 IEP Team believes will enable the student to make progress in the general education
13 curriculum.⁸³

14 5. The IEP tells how the student will be educated, especially with regard to the
15 student’s unique needs that result from the student’s disability, and what services will be
16 provided to aid the student. The student’s parents have a right to participate in the
17 formulation of an IEP.⁸⁴ The IEP Team must consider the strengths of the student,
18 concerns of the parents, evaluation results, and the academic, developmental, and
19 functional needs of the student.⁸⁵

23 ⁷⁹ *Id.*, 485 U.S. at 207. In 2017, in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct.
24 988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard, adding
25 that a school “must offer an IEP that is reasonably calculated to enable a child to make progress appropriate
26 in light of the child’s circumstances,” but the Court declined to elaborate on what “appropriate progress”
27 would look like case to case (*i.e.*, in light of a child’s circumstances).

28 ⁸⁰ *Rowley*, 458 U.S. at 200.

29 ⁸¹ *Id.* at 198.

30 ⁸² *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)).

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

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

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

1 6. IEPs are to be evaluated by the courts using the “snapshot rule”. That is,
2 the IEP should not be scrutinized using hindsight, but in light of the circumstances existing
3 at the time the IEP was developed.⁸⁶

4 7. To foster full parent participation, in addition to being a required member of
5 the team making educational decisions about the child, school districts are required to
6 give parents written notice when proposing any changes to the IEP,⁸⁷ and are required to
7 give parents, at least once a year, a copy of the parents’ “procedural safeguards,”
8 informing them of their rights as parents of a child with a disability.⁸⁸

9 8. The IEP Team must consider the concerns of a child’s parents when
10 developing an IEP.⁸⁹ In fact, the IDEA requires that parents be members of any group
11 that makes decisions about the educational placement of a child.⁹⁰

12 ***Substantive Violations versus Procedural Violations***

13 9. A determination of whether a student received a FAPE must be based on
14 substantive grounds.⁹¹ For a substantive analysis of an IEP, the review of the IEP is limited
15 to the contents of the document.⁹² Therefore, any question regarding whether an IEP is
16 reasonably calculated to provide educational benefit to a student must be decided on the
17 basis of the content of the IEP itself.

18 10. Procedural violations in and of themselves do not necessarily deny a student
19 a FAPE. If a procedural violation is alleged and found, it must be determined whether the
20 procedural violation either (1) impeded the student’s right to a FAPE; (2) significantly
21 impeded the parents’ opportunity to participate in the decision-making process; or (3)

22
23
24 ⁸⁶ See *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010).

25 ⁸⁷ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

26 ⁸⁸ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet. 20 U.S.C. §
27 1415(d)(B).

28 ⁸⁹ 20 U.S.C. § 1414(d)(3)(A)(ii); 34 C.F.R. §§ 300.324(a)(1)(ii).

29 ⁹⁰ 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.327 and 300.501(c)(1).

30 ⁹¹ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

⁹² *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)).

caused a deprivation of educational benefit.⁹³ If one of those three impediments has occurred, the student has been denied a FAPE due to the procedural violation.

Least Restrictive Environment (LRE)

11. The IDEA does not provide an absolute right to a particular placement or location as a child's LRE. Each proposed or alternative placement is simply required to have been "considered" by the IEP Team with regard to potential harmful effect on the student or potential harmful impact on the quality of the services that the child needs.⁹⁴ Therefore, LRE and placement are required to be determined only after analyzing the student's unique needs (and the nature and severity of disabilities) against the federal mandate to educate disabled children "to the maximum extent appropriate" with his or her nondisabled peers. The IDEA preference for mainstreaming is also not an absolute.⁹⁵

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

Educational Placement versus Location

13. It is settled law that a Student's "educational placement" is an IEP Team decision, whereas the physical "location" is an administrative decision.⁹⁶

[T]he term "educational placement" in the regulations refers only to the general type of educational program in which the child is placed. "Educational placement" refers to the general educational program – such as the classes, individualized attention and additional services a child will receive – rather than the "bricks and mortar" of the specific school. [T]here is no requirement in the IDEA that the IEP name a specific school location. [A]n IEP's failure to identify a specific school location will not constitute a per se procedural violation of the IDEA. The location of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or resource room?⁹⁷

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

⁹⁴ See 34 C.F.R. § 300.116(d).

⁹⁵ See 34 C.F.R. §§ 300.114(a)(1) and (2). A school may, and should, remove a child from the regular educational environment if the nature and severity of the child's disability is such that, even with supplemental aids and services, the education of the disabled child cannot be satisfactorily achieved. See 34 C.F.R. §§ 300.114(a)(2)(ii) and 300.116(d).

⁹⁶ See *Deer Valley Unified School District v. L.P.*, 942 F.Supp.2d 880 (D. Ariz. 2013).

⁹⁷ *Id.* at 887 (alterations in original) (citations and quotations omitted).

14. The IDEA requires that every local educational agency (LEA) “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services” including “regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.”⁹⁸

15. It is possible for a change in location to constitute a change of educational placement. To determine whether such a change has occurred, the effect of the change in location on the following factors must be considered:

- a. Whether the educational program set out in the child's IEP has been revised;
- b. Whether the child will be able to be educated with nondisabled children to the same extent;
- c. Whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and
- d. Whether the new placement option is the same option on the continuum of alternative placements.⁹⁹

Burden of Proof and Basis of Decision

16. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.¹⁰⁰ The standard of proof is “preponderance of the evidence,” meaning evidence showing that a particular fact is “more probable than not.”¹⁰¹ Therefore, in this case Petitioners bear the burden of proving by a preponderance of evidence that Respondent substantively violated the IDEA through the alleged actions or inactions. If a procedural violation is alleged and demonstrated, Petitioners must then show that the procedural violation either (1) impeded Student’s right to a FAPE, (2) significantly impeded Parents’ opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit to Student.¹⁰²

⁹⁸ 34 C.F.R. § 300.115(a)-(b)(1).

⁹⁹ *Letter to Fisher*, 21 IDELR 992 (OSEP July 6, 1994).

¹⁰⁰ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

¹⁰¹ *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).

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

DECISION

Issue 1: Change of Placement

17. Petitioners' first issue was "[w]hether Respondent School District made a change in placement from Level D to Level H without parent input."

18. Throughout its presentation and argument, Petitioners argued that ALA Virtual was a drastically different program than that of AZ Aspire.

19. In fact, Petitioners seemingly argued that Respondent School District changed Student's placement from a more restrictive environment to a lesser restrictive environment. That is, at ALA Virtual, Student would receive fewer hours of instruction; Student would receive fewer hours of specially designed instruction; Student would receive fewer hours of general instruction; and Student had the possibility of interacting with non-disabled peers.

20. However, such a position is in contradiction with Petitioners' issue presented that Respondent School District changed Student's placement from the lesser restrictive Level D placement to the more restrictive Level H placement.

21. In the October 25, 2019 IEP Addendum that placed Student at AZ Aspire, Student's placement was documented as Level H. In the May 14, 2020 IEP, Student's placement was changed to Level D without any discussion or explanation as to the reason for the change. In May 13, 2021 IEP, Student's placement was changed back to Level H without any discussion or explanation as to the reason for the change.

22. Both the May 14, 2020 IEP and the May 13, 2021 IEP noted that Student received special education services as a student with OHI in an off-campus or virtual setting.

23. The Administrative Law Judge has no doubt that the stated Level D placement in the May 14, 2020 IEP was erroneous and should have been documented as a Level H placement. With that understanding, there was no documented change in placement between the May 14, 2020 IEP and the May 13, 2021 IEP.

24. Assuming, *arguendo*, that Petitioners' issue was actually that the change from AZ Aspire to ALA Virtual was a change in placement, the following analysis applies.

25. As to the four factors identified above,

- a. The educational program in the IEP did not change. Student received fewer hours of instruction, but the manner in which the instruction was provided did not change.
- b. While Student was offered the opportunity to participate in synchronous learning with nondisabled peers, it was not required, and Student never availed herself of the opportunity to do so.
- c. No evidence was submitted as to any nonacademic or extracurricular services Student may have had the opportunity to participate in.
- d. As detailed above, Student was still on Homebound services at ALA Virtual.

26. Accordingly, the factors do not support a conclusion that the change from AZ Aspire to ALA Virtual was a change in placement.

27. The “drastic differences” Petitioners assert existed between AZ Aspire and ALA Virtual consisted almost entirely of the number of hours of instruction provided to Student. However, the number of hours of instruction was a result of the IEP Team decision as to what was appropriate for Student.

28. In the case of a student attending a physical school, such a change in hours could obviously impact that student’s placement in that, more hours receiving instruction outside of the classroom would result in less time being educated with their nondisabled peers. However, when a student is homebound, the change in hours has no impact on the amount of time the student spends being educated with their nondisabled peers.

29. To the extent the number of hours offered was different, no evidence was submitted to establish how many hours of instruction Student was actually receiving at AZ Aspire. Student’s attendance was merely recorded as present or absent, and logging in for any amount of time resulted in her being marked as present.

30. To the extent the original intention at AZ Aspire was that Student would receive in-person 1:1 instruction, no evidence was submitted to establish that ever happened, even prior to the COVID-19 pandemic.

31. Thus, Petitioners failed to sustain their burden of proof to establish that Respondent School District altered Student’s placement without parental input.

Issue 2: Failure to Provide FAPE

Failing to provide the instruction and minutes as set forth in Student's IEP

32. While Petitioners' issue specifically involved the provision of the instruction and minutes, their arguments centered on Respondent School District's failure to convene and IEP Team meeting to amend the IEP to address Student's lack of attendance. As the appropriateness of Student's IEP was not an issue for hearing, those arguments lack merit.

33. There was no question that Student did not receive all of the instruction and minutes as set forth in Student's IEP. The issue to be determined is to what extent the lack of instruction and minutes was the responsibility of Respondent School District and the responsibility of Petitioners.

34. The main thrust of Petitioners' arguments, to that point, were that Respondent School District was responsible for getting Student to participate in the virtual sessions without Petitioners bearing any responsibility in the same.

35. Petitioners cited case law supporting their position that a school district cannot merely offer minutes and wait for a student to participate.¹⁰³ Rather, the school district is required to take appropriate measures to address a student's needs when a student fails to participate.

36. In this matter, Respondent School District undertook significant measures to encourage Student's participation in the virtual learning, including the following:

- a. Hired teachers specifically to offer Student services during her "alertness window";
- b. Changing teachers to encourage a greater interpersonal connection with Student;
- c. Offered services outside of scheduled service times;
- d. Texted daily reminders and check-ins to encourage Student's attendance;

¹⁰³ *Clover Park School District*, 103 LRP 27267 (2002) (providing that a school bears the burden of complying with the IDEA and may not shift that burden to parents); and *St. Louis Park Public Schools*, 122 LRP 27733 (2022) (finding that a district's "reliance on the student to show up for her online class in a community setting 'demonstrates wishful thinking, not careful planning'").

- e. Modified notes to allow Student to view them on her phone;
- f. Offered 1:1 tutoring;
- g. Offered synchronous and asynchronous instruction to Student to supplement service minutes; and
- h. Provided digital content and instructional support including videos of instructional sessions.

37. Further, while Student was “very resistant” to discussion of her transition goals, Third Special Education Teacher discovered ways to address the matter through natural openings in their conversations. Student’s refusal to directly address the topic prevented further provision of services related to the transition goals.

38. As to the two-day window during which Ms. Richins conducted Student’s sessions and the five sessions cancelled by the teachers that were not made up, it was not possible to make up those missed sessions given Student’s failure to attend even 25 percent of the time made available to her.

39. No provision of the IDEA specifically requires a school district to ensure a child attends school. Rather, the IDEA provides that a FAPE must “be available to all children.”¹⁰⁴ Further, the Supreme Court has held that schools must “offer” a FAPE to students.¹⁰⁵

40. While Parents clearly wanted more from Respondent School District, including a placement at AZ Aspire, Respondent School District offered the required minutes of instruction to Student and took significant measures to encourage her attendance.

41. Therefore, Petitioners failed to sustain their burden of proof to establish that Respondent School District failed to provide FAPE by failing to provide the minutes and instruction provided for in the IEP.

¹⁰⁴ 34 C.F.R. § 300.101(a).

¹⁰⁵ See *Endrew F.*, 580 U.S. at 11 (“a school must offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”).

1 *Modifying Student's curriculum without noting modifications in her IEP from August 2021*
2 *to February 27, 2022*

3 42. Petitioners asserted that the "modifications" listed in the February 28, 2022
4 IEP Addendum had been provided from August 2021 through February 27, 2022, without
5 being listed in the operative IEPs and IEP Addendums during that time period.

6 43. Specifically, the February 28, 2022 IEP Addendum included, in the section
7 entitled Modifications, the following:

8 [Student] will be graded on mastery-based instruction: [Student] provides the
9 instructor with verbal response to instructional material presented to her verbally
10 and visually. Notes are adjusted to focus on targeted standards to aid in
11 retention.¹⁰⁶

12 44. Petitioners offered no evidence or argument to support a conclusion that,
13 merely because something was listed in the Modifications section of the IEP, that it was,
14 in fact, a modification.

15 45. "Modification" has a specific meaning under the IDEA and Arizona
16 regulation. As noted in the IEP Addendum itself,

17 **Modifications** means substantial changes in what a student is expected to
18 learn and to demonstrate. Changes may be made in the instructional level,
19 the content or the performance criteria. Such changes are made to provide
20 a student with meaningful and productive learning experiences,
21 environments, and assessments based on individual needs and abilities.¹⁰⁷

22 46. The items listed in the February 28, 2022 IEP Addendum were not
23 modifications, but were accommodations, that is,

24 [t]he provisions made to allow a student to access the general education
25 curriculum and demonstrate learning. Accommodations do not substantially
26 change the instruction level, the content or the performance criteria, but are
27 made in order to provide a student equal access to learning and equal
28 opportunity to demonstrate what is known.¹⁰⁸

29 47. As was described at the hearing, Student was expected to learn the same
30 material as her nondisabled peers, but did not spend time repeating instruction on a

106 Exhibit EE.

107 Exhibit EE.

108 Exhibit EE.

1 standard to further enrich her understanding. The curriculum did not change, but the
2 amount of information presented was reduced.¹⁰⁹

3 48. No evidence was submitted to establish that Student was taught content at
4 a lower grade level than her nondisabled peers or that she was allowed to avoid certain
5 required standards in her education. Rather, Student's education was streamlined, much
6 like in a summer school setting, to allow her to progress through the class at a faster pace
7 given her limited window of availability to participate in her learning.

8 49. Therefore, Petitioners failed to sustain their burden of proof to establish that
9 Respondent School District modified Student's curriculum without noting the
10 modifications in her IEP from August 2021 through February 27, 2022.

11 *Passing Student Through the Lessons*

12 50. Petitioners asserted that Respondent School District made it impossible for
13 Student to fail and merely passed her through her lessons to give her credit towards
14 graduation.

15 51. Petitioners argued that the methods used by the special education teachers
16 were all attempts to move to the next lesson without any expectation that Student would
17 recall the information beyond the instructional session.

18 52. At hearing, Petitioners maintained that Student had the ability to learn and
19 retain information despite the multiple reports provided to Respondent School District
20 during the relevant time period that Student was "unable to remember content she
21 learn[ed]", that "her ability to retain information" was "severely" and "biologically" limited,
22 or that she "never remember[ed] anything from a day ago or 5 minutes ago." Further,
23 Mother advised Respondent School District that Student's limitations were "medical
24 realities" that were "biologically" determined.¹¹⁰

25
26
27 ¹⁰⁹ Prior to starting at ALA Virtual, Mother indicated Student required modifications in her June 1, 2021
28 email to Ms. Gamble. Mother stated that she understood Student was receiving modifications at AZ Aspire
29 and that "[b]ased on her disability, [Student was] not able to remember content she learns." Mother asserted
30 that "the curriculum must be modified to limit the standards" that Student was taught and that she believed
it "must be written into her IEP since this is what she requires." Exhibit 109.

¹¹⁰ See Finding of Fact 45, *supra*.

53. The methods employed by the special education teachers to assist Student in recalling the information in the notes and applying that information to her test answers was not inappropriate, but was an effort to circle back and reinforce the information in light of Student's known limitations.

54. Perhaps the most significant factor contradicting Petitioners' argument was that Student earned only .5 credits from August 2021 through February 22, 2022. If Respondent School District were, in fact, merely moving Student through the lessons in an effort to give her credit towards graduation, one would expect that she would have been awarded more than just .5 credits in that time frame.

55. Therefore, Petitioners failed to sustain their burden of proof to establish that Respondent School District merely passed Student through her lessons.

CONCLUSION

56. Petitioners failed to sustain their burden of proof to establish that Respondent School District violated the IDEA or failed to offer Student a FAPE at all times relevant to this proceeding.

ORDER

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

Done this day, May 31, 2023.

/s/ Tammy L. Eigenheer
Administrative Law Judge

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this Decision and Order is the final decision at the administrative level. Furthermore, any party aggrieved by the findings and decisions made herein has the right to bring a civil action, with respect

1 to the complaint presented, in any State court of competent jurisdiction or in a HUSD court
2 of the United States. Pursuant to Arizona Administrative Code § R7-2-405(H)(8), any
3 party may appeal the decision to a court of competent jurisdiction within thirty-five (35)
4 days of receipt of the decision.

5 Transmitted by either mail, e-mail, or facsimile to:

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7 Arizona Department of Education
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