

STATE OF ARIZONA  
OFFICE OF ADMINISTRATIVE HEARINGS

Student, by and through Parents  
and ,

No. 12C-DP-003-ADE

Petitioners,

-v-

Cottonwood-Oak Creek Elementary  
School District,

ADMINISTRATIVE  
LAW JUDGE DECISION

Respondent.

**HEARING:** October 5, 6, 7 and 14, 2011

**APPEARANCES:** Attorney Amy Langerman, AMY G. LANGERMAN, PC, appeared on behalf of Petitioners, accompanied by Parents; attorney Kellie Petersen, MANGUM, WALL, STOOPS & WARDEN PLLC, appeared on behalf of the Cottonwood-Oak Creek School District ("COCSD"), accompanied by district representative Patricia Osborne, COCSD Educational Services Director. Certified Court Reporters Carole Whipple, Debra Riggs Torres, Marta Johnson, and Doreen Borgmann, of GRIFFIN & ASSOCIATES COURT REPORTERS, were present and recorded the four days of proceedings as the official record of the hearing.

**WITNESSES:**<sup>1</sup> Dianne Frazier, COCSD Director of Special Education Services; Tammy Catalano, Special Education Teacher, COCSD ("**COCSD Special Education Teacher**"); Marti Baio, M.A., CCC-SLP, Speech Pathology Evaluator; Susan Golubock, M.Ed., OTR/L, Occupational Therapy Evaluator; Suzanne Oliver, MT-BC, Founder and Executive Director of Neurological Music Therapy Services of Arizona, Director of ACT School; Patty McCartney, Ph.D., CCC-SLP, co-Director of Chrysalis Academy; Kim Yamamoto, Parent Advocate; Debra Sims, Teacher, COCSD ("**General Education Teacher**"); Jennifer McConnell, B.A., Behavior Consultant, Counseling & Consulting Services; Joseph Gentry, Ph.D., BCBA-D, Gentry Pediatric Behavioral Services; Lisa Larez, OT/L, Occupational Therapist; Phillip Tanner, Ph.D., School Psychologist, COCSD; Michael Viotti, Ph.D., School Psychologist, COCSD; and Petitioner ( "Parent").

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

<sup>1</sup> 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  
2 Parent brings this due process action, on behalf of Student, challenging several  
3 individualized educational programs ("IEPs") adopted by Respondent School District,  
4 seeking reimbursement for parental placements in special private schools, and seeking  
5 compensatory education for failure to properly educate Student, who is disabled. The  
6 law governing these proceedings is the Individuals with Disabilities Education Act  
7 ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-authorized and  
8 amended in 2004),<sup>2</sup> and its implementing regulations, 34 Code of Federal Regulations  
9 ("C.F.R.") Part 300, as well as the Arizona Special Education statutes, Arizona Revised  
10 Statutes (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona  
11 Administrative Code ("A.A.C.") R7-2-401 through R7-2-406.

12 Procedural History

13 Petitioners filed a due process complaint on August 15, 2011. The complaint  
14 claims that Respondent School District did not offer Student a free appropriate public  
15 education ("FAPE") during her [REDACTED] and [REDACTED] grades, making claims of both  
16 substantive and procedural violations of the IDEA. Petitioners seek reimbursement of  
17 expenses for unilateral parental placements (part-time during [REDACTED] grade and full-  
18 time for [REDACTED] grade) and an order awarding further compensatory education.  
19 Respondent School District denies the claims. The parties waived a Resolution  
20 Session and the matter proceeded to hearing.

21 Evidence and Issues at Hearing

22 The parties presented testimony and exhibits at a formal evidentiary hearing  
23 held October 4-7, 2011, and completed on October 14, 2011.<sup>3</sup> The parties presented  
24  
25  
26

27  
28 <sup>2</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of  
2004," IDEA 2004 became effective on July 1, 2005.

29 <sup>3</sup> At the agreement of the parties, the first day of hearing, October 5, 2011, was held at a location in  
30 Cottonwood, Arizona. The remaining days of hearing were held at the Office of Administrative Hearings  
in Phoenix, Arizona.

1 testimony from the witnesses listed above<sup>4</sup> and offered into evidence Petitioners'  
2 Exhibits A through W<sup>5</sup> and Respondent School District's Exhibits 1 through 41.<sup>6</sup>

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

5 (1) Whether a FAPE was denied Student from August 2009 to February  
6 2011 when Respondent School District changed Student's  
7 placement without consulting Student's IEP team or issuing a Prior  
8 Written Notice?

9 (2) Whether Student's February 2010 IEP was created without parental  
10 input?

11 (3) Whether Student's February 2010 IEP was reasonably calculated to  
12 provide meaningful educational benefit (a FAPE) if it:  
13 (a) lacked an appropriate behavior plan,  
14 (b) failed to provide Student a full-time one-to-one aide,  
15 (c) failed to provide Student an appropriate augmentative  
16 communication system, or  
17 (d) placed Student in a general education classroom rather than a  
18 self-contained classroom?

19 (4) Whether Student's May 2011 IEP was reasonably calculated to  
20 provide meaningful educational benefit (a FAPE) if it:  
21 (a) lacked an appropriate behavior plan,  
22 (b) failed to provide Student a full-time one-to-one aide,  
23 (c) failed to provide Student an appropriate augmentative  
24 communication system, or  
25 (d) placed Student in a general education classroom rather than a  
26 self-contained classroom?

27 (5) If a violation is found, whether Student is entitled to compensatory  
28 education and, if so, in what amount?

29 (6) If Respondent School District denied Student a FAPE in February  
30 2010, whether Parents are entitled to reimbursement for expenses  
incurred when they placed Student for three days a week at ACT  
school for the 2010-2011 school year?  
(a) Whether ACT school is an appropriate placement for Student?

<sup>4</sup> Transcripts of the testimony have been added to the record.

<sup>5</sup> These exhibits include over 900 pages of documentation. Exhibit N-520a was admitted only for impeachment purposes.

<sup>6</sup> Like Petitioners' Exhibits, some of these Exhibits contain multiple parts. Many of the pages are not numbered. In total, they include about 500 pages.

1 (7) If Respondent School District denied Student a FAPE in May 2011,  
2 whether Parents are entitled to reimbursement for expenses  
3 incurred when they placed Student full-time at Chrysalis Academy  
4 in August 2011 for the 2011-2012 school year?  
5 (a) Whether Chrysalis is an appropriate placement for Student?

6 Parents argue that both procedural and substantive violations of the IDEA by  
7 Respondent School District denied Student a FAPE. Their main contention is that  
8 Respondent School District has not offered Student a FAPE beginning August 2009.  
9 Respondent School District defends its actions, arguing that a FAPE has been offered  
10 to Student at all times. Respondent School District does admit that, with regard to  
11 issue (1) above, it did not follow IDEA procedures.

12 Post-Hearing Motion to Strike

13 In its written closing argument, Respondent School District raises a procedural  
14 issue that affects the scope of this Decision. Respondent School District moves to  
15 strike "allegations" made by Petitioners based on evidence presented at hearing  
16 regarding two assertions: (1) failure to provide Parents sufficient and accurate  
17 information when developing the February 2010 IEP, resulting in insufficient parental  
18 participation; and (2) failure to accurately monitor the goals of the February 2009 IEP  
19 and/or rewrite them.<sup>7</sup> These assertions were not spelled-out in the due process  
20 complaint and were presented first at the hearing in the evidence and testimony of  
21 witnesses and then argued explicitly for the first time during Petitioners' written closing  
22 argument.<sup>8</sup> In its response brief, Respondent School District urges that Petitioners be  
23 barred from making these assertions because they are amendments to the complaint in  
24 violation of the procedural rules for IDEA.  
25

26  
27 <sup>7</sup> Because Respondent School District does not cite to PETITIONERS' POST-HEARING BRIEF and does not  
28 clearly characterize the arguments to which objection is made, it is difficult to interpret what arguments  
29 the motion is referring to. The "allegations" paraphrased above are the Administrative Law Judge's best  
30 guess.

<sup>8</sup> Counsel for Petitioners has explained that much of the information involved with those assertions was  
not disclosed to Parents until after the complaint was filed and when preparation for the hearing had  
begun. PETITIONER'S [sic] REPLY [BRIEF]... at 2.

1 Under the IDEA statutes and regulations, a party may amend its complaint only if  
2 (a) the other party consents in writing and is given an opportunity to resolve the  
3 complaint through a resolution meeting, or (b) permission of the presiding officer is  
4 obtained, except that the presiding officer cannot give permission to amend less than  
5 five days before hearing.<sup>9</sup> Thus, a school district has a right to advance notice of  
6 claims and the factual and legal bases for those claims.

7 However, Respondent School District did not object or raise a claim of surprise  
8 at the hearing. Indeed, Respondent School District addressed the evidence. No  
9 objection was made until the response brief. This is much too late. Had Respondent  
10 School District raised an objection at hearing, the issue could have been addressed in  
11 a timely manner. But, the objection was not raised and now the record is closed. Thus,  
12 Respondent School District failed to timely object and has waived its rights.<sup>10</sup>

13 Therefore, Respondent School District's Motion to Strike is denied.

14 Respondent School District's Motion to Bar  
15 Issue (1) Due to IDEA Statute of Limitations

16 Respondent School District argues that Issue (1) above, concerning Student's  
17 change of placement without an IEP modification or Prior Written Notice ("PWN"), is  
18 barred by the IDEA's "statute of limitations," which allows parents two years to bring a  
19 claim. Respondent School District bases its argument on the undisputed facts that (a)  
20 Student began second grade (under a February 2009 IEP) on August 4, 2009, and (b)  
21 Petitioners' due process complaint was filed on August 15, 2011, more than two years  
22 later. Petitioners deny that Issue (1) is barred, arguing that one of the exceptions to the  
23 two-year rule applies to them due to the failure of Respondent School District to issue a  
24 PWN for the change in placement.

25 The IDEA sets a timeline for requesting a hearing: "A parent or agency shall  
26 request an impartial due process hearing within 2 years of the date the parent or

27 <sup>9</sup> 20 U.S.C. § 1415(c)(2)(E); 34 C.F.R. § 300.508(d)(3). In addition, an amended complaint starts the  
28 resolution and hearing timelines over again. *Id.*

29 <sup>10</sup> The rule applicable to amending complaints is intended to protect the non-amending party from lack of  
30 notice or surprise. The non-amending party has a right to reasonable notice of the claims that will be  
addressed at hearing. In the circumstances here, Respondent School District sat on that right and  
participated in four days of hearing without objection.

1 agency knew or should have known about the alleged action that forms the basis of the  
2 complaint. . . ."<sup>11</sup> There are two exceptions to the timeline.<sup>12</sup> Under one of the  
3 exceptions, a claim may be brought based on actions older than two years when a  
4 school district has withheld "information from the parent that was required under this  
5 part [20 U.S.C. §§ 1411-1419] to be provided to the parent."<sup>13</sup> School districts are  
6 required to issue a PWN to parents whenever the school district proposes to change  
7 the educational placement of a disabled student.<sup>14</sup> A PWN informs parents about what  
8 action is being taken, explains why it is being taken, explains what other options were  
9 considered, informs parents that they have procedural rights, and provides sources for  
10 assistance in understanding those rights.<sup>15</sup>

11 This tribunal finds that the lack of a PWN informing Parents of the change in  
12 Student's placement falls within the time-limit exception. The PWN is an essential  
13 document in the IDEA process and the failure to issue one when placement is being  
14 changed is a substantial violation of the IDEA and a significant failure to provide  
15 Parents information that was required to be sent to them. The claim made in Issue (1),  
16 even to the extent that it is based on actions that occurred before August 15, 2009, is  
17 not barred.<sup>16</sup>

18 Therefore, Respondent School District's motion to bar Issue (1) is denied.

### 19 Introduction

20 The Administrative Law Judge has considered the entire record, including the  
21 testimony and Exhibits, and now makes the following Findings of Fact, Conclusions of  
22 Law, and Order finding substantive violations of the IDEA and awarding reimbursement  
23 and compensatory education.

### 24 FINDINGS OF FACT

26 <sup>11</sup> 20 U.S.C. § 1415(f)(3)(C). The omitted portion of the quote allows State's to set their own time limit.  
27 Arizona has not changed the two years provided in the IDEA.

28 <sup>12</sup> 20 U.S.C. § 1415(f)(3)(D)(i) and (ii). Paragraph (i) is not applicable here.

29 <sup>13</sup> 20 U.S.C. § 1415(f)(3)(D)(ii).

30 <sup>14</sup> 20 U.S.C. § 1415(b)(3).

<sup>15</sup> 20 U.S.C. § 1415(c)(1).

<sup>16</sup> Because of this ruling, it is not necessary to address when Parents knew or should have known of the violation.

1           1. Student is an elementary school student who is eligible for special education  
2 under the categorical eligibilities of Autism (primary), Moderate Intellectual Disability,  
3 and Speech Language Impairment.<sup>17</sup> She has received related services in the areas of  
4 speech/language therapy, physical therapy, and occupational therapy. She has deficits  
5 in communication skills, adaptive functioning skills, academic skills, and  
6 social/emotional/behavioral skills.

7 February 2009 IEP

8           2. In August 2009, Student began [REDACTED] grade at Respondent School District.  
9 Her IEP called for her to be in a self-contained classroom setting full-time with  
10 individual and small group instruction in functional academics.<sup>18</sup> Instead, due to an  
11 "inclusion program," Respondent School District placed Student in a regular education  
12 classroom with supports and some instruction from the special education teacher, who  
13 was called her "Case Manager." Respondent School District had not consulted  
14 Student's IEP team for this change of placement and had not issued a PWN for it.<sup>19</sup>  
15 The COCSD Special Education Teacher had met with Parents over the summer and  
16 had informally informed them of the change.

17           3. Student remained in that setting for the entire [REDACTED] grade. Her IEP was  
18 reviewed and renewed in February 2010. That IEP called for placement in the regular  
19 education classroom, the same placement Student had been in since August 2009.  
20 The IEP team made the placement in February 2010. Therefore, from August 2009 to  
21 February 2010, Respondent School District was not implementing Student's IEP as  
22 written. The failure was a material one, since Respondent School District radically  
23 changed her placement from the one that was found by her IEP team in February 2009  
24 to enable her to obtain meaningful educational benefit. Respondent School District's  
25 improper change of placement was a significant and substantial failure to follow  
26 Student's IEP.

27 February 2010 IEP

28  
29 <sup>17</sup> Exhibit 3 (using the term "Moderate Mental Retardation" instead of newly-implemented terminology  
Moderate Intellectual Disability). Student also has [REDACTED]

30 <sup>18</sup> Exhibit 7.

<sup>19</sup> Dianne Frazier, COCSD Director of Special Services, admitted this in her testimony.

1           4. In January 2010, Jennifer McConnell, a Behavior Consultant with Counseling  
2 & Consulting Services, observed Student at school as part of a Functional Behavioral  
3 Analysis ("FBA").<sup>20</sup> The FBA was requested by Parents partly because Student had  
4 jumped off the school playground slide in November 2009, severely damaging her  
5 arm.<sup>21</sup> The FBA was to focus on Student's "challenging behaviors" and "poor safety  
6 skills" at home, with a non-parent caregiver, and at school. Ms. McConnell found that  
7 "[t]he primary function of [Student's] behaviors appears to be to communicate her  
8 needs or desires, address sensory needs, to avoid undesirable tasks or environments  
9 and to seek individual attention."<sup>22</sup> Ms. McConnell made detailed recommendations for  
10 Student, which included creating a sensory diet and training workers at school, and to  
11 coordinate across environments to create consistency for Student. The FBA also  
12 included specific techniques for addressing Student's problem behaviors. At hearing,  
13 Ms. McConnell testified that Student's behaviors were greatly impeding her learning in  
14 the general education classroom.<sup>23</sup>

15           5. In February 2010, Student's IEP team met to review her progress and create  
16 a new IEP. The evidence shows that, at that meeting, the IEP team was given  
17 erroneous information about Student's progress. Her problematic behaviors were  
18 hardly discussed and were minimized.<sup>24</sup> In addition, the IEP team was told by the  
19 COCSD Special Education Teacher that Student had met several of her goals from the  
20 February 2009 IEP: one concerning attending/listening skills and another concerning  
21 decoding letters.

22           6. The first February 2009 IEP goal that the team was told that Student had met  
23 was an attending/listening goal: "[Student] will correctly follow functional, multi-step (i.e.  
24 2-3 step) directions during structured classroom activities."<sup>25</sup> Although, the COCSD  
25 Special Education Teacher reported that Student had met that goal,<sup>26</sup> the evidence

26 <sup>20</sup> Exhibit 37.

27 <sup>21</sup> Under the February 2009 IEP, Student was to have an aide for behavioral management. Exhibit 7 at  
28 6.

29 <sup>22</sup> *Id.* (pages are not numbered).

30 <sup>23</sup> Reporter's Transcript of Proceedings ("RTP") Vol. 3 (October 7, 2011) at 729.

<sup>24</sup> Exhibit 8 at 4.

<sup>25</sup> Exhibit 8 (2009 Goals sheet with handwritten notes).

<sup>26</sup> *Id.*



1 shows that Student had not met the goal. The school recorded no data about Student's  
2 progress on the actual goal.<sup>27</sup> Rather, the goal was rewritten to include cues and  
3 prompts, and even then the data that was collected did not show meaningful  
4 progress.<sup>28</sup> Significantly, the speech language pathologist reported that Student still  
5 struggled with following only 2-step directions.<sup>29</sup> The representation that Student had  
6 met the attending/listening goal was not accurate.

7 7. Student also had a decoding goal, her only academic goal, in the February  
8 2009 IEP.<sup>30</sup> Again, it was reported that she had met that goal.<sup>31</sup> However, the  
9 evidence does not support that report. Instead, the evidence shows that the goal was  
10 rewritten by the COCSD Special Education Teacher, and the sparse data collected  
11 shows that Student did not meet the goal as written.<sup>32</sup> Nevertheless, it was reported to  
12 the February 2010 IEP team that Student had met the goal.

13 8. The 2010 IEP team, based in part on this erroneous information, concluded  
14 that Student was doing well in her the regular education inclusion placement and  
15 continued that placement.<sup>33</sup> The team did not provide for a one-to-one aide to help  
16 Student with her behaviors, nor did the team create a Behavioral Intervention Plan  
17 ("BIP") to tell staff how to address disruptive behaviors. There is no evidence that the  
18 team weighed the educational and non-academic benefits of keeping Student in the  
19 regular classroom versus a more restrictive setting, or the disruption that Student might  
20 cause other students in the regular education classroom. Although Student had  
21 sensory needs according to Ms. McConnell, the February 2010 IEP failed to address  
22 those needs.

23 9. Finally, the evidence shows that in February 2010, Student needed a  
24 supplementary, functional communication system<sup>34</sup> and that the IEP did not provide  
25 one.

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26 <sup>27</sup> Exhibit C-040.

27 <sup>28</sup> Exhibit C-051.

28 <sup>29</sup> Exhibit 3E.

29 <sup>30</sup> Exhibit 7 at 8.

30 <sup>31</sup> Exhibit 8 (2009 Goals sheet with handwritten notes).

<sup>32</sup> Exhibit C-052.

<sup>33</sup> Exhibit 8 at 11.

<sup>34</sup> Exhibit 37 (McConnell report).

Parents Requests for Help

10. Late in the 2009-2010 school year, Parents began taking Student to private music therapy in Phoenix. The music therapy Student attended is associated with the ACT School ("Assuming Competence Today"), which specializes in educating children with autism. Student also visited ACT school for a day. When Parents saw how much better Student did in these experiences, where she was assisted by highly trained aides who addressed her sensory needs, Parents began requesting that the school district provide Student with a highly trained one-to-one aide. IEP meetings were held, but the request was denied. Parents persisted, vigorously contending that Student could do well with "a sensory-integration trained one on one aide."<sup>35</sup> Parents also began to understand that the setting that Student was in might be a problem: "She needs the general education curriculum not necessarily a general education setting."<sup>36</sup> Members of the IEP team were not in agreement, and Respondent School District declined to make any changes to the IEP in May 2010<sup>37</sup> and August 2010,<sup>38</sup> but did agree to re-evaluate Student.<sup>39</sup>

Part-time Placement at ACT School

11. Beginning in August 2010, Parents placed Student at ACT school for three days a week (Tuesday, Wednesday, and Thursday).<sup>40</sup> Student attended school in COCSD on Mondays and Fridays. This lasted throughout the 2010-2011 school year. Student did well at ACT, but continued to struggle at COCSD.

12. Suzanne Oliver, founder and Executive Director of ACT school, testified at the hearing about ACT and Student's education there. Ms. Oliver is a board-certified music therapist with advanced training in neurologic music therapy.<sup>41</sup> She has been working with autistic children for thirty years and is considered to be an expert in

<sup>35</sup> Exhibit N-488.

<sup>36</sup> Exhibit N-489.

<sup>37</sup> Exhibit 10.

<sup>38</sup> Exhibit 11.

<sup>39</sup> Exhibit 11F.

<sup>40</sup> Parents notified Respondent School District that they were going to make that placement. Respondent School District stipulated that proper notification was made. Lack of notification for the parental placement is not an issue in this case.

<sup>41</sup> RTP Vol. 2 (October 6, 2011) at 419.

1 autism.<sup>42</sup> She testified that ACT is a private day school, approved by the Arizona  
2 Department of Education, that serves children with autism, especially those with severe  
3 sensory dysregulation and behavior issues.

4 13. At ACT, Student had a full-time one-on-one aide to give her sensory support  
5 and help her regulate her behaviors. Ms. Oliver described the autism treatment  
6 methodology used at ACT as the "Antecedent Package,"<sup>43</sup> a methodology that has  
7 been established through research as an effective form of treatment for autism,  
8 according to The National Autism Center's *National Standards Report*.<sup>44</sup> The  
9 Antecedent Package uses a variety of interventions to modify "situational events that  
10 typically precede a targeted behavior."<sup>45</sup> As such, it is an appropriate methodology to  
11 use with Student.

12 14. In addition, ACT uses a "total communication" approach that is research-  
13 based and is a recognized communication methodology for children with autism.<sup>46</sup> It  
14 provides a variety of modes for communication. Marti Baio, a Speech-Language  
15 Pathologist who observed Student at ACT for an evaluation, testified that this approach  
16 was appropriate for Student.<sup>47</sup> Suzanne Oliver testified that "total communication" was  
17 Student's primary mode of communication.<sup>48</sup>

18 15. The evidence shows that one method used at ACT is Facilitated  
19 Communication ("FC"). FC is a controversial and non-established form of  
20 communication that has been criticized by this tribunal in the past.<sup>49</sup> However, Ms.  
21 Oliver credibly testified that Student used FC at ACT only minimally and that it was not  
22 a primary mode of communication for her.<sup>50</sup> Therefore, this tribunal finds that Student's  
23 use of FC while at ACT did not render ACT an inappropriate placement.

24 16. ACT was an appropriate school for Student.

25  
26 <sup>42</sup> *Id.* at 422.

27 <sup>43</sup> *Id.* at 439.

28 <sup>44</sup> Exhibit M.

29 <sup>45</sup> Exhibit M-372.

30 <sup>46</sup> Testimony of M. Baio, RTP Vol. 2 at 336.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 436.

<sup>49</sup> *M.H. v. Avondale Elem. Sch. Dist.*, No. 08C-DP-08030-ADE (Nov. 14, 2008).

<sup>50</sup> RTP Vol. 2 at 436.

Gentry Evaluation

17. During the first months of 2011, Joseph Gentry, Ph.D., BCBA-D, performed a comprehensive evaluation and functional behavioral assessment of Student.<sup>51</sup> Dr. Gentry has impressive credentials. He is a licensed psychologist, a certified school psychologist, and a Board-Certified Behavioral Analyst ("BCBA") with a Ph.D. in School Psychology.<sup>52</sup> He works exclusively with children with autism, and has done so for 11 years.<sup>53</sup> He is in private practice now, but for many years was the Director of School Consultation at the Southwest Autism Research and Resource Center, performing functional behavioral analyses and writing behavior plans, and training teachers and school staff.<sup>54</sup> This tribunal finds that he is an expert in the field of treating children with autism.

18. Dr. Gentry<sup>55</sup> performed interviews with Parents and Student's teachers, reviewed the school records he was given, conducted testing and assessments on Student, and, most importantly, observed Student at both COCSD and ACT for many hours over three days.<sup>56</sup> It is evident from his report and his testimony that he obtained a very good picture of Student and her behaviors in a school environment. He wrote a lengthy and detailed comprehensive evaluation and behavioral assessment that made specific findings and detailed recommendations for Student. His report and his consultation are important pieces, perhaps the most important, of information about how to educate Student.

19. At hearing, Dr. Gentry offered lengthy testimony in support of his findings and recommendations. The most compelling part of his testimony was his explanation of "instructional control." He noted that both testing and observations showed that Student has significant problem behaviors that impede her learning.<sup>57</sup> At ACT, his

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<sup>51</sup> Exhibit O-522.

<sup>52</sup> RTP Vol. 3 at 761.

<sup>53</sup> *Id.* at 761-62.

<sup>54</sup> *Id.* at 762-63.

<sup>55</sup> Along with his partner Dr. Lori Long.

<sup>56</sup> *Id.* at 769.

<sup>57</sup> *Id.* at 792, 832.

1 observations showed that those behaviors were being well-managed<sup>58</sup> and that the  
2 teachers and staff had instructional control.<sup>59</sup> He defined "instructional control" as  
3 when "the demand giver, the person providing the instruction, has a high probability of  
4 – of receiving an answer in return."<sup>60</sup> ACT had it;<sup>61</sup> COCSD did not.<sup>62</sup>

5 20. At ACT, Dr. Gentry opined, Student had an opportunity to learn and engage  
6 in academic activities because her behaviors were being regulated.<sup>63</sup> He testified that  
7 ACT was appropriate and that Student was receiving educational benefit there.<sup>64</sup> At  
8 COCSD, Student's teacher did not have instructional control and Student did not attend  
9 to her environment because she had only intermittent aide support.<sup>65</sup> In addition,  
10 COCSD staff did not appear to be appropriately trained because when Student  
11 engaged in attention-seeking behaviors the aides would give Student attention, which  
12 maintained those behaviors.<sup>66</sup> Student was in control of the learning environment at  
13 COCSD.<sup>67</sup> She was also disruptive to the class.<sup>68</sup> Dr. Gentry did not believe that a  
14 general education environment was appropriate for Student.<sup>69</sup> He testified that it was  
15 not reasonably likely that Student was receiving any meaningful educational benefit at  
16 COCSD.<sup>70</sup> In fact, he characterized Student's education at COCSD as follows: "She's  
17 going to school for so many hours a day, and 90 percent of it she's being taught  
18 negative behaviors, and . . . 9 percent she's engaging in activities that she finds  
19 amusing. And the other 1 percent she's actively learning."<sup>71</sup>

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23 <sup>58</sup> *Id.* at 807.

24 <sup>59</sup> *Id.* at 813.

25 <sup>60</sup> *Id.* at 811.

26 <sup>61</sup> Dr. Gentry testified that "ACT did a great job of teaching her how to regulate her behavior." *Id.* at 816.

27 <sup>62</sup> *Id.* at 812.

28 <sup>63</sup> *Id.* at 816-18.

29 <sup>64</sup> *Id.* at 819.

30 <sup>65</sup> *Id.* at 821.

<sup>66</sup> *Id.* at 821, 826, 827.

<sup>67</sup> *Id.* at 828.

<sup>68</sup> *Id.* at 832.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 845.

<sup>71</sup> *Id.* at 856.

1           21. Dr. Gentry also observed that Student had no effective communication  
2 system at COCSD.<sup>72</sup> This is consistent with the report and testimony of the speech-  
3 language pathologist discussed below.

4           22. Dr. Gentry also observed Student at Chrysalis Academy, which Student  
5 began attending full-time in August 2011 on the basis of Dr. Gentry's  
6 recommendation.<sup>73</sup> He observed that Chrysalis had instructional control of Student  
7 within her first 30 days there.<sup>74</sup> He attributed that to the Applied Behavioral Analysis  
8 ("ABA") program there that is supervised by a BCBA.<sup>75</sup> Obviously, since he  
9 recommended it, Dr. Gentry believes that Chrysalis Academy is an appropriate  
10 placement for Student.

11           23. Finally, Dr. Gentry testified about the type of remediation Student needs to  
12 make up the ground he believes she lost at COCSD. He believes that Student needs  
13 an intensive ABA program like the one at Chrysalis, as well as supplemental  
14 individualized instruction using various research-based methodologies.<sup>76</sup> He testified  
15 that she would need at least 3 hours per day of individualized instruction.<sup>77</sup>

16           24. Dr. Gentry's testimony is found to be consistent with the credible evidence  
17 in this matter and is given a great deal of weight.<sup>78</sup>

18 Augmentative Communication

19           25. One of Student's substantial needs is assistance with communication. Marti  
20 Baio, Speech-Language Pathologist, evaluated Student in December 2010.<sup>79</sup> She  
21 found that Student was unable to express her wants and needs, comprehend  
22 directions, express herself in an emergency, and relate to her peers.<sup>80</sup> She concluded  
23 that Student would not be able to improve her learning and communication skills if she  
24 is not in a classroom with "ongoing sensory input, a 1:1 aid, and opportunities to  
25

26 <sup>72</sup> *Id.* at 863.

27 <sup>73</sup> Exhibit N-520.

28 <sup>74</sup> RTP Vol. 3 at 889.

29 <sup>75</sup> *Id.* at 890.

30 <sup>76</sup> *Id.* at 893.

<sup>77</sup> *Id.*

<sup>78</sup> Respondent School District has not mounted a serious challenge to Dr. Gentry's report or opinion.

<sup>79</sup> Exhibit O-543.

<sup>80</sup> Exhibit O-547.

1 communicate throughout the entire day.”<sup>81</sup> She recommended that Student be  
2 evaluated for an “augmentative communication system with speech output” because  
3 during the evaluation Student was introduced to “the Alexicom Tech system . . . and  
4 needed only a few minutes to figure out how to use the system.”<sup>82</sup> Thus, such a system  
5 would benefit Student’s ability to communicate.

6 May 2011 IEP

7 26. In May 2011, Student’s IEP team met to finalize her next IEP.<sup>83</sup> Although  
8 presented with the evaluations that had been performed in the prior Fall and Winter,<sup>84</sup>  
9 including Dr. Gentry’s combined comprehensive evaluation and functional behavioral  
10 assessment, and although Dr. Gentry attended an IEP team meeting and presented his  
11 findings and recommendations to the team personally,<sup>85</sup> the district members of the  
12 team declined to provide Student a formal written behavior plan, declined to move  
13 student out of the general education environment, and declined to provide a one-to-one  
14 aide to support Student’s sensory and behavior needs.<sup>86</sup> The IEP acknowledged that  
15 the use of an appropriate augmentative communication device should be explored,<sup>87</sup>  
16 but did not provide for it.

17 27. The appropriateness of the May 2011 IEP is not supported by the evidence  
18 because it lacked a formal behavior plan, a one-to-one aide, an appropriate  
19 augmentative communication device, and a change of placement to a more restrictive  
20 setting. It was not calculated to provide meaningful educational benefit to Student.  
21 Therefore, it did not offer Student a FAPE.

22 Placement at Chrysalis Academy

23 28. In response to the May 2011 IEP, Parents placed Student full-time at  
24 Chrysalis Academy. Chrysalis is approved by the Arizona Department of Education as  
25 a private day school for children with autism.<sup>88</sup> Patty McCartney, Ph.D., CCC-SLP, co-

26 <sup>81</sup> *Id.*

27 <sup>82</sup> Exhibit O-548.

28 <sup>83</sup> The February 2010 IEP’s expiration in February 2011 had been extended by consensus.

29 <sup>84</sup> Exhibit 13.

30 <sup>85</sup> *Id.*

<sup>86</sup> Exhibits 13 and 14.

<sup>87</sup> Exhibit 14B at 6.

<sup>88</sup> RTP Vol. 2 at 510.

1 Director of Chrysalis, testified that it is an ABA school that follows a verbal behavior  
2 model.<sup>89</sup> She testified that during Student's first 30 days at Chrysalis, they worked to  
3 assess her behaviors and to establish instructional control.<sup>90</sup> This led to the creation of  
4 a Behavior Support Plan for Student.<sup>91</sup> It also led to assigning a one-to-one highly  
5 trained aide to work with Student.<sup>92</sup> The aide is supervised by a BCBA.<sup>93</sup>

6 29. Dr. McCartney testified that Chrysalis was an appropriate placement for  
7 Student and that Student had already gained some educational benefit.<sup>94</sup> Records from  
8 Chrysalis support that testimony.<sup>95</sup>

9 30. The evidence shows that Chrysalis Academy is an appropriate placement  
10 for Student.

#### 11 Expenses Incurred by Parents

12 31. Both ACT and Chrysalis Academy are located in Phoenix, Arizona.  
13 Petitioners do not live in Phoenix. Parents presented evidence of the expenses they  
14 have incurred for tuition, transportation, and lodging associated with placing Student at  
15 those private schools.<sup>96</sup> Respondent School District has not challenged the content or  
16 amount of the expenses. If calculated through November 2011, those expenses  
17 amount to \$60,267.14.<sup>97</sup>

18 32. This tribunal finds the requested expenses to be reasonable and  
19 equitable.<sup>98</sup>

### 20 CONCLUSIONS OF LAW

#### 21 APPLICABLE LAW

#### 22 FAPE

23 <sup>89</sup> *Id.* at 514.

24 <sup>90</sup> *Id.* at 532-33.

25 <sup>91</sup> *Id.* at 540-41. Exhibit S-771.

26 <sup>92</sup> RTP Vol. 2 at 548.

27 <sup>93</sup> *Id.* at 553.

28 <sup>94</sup> *Id.* at 564.

29 <sup>95</sup> Exhibit S.

30 <sup>96</sup> Exhibit T.

<sup>97</sup> Combine Exhibit T-778 with PETITIONER'S [sic] POST-HEARING BRIEF at 64-66.

<sup>98</sup> Conspicuously absent from these Findings of Fact is an evaluation of the testimony of the COCSD Special Education Teacher, who this tribunal did not find to be a credible witness. Respondent School District relied almost exclusively on her to support its defense. Her testimony was defensive, evasive,



1 1. Through the IDEA, Congress has sought to ensure that all children with  
2 disabilities are offered a free appropriate public education that meets their individual  
3 needs.<sup>99</sup> These needs include academic, social, health, emotional, communicative,  
4 physical, and vocational needs.<sup>100</sup> To do this, school districts must identify and  
5 evaluate all children within their geographical boundaries who may be in need of  
6 special education and services. The IDEA sets forth requirements for the identification,  
7 assessment and placement of students who need special education, and seeks to  
8 ensure that they receive a free appropriate public education. A free appropriate public  
9 education ("FAPE") consists of "personalized instruction with sufficient support services  
10 to permit the child to benefit educationally from that instruction."<sup>101</sup> The IDEA mandates  
11 that school districts provide a "basic floor of opportunity," nothing more.<sup>102</sup> It does not  
12 require that each child's potential be maximized.<sup>103</sup> A child receives a FAPE if a  
13 program of instruction "(1) addresses his unique needs, (2) provides adequate support  
14 services so he can take advantage of the educational opportunities and (3) is in accord  
15 with an individualized educational program."<sup>104</sup>

#### 16 The IEP

17 2. Once a child is determined eligible for special education services, a team  
18 composed of the child's parents, teachers, and others formulate an Individualized  
19 Education Program ("IEP") that, generally, sets forth the child's current levels of  
20 educational performance and sets annual goals that the IEP team believes will enable  
21 the child to make progress in the general education curriculum.<sup>105</sup> The IEP tells how  
22 the child will be educated, especially with regard to the child's needs that result from  
23 the child's disability, and what services will be provided to aid the child. The child's

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24 and was not supported by documentation. As such, although the testimony was considered, the  
25 Administrative Law Judge chooses to simply make this footnote and move on.

26 <sup>99</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

27 <sup>100</sup> *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983  
U.S.C.C.A.N. 2088, 2106).

28 <sup>101</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

<sup>102</sup> *Id.*, 458 U.S. at 200.

<sup>103</sup> *Id.* at 198.

29 <sup>104</sup> *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9<sup>th</sup> Cir. 2006) (citing *Capistrano Unified*  
30 *Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9<sup>th</sup> Cir. 1995)).

<sup>105</sup> 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

1 parents have a right to participate in the formulation of an IEP.<sup>106</sup> The IEP team must  
2 consider the strengths of the child, concerns of the parents, evaluation results, and the  
3 academic, developmental, and functional needs of the child.<sup>107</sup> To foster full parent  
4 participation, in addition to being a required member of the team making educational  
5 decisions about the child, school districts are required to give parents written notice  
6 when proposing any changes to the IEP,<sup>108</sup> and are required to give parents, at least  
7 once a year, a copy of the parents' "procedural safeguards," informing them of their  
8 rights as parents of a child with a disability.<sup>109</sup>

9 3. IEP teams must consider the communication needs of a child.<sup>110</sup> The team  
10 must also consider the concerns of a child's parents when developing an IEP.<sup>111</sup> In  
11 fact, the IDEA requires that parents be members of any group that makes decisions  
12 about the educational placement of a child.<sup>112</sup>

### 13 Behavioral Plan

14 4. If a child's behavior impedes the child's learning or the learning of others, the  
15 IEP team must also consider "the use of positive behavioral interventions and supports,  
16 and other strategies, to address that behavior."<sup>113</sup> This is typically done by means of a  
17 written behavioral plan that is attached to the IEP.

18 5. In the *Neosho*<sup>114</sup> case, an autistic student who had behavioral issues that  
19 impeded his learning did not have a written behavior management plan attached to his  
20 IEP.<sup>115</sup> The student's teacher and aide attempted to manage the behaviors to the best  
21 of their ability but failed.<sup>116</sup> An expert witness testified that the student needed a  
22 cohesive behavior management plan.<sup>117</sup> The appellate court upheld the state

23  
24 <sup>106</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

25 <sup>107</sup> 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

26 <sup>108</sup> 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

27 <sup>109</sup> 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.

28 <sup>110</sup> 20 U.S.C. § 1415(d)(B).

29 <sup>111</sup> 20 U.S.C. § 1414(d)(3)(B)(iv); 34 C.F.R. §§ 300.324(a)(2)(iv).

30 <sup>112</sup> 20 U.S.C. § 1414(d)(3)(A)(ii); 34 C.F.R. §§ 300.324(a)(1)(ii).

<sup>113</sup> 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.327 and 300.501(c)(1).

<sup>114</sup> 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. §§ 300.324(a)(2)(i).

<sup>115</sup> *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003).

<sup>116</sup> 315 F.3d at 1025.

<sup>117</sup> *Id.*

*Id.* at 1026.

1 administrative tribunal and the district court by finding that the lack of a cohesive  
2 behavior management plan in the IEP meant that it was not reasonably calculated to  
3 provide an educational benefit for that student.<sup>118</sup>

4 Prior Written Notice

5 6. The IDEA process for making changes to an IEP, including changing  
6 educational placements, requires a school district to give parents written notice before  
7 taking the proposed action.<sup>119</sup> That notice (often called Prior Written Notice or PWN)  
8 must contain certain information specified by the IDEA, such as an explanation of why  
9 a decision is being made, the documentation used to make the decision, and a  
10 reminder of parents' procedural rights. Of particular note is the requirement that the  
11 PWN contain '[a] description of other options that the IEP Team considered and the  
12 reasons why those options were rejected. . . .'<sup>120</sup> Thus, the PWN is issued after an IEP  
13 team decision has been made, not before.

14 Reimbursement for Private School Placement

15 7. Parents who dispute whether an IEP provides a FAPE to a child, and who as  
16 a result enroll that child in a private school, may receive reimbursement for the costs of  
17 that private-school enrollment under certain circumstances.<sup>121</sup> The program offered by  
18 the school district must fail to provide a FAPE to the child and the private school must  
19 be an "appropriate" placement.<sup>122</sup> A private school placement may be appropriate even  
20 if it does not operate under public school standards.<sup>123</sup> Under these circumstances,  
21 parents may "enroll the child in a private preschool, elementary school, or secondary  
22 school without the consent of or referral by the [school district]. . ." and seek  
23 reimbursement from the school district for the expense of that enrollment from a court  
24 or hearing officer.<sup>124</sup> Indeed, parents have "an equitable right to reimbursement for the  
25 cost of providing an appropriate [private] education when a school district has failed to  
26

27 <sup>118</sup> *Id.* at 1030.

28 <sup>119</sup> 20 U.S.C. § 1415(b)(3); 34 C.F.R. §§ 300.503(a).

29 <sup>120</sup> 20 U.S.C. § 1415(c)(1)(E); 34 C.F.R. §§ 300.503(b)(6).

30 <sup>121</sup> 34 C.F.R. § 300.148.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> 34 C.F.R. § 300.148(b) and (c).

1 offer a child a [free appropriate public education]."<sup>125</sup> Furthermore, the placement does  
2 not have to meet IDEA requirements for a FAPE.<sup>126</sup>

3 8. However, an award for reimbursement can be reduced or denied in various  
4 circumstances.<sup>127</sup> An award may be reduced or denied if the parents have not given  
5 adequate notice as set forth in the IDEA.<sup>128</sup> There is no claim of inadequate parental  
6 notice in this case. Therefore, reimbursement, if warranted, will not be reduced or  
7 denied in this case.

### 8 DECISION

9 9. A parent who requests a due process hearing alleging non-compliance with  
10 the IDEA must bear the burden of proving that claim.<sup>129</sup> The standard of proof is  
11 "preponderance of the evidence," meaning evidence showing that a particular fact is  
12 "more probable than not."<sup>130</sup> Here, Parents seek compensatory education for lost  
13 educational benefits and reimbursement for unilateral placements of Student at ACT  
14 and Chrysalis Academy. Therefore, Petitioners bear the burden of proving by a  
15 preponderance of evidence that Respondent School District failed to provide Student a  
16 FAPE by failing to follow the February 2009 IEP, and failed to provide a FAPE in the  
17 February 2010 IEP and May 2011 IEP, and that placements at ACT and Chrysalis  
18 Academy were appropriate.

19 10. Furthermore, this tribunal's determination of whether or not Student received  
20 a FAPE must be based on substantive grounds.<sup>131</sup> If a procedural violation is alleged  
21 and found, it must be determined whether the procedural violation either (1) impeded  
22 the child's right to a FAPE; (2) significantly impeded the parents' opportunity to  
23 participate in the decision-making process; or (3) caused a deprivation of educational  
24

25 <sup>125</sup> *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9<sup>th</sup> Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960  
26 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1992)).

<sup>126</sup> *Florence County. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

<sup>127</sup> 34 C.F.R. § 300.148(d).

<sup>128</sup> 34 C.F.R. § 300.148(d)(1).

<sup>129</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

<sup>130</sup> *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279  
29 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,  
30 437, 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).

<sup>131</sup> 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

benefit.<sup>132</sup> If one of the three impediments listed has occurred, the child has been denied a FAPE due to the procedural violation.

11. This tribunal finds that Petitioners have met their burden by showing substantive violations of the IDEA. This tribunal also finds, for the reasons stated below, that parent's unilateral private placements are appropriate and must remain the placement for Student.

Substantive Violations

(A) Failure to substantially implement an IEP

12. First, Student's February 2009 IEP determined what would provide her meaningful educational benefit. It required placement in a self-contained classroom with full-time instruction from a special education teacher. From August 2009 through February 2010, Respondent School District did not follow the requirements of the IEP because Respondent School District placed her in a regular education setting. This was a substantial deviation from the IEP. Thus, Respondent School District violated the IDEA each school day that Student was present for that period. Student did not receive meaningful educational benefit each of those days.<sup>133</sup> Student is, therefore, in need of compensatory education.

(B) February 2010 IEP did not offer a FAPE

13. This tribunal's review of the IEPs is limited to the contents of the document.<sup>134</sup> Therefore, the question of whether the IEPs were reasonably calculated to provide educational benefit to Student must be decided on the basis of the contents of the IEPs themselves.

14. The February 2010 IEP denied Student a FAPE because it did not have a comprehensive behavior plan that provided positive behavioral management. It also

<sup>132</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

<sup>133</sup> It is also true, of course, that Respondent School District failed to follow mandated procedure by calling an IEP team meeting to consider a change of placement and issuing a PWN. However, by regulation substantive violations have preference over procedural ones, so only the substantive will be addressed here, where there are both.

<sup>134</sup> *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6<sup>th</sup> Cir. 2001), see also *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9<sup>th</sup> Cir. 1994) (IDEA requirement of a formal, written offer should be enforced rigorously: "only those services identified or described in the . . . IEP should have been considered in evaluating the appropriateness of the program offered.").

1 did not adequately address Student's sensory needs. In addition, it did not provide for  
2 a full-time one-to-one aide to support Student with academic, sensory, communication,  
3 and behavioral needs. Finally, it did not provide a supplemental communication system  
4 to help Student overcome her inability to adequately communicate. Student needed all  
5 those elements to be able to obtain meaningful educational benefit.

6 15. Moreover, the placement of Student in a general education inclusion setting  
7 with supports was not appropriate. Student had too many and too significant  
8 challenges to be educated in that setting. Although that setting would be an  
9 appropriate goal for Student to strive for, the evidence shows that she could not obtain  
10 meaningful educational benefit in that setting at that time.

11 (C) May 2011 IEP did not offer a FAPE

12 16. Because the May 2011 IEP retained the same components as the prior IEP,  
13 it too did not offer Student a FAPE. It should have been clear to Respondent School  
14 District by then, given the evaluations that they were presented with (especially that of  
15 Dr. Gentry), that significant changes needed to be made in the areas noted above in  
16 Conclusion of Law 14. By failing to make those changes, the IEP did not offer a FAPE.

17 Appropriate Placements

18 17. The evidence shows that both ACT and Chrysalis Academy are appropriate  
19 placements for Student. They are both state-approved schools that specialize in  
20 educating students with autism. Furthermore, several credible experts testified that  
21 both schools were appropriate for Student.

22 18. Because this tribunal agrees with Parent that Chrysalis is appropriate, this  
23 creates an agreement between the State and the parent and constitutes Student's  
24 current educational placement. Student shall remain at Chrysalis at Respondent  
25 School District's expense at least through the end of the current school year.

26 Compensatory Education

27 19. As noted, Student is in need of compensatory education. It is hoped that  
28 she will make great strides at Chrysalis Academy, but Dr. Gentry offered credible  
29 testimony that Student will need, in addition to Chrysalis, intensive instruction to recoup  
30

1 lost skills. He testified that the instruction should be one-to-one, intensive ABA that is  
2 supervised by a BCBA.

3 20. Parents have calculated a range of 338 to 429 hours of compensatory  
4 education based on the days Student was at school in the district. However,  
5 compensatory education is an equitable remedy and does not necessarily have to  
6 correspond one-to-one. 400 hours of extra instruction is a large amount of extra school  
7 for a little girl who is going to school all day. This tribunal finds that, because the  
8 instructor will be highly-trained and supervised by a BCBA, recoupment can be gained  
9 in 300 hours. Therefore, Student is awarded 300 hours of compensatory education as  
10 prescribed by Dr. Gentry, to include intensive one-to-one instruction supervised by a  
11 BCBA.

#### 12 Reimbursement of Expenses

13 21. As found above, Parents have calculated their tuition, lodging, and  
14 transportation expenses through November 30, 2011.<sup>135</sup> Those expenses, totaling  
15 \$60,267.14 are to be reimbursed by Respondent School District.

#### 16 Conclusion

17 22. Respondent School District denied Student a FAPE. In response, Parents  
18 placed Student in appropriate private placements. Parents are entitled to  
19 reimbursement of the expenses for those placements. Furthermore, Student shall  
20 remain at her current placement at Respondent School District's expense for at least  
21 the remainder of the current school year. Finally, Student is awarded compensatory  
22 education of 300 hours of specialized instruction as provided above.

#### 23 ORDER

24 Based on the findings and conclusions above, IT IS HEREBY ORDERED that  
25 that the relief requested in the due process complaint is **granted**. Respondent School  
26 District must reimburse Parents \$60,267.14 for past expenses at both ACT school and  
27 Chrysalis and fund Student at Chrysalis at Respondent School District's expense. In

28  
29 <sup>135</sup> See *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1527 (9<sup>th</sup> Cir. 1994) ("If a child's appropriate special  
30 education placement is at a non-residential program not within daily commuting distance of the family  
residence, transportation costs and lodging near the school are related services that are required to  
assist that child to benefit from special education.").

1 addition, Respondent School District must provide Student 300 hours of compensatory  
2 education as described above.

3 Done this 9<sup>th</sup> day of December 2011.

4 OFFICE OF ADMINISTRATIVE HEARINGS

5  
6  
7 \_\_\_\_\_  
8 Eric A. Bryant  
9 Administrative Law Judge

10 **RIGHT TO SEEK JUDICIAL REVIEW**

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

20 Copy sent by **electronic mail** and regular mail  
21 this \_\_\_\_ day of December 2011, to:

22 Amy G. Langerman, Esq.  
23 951 Coronado Avenue  
24 Coronado, CA. 92118  
25 **alangermanlaw@aol.com**

26 Copy sent by **electronic mail** and regular mail  
27 this \_\_\_\_ day of December 2011, to:

28 Kellie A. Peterson, Esq.  
29 MANGUM, WALL, STOOPS, & WARDEN, PLLC  
30 P.O. Box 10 // 100 N. Elden St.  
Flagstaff, Arizona 86002



1 kpeterson@mwswlaw.com

2  
3 By \_\_\_\_\_

4  
5 Transmitted electronically to:

6 Arizona Department of Education  
7 Dispute Resolution Unit  
8 ATTN: Kacey Gregson, Dispute Resolution Coordinator  
9 Arizona Department of Education  
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