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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

Student, by and through Parent

No. 12C-DP-001-ADE

Petitioners,

-v-

Deer Valley Unified School District,

ADMINISTRATIVE
LAW JUDGE DECISION

Respondent.

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HEARING: September 12-13, 2011

APPEARANCES: Attorney Hope N. Kirsch, KIRSCH-GOODWIN & KIRSCH, PLLC, appeared on behalf of Petitioners, accompanied by Parent; attorney Karl H. Widell, GUST ROSENFELD PLC, appeared on behalf of the Deer Valley Unified School District ("DVUSD"), accompanied by district representative Dr. Richard Gray, DVUSD Psychologist. Certified Court Reporter Carole Whipple, GRIFFIN & ASSOCIATES COURT REPORTERS, was present and recorded the proceedings as the official record of the hearing.

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WITNESSES:¹ **Shakira Simmons**, Special Education Teacher, Public Day Autism Center, DVUSD; **Melinda Pelzel**, Special Education Teacher, DVUSD ("**DVUSD Special Education Teacher**"); **Timothy Jordan**, M.D., Developmental Pediatrician; Petitioner (redacted) ("**Parent**"); **Kristina Blackledge**, Parent Advocate; **Bryan Davey**, Ph.D., BCBA-D, Director of Behavioral Services, ACCEL School; **Elaine Dachis**, Special Education Teacher, Sierra Academy ("**Sierra Teacher**"); **Debra Watland**, Director of Sierra Academy; **Nena Holt**, Teacher, DVUSD ("**General Education Teacher**"); **Janet Chmela**, Occupational Therapist; **Valerie Rouse**, Speech Language Pathologist; **Tamara Wheeler**, Student Support Services Manager, DVUSD; and **Richard Gray**, Ph.D., School Psychologist.

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ADMINISTRATIVE LAW JUDGE: Eric A. Bryant

Parent brings this due process action, on behalf of Student, challenging an individualized educational program ("IEP") adopted by Respondent School District,

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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.

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

9 Procedural History

10 Petitioners filed the due process complaint on July 21, 2011. The complaint
11 claims that Respondent School District did not offer Student a free appropriate public
12 education ("FAPE") in a May 2011 IEP, focusing particularly on the procedure used to
13 determine placement location as well as the substantive merits of the placement
14 location. Petitioners seek reimbursement for a unilateral parental placement and an
15 order that Student remain at that parental placement at Respondent School District's
16 expense. Respondent School District denies the claims. When the parties could not
17 resolve the matter during a mediation session held August 9, 2011, the matter
18 proceeded to hearing.

19 Evidence and Issues at Hearing

20 The parties presented testimony and exhibits at a formal evidentiary hearing
21 held September 12-13, 2011. The parties presented testimony from the witnesses
22 listed above³ and offered into evidence Petitioners' Exhibits 1 through 22 and
23 Respondent School District's Exhibits A through G.⁴

24 After the Exhibits and testimony were admitted, the parties argued to the
25 tribunal, in written memoranda, the following issues:

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

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

⁴ Each party's Exhibit Notebook consists of approximately 400 pages of documentation, some of which is
duplicative.

1) Whether Respondent School District predetermined Student's placement in a May 2011 IEP and thereby denied Student a free appropriate public education?

2) Whether parent's unilateral placement of Student in a special private school was an appropriate placement for purposes of reimbursing parent the cost of the placement?

3) Whether Student's current placement by parent should remain Student's placement?

Parent argued that there were both procedural and substantive violations of the IDEA in the denial of a FAPE. Her main contention is that the determination regarding which school Student would attend under the May 2011 IEP was decided without her input.⁵ She also argues that the placement chosen by Respondent School District for Student in the May 2011 IEP is not a proper placement. Respondent School District defends its findings and actions, arguing that a FAPE has been offered to Student and that there has been no IDEA violation.

The Administrative Law Judge has considered the entire record, including the testimony and Exhibits,⁶ and now makes the following Findings of Fact, Conclusions of Law, and Order finding both a substantive and a procedural violation of the IDEA and that Student's current placement in a separate private school is appropriate and should be maintained.

FINDINGS OF FACT

1. Student is a [REDACTED] grader who has been diagnosed with Autism Spectrum Disorder.⁷ He is eligible for special education under the categorical eligibilities of Autism (primary) and Speech/Language Impairment.⁸ Because his cognitive abilities are in the average range and his pragmatic language skills are average,⁹ he has been characterized by some as "high functioning." He does, however, have deficits in

⁵ She calls this "predetermination."

⁶ The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if the witness is not specifically mentioned in this Decision.

⁷ Exhibit 5 at P133.

⁸ Exhibit 2 at P93.

⁹ Exhibit 6 at P137.

1 communication and socialization that are typical of autism.¹⁰ He also has behavioral
2 issues that can impede his learning.¹¹

3 The IEP Process

4 2. In a series of meetings from February to April 2011, while Student was in
5 [REDACTED]¹² Student was comprehensively evaluated and a Multidisciplinary
6 Evaluation Team ("MET"), of which Parent was a member, determined that Student was
7 eligible for special education under the categories above.¹³ The comprehensive
8 evaluation provided a great deal of information about Student's present levels of
9 academic achievement and functional performance. Student's IEP team met in April
10 2011 and created an IEP for the remainder of that school year as well as one for the
11 next school year, Student's [REDACTED] grade year.¹⁴

12 3. Parent believed that the IEP was too weak in academic areas and notified
13 Respondent School District in writing that she would be placing Student in a private
14 placement and seeking reimbursement from Respondent School District.¹⁵ In
15 response, Respondent School District reconvened the IEP team to consider revising
16 the IEP to provide more academics.

17 4. That meeting was held on May 5, 2011.¹⁶ The full IEP team was present and
18 Parent brought Debra Watland, Director of Sierra Academy, to tell the team about that
19 private special school. The meeting lasted close to two hours.¹⁷ It began with the team
20 discussing increased minutes for instruction and services. The team agreed that the
21 goals that were already in the IEP were appropriate, but that more intensive work on
22 those goals was needed. The team decide to continue with the goals and services

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25 ¹⁰ *Id.* at P148-P150.

26 ¹¹ *Id.*

27 ¹² Although this case began when Student was in [REDACTED], the focus is on [REDACTED] grade because at the
28 end of the [REDACTED] year, as the process described herein unfolded, Student missed many days of
29 school due to a tonsillectomy and complications from it.

30 ¹³ Exhibit 1 at P1-P30.

¹⁴ Exhibit 1 at P31-P63.

¹⁵ Exhibit 4 at P126.

¹⁶ Exhibit 10 at P181-P227 is a poor but functional transcript of the meeting.

¹⁷ *Id.* at 181.

1 already written and to provide increased support in the areas of reading, occupational
2 therapy, and speech and language.¹⁸

3 5. During the May 5 meeting, the IEP team heard from representatives of two
4 private schools that Parent was considering for placement: Lexis Preparatory School
5 ("Lexis") and Sierra Academy ("Sierra"), both of which are special schools for children
6 with disabilities.¹⁹ It is clear that Parent came to the meeting believing that the team
7 would consider these schools for placement. The Lexis and Sierra representatives
8 talked about the schools and told the team about how Student would fit in at each
9 school. Another school, "Terramar,"²⁰ was briefly mentioned at the meeting because
10 Parent had just visited that school the morning of the meeting.²¹ No representative was
11 there to present "Terramar" to the team though.

12 6. Toward the end of the May 5 meeting it was declared that the team was "not
13 choosing a location right now" and no decision about what school to send Student to
14 was made. Instead, the team determined, at the direction of the Respondent School
15 District's administration representative, only that the level of service would be
16 increased to the "special school level of service,"²² meaning a separate public or
17 private day school. The meeting then ended without a determination of the school that
18 would meet Student's needs.

19 7. Tamara Wheeler, Student Support Services Manager for DVUSD then sent
20 Parent an e-mail on May 9, 2011, that requested an "intake meeting" for Student to
21 "start him in our Terramar Public/Private Day Autism Program on Monday, May 16th."²³
22 Attached to the e-mail were two Prior Written Notices ("PWN"). The first PWN notified
23 Parent of the increase in services and decision to place Student in a more intensive
24 setting at the "special schools" level of service.²⁴ It informed Parent that the IEP team

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26 ¹⁸ *Id.* at P203.

27 ¹⁹ "Special schools" refers to public or private separate day schools that are self-contained schools that
28 serve students with disabilities. Exhibit 14 at P351. They are restrictive placements because there are
29 no non-disabled students in the school.

30 ²⁰ Much later this school became known as Public Day Autism Center or PDAC.

²¹ *Id.* at P224. Nothing of substance was presented about "Terramar" at that meeting.

²² *Id.* at P225.

²³ Exhibit 2 at P64.

²⁴ *Id.* at P66.

1 had determined that the least restrictive environment for Student was in a special
2 school.

3 8. The second PWN notified Parent that Respondent School District was
4 placing Student in the "Deer Valley Unified School District Public/Private Autism
5 Program located at Terramar School beginning 5/16/11."²⁵ It stated that Respondent
6 School District had considered other special schools, including Lexis and Sierra, but
7 had determined that Terramar "is the most appropriate attendance school at this
8 time."²⁶ In addition, when parent received the IEP for Student's [REDACTED] grade year, she
9 noted that it stated that he would be attending "Terramar Elementary School."²⁷

10 9. Respondent School District completely shut Parent out of the initial decision-
11 making as to which special school could best serve Student's needs. Respondent
12 School District considered the options for various schools, not the IEP team.

13 10. Parent voiced objection to the decision. In response, Respondent School
14 District issued a Meeting Notice on May 13, 2011, for an IEP team meeting to be held
15 on May 18, 2011, "[t]o consider and discuss which special school [Student] will attend
16 and to revise [Student's] IEP location as needed."²⁸ The meeting was held and the
17 team had a nearly two-hour discussion.²⁹ It was stated that the purpose of the meeting
18 was to look at options for schools.³⁰ Parent was understandably confused, as she
19 thought that the decision had already been made to send Student to Terramar. It was
20 explained to her that Respondent School District's procedure is to make an initial
21 determination outside the IEP team and send a PWN to Parent, who can then object
22 and "bring it back" to the IEP team for further discussion and a new decision.³¹ Parent
23 expressed her concern that the decision had already been made and that the district
24 members of the IEP team would not go against that decision. Her concerns were noted
25 and team members denied that they would just rubber-stamp the decision that had

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27 ²⁵ *Id.* at P68. Hereinafter, the program will be called "Terramar."

28 ²⁶ *Id.*

29 ²⁷ Exhibit 2 at P93.

30 ²⁸ *Id.* at P116.

31 ²⁹ Exhibit 11 at P228.

³⁰ *Id.* at P229.

³¹ *Id.* at P260.

1 been made by the administration. At the meeting, the team listened to the recording of
2 the presentations from Lexis and Sierra on May 5, and heard live from a representative
3 of the "public program operating [at] Terramar."³² By telephone, the team also spoke
4 again with Debra Watland about Sierra. After almost two hours of discussion, the team
5 decided to continue the rest of meeting to May 20, 2011.

6 11. The IEP team meeting reconvened on May 20, 2011, and the team listed the
7 pros and cons of each of the three special schools under consideration: Lexis, Sierra,
8 and Terramar.³³ After an hour of discussion, the team members were not all in
9 agreement. Two of the team, Parent and DVUSD Special Education Teacher, thought
10 that Sierra was the best placement. The rest of the team opted for Terramar. All
11 members stated the reason for their decision.³⁴ On May 20, 2011, Respondent School
12 District issued another PWN stating that Student would be placed at Terramar.³⁵
13 Parent did not send Student to Terramar, but sent another letter to Respondent School
14 District in August 2011 stating that she was unilaterally placing Student in a private
15 school and seeking reimbursement.³⁶

16 The IEP Substance

17 12. Several of the goals in Student's May 2011 IEP are important to the issue of
18 whether, substantively, the May 2011 IEP, with placement at Terramar, offered Student
19 a FAPE. Student's IEP states that socialization and communication are important parts
20 of Student's education:

21 2-7-11: [Student] is able to communicate with his peers and the staff.
22 Although his reduced communication skills will impact his involvement
23 and progress in the general curriculum by decreasing his ability to follow
24 classroom instructions of increasing length and complexity, understand
25 and answer teacher questions and express his ideas clearly and
26 effectively. [sic]³⁷

27 3-25-11: Without intervention, [Student's] inconsistent responses to his
28 peers when they call out to him or say 'hi' as well as his lack of social turn

29 ³² *Id.* at P236.

30 ³³ Exhibit C.

³⁴ Exhibit 12 P276-P348 is another poor but functional transcript of the meeting recording.

³⁵ Exhibit A at DV8.

³⁶ Exhibit 4 at P127. Parent had already filed her due process complaint in July.

³⁷ Exhibit 2 at P99.

1 taking skills during peer group activities could increase the likelihood of
2 him being isolated during peer activities.”³⁸

3 Naturally, then, several of his goals address this. In the area of communication,
4 Student has a goal to respond to greetings of peers 8 out of 10 opportunities.³⁹ He also
5 has a goal that, “[d]uring group activities with peers, [Student] will request a turn, given
6 an adult prompt, by verbalizing ‘May I have a turn?’ and/or ‘It’s my turn please,’ 4 out of
7 5 opportunities. . . .”⁴⁰ In connection with this, Student has a social/emotional goal to
8 increase the number of times he waits his turn from 2 out of 5 times to 4 out of 5 times
9 during structured activities.⁴¹

10 13. One of the issues concerning which special school Student should attend is
11 whether the school has classroom peers that function on a similar or higher level than
12 Student in the area of communication. Without such classmates, Student cannot work
13 on the goals described above. Student’s IEP contemplates classmate peers who are
14 functioning at or above Student’s level. Most of the IEP team members that “voted” for
15 Terramar at the May 20 meeting, noted that it is located on a public school campus and
16 has easy access to typical student peers.⁴² Those typical, non-disabled students would
17 have to be “brought into” the classroom, though; they would not be Student’s
18 classmates. Whether that would work for Student’s IEP was explored at hearing with
19 witness Valerie Rouse, a speech pathologist who was a member of Student’s IEP team
20 in May 2011, at the end of her cross-examination in the following exchange:

21 Q. [Petitioners’ counsel]: Oh, what do you understand the access The
22 Student would have to gen. ed. or typical students at the autism program
23 at Terramar?

24 A. [Valerie Rouse]: My understanding was that Shakira [Simmons—
25 Terramar teacher] is able to bring in non-disabled peers as appropriate
26 into the room . . . with permission and everything and to work on social
27 groups. And then – or if there are other activities I suppose that were
28 appropriate so he could have those types of peer models. And then the

28 ³⁸ *Id.*

29 ³⁹ *Id.* at P105.

30 ⁴⁰ *Id.*

⁴¹ *Id.* at P107.

⁴² See Exhibit 12, *passim*.

1 other thing would be, you know, now I'm not sure where he's at with this
2 but the specials. I'm thinking that PE and art and those things.

3 Q: That would have to be in his IEP, of course, right?

4 A: Right.

5 Q: And that's not in his IEP?

6
7 A: Okay. So that's what I didn't know about. So the main thing would be
8 getting the peers coming into the classroom.

9 Q: Would it be more beneficial from an educational point of view for The
10 Student to be in a class with lower functioning children all day long in a
11 self-contained model and having typical peers coming in here and there,
12 as opposed to him being in a classroom with higher functioning peers all
13 day long?

14 A: Yes.

15 Q: Why do you say that?

16 A: Because he needs the access to general education peers. I believe
17 that.

18 Q: Is there certain amounts of time that they have to be there for him to
19 get a benefit?

20 A: No. I think we put – had some of that written into the [service] time.

21 Q: I'll tell you it's not written in. So my question to you independent of
22 what his IEP says, how much time would a typical child have to be in his
23 classroom for it to be a benefit to him?

24 A: I would want him to have that myself at least an hour a day where he
25 can get – have that social group time. But it's something that would have
26 to be up for discussion.

27 Q: Okay. Thank you. I have no other questions.⁴³

28 This exchange points out the absence in Student's IEP of time to work on goals with
29 non-disable peers. Therefore, the only peers with which Student can work on his

30 ⁴³ Reporter's Transcript of Proceedings ("RT"), Vol. 2 at 416-418.

1 goals, *under the IEP as it is written*, are classmates. And if he has no classmates that
2 function in communication at or above his level, he cannot work on those goals. Thus,
3 Student must be placed in a special school in which he will have classmates that have
4 functional communication skills at or above Student's level.

5 14. The evidence shows that Terramar had four students in May 2011 when
6 Respondent School District, and subsequently the IEP team, made its decision. Of
7 those four students, two were non-verbal and clearly could not act as communication
8 peers to Student.⁴⁴ As to the two remaining Students, the record is not clear regarding
9 their level of communication skills. According to the Terramar teacher Shakira
10 Simmons, those two "struggle with the use of live language" and need support with
11 language;⁴⁵ one of the two is at a basic "I want" or "I need" level;⁴⁶ and one functions at
12 a level under the age of two in communication skills.⁴⁷ When asked about the benefits
13 of having peers to communicate with in order to foster social and emotional skills and
14 communication skills, Ms. Simmons did not talk about the classmates that Student
15 would have at Terramar but stated "That's why it is so nice to be on a campus where
16 we have access to gen. ed. students."⁴⁸

17 15. Parent visited Terramar and testified that while she was there none of the
18 four children verbalized.⁴⁹ She was acquainted with one of the children in the class⁵⁰
19 and knew that the child did not speak.⁵¹ She testified that she thought Terramar was a
20 great program for "low functioning autistic children" but that it was not appropriate for
21 Student.⁵²

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25 ⁴⁴ RT, Vol. 1 at 56.

26 ⁴⁵ *Id.* at 48.

27 ⁴⁶ *Id.* at 57.

28 ⁴⁷ *Id.* at 58.

29 ⁴⁸ *Id.* at 65. However, Ms. Simmons also testified that as of the date of hearing, no non-disabled child
30 had been in the Terramar classroom since the beginning of the school year in August 2011. *Id.* at 49.

⁴⁹ *Id.* at 154.

⁵⁰ She knew the child because Student and the child played in the same baseball league and had the
same advocate. *Id.* at 155.

⁵¹ *Id.* at 156.

⁵² *Id.*

1 16. Parent also testified that she sent Student to Sierra Academy for the
2 summer in 2011⁵³ and again in August 2011 when the school year started.⁵⁴ Sierra was
3 her chosen private placement because, among other things, Student's classmates at
4 Sierra are verbal and can interact with him verbally.⁵⁵ She wants Student to transition
5 back to general education in a few years and believes that Student's education at
6 Sierra will accomplish that.⁵⁶

7 17. Dr. Timothy Jordan, M.D., a developmental pediatrician who evaluated
8 Student for autism, testified that it was important that Student be educated with children
9 at the same level of development, who are similar to him.⁵⁷

10 18. Kristina Blackledge, Parent Advocate and a Marriage and Family Therapist,
11 testified that she had visited Terramar about two weeks before the hearing and found
12 that none of the four students verbalized or used dialogue.⁵⁸ She has helped place two
13 students into the Terramar school and believes that it would not be beneficial for
14 Student because the other students there are not "conversational" and Student is.⁵⁹

15 19. Dr. Bryan Davey, Ph.D., also provided helpful testimony at the hearing. Dr.
16 Davey has a Ph.D. in Special Education and is a Board Certified Behavior Analyst.⁶⁰
17 He has expertise in assessing, evaluating and helping people with autism. He
18 observed Student three times, once at Student's [REDACTED] class and twice at Sierra,
19 his [REDACTED] grade school.⁶¹ Dr. Davey was observing Student so that he could write an
20 evaluation report and behavioral assessment for the IEP team.⁶² For reasons not
21 important, that report was never written.⁶³ Nevertheless, Dr. Davey testified at hearing
22 about his observations and impressions of Student. He noted that not all schools or
23 programs for children with autism are the same because autism is a spectrum disorder
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25 ⁵³ Student's IEP states that he is eligible for Extended School Year services.

26 ⁵⁴ *Id.* at 167.

27 ⁵⁵ *Id.* at 173. This was confirmed by Dr. Davey at 247.

28 ⁵⁶ *Id.*

29 ⁵⁷ *Id.* at 131-132.

30 ⁵⁸ *Id.* at 210-214.

⁵⁹ *Id.* at 217.

⁶⁰ *Id.* at 240-242. He was also a certified special education teacher.

⁶¹ *Id.* at 244.

⁶² RT, Vol. 2 at 323-324.

⁶³ *Id.* at 324.

1 and is highly individualized.⁶⁴ Each child with autism is different and has different
2 needs.⁶⁵ He testified that Student needs to be with children “at a similar profile to him”
3 and that Sierra is meeting his educational needs.⁶⁶

4 20. Dr. Davey is also the Director of Behavioral Services at ACCEL school, a
5 school that educates children with autism and that Parent was considering for
6 Student.⁶⁷ However, Dr. Davey stated that ACCEL was not a good placement for
7 Student because the campus that would serve Student did not have a class for
8 kindergarten, first grade, or second grade children with developmental disabilities.⁶⁸
9 According to Dr. Davey, it would be more beneficial to Student to be in a classroom
10 with peers that are closer to his level of functioning than it would to be in a class with
11 students who are lower functioning than him and have general education students
12 spend brief periods of time with him.⁶⁹

13 21. Student’s current Sierra Teacher testified at the hearing about Student’s
14 progress in her class. She testified that he is “very social” and interacts with other
15 students.⁷⁰ All his classmates are verbal.⁷¹ He has made progress academically as
16 well.⁷²

17 22. Parent submitted evidence showing that she has spent \$1,592.52 for tuition
18 at Sierra since August 11, 2011.⁷³

19 **CONCLUSIONS OF LAW**

20 **APPLICABLE LAW**

21 **FAPE**

22 1. Through the IDEA, Congress has sought to ensure that all children with
23 disabilities are offered a free appropriate public education that meets their individual
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25 ⁶⁴ RT, Vol. 1 at 248.

26 ⁶⁵ *Id.*

27 ⁶⁶ *Id.* at 255, 259, and 260.

28 ⁶⁷ *Id.* at 151.

29 ⁶⁸ *Id.* at 247.

30 ⁶⁹ *Id.* at 258-259.

⁷⁰ RT, Vol. 2 at 273.

⁷¹ *Id.* at 275.

⁷² *Id.* at 277.

⁷³ Exhibit 19.

1 needs.⁷⁴ These needs include academic, social, health, emotional, communicative,
2 physical, and vocational needs.⁷⁵ To do this, school districts must identify and evaluate
3 all children within their geographical boundaries who may be in need of special
4 education and services. The IDEA sets forth requirements for the identification,
5 assessment and placement of students who need special education, and seeks to
6 ensure that they receive a free appropriate public education. A free appropriate public
7 education ("FAPE") consists of "personalized instruction with sufficient support services
8 to permit the child to benefit educationally from that instruction."⁷⁶ The IDEA mandates
9 that school districts provide a "basic floor of opportunity," nothing more.⁷⁷ It does not
10 require that each child's potential be maximized.⁷⁸ A child receives a FAPE if a
11 program of instruction "(1) addresses his unique needs, (2) provides adequate support
12 services so he can take advantage of the educational opportunities and (3) is in accord
13 with an individualized educational program."⁷⁹

14 The IEP

15 2. Once a child is determined eligible for special education services, a team
16 composed of the child's parents, teachers, and others formulate an Individualized
17 Education Program ("IEP") that, generally, sets forth the child's current levels of
18 educational performance and sets annual goals that the IEP team believes will enable
19 the child to make progress in the general education curriculum.⁸⁰ The IEP tells how the
20 child will be educated, especially with regard to the child's needs that result from the
21 child's disability, and what services will be provided to aid the child. The child's
22 parents have a right to participate in the formulation of an IEP.⁸¹ The IEP team must
23 consider the strengths of the child, concerns of the parents, evaluation results, and the
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25 ⁷⁴ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

26 ⁷⁵ *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).

27 ⁷⁶ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

28 ⁷⁷ *Id.*, 458 U.S. at 200.

29 ⁷⁸ *Id.* at 198.

30 ⁷⁹ *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)).

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

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

1 academic, developmental, and functional needs of the child.⁸² To foster full parent
2 participation, in addition to being a required member of the team making educational
3 decisions about the child, school districts are required to give parents written notice
4 when proposing any changes to the IEP,⁸³ and are required to give parents, at least
5 once a year, a copy of the parents' "procedural safeguards," informing them of their
6 rights as parents of a child with a disability.⁸⁴

7 3. IEP teams must consider the communication needs of a child.⁸⁵ The team
8 must also consider the concerns of a child's parents when developing an IEP.⁸⁶ In fact,
9 the IDEA requires that parents be members of any group that makes decisions about
10 the educational placement of a child.⁸⁷

11 Prior Written Notice

12 4. The IDEA process for making changes to an IEP, including changing
13 educational placements, requires a school district to give parents written notice before
14 taking the proposed action.⁸⁸ That notice (often called Prior Written Notice or PWN)
15 must contain certain information specified by the IDEA, such as an explanation of why
16 a decision is being made, the documentation used to make the decision, and a
17 reminder of parents' procedural rights. Of particular note is the requirement that the
18 PWN contain "[a] description of other options that the IEP Team considered and the
19 reasons why those options were rejected. . . ."⁸⁹ Thus, the PWN is issued after an IEP
20 team decision has been made, not before.

21 Reimbursement for Private School Placement

22 5. Parents who dispute whether an IEP provides a FAPE to a child, and who as
23 a result enroll that child in a private school, may receive reimbursement for the costs of
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26 ⁸² 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

27 ⁸³ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

28 ⁸⁴ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.
29 20 U.S.C. § 1415(d)(B).

30 ⁸⁵ 20 U.S.C. § 1414(d)(3)(B)(iv); 34 C.F.R. §§ 300.324(a)(2)(iv).

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

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

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

⁸⁹ 20 U.S.C. § 1415(c)(1)(E); 34 C.F.R. §§ 300.503(b)(6).

1 that private-school enrollment under certain circumstances.⁹⁰ The program offered by
2 the school district must fail to provide a FAPE to the child and the private school must
3 be an “appropriate” placement.⁹¹ A private school placement may be appropriate even
4 if it does not operate under public school standards.⁹² Under these circumstances,
5 parents may “enroll the child in a private preschool, elementary school, or secondary
6 school without the consent of or referral by the [school district]. . .” and seek
7 reimbursement from the school district for the expense of that enrollment from a court
8 or hearing officer.⁹³ Indeed, parents have “an equitable right to reimbursement for the
9 cost of providing an appropriate [private] education when a school district has failed to
10 offer a child a [free appropriate public education].”⁹⁴ Furthermore, the placement does
11 not have to meet IDEA requirements for a FAPE.⁹⁵

12 6. However, an award for reimbursement can be reduced or denied in various
13 circumstances.⁹⁶ An award may be reduced or denied if the parents have not given
14 adequate notice as set forth in the IDEA.⁹⁷ There is no claim of inadequate parental
15 notice in this case. Therefore, reimbursement, if warranted, will not be reduced or
16 denied in this case.

17 DECISION

18 7. A parent who requests a due process hearing alleging non-compliance with
19 the IDEA must bear the burden of proving that claim.⁹⁸ The standard of proof is
20 “preponderance of the evidence,” meaning evidence showing that a particular fact is
21 “more probable than not.”⁹⁹ Here, Parent seeks reimbursement for her unilateral
22 placement of Student at Sierra Academy. Therefore, Petitioners bear the burden of

23 ⁹⁰ 34 C.F.R. § 300.148.

24 ⁹¹ *Id.*

25 ⁹² *Id.*

26 ⁹³ 34 C.F.R. § 300.148(b) and (c).

27 ⁹⁴ *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960
28 F.2d 1479, 1485 (9th Cir. 1992)).

29 ⁹⁵ *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

30 ⁹⁶ 34 C.F.R. § 300.148(d).

⁹⁷ 34 C.F.R. § 300.148(d)(1).

⁹⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

⁹⁹ *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,

1 proving by a preponderance of evidence that Respondent School District failed to
2 provide Student a FAPE through the May 2011 IEP and that placement at Sierra
3 Academy was appropriate.

4 8. Furthermore, this tribunal's determination of whether or not Student received
5 a FAPE must be based on substantive grounds.¹⁰⁰ If a procedural violation is alleged
6 and found, it must be determined whether the procedural violation either (1) impeded
7 the child's right to a FAPE; (2) significantly impeded the parents' opportunity to
8 participate in the decision-making process; or (3) caused a deprivation of educational
9 benefit.¹⁰¹ If one of the three impediments listed has occurred, the child has been
10 denied a FAPE due to the procedural violation.

11 9. This tribunal finds that Petitioners have met their burden by showing both a
12 substantive violation of the IDEA and a procedural violation that significantly impeded
13 parent's participation in the decision-making process. This tribunal also finds, for the
14 reasons stated below, that parent's unilateral private placement is appropriate and
15 must remain the current placement for Student.

16 Substantive Violation

17 10. This tribunal's review of the May 2011 IEP is limited to the contents of the
18 document.¹⁰² Therefore, the question of whether the May 2011 IEP is reasonably
19 calculated to provide educational benefit to Student must be decided on the basis of
20 the content of the IEP itself.

21 11. As found above, the IEP has goals for the areas of communication and
22 social/emotional that require Student to have similar-functioning classmate peers. The
23 only way those goals can be addressed is if similar-functioning or higher-functioning
24 peers are in the classroom with Student on a more than temporary basis. Respondent
25 School District's position that non-disabled peers can be brought in for lunch or other
26

27 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action*
28 *No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

29 ¹⁰⁰ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

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

¹⁰² *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001), see also *Union Sch. Dist. v. Smith*,
30 15 F.3d 1519, 1526 (9th Cir. 1994) (IDEA requirement of a formal, written offer should be enforced rigorously).

1 activities is not sufficient to address those goals and is not provided for in the IEP. The
2 IEP presumes that Student will have classmates that are at or above his level.

3 12. Therefore, Terramar cannot be an appropriate placement under Student's
4 IEP because it does not have the right population of children such that it can offer
5 educational benefit to Student on those particular goals. The placement decision for
6 Terramar was, thus, a substantive violation of the IDEA and denied Student a FAPE.

7 Procedural Violation

8 13. The findings show that Respondent School District's administration made
9 the initial decision as to which school to send Student to without the participation of
10 Parent or even the IEP team. Respondent School District explained that its process
11 was to have administrators make an initial decision about which school to send a
12 student to and then, if a parent objects, hold a subsequent IEP team meeting to discuss
13 options. Respondent School District followed that process in this case and issued a
14 PWN proposing Terramar. That PWN was never withdrawn or rescinded, even when
15 Parent objected to it. Instead, the issue was taken to an IEP team whose members all
16 knew that the administration wanted to send Student to Terramar. The team then
17 "reconsidered" the placement decision. A second PWN on the same decision was then
18 issued.

19 14. Such a process is not provided for in the IDEA. A PWN is issued when a
20 school district *proposes* a change, not when it *suggests* a change that will take place
21 unless the parent objects, in which case the IEP team will review the initial decision and
22 then a change will be proposed in a second PWN. This process does not grant parents
23 procedural due process.¹⁰³ Instead, it adds an unnecessary layer to the process and
24 keeps parents and the IEP team excluded from an important decision. Not all special
25 schools are the same or can offer educational benefit to any particular student with
26
27

28 _____
29 ¹⁰³ One wonders what Respondent School District would think if, at the beginning of a hearing, the
30 Administrative Law Judge announced that he has reviewed the exhibits and made a decision for the
parent, but will keep an open mind and reconsider his decision upon presentation of further evidence at
the hearing.

1 autism, as this case so clearly points out. The IEP team must match the Student to a
2 school that will offer educational benefit.¹⁰⁴

3 15. The failure of Respondent School District to allow the IEP team *in the first*
4 *instance* to make the decision as to which school to send Student to was a procedural
5 violation that denied Parent an opportunity to participate in that decision and denied
6 Student a FAPE.¹⁰⁵

7 Appropriate Placement

8 16. The evidence submitted by Petitioners shows that Sierra is an appropriate
9 placement for Student. He has classmates that are appropriate for him to communicate
10 with and he has made progress while there.

11 17. In addition, the record shows that Sierra was the more appropriate
12 placement considered by the IEP team. Terramar is not appropriate because of the
13 lack of same- or similar-level classmates. The best placement then, based on the IEP
14 team discussions, is Sierra.

15 18. Because this tribunal agrees with Parent that Sierra is appropriate, this
16 creates an agreement between the State and the parent and constitutes Student's
17 current educational placement. Student shall remain at Sierra Academy at Respondent
18 School District's expense until his IEP team determines otherwise.

19 Conclusion

20 19. Respondent School District denied Student a FAPE both substantively and
21 procedurally. Parent placed Student in an appropriate private placement. Parent is
22 entitled to reimbursement of the tuition she has paid for placing Student in Sierra
23 Academy. Furthermore, Student shall remain at his current placement at Respondent
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26 ¹⁰⁴ To the extent that Respondent School District relies on the argument that the law allows it to
27 determine mere location as opposed to placement, that argument has already been considered and
28 rejected by this tribunal in *J. H. v. Coolidge Unified School District*, OAH Docket No. 11C-DP-002-ADE
(Dec. 22, 2010). That rejection is the current ruling on that issue in Arizona, and will continue to be
unless it is overturned by the courts.

29 ¹⁰⁵ If the IEP team is not to make the decision, why did it spend a great deal of time listening to the
30 representatives from Lexis and Sierra on May 5? Furthermore, why would a PWN be necessary, since it
is a decision to be made by the administration and not the IEP team? Respondent School District
actions belie its position.

1 School District's expense until his IEP team determines that another placement is
2 appropriate.

3 **ORDER**

4 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
5 that the relief requested in the due process complaint is **granted**. Respondent School
6 District must reimburse Parent \$1,592.52 for past tuition at Sierra and place Student at
7 Sierra at Respondent School District's expense.

8 Done this 1st day of November 2011.

9
10 **OFFICE OF ADMINISTRATIVE HEARINGS**

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12 _____
13 Eric A. Bryant
14 Administrative Law Judge
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RIGHT TO SEEK JUDICIAL REVIEW

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

Copy sent by **electronic mail** and regular mail
this ___ day of November 2011, to:

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Copy sent by **electronic mail** and regular mail
this ___ day of November 2011, to:

Karl H. Widell
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kwidell@gustlaw.com

By _____

Transmitted electronically to:

Arizona Department of Education
Dispute Resolution Unit
ATTN: Kacey Gregson, Dispute Resolution Coordinator
Arizona Department of Education