

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 **E. S.**, a Student, by and through
4 Parent M. G.,

No. 13C-DP-005-ADE

5 Petitioners,

6 -v-

**ADMINISTRATIVE
LAW JUDGE DECISION**

7 **Flagstaff Arts and Leadership Academy,**

8
9 Respondent.

10
11 **HEARING:** February 6-8, 2013

12
13 **APPEARANCES:** Attorney Hope N. Kirsch, KIRSCH-GOODWIN & KIRSCH, PLLC,
14 appeared on behalf of Petitioners, accompanied by Parent; attorneys Kenneth Brendel
15 and Jeffrey Dollins, MANGUM, WALL, STOOPS & WARDEN PLLC, appeared on behalf of
16 Flagstaff Arts and Leadership Academy ("FALA"), a charter school, accompanied by
17 school representative Ariana Wilder, Dean of Academy. Certified Court Reporter
18 Annette Satterlee, PERFORMANCE REPORTERS, INC., was present and recorded the
19 proceedings as the official record of the hearing.

20
21 **WITNESSES:**¹ Deborah Graham, **FALA Special Education Director**; Karen
22 Nickl, Ph.D., Psychologist, [REDACTED] ("**Parent**") (via telephone) ([REDACTED]
23 **Psychologist**"); Ariana Wilder, FALA Dean of Academy; Wendy LeFevre, Educational
24 Director, [REDACTED] (via telephone) ("**Education Director**"); Coady Schueler, Ph.D.,
25 Clinical Psychologist, [REDACTED] (via telephone); Petitioner [REDACTED] M.D. ("**Parent**");
26 **Amy Serin**, Ph.D., Neuropsychologist Evaluator; Christina Bauer, FALA School
27 Counselor; Joe Sweet, FALA English Teacher; Ryan Narce, FALA Social Studies
28 Teacher; and Jeanne Ledvina, FALA Math Teacher.

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30 **ADMINISTRATIVE LAW JUDGE:** Eric A. Bryant

Parent brings this due process action, on behalf of Student, claiming that Respondent did not provide Student a free appropriate public education ("FAPE"), seeking reimbursement for parental placement in a special private school, and seeking

¹ Throughout this Decision, proper names of Parent, school staff, 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.

1 an order placing Student in that special private school. The law governing these
2 proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United States
3 Code ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in 2004),² and its
4 implementing regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well
5 as the Arizona Special Education statutes, Arizona Revised Statutes
6 (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative
7 Code ("A.A.C.") R7-2-401 through R7-2-406.

8 Procedural History

9 Petitioners filed their due process complaint on July 26, 2012, and filed an
10 amended complaint on November 20, 2012. The complaint, as amended, claims that
11 Respondent, a charter school, did not offer Student a FAPE in a January 2012
12 Individualized Education Program ("IEP"), and also in a June 2012 IEP, for multiple
13 reasons that are both substantive and procedural. Petitioners seek reimbursement for
14 a unilateral parental placement and an order that Student remain at that parental
15 placement at Respondent's expense. Respondent denies all claims.

16 Evidence and Issues at Hearing

17 The parties presented testimony and exhibits at a formal evidentiary hearing
18 held February 6-8, 2013. The parties presented testimony from the witnesses listed
19 above³ and offered into evidence Petitioners' Exhibits A through CC and Respondent's
20 Exhibits A through F.⁴

21 After the Exhibits and testimony were admitted, the parties submitted written
22 arguments to the tribunal. The final memorandum was filed on April 29, 2013.

23 Petitioners make the following claims:

24 1) FALA denied Student FAPE by failing to evaluate Student as a
25 student with a suspected disability from August 2010 to January
26 2012.

27 2) FALA denied Student FAPE by failing to provide Parent with a copy of
28 the IDEA procedural safeguards prior to June 2012.

29 ² By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of
30 2004," IDEA 2004 became effective on July 1, 2005.

³ Transcripts of the testimony are part of the record.

⁴ The Exhibits consist of approximately 3000 pages of documentation, a portion of which is duplicative.

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- 3) FALA denied Student FAPE by failing to assess Student in all suspected areas of disability in January 2012.
- 4) FALA denied Student FAPE by failing to find Student eligible for special education as a Student with an Emotional Disability in January 2012.
- 5) FALA denied Student FAPE by failing to create an IEP in January 2012 that addressed all of Student's needs and offered Student meaningful educational benefit.
- 6) FALA denied Student FAPE by failing to create an IEP in June 2012 that addressed all of Student's needs and offered Student meaningful educational benefit.
- 7) FALA denied Student FAPE by failing to include all required members of the IEP team when creating the January 2012 IEP and the June 2012 IEP.
- 8) FALA denied Student FAPE by predetermining Student's placement in the June 2012 IEP.
- 9) Parent's unilateral placement is an appropriate placement for Student.
- 10) Student requires a residential placement such as the placement Parent made to receive educational benefit.
- 11) Parent is entitled to reimbursement for the expense of obtaining a Neuropsychological Evaluation of Student.

Parent argues that there were both procedural and substantive violations of the IDEA during Student's attendance at FALA. However, the main contention is that neither the January 2012 IEP nor the June 2012 IEP offered Student a FAPE. Therefore, Parent argues, unilateral parental placement was warranted and that the parental placement is an appropriate placement. In this circumstance, Parent continues, the IDEA authorizes reimbursement of tuition and other expenses for Student to attend the parental placement, and authorizes a ruling that FALA fund the parental placement through, at least, May 2014. Respondent defends its actions by arguing that the IEPs offered

1 Student a FAPE and that parental placement is not an appropriate placement for
2 Student.

3 The Administrative Law Judge has considered the entire record, including the
4 testimony and Exhibits,⁵ and now makes the following Findings of Fact, Conclusions of
5 Law, and Decision finding that Respondent did not offer Student a FAPE, that Parent is
6 entitled to full reimbursement, and that the parental placement is appropriate and
7 should be maintained.⁶

8 **FINDINGS OF FACT**

9 1. Student began attending FALA in August 2010, for her seventh grade year.
10 Her parents are divorced and have joint custody. At that time, she split time living with
11 Parent⁷ and her other parent. When she began at FALA, Student had a diagnosis of
12 Attention Deficit Hyperactivity Disorder ("ADHD")⁸ and struggled with organization,
13 impulsivity, and distractibility.⁹ In October 2010, Parent met with the school and they
14 created a plan to track Student's daily assignments.¹⁰ There was no discussion of
15 special education or accommodations for students with disabilities either under the
16 IDEA or under Section 504 of the Rehabilitation Act of 1973 ("504").¹¹ Nor was there
17 any suggestion that Student be evaluated for special education eligibility.¹²

18 2. The assignment tracking plan did not work very well, likely because it relied
19 on Student to carry papers back and forth between teachers and Parent and have them
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21 _____
22 ⁵ The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned in
23 this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if
24 the witness is not specifically mentioned in this Decision.

25 ⁶ Because the IDEA generally mandates that the Administrative Law Judge's determination of whether a
26 student received a FAPE must be based on substantive grounds (34 C.F.R. § 300.513(a)(1)), and
27 because the Administrative Law Judge finds substantive violations of the IDEA, not all of Petitioners'
28 claims are addressed herein. This Decision addresses whether the January 2012 IEP and the June 2012
29 IEP offered Student a FAPE. Finding that they do not, the Administrative Law Judge then addresses
30 whether the parental placement is an appropriate placement for Student. The only other issue addressed
herein is Parent's claim for reimbursement of expenses in obtaining the evaluation from Dr. Serin.

⁷ Parent is a highly educated medical professional. Her testimony at hearing is found to be generally
credible and consistent with the available documentation.

⁸ Exhibit A2.

⁹ Exhibit L1-5.

¹⁰ Testimony of Parent, Reporter's Transcript of Proceedings ("RTP") Vol. II at 150-51.

¹¹ *Id.* at 153.

¹² *Id.*

1 signed.¹³ Student's grades were suffering and her behaviors at school were becoming
2 worse.¹⁴ Parent hired a tutor to help Student with homework at home,¹⁵ but this did not
3 seem to be making much difference.

4 3. In March 2011, Parent requested a meeting with teachers and "special ed
5 staff" to discuss her concerns about Student's "academic performance."¹⁶ At the
6 meeting, Parent asked if Student was eligible for a 504 plan or special education.¹⁷ In
7 response, FALA developed a 504 plan for Student.¹⁸ No offer to evaluate Student for
8 IDEA eligibility was made and FALA did not provide Parent with a Procedural
9 Safeguards Notice.¹⁹ Student finished the school year with the 504 plan, but continued
10 to struggle. During this time, FALA became aware that Student was talking and writing
11 about suicide, pregnancy, and violence.²⁰ A school counselor addressed these things
12 with Student, but Parent chose to have an outside private counselor work with Student
13 primarily.²¹

14 4. Her eighth grade year started with the same problems. She had "outbursts"
15 and other problem behaviors in class.²² The school counselor learned that Student was
16 cutting herself and discussed it with her.²³ By the end of September, Student had
17 detention.²⁴ Teachers asked advice from Parent as to how to help Student.²⁵ Parent
18 told one teacher that Student was "2-3 years behind her peers, both cognitively and
19 social/emotional IQ-wise" and that Student "suffers from a cognitive disability that is
20 difficult to quantitate [sic] and tantalizingly easy to dismiss as an unwillingness to put
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24 ¹³ *Id.* at 151-52.

25 ¹⁴ Exhibit L10-L70 (emails between Parent and teachers); Exhibit B1-3 (behavior incident logs).

26 ¹⁵ Exhibit L10-70.

27 ¹⁶ Exhibit L72.

28 ¹⁷ Testimony of Parent, RTP Vol. II at 157.

29 ¹⁸ Exhibit C7-8.

30 ¹⁹ Exhibit C1.

²⁰ Exhibits L89, L91.

²¹ Testimony of FALA School Counselor, RTP Vol. III at 222.

²² Exhibits L99, L107.

²³ Exhibit B7.

²⁴ Exhibit L115.

²⁵ Exhibit L123.

1 forth effort."²⁶ FALA then called a meeting in October 2011 to address Student's
2 problems and the 504.

3 5. There is no notice for that meeting in the record, but FALA Special Education
4 Director testified that the purpose of the meeting was to consider exiting Student from
5 the 504 plan and consider her for special education.²⁷ At the meeting, Parent informed
6 FALA that she suspected that Student might have Asperger's Syndrome or some other
7 condition on the autism spectrum and had obtained an appointment for Student to be
8 evaluated by a neuropsychologist in November 2011. FALA Special Education Director
9 informed Parent that FALA could evaluate Student, but Parent declined, stating that the
10 appointment was only a few weeks away and she did not want to cancel it.²⁸ Due to the
11 impending evaluation, no decisions were made at that meeting. Everyone agreed to
12 wait for the results of the evaluation.

13 6. In November 2011, Student was evaluated by Amy Serin, Ph.D., a clinical
14 neuropsychologist who has been in practice since completing her internship at Phoenix
15 Children's Hospital in 2004.²⁹ She is currently in private practice. She performed a
16 Neuropsychological Evaluation that included interviews with Parent and Student;
17 behavior questionnaires filled out by Parent, Student, and a teacher; and a battery of
18 tests to determine cognitive functioning, executive functioning, and other areas of
19 Student's functioning. Dr. Serin's written evaluation report (hereinafter "written
20 evaluation" or "report") is comprehensive and thorough, and carries a great deal of
21 weight.³⁰

22 7. Dr. Serin diagnosed Student with Anxiety Disorder NOS (Not Otherwise
23 Specified), Reading Disorder, and Learning Disorder NOS (Nonverbal Learning
24 Disability).³¹ She found rule out diagnoses of ADHD, Combined Type; Cyclothymic
25 Disorder; and Dysthymic Disorder.³² She also made a rule out diagnosis of Borderline

26 ²⁶ Exhibit L126.

27 ²⁷ RTP Vol. I at 58.

28 ²⁸ Testimony of Parent, RTP Vol. II at 163-64.

29 ²⁹ Exhibit D1. Dr. Serin has a Ph.D. in clinical psychology with a concentration in neuropsychology. RTP
Vol. III at 101.

30 ³⁰ Exhibit D4-21.

31 ³¹ Exhibit D21.

32 ³² *Id.*

1 Personality Disorder.³³ These findings show a student with significant disabilities that
2 interfere with her ability to learn. The opening paragraph of Dr. Serin's "Summary" in
3 her written evaluation provides a helpful description of Student's overall condition:

4 [Student] is a ■■■-year-old teenager whose overall cognitive ability cannot
5 easily be summarized because her verbal reasoning abilities are much
6 better developed than her nonverbal reasoning abilities. This pattern of
7 scores can be indicative of a Nonverbal Learning Disability (NLD), which
8 is relative dysfunction in the right hemisphere. Further evidence for this is
9 [Student]'s relative difficulty with math calculation, and her overall
10 weaknesses in visuospatial skills. Individuals with NLD often appear to
11 have Asperger's Disorder as the two disorders share several traits. The
12 difference is that individuals with NLD commonly have lower perceptual
13 reasoning (nonverbal abilities) and therefore math disabilities. It appears
14 the lack of integration between the hemispheres and the inefficient
15 processing in the right hemisphere create a lack of social awareness and
16 difficulties reading nonverbal communication cues. The result is a lack of
17 social accommodations for life skills such as navigation, balancing a
18 checkbook, and math computation. [Student] will learn better verbally and
19 should not rely on visual maps or visual cues to aid in her learning.³⁴

20 Dr. Serin also notes that Student has a weakness in decoding ability that is suggestive
21 of dyslexia. Her inability to overcome that weakness has resulted in "reading abilities
22 [that] are not at the level that would be expected given her verbal intellectual
23 abilities."³⁵ Dr. Serin further noted the presence in Student of a high level of anxiety
24 and a poor "style" of attachment in relationships.³⁶

25 8. Student's level of functioning is compromised with respect to daily living
26 skills.³⁷ She appears to be higher functioning than she actually is because of her
27 higher verbal abilities.³⁸ Dr. Serin noted that "all individuals who teach, treat, and work
28 with [Student] should be aware of her unique constellation of strengths and
29 weaknesses."³⁹ Dr. Serin also noted Student's "many executive functioning deficits,"
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33 *Id.* She explained at hearing that Student was too young to carry that diagnosis, but was "developing"

34 *Id.*

35 Exhibit D19.

36 *Id.*

37 Exhibit D19-20.

38 Exhibit D20.

39 *Id.*

Id.

1 and attached to her written evaluation a “comprehensive list of interventions” to
2 address daily living skills and executive functioning skills.⁴⁰

3 9. Finally, Dr. Serin recognized that Student had “so many issues that warrant
4 treatment” and made specific recommendations for addressing those issues at school.
5 Although Dr. Serin does not expressly state it, it is clear that she believed that Student
6 was eligible for special education.

7 10. In preparation for a meeting to determine special education eligibility for
8 Student, Parent sent Dr. Serin’s report to FALA in early January 2012, except that
9 Parent removed the first three pages of the copy she sent to FALA. She explained in
10 an email to FALA that she was doing this because Student’s “social history” was “not
11 pertinent to her school difficulties.”⁴¹ Those first three pages contain names, dates and
12 other data identifying the evaluation, as well as sections addressing the reason for the
13 evaluation, a list of the testing instruments used, Student’s background information
14 (social history), and Dr. Serin’s behavioral observations. At the hearing, FALA Special
15 Education Director expressed frustration that the pages were missing and indicated
16 that FALA could not fully evaluate Student without them.⁴² However, while there is
17 some truth to FALA Special Education Director’s testimony, the Administrative Law
18 Judge has reviewed the written evaluation and finds that the absence of those pages
19 did not significantly restrict FALA’s ability to assess Student’s needs.⁴³

20 11. On January 10, 2012, a Multidisciplinary Evaluation Team (“MET”) that
21 included Parent met and, without any psychological evaluation other than Dr. Serin’s,
22 found Student eligible for special education in the categories of Specific Learning
23 Disability (“SLD”) and Other Health Impairment.⁴⁴ The areas of eligibility for SLD were
24 found to be Basic Reading Skills, Written Expression, Mathematics Calculation,
25 Mathematics Problem Solving, and Reading Fluency.⁴⁵ The same team immediately re-

26 ⁴⁰ *Id.* The attached document is a 22-page “Executive System Intervention” narrative that describes
27 approaches to intervention for executive functioning. Exhibit D22-44.

28 ⁴¹ Exhibit L149.

29 ⁴² RTP, Vol. I, at 125-30. FALA received the full document a few months later.

30 ⁴³ A great amount of the information in the first three pages was repeated later in the report. In addition,
FALA could have performed its own evaluation, but did not do so.

⁴⁴ Exhibit F1.

⁴⁵ *Id.*

1 formed as an IEP team and created an IEP for Student. The IEP provided that her
2 placement was to be at FALA in a general education setting at least 80% of the day.⁴⁶
3 The team found that Student's behavior significantly and adversely affected her
4 progress in the general curriculum.⁴⁷ The IEP notes that Student often needs
5 prompting to initiate work and stay on task, and needs supervision when working.⁴⁸
6 The IEP also provides a long list of accommodations for Student, including preferential
7 seating, extra time on written assignments, and other helpful interventions.⁴⁹

8 12. The goals written in the January 2012 IEP are extremely brief. Only four
9 goals were written: two for language arts, one for math, and one for behaviors. The
10 language arts goals concern accuracy of identification of similes and metaphors when
11 reading a grade level text, and creating an outline for a writing assignment of a four
12 paragraph essay.⁵⁰ The math goal concerns proper sequencing for solving algebra
13 problems.⁵¹ Finally, the behavior goal requires her to comply with prompts to get back
14 on task.⁵²

15 13. Dr. Serin testified at the hearing that the January 2012 IEP failed to include
16 goals to address a host of Student's needs that were identified in the written evaluation,
17 such as visuospatial skills, perceptual reasoning, social deficits, social skills and life
18 skills, and disabilities in basic reading and reading fluency.⁵³ She also criticized the
19 IEP for failing to address Students emotional disabilities with goals or services (such as
20 counseling) that would remediate those issues.⁵⁴ She testified that the behavioral goal
21 in the January 2012 IEP was not viable for Student because it did not address "the
22 underlying undercurrent of significant anxiety and some depression. . . ."⁵⁵ She
23 testified that the language arts goals were not appropriate because the outlining goal
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25 ⁴⁶ *Id.*

26 ⁴⁷ Exhibit F4.

27 ⁴⁸ Exhibit F6. There is no formal Functional Behavioral Assessment ("FBA") or Behavioral Intervention
28 Plan ("BIP").

29 ⁴⁹ Exhibit F10.

30 ⁵⁰ Exhibit F7.

⁵¹ Exhibit F8.

⁵² Exhibit F9.

⁵³ RTP, Vol. III at 136-51.

⁵⁴ *Id.* at 134-35.

⁵⁵ *Id.* at 136.

1 was not basic enough and the identification of metaphors and similes did not address
2 basic reading skills or reading fluency.⁵⁶ And, finally, she described “a whole host of
3 problems” with the math goal’s use of algebra, including that Student has a hard time
4 with basic math operations and word problems.⁵⁷

5 14. The evidence shows that the January 2012 IEP did not contain appropriate
6 goals for Student. Thus, the January 2012 IEP did not offer Student a FAPE.

7 15. FALA implemented the January 2012 IEP and Student’s problems
8 continued. Student’s problem behaviors were escalating, both at school⁵⁸ and at home.
9 During the night on a weekend in late March 2012, Student snuck out of Parent’s home
10 and was missing for five hours.⁵⁹ When Student returned home, she became angry
11 with Parent, locked herself in the bathroom, and gave herself multiple, mostly
12 superficial, cuts.⁶⁰ Parent saw this as a need for emergency help and contacted a
13 hospital. At the hospital, behavioral health professionals attempted to find an available
14 psychiatric bed for Student, but could not.⁶¹ Eventually, Parent placed Student in a
15 wilderness program in ██████████⁶² Student was in that program for about six weeks.⁶³

16 16. Parent had been considering residential placement for Student since at
17 least March 2012. Shortly after the bathroom cutting incident and wilderness
18 placement, Parent informed FALA that she planned to place Student in a residential
19 setting and seek reimbursement from FALA.⁶⁴ In late May 2012, Parent placed Student
20 at ██████████ (“██████”) in ██████████

21 17. ██████████ is a small residential school for girls with learning disabilities and
22 emotional problems.⁶⁵ Many of the 16 students at ██████████ have a learning disability
23 similar to Student’s.⁶⁶ ██████████ is a state-accredited school with certified teachers and a

24
25 ⁵⁶ *Id.* at 137-40.

⁵⁷ *Id.* at 142-43.

⁵⁸ See Exhibit B, the disciplinary log. See also Exhibits L272 and L284.

⁵⁹ Testimony of Parent, RTP Vol. 2 at 196.

⁶⁰ *Id.* at 196-98.

⁶¹ *Id.* at 198-99.

⁶² *Id.* at 200-02.

⁶³ Parent is not requesting reimbursement for that program.

⁶⁴ Exhibits L302, L303.

⁶⁵ Testimony of ██████████ Psychologist, RTP Vol. at 181-82.

⁶⁶ *Id.* at 182.

1 curriculum that aligns with [REDACTED] standards.⁶⁷ [REDACTED] Psychologist, who treats Student,
2 and [REDACTED] Educational Director testified about the school and Student at the hearing.

3 18. [REDACTED] Psychologist testified that [REDACTED] has an intensive program of wrap-
4 around services, high staff-to-student ratio, and, for Student, a one-on-one arm's length
5 aide.⁶⁸ The aide is not for safety but to prompt Student to stay on task, to clarify
6 misunderstandings about work to be done, to calm Student when she is disruptive and
7 impulsive, to take her for a walk or out of the classroom as needed, to help her process
8 her feelings, to return her to class, to help mediate situations with peers and teachers,
9 and to help her be successful.⁶⁹ [REDACTED] staff understand the pathology of NLD and the
10 treatment is research based.⁷⁰ The one-on-one aide is not stigmatizing at [REDACTED]
11 because most of the other girls also have one or have had one.⁷¹ The residential and
12 the school staff work together and meet weekly.⁷²

13 19. [REDACTED] Educational Director testified that she directs all education at [REDACTED]
14 supervises teachers, supervises instruction of students, occasionally provides direct
15 instruction, observes classes and is part of the treatment team that discusses students
16 each week.⁷³ Student's school day at [REDACTED] starts at 8:15 AM and includes four classes
17 of instruction (Math including math computation and fluency, Earth Science, English,
18 and American history), and two other classes such as fine arts, dance, drama, or
19 equine science (for which she receives school credit as it is aligned with core standards
20 under career technical education).⁷⁴ Classes have a ratio of one certified teacher and
21 one residential staff to five or six students per class, with some students having a one-
22 on-one aide.⁷⁵ Homework is assigned based on a student's ability.⁷⁶ All teachers are
23 trained in NLD and members of the Learning Disabilities Association.⁷⁷ The entire

24
25 ⁶⁷ Exhibit T116-48; Testimony of [REDACTED] Education Director, Vol. II at 6-8.

26 ⁶⁸ RTP Vol. I at 188-89 and 216-17.

27 ⁶⁹ *Id.*

28 ⁷⁰ Testimony of Dr. Serin, RTP Vol. III at 150-51.

29 ⁷¹ Testimony of [REDACTED] Psychologist, RTP Vol. I at 217.

30 ⁷² *Id.* at 183, 215.

⁷³ RTP Vol. II at 5-6.

⁷⁴ *Id.* at 7-9, 16.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 18.

1 program is structured.⁷⁸ The campus has dedicated classrooms.⁷⁹ Student receives
2 grades.⁸⁰ Teachers address anxiety in the classroom and there is a study skills class
3 where students work on assignments, complete homework, and are taught study
4 skills.⁸¹ Since she began at [REDACTED], Student has progressed in writing (including
5 grammar and punctuation), math, executive function and managing assignments (she
6 now barely misses assignments).⁸² Her anxiety in school has decreased.⁸³ [REDACTED]
7 school program is year round; Student attended [REDACTED] during Summer 2012.⁸⁴

8 20. At [REDACTED], Student receives specially-designed instruction and intensive
9 services.⁸⁵

10 21. Based on the testimony of the witnesses from [REDACTED] who the Administrative
11 Law Judge finds to be credible and reliable witnesses, the evidence shows that Student
12 requires a school setting that is highly structured where she is taught proper social
13 interaction with peers and adults and how to control her anxiety.⁸⁶ She has done well
14 at [REDACTED] because it is highly structured and consistent, addresses her academic, social,
15 and emotional needs, provides extra help with homework and executive functioning
16 from staff throughout the day who are specially trained in NLD.⁸⁷ The educational
17 component cannot be separated from the clinical/therapeutic component for Student;
18 they are intertwined in such a way that the social and emotional aspects affect her
19 academic performance.⁸⁸

20 22. Students at [REDACTED] typically stay there 18 to 24 months.⁸⁹ [REDACTED] prepares them
21 to function in a less restrictive environment.⁹⁰

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24 ⁷⁸ *Id.* at 9.

⁷⁹ Exhibit T15-17.

⁸⁰ Testimony of [REDACTED] Education Director, RTP Vol. II at 33.

⁸¹ *Id.* at 10.

⁸² *Id.* at 11-13. Exhibit T74-108.

⁸³ Testimony of [REDACTED] Education Director, RTP Vol. II at 12.

⁸⁴ *Id.* at 25-26.

⁸⁵ *Id.* at 13-14.

⁸⁶ *Id.* at 14-15.

⁸⁷ *Id.* at 31.

⁸⁸ *Id.* at 15, 20-21, 31.

⁸⁹ Testimony of [REDACTED] Psychologist, RTP Vol. I at 211.

⁹⁰ *Id.*

1 23. Upon receiving Parent's April 16, 2012 notice of unilateral placement, FALA
2 sent Parent a letter acknowledging the noticed of parental placement, characterizing it
3 as a "withdrawal," and denying the reimbursement claim.⁹¹ FALA invited Parent to "re-
4 enroll" Student and schedule an IEP meeting to address Student's needs. While
5 Parent disagreed that she had withdrawn Student from FALA, she reluctantly re-
6 enrolled Student and requested an IEP meeting.⁹² That meeting occurred on June 8,
7 2012, and was designated as a meeting to consider amending the January 2012 IEP.⁹³

8 24. Student's IEP team created an amended IEP for Student in June 2012.⁹⁴
9 Parent objected to the IEP.⁹⁵ The June 2012 IEP builds on the January 2012 IEP,
10 making several changes. First, the team added the eligibility category of Emotional
11 Disability.⁹⁶ Also, placement was changed to a general education setting for at least
12 40% of the day and no greater than 80% of the day.⁹⁷

13 25. A significant change occurred with the goals. Three goals from the January
14 2012 IEP remained: the language arts goal relating to similes and metaphors, the
15 algebra problems math goal, and the language arts outlining goal, which was retained
16 but modified to outlining one paragraph instead of four.⁹⁸ In addition, new goals were
17 added: a decoding goal in language arts, a math calculation skills goal in math, two
18 daily living skills goals, and three social/emotional goals.⁹⁹ Although this IEP was an
19 improvement from the January 2012 IEP, Dr. Serin testified that it was not adequate to
20 offer Student educational benefit.¹⁰⁰

21 26. Dr. Serin noted that some of the goals did not indicate how they would be
22 implemented, so that there was no way to tell if they would be effective. For example,
23 Dr. Serin did not have a problem with the language arts decoding goal.¹⁰¹ However,

24
25 ⁹¹ Exhibit L309.

⁹² Exhibit L317.

26 ⁹³ Exhibit O1.

⁹⁴ Exhibit O.

27 ⁹⁵ Exhibit O3.

⁹⁶ Exhibit O1.

28 ⁹⁷ *Id.*

⁹⁸ Exhibit O8-9.

29 ⁹⁹ Exhibit O8-11.

¹⁰⁰ RTP Vol. III at 152-73.

30 ¹⁰¹ *Id.* at 154.

1 she wondered what reading program would be used to implement it. When she was
2 told that other evidence suggested that the "Wilson" reading program would be used,
3 Dr. Serin testified that Wilson would be inappropriate for Student and that Student
4 should be using the "Lindamood-Bell" program due to her NLD.¹⁰² Another big concern
5 that Dr. Serin expressed related to placement. As noted, the level of service statement
6 in the June 2012 IEP required a significant amount of time out of the general education
7 setting. But the services page of the IEP indicated that all instruction would be given in
8 a general education classroom.¹⁰³ Furthermore, Dr. Serin testified that Student needed
9 intensive behavioral support, by which she meant continuous, 24-hour support.¹⁰⁴ This
10 means that only a residential setting would be appropriate for Student. So, Dr. Serin
11 did not believe that the June 2012 IEP was adequate to meet Student's needs.¹⁰⁵

12 27. The evidence shows that Student needs an intensive program of behavioral
13 support in order to receive educational benefit. Thus, the June 2012 IEP did not offer
14 Student a FAPE.

15 28. In July 2012, Parent filed this due process complaint, requesting
16 reimbursement for placement at [REDACTED]

17 CONCLUSIONS OF LAW

18 APPLICABLE LAW

19 FAPE

20 1. Through the IDEA, Congress has sought to ensure that all children with
21 disabilities are offered a free appropriate public education that meets their individual
22 needs.¹⁰⁶ These needs include academic, social, health, emotional, communicative,
23 physical, and vocational needs.¹⁰⁷ To do this, school districts must identify and
24 evaluate all children within their geographical boundaries who may be in need of
25 special education and services. The IDEA sets forth requirements for the identification,
26

27 ¹⁰² *Id.* at 155.

28 ¹⁰³ Exhibit O19.

29 ¹⁰⁴ *Id.*

30 ¹⁰⁵ *Id.* at 172.

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

¹⁰⁷ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106).

1 assessment and placement of students who need special education, and seeks to
2 ensure that they receive a free appropriate public education. A free appropriate public
3 education (“FAPE”) consists of “personalized instruction with sufficient support services
4 to permit the child to benefit educationally from that instruction.”¹⁰⁸ The IDEA mandates
5 that school districts provide a “basic floor of opportunity,” nothing more.¹⁰⁹ It does not
6 require that each child’s potential be maximized.¹¹⁰ A child receives a FAPE if a
7 program of instruction “(1) addresses his unique needs, (2) provides adequate support
8 services so he can take advantage of the educational opportunities and (3) is in accord
9 with an individualized educational program.”¹¹¹

10 The IEP

11 2. Once a child is determined eligible for special education services, a team
12 composed of the child’s parents, teachers, and others formulate an Individualized
13 Education Program (“IEP”) that, generally, sets forth the child’s current levels of
14 educational performance and sets annual goals that the IEP team believes will enable
15 the child to make progress in the general education curriculum.¹¹² The IEP tells how
16 the child will be educated, especially with regard to the child’s needs that result from
17 the child’s disability, and what services will be provided to aid the child. The child’s
18 parents have a right to participate in the formulation of an IEP.¹¹³ The IEP team must
19 consider the strengths of the child, concerns of the parents, evaluation results, and the
20 academic, developmental, and functional needs of the child.¹¹⁴ To foster full parent
21 participation, in addition to being a required member of the team making educational
22 decisions about the child, school districts are required to give parents written notice
23 when proposing any changes to the IEP,¹¹⁵ and are required to give parents, at least
24

25
26 ¹⁰⁸ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

27 ¹⁰⁹ *Id.*, 458 U.S. at 200.

28 ¹¹⁰ *Id.* at 198.

29 ¹¹¹ *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).

30 ¹¹² 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

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

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

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

1 once a year, a copy of the parents' "procedural safeguards," informing them of their
2 rights as parents of a child with a disability.¹¹⁶

3 Reimbursement for Private School Placement

4 3. Parents who dispute whether an IEP provides a FAPE to a child, and who as
5 a result enroll that child in a private school, may receive reimbursement for the costs of
6 that private-school enrollment under certain circumstances.¹¹⁷ The program offered by
7 the school district must fail to provide a FAPE to the child and the private school must
8 be an "appropriate" placement.¹¹⁸ A private school placement may be appropriate even
9 if it does not operate under public school standards.¹¹⁹ Under these circumstances,
10 parents may "enroll the child in a private preschool, elementary school, or secondary
11 school without the consent of or referral by the [school district]. . ." and seek
12 reimbursement from the school district for the expense of that enrollment from a court
13 or hearing officer.¹²⁰ Indeed, parents have "an equitable right to reimbursement for the
14 cost of providing an appropriate [private] education when a school district has failed to
15 offer a child a [free appropriate public education]."¹²¹ Furthermore, the placement does
16 not have to meet IDEA requirements.¹²²

17 4. However, an award for reimbursement can be reduced or denied in various
18 circumstances.¹²³ An award may be reduced or denied if the parents have not given
19 adequate notice as set forth in the IDEA.¹²⁴ There is no claim by FALA of inadequate
20 parental notice in this case. Therefore, reimbursement, if warranted, will not be
21 reduced or denied for inadequate parental notice.

22 **DECISION**

23
24 ¹¹⁶ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.

25 ¹¹⁷ 20 U.S.C. § 1415(d)(B).

26 ¹¹⁸ 34 C.F.R. § 300.148.

27 ¹¹⁹ *Id.*

28 ¹²⁰ *Id.*

29 ¹²¹ 34 C.F.R. § 300.148(b) and (c).

30 ¹²² *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992)).

¹²³ *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

¹²⁴ 34 C.F.R. § 300.148(d).

¹²⁵ 34 C.F.R. § 300.148(d)(1). *Anchorage School District v. M.P.*, 689 F.3d 1047, 1059 (9th Cir. 2012) lists other equitable factors that might reduce reimbursement, none of which have been raised here.

1 5. A parent who requests a due process hearing alleging non-compliance with
2 the IDEA must bear the burden of proving that claim.¹²⁵ The standard of proof is
3 “preponderance of the evidence,” meaning evidence showing that a particular fact is
4 “more probable than not.”¹²⁶ Here, Parent seeks reimbursement for her unilateral
5 placement of Student at [REDACTED]. Therefore, Petitioners bear the burden of proving by a
6 preponderance of evidence that Respondent failed to provide Student a FAPE through
7 the January 2012 IEP and the June 2012 IEP, and that placement at [REDACTED] was
8 appropriate.

9 6. Furthermore, this tribunal's determination of whether or not Student received
10 a FAPE must be based on substantive grounds.¹²⁷ If a substantive violation is found,
11 Then FAPE has not been offered and there is no need to address whether a procedural
12 violation has occurred.¹²⁸

13 7. This tribunal finds that Petitioners have met their burden by showing
14 substantive violations of the IDEA with respect to both the January 2012 IEP and the
15 June 2012 IEP. This tribunal also finds, for the reasons stated below, that Parent's
16 unilateral private placement at [REDACTED] is appropriate and must remain the current
17 placement for Student. This tribunal does not find that Parent is entitled to
18 reimbursement for the expense of Dr. Serin's evaluation.

19 The January 2012 IEP¹²⁹

20 8. This tribunal's review of the January 2012 IEP and the June 2012 IEP is
21 limited to the contents of the documents.¹³⁰ Therefore, the question of whether the
22

23 _____
24 ¹²⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

25 ¹²⁶ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
26 (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*
27 *No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

28 ¹²⁷ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

29 ¹²⁸ 34 C.F.R. §§ 300.513(a)(2). Because this tribunal finds substantive violations of the IDEA,
30 Petitioners' procedural claims are not addressed.

¹²⁹ Parent's other claims are not addressed because Parent chose to unilaterally place Student and seek
reimbursement. If the January IEP offered Student a FAPE, Parent would not be entitled to
reimbursement.

¹³⁰ *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001), see also *Union Sch. Dist. v. Smith*,
15 F.3d at 1526 (IDEA requirement of a formal, written offer should be enforced rigorously).

1 IEPs are reasonably calculated to provide educational benefit to Student must be
2 decided on the basis of the contents of the IEPs themselves.

3 9. As found above, the January 2012 IEP was inadequate to offer Student
4 educational benefit because it did not address all of her needs or areas of disability. It
5 failed to provide goals to properly address basic reading, reading fluency, life skills,
6 and other areas of need. As such, it did not offer a FAPE to Student.

7 The June 2012 IEP¹³¹

8 10. Similarly, the June 2012 IEP was not calculated to provide Student
9 educational benefit. Although it improved the goals somewhat, it still did adequately
10 address all areas and did not provide enough specificity to show that it would provide
11 educational benefit to Student. Most notably, the placement at FALA was not
12 appropriate for Student. The evidence shows that Student needed, and still needs, an
13 intensive program like [REDACTED]

14 11. Therefore, FALA cannot be an appropriate placement for Student. The
15 placement decision in the June 2012 IEP was, thus, a substantive violation of the IDEA
16 and denied Student a FAPE.

17 Appropriate Placement

18 12. Petitioners contend that [REDACTED] is an appropriate placement because the
19 teachers and staff are familiar with students who have NLD (indeed, many of the
20 students attending [REDACTED] have that condition) and because Student needs a residential
21 environment with constant behavior supports to help her learn academic skills,
22 functional life skills, and how to be an independent member of society. Respondent
23 argues that a residential setting is not necessary for Student to be educated.

24 13. The requirement that to get reimbursement the parental placement be
25 appropriate is "essential to ensuring that reimbursement awards are granted only when
26 such relief furthers the purposes of the [IDEA]."¹³² In a situation in which the parent

27
28 ¹³¹ This claim is addressed because, if the June 2012 IEP offered Student a FAPE, Parent would not be
entitled to reimbursement for any period after the offer.

29 ¹³² *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 P.3d 1004, 1009 (9th Cir. 2009) (quoting *Forest*
30 *Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242 n.9, 129 S. Ct. 2484, 2493 n.9, 174 L. Ed. 2d 168, 181 n.9
(2009)).

1 has placed a student in a residential facility, the Ninth Circuit has held that the
2 placement is appropriate only if it is necessary to provide special education and related
3 services.¹³³ This requirement furthers the purposes of the IDEA.¹³⁴ Thus, the question
4 that must be answered is “[w]hether a residential placement is necessary to provide
5 special education and related services;” or alternatively, “whether the ‘student is
6 incapable of deriving educational benefit outside of a residential placement.’”¹³⁵

7 14. The Ninth Circuit has also held that, in the context of a parental placement
8 to a residential facility, the analysis “must focus on whether [the residential] placement
9 may be considered necessary for educational purposes, or whether the placement is a
10 response to medical, social, or emotional problems that is necessary quite apart from
11 the learning process.”¹³⁶ And more recently, the Ninth Circuit adopted a standard first
12 established by the Second Circuit:

13 To qualify for reimbursement under the IDEA, parents need not show that
14 a private placement furnishes every special service necessary to
15 maximize their child's potential. They need only demonstrate that the
16 placement provides educational instruction specially designed to meet the
17 unique needs of a handicapped child, supported by such services as are
18 necessary to permit the child to benefit from instruction.¹³⁷

19 Therefore, to be an appropriate parental placement under IDEA standards as
20 interpreted by the Ninth Circuit, the residential placement must be necessary for the
21 student to derive educational benefit and must provide educational instruction specially
22 designed to meet the unique needs of the student, along with services that are
23 necessary for the child to benefit from the instruction.

24 15. The evidence shows that [REDACTED] meets that requirement. At [REDACTED], Student
25 receives specially designed instruction in a setting that provides intensive behavioral
26 support and life skills training. This is critical for Student, as she is heading into her

26 ¹³³ R. J., 588 P.3d at 1009 (quoting *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d at 1500).

27 ¹³⁴ R. J., 588 P.3d at 1009.

28 ¹³⁵ R. J., 588 P.3d at 1009 (quoting *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d at 1499).

29 ¹³⁶ *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 P.3d 1175, 1185 (9th Cir. 2009) (quoting *Clovis
Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990)).

30 ¹³⁷ *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006) (citation and internal quotation marks
omitted) (quoted and adopted in *C. B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159-60 (9th
Cir. 2011)).

1 final years of secondary school. ██████ goal is to prepare Student for a less restrictive
2 setting. This should be accomplished in an 18-24 month period.

3 16. ██████ is an appropriate placement for Student and should remain her
4 placement for 18-24 months from her date of admission.

5 Reimbursement for Dr. Serin's Evaluation

6 17. The final issue to address in this matter is Parent's request for
7 reimbursement of the expense of Dr. Serin's evaluation. The evidence shows, by
8 Parent's own testimony, that she was informed in October 2011 that FALA could
9 evaluate Student and Parent chose to go ahead with November 2011 Dr. Serin
10 appointment rather than have FALA do an evaluation.¹³⁸ The rules applicable to
11 Independent Educational Evaluations (IEEs) are not relevant here, as this was not the
12 type of situation that those rules cover. Parent made a choice and must be held
13 financially responsible for that choice.

14 Conclusion

15 18. FALA denied Student a FAPE in January 2012. As a result, Parent placed
16 Student in an appropriate private placement. FALA attempted to offer Student a FAPE
17 in June 2012, but failed. Parent is entitled to reimbursement of the tuition and expense
18 she has paid for placing Student in ██████ and keeping her there. Furthermore, Student
19 should remain at her current placement at FALA's expense for 18-24 months and until
20 her FALA IEP team determines that another placement is appropriate. Finally, Parent
21 is responsible for payment to Dr. Serin for her evaluation.

22 **DECISION**

23 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
24 Respondent reimburse Parent for ██████ tuition she has paid.¹³⁹

25 IT IS FURTHER ORDERED that Respondent pay Student's tuition at ██████ going
26 forward, for 18-24 months from her admission date and until her FALA IEP team
27 determines that another placement is appropriate.

28
29
30 ¹³⁸ RTP Vol. II at 163-64.

¹³⁹ See Exhibit Z4-14.

1 IT IS FURTHER ORDERED that Respondent reimburse Parent for expenses
2 associated with Student's placement at [REDACTED].¹⁴⁰

3 IT IS FURTHER ORDERED that Parent's request for reimbursement of expense
4 for Dr. Serin's evaluation is denied.

5 Done this day, June 15, 2013.

6
7 /s/ Eric A. Bryant
8 Administrative Law Judge
9

10 **RIGHT TO SEEK JUDICIAL REVIEW**

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

20 Copy sent by **electronic mail** and regular mail
21 this 15 day of June 2013, to:

22 Hope N. Kirsch
23 KIRSCH-GOODWIN & KIRSCH, PLLC
24 8900 E. Pinnacle Peak Road, Suite D-250
25 Scottsdale, Arizona 85255
26 **hope@kgklaw.com**

27 Copy sent by **electronic mail** and regular mail
28 this 15 day of June 2013, to:

29 Jeffrey D. Dollins, Esq.

30 ¹⁴⁰ Exhibits Z17, Z19, Z26, Z28, Z29, Z30, Z33.