STATE OF ARIZONA

OFFICE OF ADMINISTRATIVE HEARINGS

[redacted], Student, by and through Parents [redacted] and [redacted].,	No. 12C-DP-019-ADE
Petitioners,	
-v-	
Scottsdale Unified School District,	**ADMINISTRATIVE LAW JUDGE DECISION**
Respondent.	

HEARING: April 12 and 13, 2012.

APPEARANCES: Hope N. Kirsch, Esq., KIRSCH-GOODWIN & KIRSCH, PLLC, appeared on behalf of Petitioners, accompanied by Parents; Jessica S. Sanchez, Esq., UDALL, SHUMWAY & LYONS, PLC, appeared on behalf of the Scottsdale Unified School District ("SUSD"), accompanied by district representative Sylvia Cohen, Ph.D. SUSD School Psychologist. Certified Court Reporters Laura Walker (April 12) and Kari Deysie (April 13), WHITE & ASSOCIATES, CERTIFIED COURT REPORTERS, were present and recorded the proceedings as the official record of the hearing.

WITNESSES:[1] Petitioners [redacted] ("**Mother**") and [redacted] ("**Father**") (collectively ""**Parents**"); Evelyn Sonenschein, SUSD Special Education Teacher ("**Public Special Ed. Teacher**"); **Joanne McFee**, M.S., OTR/L, Occupational Therapy Evaluator; **Marilyn Kurtz**, OT/L, SUSD Occupational Therapist; **Deborah Fash**, CCC-SLP, Director of Intervention, New Way Academy; Melissa Pallister, Special Education Teacher, New Way Academy ("**Private Special Ed. Teacher**"); Joan Nelson, Parent **Advocate**; **Lanie Zigler**, Ph.D., Neuropsychologist, Independent Educational Evaluator; Alisha Rudolph, SUSD General Education Teacher ("**Public General Ed. Teacher**"); **Sylvia Cohen**, Ph.D., SUSD Lead School Psychologist; **Brian Potter**, SUSD School Psychologist.

ADMINISTRATIVE LAW JUDGE: Eric A. Bryant

Parents bring this due process action, on behalf of Student, seeking reimbursement for parental placement of Student in a special private day school. The

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

law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in 2004),[2] and its implementing regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well as the Arizona Special Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through R7-2-406.

Procedural History

Petitioners filed this due process complaint on November 29, 2011. The complaint claims that Respondent School District did not offer Student a free appropriate public education ("FAPE") during his second-grade and third-grade years, making claims of both substantive and procedural violations of the IDEA. Petitioners seek reimbursement of expenses for unilateral parental placement for fourth-grade and Extended School Year ("ESY") parental placements in 2010 and 2011. Respondent School District denies the claims, asserting that Student was offered FAPE and that reimbursement is not warranted.

Evidence and Issues at Hearing

The parties presented testimony and exhibits at a formal evidentiary hearing held April 12-13, 2012. The parties presented testimony from the witnesses listed above[3] and offered into evidence Petitioners' Exhibits A through CC[4] and Respondent School District's Exhibits 1 through 77.[5]

After Exhibits and testimony were admitted, the parties argued to the tribunal, in written memoranda, the following issues, as stated by Petitioners:[6]

> (1) Whether [Respondent School District]'s IEPs [Individualized Education Programs] were reasonably calculated to provide Student FAPE in the least restrictive environment, including services, service minutes and placement?

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

[3] Transcripts of the testimony have been added to the record. By stipulation of the parties, the transcripts are the official record of the hearing.

[4] These exhibits alone include almost 900 pages of documentation. Exhibit CC (and CC-1) are six audio files (covering six lengthy meetings) on two compact discs.

[5] Respondent School District submitted over 700 pages of exhibits.

[6] PETITIONERS' POST-HEARING MEMORANDUM at 2.

(2) Whether [Respondent School District] deprived Parents of meaningful participation in the decision-making process and impeded Student's right to FAPE:
a. when it unilaterally decreased service minutes?
b. when it failed to consider other services or placement?
c. when it closed out goals without parent participation?

(3) Whether [Respondent School District] considered funding as a factor, reason or excuse in its determination of Student placement and services and, if so, whether [Respondent School District]'s consideration of funding denied Student FAPE?

(4) Whether [Respondent School District] denied Student FAPE when it denied Student ESY in 2010 and/or 2011?

(5) Whether [Respondent School District] violate the Individuals with Disabilities Education Act, and denied Student FAPE, when it failed to provide an independent educational evaluation at [Respondent School District] expense by failing to pay for Dr. Zigler's psychoeducational evaluation?

(6) Is New Way [Academy] an appropriate placement?[7]

Parents argue that both procedural and substantive violations of the IDEA by Respondent School District denied Student a FAPE. Their chief contention is that Respondent School District did not offer Student a FAPE in the 2009-2010 and 2010-2011 school years, as evidenced by Student's lack of progress in reading. Respondent School District defends its actions, arguing that a FAPE has been offered to Student at all times.

Is Issue 2(a) an Untimely Amendment of the Complaint?

In its written closing argument, Respondent School District raises procedural issues that potentially affect the scope of this Decision. Respondent School District argues that the issue identified above as Issue 2(a) was (1) not alleged in the due process complaint and, therefore, is an untimely amendment to the complaint; and (2) is based on events that occurred in August 2009, which is outside the statutory two-year complaint period.

[7] This issue must be decided only if it is found that a FAPE was not offered. *See* 34 C.F.R. § 300.148(c).

A review of the due process complaint filed on November 29, 2011, shows that Petitioners made a factual allegation that Respondent School District "reduced" special education service minutes in August 2009, thereby "short changing" Student. In the "Issues Presented" portion of the complaint, Petitioners claim that this was denial of a FAPE because it did not match the service minutes in the prior IEP ("Individualized Education Program"). While it is true that Petitioners did not articulate the claim in the same way that they do in their closing argument (arguing that minutes were reduced without input from the IEP team), the complaint put Respondent School District on notice that Petitioners were claiming a reduction in service minutes that denied a FAPE. This tribunal does not find Petitioners' closing argument to be an amendment of the complaint.

Is Issue 2(a) Barred by the Two-Year Complaint Period?

Respondent School District argues that Issue 2(a) above is barred by the IDEA's "statute of limitations," which allows parents two years to bring a claim. Respondent School District bases its argument on the undisputed facts that (1) Student began second grade on August 4, 2009, and (2) Petitioners' due process complaint was filed on November 29, 2011, more than two years later. Petitioners deny that Issue 2(a) is barred, arguing that one of the exceptions to the two-year rule applies to them. They allege that the failure of Respondent School District to issue a PWN for the "reduction" of service minutes justifies an exception to the two-year rule.

The IDEA sets a timeline for requesting a hearing: "A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. . . ."[8] There are two exceptions to the timeline.[9] Under one of the exceptions, a claim may be brought based on actions older than two years when a school district has withheld "information from the parent that was required under this part [20 U.S.C. §§ 1411-1419] to be provided to the parent."[10] School districts are required to issue a PWN to parents whenever the school district proposes to change

[8] 20 U.S.C. § 1415(f)(3)(C). The omitted portion of the quote allows states to set their own time limit. Arizona has not changed the two-year period provided in the IDEA.
[9] 20 U.S.C. § 1415(f)(3)(D)(i) and (ii). Paragraph (i) is not applicable here.

the educational placement of a disabled student.[11] A PWN informs parents about what action is being taken, explains why it is being taken, explains what other options were considered, informs parents that they have procedural rights, and provides sources for assistance in understanding those rights.[12]

Here, the record contains a PWN issued August 21, 2009,[13] in which Respondent School District states that the IEP team considered and rejected maintaining Student's "level of special education resource assistance" at the prior level. Although not crystal clear and not in plain language, that statement, read broadly and in context, notified Parents of the decrease in service minutes. Thus, the record does not support Petitioners' claim that no PWN was issued in reference to the reduction of service minutes. A PWN was issued and no exception to the two-year period is warranted.

Therefore, Respondent School District's motion to bar Issue 2(a), which alleges that Respondent School District "unilaterally decreased service minutes" in August 2009, is granted. Issue 2(a) is dismissed.[14]

Introduction

The Administrative Law Judge has considered the entire record, including the testimony and Exhibits,[15] and now makes the following Findings of Fact, Conclusions of Law, and Order finding that Respondent School District offered Student a FAPE and, therefore, denying Parents' reimbursement requests.

FINDINGS OF FACT

1. Student is an elementary school student who is eligible for special education as a student with specific learning disabilities[16] in the areas of basic reading skills,

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[10] 20 U.S.C. § 1415(f)(3)(D)(ii).
[11] 20 U.S.C. § 1415(b)(3).
[12] 20 U.S.C. § 1415(c)(1).
[13] Exhibit 6.
[14] However, the issue of proper implementation of the August 2009 IEP after November 29, 2009 is within the two-year period.
[15] The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if the witness is not specifically mentioned in this Decision.
[16] "Specific Learning Disability" is defined by A.R.S. § 15-761(33), which incorporates by reference 20 U.S.C. § 1401(30):

> Specific learning disability.
> (A) In general. The term "specific learning disability" means a disorder in 1 or more of

reading comprehension, and reading fluency.[17] In 2008, he was diagnosed with developmental dyslexia by neuropsychologist Lanie Zigler, Ph.D.[18] During the time at issue in this due process proceeding, which includes most of Student's second-grade year (2009-2010) and all of Student's third grade year (2010-2011), Student was eligible for special education because of his specific learning disabilities. Also, during this time, he was placed in a regular education classroom with pull-out services for work on reading skills. He also received occupational therapy for writing.

2. From February 2008 through April 2008, and from June 2009 through July 2009, Student was enrolled, at Parents' expense, in Lindamood-Bell Learning Process,[19] an intensive, private, after-school program designed to help those like Student. In August 2009, Student enrolled in Respondent School District and began second grade. Respondent School District adopted Student's IEP from his prior school district, with some modifications.[20] That IEP placed Student in a regular education classroom with special education services given to him in reading each day in a separate "resource room."[21] The IEP contained goals for word decoding, reading fluency, comprehension, and occupational therapy.[22] The IEP required reporting on Student's progress by means of IEP meetings, teacher/parent conferences, quarterly IEP progress reports, and additionally called for "monthly goal progress updates."[23]

> the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.
>
> (B) Disorders included. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.
>
> (C) Disorders not included. Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

[17] Exhibit 5 (p10). Respondent School District's Exhibits are paginated as a whole, without regard to exhibit number. This Decision will cite the page number of Respondent School District's Exhibits as a parenthetical after the Exhibit identifier.

[18] Exhibit L (PET 275). Petitioners' Exhibits are also paginated, but in the format PET 000page#. This Decision will cite the page number of Petitioners' Exhibits (keeping the PET but leaving out the 000) as a parenthetical after the Exhibit identifier.

[19] Exhibit T (PET 704-05).

[20] Exhibit 6 (p37).

[21] Exhibit 5 (p6).

[22] *Id.* (pp30-32).

[23] *Id.* (p15).

3. According to the relevant progress reports, Student made satisfactory progress through December 2009 and into February 2010.[24]

4. In February 2010, Student's IEP team met to review and revise his IEP.[25] The new IEP was to cover the period between February 2010 and February 2011.[26] The IEP noted that Student was showing improvements in "focusing and work completion" and in reading.[27] It also noted that the team considered ESY, but determined that Student did not need it.[28] Occupational therapy services were continued.[29] New goals were written for decoding, comprehension, fluency and writing.[30] In addition, a long list of specific accommodations was added to the IEP.[31] Finally, the February 2010 IEP called for quarterly progress reports as the means of informing Parents about Student's progress.[32]

5. The PWN that issued after the IEP team meeting noted clearly that ESY services had been considered and denied as "not needed."[33] The progress reports that were issued in May 2010 and October 2010 show that Student was making adequate progress.[34]

6. In April 2010, another IEP team meeting was held, this time to discuss Student's progress and consider services for Student's third grade.[35] Parents were informed about Student's scores on assessments and how he was doing in the classroom, which was characterized as "making progress."[36] An IEP addendum was created that increased the number of resource room hours for the Fall 2010 period, going from 3 hours 45 minutes per week to 5 hours 15 minutes per week.[37] Other

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[24] Exhibit 8 (pp39-43).
[25] Exhibit 9.
[26] Exhibit 10 (p45).
[27] *Id.* (p46).
[28] *Id.*
[29] *Id.* (p47).
[30] *Id.* (pp49-53).
[31] *Id.* (p57).
[32] *Id.* (p55).
[33] Exhibit 12.
[34] Exhibit 17 (pp74-78).
[35] Exhibit 13.
[36] Exhibit 15 (p70).
[37] Exhibit 14 (p66).

minor changes were made as well.[38] The records also indicate that Student was found to not qualify for ESY for 2010.[39]

7. Parents sent Student to Davis Dyslexia Center in California during the Summer of 2010.[40]

8. The IEP team met again in November 2010 to consider Student's academic progress and progress with his occupational therapy goals.[41] From that meeting, a new IEP was drafted that continued the same amount of pull-out services but adopted new goals.[42] The notes from the meeting show that Student's teachers felt he was making progress while Parents felt that he was not and needed more intensive intervention.[43] Parents wanted outside private intervention, such as Lindamood-Bell.[44] At one point in the middle of the meeting, Father became upset and left the meeting.[45] Mother remained but did not interact much with the team after that point.[46] The notes reflect that the new goals were discussed and that Mother had no objection to the new goals being implemented.[47] Again, the IEP called for quarterly progress reports and found that ESY was not necessary.[48]

9. The new goals addressed reading comprehension, phonics, fluency, and occupational therapy goals for writing and using a keyboard.[49] Prior Written Notice was issued on November 15, 2010, stating that the new goals would "focus on the specific skills he is currently working on."[50] The PWN also noted that the IEP team recommended a psychoeducational re-evaluation to gather additional data to help the IEP team consider other needs Student might have.[51] In addition, notice was given that the IEP team refused to change Student's placement to include private outside

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[38] Exhibit 16 (p72).
[39] Exhibit 14 (p68).
[40] Testimony of Father, April 12, 2012 Reporter's Transcript of Proceedings ("RT"), Vol. I at 82.
[41] Exhibit 18.
[42] Exhibit 19.
[43] Exhibit 20 (p99).
[44] *Id.*
[45] *Id.*
[46] Testimony of Public Special Ed. Teacher, April 12, 2012 RT, Vol. I at 213.
[47] Exhibit 20 (p99).
[48] Exhibit 19 (pp91, 92).
[49] Exhibit 19 (pp84-89).
[50] Exhibit 21 (p100).

programs.[52] School staff thought that Student was making "measurable and meaningful gains" and "adequate progress."[53] Some concerns were noted, but the IEP team determined that re-evaluation was more appropriate than a change in placement. Parents refused consent for re-evaluation.[54]

10. Progress reports from January 2011 show that Student was making progress toward completion of his academic goals.[55] Progress reports from March 2011 and May 2011 show that Student made further progress on all goals and even met one of them.[56]

11. In May 2011, Parents consented to re-evaluation of Student.[57] Student's IEP team met to determine what information was needed.[58] The team decided that a comprehensive psychoeducational evaluation was needed with assessments in basic reading skills, reading fluency, reading comprehension, and math, as well as occupational therapy.[59]

12. Parents sent Student to New Way Academy for Summer 2011.[60]

13. Respondent School District conducted an evaluation and on June 16, 2011, Student's Multidisciplinary Evaluation Team ("MET") issued an evaluation report.[61] The MET reviewed existing data, including the results of psychoeducational testing performed by Dr. Lanie Zigler in 2008 and 2010, by Fountain Hills Unified School District in 2009, and by Lindamood-Bell Learning Process in 2010.[62] The MET reviewed Student's developmental and educational histories, information from Parents, and observations from Student's teachers.[63] It also considered results from cognitive and achievement testing performed in May and June 2011 by Brian Potter, a school

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[51] *Id.* The previous evaluation had been conducted by Fountain Hills Unified School District in 2009. Student had never been evaluated by Respondent School District.
[52] Exhibit 22.
[53] *Id.* (p102).
[54] Exhibit 23.
[55] Exhibit 24.
[56] Exhibit 25.
[57] Exhibit 29.
[58] Exhibit 30.
[59] *Id.*
[60] Exhibit I (PET 147).
[61] Exhibit 32.
[62] *Id.* (pp126-29).
[63] *Id.* (pp129-33).

psychologist with Respondent School District.[64] In addition, an occupational therapy assessment was performed that found Student no longer needed those services.[65]

14. The MET report found that Student continued to struggle significantly with reading due to his learning disabilities. After pinpointing specific areas of need, such as his inability to recall common words while reading and to quickly and easily read material required in the curriculum, the MET report found that the appropriate placement for Student was in a regular education classroom with support from a special education resource room.[66] Many recommendations for educating Student and addressing his needs were listed in the report, including using reading materials at Student's instructional level and at his independent reading level.[67]

15. The same day as the MET report and meeting, June 16, 2011, Parents expressed disagreement with Respondent School District's evaluation and requested an Independent Educational Evaluation ("IEE").[68] They wanted Dr. Zigler to perform the IEE. Respondent School District told Parents that they would send them information about the process for obtaining an IEE at public expense, which Respondent School District did a few days later.[69]

16. At the same time, Parents contacted Dr. Zigler and hired her to perform another evaluation of Student, which she did on June 18 and 23, 2011.[70] Her written evaluation was not issued until several months later:[71] Respondent School District received it in September 2011.[72]

17. On August 2, 2011, Parents gave Respondent School District notice that they were placing Student in a private day school, New Way Academy, for his fourth-grade year and would be seeking reimbursement from Respondent School District for expenses.[73] The parties met on August 19, 2011, to discuss the situation, but no

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[64] *Id.* (pp133-41).
[65] *Id.* (p141, 146-47).
[66] *Id.* (p144).
[67] *Id.* (p145).
[68] Exhibit 33.
[69] Exhibit 48 (pp444, 446).
[70] Exhibit L (PET 275).
[71] The report itself is not dated.
[72] Exhibit 52. The delay occurred because Dr. Zigler was waiting to receive information from Respondent School District.
[73] Exhibit 34.

resolution was reached: school district members of the IEP team continued to express that Student was making meaningful progress in the regular education classroom with resource room supports and Parents did not agree.[74] Student has remained at New Way Academy since August 2011.

18. After receiving Dr. Zigler's evaluation report in September 2011, the IEP team was not able to meet to review it until January 2012.[75] Dr. Zigler's report was based on her full evaluation from 2008, her "brief reevaluation of reading and written expression skills" in 2010,[76] the MET report from June 2011, other testing that Dr. Zigler performed in June 2011, and parental input. Comparing the current information with the prior reports, she found that Student was declining "across all academic areas."[77] She found that "the current placement has not been able to meet [Student]'s academic/remediation needs"[78] and recommended that Student be placed in a specialized school "such as New Way [ ] Academy."[79] She also recommended that Student received ESY because he was "well below age and grade levels" and needed "intensive remediation and continued exposure to the learned material to enhance his retention of the concepts and information."[80]

19. On January 11, 2012, Student IEP team met to consider Dr. Zigler's report, with the following results:

> School staff expressed concerns about differences in test scores obtained by the IEEs with other measures of skills, insufficiencies in sources reviewed or collected, a lack of focus on school functioning or lack of consideration of the least restrictive environment in which [Student]'s needs could be addressed. Additionally, the team's discussion included concerns regarding the IEE findings and their relevance to the school setting. Information about [Student]'s actual functioning in the school setting and performance in relation to the school curriculum was also discussed by school staff. [Student]'s parents were again asked if they had any questions about the IEE results, if they had additional information to add for the team to consider, or responses to the concerns or discussions presented by the school members of the team. [Parents

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[74] Exhibit 40.
[75] Exhibits 42 and 44.
[76] Exhibit L (PET 276).
[77] *Id.* (PET 282).
[78] *Id.* (PET 283).
[79] *Id.*
[80] *Id.* (PET 286).

did not have anything else to say.] The school team therefore referred back to and decided that the earlier recommendations from 6/16/11 were appropriate and concluded the meeting.[81]

Thus, the IEP team maintained the prior IEP with no changes.

20. During the Summer 2011, a dispute arose regarding Parents' retention of Dr. Zigler for the IEE. Respondent School District's procedures for IEEs are that the evaluator selected by the parent is sent information about what is expected for the IEE and the evaluator is asked to agree to certain procedures, including observing the student in the educational environment and a fee of no more than $750.00.[82] Although that information was sent to Parents and Dr. Zigler, Parents had already hired Dr. Zigler and she had begun her evaluation before receiving the information. When Dr. Zigler later presented her bill to Respondent School District, it was more than twice the maximum fee.[83] Respondent School District asked Dr. Zigler to justify the extra amount: "If your evaluation required extensive and extraordinary testing, please respond in writing regarding the need for additional compensation."[84] Dr. Zigler replied that she had not agreed to the fee cap.[85] Respondent School District paid Dr. Zigler $750.00.[86]

21. At hearing, Petitioners presented evidence in an attempt to show that Student did not make progress in second and third grades.[87] Dr Zigler testified in support of her opinion that from 2008 to 2011 Student's reading skills were actually declining, as stated in her report. This tribunal finds that the weight of Dr. Zigler's opinion is diminished by two factors. First, she did not observe Student in a school environment. That is one of the required IEE procedures in Respondent School

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[81] Exhibit 44 (pp167-68)..
[82] Exhibit 48 (p451). Dr. Cohen testified that this amount was established as a reasonable fee by questioning IEE providers in the Scottsdale area. April 13,2012 RT, Vol. II at 107.
[83] Exhibit 57.
[84] Exhibit 52.
[85] Exhibit 53.
[86] Exhibit 56.
[87] Because the remedy requested is reimbursement for unilateral parental placement in August 2011, the only IEP relevant to that claim is the IEP from which parents made the private placement: the November 2010 IEP. However, Respondent School District did not object to evidence regarding the prior 2010 IEPs.

District's protocols, emphasizing its importance.[88] Second, as Dr. Cohen testified at hearing, Dr. Zigler's opinion is colored by her prior evaluation of Student and her prior conviction that Student needs a special private school setting. Dr. Zigler had already made a determination about how best to educate Student and, quite naturally, was invested in that determination, whereas someone who had not yet given an opinion would likely be more objective.[89] This tribunal finds that Dr. Zigler's recommendation to take Student out of the general education setting has not been justified or shown to be necessary by a preponderance of evidence, especially in light of the least restrictive environment dictates of the IDEA.

22. Respondent School District provided credible testimony from Student's third-grade teachers, both Public Special Ed. Teacher and Public General Ed. Teacher, in support of its position that Student was making some progress on his goals. The evidence in the record supports that testimony.[90]

CONCLUSIONS OF LAW

APPLICABLE LAW

FAPE

1. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a free appropriate public education that meets their individual needs.[91] These needs include academic, social, health, emotional, communicative, physical, and vocational needs.[92] To do this, school districts must identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification, assessment and placement of students who need special education, and seeks to ensure that they receive a free appropriate public education. A free appropriate public education ("FAPE") consists of "personalized instruction with sufficient support services

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[88] *See Jaccari J. v. Bd. of Educ. of the City of Chicago*, 690 F.Supp.2d 687, 697 (N.D. Ill. 2010) (standardized test scores are not the sole or dispositive indicia of progress).

[89] This is not criticism of Dr. Zigler. Her report and testimony were professionally presented. However, every witness, to some extent, has bias. The Administrative Law Judge's duty is to identify that bias and judge whether it has a substantial affect on the weight of the testimony.

[90] One point that is evident from the record is that Respondent School District's recordkeeping is sloppy. However, keeping sloppy records is not a violation of the IDEA.

[91] 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

to permit the child to benefit educationally from that instruction."[93] The IDEA mandates that school districts provide a "basic floor of opportunity," nothing more.[94] It does not require that each child's potential be maximized.[95] A child receives a FAPE if a program of instruction "(1) addresses his unique needs, (2) provides adequate support services so he can take advantage of the educational opportunities and (3) is in accord with an individualized educational program."[96]

The IEP

2. Once a child is determined eligible for special education services, a team composed of the child's parents, teachers, and others formulate an Individualized Education Program ("IEP") that, generally, sets forth the child's current levels of educational performance and sets annual goals that the IEP team believes will enable the child to make progress in the general education curriculum.[97] The IEP tells how the child will be educated, especially with regard to the child's needs that result from the child's disability, and what services will be provided to aid the child. The child's parents have a right to participate in the formulation of an IEP.[98] The IEP team must consider the strengths of the child, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the child.[99] To foster full parent participation, in addition to being a required member of the team making educational decisions about the child, school districts are required to give parents written notice when proposing any changes to the IEP,[100] and are required to give parents, at least once a year, a copy of the parents' "procedural safeguards," informing them of their rights as parents of a child with a disability.[101]

Prior Written Notice

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[92] *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).
[93] *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).
[94] *Id.*, 458 U.S. at 200.
[95] *Id.* at 198.
[96] *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006) (citing *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9th Cir. 1995).
[97] 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.
[98] 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(1).
[99] 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).
[100] 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.
[101] 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet. 20 U.S.C. § 1415(d)(B).

3. The IDEA process for making changes to an IEP, including changing educational placements, requires a school district to give parents written notice before taking the proposed action.[102] Often called Prior Written Notice (or PWN), that notice must contain certain information specified by the IDEA, such as an explanation of why a decision is being made, the documentation used to make the decision, and a reminder of parents' procedural rights. Of particular note is the requirement that the PWN contain '[a] description of other options that the IEP Team considered and the reasons why those options were rejected. . . .'"[103] Thus, the PWN is issued after an IEP team decision has been made, not before.

ESY

4. Disabled students are eligible for Extended School Year services if those services are necessary so that (1) the student will not severely or substantially regress in skills during recesses or the summer break, and (2) if the benefits gained by the student during the regular school year would be significantly jeopardized during school breaks without extended services.[104] ESY is not appropriate to provide daycare or respite services to caregivers, for summer recreation, or to maximize academic potential.[105] ESY is to be determined by the IEP team using retrospective data unless it is not available, in which case predictive data can be used.[106]

Reimbursement for Private School Placement

5. Parents who dispute whether an IEP provides a FAPE to a child, and who as a result enroll that child in a private school, may receive reimbursement for the costs of that private-school enrollment under certain circumstances.[107] The program offered by the school district must fail to provide a FAPE to the child and the private school must be an "appropriate" placement.[108] A private school placement may be appropriate even if it does not operate under public school standards.[109] Under these circumstances, parents may "enroll the child in a private preschool, elementary school, or secondary

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[102] 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).
[103] 20 U.S.C. § 1415(c)(1)(E); 34 C.F.R. § 300.503(b)(6).
[104] A.R.S. § 15-881(A).
[105] A.R.S. § 15-881(D).
[106] A.R.S. § 15-881(B).
[107] 34 C.F.R. § 300.148.
[108] *Id.*

school without the consent of or referral by the [school district]. . ." and seek reimbursement from the school district for the expense of that enrollment from a court or hearing officer.[110] Indeed, parents have "'an equitable right to reimbursement for the cost of providing an appropriate [private] education when a school district has failed to offer a child a [free appropriate public education].'"[111] Furthermore, the placement does not have to meet IDEA requirements for a FAPE.[112]

6. However, an award for reimbursement can be reduced or denied in various circumstances.[113] An award may be reduced or denied if the parents have not given adequate notice as set forth in the IDEA.[114] There is no claim of inadequate parental notice in this case. Therefore, reimbursement, if warranted, will not be reduced or denied in this case.

DECISION

7. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.[115] The standard of proof is "preponderance of the evidence," meaning evidence showing that a particular fact is "more probable than not."[116] Here, Parents seek reimbursement for private school placement at New Way Academy for Summer 2011, and school year 2011-2012.[117] Therefore, Petitioners bear the burden of proving by a preponderance of evidence first that Respondent School District failed to provide Student a FAPE in the IEP offered at the time of private placement, and second that the placement at New Way Academy was appropriate.

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[109] *Id.*
[110] 34 C.F.R. § 300.148(b) and (c).
[111] *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1485 (9th Cir. 1992)).
[112] *Florence County. Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).
[113] 34 C.F.R. § 300.148(d).
[114] 34 C.F.R. § 300.148(d)(1).
[115] *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).
[116] *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).
[117] Parents do not request reimbursement for Summer 2010.

8. Furthermore, this tribunal's determination of whether or not Student received a FAPE must be based on substantive grounds.[118] If a procedural violation is alleged and found, it must be determined whether the procedural violation either (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit.[119] If one of the three impediments listed has occurred, the child has been denied a FAPE due to the procedural violation.

9. For the reasons below, this tribunal concludes that Petitioners have not met their burden.

(1) Did Respondent School District Offer Student a FAPE in August 2011?

10. Because the FAPE offer that Parents rejected when they privately placed Student was the placement made in the November 2010 IEP (as renewed in the June 2011 MET report), Parents must show that the November 2010 IEP did not offer a FAPE. Whether any prior IEPs offered Student a FAPE is not relevant, since the November 2010 IEP was in place when Parents made their unilateral placement.

11. A FAPE does not require the absolute best or "potential-maximizing" education for a disabled child.[120] Neither can a school district meet its duty under the IDEA by providing a program that produces minimal or trivial academic advancement.[121] However, the standard for evaluating IEPs is not retrospective:

> Instead of asking whether the [IEP] was adequate in light of the [Student's] progress, the district court should have asked the more pertinent question of whether the [IEP] was appropriately designed and implemented so as to convey [Student] with a meaningful benefit. We do not judge an [IEP] in hindsight; rather, we look to the [IEP's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [Student] with a meaningful benefit. . . . In striving for "appropriateness," an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.[122]

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[118] 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).
[119] 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).
[120] *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 439 (9th Cir. 2010), *affirming and re-publishing J.W. v. Fresno Unified Sch. Dist.*, 611 F.Supp.2d 1097 (E.D. Cal. 2009) (quoting *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987)).
[121] *Id.* (quoting *Amanda J. v. Clark County Sch. Dist.*, 267 F. 3d 877, 890 (9th Cir. 2001)).
[122] *Id.* (quoting *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)).

Thus, the IEP is viewed as a snapshot and reviewed in the context of the information that the IEP team knew or should have known at the time the IEP was drafted.[123] An IEP provides a FAPE if it is appropriately designed and implemented so as to convey meaningful benefit.[124]

12. Moreover, this tribunal's review of the November 2010 IEP is limited to the contents of the document.[125] Therefore, the question of whether the November 2010 IEP is reasonably calculated to provide educational benefit to Student must be decided on the basis of the content of the IEP itself.

13. This tribunal finds that Respondent School District offered Student a FAPE in August 2011, pursuant to the continuing implementation of the November 2010 IEP. The evidence shows that placement in a regular education classroom with resource room support for reading was appropriate for Student and was the least restrictive environment for him. His IEP was developed by a group of professionals from various disciplines and included input from Parents and other professionals. The IEP team considered the present level of functioning of Student and designed an individualized program for him. The IEP team considered various alternatives and services, and explained why they were either accepted or rejected. This tribunal's task, under the IDEA, is "not to speculate or to second-guess the decisions made by educators and conceive of ways in which the school district could have done a better job."[126] This tribunal finds that the November 2010 IEP was reasonably calculated to provide meaningful benefit to Student.

14. As noted, Petitioners' chief argument is that Student did not make progress in reading in his second-grade and third-grade years. Petitioners have not presented, and this tribunal cannot find, any statute or case law that states that mere lack of progress is a

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[123] *Adams*, 195 F.3d at 1149.

[124] *Aaron P. v. Dept. of Educ., State of Hawaii*, No. 10-00574, 2011 U.S. Dist. LEXIS 126450, at *50 (D. Haw. Oct. 31, 2011) (quoting *J.W.*, 626 F3d at 433)).

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

[126] *Jaccari J.*, 690 F.Supp.2d at 705.

violation of the IDEA.[127] The IDEA does not require that school districts guarantee educational progress.

15. Even so, the evidence of record does not show a lack of progress. Student's teachers credibly testified, and maintained during IEP meetings, that Student was making meaningful progress. The progress reports verify and quantify the progress that he made. Respondent School District reported Student's progress in the manner required by the IEPs. It is understandable that Parents wanted Student to make more progress and wanted Student to have more services. But, an IEP is developed by a team. It does not have to conform to a parent's wishes in order to be sufficient and appropriate.[128] The parties have clear and honest differences of opinion about the progress Student made, but the evidence shows that Student's IEP team developed an individualized program that was tailored to meet his needs in the least restrictive environment.[129]

(2) Did Respondent School District Violate IDEA Procedure?

(a) Unilateral Decrease of Service Minutes

16. As determined above, the conduct that is the basis for this claim occurred in August 2009, outside the two-year period for bringing a complaint. Therefore, this claim is barred by the IDEA as untimely. It is dismissed.

(b) Consideration of Other Services or Placements

17. The evidence shows that the IEP team and the MET considered other placements and other services for Student. Petitioners' argument to the contrary is not supported by the evidence.

(c) Did Respondent School District "Close" Goals Without Parental Participation?

18. Petitioners argue that Respondent School District "closed" goals in November 2010 without the knowledge or participation of Parents. However, as found in Finding of Fact 8 above, the meeting notes show that new goals were discussed and that the team decided to implement the new goals. Mother was present during that

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[127] Whether or not a student has made progress is relevant only in limited circumstances, such as determining if a student has been harmed by a material failure to implement an IEP. *See Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770 (9th Cir. 2007). Petitioners have not argued here that Respondent School District failed to implement the provisions of the IEP.

[128] *Aaron P.*, 2011 U.S. Dist. LEXIS at *88.

discussion. That meeting had been properly noticed and a PWN was issued appropriately.

(3) Did Respondent School District Consider Funding?

19. Petitioners make this argument perfunctorily and offer no substantial evidence supporting it. There is no reason to believe that funding was considered by the IEP team. Furthermore, Petitioners have provided no legal authority stating that funding cannot ever be a factor of consideration. This claim is summarily dismissed.

(4) Was Student Eligible for ESY in 2010 and 2011?

20. The evidence does not show that Student was ever eligible for ESY while attending school in Respondent School District. The IEP team considered ESY services each time they met and rejected them because Student's teachers were not seeing evidence of regression or the need for recoupment of skills outside of the ordinary experience that all students have after breaks in education.

(5) Did Respondent School District Violate the IDEA by Not Fully Paying Dr. Zigler's Bill?

21. School districts are allowed to create criteria for IEEs, as long as those criteria are the same that the school district uses when it initiates its own evaluation.[130] Here, the criteria applied by Respondent School District was reasonable and logical. Dr. Zigler could have waited to hear from Respondent School District before conducting her IEE. She could have reviewed the Respondent School District's procedures and, if they were not acceptable, declined to conduct the IEE. This tribunal finds that Respondent School District acted reasonably and is not required to pay more than the price established in its criteria. Payment to Dr. Zigler of $750.00 for the IEE does not violate the IDEA.

(6) Is New Way Academy an Appropriate Placement?

22. This issue need not be decided due to the conclusion that a FAPE was offered to Student.

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[129] *See Id.* at *89-*90.
[130] 34 C.F.R. § 300.502(e).

Conclusion

23. The credible evidence of record shows that Student made meaningful progress on his IEP goals while being educated by Respondent School District. Respondent School District complied with the substantive portions of the IDEA and has not violated any of Petitioners' procedural rights. Student was not eligible for ESY in 2010 or 2011 and Parents' right to an IEE was not infringed. No violation of the IDEA has been shown.

ORDER

Based on the findings and conclusions above, IT IS HEREBY ORDERED that that the relief requested in the due process complaint in this matter be denied.

Done this 2nd day of August 2012.

OFFICE OF ADMINISTRATIVE HEARINGS

Eric Bryant by Kay Abramson

Eric A. Bryant
Administrative Law Judge

RIGHT TO SEEK JUDICIAL REVIEW

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

. . .

. . .

Copy sent by **electronic mail** and regular mail
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Transmitted electronically to:

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

By Cruz Serrano