

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 ██████████, Student, by and through Parent

No. 23C-DP-052-ADE

4 Petitioners,

**ADMINISTRATIVE LAW JUDGE
DECISION**

5 v.

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7 Peoria Unified School District,
8 Respondent.

9 **HEARING:** Convened June 26-28, 2023, followed by review of the official record
10 received on July 18, 2023, and review of closing arguments received on August 21, 2023.

11 **APPEARANCES:** ██████████ ("Parent") appeared on behalf of ██████████
12 ██████████ ("Student") (collectively as "Petitioners").

13 Attorneys David D. Garner, Esq.,¹ Heather Robles, Esq., Lynne C. Adams, Esq.,
14 and Andrew G. Pappas, Esq., of OSBORN MALEDON, P.A., appeared on behalf of Peoria
Unified School District ("District" or "Respondent").

15 **WITNESSES:**

- 16 • ██████████ – Parent;²
17 • ██████████ – Principal;
18 • ██████████ – District Special Education Coordinator, and
 • ██████████ – District Director of Exceptional Student Services

19 **HEARING RECORD:** Certified Court Reporter Mari Coash (CCR No. 50327),
20 COASH COURT REPORTING & VIDEO, LLC, recorded the proceedings as the official record
21 of the hearing.³

22 **ADMINISTRATIVE LAW JUDGE:** Jenna Clark.

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26 ¹ Mr. Garner is an attorney of record for this matter and participated in the first of 2 prehearing conferences
on behalf of Respondent, but was not present as legal representation for any hearing dates due to exigent
circumstances.

27 ² Formerly ██████████, as referenced throughout both parties' exhibits.

28 ³ The parties stipulated that the court reporter's transcript would be the official record of the proceedings,
29 which were timely received on July 18, 2023. The transcript is comprised of three (3) volumes: Volume 1
(pages 1-192), Volume 2 (pages 193-438), and Volume 3 (pages 439-659). Notably, the ALJ's surname
30 mistakenly appears as "Carter" throughout Volume 3, which is an innocuous and immaterial typographical
error.

1 Parent brings this due process action on behalf of Student, claiming that
2 Respondent violated the Individuals with Disabilities Education Act ("IDEA"), alleging
3 procedural and substantive errors.

4 The law governing these proceedings is the IDEA found at 20 United States Code
5 ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in 2004),⁴ and its implementing
6 regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well as the Arizona
7 Special Education statutes, Arizona Revised Statutes ("ARIZ. REV. STAT.") §§ 15-761
8 through 15-774, and implementing rules, Arizona Administrative Code ("ARIZ. ADMIN.
9 CODE") R7-2-401 through R7-2-406.

10 **PROCEDURAL HISTORY**

11 On or about March 22, 2023, Petitioners filed their due process complaint
12 ("Complaint") with the Arizona Department of Education ("Department") that alleged 6
13 violations of the IDEA against Respondent.⁵ On March 23, 2023, the Department issued
14 a NOTICE OF HEARING setting the matter for hearing at 9:00 a.m. on May 05, 2023, before
15 the Office of Administrative Hearings ("OAH"), an independent state agency.⁶ On May 19,
16 2023, the parties submitted a JOINT SUMMARY OF ISSUES AND REQUESTED RELIEF FOR
17 HEARING whereby the Complaint was modified as having 9 allegations, including 9
18 additional sub-allegations. On May 23, 2023, the Tribunal accepted the parties' stipulated
19 issues for hearing ("AMENDED COMPLAINT"), and reset the matter to be heard June 26-30,
20 2023.

21 ⁴ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"
22 IDEA 2004 became effective on July 01, 2005.

23 ⁵ On or about January 17, 2023, Petitioners filed a related due process complaint with the Department
24 which alleged, essentially, that Respondent had not provided Parent with written notice as to its intent to
25 place Student at a school or provide Parent with the option to request mediation or a due process hearing.
26 On January 19, 2023, the Department issued a NOTICE OF HEARING for Case No. 23C-DP-037-ADE which
27 set the matter for hearing at 9:00 a.m. on March 03, 2023, before OAH. On February 14, 2023, Respondent
28 submitted a MOTION TO VACATE, alleging in pertinent part, that Petitioners' complaint failed to allege any
29 violation(s) of due process under the IDEA for which the Tribunal could provide a remedy. Thusly,
30 Respondent argued, the matter required dismissal. After a prehearing conference held February 17, 2023,
the matter was set for a STATUS UPDATE on or before March 20, 2023, to afford Petitioners adequate time to
amend their complaint. On March 21, 2023, because Petitioners failed to comply with the aforementioned
Order, the matter was vacated from OAH's calendar without prejudice.

⁶ On April 20, 2023, the matter was continued and set for a STATUS UPDATE on May 05, 2023, which was
extended through May 19, 2023.

EXHIBITS

The parties presented testimony, exhibits, and argument at the formal evidentiary hearing session. Petitioners' Exhibits 1, 2-2723B, 4A-4B, 6A-6B, 6F-6L, 7 Transportation for [Student] 22222 A-D, 7 Gmail Transportation 10421A (10/4/21); 10421B (10/6/21); 10421D (10/6/21), 7 Bus for 10_28 and 10_29 102721 A-M, 8A-8B, and 8-tour122222B were admitted into the record. Respondent's Exhibits A-B, D, F, H-J, V-Z, DD, and EE were admitted into the record. The NOTICE OF HEARING, May 19, 2023, final AMENDED COMPLAINT, May 22, 2023, CONTINUED HEARING ORDER, PETITIONERS' PREHEARING MEMORANDUM, PETITIONERS' CLOSING ARGUMENT, RESPONDENT'S PREHEARING MEMORANDUM, and RESPONDENT'S CLOSING ARGUMENT were also admitted into the record as their own exhibits.

ISSUES AT HEARING

Based on a review of the parties' stipulated AMENDED COMPLAINT, the Administrative Law Judge ("ALJ") determined the following issues were raised for determination at the due process hearing:

- (1) **Respondent allegedly failed to provide a 1:1 classroom aide and 1:1 health aide.** Specifically, Petitioners allege that Student's April 12, 2022, and/or December 21, 2022, Individualized Education Program ("IEP") Addendum required Respondent to provide a 1:1 classroom aide and a 1:1 health aide beginning January 2022, and that neither was provided.
- (2) **Respondent allegedly failed to track data on a daily basis as required by the IEP.** Specifically, Petitioners allege that Student's Functional Behavioral Assessment ("FBA") required Respondent to collect data on a daily basis beginning after the April 12, 2022 IEP meeting and that Respondent failed to do so.
- (3) **Respondent allegedly failed to provide proper transportation to Student.**
 - a. 2021-2022: Petitioners allege that requested transportation for Student was refused by her IEP team at an April 2021 IEP meeting. Specifically, Petitioners allege that [Respondent] agreed to provide curb-to-curb

1 transportation for Student after the IEP meeting, but allegedly provided it on
2 a general education bus rather than on a special education bus.

- 3 b. 2022-2023: Petitioners allege that Student's IEP team approved and began
4 implementing door-to-door transportation for Student on February 24, 2022,
5 but that Student's IEP was not updated to reflect the change.

6 **(4) Respondent allegedly changed Student's placement from Level B to**
7 **Level D in connection with the December 21, 2022, IEP meeting.**

- 8 a. **Insufficient notice and failure to obtain "informed consent":** Petitioners
9 allege that Respondent did not provide Parent with sufficient notice in
10 advance of the December 2022 IEP meeting and did not provide Parent
11 with sufficient information relating to potential placement options for Student
12 and/or transferring Student to a private day school. Petitioners allege that
13 the alleged lack of information prevented Parent from providing "informed
14 consent" to the IEP team's placement determination.
- 15 b. **False information:** Petitioners allege that Respondent provided Parent
16 with false information relating to Student's change in placement.
17 Specifically, Petitioners allege that Respondent told Parent that there was
18 no room for Student at Sierra Schools when there was in fact space
19 available at that school.
- 20 c. **Inaccurate Prior Written Notices ("PWN"):** Petitioners allege that the
21 PWN for the December 21, 2022, IEP meeting was required to be provided
22 within fifteen (15) days of the meeting, but was not provided to Parent until
23 January 12, 2023. Petitioners also allege that the PWN contained the
24 following inaccuracies:
- 25 i. The PWN said the IEP team considered information that they did not
26 consider, including Level A or B placement and placement at Sierra
27 Schools, and
- 28 ii. The PWN said that the team did not consider placement at ACES,
29 but they did consider that school.

- 1 d. **Outdated Data on IEP:** Petitioners allege that the IEP Addendum from the
2 December 21, 2022, IEP meeting included outdated behavioral data.
- 3 e. **Parental agreement:** Petitioners allege that Respondent falsely concluded
4 that Parent agreed with the decision to change Student's placement.
- 5 f. **Procedural Safeguard Notice:** Petitioners allege that Respondent failed
6 to provide Parent with a copy of the Procedural Safeguard Notice after the
7 December 2022 IEP meeting in which Student's placement was allegedly
8 changed to Level D.
- 9 g. **Failure to Provide a PWN to Correct Inaccuracies in PWNs:** Petitioners
10 allege that Respondent did not provide a PWN regarding its intent to correct
11 the inaccuracies that Parent identified in the PWN and that Parent asked to
12 be corrected.
- 13 (5) **Respondent allegedly required Student to use the bathroom in the school**
14 **nurse's office.** Specifically, Petitioners allege that Respondent improperly
15 required Student to use the bathroom in the nurse's office on or about February
16 07, 2023, in contravention of Student's IEP. Petitioners also allege that
17 Student's teachers continued this practice after Parent sent an email objecting
18 to it and was told by Principal [REDACTED] that it would be stopped.
- 19 (6) **Respondent allegedly failed to provide Parent with PWNs when required**
20 **to do so under the IDEA.** Specifically, Petitioners allege that Parent did not
21 receive PWNs related to (1) the team's April 20, 2021, decisions to provide 1:1
22 support and refusing to offer extended school year ("ESY") services, (2) the
23 team's April 12, 2022, refusal to provide 1:1 support and refusal to offer ESY,
24 and (3) the team's April 2021 and April 2022 decisions to deny door-to-door
25 transportation for Student.
- 26 (7) **Respondent allegedly denied Parent's requests to observe Student's**
27 **classroom.** Specifically, Petitioners allege that Parent has a right under the
28 IDEA to participate in her child's education, which includes the right to observe
29 Student's classroom. Petitioners allege that Parent's requests to observe
30 Student's classroom were ignored or denied since February 2023.

1 (8) **Respondent allegedly failed to timely remove an Arizona Department of**
2 **Child Safety (“DCS”) representative as Student’s “parent” on an IEP**
3 **cover page.** Specifically, Petitioners allege that a second parent’s name was
4 included on the cover sheet to Student’s IEP, even though Respondent was
5 aware that Parent was Student’s custodial parent. Petitioners allege that
6 Respondent should have removed the name or issued a PWN to say why the
7 named parent would not be removed. Petitioners allege that Respondent failed
8 to issue a PWN regarding its intent to either remove or not remove the name.

9 (9) **Alleged retaliation against Parent by Director [REDACTED].** Specifically,
10 Petitioners allege that in a January 25, 2023, email Director [REDACTED] threatened
11 discontinuation of Student’s transportation due to Parent’s refusal to complete
12 enrollment documentation for Student at Children’s Center for
13 Neurodevelopmental Studies (“CCNS”).

14 **REQUESTED REMEDIES**

15 Petitioners requested the following remedies:

- 16 • **Claim 1** – Compensatory education, paid directly to the providers of Petitioners’
17 choice, for the number of days that the 1:1 aide(s) should have been provided.
- 18 • **Claim 2** – An order requiring Respondent to track daily data on a form that will be
19 sent home to Parent daily;

20 Compensatory education, paid directly to the providers of Petitioners’ choice, for
21 any services and/or accommodations that would have been adjusted or modified
22 if Respondent had been tracking daily data, and

23 An order that Respondent allow a non-biased third party hired by Parent to come
24 to the school and provide behavior coaching at the school, as recommended by
25 the third party.

- 26 • **Claim 3** – Compensatory education, paid directly to the providers of Petitioners’
27 choice, for the number of days the service should have been provided, with the
28 date calculated from the date transportation would have been initiated if the IEP
29 team had approved transportation at the IEP meeting where it was requested; and

30 An order requiring school staff to be retrained on the requirements for student
IEPs.

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- **Claim 4** – An order prohibiting Respondent from changing Student’s placement from level B to any other placement level for at least one school year so that the school can properly track the data it would need to prove that changing Student’s placement is in the best interest of the child;

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An order that Respondent allow a non-biased third party hired by Parent to come to the school and provide behavior coaching at the school as recommended by the third party, and

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Retrain staff on IEP/IDEA.

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- **Claim 5** – Charges of ethical violations to be applied against applicable teaching certifications under ARIZ. ADMIN. CODE R7-2-1308 which requires non-certified staff and certified staff make reasonable efforts to protect pupils from conditions harmful to learning, health, or safety and shall not discriminate against or harass any pupil on the basis of origin, religion, sex, disability, color, or age; and

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An order that Respondent allow a non-biased third party hired by Parent to come to the school and provide behavior coaching at the school as recommended by the third party.

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- **Claim 6** – Compensatory education, paid directly to the providers of Petitioners’ choice, for the number of days the services would have been provided had they been approved at the IEP meetings; and

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Retrain staff on IEP IDEA PWNs.

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- **Claim 7** – Sanctions against the school and ethical violations charged against the teaching certifications of involved teachers.

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- **Claim 8** – An order requiring Respondent to immediately update the IEP to remove the incorrect name, delete the old copy, and purge it from their system.

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- **Claim 9** – A sanction for an ethical violation to go against Director [REDACTED] certification under ARIZ. ADMIN. CODE R7-2-130, which requires that non-certified staff and certified staff make reasonable efforts to protect pupils from conditions harmful to learning, health, or safety and shall not discriminate against or harass any pupil on the basis of origin, religion, sex, disability, color, or age; or

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Retrain Director [REDACTED] if the Tribunal cannot sanction her certification.

1 The Tribunal has considered the entire hearing record, including the testimony and
2 the admitted Exhibits, and now makes the following Findings of Fact, Conclusions of Law,
3 and Ruling finding that Petitioners have failed to demonstrate that Respondent
4 substantively violated the IDEA through the aforementioned allegations set forth in the
5 AMENDED COMPLAINT. The credible and material evidence of record is as follows:

6 **FINDINGS OF FACT**

7 **BACKGROUND**

8 1. Student ([REDACTED]) has attended [REDACTED]
9 [REDACTED] since October 18, 2020. As of the last date of hearing, Student was [REDACTED]
10 years old and in the [REDACTED] grade.

11 2. Student was first identified as eligible for special education and related
12 services during her [REDACTED] grade term, on or about April 08, 2021, under the [REDACTED]
13 [REDACTED].⁷ At that time, Student resided less than a mile away from [REDACTED]
14 and was walked to campus by an older sibling. During that period staff devised a system
15 to advise Parent whether Student had completed an assignment; an assignment
16 calendar, which would be sent home with Student daily to track fidelity.

17 3. Student's first IEP was created on April 20, 2021.⁸ The PWN, issued the
18 same date, noted the following:

19 A copy of the Procedural Safeguards was sent home with the Initial
20 Placement Statement and DSC forms. [Parent] stated that she had multiple
21 copies of the Procedural Safeguards and will not need them in the future.

22 Parent never rescinded her rejection of Procedural Safeguards with Respondent.

23 4. On October 07, 2021, an IEP Addendum team meeting was held whereby
24 Parent agreed that "curb to curb" special education transportation be included in Student's
25 IEP.⁹

28 ⁷ See Respondent Exhibit V.

29 ⁸ See Respondent Exhibit W.

30 ⁹ *Id.*

HEARING EVIDENCE

Issues #1, #2, #4, #6, and #8

5. On April 20, 2021, Student's IEP team held their first IEP meeting. At that time, Parent requested that a 1:1 classroom aide or 1:1 health aide support services and "door-to-door" transportation be added to Student's IEP. A subsequent PWN was issued by Respondent the same date, denying Parent's requests due to insufficiency of data late in the school year.¹⁰

6. On April 07, 2022, during Student's [REDACTED] grade term, a school psychologist conducted a FBA¹¹ for Student whereby he determined the following:

Based on the present data and observation, [Student's] problem behaviors appear to be related to Escape and Work Avoidance, which therefore is the "function" of her defiance and refusal behaviors. As the problem behaviors have been documented to occur almost exclusively during structured activities, in which a non-preferred task or activity is asked of [Student], these circumstances can be identified as the antecedents. As such, the function of [Student's] defiance and refusal behaviors appears to be avoiding or escaping non-preferred activities.

As a result, a litany of antecedent interventions; replacement behaviors; consequence intervention; general teaching recommendations, including daily data collection and social/emotional skills, were offered as behavior support plan recommendations.

7. On April 07, 2022, a Behavior Intervention Plan ("BIP") was created for Student based on the FBA,¹² whereby the following was noted:

[Student's] defiant and refusal behaviors have been present throughout the school year. Employing frequency data tracking, with data collected by the Instructional Assistant, reveals that [Student's] defiance and refusal behaviors have been consistent throughout the school year. Specifically, in late January and early February, [Student] demonstrated 77 acts of aggression over the course of 5 separate school days. Looking at March, [Student] engaged in 67 defiance and refusal acts, which remained relatively consistent when compared to the January/February frequency sample. Close review of the data collection tools, reveals that [Student's] behaviors do not occur during less structured activities and during preferred activities such as recess, lunch, and some specials. Further, data tracking

¹⁰ *Id.*

¹¹ See Respondent Exhibit X.

¹² See Respondent Exhibit Y.

1 confirms that [Student's] behaviors of defiance and refusal occur during
2 academic instruction periods when she is asked to participate in structured
3 academic activities. Additionally, data tracking also indicates that
4 [Student's] defiance and refusal does decline slightly when provided direct
5 support from school staff. Interestingly, this data indicates that while
6 [Student's] defiance and refusal behaviors do decline when provided direct
7 support, [Student's] behaviors still occur frequently in all structured
8 academic activities and are having a significant negative impact on her
9 educational progress.

10 As a result, it was recommended that data collection occur daily to ensure that progress
11 towards goals was being made through the continued use of data tracking sheets by
12 Student's teachers and support staff. A requirement that data be sent home with Student,
13 daily, weekly or otherwise, was not included in the BIP.

14 8. On April 12, 2022, Student's IEP team held an annual IEP meeting.¹³ At that
15 time Parent requested that 1:1 classroom aide or 1:1 health aide support services and
16 "door-to-door" transportation be added to Student's IEP. Parent's requests were denied,
17 as it was opined by Student's IEP team that there was insufficient data available to
18 support Parent's request. A subsequent PWN was issued by Respondent on April 14,
19 2022, which did not address Parent's 1:1 aide request.¹⁴ Although unrequested by Parent,
20 the PWN denied Student's eligibility to participate in ESY.¹⁵

21 a. Transportation services for Student had already commenced October 2021.

22 As a result, the PWN did not address the request as it was moot.

23 9. On September 06, 2022, Parent began receiving Student's behavioral data
24 tracking sheets.¹⁶ Data was provided semi-regularly due to Student's absences; Student's
25 behaviors that prevented staff from filling out the forms, including Student's destruction of
26 the form(s); and Student losing the sheets during classroom transfers.¹⁷

27 10. On September 26, 2022, by order of a dependency petition, Student was
28 removed from Parent's home and placed in the custody of DCS.

29 ¹³ *Id.*

30 ¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Respondent Exhibit DD.

¹⁷ See Respondent Exhibit EE.

11. On December 20, 2022, just before Respondent's regularly scheduled Winter Break,¹⁸ Student was returned to Parent's custody.

- a. While Student was in DCS custody she was placed in two (2) different group homes. Neither group home reported receiving behavioral data tracking sheets for Student during that time. Parent did not receive any of Student's behavioral data tracking sheets during that time either.

12. On December 20, 2022, Respondent scheduled an IEP Addendum team meeting for the following day, December 21, 2022, as Respondent was desirous of meeting with Parent prior to the end of that academic term. A draft IEP was not provided to Parent in advance of the IEP Addendum team meeting.

13. On December 21, 2022, Student's IEP team held an IEP Addendum team meeting to review Student's lack of academic progress, discuss her behaviors and social-emotional needs, and consider alternative options for educational placement to meet Student's needs. During the meeting, Parent opined that she did not think it was fair to discuss potential placement while Student was in the midst of "trauma" related to her temporary DCS removal. Parent also opined that Respondent should have expected an escalation of Student's adverse behaviors due to said removal. Respondent conceded that removal may have exacerbated Student's behaviors, but dismissed the contention that removal was the root or cause of them as similar behaviors had been observed and extensively documented prior to her removal by DCS. Ultimately, the IEP team updated Student's placement to Level D, effective January 16, 2022,¹⁹ to a private day school, CCNS, to ensure she received a Free Appropriate Public Education ("FAPE") as it was determined that Student required the highest level of support. They also added a 1:1 assistant to Student's IEP²⁰ and developed exit criteria (i.e. 0 incidents of physical or

¹⁸ The last day of the Fall 2022 term was December 22, 2022. An IEP meeting was not scheduled while Student was in DCS custody because Respondent did not think it was appropriate.

¹⁹ The 2022 year is a typographical error. Respondent meant 2023, as evidenced by repeated use of the correct year throughout the remainder of the document.

²⁰ See Respondent Exhibit Z. On Page 19 of 35 of Student's IEP, under Least Restrictive Environment, Respondent notes that "Beginning 01/16/2023 while attending CCNS ... " evincing its intent to provide 1:1 support for Student in a Level D placement setting, effective January 16, 2023.

1 verbal aggression, elopement, or destruction of property for 18 consecutive weeks).²¹ The
2 following information was noted:

3 [Student's] emotional disability is affecting her ability to be successful in the
4 academic environment. [Student] engages in work refusal, which will lead
5 her to function below grade level in the areas of reading, writing and math.
6 Oftentimes, when she is given a direction, she engages in inappropriate
7 behavior to avoid what she perceives as an aversive task. [Student] also
8 lacks the social skills necessary for school success. She often behaves or
9 reacts in a manner that his not appropriate with the circumstances due to
10 her difficulties with inappropriate thoughts or feelings under normal
11 circumstances. [Student's] emotional disability will continue to impact her
12 ability to learn imperative social and academic skills at the rate of her same
13 age peers.

14 [Student] frequently argues, yells, refuses to work, throws objects, and
15 elopes to avoid working on academic tasks in the resource room.

16 [Respondent] proposes a Level D private day school placement for
17 [Student] due to the frequency, duration and intensity of her work refusal
18 and externalizing aggressive behaviors (yelling, eloping, safety, etc.).
19 [Student] is demonstrating the need of a private day schools student to staff
20 ratio, structure, supervision, and specialized direct instruction.
21 [Respondent] proposes CCNS due to the smaller secure setting as well as
22 the multisensory strategies embedded into daily instruction.

23 Student's placement at CCNS was determined to outweigh potential harm and to be
24 necessary due to behaviors that prevented her from receiving a FAPE in the general
25 education classroom.²² Alternative placements, including keeping Student at [REDACTED];
26 placing Student at the Autism Center for Exceptional Students ("ACES"), a Level D private
27 day school; and/or placing Student at self-paced instructional model private day program,
28 Sierra Schools, per Parent's suggestion, were all considered and rejected by the IEP
29 team. Per the IEP team, Student's placement at CCNS best ensured that she would
30 receive services that could not be offered to her on a comprehensive public school
campus.²³

²¹ See Respondent Exhibit Z.

²² *Id.*

²³ *Id.*

- a. At the time of the IEP meeting, Student was noted to have earned the following grades: Math – A, English – C, Science – A, and Social Studies – A.
- b. The document, which unbeknownst to Respondent, automatically populated the DCS case worker's name using Respondent's software as Student's second parent on the first page, was signed by the entire IEP team, including Parent, on December 21, 2022. After the oversight was brought to Respondent's attention, a software override was performed to manually remove the case worker's name from Student's IEP. The document was never sent to DCS. A subsequent PWN was not issued by Respondent to explain the inclusion of the case worker's name or provide notice of its intent to remove it from Student's IEP Addendum.
- c. Parent requested a tour of the CCNS campus, which was completed on December 22, 2022.

14. After the IEP Addendum team meeting, Parent was not offered a Procedural Safeguard Notice by Respondent due to the fact that on numerous prior occasions she had refused them. Parent never requested a copy of the document after the meeting either.

15. On December 23, 2022, Parent accused Coordinator [REDACTED] of being dishonest about whether Sierra Schools had space available for Student.²⁴ In actuality, Coordinator [REDACTED] did not advise Parent that there was "no room" for Student at Sierra Schools, but that she was "not sure" if space was available. Coordinator [REDACTED] had further opined to Parent that she believed CCNS would be a better fit for Student emotionally and academically, but also because she believed that there was a NO CONTACT ORDER between Parent and Parent's other minor daughter ("Daughter"), a Sierra Schools student. While Student's placement at CCNS was in her best interest, it was also Coordinator [REDACTED] best attempt to balance Respondent's duties to both of their students. In a response on December 23, 2022, Coordinator [REDACTED] informed Parent that

²⁴ See Petitioners Exhibit 8 – CCNS122322B.

1 she would send Student's IEP to Sierra Schools for their review and reach back out to
2 Parent after Winter Break to determine the best Level D placement for Student.²⁵

3 16. On January 12, 2023, Respondent issued a PWN to Parent regarding
4 Student's Level D placement to CCNS.²⁶ The following advisement is printed towards the
5 bottom of the PWN:

6 **Parents of a child with a disability have protection under the**
7 **procedural safeguards. A copy of a description of your procedural**
8 **safeguards may be obtained by contacting the agency at, Peoria**
9 **Unified School District, Sp Ed Dept. [REDACTED] (623) 486-****.**²⁷
10 *(Emphasis in original.)*

11 Neither prior to, upon, nor after receipt of the January 12, 2023, PWN did Parent ask
12 Respondent or Director [REDACTED] for a Procedural Safeguards Notice. On January 18, 2023,
13 Director [REDACTED] provided additional copies of Student's IEP and PWN to Parent.²⁸

14 17. On an unknown date, Parent asked Respondent to correct unspecified
15 "inaccuracies" she perceived in the PWN. A subsequent PWN was not issued by
16 Respondent denying Parent's request.

17 18. On January 27, 2023, Student's behavioral data tracking sheets resumed
18 being sent to Parent.²⁹ Data tracking sheets were provided to Parent semi-regularly
19 through April 10, 2023. The sheets were not provided to Parent daily, in large part, due
20 to Student's absences, because Student would tear them up if she did not want to perform
21 an academic task, often teachers were unable to complete the sheets because they were
22 attending to Student's behaviors, and sometimes Student would lose them.

23 **Issue #3**

24 19. For the 2021-22 term, Respondent only had 1 bus available for
25 transportation to [REDACTED] It was designated as a general education bus, though general
26 education and special education students utilized its services.

27 ²⁵ See Respondent Exhibit A.

28 ²⁶ See Petitioners Exhibit 2 – MeetingW [REDACTED] 2723B; see also Respondent Exhibit Z.

29 ²⁷ The last 4 digits of Director [REDACTED] telephone number are redacted for privacy.

30 ²⁸ See Respondent Exhibit F.

²⁹ *Id.*; see also Petitioners Exhibit 6 – Goal Sheets 2_9_2023 2933 F-K & L.

1 20. On October 27, 2021, Principal [REDACTED] informed Parent that bus
2 transportation for routes October 28-29, 2021, including for Student, were temporarily
3 cancelled due to district-wide bus driver shortages.³⁰ Parent expressed her concerns
4 regarding the cancellations, which were escalated to the Director of Transportation, [REDACTED]
5 Camacho, and Director [REDACTED].³¹

6 21. On October 28, 2021, at 5:46 a.m., Director Camacho emailed Parent that
7 staff would contact her to schedule Student's transportation for that day as well as the
8 following date.³² At 6:00 a.m., Parent was notified via email that staff had attempted to
9 reach her several times via phone, but were unsuccessful.³³ Parent was further advised
10 that a bus would be sent at 7:45 a.m., to pick Student up for school that day.³⁴ At 7:51
11 a.m., Parent was notified via email that transportation had been sent to pick Student up
12 for school, and instructed her to call Director Camacho to coordinate a later pick-up.³⁵ At
13 9:10 a.m., Parent advised Principal [REDACTED] and Director Camacho via email that she had
14 missed their messages because her phone, which she used to access emails, had not
15 charged overnight. Parent also expressed her frustration with the "last minute handling"
16 of Student's transportation to school. At 9:27 a.m., Director Camacho apologized for the
17 oversight and advised that Student would be transported home via bus that day. Parent
18 was further advised that transportation would be coordinated for the following day and
19 that Student's regularly scheduled transportation would resume the following Monday (i.e.
20 November 01, 2021.).

21 22. On February 24, 2022, Parent opined to Directors Camacho and [REDACTED] that
22 Student "needed to be supervised getting on and off the bus."³⁶ Parent further demanded
23 that Student's IEP "needs to be updated to show door to door and not curb to curb
24 because she is a safety risk."³⁷ Shortly thereafter, Coordinator [REDACTED] advised Parent that

25
26 ³⁰ See Petitioners Exhibit 7 – Bus for 10_28 and 10_29 102721 A-M.

27 ³¹ *Id.*

28 ³² *Id.*

29 ³³ *Id.*

30 ³⁴ *Id.*

³⁵ *Id.*

³⁶ See Petitioners Exhibit 6 – Gmail Door to Door vs Curb to Curb A-B.

³⁷ *Id.*

third-party transport, HopSkipDrive, would provide “door-to-door” transportation services for Student.³⁸

- a. Student’s IEP was not amended to reflect door-to-door in lieu of curb-to-curb transportation services, as there was no cognizable difference between the two phrases as the services are synonymous.³⁹

Issue #5

23. On an unknown date during the 2022-23 academic term, Respondent began having Student use the bathroom in the Nurse’s office to prevent her elopement, ensure her safety, and account for her whereabouts during school hours. Historically, Student would ask to use the bathroom and be absent from class between 20 and 30 minutes, as she would wander the campus or seek out the attention of a preferred adult. Having Student use the Nurse’s bathroom, where the Nurse would escort Student back to class, proved successful in achieving Respondent’s goals. The practice was not prohibited by Student’s IEP.

24. On February 17, 2023, Parent expressed her concerns to Principal [REDACTED] regarding Student’s required use of the Nurse’s bathroom and expressed her displeasure in light of the fact that such was not included in Student’s IEP.⁴⁰

25. On February 21, 2023, Parent asked Principal [REDACTED] to explain the practice or stop it; as she opined it could be considered “retaliatory” or “discriminatory.”⁴¹ Principal [REDACTED] immediately complied by asking Student’s teachers and staff to cease the practice. Student has not used the Nurse’s bathroom since that date.

Issue #7

26. On February 06, 2023, Parent inquired about Student’s conduct in the resource room with the Resource Teacher. After the Resource Teacher replied with a succinct list of concerns regarding Student’s behavior, including her worry that “unless

³⁸ *Id.*

³⁹ Courts have held that special education transportation does not encompass transportation of a student in or around their home; thus, there is no legal obligation to carry or otherwise escort a student from their apartment door to their school bus. *Pierre-Noel v. Bridges Public Charter School* Case No. 1:23-cv-00070 (United States District Court, District of Columbia (2003)).

⁴⁰ See Petitioners Exhibit 4 – Gmail Bathroom Breaks21723 A-B.

⁴¹ *Id.*

1 [Student's] behavior gets under control, she will not make any academic progress this
2 year," Parent offered to come in and show the Resource Teacher how to "implement
3 various strategies."⁴² Parent also asked Principal [REDACTED] if she could demonstrate to
4 staff how to "motivate" Student.⁴³

5 27. On unknown dates during the relevant time period and after passing a
6 background check to volunteer at [REDACTED] Parent's multiple impromptu requests to sit
7 in and observe Student's classroom were denied. Per Parent, the purpose of her intended
8 in-class observation was to observe how the classroom was handling Student's IEP, what
9 was happening in her classroom, and to see if and how her IEP was being implemented.
10 Because an advisement on Respondent's website offered that parents had a right to
11 participate in their student's education, Parent believed Respondent's refusal was
12 improper. However, the website also advised that on-site visits were required to be
13 authorized in advance by Respondent.

14 28. On at least one occasion, March 09, 2023, Parent was granted permission
15 to participate in an authorized in-class observation but declined after arrival because the
16 Resource Teacher was unexpectedly absent and special education services were not
17 offered to Student that day.

18 **Issue #9**

19 29. On January 25, 2023, in the midst of a stay related to Case No. 23C-DP-
20 037-ADE, Director [REDACTED] issued a PWN to Parent dated January 12, 2023, regarding the
21 proposed cancellation of Student's transportation to [REDACTED] in lieu of Student's
22 enrollment at CCNS.⁴⁴ At that time, Director [REDACTED] had received the Department's
23 NOTICE OF HEARING for 23C-DP-037-ADE but had not received a copy of the underlying
24 compliant from Parent or Petitioners. The correspondence notes the following, in pertinent
25 part:

26 Attached is [Respondent's] Prior Written Notice with our proposal of FAPE.
27 We will need to move forward with this proposal, therefore transportation
28 will no longer transport [Student] to [REDACTED] Elementary after January 27,

28 ⁴² See Respondent Exhibit J.

29 ⁴³ *Id.*

30 ⁴⁴ See Petitioners' Exhibit 2 – Gmail Offer of FAPE22523A; see *a/so* Respondent Exhibit H.

2023. Once you have completed the enrollment packet for CCNS, transportation will resume their services and transport to CCNS.

A CCNS enrollment packet was also attached to the correspondence.⁴⁵

30. Parent replied the same day with the following, in pertinent parts:

I'm not sure what this is but I don't see any offer of resolution attached to this email. What I see is a PWN with a summary of the behavior safeguards used at the alternative placement option the district chose and the enrollment packet. She has a right to be in the least restrictive environment with proper services such as esy, a 1 on 1, clumped assignments, assignments on a fixed interval of 4 minutes with reinforcement, check in/check out assignment, etc. As I said I do not agree with her being placed in level D school when you as a district have not implemented her IEP properly, didn't enact the behavior intervention plan until April of 2022, and you decided to remove her after a traumatic experience which doesn't prove the escalated behaviors are due to her diagnosis. I am not filling out the registration paperwork and she has a right to stay at her school of placement until the due process hearing on 3/5/2023 with her current services in place.

According to the documents attached from the [Department] they requested that you hold a resolution session within 15 days to determine if we can reach an agreement not for you to try to bully me into complying with you.⁴⁶
(All errors in original.)

31. On January 30, 2023, Director [REDACTED] received a copy of the underlying complaint for 23C-DP-037-ADE, from the Department upon her request.

ADDITIONAL EVIDENCE

32. Parent broached the topic of changing Student's placement to Level D multiple times with Student's IEP team, including at the April 2022 IEP team meeting.

33. At the time of the December 21, 2022, IEP Addendum team meeting, Student was between two and three grade levels below her grade-level curriculum. Sporadic instances of progression were derailed by multiple instances of regression.

34. Neither Student's special education and related services nor placement have been changed since the December 21, 2022, IEP Addendum team meeting.

⁴⁵ Only a custodial parent or guardian may enroll a student in a private day program, which is why Respondent did not complete the enrollment packet on Student's behalf.

⁴⁶ See Petitioners' Exhibit 2 – Gmail Offer of FAPE22523B; see also Respondent Exhibit I.

35. The effective date for Student's 1:1 aide services is January 16, 2023, contingent or in conjunction with Level D placement.

CLOSING ARGUMENTS

Respondent

36. In closing, Respondent argued that Petitioners failed to sustain their evidentiary burden as to issues 1, 2, 3a, 3b, 4a, 4b, 4c, 4d, 4f, 6, 8, and 9. Respondent further argued that issues 4e, 4g, 5, and 7 are not actionable under the IDEA and therefore must fail as a matter of law. Ultimately, Respondent opined that it had met and exceeded its obligations under the IDEA to provide Student with a FAPE. As such, Respondent beseeched the Tribunal to issue an order in its favor on all issues.

Petitioners

37. In closing, Petitioners essentially argued that the data Respondent sought to use as a justification for Student's Level D placement was inconsistent and unreliable. Petitioners noted that Student was able to academically progress and opined that any regression was likely related to the perceived trauma of her DCS removal. Per Petitioners, the record supported a finding that Student had been denied a FAPE.

CONCLUSIONS OF LAW

APPLICABLE LAW

1. Congress enacted the IDEA to ensure that all students with disabilities are offered a FAPE that meets their individual needs.⁴⁷ The IDEA does not define the level of education that must be provided, except that it must be "reasonably calculated to enable the student to receive educational benefits."⁴⁸ Through the IDEA, Congress has sought to ensure that all students with disabilities are offered a FAPE that meets their individual needs.⁴⁹ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.⁵⁰ To do this, school districts must identify and evaluate all students within their geographical boundaries who may be in need of special education

⁴⁷ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996).

⁴⁸ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 201 (1982)

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

⁵⁰ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

1 and services. The IDEA sets forth requirements for the identification, assessment and
2 placement of students who need special education, and seeks to ensure that they receive
3 a free appropriate public education. The IDEA mandates that school districts provide a
4 “basic floor of opportunity.”⁵¹

5 2. A FAPE consists of “personalized instruction with sufficient support services
6 to permit the child to benefit educationally from that instruction.”⁵² The FAPE standard is
7 satisfied if the student’s IEP sets forth his or her individualized educational program that
8 is “reasonably calculated to enable the child to receive educational benefit.”⁵³ Therefore,
9 a school offers a FAPE by offering and implementing an IEP “reasonably calculated to
10 enable [a student] to make progress appropriate in light of [the student’s]
11 circumstances.”⁵⁴ The IDEA does not require that each student’s potential be
12 maximized.⁵⁵ A student receives a FAPE if a program of instruction “(1) addresses his
13 unique needs, (2) provides adequate support services so he can take advantage of the
14 educational opportunities and (3) is in accord with an individualized educational
15 program.”⁵⁶

16 3. Once a student is determined to be eligible for special education services,
17 a team composed of the student’s parents, teachers, and others formulate an IEP that,
18 generally, sets forth the student’s current levels of educational performance and sets
19 annual goals that the IEP team believes will enable the student to make progress in the
20 general education curriculum.⁵⁷ The IEP tells how the student will be educated, especially
21 with regard to the student’s needs that result from the student’s disability, and what
22 services will be provided to aid the student. The student’s parents have a right to

23 ⁵¹ *Rowley*, 458 U.S. at 200.

24 ⁵² *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

25 ⁵³ *Id.*, 485 U.S. at 207. In 2017, in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct.
26 988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard, adding
27 that a school “must offer an IEP that is reasonably calculated to enable a child to make progress appropriate
28 in light of the child’s circumstances,” but the Court declined to elaborate on what “appropriate progress”
29 would look like case to case (*i.e.*, in light of a child’s circumstances).

30 ⁵⁴ *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___ (2017).

⁵⁵ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

⁵⁶ *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)).

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

1 participate in the formulation of an IEP.⁵⁸ The IEP team must consider the strengths of
2 the student, concerns of the parents, evaluation results, and the academic,
3 developmental, and functional needs of the student.⁵⁹ To foster full parent participation,
4 in addition to being a required member of the team making educational decisions about
5 the student, school districts are required to give parents written notice when proposing
6 any changes to the IEP,⁶⁰ and are required to give parents, at least once a year, a copy
7 of the parents' "procedural safeguards," informing them of their rights as parents of a
8 student with a disability.⁶¹

9 4. The IEP team must consider the concerns of a student's parents when
10 developing an IEP.⁶² In fact, the IDEA requires that parents be members of any group
11 that makes decisions about the educational placement of a student.⁶³

12 5. A parent who requests a due process hearing alleging non-compliance with
13 the IDEA must bear the burden of proving that claim.⁶⁴ The standard of proof is
14 "preponderance of the evidence," meaning evidence showing that a particular fact is "more
15 probable than not."⁶⁵

16 6. The IDEA's statute of limitations requires courts to bar claims made more
17 than two years after the parents "knew or should have known" about the actions forming
18 the basis of the complaints.⁶⁶

21 ⁵⁸ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

22 ⁵⁹ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

23 ⁶⁰ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

24 ⁶¹ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.
25 20 U.S.C. § 1415(d)(B).

26 ⁶² 20 U.S.C. § 1414(d)(3)(A)(ii); 34 C.F.R. §§ 300.324(a)(1)(ii).

27 ⁶³ 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.327 and 300.501(c)(1).

28 ⁶⁴ *Schaffer v. Weast*, 546 U.S. 49, 56 (2005).

29 ⁶⁵ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
30 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-72 (1970)); see also ARIZ. REV. STAT. § 41-1092.07(G)(2);
ARIZ. ADMIN. CODE R2-19-119(B)(1); *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).

⁶⁶ 20 U.S.C. §1415(f)(3)(C); see also *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 937 (9th Cir. 2017); *J.K. and J.C. on behalf of themselves and K.K-R v. Missoula County Publ. Schools*, 713 F. App'x 666 (9th Cir. 2018).

1 7. Statutes should be interpreted to provide a fair and sensible result.⁶⁷ “In
2 applying a statute its words are to be given their ordinary meaning unless the legislature
3 has offered its own definition of the words or it appears from the context that a special
4 meaning was intended.”⁶⁸

5 8. The Tribunal is required to apply equitable principles when rendering
6 decisions.⁶⁹ The application of equity entails offering a remedy to avoid an
7 unconscionable or unjust result.⁷⁰

8 9. This Tribunal’s determination of whether Student received a FAPE must be
9 based on substantive grounds.⁷¹ A FAPE consists of “personalized instruction with
10 sufficient support services to permit the child to benefit educationally from that
11 instruction.”⁷² Courts do not “substitute their own notions of sound educational policy for
12 those of the school authorities which they review.”⁷³ In addition, the appropriateness of
13 an offer of FAPE must be judged in light of the circumstances at the “snapshot in time”
14 when the IEP was developed, not with the benefit of hindsight.⁷⁴

15 10. 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 either (1) impeded the student’s right to a FAPE; (2) significantly
18 impeded the parents’ opportunity to participate in the decision-making process; or (3)
19 caused a deprivation of educational benefit.⁷⁵ If one of the three impediments listed has
20 occurred, the student has been denied a FAPE due to the procedural violation.

21
22
23 ⁶⁷ See *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011)(citation omitted);
24 *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968) (“Courts will not place an absurd and
unreasonable construction on statutes.”).

25 ⁶⁸ *Mid Kansas Federal Savings and Loan Ass’n of Wichita v. Dynamic Development Corp.*, 167 Ariz. 122,
128, 804 P.2d 1310, 1316 (1991).

26 ⁶⁹ *Seitz v. Industrial Commission of Arizona*, 184 Ariz. 599, 603 (Ariz. Ct. App., Div. 1, 1995).

27 ⁷⁰ *Sanders v. Folsom*, 104 Ariz. 283, 289, 451 P.2d 612 (Ariz. 1969)(quoting *Merrick v. Stephens*, 337
S.W.2d 713, 719 (Mo. App. 1960)).

28 ⁷¹ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

29 ⁷² *Rowley*, 458 U.S. at 203.

30 ⁷³ *Id.* at 206.

⁷⁴ *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010).

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

11. [W]hen a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP."⁷⁶ "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education."⁷⁷

DECISION

12. Parent filed the DUE PROCESS COMPLAINT in this matter on March 22, 2023; thus, the relevant period of time for the issues at bar run between Student's 2nd and 4th grade academic terms. Therefore, any actions or inactions that occurred before March 22, 2021, are beyond the limitations period.

13. To prevail in the case at bar, Petitioners must establish by a preponderance of the evidence that Respondent procedurally and/or substantively violated the IDEA as alleged in the AMENDED COMPLAINT.

Issue #1 – Respondent's alleged failure to provide Student with a 1:1 classroom and/or health aide

- a. 34 CFR § 300.34(c)(13) provides that school health services are designed to enable a student with a disability to receive FAPE as described in a student's IEP.
- b. 34 CFR § 300.107 provides that a Local Educational Agency ("LEA") must take steps to provide supplementary aids, services, and nonacademic services; including health services, in a manner necessary to afford students with disabilities an equal opportunity for participation in those services and activities.
- c. 1:1 aide services were added to Student's IEP as part of Respondent's proposed change to Level D placement, which was determined at the December 21, 2022 IEP meeting. The resulting IEP Addendum contained a typographical error on the year of the start date, indicating that the 1:1 services began on January 16, 2022, instead of January 16, 2023. This

⁷⁶ *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 815 (9th Cir. 2007)

⁷⁷ *Id.* at 821.

1 harmless administrative error is not an actionable offense.⁷⁸ Notably,
2 service inclusion could not be implemented, however, due to Petitioners'
3 filing of 23C-DP-037-ADE as it triggered a stay-put order.

- 4 d. Petitioners failed to sustain their burden of proof as to this allegation. No
5 procedural or substantive due process violation exists.

6 ***Issue #2 - Respondent's alleged failure to track data on a daily basis as required***
7 ***by Student's IEP***

- 8 e. 34 CFR § 300.39(a)(1) provides that special education means specially
9 designed instruction, at no cost to parent(s), to meet the unique needs of a
10 child with a disability, including instruction conducted in the classroom.
11 f. 34 CFR § 300.39(b)(3) specially designed instruction means adapting the
12 content, methodology, or delivery of instruction to address the unique needs
13 of the student that result from the student's disability, and ensure access of
14 the student to the general curriculum so that the student can meet the
15 educational standards within the jurisdiction of the LEA that apply to all
16 students.
17 g. Student's IEP requires that Parent receive quarterly progress reports and
18 an annual update. Student's IEP has never required the daily tracking or
19 collection of data. Parent's reliance on recommendations made in Student's
20 FBA are not akin to requirements that Respondent is beholden to under the
21 IDEA. Notably, this issue was abandoned altogether during Parents
22 testimony.⁷⁹
23 h. Petitioners failed to sustain their burden of proof as to these allegations. No
24 procedural or substantive due process violations exist.

25 ***Issue #3 - Respondent's alleged failure(s) to provide proper transportation to***
26 ***Student***

28
29 ⁷⁸ *Burnett v. San Mateo Foster City Sch. Dist.*, 739 F. App'x 870, 872 (9th Cir. 2018)

30 ⁷⁹ Transcript Vol I, pages 19-22.

- 1 a. 34 CFR § 300.34 provides, in part, that related services means
2 transportation services as are required to assist a student with a disability
3 to benefit from special education.
- 4 b. 34 CFR § 300.42 provides that supplementary aids and services means
5 supports that are provides in regular education classes and nonacademic
6 settings to enable students with disabilities to be educated with nondisabled
7 children to the maximum extent appropriate.
- 8 c. On April 20, 2021, during the 2020-21 school year, Parent's request for
9 transportation for Student was denied, as Respondent did not possess
10 sufficient or otherwise requisite data to grant the request.
- 11 d. On October 07, 2021, during the 2021-22 school year, the IEP team added
12 curb-to-curb transportation to Student's IEP. Transportation services for
13 Student commenced sometime in October 2021. At that time, 1 bus was
14 used for both general education and special education students because
15 no other buses were available. On October 28, 2021, due to a district-wide
16 bus driver shortage, Student's transportation was cancelled for October 28-
17 29, 2021. After Parent's complaint was brought to the Director of
18 Transportation's attention, a bus was sent to pick Student up for school the
19 morning of October 28, 2021. Student was transported home via bus later
20 that afternoon, and was also transported to and from school via bus the
21 following day, October 29, 2021.
- 22 e. Student's April 12, 2022, IEP maintains that she will continue to receive
23 curb-to-curb transportation.
- 24 f. Petitioners failed to sustain their burden of proof as to these allegations. No
25 procedural or substantive due process violations exist.

26 ***Issue #4 - Respondent's alleged change of Student's placement from Level B to***
27 ***Level D***

- 28 g. 34 CFR § 300.116(a)(1) provides that in determining the educational
29 placement of a student with a disability an LEA must ensure that the
30 placement decision is made by a group of persons knowledgeable about

1 the student; including the parent(s), the meaning of the evaluation data, and
2 the placement options.

- 3 h. 34 CFR § 300.324(a)(2) provides that in developing a student's IEP, in the
4 case of a student's whose behavior impedes their learning or that of others,
5 the IEP team must consider the use of positive behavioral interventions and
6 other strategies to address that behavior.
- 7 i. 34 CFR § 300.324(b)(ii) provides that an LEA must ensure that the IEP team
8 revises the IEP, as appropriate, to address any lack of expected progress
9 toward the annual goals in the general education curriculum and the
10 student's anticipated needs.
- 11 j. 34 CFR § 300.114 provides that an LEA must ensure that removal of
12 students with disabilities from the regular education environment occurs
13 only if the nature or severity of the disability is such that education in regular
14 classes with the use of supplementary aids and services cannot be
15 achieved satisfactorily.
- 16 k. The IDEA requires that IEP team members come to an IEP team meeting
17 with an open mind, not a blank mind.
- 18 l. While Student's IEP team certainly proposed a change in placement for
19 Student, no such change took place after the December 21, 2022, IEP
20 Addendum team meeting. In January 2023, after the conclusion of [REDACTED]
21 [REDACTED] Winter Break, and before the Complaint in 23C-DP-037-ADE was
22 filed, Student remained enrolled at [REDACTED]
- 23 m. To the extent that Petitioners argue that Level D placement was not
24 appropriate for Student, the record does not support that contention. Parent
25 admitted that she was in agreement with Level D placement and advocated
26 for Student's placement at Sierra Schools.
- 27 n. Student's behavioral issues were significantly more severe than the majority
28 of students on IEPs at [REDACTED] and her meltdowns and elopements were
29 causing her to spend increasing periods of time out of the general
30 population and threatening her ability to receive a FAPE.

- 1 o. Level D placement is appropriate for Student because data reflects that she
2 was making significant regression on her academic goals, which were
3 already below grade level, and because she was already spending a
4 significant amount of time outside of the general education classroom due
5 to her behaviors. Data reflects that Student would yell, cry, hit, tear up
6 paperwork, throw things, and elope out of [REDACTED] classrooms if she did
7 not want to perform an academic task. Data also reflects that Student was
8 rarely able to complete academic tasks in the general education or resource
9 classrooms due to her behaviors, which were consistent throughout her
10 tenure; including her temporary placement with DCS, all of which was
11 discussed in the December 21, 2022, IEP Addendum team meeting. The
12 IEP team's determination that Student needed a smaller setting with a small
13 student-to-teacher ratio in order to help her receive a meaningful
14 educational benefit is supported by the record.
- 15 p. To that end, Student's IEP team developed exit criteria to ensure Student's
16 placement would be reevaluated when her behavior no longer impeded her
17 academic progress, which they determined would be after a period of 18
18 consecutive weeks with "0 incidents of physical or verbal aggression,
19 elopement, or destruction of property."
- 20 q. Moreover, the decision to enroll Student at CCNS as the location of her
21 Level D placement rests with Respondent, not Parent. To that end, the
22 record also reflects that the decision to place Student at CCNS was also
23 supported by the record; as Student's IEP team reasonably believed the
24 smaller setting and social-emotional supports would successfully manage
25 Student's behaviors and help her make academic gains again.
- 26 r. Petitioners failed to sustain their burden of proof as to this allegation. No
27 procedural or substantive due process violations exist.

28 ***Issue #4a - Respondent's alleged failure to provide sufficient notice of the***
29 ***December 21, 2022, IEP Addendum team meeting and failure to obtain Parent's***
30 ***"informed consent"***

- 1 s. Federal regulations do not define “informed consent.” Instead, 34 CFR §
2 300.300 requires that an LEA make reasonable efforts to obtain informed
3 parental consent for an initial special education evaluation and related
4 services.
- 5 t. 34 CFR § 300.322(a) provides that an LEA must take steps to ensure that
6 one or both parents of a child with a disability is present at each IEP team
7 meeting or are afforded the opportunity to participate; including notifying
8 parent(s) of the meeting early enough to ensure that they will have an
9 opportunity to attend, and scheduling a meeting at a mutually agreed on
10 time and place.
- 11 u. 34 CFR § 300.328 provides that an LEA and parent may agree to use
12 alternative means of meeting participation, such as video conferences and
13 conference calls.
- 14 v. 34 CFR § 300.9(a) provides that “consent” means that a parent has been
15 fully informed of all information relevant to the activity for which consent is
16 sought.
- 17 w. 34 CFR § 501(b)(1) provides that parents of a child with a disability must be
18 afforded an opportunity to participate in meetings with respect to the
19 educational placement of a student and the provision of FAPE to the
20 student.
- 21 x. 34 CFR § 501(c)(1) provides that an LEA must ensure that a parent of a
22 student with a disability is a member of any group that makes decisions on
23 the educational placement of the parent’s student.
- 24 y. Respondent’s rationale for holding the meeting prior to the commencement
25 of a regularly scheduled break in its academic term is reasonable under the
26 given circumstances. The day that Student was returned to Parent’s legal
27 custody, Parent was provided notice of the December 21, 2022, IEP
28 Addendum team meeting.
- 29 z. Parent did not object to participating in the meeting, ask to reschedule the
30 meeting, or fail to attend the meeting. Parent had sufficient information so

1 that she could meaningfully participate in the decision making process and
2 actively participated in the December 21, 2022, IEP Addendum team
3 meeting.

4 aa. Parent's assertion that a lack of information prevented her from providing
5 informed consent to the IEP team's Level D placement determination is not
6 corroborated by the record. The record reflects that Parent agreed with
7 Level D placement for Student, but was not convinced that CCNS was more
8 appropriate for Student than Sierra Schools, as she reserved her
9 determination until she was able to take a tour of the CCNS campus.
10 Notably, Parent's desire for Student to be sent to Sierra Schools did not
11 trump Respondent's authority to place Student at CCNS.

12 bb. Petitioners failed to sustain their burden of proof as to these allegations. No
13 procedural or substantive due process violations exist.

14 ***Issue #4b - Respondent allegedly informed Parent that Student could not be placed***
15 ***at Sierra Schools because they had no room***

16 cc. 34 CFR § 300.327 provides that an LEA must ensure that the parent(s) of
17 a student with a disability are members of any group that makes decisions
18 about the educational placement of their student.

19 dd. Inarticulation is not an actionable offense. In fumbling her words,
20 Coordinator [REDACTED] made the misstatement that she was "not sure" if Sierra
21 Schools could accommodate Student's Level D placement. Coordinator
22 [REDACTED] spontaneous utterance came on the heels of her belief that there
23 was a NO CONTACT ORDER in place between Parent and Daughter, a Sierra
24 Schools student, and her extemporaneous attempt to balance
25 Respondent's duties to both students. Notably, Coordinator [REDACTED] near-
26 immediately clarified that she had concerns with the idea of enrolling
27 Student at Sierra Schools, but nonetheless took steps to assist Parent in
28 exploring the possibility of Student's placement there. Regardless of what
29 she knew when Parent initially asked about Sierra Schools availability,
30 Coordinator [REDACTED] did not take a position in the affirmative or negative with

1 Parent. Instead, she gave a non-committal response which was not
2 inherently dishonest or deceptive. The record clearly reflects that Student's
3 IEP team, including Parent, agreed on Level D placement for Student. It is
4 well-settled that once placement determination has been made, selecting a
5 service location is "an administrative determination," not an IEP team
6 decision.⁸⁰

7 ee. Petitioners failed to sustain their burden of proof as to this allegation. No
8 procedural or substantive due process violation exists.

9 ***Issue #4c – Respondent's alleged requirement to provide Petitioners with a PWN***
10 ***within fifteen (15) days of the December 21, 2022, IEP Addendum team meeting***

11 ff. 34 CFR § 300.503(a) provides that an LEA must issue a PWN within a
12 reasonable amount of time when proposing or refusing to initiate or change
13 the identification, evaluation, or educational placement of a student, or the
14 provision of FAPE to a student.

15 gg. Nothing in the record establishes that Respondent's issuance of the
16 January 12, 2023 PWN to Parent 22 days after the December 21, 2022, IEP
17 Addendum team meeting was done in an inherently or circumstantially
18 unreasonable amount of time.

19 hh. Petitioners failed to sustain their burden of proof as to this allegation. No
20 procedural or substantive due process violation exists.

21 ***Issue #4d - Respondent's use and/or reliance on alleged outdated behavioral data***
22 ***in the December 21, 2022, IEP Addendum team meeting***

23 a. 34 CFR § 300.324(b)(ii) provides that an LEA must ensure that the IEP team
24 revises the IEP, as appropriate, to address any lack of expected progress
25 toward the annual goals in the general education curriculum and the
26 student's anticipated needs.

27 b. On December 21, 2022, Student's special education teacher, general
28 education teachers, school psychologist, case manager, and Principal

29 ⁸⁰ *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 382 (5th Cir. 2003); *see also Deer Valley Unified Sch.*
30 *Dist. v. L.P.*, 942 F.Supp.2d 880, 887, 889 (D. Ariz. 2013).

1 [REDACTED] discussed Student's academic status and how her dysregulation
2 was not allowing her to make academic progress or let her be in the
3 classroom due to her social-emotional needs. Behavioral data tracking
4 sheets referenced for use were created early-September 2022.
5 Inconsistencies in production were due to Student's loss or destruction of
6 the documents, her absences and elopements, and staff's inability to fill
7 them out due to Student's behaviors. Quarterly progress reports on
8 Student's annual goals in the IEP were also based on data collected during
9 the relevant time period.

- 10 c. None of the aforementioned data is "outdated" on its face, as all information
11 was collected within the applicable time frame.
12 d. Petitioners failed to sustain their burden of proof as to this allegation. No
13 procedural or substantive due process violation exists.

14 ***Issue #4f – Respondent's alleged failure to provide Parent with a Procedural***
15 ***Safeguard Notice after the December 21, 2022, IEP Addendum team meeting***

- 16 e. 34 CFR § 300.504(a)(4) provides that a copy of the procedural safeguards
17 must be given to the parent of a child with a disability once per school year,
18 except upon request by a parent.
19 f. 34 CFR § 300.513(a)(2) provides that substantive procedural due process
20 violations amounting to a denial of FAPE occur when a procedural
21 inadequacy impedes the student's right to a FAPE, significantly impedes a
22 parent's opportunity to participate in the decision-making process regarding
23 the provision of a FAPE to the student, and/or if the procedural inadequacy
24 caused a deprivation of educational benefit.
25 g. The last time Respondent provided Parent with a copy of Procedural
26 Safeguards Notice was during the 2020-21 school year, on April 20, 2021.
27 Regardless of Parent's assertions that she had "multiple copies,"
28 Respondent nonetheless maintained an obligation to provide them to her at
29 least once during the 2022-23 school year; which could have, and likely

should have occurred, after Respondent issued the January 12, 2023, PWN.

- h. Petitioners have sustained their burden of proof as to this allegation. A *de minimis* procedural due process violation exists.

Issue #6 – Respondent’s alleged failure to provide Parent with PWNs after IEP team meetings in April 2021 and April 2022

- i. 34 CFR § 300.503(a) provides that an LEA must issue PWN within a reasonable amount of time when proposing or refusing to initiate or change the identification, evaluation, or educational placement of a student, or the provision of FAPE to a student.
- j. 34 CFR § 300.503(b)(2) provides that a PWN must include an explanation of why an LEA proposes or refuses to take action.
- k. Respondent issued PWNs to Parent on April 20, 2021, and April 14, 2022. However, the PWN issued by Respondent on April 14, 2022, did not address Parent’s 1:1 aide request.
- l. Petitioners have sustained their burden of proof as to this allegation. A *de minimis* procedural due process violation exists.

Issue #9 - Alleged retaliation against Parent by Director

- m. Section 504 of the Rehabilitation Act, a civil rights statute, is not incorporated into the IDEA. Therefore, its regulations are inapplicable to the case at bar.⁸¹ There are no on-point provisions in 34 CFR Subtitle B that

⁸¹ Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 et seq., prohibits anyone from interfering with the exercise of rights granted by the law to individuals with disabilities. Section 504 incorporates the anti-retaliation provision of Title VI of the Civil Rights Act of 1964, which “prohibits recipients from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege ... or because [s]he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.” 34 C.F.R. §§ 100.7(e) and 104.61. To state a prima facie case of retaliation under Section 504, an individual must show that (1) she engaged in a protected activity, (2) she suffered an adverse action, and (3) there was a causal link between the two. *T.B. v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 472 (9th Cir. 2015); *see also Pangerl v. Peoria Unified Sch. Dist.*, No. CV-15-02189-PHX-ROS, 2018 WL 9708471, at *6 (D. Ariz. Sept. 28, 2018). Protected activity in the school environment comes in many forms, including pursuing one’s rights under the IDEA. An “adverse action” is one that “is reasonably likely to deter the charging party or others from engaging in protected activity.” *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir. 2000). The adverse action must be causally related to the protected activity. The Ninth Circuit’s standard for a causal link is “but-for” causation. *T.B.*,

1 address alleged retaliation of an LEA towards a student and/or their
2 parent(s).

- 3 n. On January 25, 2023, Director [REDACTED] issued a PWN to Parent dated
4 January 12, 2023. The correspondence was not “threatening” as no
5 inherent, objective, and/or subjectively threatening language was used. By
6 all appearances to the contrary, the issuance of the PWN was a good-faith
7 effort by Respondent to settle the parties’ underlying dispute(s). While
8 Respondent’s contention that Director [REDACTED] was unaware that the
9 issuance of the NOTICE OF HEARING for 23C-DP-037-ADE triggered an
10 automatic stay-put order was inaccurate, the record does establish that
11 Director [REDACTED] had not received a copy of the Complaint at the time the
12 PWN was issued to Parent.
- 13 o. It cannot reasonably be argued that retaliation, or an attempt thereof, was
14 taken against Parent by Director [REDACTED]. It is clear from the correspondence
15 that Director [REDACTED] was operating under a presumption that Parent was in
16 agreement that Student would enroll at CCNS for Level D placement, and
17 cancelled Student’s [REDACTED] transportation in exchange for the
18 commencement of Student’s transportation services at CCNS.
- 19 p. Petitioners failed to sustain their burden of proof as to this allegation. No
20 procedural or substantive due process violation exists.
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24 806 F.3d at 472–73 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013)). To state a
25 prima facie case of retaliation under Section 504, an individual must show that (1) she engaged in a
26 protected activity, (2) she suffered an adverse action, and (3) there was a causal link between the two.
27 *T.B. v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 472 (9th Cir. 2015); see also *Pangerl v. Peoria Unified*
28 *Sch. Dist.*, No. CV-15-02189-PHX-ROS, 2018 WL 9708471, at *6 (D. Ariz. Sept. 28, 2018). Protected
29 activity in the school environment comes in many forms, including pursuing one’s rights under the IDEA. An
30 “adverse action” is one that “is reasonably likely to deter the charging party or others from engaging in
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causally related to the protected activity. The Ninth Circuit’s standard for a causal link is “but-for” causation.
T.B., 806 F.3d at 472–73 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013)).

ADDITIONAL CONSIDERATIONS

14. Complaint issues #4e, #4g, #5, #7, and #8 are not actionable under the IDEA and therefore must fail as a matter of law. The Tribunal specifically concludes as follows:

- a. **Issue #4e** – The IDEA does not provide relief for a school’s notion, whether accurate or mistaken, that a parent agreed with an IEP team’s decision.
- b. **Issue #4g** – While the IDEA provides Parent with a mechanism to challenge the underlying decision set forth in a PWN, it does not provide separate relief for including alleged inaccurate information therein.
- c. **Issue #5** – Requiring Student to use the bathroom in the Nurse’s office was within Respondent’s discretion. Petitioner made no attempt to articulate how Student’s use of any particular bathroom on campus relates to Respondent’s provision of FAPE.
- d. **Issue #7** – Neither the IDEA nor Student’s IEP provide Parent with a right to observe Student’s classroom. Nonetheless, Parent was permitted to complete an observation on March 09, 2023, but declined as was her prerogative.
- e. **Issue #8** – The record reflects that Respondent took swift action to remove the case worker’s name from Student’s IEP cover page, which cannot reasonably be deemed as “untimely” or harmful as Petitioners have contended; as the record also reflects that the document was never sent to DCS. Nonetheless, relief for this type of error is not provided for under the IDEA. Instead, the Family Educational Rights and Privacy Act (“FERPA”) is the federal law that affords parents the right to have some control over the disclosure of their student’s personally identifiable information from education records.⁸²

⁸² 34 CFR § 99.20 et seq.

RULING

15. The evidentiary record demonstrates *de minimis* procedural due process violations regarding Complaint issues #4f and #6. Neither resulted in a denial of FAPE.

16. The evidentiary record does not support a finding of any other procedural or substantive due process violations regarding the remainder of Complaint issues contained herein.

Based on the foregoing,

IT IS ORDERED that claim #4f is **granted**. Petitioners' corresponding requests for relief are **granted, in part, and denied, in part**. Respondent shall review 34 CFR § 300.504(a)(4) and henceforth issue a Procedural Safeguards Notice to Parent at least once per school year, save any specific request for their issuance by Parent. All remaining related requests for relief are denied.

IT FURTHER IS ORDERED that that claim #6 is **granted, in part, and denied, in part**. Petitioners' corresponding requests for relief are **granted, in part, and denied, in part**. Respondent shall review 34 CFR § 300.503 and retrain staff to henceforth address all of Parent's requests in PWNs when proposing or refusing to initiate or change the identification, evaluation, or educational placement of Student, or the provision of FAPE to Student.

IT FURTHER IS ORDERED that claims #1-#4e, #4g, #5, the remainder of claim #6, and #7-#9 of the Complaint, and related relief requested, are all **dismissed**.

Done this day, September 21, 2023.

Office of Administrative Hearings

/s/ Jenna Clark
Administrative Law Judge

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NOTICE OF RIGHT TO SEEK JUDICIAL REVIEW

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

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

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