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Mesa Unified School District
Respondent.

ADMINISTRATIVE LAW JUDGE DECISION

APPEARANCES: Amy Langerman, Esq. represented Petitioner [REDACTED] Student, by and through Parents [REDACTED] (Petitioner or Student). Kathleen Brantingham, Esq. represented Respondent Mesa Unified School District (District).

- [REDACTED] (Mother);
- [REDACTED] Father);
- Julie Bartanen, Special Education Elementary Area East Director;
- [REDACTED] **General Education Teacher**/Zaharis Elementary School;
- [REDACTED] **Special Education Teacher**/Zaharis Elementary School;
- Sherri Mulholland, Adjunct Professor at University of Arizona;
- John Warner, Psy. D., School Psychologist;
- Michele Roberts, Physical Therapist;
- [REDACTED] **(SDI) Special Education Teacher**/Zaharis Elementary School;
- Erika Ussery, Speech Language Pathologist;
- Theresa Baca, Assistant Superintendent Student Services;

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

² The Tribunal received the entire transcript after the final hearing session. The Tribunal does not begin its review process with the use of a transcript until the hearing sessions are complete and the post-hearing submissions are complete for the reason that parties often stipulate, concede, and/or withdraw issues that, therefore, would not be considered or addressed in a final decision.

1 **ADMINISTRATIVE LAW JUDGE:** Velva Moses-Thompson

2
3 Parents brought this due process action on behalf of Student, claiming that the
4 District violated the Individuals with Disabilities Education Act (IDEA), alleging procedural
5 and substantive errors. The law governing these proceedings is the IDEA found at 20
6 United States Code (U.S.C.) §§ 1400-1482 (as re-authorized and amended in 2004),³
7 and its implementing regulations, 34 Code of Federal Regulations (C.F.R.) Part 300, as
8 well as the Arizona Special Education statutes, Arizona Revised Statutes
9 (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code
10 (A.A.C.) R7-2-401 through R7-2-406.

11 **PROCEDURAL HISTORY**

12 The due process complaint notice (Complaint) in this matter was filed with the
13 Arizona Department of Education (Department) on December 4, 2023. On January 2, 2024,
14 Petitioner filed an unopposed motion to amend the due process complaint. On January 3,
15 2024, Petitioner requested that the hearing be set for March 11 through March 14, 2024,
16 and that the 45th day to issue a decision be extended to April 5, 2024. The Administrative
17 Law Judge granted Petitioner's request.

18 The hearing convened on March 11, 2024. However, the hearing did not end on March
19 14, 2024. Therefore, the matter was set for a further hearing on April 2, 2024 and April 3,
20 2024.

21 Respondent requested to submit a post-hearing brief by April 19, 2024. Petitioner
22 objected. The Administrative Law Judge granted Respondent's request and allowed both
23 parties to submit post-hearing briefs no later than April 18, 2024.

24 ***Evidence and Issues at Hearing***

25 The parties presented testimony, Exhibits, and some argument at formal
26 evidentiary hearing sessions convened on six days.

27 ***Exhibits***

28 Petitioner submitted Exhibits 1 through 32 and 34 through 81. Respondent
29 submitted Exhibits 55 and 56.

30

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

Issues for Hearing

Through the Complaint, Petitioner raised the following issues for a due process hearing:

1. Whether District denied parental participation resulting in a substantive denial of a free and appropriate education (FAPE) at the Individualized Educational Program (IEP) meeting on November 14, 2023.
2. Whether the IEP dated November 14, 2023, will provide FAPE to Student14 and in Student's least restrictive environment (LRE).
3. Whether the District removed Student from a general education setting in excess of the amount of time identified by the Legacy Traditional School (Legacy) (Stay Put) IEP and/or otherwise did not implement the Legacy IEP as it was written denying FAPE to Student.
4. Whether the District discriminated against Student by denying Student equal access to the District's general education programs.

Requested Remedies

As remedies, Petitioner requested:

1. An Order of stay put, preventing the District from implementing its proposed November 14, 2023 IEP and mandating that the District implement the Legacy IEP, including the paraprofessional support, direct physical therapy service, and limit the pull out instruction to the amounts in the Legacy IEP.
2. An Order that the District did not substantially implement Student's IEP denying FAPE to Student. Petitioner also requests an order determining the extent of non-implementation of the Legacy IEP's supports, services and the illegal removal of Student from her IEP required general education setting through the date of the hearing and providing reasonable compensatory education in an amount deemed appropriate.
3. An Order that the District predetermined placement/services and implemented them without prior

1 written notice which denied parental participation and is a
2 substantive denial of FAPE.

3 4. An Order that the District's November 14, 2023, IEP will not
4 provide FAPE and in Student's LRE and cannot be
5 implemented. For the violations in paragraphs 4 and 5,
6 Petitioner requests the following equitable remedies to be
7 implemented upon Student's return to school:

8 a. consultation and training by an outside inclusion
9 specialist for Student's team, including monthly follow
10 up consultation/support for Student from that inclusion
11 specialist through Student's annual IEP meeting that
12 will take place during the 2024-2025 school year,
13 including payment for her to attend all IEP team
14 meetings to provide expertise on how Student can be
15 supported in a general education setting consistent
16 with her developmental expectancy and allow her
17 goals to be implemented;

18 b. an Order requiring in person legal training¹⁷ of
19 Student's team prior to Student's next annual IEP
20 meeting relating to LRE, prior written notice (PWN),
21 rights of incoming transfer students (those with current
22 IEPs), predetermination, push in services and
23 supports, FAPE for students who are below grade
24 level, ability of general education teachers to provide
25 specially designed instruction in
26 consultation/collaboration with special education
27 teachers, UDL and other inclusive methodologies. The
28 training should also include instruction on what
29 reasonable notice is required PRIOR to implementing
30 any change in the provision of FAPE to allow Parents
an opportunity to exercise procedural rights.

c. an Order that the District's November 14, 2023, IEP
and the November 8, 2023, PWN seeking to implement
it, be deleted from the District's computer so that it can
never be shared with any other school should
Student's family choose to leave the District. As stay
put would prevent it from being implemented, it should
be deleted; By operation of law, when Student returns
to the District, the Legacy IEP, which is the "operative"
current IEP, must be implemented at least for 30 days
until the team can meet and write a new IEP.

1 d. an injunction prohibiting the District from relying
2 upon an outdated 1997 article and an incorrect LRE
3 statement to deny necessary supplementary aids and
4 services to students in inclusive settings in violation of
5 9th Circuit LRE standards.

6 5. Reimbursement of any expenses (including transportation
7 related expenses – mileage and a reasonable amount to
8 compensate the driver) associated with any unilateral
9 placement Parents may make, including any private services
10 Parents may contract for if a school setting is not immediately
11 available and Parents have to homeschool Student pending
12 resolution of this matter.

13 6. Such other and further relief as the Administrative Law
14 Judge (ALJ) may deem appropriate.

15 In due process matters, remedies are only considered regarding proven IDEA
16 violations and all remedies must be related to a resolution of a proven IDEA violation.
17

18 The Administrative Law Judge has considered the entire hearing record including
19 the testimony and the admitted Exhibits,⁴ and now makes the following Findings of Fact,
20 Conclusions of Law, and Decision finding that Petitioner demonstrated that the District
21 violated the IDEA and denied a FAPE to Student.

22 **FINDINGS OF FACT**

23 1. Student is ■ years old and has a medical diagnosis of developmental delay
24 (gross motor) and cerebral palsy, unspecified, global developmental delay, and speech
25 developmental delay.⁵

26 2. Student has been diagnosed with dysarthria⁶ and childhood apraxia of
27 speech.⁷

28 3. Student received early intervention services through Arizona's Early
29 Intervention Program (AzEIP). Her initial AzEIP evaluation reflected below average
30

31 ⁴ The Administrative Law Judge has read and considered each page of each admitted Exhibit, even if not
32 mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every
33 witness, even if the witness is not specifically mentioned in this Decision. The review of the hearing record
34 in relation to the only appropriate due process complaint notice, the documentation, the testimony.

35 ⁵ Student Exhibit (Ex.) 6 at 76.

36 ⁶ Student Ex. 5 at 75.

37 ⁷ Student Ex. 15 at 311.

1 communication skills (standard score of ■■■), below average gross motor skills (standard
2 score of ■■■), average fine motor skills (standard score of ■■■), average social emotional
3 skills (standard score of ■■■) and a cognitive composite of ■■■.⁸

4 4. Student's expressive language skills were so impacted by her disability that
5 she was provided with an alternative augmentative communication (AAC) device through
6 her medical insurance/DDD when she was ■■■ years old.⁹

7 5. Prior to her ■■■ birthday, Student was referred to Mesa Unified School
8 District for evaluation and consideration for special education services. The District's
9 initial evaluation revealed significant gross motor deficits, a mild developmental delay in
10 social domains, a moderate delay in adaptive domains and a cognitive quotient score of
11 ■■■. Significant expressive language deficits were found but Student's auditory
12 comprehension and receptive language were much higher.¹⁰

13 6. Student was found eligible for an IEP under the eligibility of Developmental
14 Delay.¹¹

15 7. Student was placed by the District in a special education developmental
16 preschool, three days per week for 2.5 hours each day. Her initial preschool IEP placed
17 Student in this classroom 100% of the time she was at school with no designated
18 mainstreaming with non-disabled peers.¹²

19 8. Student continued in a separate setting for the second year of preschool for
20 100% of the time she was at school with no designated mainstreaming with non-disabled
21 peers.¹³

22 9. Before Student began kindergarten, the District completed a
23 multidisciplinary evaluation (MET) shortly before the county closed down due to COVID.
24 The District's January 29, 2020 MET report reflected a Nonverbal IQ score of ■■■ and a
25 Verbal IQ score of ■■■.¹⁴ While Student's adaptive skills were in the average range
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27 ⁸ Student Ex. 1 at 2.

28 ⁹ Student Ex.5 at 70

29 ¹⁰ Student Ex. 3 at 40.

30 ¹¹ Student Ex. 3 at 41.

¹² Student Ex. 3 at 48.

¹³ Student Ex. 4 at 66.

¹⁴ Student Ex. 7 at 134.

(Standard Score of ■■■), her school readiness skills were below average (Standard Score of ■■■).¹⁵

10. Student's IEP eligibility was changed from Developmental Delay to Orthopedic Impairment.¹⁶

11. Parents researched kindergarten school options in the District and chose the Montessori program located at Bush Elementary.¹⁷

12. Student's kindergarten placement was at the District's Montessori program, and Student's LRE code was changed to "Inside Regular Class 80% or more of the day. (Effective Date: May 22, 2020)."¹⁸ The kindergarten transition IEP also included an addendum that added Adaptive Physical Education.¹⁹

13. Student left Mesa Unified School District part-way into the kindergarten school year because the Montessori school did not appear receptive to Student's inclusion in a general education classroom; staff were suggesting that the general education Montessori program might not be a good fit and that Student might need a segregated special education program. Parents decided to leave and enrolled Student at Legacy Traditional School (a charter school) in November 2020.²⁰

14. Legacy implemented the Mesa Unified School District (MUSD) kindergarten IEP, maintaining Student's LRE code at 80% or more of the day in the general education setting.²¹

15. Towards the end of Student's kindergarten year at Legacy, Parents requested a meeting to consider kindergarten retention. Legacy staff told Parents that retention was not necessary because Student "[was] making progress at her level to catch up to her peers. On every level of her goal, she [was] making progress. That is our goal for her to eventually catch up. . . . Her IEP is working. . . . If [Student] was not making progress since we started, we would be having a different conversation."²²

¹⁵ Student Ex. 7 at 32.

¹⁶ Student Ex. 7 at 137.

¹⁷ Hearing (Hr'g) Transcript (Tr.) Volume (vol.) III, 161:9–18. (Mother)

¹⁸ Student Ex. 8 at 157.

¹⁹ Student Ex. 8 at 160.

²⁰ Hr'g Tr. vol. III, 165:1–166:6. (Mother)

²¹ Student Ex. 9.

²² Student Ex.10 at 212.

16. In 2021, when Student was six years old, she was evaluated by neuropsychologist, Dr. Jan Blackham, at Phoenix Children's Hospital.²³ The results of the comprehensive neuropsychological evaluation revealed a Full Scale IQ of ■ and a General Ability Index of ■.²⁴ Dr. Blackham also evaluated Student's Cognitive Proficiency Index (CPI), which provides an estimate of the efficiency with which cognitive information is processed in the service of learning, problem solving, and higher order reasoning. Student obtained a CPI of ■, which is in the low average range. Her Nonverbal Index on cognitive testing was an ■.²⁵ Student obtained age-appropriate average visual-spatial, working memory, and processing speed scores.²⁶ Her receptive language standard score was ■; her expressive language standard score was ■, both in the average range.²⁷ In the academic area, Student obtained a School Readiness Composite of ■, in the very delayed range.²⁸ On the WIAT-4, Student obtained the following: average range on Listening Comprehension, and very low range on Reading Comprehension, Spelling, Math Problem Solving and Numerical Operations.²⁹ Her receptive vocabulary on the WIAT-4, however, was a ■, in the above average range.³⁰

17. Legacy conducted a triennial (MET) evaluation of Student in January 2023.³¹ The Legacy MET report included an IQ score of ■.³² However, the PWN and conference summary issued by Legacy about the MET meeting reported that Student's IQ score was ■.³³ The IQ of ■ was consistent with results from previous assessments by Mesa Unified School District in 2019 (Developmental Quotient of ■)³⁴ and 2020 (IQ of ■, nonverbal IQ of ■)³⁵ and the 2021 Phoenix Children's Hospital (PCH) evaluation (Full Scale IQ of ■, nonverbal IQ of ■).³⁶ Based on the results of the 2023 triennial,

²³ Student Ex. 11.

²⁴ Student Ex. 11 at 216–217.

²⁵ Student Ex. 11 at 217.

²⁶ Student Ex. 11 at 218.

²⁷ Student Ex. 11 at 224.

²⁸ Student Ex. 11 at 219.

²⁹ Student Ex. 11 at 221.

³⁰ Student Ex. 11 at 226.

³¹ Student Ex. 12.

³² Student Ex. 12 at 254.

³³ Student Ex. 12 at 265, 268

³⁴ Student Ex. 3 at 35.

³⁵ Student Ex. 7 at 134.

³⁶ Student Ex. 11 at 216-17.

1 the Legacy school team discussed potential eligibility under Orthopedic Impairment and
2 Other Health Impairment, and the Legacy team determined Student eligible under Other
3 Health Impairment (OHI), which was a change from her previous eligibility under
4 Orthopedic Impairment.³⁷ Student was not found eligible under Intellectual Disability, and
5 Intellectual Disability eligibility was not even considered.³⁸

6 18. Following the 2023 MET meeting, Legacy updated Student's IEP (dated
7 2/10/2023).³⁹ The updated IEP provided Student with the following specially designed
8 instruction and related services, implemented in a special education (resource) classroom
9 at Legacy: 240 minutes each month for basic reading and math (both 30 minutes, twice
10 a week); 120 minutes per month for written expression (30 minutes once per week);
11 occupational therapy for 90 minutes per month (three sessions per month, each 30
12 minutes); physical therapy for 90 minutes per month (three sessions per month, each 30
13 minutes); and speech therapy for 240 minutes per month (twice per week for 30 minutes).

14 19. The IEP also provided 240 minutes per month (one time per week for 60
15 minutes) of "push in" specially designed instruction in the general education classroom
16 for reading comprehension.⁴⁰ Student's Legacy IEP also included paraprofessional
17 support and modified curriculum/assignments/assessments, so Student was accessing
18 the general curriculum at her instructional level.⁴¹ Legacy's IEP provided for 20 different
19 academic accommodations, such as preferential seating, seating Student with a peer that
20 would be helpful for her inclusion, simplification of directions and checking for
21 understanding, manipulatives and prompts, testing accommodations and keeping the
22 expectations at Student's ability level, among many others.⁴² Based on the Legacy
23 schedule, Student's placement was 80% or more of the day inside a general education
24 classroom with general education peers.⁴³ Student remained at Legacy in an inclusive
25 placement through second grade.⁴⁴

26 ³⁷ Student Ex. 12 at 265.

27 ³⁸ Hr'g Tr. vol. III, 174:21–175:6 (Mother).

28 ³⁹ Student Ex. 13.

29 ⁴⁰ Student Ex. 13 at 287.

30 ⁴¹ Student Ex. 13 at 288.

⁴² Student Ex. 13 at 284.

⁴³ Student Ex. 13 at 270.

⁴⁴ Student Ex. 9 and 13.

1 20. At the start of third grade, Student began at Legacy, but there were staffing
2 issues that caused Parents to have concerns about whether Legacy would be able to
3 provide the supports set out in Student's IEP.⁴⁵ As a result, Parents decided to look for
4 other options back in their district of residence which had a later start for the 2023-2024
5 school year.⁴⁶

6 21. Parents enrolled Student back into the District at [REDACTED] Elementary
7 ([REDACTED] Parents chose [REDACTED] after extensive research on schools and their interest in
8 a STEAM (Science, Technology, Engineering, Arts, and Math) school because of
9 Student's interest in science.⁴⁷

10 22. Parents provided [REDACTED] with Student's current IEP and multidisciplinary
11 evaluation team (MET) report from Legacy, and the 2021 PCH evaluation.⁴⁸ Upon her
12 re-enrollment, the District conducted a transfer review process.⁴⁹ On receipt of the
13 Legacy IEP, the District determined that it would implement the IEP with comparable
14 services and accommodations/modifications...to the fullest extent possible until a new
15 IEP was developed."⁵⁰

16 23. Student's General Education Teacher teaches a third-grade classroom of
17 twenty-two students. She holds a Bachelor's degree in Elementary Education, a Master's
18 degree in Educational Leadership and has taught in general education classrooms for ten
19 years with eight years teaching third graders.⁵¹

20 24. The Special Education Teacher was assigned as Student's case manager
21 at [REDACTED]⁵² The Special Education Teacher holds a Bachelor's degree with majors in
22 both Elementary and Special Education, a Master's degree in Special Education and has
23 taught eighteen years as a general education teacher and ten years as a special
24 education teacher.⁵³

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26 ⁴⁵ Hr'g Tr. vol. III, 175:7–176:16 (Mother); Hr'g Tr. vol. IV, 10:5–9 (Father).

27 ⁴⁶ Hr'g Tr. vol. III, 176:17–24, 177:7–19 (Mother).

28 ⁴⁷ See id.

29 ⁴⁸ Hr'g Tr. vol. III, 178:21, 222:13–20 (Mother).

30 ⁴⁹ Student Ex. 14 at 295; Hr'g Tr. vol. III, 14:22–15:7 (Warner).

⁵⁰ Student Ex. 14 at pages 303-304.

⁵¹ Hr'g Tr. vol. V, 18:4-8.

⁵² Hr'g Tr.vol. I, 280:9-11.

⁵³ Hr'g Tr. vol IV, 194:6-17.

1 25. At the start of the school year, the Special Education Teacher assessed
2 Student's reading abilities and determined that Student could not yet decode words
3 because she had not mastered letter sound connection so she should be properly placed
4 in the District-adopted curriculum for phonemic awareness and instruction, Sounds
5 Sensible.

6 26. The Special Education Teacher did not have a student group in the Sounds
7 Sensible curriculum and asked (SDI) Special Education Teacher to work with Student
8 using Sounds Sensible.⁵⁴

9 27. The (SDI) Special Education Teacher has a Bachelor's degree in Sociology,
10 dual Master's degrees in General Education, K-8 and Special Education K-12, and that
11 she is in her second year as a certificated Special Education teacher.⁵⁵ The (SDI) Special
12 Education Teacher provided specially designed instruction to Student utilizing the Sounds
13 Sensible curriculum to develop skills in letter-sound correspondence ("phonics".) The
14 (SDI) Special Education Teacher provided 30 minutes of instruction four days per week
15 to satisfy the Sounds Sensible protocol.⁵⁶ Ms. Baca testified that the four 30 minute
16 sessions per week is aligned to the research provided by the publisher.⁵⁷

17 28. The General Education Teacher had never before had a student with
18 cerebral palsy or who used AAC. ⁵⁸

19 29. In or around August of 2023, Student's case manager, the Special
20 Education Teacher, requested AAC support/training for The General Education Teacher
21 from Becky Woolley, the District's AT Facilitator.⁵⁹ The AT Facilitator emailed the General
22 Education Teacher on August 11, 2023 to let her know she would come to the school on
23 August 17, 2023 to show her how to use Student's AAC device.⁶⁰ The General Education
24 Teacher admitted, however, that she was not trained on Student's AAC device.⁶¹

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27 ⁵⁴ Hr'g Tr. vol. IV, 198:21-199:13.

28 ⁵⁵ Hr'g Tr. vol V, 79:7 – 80:5.

29 ⁵⁶ Hr'g Tr. vol. V, 82:2-4 and 91:2-6 (Special Education Teacher).

30 ⁵⁷ Hr'g Tr. vol. VI92:1-8 (Baca).

⁵⁸ Hr'g Tr. vol. I, 174:22; 165:2; 168:1 (General Education Teacher).

⁵⁹ Student Ex. 22 at 360.

⁶⁰ Student Ex. 23 at 365.

⁶¹ Hr'g Tr. vol. V, 54:12 (General Education Teacher).

30. After Ms. Woolley's visit on August 17, 2023, she emailed the Gen Ed Teacher, the Special Education Teacher, and Erica Ussery, (Student's Speech and Language Pathologist (SLP)) with "The Plan" to "encourage a classroom culture where the use of assistive technology is normalized": the plan was to 1) provide 2 reader pens and an iPad with the Natural Reader app; and 2) encourage students in class to use the tools.

31. Erika Ussery has a Bachelor's degree followed by a Master's degree in Speech and Language Pathology and has served as a speech and language pathologist for 21 years.⁶²

32. The AT facilitator requested follow up by both the case manager and SLP and told the SLP that if Student started using the classroom Natural Reader iPad, to call Parents and see about putting the app on her communication device.⁶³ That same day, the Special Education Teacher responded that she would provide training and support and reach out to Parents about the Natural Reader app.⁶⁴ No follow up with Parents occurred; Mother testified she was unaware of "The Plan" for incorporating assistive technology into the classroom.⁶⁵ The SLP attempted to follow up on "The Plan" through an email to the General Education Teacher on November 6, 2023 to see if the reader pen or AT tools that the AT facilitator had left were being used. The General Education Teacher responded that she didn't have the reader pens. She added that the AT facilitator had shown her how to use them "but then I haven't seen them since."⁶⁶

33. No one told the General Education Teacher that Student had an intellectual disability; she concluded that Student had an intellectual disability because she did very poorly on the District's 3rd grade benchmark assessments that were given to her at the start of school.⁶⁷

34. Student began seeing the (SDI) Special Education Teacher in early August, 2023, at the start of the school year for reading groups, four days a week for 30 minutes

⁶² Hr'g Tr. Vol. V., 130:23 – 131:14; 138:7 - 20.

⁶³ Student Ex. 23 at 366.

⁶⁴ Student Ex. 23 at 367.

⁶⁵ Hr'g Tr. vol. III, 199:13–200:1 (Mother).

⁶⁶ Student Ex. 28 at 394-5; Hr'g Tr. vol. I, 237:6–16 (Scow).

⁶⁷ Hr'g Tr. vol. I, 172:8–10; 173:4–7 (Scow).

1 because Student did not fit into any of the Special Education Teacher's groups.⁶⁸
2 Student's Legacy IEP only provided for 60 minutes per week (2 x 30 minutes) for pull out
3 services for basic reading; she was supposed to receive 60 minutes per week of push-in
4 services in the general education setting for reading comprehension specially designed
5 instruction.⁶⁹

6 35. On August 31, 2023, before curriculum night at [REDACTED] the Special
7 Education Teacher and the General Education Teacher met with Mother. The Special
8 Education Teacher set up the meeting as she did not feel that the services provided in
9 the Legacy IEP were meeting Student's needs. At the meeting, the Special Education
10 Teacher asked Mother to articulate her goal for Student. Mother stated that she wanted
11 her daughter to "catch up to her peers in an inclusive setting." The Special Education
12 Teacher replied that instructional minutes would have to be increased if Student were to
13 ever catch up to the academic level of her peers.⁷⁰

14 36. At the August 31, 2023 meeting with Mother, the Special Education Teacher
15 told Mother that she would increase service times and would collect data on Student's
16 progress and that an IEP meeting would be scheduled likely in October 2023 to write a
17 new IEP.⁷¹

18 37. District staff reported on Student's IEP progress on her IEP goals on
19 October 6, 2023.⁷² The progress was noted as follows:

- 20 • Language Arts (phonics and word analysis)—10%
(Note: Student read the word "dad")
- 21 • Language Arts (sight words)—no report
- 22 • Language Arts (listening comprehension)—2/5 (Note:
23 Student "has difficulty communicating and this goal
24 would be better using visuals)
- 25 • Handwriting—reported as "Language Arts"—4/5 (Note:
26 Student "is able to write every letter from a model when
27 given time.
- Math (place value to 100s)—0/5 (Note: Student "is still
learning each of the values of digits. She is able to
identify single and double digit up to 20)

28 ⁶⁸ Student Ex. 27 at 386.

29 ⁶⁹ Student Ex. 13 at 287.

30 ⁷⁰ Hr'g Tr. vol. IV, 195:3-15 and 195:22-25 (Special Education Teacher).

⁷¹ Hr'g Tr. vol. IV, 200:12-19 (Special Education Teacher).

⁷² Student Exs. 16 and 17 at 313-320.

- Math (read numbers 30-100)—0/5 (Note: Student “is unable to identify any numerals past 20”)
- Math (skip count by 5s, 10s, 100s to 1000)—1/5
- Communication/Speech (comprehension of read aloud story)—42% (Note: “Given no more than 1 verbal/visual cue)
- Speech (articulation)—56% (Note: “Given a model [Student] requires cues to produce final consonants)
- Speech (articulation and intelligibility)—33% with maximum cues; 0% without cues
- Communication/Speech (expressive language)—35% when given an initial model
- Occupational Therapy (fine motor/handwriting)—no report
- Occupational Therapy (fine motor)—no report
- Physical Therapy (bilateral coordination/motor planning and attention to task)—“Right foot 3/10; left foot 0/10 for mobile ball. Able to kick stationary ball R/L [with moderate] force.”
- Physical Therapy (functional mobility and motor planning) - [Demonstrates] rapid walk/run [with increased] verbal [and] visual cues to [change] direction [and increased] time to complete.

38. The Special Education Teacher’s schedule documents 120 minutes per week of pull out specially designed instruction for written expression (4 x 30), 60 minutes per week of pull out specially designed instruction for math, and 30 minutes per week of push in specially designed instruction for math.⁷³ Student’s Legacy IEP only provides for 30 minutes per week of pull out instruction for written expression and 2 x 30 minute sessions each week for pull out math.⁷⁴ When questioned about the increase in service minutes from that authorized by Student’s IEP, the Special Education Teacher testified that she believed she was allowed to “provide more services, but not less.”⁷⁵

39. Student also had direct OT and PT services on her IEP, 90 minutes per month (3 x 30) for each service. ⁷⁶

⁷³ Student Ex. 79.

⁷⁴ Student Ex. 13 at 287.

⁷⁵ Hr’g Tr. vol. I, 285:14–16 (Special Education Teacher).

⁷⁶ Student Ex. 13 at 287.

1 40. In mid-September, Student's AAC device was dropped and the screen was
2 shattered while Student was attending [REDACTED] because of a flood at
3 [REDACTED] On September 25, 2023, Ms. Ussery, Student's Speech Language Pathologist,
4 emailed Student's teachers that she was going to order a district device.⁷⁷

5 41. The District issued a loaner device for Student and notified Ms. Ussery, who
6 requested that it be delivered to [REDACTED]⁷⁸ When the device had still not been delivered
7 by October 17, 2023, Ms. Ussery emailed again, to ascertain why. The AT facilitator, Ms.
8 Woolley, responded the same day: "Oh right, we do have an iPad here for her. Brett [the
9 AT assistant] is emailing the SPED instructional coach for [REDACTED] to see if they can bring
10 it out to you."⁷⁹ Student was without her device or a District loaner for over a month,⁸⁰
11 despite the fact that if a student needs a replacement device, the AT department should
12 be able to get it for her "immediately" because "she needs it to talk." Student's General
13 Education Teacher noted that Student was having difficulties communicating with her
14 peers and that her peers avoided conversations.⁸¹ The Special Education Teacher
15 testified that during her observation in the third-grade classroom, she observed peers
16 being unkind to Student and pulling away from her when she tried to hug them.⁸²

17 42. On October 18, 2023 at 7:49 a.m., Mother emailed the General Education
18 Teacher and requested to schedule a parent teacher conference.⁸³ In response to that
19 email, Ms. Cooper emailed Mother that while she knew that Mother had requested a
20 parent-teacher conference, she "would really like to hold an IEP meeting instead, as
21 [Student's] goals are not matching up with her present levels. . . . so we can go over her
22 present levels and re-write the IEP."⁸⁴ Mother responded stating "that sounds great."
23 Shortly thereafter, the Special Education Teacher emailed the school team members that
24 she would like a district rep or director present" for the IEP meeting that she was
25

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27 ⁷⁷ Student Ex. 28 at 389.

⁷⁸ Student Ex. 28 at 392.

⁷⁹ Student Ex. 28 at 393.

⁸⁰ Hr'g Tr. vol. I, 239:5-8 (General Education Teacher

⁸¹ Student Ex. 77; Hr'g Tr. vol. V, 52:15-23 (General Education Teacher).

⁸² Student Ex. 77; Hr'g Tr. vol. V, 52:15-23 (General Education Teacher)

⁸³ See id.

⁸⁴ Student Ex. 25 at 376.

1 scheduling for Student because she wanted “to visit the idea of MRP as I feel her current
2 IEP does not meet her needs.”⁸⁵ MRP means “More Restrictive Placement.”⁸⁶

3 43. At hearing, the Special Education Teacher testified that the purpose of the
4 IEP meeting was to formalize the increase in pull-out instruction that she had been
5 providing to Student and obtain additional adult (instructional assistant) support for
6 Student.⁸⁷

7 44. Prior to the IEP meeting, the Special Education Teacher consulted with
8 Dr. John Warner (school psychologist) to discuss her concerns for the upcoming IEP
9 meeting.

10 45. Dr. Warner testified that the focus of the discussion was the Special
11 Education Teacher’s desire to obtain more aide support for Student; the Special
12 Education Teacher did not discuss any scenario with Dr. Warner to move Student to a
13 segregated special education program – she just was hoping for an aide.⁸⁸ Dr. Warner
14 advised the Special Education Teacher to “loop in the director” because although the
15 school team can make the decision to provide a 1:1 aide, it is advisable to have the
16 director involved.⁸⁹

17 46. As part of the IEP process, the General Education Teacher completed a
18 teacher input form.⁹⁰ The General Education Teacher had documented in her teacher
19 input form that the IEP team should consider a “full time aide.” The Gen Ed Teacher’s
20 teacher input form also noted that students in her class were avoiding Student because
21 they could not understand her.⁹¹

22 47. An IEP meeting was held on November 14, 2023 for Student.

23 48. District representative Julie Bartanen, a Special Education Director in the
24 District who oversaw special education at [REDACTED] Elementary, attended, and Parents
25 were told she was there to present alternative programs for discussion.⁹² Parents were

26 ⁸⁵ Student Ex. 25 at 377.

27 ⁸⁶ Hr’g Tr. vol. III, 103:22–24 (Roberts).

28 ⁸⁷ Hr’g Tr. vol. IV, 202:1–203:5 (Special Education Teacher).

29 ⁸⁸ Hr’g Tr. vol. II, 226:20–24 (Warner).

30 ⁸⁹ Hr’g Tr. vol. II, 228:2–4 (Warner).

⁹⁰ Student Ex. 77.

⁹¹ Student Ex. 77.

⁹² Hr’g Tr. vol. III, 190:1–9 (Mother); Hr’g Tr. vol. I, 86:23–87:4 (Bartanen).

1 not provided with a draft IEP to review prior to this meeting and did not have time at the
2 meeting to look it over; usually they would get a draft and send it to a friend who taught
3 special education at Grand Canyon University where mother worked to receive input to
4 specially raise at any IEP meeting.⁹³ At the outset of the November 14, 2023 IEP meeting,
5 the Special Education Teacher handed out an Agenda and an IEP.⁹⁴ The IEP that the
6 Special Education Teacher handed out at the start of the meeting did not contain a
7 watermark with the word “draft.” The IEP distributed to the Parents already had a
8 completed services page and LRE page.⁹⁵

9 49. The present levels were not read to the Parents at the meeting; they were
10 just summarized.⁹⁶ The actual percentage of progress on Student’s Legacy IEP goals
11 was not discussed at the IEP meeting.⁹⁷

12 50. During the meeting, Mother asked about Student’s participation with peers,
13 noting that by this time at Legacy, Student had received birthday party invitations and
14 none had been received at [REDACTED].⁹⁸ The Special Education Teacher responded that
15 she would add a social skills goal and social skills instruction.⁹⁹

16 51. During the IEP meeting, Julie Bartanen, Director of Elementary Special
17 Education for the East Area, served as the District representative. Ms. Bartanen holds
18 two Master’s degrees, one in Special Education and one in Education Administration and
19 Leadership.¹⁰⁰ Ms. Bartanen has been an educator for at least sixteen years and has
20 taught Resource Special Education, and has experience in inclusive practices,
21 compliance, and as an instructional coach.¹⁰¹ Ms. Bartanen presented a continuum of
22 services as required by the IDEA as options for parents to consider, including increasing
23 time for an instructional assistant (aide) to be assigned to Student and two specialized
24 programs, one at Pomeroy Elementary and one at Mendoza Elementary (Mendoza).¹⁰²

25 ⁹³ Hr’g Tr. vol. V, 261:8–21; Hr’g Tr. Vol. VI, 34:4-35:6 (Mother).

26 ⁹⁴ Student Ex. 19.

27 ⁹⁵ 8 Hr’g Tr. vol. III, 189:13-25 (Mother).

28 ⁹⁶ Hr’g Tr. vol. II, 51 (Cooper):15–18; Hr’g Tr. vol. III, 118:15–119:1 (Roberts); Hr’g Tr. vol. I, 148:1– 18
(Bartanen); Hr’g Tr. vol. VI, 35:7-36:12 (Mother).

29 ⁹⁷ Hr’g Tr. vol. I, 149:10–14 (Bartanen).

30 ⁹⁸ Hr’g Tr. vol. V, 262:13–16; Hr’g Tr. vol. VI, 36:17-38:4 (Mother).

⁹⁹ Hr’g Tr. 190:22–191:11 (Mother).

¹⁰⁰ Hr’g Tr. Vol. IV, 55:18-21.

¹⁰¹ Hr’g Tr. Vol. IV, 56:11, 57:6.

¹⁰² Hr’g Tr. vol. IV, 57:17-19; 77:5-18 and 96:7-21 (Bartanen).

1 52. The Mendoza program was for students with mild disabilities. The program
2 is aligned to the general education curriculum with intensive scaffold and reinforcement
3 of instruction for students whose disability may impact their ability to keep up with the
4 pace of a general education classroom.¹⁰³

5 53. The District does not have a segregated program for students with
6 intellectual disabilities.¹⁰⁴

7 54. The Mendoza program was for students with mild disabilities. The program
8 is aligned to the general education curriculum with intensive scaffold and reinforcement.

9 55. Neither Mother nor Father wanted a self-contained program and Father
10 especially said that in response to Ms. Bartanen's mention of the Mendoza program.¹⁰⁵
11 A school representative at the meeting told Mother and Father that Mendoza was not a
12 self-contained program. Mother suggested the District consider other options instead of
13 a specialized program on another campus, including implementing color coded
14 notebooks, retention, or use of a C-Pen; none of the District members of the IEP team
15 responded to Mother's alternative suggestions.¹⁰⁶

16 56. During the meeting, Ms. Bartanen also advised Parents that there was
17 research which was critical of the efficacy of using instructional aides to support special
18 education students in a general education classroom and that having an assigned aide
19 can be a more restrictive setting for the student.¹⁰⁷ Unbeknownst to Ms. Bartanen, the
20 Special Education Teacher had included 20 hours of additional adult support for Student
21 in the IEP that she had handed out to Parents at the start of the meeting.¹⁰⁸ The additional
22 adult support had been included in the Supplementary Aids and Services section of the
23 draft IEP¹⁰⁹ which was never reviewed nor discussed during the November 14, 2023 IEP
24 meeting.

25
26 ¹⁰³ Hr'g Tr. vol. IV, 100:1-10 (Bartanen).

27 ¹⁰⁴ Tr. vol. VI, 52:25-53:2 (Baca).

28 ¹⁰⁵ Hr'g Tr. vol. IV, 19:11-20:6 (Father).

29 ¹⁰⁶ Hr'g Tr. vol. III, 195:19-196:25 (Mother).

30 ¹⁰⁷ Hr'g Tr. vol. I, 115:18-116:12 (Bartanen)

¹⁰⁸ Hr'g Tr. vol. I, 96:3-25 (Bartanen). When shown the draft IEP, and specifically the section where the aide support was included, Ms. Bartanen was at first confused, thinking she was looking at the Legacy IEP which had included aide support, then she was speechless after Parent's counsel pointed out the aide support and said "Surprise."

¹⁰⁹ Student Ex. 19 at p. 335.

1 57. At the hearing, the Special Education Teacher testified about aide support;
2 the Special Education Teacher testified that there was “no debate” that Student needed
3 aide support and that she believed the student needed an aide.¹¹⁰ As a result, the Special
4 Education Teacher had included 20 hours a week of additional adult assistance in the
5 draft IEP to support Student with safety during transitions, visual cueing, communication
6 with AAC device and providing accommodations to support academic work.¹¹¹ While
7 General Education Teacher left the IEP meeting after 20 minutes,¹¹² she testified that
8 Student needed aide support,¹¹³ and she only had one hour of aide support in the
9 classroom which was why she had spoken to the Special Education Teacher to get more
10 aide support.¹¹⁴ Dr. Warner testified that he “thought this [IEP meeting] was about getting
11 an aide, you know, not a placement....That was what the original consulting that [he] did
12 with Julie [Cooper] was.”¹¹⁵

13 58. Dr. Warner testified that considering an aide first would be “good practice”
14 before moving the student to a more restrictive placement.¹¹⁶ He also testified that he
15 would not believe it appropriate to place a student with a cognitive proficiency index of [REDACTED]
16 in a program for students with intellectual disabilities.¹¹⁷

17 59. After Mother and Mrs. Bartanen expressed disagreement regarding the
18 Mendoza program, the Special Education Teacher briefly identified a few more pages in
19 the IEP that had been handed out, saying very little about their content; the only mention
20 of AT in the pre-filled out IEP was that Student would have access to her personal AAC
21 device.¹¹⁸ No other consideration of AT was discussed at the IEP meeting, but
22 Ms. Bartanen admitted that if the AT facilitator had provided AT tools to the Student, it
23 should have been documented in the IEP.¹¹⁹ The Special Education Teacher agreed;
24 she testified that the failure to identify the additional AT that had actually been provided

25 ¹¹⁰ Hr’g Tr. vol. II, 51:24–52:3, 59:7–10 (Special Education Teacher).

26 ¹¹¹ Student Ex. 19 at 335.

27 ¹¹² Hr’g Tr. vol. I, 264:17–25 (General Education Teacher).

28 ¹¹³ Hr’g Tr. vol. I, 211:21–23 (General Education Teacher).

29 ¹¹⁴ Hr’g Tr. vol. I, 210:18–23 (General Education Teacher).

30 ¹¹⁵ Hr’g Tr. vol. III, 62:22–63:15 (Warner).

¹¹⁶ Hr’g Tr. 64:16–65:2 (Warner).

¹¹⁷ Hr’g Tr. vol. II, 226:20–24 (Warner). The next day, Dr. Warner would disavow saying what the record reflects he actually did say. Hr’g Tr. vol. III, 47:21–48:2.

¹¹⁸ Student Ex. 19 at 330; Hr’g Tr. vol. I, 78:11 –17 (Bartanen).

¹¹⁹ Hr’g Tr. vol. I, 79:13-16 (Bartanen).

1 to Student (c-pen, iPad with Natural Reader) in the Special Considerations section of the
2 IEP was “a mistake.”¹²⁰

3 60. While the latter portions of the IEP were not discussed at the November 14,
4 2023 IEP meeting, they were all filled out in the IEP that had been handed out at the start
5 of the meeting. The pre-filled out IEP included the following specially designed instruction:
6 one hour per week of pull-out services for reading comprehension, two hours per week
7 of pull-out services for written expression, one hour per week of pull-out services for math
8 problem solving, two hours per week of pull-out services for reading decoding, and one
9 hour per week of pull-out services for math calculation, totaling 7 hours per week of pull
10 out services for academic instruction.¹²¹ This represented a significant increase from the
11 30 minutes per day (2.5 hours per week) of pull out academic specially designed
12 instruction that had been included in the Legacy IEP.¹²² Ms. Bartanen testified that the
13 November 14, 2023 IEP did affect a change in the Student’s LRE which also constituted
14 a change of placement.¹²³

15 61. The District’s draft IEP eliminated all gross motor goals and the 90 minutes
16 per month of direct physical therapy services that had been included on Student’s IEP
17 from Legacy, changing PT services to “indirect services only.”¹²⁴ Mrs. Roberts did not
18 conduct a re-evaluation prior to eliminating all direct PT services on the draft IEP.¹²⁵ While
19 the present levels of the draft IEP does include information about Student’s gross motor
20 needs,¹²⁶ it was not accurate; Ms. Roberts testified that there were two sentences in the
21 present levels relating to Student’s ability to kick a stationary ball and the second one was
22 inaccurate and actually related to a rolling ball, a mistake that Ms. Roberts did not catch
23 and was not corrected.¹²⁷

24 62. The pre-filled IEP that was given to Parents included the following statement
25 in the LRE section: “Inside regular class for no more than 79% of the day and no less
26

27 ¹²⁰ Hr’g Tr. vol. II, 78:4–16 (Special Education Teacher).

28 ¹²¹ Student Ex. 19 at 334.

29 ¹²² Student Ex. 20 at 352; Hr’g Tr. vol. I, 88:11–20 (Bartanen).

30 ¹²³ Hr’g Tr. vol. I, 88:11–16, 156:16–19 (Bartanen).

¹²⁴ Student Ex. 19 at 335; Student Ex. 13 at 287

¹²⁵ Hr’g Tr. vol. III, 110:18–20 (Roberts).

¹²⁶ Student Ex. 19 at 329.

¹²⁷ Hr’g Tr. vol. III, 117:2–119:7 (Roberts); Student Ex. 20 at 344.

1 than 40% of the day.” It also stated: “Due to [Student’s] significant delays in all academic
2 areas, [Student] will participate with non-disabled peers in non-academic environments
3 unless she is receiving instruction in the resource setting for reading, writing and
4 mathematics, and social skills.”¹²⁸ This section of the IEP was not discussed during the
5 IEP meeting.¹²⁹ The accommodations, modifications, extended school year (ESY),
6 testing accommodations, service minutes and LRE sections of the IEP were not
7 discussed during the IEP meeting.¹³⁰ The Special Education Teacher noted that the ESY
8 language and the change in LRE language (from “inside regular class for no more than
9 79% of the day and no less than 40% of the day” and the harmful effects) were “default”
10 language inserted by the District’s IEP software.¹³¹ At the time these latter portions of the
11 IEP “came up” for discussion, Mother was upset with Ms. Bartanen’s proposal of a
12 specialized program on another campus.¹³² The District said they wanted Parents to tour
13 the program and the IEP team would reconvene in December.¹³³

14 63. Parents assumed the rest of the IEP would be discussed after they toured
15 the District’s program at Mendoza, at a second meeting that the team scheduled at the
16 end of the November 14, 2023 IEP meeting.¹³⁴ The District also believed that the
17 November 13, 2023 IEP was a “part one” meeting that would be continued in
18 December.¹³⁵ The Special Education Teacher testified that the “meeting ended abruptly,”
19 and “it felt a little unsettled,”¹³⁶ and that the rest of the IEP that the team had not yet
20 covered would be discussed at the next IEP meeting.¹³⁷

21
22 ¹²⁸ Student Ex. 19 at 337.

23 ¹²⁹ Hr’g Tr. vol. III, 201:23-202:7 (Mother).

24 ¹³⁰ Hr’g Tr. vol. II, 84:4–23 (Special Education Teacher).

25 ¹³¹ Hr’g Tr. vol. II, 82:25–83:9 (Special Education Teacher).

26 ¹³² Hr’g Tr. vol. IV, 101:23-102:1 (Bartanen).

27 ¹³³ Hr’g Tr. vol. III, 202:10-20 (Mother); Hr’g Tr. vol. IV, 32:7–16 (Father).

28 ¹³⁴ Hr’g Tr. vol. III, 202:10–20 (Mother).

29 ¹³⁵ Hr’g Tr. vol. I, 275:6–10 (Scow); Hr’g Tr. vol. II, 84:18– 23(Cooper; Hr’g Tr. vol. V,198:16-25 (Ussery)
(Special Education Teacher). Ms. Bartanen was the only one who claimed the IEP had been finished at
30 the 11/14/24 IEP meeting, claiming it was her “impression that we had completed the IEP meeting” and
the December IEP meeting would be to create an “IEP Amendment.” Hr’g Tr. vol. IV, 106:15-
20(Bartanen). Her testimony stands alone.

¹³⁶ 9 Hr’g Tr. vol. IV, 205:20–206:2 (Special Education Teacher)

¹³⁷ Hr’g Tr. vol. IV, 211:8–20 (Special Education Teacher)

¹³⁷ Hr’g Tr. vol. IV, 211:8–20 (Special Education Teacher).

1 64. At the close of the meeting, Parents were told someone would reach out to
2 them and schedule a tour of Mendoza, and Ms. Bartanen said she would send Parents
3 the article about the harmful effects of 1:1 paraprofessionals.¹³⁸ Ms. Bartanen also told
4 Parents they would have a draft of the IEP prior to the next meeting.¹³⁹ Mother believed
5 that until the December IEP meeting that Student's IEP from Legacy would remain in
6 effect.¹⁴⁰

7 65. The day following the IEP meeting, the [REDACTED] scheduling clerk emailed
8 Parents a notice to schedule the "follow-up IEP meeting" on December 13, 2023."¹⁴¹

9 66. On November 16, 2023, Director Julie Bartanen emailed Mother to follow up
10 on setting a tour of the Mendoza program. She included the [REDACTED] psychologist,
11 Dr. John Warner, and the Mendoza psychologist, Amani Amr, on the email so that a tour
12 could be scheduled. In the same email, Ms. Bartanen sent parent a link to the article
13 mentioned at the IEP meeting, telling Mother that it was "recently shared with [MPS's]
14 parent panel about instructional assistants that you had asked I share with you."¹⁴²

15 67. The article that Ms. Bartanen sent to Mother did not support Ms. Bartanen's
16 claim that a 1:1 aide was "more restrictive"; the article suggested that any problems with
17 the proximity of an aide to an included student and the impact of that proximity should be
18 addressed with training, use of class aides to support student needs as opposed to 1:1
19 aides, clarification of the roles of the aide toward the student with a disability and the other
20 students and other pro-active strategies to ensure appropriate aide support is being
21 provided to those who need it.¹⁴³

22 68. On November 20, 2023, the Special Education Teacher emailed Mother,
23 and attached "a copy of the new PWN and IEP." ¹⁴⁴ The Prior Written Notice was for
24 another student, mistakenly attached to the email, so Mother emailed the Special
25
26

27 ¹³⁸ Hr'g Tr. vol. III, 202:21–203:3 (Mother).

28 ¹³⁹ Hr'g Tr. vol. IV, 137:2-5 (Bartanen).

29 ¹⁴⁰ Hr's Tr. vol. III, 205:6–10 (Mother).

30 ¹⁴¹ Student Ex. 31 at 410.

¹⁴² Student Ex. 30 at 406.

¹⁴³ Student Ex. 37 at 530-531.

¹⁴⁴ Student Ex. 20 at 338.

Education Teacher about the mistake.¹⁴⁵ Upon receiving the IEP, Mother believed that it was the “new” draft.¹⁴⁶

69. The IEP that was mailed to Parents on November 20, 2023 included some changes from the draft IEP that had been given to Parents at the November 14, 2023 IEP meeting: 1) addition of social skills goal;¹⁴⁷ 2) addition of social skills service minutes to be provided in the special education classroom;¹⁴⁸ 3) deletion of the adult support under supplementary aids and services and, instead, a statement was added that “supplementary aids and services were considered but not needed, and 4) addition of claimed academic deficits that impeded Student’s access to the general curriculum (in the present levels section) and the general education setting (in the LRE section of the IEP)”¹⁴⁹

70. The IEP that was mailed to Parents kept the pre-filled IEP service delivery model; all services were listed as “pull out” and to be implemented in a special education classroom. The pull out service delivery model was not selected because of Student’s distractibility which was no different than any other of her general education peers¹⁵⁰; Rather, the Special Education Teacher indicated that she provided a pull out setting for her services so she could provide immediate feedback to Student.¹⁵¹ She knew that the General Education Teacher also provided small group instruction in her classroom and that Student participated in those groups but that she had not seen the workbooks and documents that Student was doing in the general education class.¹⁵² Nonetheless, she wrote all the services as pull out because that way, she knew that Student was getting the accommodations and modifications because she was providing them.¹⁵³ She had never received any training about the circumstances when a general education teacher

¹⁴⁵ Student Ex. 21 at 356.

¹⁴⁶ Hr’g Tr. vol. III, 227:2–12 (Mother).

¹⁴⁷ Student Ex. 20 at 348.

¹⁴⁸ Student Ex. 20 at 349.

¹⁴⁹ Student Ex. 20; Hr’g Tr. vol. II, 89:24–90:24 (Special Education Teacher).

¹⁵⁰ Hr’g Tr. vol. IV, 213:24–214:5 (Special Education Teacher).

¹⁵¹ Hr’g Tr. vol. IV, 222:5–11 (Special Education Teacher).

¹⁵² Hr’g Tr. vol. IV, 222:12–223:8 (Cooper) and Student Ex. 76.

¹⁵³ Hr’g Tr. vol. IV, 221:1–15 (Special Education Teacher).

1 is permitted to provide specially designed instruction nor how a special education teacher
2 would support a general education teacher in that service delivery model.¹⁵⁴

3 71. The Special Education Teacher conceded, however, that Student watched
4 her non-disabled peers in the general education setting, she let them guide her, she
5 copied them, mimicked them, looked at their papers for guidance, and they were really
6 good models for her; she used the general education peers as models. The General
7 Education Teacher agreed that Student was a very good mimicker and likes to mimic
8 what her classmates said; both The General Education Teacher and the non-disabled
9 peers would repeat and model appropriate sentence structure and provide her with verbal
10 cues.¹⁵⁵

11 72. The IEP that was mailed to Parents on November 20, 2023 kept the pre-
12 filled IEP LRE statements and included no direct PT services.¹⁵⁶ The IEP that was emailed
13 had no program supports for Student.¹⁵⁷ The Special Education Teacher testified that the
14 absence of required program supports and modified curriculum, modified grades, and
15 modified assignments was not intentional; it was a mistake.¹⁵⁸ The General Education
16 Teacher believed that Student needed modified curriculum, modified assignments, and
17 modified tests.¹⁵⁹

18 73. 61. The Special Education Teacher emailed the correct PWN for Student's
19 IEP to Mother on November 21, 2023. The PWN bears a date of November 8, 2023 which
20 is when the Special Education Teacher first drafted Student's IEP. The PWN emailed to
21 parents on November 21, 2023 indicated that the District had already begun implementing
22 the IEP the same day as the IEP meeting - November 14, 2023 - before Parents had
23 received the new IEP or written notice.¹⁶⁰

24 74. The PWN that was sent to Parents on November 21, 2023 documented why
25 the District had "declined" to include the additional adult support that had been in the draft,
26 and that both the case manager and teacher had confirmed was needed for Student; the

27 ¹⁵⁴ Hr'g Tr. vol. IV, 217:22-218:4 (Special Education Teacher).

28 ¹⁵⁵ Hr'g Tr. vol. I, 191:7-13 (Special Education Teacher).

29 ¹⁵⁶ Student. Ex. 20 at 350.

30 ¹⁵⁷ Student. Ex. 20 at 350.

¹⁵⁸ Hr'g Tr. vol. II, 74:2-6 (the Special Education Teacher).

¹⁵⁹ Hr'g Tr. vol. I, 268:13-18 (General Education Teacher).

¹⁶⁰ Student Ex. 21 at 356, 357.

1 PWN confirmed the Student's need for the support but declined it anyway: "At this time,
2 the team determined that with the increase of specially designed instruction, [Student] will
3 be out of the classroom during core instruction and will be receiving modified curriculum
4 at her level in place of providing additional adult support in the classroom."¹⁶¹

5 75. 63. While Ms. Bartanen claimed that "there was consensus on the
6 November IEP," ¹⁶² the evidence was to the contrary: The removal of aide support was
7 not a consensus decision. ¹⁶³ The General Education Teacher was not aware that the
8 aide support had been removed from the November 14, 2023 IEP. She was surprised to
9 learn that aide support had been declined and when she learned that for the first time
10 during her testimony, she asked: "Who declined it? Because Julie Cooper and I were like
11 hoping that we would get more aide support for Student and that's why she was rewriting
12 the IEP."¹⁶⁴ The Special Education Teacher testified that Ms. Bartanen had the power to
13 veto the aide and that it was Ms. Bartanen who was the one who delivered the news to
14 the Parents that the aide support that was included in the IEP would be refused.¹⁶⁵

15 76. Although the PWN and IEP were finalized, The General Education Teacher
16 testified that she thought that the IEP was a "work in progress."¹⁶⁶ When shown the IEP
17 that had been emailed to the Parents with the PWN ¹⁶⁷ at the hearing, the General
18 Education Teacher questioned whether it was ever "approved" as she always gets a copy
19 of an approved IEP and goes through it with the special ed teacher and had never seen
20 that IEP. ¹⁶⁸

21 77. Ms. Bartanen claimed that the IEP could not be held open and that the
22 District had to "lock it." ¹⁶⁹ Her supervisor, Theresa Baca, belied any implication that an
23 unfinished IEP could be finalized or implemented; she testified that the District cannot
24
25

26 ¹⁶¹ Student Ex. 21 at 357.

27 ¹⁶² Hr'g Tr. vol. I, 65:25 (Bartanen).

28 ¹⁶³ Hr'g Tr. vol. II, 59:1–10 (Hr'g Tr. vol. II, 59:1–10 (Special Education Teacher).

29 ¹⁶⁴ Hr'g Tr. vol. I, 211:12–20 (Special Education Teacher).

30 ¹⁶⁵ Hr'g Tr. vol. II, 57:23–58:5 (Special Education Teacher).

¹⁶⁶ Hr'g Tr. vol. I, 275:17 (Special Education Teacher).

¹⁶⁷ Student Ex. 20.

¹⁶⁸ Hr'g Tr. vol. I, 171:2–12 (General Education Teacher).

¹⁶⁹ Hr'g Tr. vol. IV, 105:24–106:20 (Bartanen).

1 finalize an unfinished IEP, and if it does, it is a denial of parental participation. There must
2 be a second IEP meeting to finish the IEP.¹⁷⁰

3 78. Although the finalized November 14, 2023 IEP did result in a change of
4 placement (i.e., Student was removed significantly more from the general education
5 setting and thus did not have access to non-disabled peers; the District changed the LRE
6 code that ADE requires schools to submit for data collection from “inside regular class
7 80% or more”¹⁷¹ to “inside regular class for no more than 79% of the day and no less than
8 40% of the day”),¹⁷² the PWN did not provide Notice to Parents that Student’s placement
9 had been changed, stating instead that a change of placement had been discussed but
10 was declined; the explanation for the declination was that the team “would revisit this
11 decision in December after services have been maximized and we review her progress
12 with modified instruction.”¹⁷³

13 79. Student’s finalized IEP explained the extent Student would not participate
14 with non-disabled peers in academic and non-academic environments and why. With
15 respect to core instruction, the LRE provision in the IEP stated: “Due to [Student’s]
16 significant delays in all academic areas, [Student] will participate with non-disabled peers
17 in non-academic environments unless she is receiving instruction in the resource setting
18 for reading, writing and mathematics and social skills.”¹⁷⁴

19 80. The Gen Ed Teacher’s class has approximately 485 minutes per week that
20 students are engaged in non-academic activities/subjects,¹⁷⁵ which is approximately 26%
21 of the school week. If Student were removed from the general education setting for all
22 core instruction as stated on the PWN and only permitted to remain during non-academic
23 activities, as stated in the IEP, Student would be outside of the general education setting
24 for 74% of the school day.¹⁷⁶

27 ¹⁷⁰ Hr’g Tr. vol. VI, 98:12-17, 100:1-9 (Baca).

28 ¹⁷¹ Student Ex. 13 at 270.

29 ¹⁷² Student Ex. 20 at 352.

30 ¹⁷³ Student Ex. 21 at 357.

¹⁷⁴ Student Ex. 21 at 357.

¹⁷⁵ Hr’g Tr. vol. I, 188:14–189:7 (General Education Teacher).

¹⁷⁶ Student Ex. 79.

81. Six school days after receiving the Prior Written Notice, Parents filed a Petition for Due Process,¹⁷⁷ invoking “stay put” to stop the implementation of the November 14, 2023 IEP and giving notice of their formal disagreement with the November 14, 2023 IEP and their intent to unilaterally place Student after winter break.¹⁷⁸

82. The District did not stop implementing the November 14, 2023 IEP.¹⁷⁹ Parents stopped sending Student to [REDACTED] in mid-December.¹⁸⁰ Parents homeschooled Student until they found a private general education Montessori school in which to enroll her.

83. Parents toured Mendoza at 8:30 AM on November 20, 2023.¹⁸¹

84. On November 20, 2023, the Special Education Teacher emailed Mother, and attached “a copy of the new PWN and IEP.”¹⁸² The Prior Written Notice was for another student, mistakenly attached to the email, so Mother emailed the Special Education Teacher about the mistake.¹⁸³ Upon receiving the IEP, Mother believed that it was the “new” draft.¹⁸⁴

85. The Special Education Teacher emailed the correct PWN for Student’s IEP to Mother on November 21, 2023. The PWN bears a date of November 8, 2023 which is when the Special Education Teacher first drafted Student’s IEP. The PWN emailed to parents on November 21, 2023 indicated that the District had already begun implementing the IEP the same day as the IEP meeting - November 14, 2023 - before Parents had received the new IEP or written notice.¹⁸⁵ The November 14, 2023 IEP¹⁸⁶ stated goals as follows:

Category	Goal
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¹⁷⁷ Pet. for Due Process, December 4, 2023.

¹⁷⁸ Pet. for Due Process, December 4, 2023 at 16.

¹⁷⁹

¹⁸⁰ Hr’g Tr. vol. II, 98:4–8 (Cooper).

¹⁸¹ Student Ex. 30 at 407.

¹⁸² Student Ex. 20 at 338.

¹⁸³ Student Ex. 21 at 356.

¹⁸⁴ Hr’g Tr. vol. III, 227:2–12 (Mother).

¹⁸⁵ Student Ex. 21 at 356, 357.

¹⁸⁶ Hr’g Tr. vol. IV, 33:8-9 (Father) and vol. V, 271:10-17 (Mother)

SLI-Articulation/ Phonology	[Student] will reduce the phonological process for final consonant in words at the word level given a model. . .
SLI-Articulation/ Phonology:	[Student] will reduce the phonological process of fronting by producing /k/ and /g/ phonemes in all positions of words at the phrase level given a model. . .
SLI-Expressive Language:	[Student] will formulate grammatically correct sentences (verbally or through AAC device) to describe a picture using the correct pronoun + helping verb + action + ing . . .
SLI-Receptive Language:	[Student] will answer wh-comprehension questions (verbally or through AAC device) based on a story read aloud . . . Reading Using her AAC device or verbally, [Student] will produce the primary sound represented by a single-lettered consonant when given (21) consonants . . .
Reading	[Student] will blend spoken phonemes to form a single-syllable word. . .
Reading	[Student] will segment spoken words into individual phonemes . . .

Reading	[Student] will answer questions about key details in a text that has been read to her, verbally or using visual cues . . .
Writing	Student] will draw a picture and write about a personal experience that includes a clear setting and characters, and a complete thought with every word represented by initial and final consonants and sight words using correct placement, formation, and sizing . . .
Math	[Student] will understand that the three digits of a three-digit number represent amounts of hundreds, tens and one by identifying the numeral in each place value . . .
Math	[Student] will use addition and subtraction within 20 to solve word problems . . . Social Skills While participating in a small group activity, [Student] will initiate an interaction with one or more peers through conversation or other communicative means (such as gesture) . . .
Math	

The November 14, 2023 IEP provided for the following special education, related services, supports to be delivered to Student:

Service	Instructional Setting/Location	Total Minutes	Provider
Social Skills	Special Education classroom	1 x 30 mins/ week	Special Education Teacher
Reading Comprehension	Special Education in a classroom	2 x 30 min sessions/week	Special Education Teacher
Written Expression	Special Education in a classroom	4 x 30 min sessions/week	Special Education Teacher
Math Problem Solving	Special Education classroom	2 x 30 min sessions/week	Special Education Teacher
Reading Decoding	Special Education classroom	4 x 30 min sessions/week	Special Education Teacher
Math Calculation	Special Education classroom	2 x 30 min sessions/week	Special Education Teacher
Occupational Therapy Services	Special Education classroom	3 x 30 minute sessions/month	OT Provider
Physical Therapy Indirect	General Education classroom	1 x 15 minute session/month	PT Provider
Occupational Therapy-Indirect	Special Education classroom	1 x 15 minute session/month	OT Provider

(SLI) Articulation/Language Speech	Speech Room	2 x 30 min sessions/week	Speech/Language Provider
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At hearing, Ms. Bartanen explained that it would not have been best practice to have left open the IEP document from November 14 of 2023 until the team met again on December 13, 2023.¹⁸⁷ The prior written notice issued following the meeting clearly states three times that the team will meet again in December to revisit any remaining issues and determine the most appropriate placement for the Student.

86. Student's report cards for both the first quarter and the second quarter at ██████ reflect that Student received the highest grade - "4"s - in science and social studies in the general education setting.¹⁸⁸ The General Education Teacher testified that Student was participating at her level in a way that was meaningful for her in science and social studies, both of which had a lot of hands-on activities.¹⁸⁹

87. On November 15, 2023, the District sent a Webex invitation to the IEP team—including Parents—for the December 13, 2023 IEP meeting.¹⁹⁰

88. On November 21, 2023, the Special Education Teacher emailed the IEP and Prior Written Notice to Student's mother.¹⁹¹

89. Six school days after receiving the PWN, Parents filed a Petition for Due Process.¹⁹² Given the filing of the Due Process, the IEP meeting set for December 13, 2023 was cancelled.

90. Parents stopped sending Student to ██████ in mid-December.¹⁹³

91. Parents homeschooled Student until they found a private general education Montessori in school in Tempe, AZ, in which to enroll her.

¹⁸⁷ Hr'g Tr. Vol. IV , 106:12-20

¹⁸⁸ Student Ex. 18 at 322; Student Ex. 72.

¹⁸⁹ Student Ex. 18 at 322; Student Ex. 72.

¹⁹⁰ Student Exhibit 31

¹⁹¹ Student Exhibit 20.

¹⁹² Pet. for Due Process, December 4, 2023.

¹⁹³ Student Ex. 71; Hr'g Tr. vol. III, 229:1–3 (Mother).

92. Parents retained inclusion specialist Sherry Mulholland, to provide training and recommendations for the private Montessori school.¹⁹⁴ Ms. Mulholland is an Adjunct Professor at the University of Arizona.¹⁹⁵ Ms. Mulholland teaches future elementary and early childhood educators inclusive practices, child development, and classroom management and guidance.¹⁹⁶

93. At hearing, Ms. Mulholland testified that she believed all services except speech services for articulation could be provided to student in the general education classroom in whole or in part by a credentialed general education teacher in consultation and collaboration with a credentialed special education teacher.¹⁹⁷ Ms. Mulholland explained why it could be appropriate to deliver all specially designed services (except speech) when the Student was not making progress on her goals when she was receiving additional service minutes in the special education setting by trained special education teachers. Ms. Mulholland as a charter school teacher in a school with only 78 students.¹⁹⁸

CONCLUSIONS OF LAW

1. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.¹⁹⁹ The standard of proof is “preponderance of the evidence,” meaning evidence showing that a particular fact is “more probable than not.”²⁰⁰ Therefore, Petitioner bears the burden of proving their claims and complaints by a preponderance of evidence.

2. This tribunal’s determination of whether or not Student received a FAPE must be based on substantive grounds.²⁰¹ If a procedural violation is alleged and found, it must be determined whether the procedural violation either (1) impeded the child’s right to a FAPE; (2) significantly impeded the parents’ opportunity to participate in the decision-

¹⁹⁴ Hr’g Tr. vol. III, 232:21–233:3 (Mother).

¹⁹⁵ Hr’g Tr. vol. II, 109.

¹⁹⁶ See id.

¹⁹⁷ Hr’g Tr. vol. II, 137:13-18

¹⁹⁸ Hr’g Tr. vol. II, 188:9-13.

¹⁹⁹ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

²⁰⁰ *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, 371-372 (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).

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

making process; or (3) caused a deprivation of educational benefit.²⁰² If one of the three impediments listed has occurred, the child has been denied a FAPE due to the procedural violation.

FAPE

3. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a FAPE that meets their individual needs.²⁰³ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.²⁰⁴ To do this, school districts 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 free appropriate public education. A school offers a FAPE by offering and implementing an IEP “reasonably calculated to enable [a student] to make progress appropriate in light of [the student’s] circumstances.”²⁰⁵ FAPE does not require that each child’s potential be maximized.²⁰⁶ A child receives a FAPE if a program of instruction “(1) addresses his unique needs, (2) provides adequate support services so he can take advantage of the educational opportunities and (3) is in accord with an individualized educational program.”²⁰⁷

The IEP

4. Once a child is determined eligible for special education services, a team composed of the child’s parents, teachers, and others formulate an IEP that, generally, sets forth the child’s current levels of educational performance and sets annual goals that the IEP team believes will enable the child to make progress in the general education curriculum.²⁰⁸ The IEP tells how the child will be educated, especially with regard to the child’s needs that result from the child’s disability, and what services will be provided to

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

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

²⁰⁴ *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).

²⁰⁵ *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ____ (2017).

²⁰⁶ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

²⁰⁷ *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)).

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

aid the child. The child's parents have a right to participate in the formulation of an IEP.²⁰⁹ The IEP team must consider the strengths of the child, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the child.²¹⁰ To foster full parent participation, in addition to being a required member of the team making educational decisions about the child, school districts are required to give parents written notice when proposing any changes to the IEP,²¹¹ and are required to give parents, at least once a year, a copy of the parents' "procedural safeguards," informing them of their rights as parents of a child with a disability.²¹²

5. The IEP team must consider the concerns of a child's parents when developing an IEP.²¹³ In fact, the IDEA requires that parents be members of any group that makes decisions about the educational placement of a child.²¹⁴

LRE

6. 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.²¹⁵ 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.²¹⁶ 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.

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

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

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

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

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

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

²¹⁵ See 34 C.F.R. § 300.116(d).

²¹⁶ 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).

7. The Ninth Circuit established a four-part test regarding consideration of a proposed educational placement in *Sacramento City School District v. Rachel H.*, 14 F.3d 1398 (1994). The four factors are: (a) a comparison of the educational benefits available in the regular classroom, supplemented with appropriate aids and services, to the educational benefits of the special education classroom; (b) the nonacademic benefits to the disabled child of interaction with nondisabled children; (c) the effect of the presence of the disabled child on the teacher and other children in the regular classroom; and (d) the costs of supplemental aids and services necessary to mainstream the disabled child in a regular classroom setting.

DECISION

Issue #1

8. Parents allege that the District denied parental participation resulting in a substantive denial of FAPE at the IEP meeting on November 14, 2023, and in finalizing and implementing the IEP. Specifically, Parents allege that the District substantively denied Student a FAPE by the following actions:

- a. Failing to discuss the Rachel H. four factors to determine the LRE for Student and never considering the general education setting for any academic instruction for Student (e.g., not discussing how Student's goals might be implemented in the general education setting);
- b. Failing failed to discuss the ability of supplemental aids and services (including such things as push-in specially designed instruction by the general education or special education teacher, training in inclusive practices, consultation with inclusion specialists, or reading specialists and increased aide support) to allow appropriate progress in a general education setting for all, most, or even some of the academic instructional time; misstating the standard for aide support, depriving the Parents of the ability to meaningfully discuss it with the team using the correct legal standards for consideration of supplementary aide support;
- c. Failing to discuss the location of services and whether any or all services that were needed COULD be provided in the general education setting;

- 1 d. Predetermining the LRE/placement prior to the meeting (as
2 evidenced by a completed IEP with the services, service
3 delivery model and LRE section already filled in), and thereby,
4 denied Student a FAPE.
- 5 e. Failing to clearly identify Student's placement and the location
6 of services and instruction for the totality of student's
7 placement in Student's IEP and PWN— e.g., where she would
8 be receiving academic instruction that was not identified as
9 specially designed instruction (including for the totality of the
10 ELA/Math instructional time, science and social studies), who
11 the provider of the instruction would be that was not specially
12 designed instruction listed on the IEP (for the rest of the
13 ELA/Math instructional periods, science and social studies),
14 and what supports Student would need to access that
15 instruction.

12 **A. Whether the November 2023 IEP failed to clearly identify Student's**
13 **placement and the location of services in the IEP**

14

15 9. The November 2023 IEP includes a description of the extent to which
16 Student will not participate with non-disabled peers in academic and non-academic
17 environments and why. The November 2023 IEP specifically enumerates the minutes that
18 Student will be pulled out of the general education classroom in the section of the IEP
19 labeled "G. STATEMENT OF SPECIAL EDUCATION/RELATED SERVICES." The
20 November 2023 IEP provides that Student would be pulled from the general education
21 classroom only to receive specifically identified special education instruction and related
22 services. Accordingly, the Administrative Law Judge (ALJ) concludes that Petitioner has
23 failed to establish that the District failed to "clearly identify Student's placement and the
24 location of services and instruction for the totality of student's placement in Student's IEP."

25 **B. Whether the District's Implementation of the November 14, 2023 IEP was**
26 **Without Prior Written Notice, Denying Parental Rights Guaranteed Under IDEA.**

27 10. The Federal Regulations mandate Prior Written Notice a "reasonable time
28 before the public agency" proposes to initiate or change the educational placement of a
29 child or the provision of FAPE to the child. 34 C.F.R. § 300.503 (a). The Arizona
30 Department of Education has provided technical assistance to school districts to help

1 them understand when a Prior Written Notice (PWN) is required. Any change in the
2 provision of FAPE, including changes to the services or LRE of the student requires the
3 district to issue a PWN. While IDEA does not include specific timelines around when to
4 provide prior written notice, it must be provided before the district implements the action.
5 Id. See also 34 C.F.R. §300.503(a).

6 11. Here, since the District had unilaterally finalized and began implementing
7 an unfinished IEP, the District understood that a PWN was required and mailed it to the
8 Parents on November 21, 2023. The PWN indicates that the November 14, 2023 IEP
9 which the PWN proposed to be implemented was already being implemented before
10 Parents even received the written notice or final IEP; it was implemented beginning
11 November 14, 2023. Id. The act of implementing an IEP before giving parents the final
12 IEP or any prior written notice deprived Parents of any opportunity to exercise their
13 procedural rights prior to implementation.

14 **C. Predetermination**

15 12. Parents allege that the District predetermined the LRE/placement of
16 Student prior to the November 2023 IEP meeting (as evidenced by a completed IEP with
17 the services, service delivery model and LRE section already filled in), and thereby,
18 denied Student a FAPE. When a placement decision is made outside the IEP process,
19 parental participation is denied resulting in a substantive denial of FAPE, even if there is
20 “after the fact” participation. Target Range, supra.; Spielberg v. Henrico Cnty Pub. Sch.,
21 853 F.2d 256 (4th Circuit, 1988) (District predetermined placement to local school from a
22 private placement and wrote the IEP to support the predetermined placement; this
23 procedural failure alone was sufficient to find a denial of FAPE); Hall v. Vance Cnty. Bd.
24 of Educ., 774 F.2d 629, 635 (4th Cir.1985) (placement decision made before IEP finally
25 drafted; after the fact involvement is insufficient to overcome procedural violation). See
26 also L. V. v. Deer Valley, slip op. at 38. If parental participation is denied, the ALJ need
27 not thereafter determine whether the proposed IEP provided FAPE or not. Shapiro v.
28 Paradise Valley Unified Sch. Dist., supra, 317 F.3d at 1079; Amanda J. v. Clark Cnty Sch.
29 Dist., 267 F.3d 877, 895 (9th Cir. 2001) (declining to address the question of whether the
30 proposed IEP was “reasonably calculated to enable [the child] to receive educational
benefits” because the school district failed to comply with the IDEA); Target Range, 960

1 F.2d 1479, 1485 (9th Cir. 1992) (same). See also L.V., supra, No. 10C-DP-029-ADE
2 (predetermination based on the District's failure to discuss Parent's proposed placement
3 and failure to consider a continuum of possible or alternative placements constituted a
4 substantive denial of FAPE.

5 13. The testimonial evidence from the District's witnesses and Parents
6 established that the November 14, 2023 was not completed at the November 14, 2023
7 IEP meeting. After the District summarized the present levels, the meeting disintegrated
8 when discussion focused on the section of the present levels that identifies how the
9 Student's disability impacts her in the general curriculum. At that time, as the Special
10 Education Teacher was discussing how Student's disability impacted her academically
11 and socially which had not been included in the draft. Ms. Bartanen introduced a
12 "specialized program" she believed would be a better fit for Student – the Mendoza
13 program for children with mild disabilities. Parents were adamant that a self-contained
14 special education program was not what they wanted for their daughter; Mother started
15 proposing a number of less restrictive alternatives, including a 1:1 instructional assistant.
16 Ms. Bartanen responded that a 1:1 aide was more restrictive. Mother asked Ms. Bartanen
17 for evidence to back up that statement.

18 14. Ms. Bartanen offered to send some research she claimed she had just seen
19 on the subject. At that point, the meeting could not continue as Mother was upset, Father
20 was trying to calm her, and Ms. Bartanen wanted them to see Mendoza so that it could
21 be discussed as a potential program for Student. The team scheduled a part two meeting
22 and Ms. Bartanen agreed to send Parents an updated draft to review before the meeting.
23 But, after the meeting, the Special Education Teacher began implementing the IEP,
24 updated it, locked it, and sent it to Parents on November 20, 2023. A PWN was sent the
25 next day documenting that the IEP was already being implemented. The IEP was finished
26 without parental input. There was no meaningful participation in the determination of the
27 services, service delivery model, supplementary aids and services, program
28 modifications, accommodations, ESY, Testing or LRE.

29 15. The District does not dispute the facts about how the IEP was finalized
30 without a meeting or Parent input on the sections that had not been reviewed on
November 14, 2023. Even Ms. Baca conceded that it is improper to finalize an unfinished

1 IEP – there must be a second meeting to allow parental participation. Ms. Bartanen
2 decried that the District “had to finish and lock the IEP;” It could not remain open, or so
3 she says. Even if there was some reason that an IEP could not remain open when the
4 team has not fully discussed it and a second IEP meeting needs to be convened to finish
5 the IEP process, that doesn’t mean the District gets to unilaterally finish the IEP and
6 implement it without parental participation and prior to written notice. Ms. Baca confirmed
7 there was no requirement to implement an unfinished IEP. There was no need to issue a
8 Prior Written Notice implementing it.

9 16. As Ms. Baca confirmed, the District cannot implement the IEP until it was
10 finished at a meeting with the Parents, where the placement and services and remaining
11 IEP components were discussed. Parents wanted Student in general education.
12 Ms. Bartanen wanted Student at Mendoza. The IEP was not finished because Mother
13 was upset, and Ms. Bartanen wanted Parents to visit the District proposed program. As
14 the IEP meeting was not finished, the District could not finalize and implement an IEP
15 without denying the Parents their right of participation. Ms. Bartanen locked the IEP, and
16 began implementing it. She then sent a PWN to document she was implementing the as
17 yet unfinished IEP. She admitted that because of her actions, she understood she had
18 stripped the Parents of their ability to timely exercise their procedural rights and stop
19 implementation. When the Special Education Teacher updated the few sections of the
20 IEP that had been considered at the IEP meeting, she removed the necessary aide
21 support from the Supplementary Aides and Services section of the IEP even though that
22 section had not been considered yet by the IEP team. The action of finalizing an in-
23 process, unfinished IEP outside of a meeting, and then removing aide support that was
24 necessary, all denied parental participation. The Parents had no input at all into the
25 placement, services, service delivery model, supplementary aides and program
26 modifications and LRE provisions of the IEP the District implemented.

27 17. Upon review of the evidence presented at hearing, the ALJ concludes that
28 the District significantly impeded the parents’ opportunity to participate in the decision-
29 making process when it locked in and finalized an unfinished IEP and began implementing
30 the IEP immediately following the November 14, 2023 meeting.

18. Regarding any potential violations described in 1(a) and 1(c) above, the ALJ

concludes that that Petitioner has failed to establish that the District significantly impeded Parents' opportunity to participate in the decision-making process based on any potential violations described in 1(a) and 1(c) above.

Issue #2

19. Parents allege that the IEP dated November 14, 2023 did not provide FAPE to Student and in Student's LRE.

A. Whether the November 14, 2023 IEP The IEP fails to provide FAPE to Student in the areas of supplementary aids, supports and program modifications

20. The evidence presented at hearing shows that Student's present levels documented the need for supports. The Legacy IEP documented the kinds of supplementary supports, accommodations and program modifications that Student needed:

- Accommodations
- Preferential seating
- Seat student near someone who will be helpful,
- Vary method of presenting information (e.g. lecture, role play, video, etc), Chunk information, and
- simplify directions. Adjust level of questioning and check for understanding
- Provide multisensory experiences
- Provide cues for repair strategies when communication breakdowns occur
- Use manipulatives, prompts and cues
- Repeat and rephrase questions
- Provide alternative assignments that require less reading and writing
- Frequently monitor Student's independent work
- Keep expectations consistent with ability level
- Provide a model of correct speech sound and grammar when an error is heard
- Use short, one concept sentences, simple vocabulary
- Revise format of test (fewer questions, fill in the blank, color coded)
- Extra test time
- Tests administered individually or small group
- Allow student plenty of time to speak and share
- Continuous positive reinforcement

1 21. The Legacy IEP also provided the following modifications:

- 2 • Assessments will be modified (reduced, simplified and/or
- 3 alternative assignments will be provided based on level of
- 4 difficulty
- 5 • Alternative assignments will be provided as needed
- 6 • Reduced spelling list/phonograms
- 7 • Book report may be recorded, written by a scribe or use
- 8 alternative assessment
- 9 • Use communication device for poem/revise poem

10 22. The November 14, 2023 IEP identified Student's need for most of the
11 accommodations, supports and program modifications on the Legacy IEP. It noted that
12 Student needed adult support to perform tasks, she needed materials read to her, she
13 needed modified assignments and adult support to complete them.²¹⁷ The IEP noted that
14 Student needed prompting from an adult, manipulatives for math, modified grade level
15 materials, and modified grades. Id.

16 23. The District did not even deny that Student needed these supports and,
17 indeed, they included necessary supplementary aides and supports on their settlement
18 IEP. The undisputed evidence is that no supplementary aids and services were included
19 because the IEP simply was not finished before the District prematurely finalized, locked
20 and began implementing it without sending a PWN to the Parents. Wherever Student was
21 going to be educated, she would need these supplementary aids and services and the
22 IEP provides none of them. The ALJ concludes that the District failed to provide FAPE to
23 Student in the areas of supplementary aids, supports and program modifications.

24 **B. Whether the November 14, 2023 IEP provided Student with a FAPE when**
25 **it failed to Provide Needed Technology and a District Communication Device and**
26 **the Supplementary Services to Support Student's Technology and Communication**
27 **Needs.**

28 24. Petitioner alleges that the November 14, 2023, IEP Fails to Provide Needed
29 Technology and a District Communication Device and the Supplementary Services to
30 Support Student's Technology and Communication Needs, and thereby fails to provide a
FAPE. It is undisputed that Student uses an augmentative and alternative communication

²¹⁷ See Student Ex. 20 at 343-343.

(AAC) device. The District's IEP notes this. However, the IEP does not provide for a District supplied AAC device nor any other technology that the District had brought to Student's classroom for Student to use (e.g., a C-Pen – a text to speech reader so Student, a non-reader, could have written text read to her; an iPad with reading software on it).¹¹ The IEP provided nothing in the way of consultation with the District's AT facilitator which the District knew that Student's team needed nor any training which the District had attempted to provide and intended on doing again when the AT facilitator learned her "Plan" had been ignored and the C-Pens and Tech tools misplaced. Finally, the District failed to consider any AT assessment to look at additional technology that would have been appropriate for Student considering her needs (e.g., a device with apps to support her goals in reading, writing and math where Student displayed significant weaknesses).

25. The Special Education Teacher admitted that the failure to document the AT tools and services that were provided was a mistake. IDEA includes both assistive technology devices and assistive technology services in this definitional section:

§300.5 Assistive technology device. Assistive technology device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such device.

§300.6 Assistive technology service. Assistive technology service means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes— (a) The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment; (b) Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities; (c) Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices; (d) Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs; (e) Training or technical assistance for a child with a disability or, if

appropriate, that child's family; and (f) Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

26. One of the mandatory provisions of every IEP is the "special factors" that IEP teams are required to consider in the development, review, and revision of every IEP. The IEP team is required to consider whether the child needs assistive technology and services. 34 C.F.R. § 300.324 (a)(2)(v). Parents assert that the District failed to properly include necessary Assistive Technology and Assistive Technology Services in the November 14, 2023 IEP. While the IEP states that Student needs AT, the only technology that the IEP included was that Student would have access to her personal device, a device funded by Student's medical insurance and provided to her for her medical needs which included only Student's communication applications.

27. Under the IDEA, when an IEP team determines that assistive technology (AT) devices and services are required to enable the child to receive a FAPE, the LEA is responsible for providing and maintaining the AT device and providing any necessary AT services. See 34 C.F.R. § 300.105. The District's failure to provide a District AAC device on Student's IEP and document other AT that Student needed is a significant FAPE violation. As the ALJ learned, Student was bringing her personal device to school and mid-September, while she was temporarily attending Red Mountain Elementary following the closure of [REDACTED] due to flooding, Student's device was dropped, and the screen shattered.²¹⁸ This deprived Student of a device to use at school (until the District finally did allocate one for her on a temporary basis only) and at home (until Parents could get insurance to replace it).

28. When the District allocated a temporary replacement device for Student, it failed to deliver it to the Student for her use for almost a month²¹⁹ and then did not permit her to take it home. Had the District properly documented and provided a District device for Student when her IEP was reviewed and formally adopted as a transfer IEP and again at the November 14, 2023 IEP meeting, the risk of additional harm to Student's home

²¹⁸ See Student Ex. 28 at 389.

²¹⁹ See Student Ex. 28 at 286.

1 device would have been eliminated (and, if Student's school device was damaged,
2 Student would have had an immediate "back up" device until the District could allocate a
3 replacement). Additionally, the IEP does not provide for the other assistive technology (a
4 C-Pen that provides text to speech and enables a non-reader to have a "reader" or an
5 iPad with reading software on it) that the AT facilitator determined Student needed. IDEA
6 mandates that if AT devices and services are being made available as part of a student's
7 program, they must be included in the IEP.

8 29. By not even telling Parents about the technology the District deemed
9 necessary, and was unsuccessfully implementing through its general education teacher
10 who, while trained, decided to ignore the required implementation "plan," Parents had no
11 ability to enforce and would have no ability to prospectively enforce Student's right to a
12 FAPE as it relates to AT. See *M.C. v. Antelope Valley Union High School District*, 858
13 F.3d 1189 (2017). Further, the November 14, 2023 IEP also fails to include other
14 technology that would have supported/supplemented Student's instruction in reading,
15 writing and math and allow student to continue in the general education environment.

16 30. Alternatively/additionally, the IEP team failed to consider an AT assessment
17 which is part of IDEA assistive technology services to help identify what additional
18 technology supports were available to benefit Student sufficient that a segregated and
19 restrictive self-contained placement would have been unnecessary. While many AT
20 devices and services can be provided without an AT evaluation, an evaluation may be
21 appropriate to help identify AT to assist the child throughout the school day. IDEA calls
22 this a functional evaluation of the child in the child's customary environment. This is
23 something that the District never did, nor even considered, before concluding that Student
24 should be removed from a general education setting more than provided for in her Legacy
25 IEP.

26 31. Finally, Student's IEP failed to provide any AT training and support to staff,
27 Student and Parents. IDEA mandates that the LEA ensure that the student, his or her
28 parents, and educators know how any AT device works through the provision of AT
29 services, which must be documented in the IEP.²²⁰ While some "training" was being
30

²²⁰ See Student Ex. 57 at 3-4.

provided behind the scenes and in secret, the general education teacher ignored it, and didn't even know where Student's C-Pen was two months after it was delivered, with a written implementation plan. ²²¹She would also testify that whatever training she did get was not on Student's AAC device. Failure to document necessary AT devices and services was one of the specific bases that the Ninth Circuit found a substantive denial of FAPE in the M.C. case because the parent was in the dark about what was needed for the Student.

32. As in M.C., here, there is also a substantive denial of FAPE. Even when a student and parent knowingly assume the District's obligation to provide a device by bringing Student's personal device to school, the District's responsibility is not ended. If the LEA and the parent agree that a child's AT device should be used instead of an AT device provided by the LEA, the child's IEP needs to provide the professional development, training or technical assistance to staff on how to support the child using the AT device and the IEP (or another document) needs to advise the parent that student's use of their own device is voluntary and the parent may choose an LEA supplied AT device at any time. There is no such written documentation here, either via a technology agreement form or in the IEP. And, if a second device is needed because of a students' unique needs, the District must provide it and document it in the IEP.

33. Student had such unique needs. She did not want to be signaled out and stigmatized as the only child using an AAC device or a C-Pen. That made it challenging for staff to access the technology which they knew Student needed. That was why the District AT facilitator came to train the general education teacher and left 2 C-Pens with detailed instructions how to "normalize" Student's technology for the class so Student would access it and an iPad with reading software that could "talk" out loud, just like Student's communication device did. The problem here is that the plan was not followed and then was secreted from the Parent. Fear of stigmatization is a known problem impacting usage of needed technology. It is imperative for the IEP team to discuss the problem and work collaboratively, including parents, and develop a plan to understand the root cause of the student's refusal and determine recommendations to be carried out

²²¹ See Student Ex. 23, 28.

1 by the team, potentially through an AT evaluation, incorporation of alternative strategies
2 into the IEP that will create greater comfort using the AT device or alternatively choosing
3 a different device and revising the IEP accordingly.

4 34. The IDEA requires a student's technology needs to be assessed, provided
5 for and documented in writing in the IEP, so that a parent has knowledge of what will be
6 provided and by whom and can readily enforce the provision of FAPE. See M.C., 858
7 F.3d 1189. This was not done. Whether by mistake or otherwise, the District's November
8 14, 2023, IEP fails to provide FAPE by not appropriately providing for Student's AT
9 technology and service needs.

10 **C. Whether the IEP provided Student with a FAPE when it Eliminated**
11 **Student's Gross Motor Goal and Direct Gross Motor Specially Designed Instruction**
12 **by the District's Physical Therapist**

13 35. Petitioner alleges that the November 14, 2023, IEP Fails to provide FAPE
14 by eliminating Student's Gross Motor Goal and Direct Gross Motor Specially Designed
15 Instruction by the District's Physical Therapist. Student has cerebral palsy and with that
16 medical diagnosis comes gross motor deficits. Student's last evaluation from Legacy is
17 dated January 17, 2023. The evaluating PT conducted two subtests from the Bruininks-
18 Oseretsky Test of Motor Proficiency: tests for body coordination and strength and agility.
19 Student scored in the 5th percentile for body coordination. Her standard score was a 15
20 (a standardized score of 40-60 is average). She scored in the 1st percentile in strength
21 and agility. The MET evaluation report determined Student was still in need of physical
22 therapy: [Student] demonstrates decreased core strength, speed/agility,
23 balance/coordination, motor planning, and proprioception skills. Furthermore, [Student]
24 demonstrates decreased attention to task and can be easily distracted. Peers and busy
25 environments can result in increased balance challenges and distractions. Due to her
26 scores on the BOT-2 and gross motor skills observed during this assessment, it was
27 determined that [Student] demonstrates global gross motor delays and functional
28 limitations and continues to qualify for physical therapy services to support her being able
29 to more safely and efficiently access her educational environment.

30 36. The Legacy IEP which was being implemented when Student enrolled at
[REDACTED] included two gross motor goals: tracking and kicking a rolling ball to a therapist

standing 8 feet away without loss of balance, and running 50 feet avoiding 3 obstacles, reversing direction and returning to start with good dynamic balance and functional gait pattern within 12 seconds. Direct physical therapy services were included on the IEP services page and were supposed to be provided 90 minutes per month (3 sessions x 30 minutes each): [Student] will receive direct services in a one on one or small group setting to address gross motor delays. This will be addressed through improving posture, transitional movements, functional mobility, strength, and agility skills by means of functional therapeutic activities/strategies, functional motor planning activities, and functional bilateral coordination/integration activities/strategies with modeling, verbal cueing, and/or tactile cueing.

37. The November 14, 2023 IEP eliminated all gross motor goals and all direct physical therapy services. The Arizona Department of Education has made clear that a re-evaluation must be done when little or no progress is being made, when a parent or teacher requests a re-evaluation, or when a student improves significantly and may no longer need the special education that was being provided.

38. Finally, the Arizona Department of Education has noted that it is imperative that an IEP team have sufficient data to determine that services are no longer required, from informal sources, including classroom observations, therapy notes and parent interviews, or formal assessment strategies. After such data is collected, the reasons for the decision to discontinue the therapy services should be documented in a re-evaluation report or in the IEP because the IEP team is required to review the evaluation results before making a final determination.

39. The PT did not conduct a re-evaluation before eliminating all gross motor goals and all physical therapy direct services for a student with cerebral palsy.

Ms. Roberts kept session notes as required by her license but was never asked to produce them by District counsel and did not. There was nothing produced concerning Student's response to physical therapy which is supposed to be recorded except for one note – the "transfer note" that was issued on October 6, 2023. This hand-written note does not contain the progress monitoring codes that the District uses when it is reporting out on quarterly progress reports. Id. The PT's handwritten notation, however, establishes that Student failed to make any progress (or regressed) on her motor

1 planning/coordination goal (Baseline was 3 out of 10 for kicking a rolling ball 8 feet with
2 both feet). Id.

3 40. As of October 6, 2003, Student could apparently only kick with her right foot
4 and was still only kicking it 8 feet 3 out of 10 times. As such, she made no progress at all
5 on the right foot and had no progress or regressed on the left (depending on whether the
6 baseline was for both feet). She was unable to kick the ball with her left foot. Mastery of
7 the goal was 7 out of 10 opportunities for each leg. The PT did not record Student's speed
8 for the second goal – to run 50 feet, avoiding 3 obstacles, reverse direction and return to
9 start in 12 seconds - so it is impossible to know how far she was from mastery at the time
10 the IEP team eliminated all PT goals and all direct therapy from a PT. There is no re-
11 evaluation report nor does the IEP document a basis for terminating direct PT services
12 and eliminating all gross motor goals. The PWN also does not document a reason to
13 terminate direct PT.²²²

14 41. There was also a significant implementation issue with respect to the PT
15 services that were supposed to be provided. Student's lack of progress and/or regression
16 from the lack of full services caused educational harm as demonstrated by her regression
17 and lack of progress in the first quarter of the school year; her failure to meet her goals
18 justified continuing the goals which were based on a current evaluation and required
19 direct physical therapy services to implement them. Additionally, while the PT did not
20 report out on progress on the then current gross motor goals at the November 14, 2023
21 IEP meeting, the present levels continue to reflect that Student was struggling in terms of
22 her gross motor skills, and those struggles make clear that Student had not yet met the
23 gross motor goals that were included on her Legacy IEP and still needed direct instruction
24 to address her gross motor deficits due to cerebral palsy:

25 [Student] has a diagnosis of cerebral palsy with presentation
26 of lower muscle tone and decreased strength throughout her
27 trunk and extremities. Additionally, [Student] is easily
28 distracted. Speed of movement when walking with staff and
29 peers fluctuates depending upon attention to task. When
30 sitting at a table to participate in activities, [Student]
demonstrates a tremor of the upper extremities. [Student] is

²²² See Student Ex. 21.

1 physically able to access her educational environment from a
2 gross motor perspective. She does demonstrate motor
3 planning issues with completion of PE related activities.
4 [Student] is able to run with demonstration of decreased
5 speed. When completing a shuttle type activity, she requires
6 increased visual and verbal cues to continue running.
7 [Student] kicks a stationary ball with her right and left foot with
8 partial swing and requiring supervision for balance. She
9 demonstrates increased difficulty kicking a stationary ball with
10 more difficulty noted kicking with her left foot. She is not yet
11 able to skip but does complete galloping with left LE lead.
12 When asked to complete a spin turn or change directions
13 while running, [Student] demonstrates loss of balance (self-
14 corrected). When participating in activities with peers (in the
15 classroom, PE and structured activities), [Student]
16 demonstrates a delay in her response as she typically waits
17 to observe her peers to figure out what should be occurring.
18 Student Ex. 20 at 344. The IEP also made clear that Student's
19 gross motor deficits did impact her ability to access "the
20 general curriculum," specifically, "her ability to consistently
21 keep pace with peers, participate in running and climbing
22 activities and her ability to participate in physical education
23 (PE) activities." Id. at 345.

24 42. The preponderance of the evidence shows that Student still had gross
25 motor deficits, she had not met her gross motor goals, and the District eliminated all direct
26 PT and all gross motor goals and stripped Parents' ability to stop the District from
27 eliminating the Legacy PT services through Stay Put. The District also did not reinstate
28 the adapted physical education (APE) services that had been on Student's kindergarten
29 transition IEP.²²³ Without any direct physical therapy services to implement gross motor
30 goals that were still necessary because they had not been mastered, the November 14,
2023 fails to provide FAPE for Student's gross motor needs. The preponderance of the
evidence shows that the District denied Student a FAPE when it eliminated Student's
Gross Motor Goal and Direct Gross Motor Specially Designed Instruction by the District's
Physical Therapist.

Whether the IEP provided Student with a FAPE in the LRE

²²³ Student Ex. 8 at p. 153

1 43. Each child's IEP must include a statement of the child's present levels of
2 academic achievement and functional performance, a statement of measurable annual
3 goals, and a description of how the child's progress toward meeting the annual goals will
4 be measured and when periodic progress reports will be provided. 34 C.F.R. §
5 300.320(a). The IEP must also include a statement of the special education, related
6 services, and supplementary aids and services to be provided to the child, and a
7 statement of the program modifications or supports for school personnel that will be
8 provided to enable the child to advance appropriately toward attaining their annual goals,
9 and to be involved in and make progress in the general education curriculum, to
10 participate in extracurricular and nonacademic activities, and to be educated and
11 participate with other children with disabilities and nondisabled children. Id.

12 44. Each child's IEP must also include "an explanation of the extent, if any, to
13 which the child will not participate with nondisabled children in the regular class . . ." and
14 a statement of any individual appropriate accommodations that are necessary to measure
15 the student's academic achievement and functional performance on state and district-
16 wide assessments. Id. In developing a child's IEP, the team must consider the child's
17 strengths, the concerns of the parents for enhancing their child's education, the results of
18 the child's most recent evaluation, and the academic, developmental, and functional
19 needs of the child. 34 C.F.R. § 300.324(a) This requires an individualized inquiry into the
20 unique educational needs of each student with a disability in determining the possible
21 range of aids and supports that are needed to facilitate the student's placement in the
22 regular educational environment before considering a more restrictive placement. [U.S.
23 Department of Education, OSEP Memorandum 95-9 (November 2, 1994)].

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

28 46. While the language of the IDEA clearly indicates a strong preference for
29 educating students with disabilities alongside their non-disabled peers in the regular
30 educational environment, the question whether to educate the child in the regular
classroom or in the special education environment requires a fact specific inquiry by the

1 IEP team. *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 448 (9th Cir. 2010) The Ninth
2 Circuit in the *J.W. v. Fresno Unified* case recognizes the tension between the goals of
3 mainstreaming and the child's ability to make academic progress stating:

4 The question whether to educate a handicapped child in the
5 regular classroom or to place him in a special education
6 environment is necessarily an individualized, fact specific
7 inquiry. In each case, the apparent tension between the
8 IDEA's clear preference for mainstreaming and its
9 requirements that schools provide individualized programs
10 tailored to the specific needs of each disabled child must be
11 balanced. 20 U.S.C. §§ 1401, 1414(a)(5) [case citations
12 omitted] In considering whether the District proposed an
13 appropriate placement for Student, the Court balances four
14 factors: '(1) the educational benefits of placement fulltime in a
15 regular class; (2) the non-academic benefits of such
16 placement; (3) the effect Student had on the teacher and
17 children in the regular class; and (4) the costs of
18 mainstreaming Student.'" [citing *Sacramento City Unified Sch.*
19 *Dist. Bd. of Educ. V. Rachel H.* 14 F.3d 1398, 1404 (9th Cir.
20 1994)] *J.W. v. Fresno Unified Sch. Dist.*, supra, 626 F.3d at
21 448.

22 47. It is also important to note that deference is given to school districts'
23 determination of educational policy. In *Bishop v. Poolaw*, the Ninth Circuit notes:

24 The IDEA's broad mandate to provide handicapped children
25 with a free appropriate public education designed to meet the
26 unique needs of the handicap[ped] child is fairly imprecise in
27 its mechanics. This vagueness reflects Congress' clear intent
28 to leave educational policy making to state and local
29 education officials. [citations omitted] School officials
30 therefore retain maximum flexibility to tailor education
programs as closely as possible to the needs of each
handicapped child. *Bishop v. Poolaw*, 67 F.3d 830 (9th Cir.
1995)

48. Ms. Bartanen testified that given the services in the November 14, 2023
IEP, the Student would spend 72% of her time in the general education classroom and
that the November 14 IEP properly provided services in the least restrictive learning
environment. The District was directed to use S.P.I.R.E. and Sounds Sensible curriculum.
The Sounds Sensible curriculum covers decoding which neuro-typical students typically
master before third grade.

1 49. In support of Petitioner's position that the November 14, 2023 IEP denied
2 Student a FAPE in the LRE, Petitioner relies upon *Los Angeles Unified School District v.*
3 *A.O.*, 92 F. 4th 1159 (9th Cir. 2024). The ALJ distinguishes *L.A.U.S.D. v. A.O.* from the
4 current case. In the *L.A.U.S.D. v. A.O.* case, the student's IEP required him to spend
5 approximately 85% of his time in school in a segregated classroom with other deaf and
6 hard of-hearing students. Here, the November 14, 2023 IEP would require Student to
7 spend only 28% of her time in a special education classroom and she would spend 72%
8 of her time in the general education classroom with general education students.

9 50. Petitioner also relies upon *D.R. v. Redondo Beach Unified Sch. Dist.* 56
10 *F.4th 636* (9th Cir 2022) and the four factor test for determining LRE in support of
11 Petitioner's position that the November 14, 2023 IEP denied Student a FAPE in the LRE.
12 The four factors are (1) comparison of the academic benefits a child with a disability
13 receives from placement in the regular classroom with the academic benefits available in
14 a special education classroom; (2) the non-academic benefits the child with a disability
15 receives from being educated in the regular classroom; (3) the potential negative effects
16 that the child with a disability's presence may have on the education of other children in
17 the classroom; and (4) the costs to the school district of providing supplementary aids
18 and services necessary to educate the child in the regular classroom. *Id.* at 643 citing
19 *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1995).

20 51. As the Ninth Circuit notes, the first factor is the most important. And, indeed,
21 in the *D.R. v. Redondo Beach* case, the court determined that the Student was making
22 academic progress on his IEP goals. *Id.* at 645. Here, it was apparent to the Special
23 Education Teacher, the special education teacher that Student was not making progress
24 on her IEP goals, particularly her goals in reading and writing and that is why the IEP
25 proposed additional service minutes. In the November 14, 2023 IEP²²⁴, the present levels
26 state: "[Student] is in the pre-alphabetic stage of reading and writing. [Student] can
27 currently identify 12/21 lower case letters by recognition and the corresponding sounds
28 of 13/21 consonants . . . [Student] is able to identify 4/10 rhyming words and can identify
29 the initial sounds for 4/10 spoken words. She is also able to blend phonemes 5/10 times
30

²²⁴ Student's Ex. 20.

1 and can segment the phonemes 13/30 for 10 spoken words in a cvc pattern.” As a result,
2 the Special Education Teacher proposed increasing Student’s service time for reading in
3 the November IEP. Petitioner has failed to establish by a preponderance of the evidence
4 that the November 14, 2023 denied Student a FAPE in the LRE.

5 ***Issue #3***

6 52. Parents allege that the District substantively denied Student a FAPE by
7 removing Student from a general education setting more than the amount of time
8 identified by the District adopted Legacy IEP and/or otherwise failing to implement the
9 Legacy IEP as it was written.

10 53. If a child with a disability (who had an IEP that was in effect in a previous
11 public school in the same State) transfers to a new public school in the same State, and
12 enrolls in a new school within the same school year, the new school (in consultation with
13 the parents) must provide FAPE to the child (including services comparable to those
14 described in the child’s IEP from the previous school) until the new school either adopts
15 the IEP from the child’s previous school or develops, adopts, and implements a new IEP.
16 See 34 C.F.R. § 300.323(e). Here, the Student transferred to the District from a charter
17 school, Legacy Traditional School, whose first day of school for the 2023-24 school year
18 was July 19, 2023. The Student’s mother testified that the Student attended Legacy for
19 approximately a few weeks before transferring to the District, whose first day of school
20 for the 2023-24 school year was August 3, 2023.

21 54. Dr. John Warner, school psychologist, testified that when the Student
22 enrolled at [REDACTED] Elementary School, he reviewed her most current evaluation
23 conducted by Legacy, and determined that it met the requirements for a comprehensive
24 evaluation. Ms. Julie Cooper, special education teacher at [REDACTED] Elementary School,
25 and Ms. Erika Ussery, speech language pathologist, reviewed the Student’s Legacy IEP
26 and determined that comparable services could be provided.²²⁵ It was anticipated that the

27
28 ²²⁵ It is important to note that in its analysis of comments and changes, the United States Department of
29 Education interprets “comparable services” to mean services that are “similar” or “equivalent.” Federal
30 Register, Vol. 71, No. 156 (August 14, 2006) “Comparable services” takes into account that different
public schools operate on different calendars and/or bell schedules and offer different educational
delivery models. This means that a receiving school implementing another school’s IEP on a temporary
basis should be given discretion to provide services in a manner that enables the student to make

1 team would observe the Student while comparable services were provided and that, once
2 the team could get to know the Student, her IEP team would be convened in order to
3 determine whether to adopt the Legacy IEP or whether a new IEP needed to be
4 developed. And that was, indeed, what happened.

5 55. On November 14, 2024, the District convened the Student's IEP team,
6 which included her parents, to discuss adopting a new IEP to better reflect the Student's
7 needs based on the data collected and the observations of her teachers and related
8 service providers because—as the Special Education Teacher testified and informed [REDACTED]
9 [REDACTED] on August 31, 2023—the Student was not making adequate progress on her IEP
10 goals. Between August 3 and November 14, 2024, the District provided the Student with
11 services comparable to those set forth in her Legacy IEP.

12 56. Petitioner argues that because the Student received additional service
13 minutes outside of the regular classroom that the District altered the Student's LRE,
14 essentially denying her the right to a FAPE. However, the evidence presented at hearing
15 shows that the District adopted Foundations®, a K-3 reading program that utilizes a
16 structured literacy approach grounded in the science of reading, for use in the general
17 education setting. As part of the District's multitier system of supports, the District also
18 offered S.P.I.R.E. and Sounds Sensible for students needing more targeted intervention.
19 S.P.I.R.E. is an intervention program designed to provide one on one or small group
20 instruction in phonemic awareness, phonics of fluency, vocabulary, and comprehension.
21 Sounds Sensible is a small group (three to five students) phonological awareness and
22 beginning phonics program. Both S.P.I.R.E. and Sounds Sensible are part of the District's
23 Tier 3 intervention system.

24 57. Ms. Baca testified that in order to provide S.P.I.R.E. and Sounds Sensible
25 with fidelity in a manner consistent with the publisher's research, it must be provided at
26 least four days per week, 30 minutes per session. The Legacy IEP included 240 minutes
27 per month of specially designed instruction in reading comprehension in a special
28 education setting and 240 minutes per month of specially designed instruction in basic
29 reading in the general education setting. The Legacy IEP included 240 minutes per month

30 progress on their IEP goals and in the general curriculum while not holding the school to provide identical
services.

1 of specially designed instruction in “math calculation.” In *Board of Education of Hendrick*
2 *Hudson Central School District, Westchester County v. Rowley* (“Rowley”), the United
3 States Supreme Court explained that when a “school district does not perform exactly as
4 called for by the IEP, the district does not violate the IDEA unless it is shown to have
5 materially failed to implement the child’s IEP.” *Board of Educ. of Hendrick Hudson Central*
6 *Sch. Dist., Westchester Co. v. Rowley*, 458 U.S. 176 (1982). In *Van Duyn v. Baker School*
7 *District*, the Ninth Circuit Court of Appeals stated that “[a] material failure occurs when
8 there is more than a minor discrepancy between the services provided to a disabled child
9 and those required by the IEP.”

10 58. The Ninth Circuit also cautions, ‘. . . minor failures in implementing an IEP,
11 just like minor failures in following the IDEA’s procedural requirements, should not
12 automatically be treated as violations of the statute.” *Van Duyn v. Baker Sch. Dist.*, 502
13 F.3d 811, 822 (9th Cir. 2007) It is significant that Petitioner’s argument that the District
14 failed to properly implement the Legacy IEP rests on the assertion that the District
15 provided too many minutes of specially designed reading instruction outside the general
16 education classroom. In the typical “implementation” case, the complainant argues that
17 the school provided less services than were set forth in the IEP and that therefore the
18 Student was not able to achieve progress on his or her academic goals. Courts in those
19 typical cases look at the lesser services provided as compared to the greater services
20 required by the IEP. The Court then analyzes whether the failure to provide services had
21 a meaningful effect on the Student’s educational progress.

22 59. Here, the District provided service minutes exceeding by some measure the
23 minutes provided in the Legacy IEP, and Petitioner argues that because Student spent
24 less time with her general education peers she missed out on “learning” from her peers.
25 As the United States Supreme Court made clear in the *Endrew F.* case, “a school must
26 offer an IEP reasonably calculated to enable a child to make progress appropriate in light
27 of the child’s circumstances.” *Endrew F. v. Douglas County School District*, 580 U.S. 386
28 (2017) And, it is progress on the child’s “measurable annual goals” (i.e. IEP goals) which
29 are tailored to the child’s needs and allow the child to make progress in the general
30 education curriculum that are relevant for this analysis. *Id.* at 402. The Supreme Court
rejected the “de minimis” progress standard adopted by the Tenth Circuit, stating “[t]he

1 IDEA demands more. It requires an educational program reasonably calculated to enable
2 a child to make progress appropriate in light of the child's circumstances." Id. at 403.

3 60. As such, to the extent that the District's professionals provided minutes of
4 specially designed instruction in excess of the parameters of the Legacy IEP, it cannot be
5 said that those actions prevented Student from making progress on her IEP goals which
6 were tied to the general education curriculum—not to learning from her peers—and
7 therefore, there is no denial of FAPE.

8 ***Issue #4***

9 Petitioner alleges that the District discriminated against Student by denying
10 Student equal access to the District's general education programs. The Office of
11 Administrative Hearings lacks jurisdiction to hear discrimination claims. Accordingly,
12 Petitioner's claim that the District discriminated against Student by denying Student equal
13 access to the District's general education programs is hereby dismissed.

14 **CONCLUSION**

15 61. The evidentiary record demonstrates that the District committed procedural
16 violations of the IDEA that significantly impeded Parents' opportunity to participate in the
17 decision-making process, and thereby denied Student a FAPE. The District predetermined
18 placement/services and implemented them without prior written notice which denied
19 parental participation and is a substantive denial of FAPE. The evidentiary record further
20 demonstrates that the November 14, 2023 IEP fails to provide a FAPE to Student.

21 **REMEDIES**

22 With respect to Parents' unilateral private placement of Student at Tempe
23 Montessori, Petitioner did not submit any evidence of the type of curriculum followed by
24 the school and whether the curriculum was allowing Student to make progress or would
25 even be effective to allow Student to make progress. Indeed, Mother testified that she
26 believed it was "Montessori" curriculum being used. She never asked because she relied
27 on the school as the "expert." Ms. Mulholland observed Student in the Montessori
28 program and testified that the Montessori school also needed to be supported by her
29 services.²²⁶ In fact there is no evidence that Student is making any type of academic

30

²²⁶ See Hr'g Tr. vol. II, 125:5 -126:8 (Mulholland).

1 progress at Tempe Montessori; as such it cannot be determined that such placement is
2 “appropriate” as required by C.F.R. § 300.148(b) and (c). There is insufficient evidence
3 to conclude that the unilateral placement at Tempe Montessori was appropriate.
4 Therefore, Petitioner’s request for tuition reimbursement and the costs of transporting
5 (mileage request) the Student to Tempe Montessori is denied.

6 Compensatory education is a form of equitable relief which may be granted for the
7 denial of FAPE to help overcome lost educational opportunity. School Comm. of
8 Burlington v. Dep’t of Educ., 471 U.S. 359, 374 (1985); Student W. v. Puyallup Sch. Dist.,
9 31 F.3d 1489, 1496 (9th Cir. 1994). The result of any award of compensatory education
10 should be an award that is “reasonably calculated to provide the educational benefits that
11 likely would have accrued from special education services the school district should have
12 provided in the first place. Reid v. District of Columbia, 401 F.3d 516, 523 (D.C. Cir. 2005).

13 Student is entitled to a remedy for the District’s failure to provide a FAPE through
14 the November 14, 2023 by removing all direct physical therapy services. Although the
15 ALJ was not provided with the Mesa Unified School District School Calendar, the ALJ
16 considers that there were 12 days between the time that the District ceased providing
17 Physical Therapy services to Student, on November 14, 2023, to the time that Student
18 stopped attending [REDACTED] in mid-December. Considering that prior to the November 14,
19 2023 IEP, Student received 90 minutes per month of direct Physical Therapy services,
20 an award of 60 minutes of Physical Therapy is reasonable.

21 ORDER

22 Based on the findings and conclusions above,

23 **IT IS ORDERED** that the District must fund 60 minutes of direct physical therapy
24 to Student from a private provider selected by Student.

25 **IT IS FURTHER ORDERED** that the District’s November 14, 2023 IEP cannot be
26 implemented as it does not provide FAPE to Student.

27 **IT IS FURTHER ORDERED** that Petitioner’s Stay Put Motion is granted in part.

28 **IT IS FURTHER ORDERED** that Student’s Stay Put shall be the Legacy IEP.

29 **IT IS FURTHER ORDERED** that an IEP must be completed for Student as soon
30 as possible.

IT IS FURTHER ORDERED that all other requests for relief are denied.

