

STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

_____, STUDENT, by and through
PARENT(S) _____ and _____,
Petitioners,
v.
SCOTTSDALE UNIFIED SCHOOL
DISTRICT,
Respondent.

No. 12C-DP-006-ADE
ADMINISTRATIVE LAW JUDGE
DECISION

HEARING: Conducted on February 22, 2012, February 23, 2012, February 24, 2012, and February 28, 2012. Closing argument was presented on March 5, 2012, followed by receipt of the Court Reporter's transcript.¹ The hearing record concluded as of April 2, 2012.²

APPEARANCES: Attorney/Parent _____ represented Student _____ and Parents _____ and _____ ("Parents"); N.P. was assisted by Interpreter Sylvia Gallegos. Attorneys Jessica Sanchez, Denise Lowell-Britt and Heather R. Pierson represented Scottsdale Unified School District ("District").

WITNESSES:³ Petitioners called the following witnesses:

Parent _____ ("Father") and Parent _____ ("Mother");
Debra Delabio ("Teacher, NWLA")⁴;
Deborah Fash ("Intervention Director, NWLA")⁵;
Kathy Gilbert ("Kindergarten Teacher, Aztec")⁶;
Leigh Hague (First Grade Teacher, Redfield")⁷;

¹ Pursuant to discussion with the parties, the Court Reporter's transcript is the official record of the due process hearing. White & Associates transcribed the proceedings and the company provided its transcript to the parties and to the Tribunal. The Tribunal has, by statute, also made a digital recording of the proceedings.

² On April 27, 2012, the 45th day in this matter was extended by agreement of the parties. Previously, the 45th day was April 29, 2012; per Minute Entry dated April 30, 2012, the 45th day is now May 1, 2012.

³ Some witnesses were on both parties' witness list. To avoid the use of proper names, and for confidentiality, witnesses are designated a generally descriptive title to be used in the body of the Decision, if necessary. The witnesses' proper names are grouped here for ease of redaction.

⁴ NWLA is an acronym for New Way Learning Academy. Summer, 2009. She was Lead Teacher for 2009-2010 and 2010-2011, and left the employ of NWLA in June 2011.

⁵ As related to Student's enrollment, she was the Intervention Director overseeing the speech and language program in 2009-2010 and 2010-2011. She is also a Speech Language Pathologist, but did not provide direct services to Student at NWLA.

⁶ 2008-2009.

⁷ 2009-2010.

Joy Gehart ("Speech Language Pathology Assistant, NWLA");
Jim Selgo ("School Co-Principal 2, Redfield")⁸;
Walter Chantler ("School Co-Principal 1, Redfield")⁹;
Ruth Del Vecchio ("Speech Language Pathologist, Aztec")¹⁰;
Carol R. Lake (Learning Resource Teacher, Redfield)¹¹; and,
Lois Healy ("Former Special Education Director").

District called the following witnesses:

Mary Louisa Quirarte ("Special Education Teacher");
Nicole Colaiacovo Kulesza ("School Psychologist");
Kathleen M. Gustine ("Speech Language Pathologist, Redfield");
Birgit D. Lurie ("Lead Psychologist")¹²; and,
Janet R. Brusca ("Special Education Coordinator")¹³.

ADMINISTRATIVE LAW JUDGE: Kay A. Abramsohn

Parents, on behalf of Student, bring this due process action with two remaining issues.¹⁴ Petitioners allege that District violated the IDEA when it failed to offer or provide a free and appropriate public education ("FAPE") through District's 2009-2010 offer of the Academic Learning Center ("ALC") self-contained District educational placement for Student, and denied a 2009-2010 private-day school educational placement at New Way Learning Academy ("NWLA") for Student.¹⁵ Petitioners also

⁸ 2009-2010. In 2008-2009, School Principal, Aztec. Aztec Elementary School closed and merged with the former Zuni Elementary School.

⁹ 2009-2010. Redfield Elementary School was formerly known as Zuni Elementary School.

¹⁰ 2008-2009.

¹¹ 2009-2010.

¹² As Lead Psychologist, her role is to provide support to the other District school psychologists. See Transcript, page 789-790. She is also an Autism Specialist with the District.

¹³ In August of 2009, she was the Special Education Coordinator for all the District's self-contained elementary programs. See Transcript, page 922.

¹⁴ Petitioners filed this due process complaint notice on August 18, 2011. See Administrative Law Judge ORDER dated December 30, 2011 regarding the statute of limitations and dismissing several issues.

¹⁵ At closing argument, Petitioners also argued that District's offer did not provide FAPE because the IEP did not mention transportation for Student to the ALC program. However, other than their disagreement with the proposed environment of special education services for Student (*i.e.*, the ALC program), Petitioners' Complaint raised no substantive issues regarding the special education services or related services either proposed or set forth in either the May 2009 or August 2009 IEP. Therefore, Petitioners' argument regarding a failure to state related transportation services in the August 20, 2009 IEP will not be addressed except to note herein that the District indicated, at hearing, that transportation would have been

1 allege that District procedurally violated the IDEA by predetermining its August 20, 2009
2 offer of ALC program educational placement, failing to consider Student's then-recent
3 evaluations and Student's individual needs, and, thereby, failed to offer or provide
4 FAPE for Student.

5 As remedy for these alleged violations, at hearing, Petitioners requested
6 reimbursement for Student's tuition costs, summer school sessions costs,
7 transportation costs, and some unspecified evaluations, as a result of the parental
8 private placement at NWLA, for the academic years 2009-2010 and 2010-2011 and
9 summer school sessions in 2010 and 2011.¹⁶

10 APPLICABLE LAW

11 The law governing this due process proceeding is the Individuals with Disabilities
12 Education Act ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-
13 authorized and amended in 2004),¹⁷ and its implementing regulations, 34 Code of
14 Federal Regulations (C.F.R.) Part 300,¹⁸ as well as the Arizona Special Education
15 statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and
16 implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.

17 DUE PROCESS HEARING

18 The parties presented testimony and Exhibits at the four hearing sessions.
19 During the hearing sessions, Petitioners elicited testimony from the witnesses noted
20 above and presented the following Exhibits in four notebooks:

21 Notebook 1 with exhibits 1 through 94, bates-stamped 1 through 406,¹⁹
22

23 included (because the offered program was not at Student's home school).

24 ¹⁶ See Exhibits 1-7 through 1-30, which are summarized in Exhibit 1-31. See also copies of enrollment
25 agreements, Exhibits 1-32 and 1-34. No hearing exhibits were located setting forth actual costs of
26 transportation; however, Petitioners' Complaint, Allegations 156, 158, 160 and 162 sets forth the distance
27 between Student's residence and NWLA. No specifics were provided during the hearing regarding the
28 procurement, or cost, of any particular evaluations for which Petitioners requested reimbursement. While
29 Petitioners' exhibits contain three evaluations (psychoeducational, speech and language, and
30 occupational therapy) that were performed in 2010, Petitioners provided no invoices for these evaluations.

¹⁷ Through Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of
2004," IDEA 2004 became effective on July 1, 2005.

¹⁸ The current federal regulations became effective October 13, 2006; several amendments were
subsequently promulgated, effective December 31, 2008.

¹⁹ Notebook 1 is entitled Submission of Evidence produced by [District] in response to Subpoena Duces
Tecum by the Petitioners. These exhibits may be referenced as 1-1, 1-2, 1-3, etc. and may also reference
a bates-stamp page number for multiple page exhibits.

1 Notebook 2 with exhibits 1 through 89, bates-stamped 1 through 433,²⁰ and,
2 Notebook 3 with exhibits 1 through 139, bates-stamped 1 through 467²¹ and
3 Notebook 3A with exhibits 140 through 197, bates-stamped 468 through 782.

4 District elicited testimony from the witnesses noted above and presented Exhibits
5 designated A through GG, bates-stamped 1 through 210.

6 **DETERMINATION**

7 The Administrative Law Judge has considered the hearing record, including the
8 testimony and exhibits,²² and now makes the following Findings of Fact, Conclusions of
9 Law, and Order finding that Petitioners have not met the burden to show that District
10 failed to offer FAPE to Student, and that Petitioners have not met the burden to show
11 that District denied FAPE through an alleged procedural failure of predetermination of
12 the offered educational placement. As a result of these determinations, the Petitioners
13 are not entitled to the relief sought and Petitioners' Complaint should be dismissed.

14 **FINDINGS OF FACT**

15 1. At the time of the due process complaint notice ("Complaint") in this
16 matter, Student was an [REDACTED] year old child. Student had previously been determined
17 by District to be eligible for special education services as a child with Specific Learning
18 Disability ("SLD") and Speech or Language Impairment ("SLI").²³

19 2. For the academic year 2008-2009, beginning August 11, 2008, Student
20 was enrolled in Kindergarten at the Aztec Elementary School ("Aztec") campus.²⁴
21 Student was receiving special education services supported through the Learning
22

23 ²⁰ Notebook 2 is entitled Submission of Evidence related to [Student]'s school records from [District],
24 correspondence, e-mails, and relevant court documents. These exhibits may be referenced as 2-1, 2-2, 2-
25 3, etc., and may also reference a bates-stamp page number for multiple page exhibits.

26 ²¹ Notebooks 3 and 3A are entitled Submission of Evidence related to [Student]'s school work and other
27 documents from New Way Academy. These exhibits, although broken up into two notebooks, may be
28 referenced as 3-1, 3-2, 3-3, etc. and may also reference a bates-stamp page number for multiple page
29 exhibits.

30 ²² The Administrative Law Judge has read each witness-referenced Exhibit, even if not mentioned in this
Decision. The Administrative Law Judge has also considered the testimony of every witness, even if not
mentioned in this Decision.

²³ See Exhibit F, May 11, 2009 Individualized Education Program ("IEP"). See also Exhibit 2-26, May 14,
2008 IEP noting Student's prior eligibility category of pre-school moderate delay ("PMD") and, effective 8-
11-08, the category of SLD.

²⁴ See Exhibit 2-26, May 14, 2008 IEP noting Student's enrollment at Aztec effective 8-11-08.

1 Resource Center ("LRC") at Aztec.²⁵ On April 21, 2009, after review of the existing
2 data, Parents requested that Student obtain an independent educational evaluation
3 ("IEE") with regard to her speech and language needs.²⁶

4 3. On May 11, 2009, the IEP Team convened to discuss Student's next
5 annual IEP.²⁷ Because Student would no longer be enrolled in pre-school the next
6 school year, the pre-school minutes per week were removed from the IEP. The IEP
7 Team increased the Student's pull-out LRC sessions from two sessions per day to
8 three sessions per day but made no changes to the amount and frequency of Student's
9 related services (Speech therapy, Physical therapy, Occupational therapy and Adaptive
10 physical education).²⁸ At that time, the new speech-language and psychoeducational
11 evaluations' reports had not yet been received by the Parents or the District and,
12 therefore, the IEP Team agreed to meet again, after receipt of the reports in order to
13 review the new data.²⁹ However, the May 11, 2009 IEP was completed at that time with
14 regard to proposed services for Student and continued to indicate LRC special
15 education services for Student.³⁰ The school site for Student's special education
16 services was noted to be "Aztec ES," *i.e.* Aztec Elementary School. Student's IEP was
17 effective on May 12, 2009.³¹

18
19 ²⁵ Exhibit X contains a general description of the LRC program in addition to general descriptions of other
20 District special education programs.

21 ²⁶ See Exhibit 2-38. Parents requested that the evaluation be performed by Anita Werner.

22 ²⁷ See Exhibits 2-36 and 2-37, e-mails regarding scheduling the May 2009 IEP meeting.

23 ²⁸ Compare Exhibit 2-26, May 14, 2008 IEP, bates-stamp page 70 and Exhibit F, May 11, 2009 IEP, bates-
24 stamp page 56. See also Exhibit 2-27, bates-stamp page 85, "Conference Summary" portion with regard
25 to the IEP Team's consideration of various educational placements for Student for the 2008-2009 year.

26 ²⁹ See Exhibit F, bates-stamp page 41. Parents characterize this agreement as holding the "proposed"
27 IEP and placement "in abeyance" pending the evaluations and considerations thereof, and looking forward
28 to "amending" the IEP. See Exhibits 2-45 and 2-46. Parents subsequently characterize their position as
29 "not accepting" the May 11, 2009 IEP because it was "open to review subject to the reports from Anita
30 Werner and Dr. Valerie Hoffman." See Exhibit 2-53. Of note, at hearing, School Psychologist testified
that she recalled (from a meeting on August 10, 2009) Father indicating that he had not agreed with the
May 2009 IEP but had only signed that he was in attendance. See Transcript, page 628. Also, at hearing,
Father testified that he had signed the IEP because he was present but not in "acceptance" of the IEP.
See Transcript, page 487.

³⁰ A copy of the May 11, 2009 Prior Written Notice ("PWN") can be found as an attachment to Parents'
August 27, 2009 letter of disagreement to the District's August 21, 2009 PWN. See Exhibit 1-51, bates-
stamp page 100. The May 11, 2009 PWN states that the District "[p]roposes to initiate the following: IEP
with 3 contacts per day of resource and continue related services of speech language, physical therapy,
occupational therapy and adaptive physical education. Continue to explore option of self-contained."

³¹ See Exhibit F, bates-stamp page 40; see also Exhibit 1-51, bates-stamp page 100.

1 4. On May 14, 2009, Parents enrolled Student at a summer school program
2 at New Way Learning Academy ("NWLA").

3 5. On May 18, 2009, Parents participated in a site visit to the Academic
4 Behavior and Communication ("ABC") classroom on the Zuni Elementary School
5 ("Zuni") campus and, although they met the teacher and speech pathologist, Parents
6 were not able to view any class instruction because there were no students in the class
7 at that time and the classroom was apparently in the process of being packed up for a
8 move to another location.³²

9 6. Anita Werner, M.S., CCC-SLP, and Nicole Boulanger, M.S., CFY-SLP,
10 performed a comprehensive speech and language evaluation on Student over two
11 days: May 18, 2009 and May 27, 2009.³³ Ms. Werner diagnosed Student with
12 Communication Disorder, Receptive/Expressive and Selective Mutism.³⁴ Based on the
13 formal and informal testing, Ms. Werner made a recommendation for speech therapy
14 for Student for two thirty-minutes sessions per week, and Ms. Werner provided her
15 recommendations for specific goals related to Student's areas of communication
16 deficiencies. Ms. Werner discussed three possible options for therapy for the selective
17 mutism, projecting a mixed model focusing on participation in social engagement both
18 verbally and nonverbally. Finally, Ms. Werner also made multiple recommendations for
19 strategies and accommodations, *i.e.*, "management," in the classroom setting (and
20 elsewhere) to enhance Student's auditory processing and language formulation, along
21 with precautionary suggestions.

22 7. Valerie R. Hoffman, Psy.D., performed a psychoeducational evaluation on
23 Student over three days: April 13, 2009, April 23, 2009 and May 12, 2009.³⁵ Dr.
24 Hoffman diagnosed Student with Specific Learning disabilities in math and reading, and
25
26

27 ³² See Exhibit 2-44. By the beginning of the 2009-2010 academic year, Aztec had closed, and had been
28 combined with Zuni and renamed Redfield.

29 ³³ See Exhibit H.

30 ³⁴ In making her report subsequent to all the testing, Dr. Valerie Hoffman reviewed Ms. Werner's
assessments, concurring in the findings, noting that Student had demonstrated better receptive language
skills than expressive communication skills but also demonstrated significant weaknesses in auditory
comprehension. See Exhibit G, page 7 of 11 (bates-stamp page 79).

³⁵ See Exhibit H.

1 with Communication Disorder and Selective Mutism.³⁶ Dr. Hoffman concluded as
2 follows:

3 [Student] is a 7-year old girl who is currently completing her
4 kindergarten year in a regular education classroom with
5 resource support. She has a history of speech delay,
6 learning disabilities in reading and math, and social anxiety.
7 She currently has an IEP in which she has been found
8 eligible for speech therapy, occupational therapy, and
9 physical therapy, in addition to resource support. [Student]
10 has been evaluated multiple times with results ranging from
11 Average to Borderline intellectual abilities. Her speech and
12 language scores have been consistently low. Motor skills
13 have also been delayed. [Student]'s parents have
14 requested an evaluation to better understand [Student]'s
15 needs and to help with placement decisions for her first
16 grade year.

17 Initially, [Student] was very difficult to test, as she was
18 largely nonverbal during testing. The results of the initial
19 cognitive testing using the WISC-IV are likely a gross
20 underestimate of her abilities. Additional testing using the
21 RIAS seemed to be a better measure of her abilities, but
22 these results may also underestimate her potentials.
23 [Student] is demonstrating a profile of cognitive skills in
24 which her verbal IQ is significantly reduced as compared to
25 her nonverbal IQ. Therefore, her Full Scale IQ should not
26 be used to estimate her cognitive potentials, as doing so
27 would result in a gross underestimate of abilities. [Student]
28 has at least Average range nonverbal intellectual abilities,
29 and although her verbal abilities are significantly low (3rd
30 percentile), [Student] should not be viewed as a child with an
intellectual disability. [Student]'s low verbal skills are likely
impacted both by her language/communication disorder as
well as her anxiety about performance situations.

[Student] has previously been diagnosed as having a
Specific Learning Disability. She currently shows
significantly reduced math skills (2nd percentile). Current
testing found reading skills within the lower end of the
Average range for her young age; however, item analysis
revealed that [Student] does not consistently identify letters
or sounds, and she was not able to identify rhyming words or

³⁶ Dr. Hoffman ruled out a diagnosis of autism. See Exhibit G, pages 6 and 7 of 11 (bates-stamp pages 78 and 79).

1 beginning and ending sounds that were the same. Testing
2 through Pediatric Speech and Language Specialists (PSLS)
3 found significant weaknesses in phonological awareness.
4 Therefore, [Student] demonstrates the beginning of a
5 phonological dyslexia and she is at risk for falling further
6 behind her peers in reading. [Student] will require continued
7 support for both reading and math.

8 [Student] has a history of a speech and language
9 impairment. Indeed, she shows continued signs of a
10 language impairment. Informal observations of [Student]'s
11 speech revealed the presence of grammatical and
12 syntactical errors in her spoken language. Formal speech
13 and language testing (PSLS) found significant weaknesses
14 in expressive language skills and listening comprehension.
15 In addition to her language deficit, [Student] also
16 demonstrates greatly reduced speech output as a product of
17 social anxiety. For example, during my initial meeting with
18 [Student], she was almost entirely mute. However, once my
19 attention was directed away from [Student], she was able to
20 speak in multiple word sentences (although her sentence
21 structure was awkward). Parents endorse that [Student] is
22 shyer than other children her age and they observe her to be
23 withdrawn and reserved in new settings. In this regard,
24 [Student] appears to have both a speech and language
25 impairment and the presence of Selective Mutism. Her
26 Selective Mutism interferes with her academic performance,
27 such as when she is unable to respond to academic tasks
28 that require verbal output. Although many children with
29 Selective Mutism have normal language skills, Selective
30 Mutism may be associated with a Communication Disorder,
as is the case for [Student]. Children with Selective Mutism
demonstrate the capacity to speak in some situations, while
remaining mute or nearly mute in other situations, such as in
performance situations. This is true for [Student] who
speaks in multiple word sentences at home, but hardly
speaks at all in social settings. [Student] does not have an
autism spectrum disorder.

[Student]'s multiple areas of deficit are concerning and she
will require the continued support of special education
services. She would benefit from a very structured
environment with a low student-to-teacher ratio where she
can receive continuous support. Small group and
individualized instruction will be best. [Student] will also
need support emotionally and behaviorally. She is

1 withdrawn, mute at times, and she is resistant to adult-
2 directed tasks. She would benefit from a specific behavior
3 modification plan to shape increased cooperation and to
4 provide a structured schedule of reward for desired
behaviors, including verbalization and participation.

5 Dr. Hoffman indicated that her report should go to the school's multidisciplinary team to
6 update Student's IEP and determine what services "will best fit" Student's needs. Dr.
7 Hoffman indicated that a special education placement was recommended, but not in a
8 program "with children who are intellectually impaired or behaviorally challenged
9 because Student "requires a program that will expose her to a language rich
10 environment" along with intervention for her academic needs. Dr. Hoffman further
11 indicated that social interaction needed to be taught and that Student "will likely perform
12 best in a small classroom with no more than 12 students."³⁷ Dr. Hoffman
13 recommended reading and math interventions through a qualified teacher (not a
14 paraprofessional), such as "Wilson, Lindamood Bell, Orton Gillingham, and others" in a
15 small group setting or, preferably, individual instruction.

16 Dr. Hoffman noted:

17 Should the school district not have an appropriate program,
18 a day school setting such as New Way Learning Academy or
19 Lexis Preparatory Academy should not be considered too
20 restrictive an environment. [Student]'s current needs for
21 specific academic intervention, speech/language
intervention, and social interaction override her need to be
included in a mainstream environment with "typical peers."

22 Finally, Dr. Hoffman deferred, in the area of speech and language therapy, to Ms.
23 Werner's evaluation and recommendations. Dr. Hoffman also provided several
24 suggestions for strategies in interventions.

25 8. On July 29, 2009, Parents provided the Werner report and the Hoffman
26 report to District.³⁸ Parents requested that the IEP meeting reconvene to complete the
27 IEP.
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30 ³⁷ *Id.*, page 9 of 11 (bates-stamp page 81).

³⁸ See Exhibit 2-45.

1 9. On August 6, 2009, Parents attended an open house at Redfield
2 Elementary School ("Redfield"). At that time, they met First Grade Teacher. On August
3 6, 2009, Parent [REDACTED] e-mailed School Psychologist regarding District's efforts to
4 reconvene the IEP meeting on August 10, 2009, and requesting to change the time of
5 the IEP meeting set for August 10, 2009 from the morning to the afternoon.³⁹

6 10. On August 10, 2009, the first day of school, Student began first grade at
7 her home school, Redfield.

8 11. On August 10, 2009, an IEP meeting convened at which time the
9 evaluations from Ms. Werner and Dr. Hoffman were generally discussed.⁴⁰ Parents
10 informed District that Student had attended NWLA over the summer and that Parents
11 had been pleased with her progress there.⁴¹ After discussion about possible
12 placements and observations, School Psychologist subsequently arranged a site visit
13 for August 12, 2009 for Parents to the self-contained ABC program at Sequoya and
14 arranged a site visit for August 14, 2009 to the self-contained ALC program at
15 Laguna.⁴²

16 12. At some point, apparently between August 10, 2009 and the self-
17 contained site visits, School Psychologist prepared a document containing background
18 and current data regarding Student, and then participated in a District Placement
19 Review Committee meeting.⁴³ According to the hearing record, School Psychologist ,
20 Lead Psychologist, Special Education Coordinator and Former Special Education
21 Director met and discussed the District's various self-contained programs in terms of
22 availability, such as how many students were currently in those self-contained programs
23 (i.e., whether the program was full), the ages of the students in the programs, and
24 staffing in the programs, (a) in order to determine which District programs could be
25 appropriate and could, or should, be visited by Parents to observe, and (b) so that
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28 ³⁹ See Exhibit J.

29 ⁴⁰ See Exhibit 2-53; see also Transcript, pages 626-628.

30 ⁴¹ Transcript, page 627, School Psychologist testimony.

⁴² *Id.*, page 627-628, School Psychologist testimony.

⁴³ See Exhibit 2-50; the document is not dated. See also Transcript, page 628-629.

1 School Psychologist could provide information to the IEP Team regarding the available
2 District programs.⁴⁴

3 13. On August 12, 2009, Parents participated in a site visit to the ABC
4 program at Sequoya Elementary School ("Sequoya"). The group had attempted to visit
5 the self-contained Language Learning Center ("LLC") program at Sequoya on the same
6 day but the group was not welcomed by the special education teacher, and was asked
7 to leave the classroom, because the visit had not been prior arranged with her.⁴⁵

8 14. On August 14, 2009, Parents visited the ALC program at Laguna, after
9 which they agreed to reconvene for the IEP meeting on August 20, 2009. In
10 correspondence dated August 14, 2009, Parents alerted District to their concern that,
11 for the entire week, Student had not received special education services.⁴⁶ Parents
12 also requested whether they should consider, or have a site visit to, "any other District
13 special education programs" in the District prior to the August 20, 2009 meeting.
14 Parents indicated that, if not, they would proceed with the understanding that the Team
15 would discuss only the "ABC, LLC, and ACL [sic] special education programs for
16 placement purposes" but also indicated they would "propose our placement
17 recommendations at her resumed IEP meeting."

18 15. On August 14, 2009, Parents also requested a copy of any draft IEP
19 prepared before the August 20, 2009 meeting and Father offered to make himself
20 available to "jointly draft the amended proposed IEP."⁴⁷

21 16. On August 17, 2009, District supplied Parents with a draft Present Levels
22 of Educational Performance ("PLEP") document, drafted by School Psychologist.⁴⁸

23 ⁴⁴ Transcript, pages 629 - 630, 683, 685, 687- 690, 691-693, and 698, School Psychologist testimony. See
24 also, Transcript, page 395, Learning Resource Teacher, Redfield testimony; Transcript, pages 425-445,
25 Former Special Education Director testimony; Transcript, pages 814 - 817, 876-880, and 882-887, Lead
26 Psychologist testimony; and, Transcript, pages 922-924, 956 960, Special Education Coordinator.

27 ⁴⁵ Although Parents had the opportunity to meet with the teacher in a conference room after being asked
28 to leave the classroom, these circumstances left a very bad impression with Parents and Parents were no
29 longer interested in considering the LLC program at Sequoya as a possible environment for Student; see
30 also Exhibit 2-53, parental letter to School Psychologist in which Parents indicate "I trust that you agree
with us that [Student] should not be considered for placement in the LLC program given Teacher [deleted
name]'s behavior." The hearing record indicated that the teacher had not yet listened to a voice-mail
message from School Psychologist about the LLC site visit. See Exhibit P, bates-stamp page 118.

⁴⁶ See Exhibit 2-53. The hearing record indicated that the first day that Speech Language Pathologist,
Redfield, was at the Redfield campus was August 20, 2009. See Transcript, page 755.

1 17. On August 20, 2009, the IEP Team reconvened and met for two hours.⁴⁹
2 The following persons were participants at the August 20, 2009 IEP meeting: Parents;
3 Parents' Advocate, Elaine Berkley ("Advocate"); First Grade Teacher, Redfield;
4 Learning Resource Teacher, Redfield; School Psychologist ; Speech Language
5 Pathologist; School Psychologist 2; Special Education Coordinator;⁵⁰ and District's in-
6 house counsel.⁵¹

7 18. At the August 20, 2009 IEP meeting, the IEP Team discussed and
8 considered Student's individual needs with regard to the District's special education
9 programs and services. The IEP Team discussed the Hoffman and Werner
10 evaluations, those evaluations' recommendations, reading programs and various
11 methodologies, the special education environments (LLC, ABC, and ALC) available
12 within the District, and the parentally requested private day-school placement of NWLA.
13 The District also indicated to Parents that the District would conduct bi-weekly progress
14 assessments to determine how, and whether, the special education program and
15 services might need to be adjusted for Student's individual needs.

16 19. As the August 20, 2009 meeting was coming to a close, Advocate asked
17 Special Education Coordinator to state what the District's offer of placement was and, in
18 response, Special Education Coordinator indicated that the District's placement offer
19 was the ALC program (located at Laguna campus). Special Education Coordinator did
20 not take a poll of the IEP Team participants before she responded and indicated the
21 District's offer of placement in the ALC program.

22 20. On August 21, 2009, District issued a PWN proposing to place Student in
23 the self-contained ALC program at Laguna Elementary School.⁵² The PWN
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25 ⁴⁷ See Exhibit 2-54. District did not prepare a draft IEP. See District Response to Complaint, page 3.

26 ⁴⁸ See Exhibit 2-58.

27 ⁴⁹ The Agenda for the August 20, 2009 meeting is set forth in Exhibit P. There is no tape recording of the
28 meeting. However, School Psychologist took notes and created a document entitled Conference Notes.
29 See Exhibit P and 1-49. Additionally, Special Education Coordinator took notes. See Exhibits R and 1-15.

30 ⁵⁰ Special Education Coordinator attended the meeting as the District representative, a person with
authority to commit funds for private day-school placement if the IEP Team determined to recommend
private day-school placement. See Transcript, page 926.

⁵¹ Parent [REDACTED] had previously indicated to District that he represented Student's interests both as her
Father and her attorney. See Exhibit J.

⁵² See Exhibit S.

1 acknowledged that a self-contained setting had been recommended for Student by the
2 May 11, 2009 IEP Team. The PWN explained as follows:

3 ... The Academic Learning Center (ALC) self-contained
4 program is an appropriate self-contained program that will
5 meet [Student]'s educational needs, and Individual
6 Education Plan goals and objectives. In addition, weekly
7 progress monitoring will be completed.

8 The PWN noted that the Werner and Hoffman evaluations had recommended a small
9 classroom with no more than 12 students, and that "the least restrictive environment to
10 meet [Student]'s educational needs was determined to be a small classroom with no
11 more than 12 students." The PWN stated that the proposed action was based on the
12 following:

13 Current evaluation results from Valerie Hoffman Psy.D., and
14 Anita Werner. Review of classroom grades, test scores,
15 work samples, effort, evaluation of intervention
16 effectiveness, current IEP and teacher observation.

17 21. On August 21, 2009, District issued a PWN refusing to place Student at
18 private day school at NWLA.⁵³ The PWN explained as follows:

19 The Academic Learning Center self-contained class (ALC) is
20 appropriate to meet [Student]'s educational needs, Individual
21 Education Plan goals and objectives. According to the
22 2008/2009 Individual Education Plan, [Student] did make
23 positive growth and progress on her IEP goals and
24 objectives.

25 The PWN again noted that the Werner and Hoffman evaluations had recommended a
26 small classroom with no more than 12 students and again indicated that the proposed
27 action was based on the following:

28 Current evaluation results from Valerie Hoffman Psy.D., and
29 Anita Werner. Review of classroom grades, test scores,
30 work samples, effort, evaluation of intervention
effectiveness, current IEP and teacher observation.

21. On August 21, 2009, Parents served District with a ten-day notice of
withdrawal for Student from Redfield, effective September 4, 2009 and intention to

1 place Student at NWLA.⁵⁴ In this letter, Parents disagreed with the ALC self-contained
2 program placement, indicating their position that the ALC placement offer "does not
3 provide [Student] with ... FAPE."⁵⁵

4 23. On August 25, 2009, District issued a PWN again refusing to place
5 Student at NWLA.⁵⁶ The PWN explained as follows:

6 The [District] has an appropriate self-contained program that
7 is able [to] meet [Student]'s educational needs. The self-
8 contained program the [District] proposes is the [ALC] at
Laguna Elementary School.

9 The PWN described its considerations as follows:

10 The [District] has considered the following options: [NWLA],
11 Regular education class, regular education class with
12 supplementary aids and services, regular classroom with
13 itinerant services in the class, regular classroom with team
14 teaching, regular classroom with resource room support,
15 self-contained class, special school, home instruction, and
16 hospitalization/institutionalization. The least restrictive
17 environment to meet [Student]'s education needs was
determined to be a self-contained classroom (classroom
with no more than 12 students). The [ALC] at Laguna
Elementary School in the [District] is a self-contained
program that is able to meet [Student]'s educational needs.

18 The basis for the refusal action was the same as had been stated in the previous
19 PWNs.

20 24. On September 4, 2009, Parents withdrew Student from District.⁵⁷ Parents
21 enrolled Student in NWLA for the remainder of the academic year 2009-2010, and
22 subsequently for summer session in 2010, academic year 2010-2011 and summer
23 session in 2011.

24 25. On September 4, 2009, District issued its PWN regarding the
25 withdrawal.⁵⁸

26 **DUE PROCESS**

27
28 ⁵³ See Exhibit T.

29 ⁵⁴ See Exhibit U.

30 ⁵⁵ *Id.*

⁵⁶ See Exhibit V.

⁵⁷ See Exhibit W.

1 26. On August 18, 2011, Parents filed the Complaint alleging the failure of
2 District to provide FAPE to Student by virtue of multiple and various process, or
3 procedural, failures. Petitioners' Complaint presents a detailed chronology of the
4 alleged process, or procedural, failures.⁵⁹ As requested and discussed at the pre-
5 hearing conference, on September 20, 2011, Parents filed a pre-hearing summary
6 statement of the issues for hearing.⁶⁰

7 27. As Count I, Parents alleged a substantive violation of a state
8 administrative rule, A.A.C. R7-2-401(F)(1) when District failed to provide to Parents a
9 copy of Respondent's procedures for the development, implementation, review and
10 revision of IEPs.

11 28. As Count II, Parents alleged a substantive and procedural violation of
12 IDEA when District failed to "complete" an IEP for the 2009-2010 school year either at a
13 May 11, 2009 IEP meeting or at an August 20, 2009 IEP meeting.⁶¹ Parents asserted
14 that the May 11, 2009 IEP was held "in abeyance" through the actions of a failure to
15 have consensus and an agreement to "meet again to review the [additional testing] data
16 and incorporate it into the IEP."

17 29. As Count III, Parents further alleged that District predetermined the
18 educational placement District offered at the August 20, 2009 IEP meeting.⁶²

19 30. As solutions for the alleged violations in the Complaint, Parents requested
20 reimbursement for the expenses, and related expenses of Student's placement at the
21 NWLA and the same such future expenses.⁶³

22 31. In its Response to the Complaint, District asserted that any and all
23 allegations and due process claims related to actions occurring on or before August 18,
24 2009 were time-barred pursuant to the IDEA and 34 C.F.R. § 300.511.⁶⁴ District

25 ⁵⁸ See Exhibit 2-68.

26 ⁵⁹ Petitioners' Complaint makes 204 allegations. Petitioners' Complaint can be found in the Administrative
Record and at Exhibit 2-70.

27 ⁶⁰ Petitioners' filing can be found in the Administrative Record and at Exhibit 2-72.

28 ⁶¹ In the Complaint, Parents indicated multiple and various requests to convene, or reconvene, an IEP
meeting. In their September 20, 2011 Pre-hearing Statement of Issues, Parents did not highlight any
alleged substantive failure(s) of the May 11, 2009 IEP.

29 ⁶² The placement offered was the ALC self-contained program at Laguna.

30 ⁶³ Parent indicated at the September 13, 2011 pre-hearing conference that the issue of future
reimbursement, raised in the Complaint, was not applicable.

⁶⁴ The District's Response filing can be found in the Administrative Record and at Exhibit 2-71.

1 agreed that the scheduled IEP meeting was convened "on August 20, [2009] to
2 continue to address Parent's concerns and re-visit [Student's] IEP and placement and
3 the recommendations of the independent evaluators."⁶⁵ District asserted that when
4 Student began the 2009-2010 school year, the May 11, 2009 IEP was complete, in
5 place, and being implemented.⁶⁶

6 32. In its Motion to Dismiss Counts I and II, District agreed that Count III may
7 proceed to hearing but argued that Counts I and II must be dismissed. District argued
8 that Count I is not being raised in the proper forum and fails to state a compensable
9 IDEA claim. District argued that Count II is barred because Parents failed to raise the
10 issue of any failure to complete Student's May 11, 2009 IEP within a two year limitation
11 period. District argued that Parents were barred from "bringing claims that occurred or
12 arose out of the May 11, 2009 IEP meeting."⁶⁷

13 33. Petitioners filed a Response to the Motion to Dismiss, along with a packet
14 entitled **SUBMISSION OF EVIDENCE IN SUPPORT OF PETITIONERS' RESPONSE TO THE**
15 **RESPONDENT'S MOTION TO DISMISS.**⁶⁸

16 34. District filed a Reply to the Response.⁶⁹

17 35. By ORDER dated December 30, 2011, the Administrative Law Judge
18 issued a determination regarding the statute of limitations, ruling on the motions and
19 setting the issue(s) for hearing.⁷⁰ The Administrative Law Judge ruled as follows:

20 RULING

21 With regard to Count I, the allegation and claim shall
22 be dismissed. Pursuant to 34 C.F.R. § 300.507(a), IDEA
23 due process complaints are limited to the identification,
24 evaluation, educational placements and provision of FAPE
25 to children with disabilities. The alleged violation of a state
26 administrative rule is not properly before the Tribunal.

27 ⁶⁵ See Respondent's Response, Response to Allegation No. 117.

28 ⁶⁶ See Respondent's Response, Response to Allegations No. 128, 126 and 117.

29 ⁶⁷ District's Motion to Dismiss Counts I and II is found in the Administrative Record and at Exhibit 2-73.

30 ⁶⁸ Petitioners' Response memorandum is found in the Administrative Record and at Exhibit 2-74; however,
the packet of Submission of Evidence in support of the Petitioners' response is found only in the
Administrative Record.

⁶⁹ The District's filing can be found in the Administrative Record and at Exhibit 2-75.

⁷⁰ The RULING portion of the Administrative Law Judge's December 30, 2011 ORDER is set forth herein,
accompanied by its original footnotes.

1 With regard to Count II, the IDEA requires that a due
2 process complaint allege violations that occurred not more
3 than two years before the date the parent knew or should
4 have known about the alleged action that forms the basis of
5 the complaint. In the Complaint, Parents are taking the
6 positions that because they and Respondent were going to
7 revisit Student's IEP when the speech language evaluation
8 and the psychoeducational evaluation were completed and
9 reviewed by the IEP Team, Student's May 11, 2009 IEP was
10 "not complete" and they had not "approved" the IEP.⁷¹ In
11 their pre-hearing issue summary, Parents state that the IEP
12 Team "did not arrive at a consensus with respect to the
13 completion of the IEP, and the matter was held in
14 abeyance." Generally, Parents alleged both substantive and
15 procedural IDEA violations for Respondent's failure to
16 complete Student's 2009-2010 IEP; however, other than a
17 disagreement with the August 20, 2009 offered ALC
18 placement, no particular substantive violation has been
19 alleged in the filings and submissions.

14 The available information demonstrates that two
15 evaluations were provided by Parents to Respondent on July
16 29, 2009 and that Parents requested to reconvene the IEP
17 meeting. Given that the submissions demonstrate both
18 parties were aware they would "revisit" the May 11, 2009 IEP
19 with the new evaluation information, the Administrative Law
20 Judge fails to see how, and Parents have not demonstrated
21 how, Respondent could have, in any manner, "completed"
22 Student's IEP in the absence of the two expected, but not
23 yet received, evaluations.

21 Therefore, Parents appear to be raising an issue of
22 an IEP (here, the May 11, 2009 IEP) that failed to provide
23 unstated requisite individualized services because the IEP
24 was not yet completed; if so, Parents would be required to
25 demonstrate in what way(s), and through what procedural
26 failures, the May 11, 2009 IEP failed to include any
27 particular required services.⁷² Pursuant to 34 C.F.R. §
28 300.507(a)(2), such an issue needed to be raised within two
29 years of the May 11, 2009 IEP meeting. Parents' Complaint
30 was not filed until August 18, 2011. Therefore, Parents'

⁷¹ The Administrative Law Judge is unaware of any law or case law under which parents are called upon or authorized to "approve" an IEP in order to effectuate a valid IEP.

⁷² Parents would be called upon to demonstrate the specific procedural violations and the dates thereof that led to an incomplete May 11, 2009 IEP. Such dates could not have occurred after May 11, 2009.

1 claims and requests for remedies regarding the May 11,
2 2009 IEP are time barred and shall be dismissed.⁷³

3 Based on the submissions, the earliest possible date
4 on which any alleged failure by Respondent to "complete"
5 Student's 2009-2010 IEP (after the May 11, 2009 IEP
6 meeting) would have been July 29, 2009 no matter how
7 many times a request for an IEP meeting had been made.
8 The IEP Team could not have considered the new
9 evaluation information until it was available. Parents'
10 Complaint was not filed until August 18, 2011. Therefore,
11 Parents' claims and requests for remedies regarding alleged
12 procedural failures to complete Student's 2009-2010 IEP are
13 time barred unless they spring from actions that took place
14 after August 18, 2009.

15 The IEP Team convened on August 20, 2009 and, at
16 that meeting, after review and consideration of the two
17 evaluations, Respondent offered Student a self-contained
18 educational placement while Parents requested a private
19 day school placement.

20 Parents apparently disagree that the two evaluations
21 were reviewed and considered by Respondent at the August
22 20, 2009 IEP meeting. Such disagreement would be
23 contained within the Count III allegation of predetermination.

24 Further, Parents clearly disagree that the IEP Team's
25 August 20, 2009 determination of an ALC educational
26 placement for Student offered FAPE for Student.⁷⁴ The
27 available information demonstrates that Parents disagreed
28 with the August 20, 2009 determination because, the next
29 day, Parents gave District a written ten day notice of
30 withdrawal. Parents' disagreement is also documented in
Parents' August 27, 2009 "response" to Respondent's
August 25, 2009 PWN denying private day school

⁷³ While the Administrative Law Judge shall only find liability and only award any compensatory education or reimbursement as remedies for events that took place within the two year limitation period, it may be necessary to hear some relevant admissible evidence referring to events that occurred more than two years prior to the filing of the Complaint for the limited purpose of providing context to the events within the two year limitation period. See *Dep't of Education, State of Hawaii v. E.B., ex rel J.B.*, 45 IDELR 249 (D. Hawaii 2006). The parties do not appear to disagree on the occurrence or dates thereof regarding events prior to August 18, 2009; therefore, stipulations to such occurrences and dates, but not characterizations, may prove to be efficient for purposes of due process hearing. The Administrative Law Judge will discuss such evidence at the next telephonic pre-hearing conference in this matter.

⁷⁴ The Administrative Law Judge was unable to locate within the submissions any copy of an IEP Addendum that was created as a result of the August 20, 2009 IEP meeting.

1 placement. Based on the IEP Team's August 20, 2009
2 determination offering ALC educational placement for
3 Student, Parents' remaining reimbursement issues (tuition
4 and transportation) based on their disagreement with the
5 ALC educational placement and their unilateral private
6 placement of Student at New Way are timely under Parents'
7 August 18, 2011 Complaint.

8 In disputes regarding disagreements about FAPE, in
9 order to demonstrate any entitlement to reimbursement for
10 the unilateral placement of Student in private day school,
11 Parents must demonstrate that, *at that time*, Respondent's
12 offer of Student's educational placement in the ALC program
13 failed to provide FAPE to Student *and* that the private day
14 placement in New Way was appropriate. See 34 C.F.R. §
15 300.148.

16 Based on the foregoing,
17 IT IS ORDERED the Respondent's Motion to Dismiss
18 Count I and II is granted. Petitioners' allegation in Count I
19 regarding a violation of state administrative rules and the
20 allegations in Count II regarding either substantive or
21 procedural violations of IDEA by Respondent that allegedly
22 occurred *before* August 18, 2009, are dismissed.

23 IT IS FURTHER ORDERED that Petitioners'
24 complaints relating to disagreement of FAPE offered or
25 provided through Student's August 20, 2009 IEP and the
26 allegations of predetermination shall proceed to hearing.

27 Thereafter, the ORDER set out the process for due process hearing to proceed and to
28 convene.

29 HEARING

30 36. Mother testified that she was at the August 20, 2009 meeting, along with
Advocate, and that she did not have the opportunity to speak at the meeting.⁷⁵ Mother
testified that Father spoke at the meeting.⁷⁶ Mother testified that she was not asked
about her opinion for an appropriate placement for Student.⁷⁷

⁷⁵ Transcript, page 542.

⁷⁶ *Id.*, page 547.

⁷⁷ *Id.*, page 543.

1 37. Father testified that he was at the August 20, 2009 meeting, that he
2 spoke, and that their Advocate also had opportunity for input at the meeting.⁷⁸ Father
3 testified that he invited Special Education Coordinator to accompany Parents for a site
4 visit to NWLA, but that she declined to do so, indicating she had already been there.⁷⁹
5 Father indicated that, in his opinion, Special Education Coordinator's notes "evidences
6 ... that there was no consensus arrived at prior to the FAPE offer."⁸⁰ Father testified
7 that, at the end of the meeting, he disagreed with the placement offer.⁸¹

8 38. Regarding his preference in August of 2009 for a private day-school
9 placement at NWLA for Student, Father testified that he wanted a program to meet
10 Student's "special and unique needs as Anita Werner indicated."⁸² Father indicated
11 that he had met with Anita Werner and discussed the results of the evaluation. Father
12 indicated that for Student's selective mutism, he wanted a program to help with that
13 "behavioral problem."⁸³ Father indicated that, as to Student's "severe communication
14 problems," he wanted to "find a program that provided special direct intervention
15 services with an intensity as recommended by Anita [Werner]."⁸⁴ Father testified that
16 he went to the site visits in good faith and further indicated that he had not been able to
17 meet with a speech language professional at any of the site visits to discuss the Werner
18 report and recommendations for Student.⁸⁵ Father's position was that he did not find
19 "cooperation" or "the same compassion and interest in my daughter's education" as he
20 had and that was why they sought out NWLA.⁸⁶ Father testified "... [NWLA] took the
21 time to review all the reports objectively, to evaluate her and to incorporate her into a
22 program that met her special and unique needs."⁸⁷

23 ⁷⁸ *Id.*, page 492, 506 and 507.

24 ⁷⁹ *Id.*, page 492.

25 ⁸⁰ *Id.*, page 485 (referencing Notebook 1, Exhibit 15).

26 ⁸¹ *Id.*, page 507.

27 ⁸² *Id.*, page 508.

28 ⁸³ *Id.*, page 508.

29 ⁸⁴ *Id.*, page 509.

30 ⁸⁵ *Id.*, pages 509, 510, 511. However, see also Transcript, pages 965- 967, Special Education Coordinator testimony indicating that Parents had not indicated to her in advance of their interest in meeting service providers at the site visit.

⁸⁶ Transcript, pages 510, 511.

⁸⁷ *Id.*, page 511. See also Exhibit U, wherein Parents indicated that, at the end of the meeting, "my wife and I indicated that it would be wise for us to consider the SUSD's placement offer, and then to advise you of our decision in writing."

1 40. With the exception of Parents, the IEP team members testified at hearing
2 that, at the August 20, 2009 IEP meeting, the IEP Team discussed the Hoffman and
3 Werner evaluations, those evaluations' recommendations, reading programs and
4 various methodologies, the special education environments (LLC, ABC, and ALC)
5 available within the District, and the parentally requested private day-school placement
6 of NWLA. The District also indicated to Parents that the District would conduct bi-
7 weekly progress assessments to determine how, and whether, the special education
8 program and services might need to be adjusted for Student's individual needs.

9 41. Teacher, NWLA testified that at NWLA, they had a program that would,
10 and did, meet the primary recommendations set forth in the Hoffman report.⁸⁸ Although
11 the number of persons in Student's classroom varied over the day, Teacher, NWLA,
12 indicated that the number was never over 12. Teacher, NWLA, testified that Student
13 made progress in her two years at NWLA, "to the point that her most recent speech and
14 language evaluation, the selective mutism had been resolved."⁸⁹ However, Teacher,
15 NWLA, also testified that, at the time when she left the employ of NWLA (June 2011),
16 Student was still below her second grade peers in all areas.⁹⁰ When discussing
17 Student's daily schedule for 2009-2010, Teacher indicated that, during the unit studies
18 portion of the day, "twice a week, we did specific social skills training with lesson plans
19 and role playing and so forth."⁹¹ According to her daily schedule (as related to her
20 identified deficiencies), Student was scheduled for the following: a fifty-five minute
21 period of math instruction every day; a fifty-five minute period of "association method"
22 each day;⁹² twice daily, another session of "association method" for one-half of a fifty-
23 five minute period; one-half of a fifty-five minute period for pull-out speech therapy each
24 day; one-half of a fifty-five minute period for pull-out occupational therapy each day; a
25 fifty-five minute period of physical education three times a week. Teacher, NWLA,
26 indicated that the NWLA November 30, 2009 IEP was developed based on the

27 ⁸⁸ Transcript, page 46; *see also* Transcript, pages 44 – 56.

28 ⁸⁹ Transcript, pages 56-58. *See also*, a June 2010 psychoeducational evaluation by Julie E. Rosebrook,
29 Ph.D., indicates under the diagnoses: "History of Selective Mutism, resolved." *See* Exhibit 1-51, page 12
(bates-stamped 130).

30 ⁹⁰ Transcript, page 111.

⁹¹ *See* Exhibit 1-41, a daily schedule for Student.

⁹² "Association method" was described as a structured reading program that also teaches oral and written

1 Hoffman and Werner reports and on classroom observations and assessments.⁹³ In
2 this regard, Teacher, NWLA, testified that "we also need to have time to review the
3 psychoeducational evaluation, the speech evaluation, work together as a team to talk
4 about which programs that we have available that would be the best program to use
5 with the child with regards to curriculum."⁹⁴

6 42. The hearing record demonstrated that the District's ALC program is
7 limited to 12 students and is specifically designed to serve students struggling with their
8 academic skills who also have deficits in behavior/social skills and communication
9 skills.⁹⁵ School Psychologist, Lead Psychologist and Special Education Coordinator
10 each testified that Student's individual needs could be met, and the Hoffman and
11 Werner evaluation recommendations could be implemented, through the District's
12 programming and services provided in the ALC program.⁹⁶ Each of these witnesses
13 also testified that NWLA would have been a more restrictive environment than the
14 District placement environment.⁹⁷

15 CONCLUSIONS OF LAW

16 1. Through the IDEA, Congress has sought to ensure that all children with
17 disabilities are offered a FAPE that meets their individual needs.⁹⁸ These needs
18 include academic, social, health, emotional, communicative, physical, and vocational
19 needs.⁹⁹ To do this, school districts are required to identify and evaluate all children
20 within their geographical boundaries who may be in need of special education and
21 services. The IDEA sets forth requirements for the identification, assessment and
22 placement of students who need special education, and seeks to ensure that they
23 receive a free appropriate public education. A FAPE consists of "personalized

24 language. See Transcript, page 67.

25 ⁹³ She also indicated that parents were involved in IEP meetings but were not involved in informal
26 meetings regarding scheduling and curriculum programs to be implemented. Transcript, page 113.

27 ⁹⁴ Transcript, pages 75-77.

28 ⁹⁵ Exhibit X contains a general description of the ALC program; see also Transcript, page 976-978.

29 ⁹⁶ Transcript, pages 643-660, 665 and 734, School Psychologist testimony. Transcript, pages 818-851,
30 Lead Psychologist testimony. Transcript, pages 929-949, Special Education Coordinator testimony.

⁹⁷ Transcript, pages 661-662 and 721, School Psychologist testimony. Transcript, pages 850-851, Lead
Psychologist testimony. Transcript, pages 947-948, Special Education Coordinator testimony.

⁹⁸ See 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

⁹⁹ *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 instruction with sufficient support services to permit the child to benefit educationally
2 from that instruction.”¹⁰⁰

3 2. Pursuant to IDEA, the District is required to annually review a student's
4 IEP to determine whether the annual goals are being achieved and to revise the IEP as
5 appropriate to address the lack of expected progress, the results of any reevaluations,
6 information about the student provided by parents, the student's anticipated needs and
7 any other unique matters.¹⁰¹ These IEP determinations, and the requisite educational
8 placement decisions, are made by a group of people, an IEP Team, which includes the
9 parents, who are knowledgeable about the student, about the available evaluations and
10 about the placement options.¹⁰² One other mandate is that a school district ensure that
11 a child's placement is determined annually, is based on the IEP, and is as close as
12 possible to the child's home.¹⁰³

13 3. A petitioner who files for a due process hearing alleging non-compliance
14 with the IDEA must bear the burden of proving that claim.¹⁰⁴ The standard of proof is
15 “preponderance of the evidence,” meaning evidence showing that a particular fact is
16 “more probable than not.”¹⁰⁵ Therefore, Petitioners bear the burden of proving by a
17 preponderance of evidence the allegations, claims and arguments raised.

18 4. Pursuant to 34 C.F.R. § 300.507(a)(2), Parents' claims and requests for
19 remedies regarding the alleged failures are time barred unless they spring from actions
20 that took place *after* August 18, 2009. The IEP Team convened on August 10, 2009
21 and reconvened on August 20, 2009. At the August 20, 2009 meeting, after review and
22 consideration of the two evaluations, and after a two-hour discussion, District offered
23 Student a District self-contained educational placement at the ALC program although
24 Parents had requested a private day school placement at NWLA. Two issues remain in
25 Petitioners' Complaint. First, Petitioners disagree that the Hoffman and Werner

26 ¹⁰⁰ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

27 ¹⁰¹ See 34 C.F.R. § 300.324(b).

28 ¹⁰² See 34 C.F.R. §§ 300.116(a) and 300.501(c).

29 ¹⁰³ See 34 C.F.R. § 300.116(b).

30 ¹⁰⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

¹⁰⁵ *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).

1 evaluations and Student's individual needs were fully considered by the IEP Team at
2 the August 20, 2009 IEP meeting and argued that the offered ALC placement was
3 predetermined as a procedural violation of the IDEA. Second, Petitioners disagree, and
4 argued, that the District's self-contained ALC placement failed to offer or provide FAPE
5 for Student's individual needs in violation of the IDEA.

6 5. Regarding the predetermination arguments, it must be concluded that the
7 hearing record demonstrated that at, and/or as a result of, both the August 10, 2009
8 and August 20, 2009 IEP meetings, (a) the IEP Team members discussed and
9 considered the Hoffman and Werner evaluations and Student's individual needs stated
10 therein, and (b) that Parents and their Advocate were present at each of these two IEP
11 meetings and that they participated in the discussion and considerations of the
12 evaluations and of Student's individual needs. Therefore, any argument with regard to
13 an alleged procedural failure preventing or significantly impeding parental participation
14 in the decision making process regarding Student's special education services must fail.

15 6. Regarding the other portion of Petitioners' predetermination argument,
16 Petitioners initially appeared to be taking the position that District employees had
17 discussed Student and her needs before the IEP meeting and had decided on her
18 placement and, thus, were not open to consider the evaluation and recommendations
19 and, therefore, did not consider that information at the IEP meeting. However, at
20 hearing, Petitioners focused the argument to be that, District employees did not have
21 any communication with each other about Student because they did not need to, for the
22 reason that some District employees, who are IEP Team members, had secretly
23 decided on Student's placement at a secret DPRC meeting and, thus, the District had
24 predetermined its offered placement of the ALC program. Petitioners further argued
25 that the DPRC meeting was really an IEP meeting to which Parents were not, but
26 should have been, invited.

27 7. The Administrative Law Judge will approach these predetermination
28 arguments in three ways. First, the IDEA requires that parents be afforded the
29 opportunity to participate in meetings that deal with identification, evaluation and
30 educational placement, and the provision of FAPE to the child. See 34 C.F.R. §
300.501(b)(1). However, the IDEA specifically carves out an exception to meetings that

1 require parental participation. The IDEA permits the educational agency to engage in
2 "preparatory activities" for the purposes of developing proposals or developing
3 responses to parental proposals that will be discussed at subsequent IEP meetings.
4 See 34 C.F.R. § 300.501(b)(3). Based on the hearing evidence, the Administrative Law
5 Judge concludes that the District's DPRC meetings fall within allowable "preparatory
6 activities" permitted under the IDEA.¹⁰⁶ Second, with regard to parental participation in
7 placement determinations, the IDEA requires that parents be a "member of any group
8 that makes decisions on the educational placement of the parent's child." See 34
9 C.F.R. § 300.501(c). Petitioners' position, and argument, was that the District did
10 decide on Student's educational placement at the DPRC meeting. However, the
11 hearing testimony of each DPRC participant refutes that because each DPRC
12 participant testified that, at the DPRC meetings, they discuss the District's various self-
13 contained programs in terms of availability, such as whether the various programs are
14 full (*i.e.*, how many students were currently in those self-contained programs), the
15 make-up of the students in the programs (*i.e.*, the ages and disabilities of the students)
16 and the staffing in the programs, and that no placement decision for any student is
17 made at the DPRC meetings. School Psychologist testified that she gathers the current
18 information about the various programs to determine which District programs could be
19 appropriate for a particular student and could be visited by parents¹⁰⁷ and that she can
20 then provide information to the IEP Team regarding available District programs to be
21 considered for a student. Former Special Education Director, who did not recall
22 specifics from the DPRC meeting being questioned by Parents, testified that the DPRC
23 committee has been in existence since before she became a special education
24 coordinator (in 1998) and was designed to look at staffing and availability of specialized
25 programs and available space in those specialized programs for a student closest to
26 their home school.¹⁰⁸ Additionally, the hearing record demonstrated that, at the August
27 20, 2009 IEP meeting, multiple possible environments for educational placement,

28 ¹⁰⁶ Petitioners provided no citations to any case law regarding any "preparatory activities" having been
29 considered to be more than "preparatory" and, thus, having been determined by the courts to be a
30 procedural violation of the IDEA.

¹⁰⁷ See Transcript, pages 422 and 426.

¹⁰⁸ See Transcript, page 629, where School Psychologist indicates that she would not want to have

1 including NWLA, were discussed and considered by the IEP Team. Based on the
2 hearing evidence, the Administrative Law Judge concludes that the DPRC meeting in
3 question in this matter was *not* an IEP meeting to which parents were required to be
4 invited for participation, and further concludes that, in this case, District did not make
5 any placement decision regarding Student at the DPRC meeting in question. Finally,
6 pursuant to 34 C.F.R. § 300.513(a)(2), parties alleging a procedural violation of the
7 IDEA must demonstrate the existence of a procedural violation, and that the procedural
8 deficiencies (a) impeded the child's right to a FAPE, (b) significantly impeded the
9 parent's opportunity to participate in the decision-making process for providing FAPE to
10 the child, or (c) caused a deprivation to the child of educational benefit. The hearing
11 record fails to demonstrate any of these elements and, therefore, the Administrative
12 Law Judge concludes that District did not commit a procedural violation of IDEA by
13 conducting a DPRC meeting.

14 8. Petitioners argued that at the August 20, 2009 IEP meeting, at the time of
15 the offer, or before the offer, the School Psychologist did not poll the IEP Team and/or
16 take a verbal indication of a recommendation from each IEP Team participant. Taken
17 in its most favorable light, this appears to be another of Petitioners' arguments alleging
18 a procedural violation of the IDEA. Petitioners cited no legal support regarding any IDEA
19 requirement to poll the IEP Team members when decision-making is taking place at the
20 IEP Team meetings. The IEP Team is the final decision maker, typically by consensus,
21 with regard to the IEP, or any necessary changes in an existing IEP, to continue to
22 provide the unique and specialized services that a child with a disability requires. A
23 reasonable person would conclude that, if a parent disagreed with a decision made at an
24 IEP meeting, then there was not a full consensus or full agreement at the IEP Team
25 meeting. However, full consensus is not required and the IDEA provides various
26 opportunities for a parent who disagrees with the local education agency in regard to
27 special education services or changes in services. Parents selected one of those
28 opportunities in this case by the filing a due process complaint notice. Parents also
29 selected one of those opportunities by unilaterally placing Student in NWLA.

30

parents observe a program that was already full.

1 9. In order to demonstrate any entitlement to reimbursement for their
2 unilateral placement of Student in private day school, Parents must demonstrate that, at
3 *that time*, Respondent's offer of Student's educational placement in the ALC program,
4 failed to provide FAPE to Student and that the private day placement in New Way was
5 appropriate.¹⁰⁹ See 34 C.F.R. § 300.148. The standard to be met for consideration in
6 this matter is whether the District's special education placement, *i.e.*, the services and
7 the environment offered at the August 20, 2009 IEP meeting, consisted of specialized
8 instruction and services reasonably calculated to enable Student to receive educational
9 benefit.¹¹⁰ Based on the hearing record, the Administrative Law Judge concludes that,
10 of the District's available special education programs, the ALC program appeared to fit
11 each of Student's identified educational needs: small classroom environment; small
12 group and individualized instruction; emphasis on specialized academic instruction in
13 reading and math; opportunities for social interaction; and, the noted related special
14 services, including speech therapy, physical therapy, occupational therapy and adaptive
15 physical education. The ALC program accommodated recommendations contained in
16 both the Hoffman and Werner reports.¹¹¹ Additionally, the District's offer of FAPE was
17 made for the least restrictive environment in which District calculated it could provide
18 specialized instruction to Student. Petitioners elicited lengthy testimony about Student's
19 progress at NWLA over her two years at NWLA, and also emphasized that Student had
20 multiple socialization opportunities and successes outside of the academic school
21 setting. However, Student's outside social successes and academic progress or status
22 nearly two years later are not factors when considering the issue of whether an offer of
23 FAPE was reasonably calculated to provide FAPE at the time it was offered. The IDEA
24 contains no particular substantive educational standard and no mandate to maximize
25 the potential of a child. In this case, the hearing record demonstrates that the Parents'

26 ¹⁰⁹ Parents recognized a possibility of reimbursement for unilateral placement when they gave the ten-day
27 notice of withdrawal. See Exhibit U.

28 ¹¹⁰ See *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

29 ¹¹¹ It is the role of the IEP Team to determine which of an evaluator's recommendations are to be
30 implemented through integration into a student's IEP goals and the requisite instructional
accommodations based on the unique needs of the particular student. There is no IDEA mandate to
adopt each and every recommendation made by an evaluator with regard to a child with a disability.
NWLA acknowledged that not every recommendation from an evaluator is incorporated into their
programs and that the school would use its "clinical and educational judgment" to determine which

1 preference for NWLA as an education environment for Student was considered by the
2 IEP Team, and was weighed against Student's unique and individual needs for
3 educational instruction in the least restrictive environment when the District offered the
4 ALC program for Student's educational placement.¹¹² Therefore, the Administrative
5 Law Judge concludes that the District's offer of the ALC program for Student's special
6 education placement offered FAPE to Student, and Petitioners have failed to
7 demonstrate otherwise.¹¹³ As a result, the Administrative Law Judge concludes that
8 Parents are *not* entitled to reimbursement for their unilateral private placement of
9 Student at NWLA for the academic year 2009-2010, summer session 2010, academic
10 year 2010-2011, summer session 2011 or their related transportation costs.

11 10. The Administrative Law Judge concludes that Petitioners have *not*
12 demonstrated that District violated the IDEA or denied FAPE with its offer of ALC program
13 placement for Student. For the reasons stated herein, the Administrative Law Judge
14 concludes that Petitioners have not met their burden to demonstrate any of the
15 allegations and, therefore, Petitioners' claims in the Complaint must be denied and the
16 Complaint must be dismissed. Petitioners are not entitled to reimbursement. District is
17 the prevailing party.

18 ORDER

19 Based on the findings and conclusions above,
20 IT IS ORDERED that Petitioners' Complaint is dismissed.
21 ORDERED this 1st day of May, 2012.

22 OFFICE OF ADMINISTRATIVE HEARINGS

23 
24

25 Kay A. Abramsohn
26 Administrative Law Judge
27
28

29 recommendations to implement." See Transcript, pages 184-185.

30 ¹¹² See 34 C.F.R. § 300.117.

¹¹³ Thus, the Administrative Law Judge need not determine whether the NWLA program was appropriate.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this Decision and/or 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. While the federal law sets forth a time frame for an action for judicial review of a Decision, the federal law also allows that a State may have a different time frame.

*Pursuant to Arizona rule A.A.C. R7-2-405(H)(8), any appeal of a Hearing Officer's decision must be filed within 35 calendar days after receipt of the Hearing Officer's decision.*¹¹⁴

Copies distributed this 1st day of May, 2012, to:

[REDACTED] and [REDACTED]
Parent/Petitioners' attorney

[REDACTED]
Jessica Sanchez
Udall, Shumway & Lyons, P.L.C.
Respondent's attorney
jss@udallshumway.com

Arizona Department of Education
Exceptional Student Services
ATTN: Kacey Gregson
1535 West Jefferson Street
Phoenix, AZ 85007

By J. Mena

¹¹⁴ A.A.C. R7-2-405, Due Process Standards Relating to Special Education, was amended and, as amended, was adopted by the State Board of Education on January 26, 2006 for purposes of comporting Arizona's due process hearing rules with IDEA 2004. Those rules contained a new provision regarding an appeal time frame. Those amendments have been published, and the Code updated, by the Arizona Secretary of State in A.A.C. Supp. 09-1.