

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 E.O., a Student by and through Parent M.O.
4 Petitioners,

No. 18C-DP-004-ADE

5 v.

**ADMINISTRATIVE LAW JUDGE
DECISION**

6 Sedona-Oak Creek JUSD #9
7 Respondent.

8
9 **HEARING:** Convened on October 16, 2017 and October 17, 2017, with the record
10 left open to receive transcripts, to receive written closing legal arguments, and for review
11 of entire hearing record.¹

12 **APPEARANCES:** Petitioner Parent [REDACTED] (Parent), appeared on his own behalf
13 and on behalf of Petitioner Student [REDACTED] (Student) and was accompanied by Student's
14 Parent [REDACTED] (Parent [REDACTED]).

15 Attorneys Patrice M. Horstman and Alex D. Ivan, HUFFORD, HORSTMAN, MONGINI,
16 PARNELL & TUCKER, P.C., represented Respondent Sedona-Oak Creek Unified School
17 District No. 9 (Respondent School District), accompanied by school representatives Trish
18 Alley, Director of Student Support Services, and Michael L. Remus, Former Director of
19 Student Support Services.

20 Certified Court Reporter Michelle Seymour, PERFORMANCE REPORTERS, INC., was
21 present and recorded the proceedings as the official record of the hearing.

22 **WITNESSES:**² **Vicky Pelphrey**, Speech-Language Pathologist; **Tiffany Wilson**,
23 **Special Education Teacher**; and **Michael L. Remus**, Former Director of Student
24 Support Services.

25 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

26
27 Parent brought this due process action, on behalf of Student, maintaining that
28 Respondent School District had failed to provide the amount of services as indicated by
29 the Individual Education Programs (IEPs) of September 2015 and September 2016 and
30 had failed to adequately implement the 2016 IEP in terms of the utilization of Language
Acquisition through Motor Planning (LAMP). The 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),³ and its implementing regulations,

¹ The parties agreed that the 45th day, the day by which a decision is due, would be January 5, 2018.

² 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.

³ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004," IDEA 2004 became effective on July 1, 2005.

1 34 Code of Federal Regulations (C.F.R.) Part 300, as well as the Arizona Special
2 Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and
3 implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.

4 Procedural History

5 *General History*

6 Petitioners filed the instant Due Process Complaint (Complaint) on July 7, 2017.
7 The Complaint alleged that Respondent School failed to provide the service minutes
8 required under the September 2015 and September 2016 IEPs. In the Complaint,
9 Petitioners separated the issue into the time periods between August 15, 2016, and
10 November 14, 2016, and after November 14, 2016, through the end of the school year.
11 The Complaint also alleged that Respondent School District failed to “adequately”
12 implement the September 2016 IEP regarding the utilization of the LAMP program. The
13 Complaint identified Petitioners’ proposed remedies as 426 hours of compensatory
14 special education services and 26 hours of compensatory related services for speech.

15 During the prehearing conference held in this matter on September 28, 2017, the
16 issues were discussed at length. As to the failure to provide the service minutes required
17 under the September 2015 and September 2016 IEPs, the parties agreed that Parent
18 submitted a request to Respondent School District that Student’s school day be shortened
19 in light of a behavioral issue on the first day of school. As a result, Student’s school day
20 was shortened by two hours per day beginning on August 15, 2016, and Student returned
21 to a full day on November 14, 2016. Respondent School District couched this as a
22 procedural issue in that the parties were all aware of the shortened school day and how
23 that would obviously affect the service minutes provided to Student during that time, but
24 Respondent School District failed to amend the September 2015 IEP to reflect that
25 change and/or issue a Prior Written Notice (PWN). Petitioners couched this as a
26 substantive issue in that Respondent School District failed to provide the service minutes
27 required under the September 2015 IEP and September 2016 IEP and Parent had no
28 notion or idea that the school day being shortened by two hours would reduce the service
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1 minutes being provided during that time.⁴ During the prehearing conference, Petitioners
2 did not address their allegation that there was a shortage of service minutes provided
3 after November 14, 2016, through the end of the school year.

4 As to the failure to appropriately implement the LAMP device, Petitioners clarified
5 that their specific complaints were 1) Respondent School District staff's lack of training
6 and/or expertise on the use of the LAMP program; 2) the Realize Language tracking
7 system was not activated promptly; and 3) the Realize Language tracking system data
8 was not provided to Parent.

9 *Disclosure Issue*

10 Petitioners filed the Complaint on July 7, 2017. The due process hearing was
11 initially scheduled to be held on August 21, 22, and 23, 2017.⁵ On July 27, 2017,
12 Respondent School District requested that the due process hearing be continued. The
13 due process hearing was continued to October 16 and 17, 2017. A prehearing conference
14 was held on September 28, 2017. During the prehearing conference, various procedural
15 matters were discussed. Included in the discussion was a statement by the
16 Administrative Law Judge that because of the Columbus Day holiday on Monday, October
17 9, 2017, the disclosure deadline for the due process hearing was Friday, October 6, 2017.
18 Neither party contested this deadline.

19 At 4:48 a.m. on Friday, October 6, 2017, Petitioners filed a Motion to Continue Due
20 Process Hearing. At 10:22 a.m. on Friday, October 6, 2017, Petitioners filed an Amended
21 Motion to Continue Due Process Hearing. As to the disclosure deadline, both motions
22 asserted, *inter alia*, that a continuance should be granted because a disclosure date "not
23 less than five business days before the commencement of the due process hearing",
24 based on the October 16th due process hearing date, would be Thursday, October 5,
25 2017; taking into the consideration of the federal holiday of Columbus Day on Monday,
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29 ⁴ When pressed during the prehearing conference, Parent could not answer what he believed would be
30 removed from Student's school day to account for the missing two-hours of attendance. Parent asserted
that he did not have any thoughts on the subject at the time.

⁵ In the Prehearing Order, the Administrative Law Judge set forth that the hearing was set for August 21,
22, and 23, 2017, and the disclosure deadline was August 14, 2017.

1 October 9, 2017” and “[n]either the Respondent nor the Petitioner have submitted to the
2 other, their disclosures as of close-of-business yesterday, Thursday, October 5th.”

3 At approximately 11:20 a.m. on Friday, October 6, 2017, Respondent School
4 District submitted to the Office of Administrative Hearings its exhibit list and witness list.
5 Respondent School District represented in a subsequent filing that it sent its witness list
6 and exhibits to Petitioners via Federal Express overnight delivery on Thursday, October
7 5, 2017, and it was received by Petitioners at 11:25 a.m. on Friday, October 6, 2017.

8 The Administrative Law Judge was out of the office on October 6, 2017, but had
9 staff contact Petitioners and Respondent via telephone to notify them that the due process
10 hearing would not be continued. Office of Administrative Hearings’ staff left a voicemail
11 message for Petitioners around 1:40 p.m. on October 6, 2017. The Administrative Law
12 Judge then drafted an Order Denying Continuance to further explain the reason for the
13 denial. As to the disclosure deadline, the Order Denying Continuance provided as
14 follows:
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16 Petitioners asserted that the disclosure deadline pursuant to 34 C.F.R. §
17 300.512(b)(1) was October 5, 2017, and stated that neither party had
18 complied with the disclosure deadline. Petitioners appear to read the
19 regulation to require the disclosure to occur more than five business days
20 prior to the hearing. As noted at the prehearing conference on September
21 28, 2017, the disclosure deadline is October 6, 2017, five business days
22 prior to the commencement of the hearing.⁶ The parties were advised of
that method of calculation since the initial prehearing order was issued on
23 July 21, 2017, when it was noted that the disclosure deadline for the
originally scheduled August 21, 2017 hearing was August 14, 2017.

24 The Order Denying Continuance was emailed to the parties at 2:28 p.m. and reiterated
25 that the disclosure deadline was the close of business on Friday, October 6, 2017.

26 At 2:05 p.m. on October 9, 2017, Petitioner filed a Second Motion to Continue Due
27 Process Hearing and/or Leave to Provide Disclosure Within Five Business Days. Due to
28 the Columbus Day holiday, the motion was not received until October 10, 2017. In the

29 ⁶ One business day prior to the hearing would be October 13, 2017. Two business days prior to the hearing
30 would be October 12, 2017. Three business days prior to the hearing would be October 11, 2017. Four
business days prior to the hearing would be October 10, 2017. Five business days prior to the hearing is
October 6, 2017.

1 motion, Petitioner requested a continuance of the due process hearing because on
2 Friday, October 6, 2017, Student sustained an injury at school, was picked up by a sibling,
3 was taken home, and on the advice of his primary care physician was taken to the
4 emergency room. Petitioners asserted that Student underwent x-rays and CT scans that
5 required Parent to physically hold Student still. Petitioners indicated that "[d]ue to the
6 exceptional and unfortunate circumstances, Petitioner was unable to exchange his
7 disclosure with the District accordingly."⁷ Petitioners requested that the due process
8 hearing be continued to a later date or that they be allowed to submit their exhibits within
9 five business days of the due process hearing.

10 At 4:19 p.m. on October 9, 2017, Respondent School District filed a Response to
11 Petitioner's Second Motion to Continue Due Process Hearing and Counter Motion to
12 Dismiss for Failure to Prosecute. Due to the Columbus Day holiday, the response and
13 counter motion was not received until October 10, 2017. In the response, Respondent
14 School District asserted that "Petitioner never informed Respondent of this medical
15 emergency or sought to arrange with Respondent a mutually-agreeable alternative date
16 and time at which to deliver his exhibits" and further, that "[t]o date, Petitioner has not
17 exchanged copies of his exhibits with Respondent." Respondent School District
18 requested that the matter be dismissed because Petitioners failed to prosecute the due
19 process complaint, or in the alternative, that Petitioners be excluded from introducing into
20 evidence any of Petitioners' exhibits that were not disclosed on Friday, October 6, 2017.

21 On October 11, 2017, the Administrative Law Judge issued an order denying
22 Petitioners' Second Motion to Continue Due Process Hearing and/or Leave to Provide
23 Disclosure Within Five Business Days, granting that portion of Respondent School
24 District's Response to Petitioners' Second Motion to Continue Due Process Hearing
25 requesting that Petitioners' exhibits not disclosed five business days before the due
26 process hearing be excluded pursuant to 34 C.F.R. § 300.512(a)(3), and denying
27 Respondent School District's Motion to Dismiss for Failure to Prosecute.
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30 ⁷ It is noted that the Discharge Instructions document submitted with the motion was date stamped 19:50:16
on October 6, 2017, and did not indicate when Student was admitted to the Emergency Room.

1 On Saturday, October 14, 2017, Petitioners filed a Motion to Prohibit Respondent
2 School District's Exhibits at Hearing. In the motion, Petitioners maintained that "the
3 Tribunal not correctly calculating the correct disclosure date, [sic] does not alleviate either
4 party from complying with the regulations governing the due process hearing." Petitioners
5 argued that, pursuant to 34 C.F.R. § 300.512(a)(3), they had the right to prohibit the
6 introduction of Respondent School District's exhibits and that "the Tribunal either through
7 error or assertion can neither subvert nor subjugate those hearing rights." At the
8 commencement of the hearing, the Administrative Law Judge denied Petitioners' motion.

9 On Sunday, October 15, 2017, Petitioners filed a Request for Reconsideration of
10 Order Denying Continuance. In the motion, Petitioners asserted that the Tribunal
11 "improperly calculated the necessary disclosure date for exhibits before the due process
12 hearing in this matter," but noted that "the Tribunal miscalculating the date does not
13 eliminate the responsibility of either the Petitioner or Respondent from complying with the
14 regulations as both parties have been partied [sic] to numerous due process hearings
15 and should be fully aware of the disclosure deadlines themselves without the necessity
16 of the Tribunal calculating it for them."⁸ Petitioners concluded that "[a]s both parties failed
17 to provide their exhibits within the statutory disclosure deadline, Petitioner asserts again
18 that the hearing be continued to a later time, as both parties would have the right under
19 34 C.F.R. § 300.512(a)(3) to prohibit the introduction of the other parties exhibits at the
20 hearing as currently scheduled." At the commencement of the hearing, the Administrative
21 Law Judge denied Petitioners' motion.

22 Assuming, *arguendo*, that the Administrative Law Judge miscalculated the
23 disclosure deadline and the disclosure deadline had been Thursday, October 5, 2017,
24 Petitioners correctly asserted that they had the right, pursuant to 34 C.F.R. §
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27 ⁸ In fact, Petitioners have filed 21 due process complaints against Respondent School District since May
28 21, 2013. In each of the due process complaints filed by Petitioners, the disclosure date has been
29 calculated by the Office of Administrative Hearings in the same manner as it was in this matter without
30 either party alleging that the disclosure date was incorrect or seeking to exclude the other party's exhibits
because they were not timely disclosed. Notably, in Docket Number 14C-DP-006-ADE and 14C-DP-012-
ADE, consolidate for hearing, the due process hearing was scheduled to convene on Monday, November
18, 2013, and because of the Veteran's Day holiday on Monday, November 11, 2013, the disclosure date
was identified as Friday, November 8, 2013. Both parties submitted their disclosure by that date.

300.512(a)(3) to prohibit the introduction of Respondent School District's proffered exhibits. However, neither party even attempted to present good cause for why the disclosure was not made by the purported disclosure deadline of October 5, 2017. As such, if the Administrative Law Judge determined the disclosure deadline had been Thursday, October 5, 2017, the exhibits of both Petitioners and Respondent School District would have been excluded, but a continuance would not have been granted based on the failure to timely disclose the exhibits. Therefore, the hearing would have proceeded on Monday, October 16, 2017, without the benefit of exhibits from either party.

Evidence at Hearing

The parties presented testimony and exhibits at a formal evidentiary hearing on October 16, 2017, and October 17, 2017.

The parties presented testimony from the witnesses listed above⁹ and offered into evidence Respondent School District's Exhibits 1 through 70.

The Administrative Law Judge has considered the entire record, including the testimony and exhibits,¹⁰ and now makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Student is eligible for special education services in the categories of [REDACTED] [REDACTED] During the 2016 – 2017 school year, Student received special education services in a self-contained setting for most of the day, but was included with his general education peers for part of the day.

2. Prior to August 2016, Student attended school at the [REDACTED] School. In August 2016, Student began attending [REDACTED] a junior high school on a high school campus.

3. As of the beginning of the 2016 – 2017 school year, the September 2015 IEP was in effect. The September 2015 IEP included 14 goals with 1080 minutes per

⁹ Transcripts of the testimony have been added to the record. The transcripts are the official record of the hearing.

¹⁰ The Administrative Law Judge has considered the admitted exhibits, 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.

1 week of special education services to be provided. The September 2015 IEP also
2 provided for the use of a Picture Exchange Communication System (PECS) book being
3 used as directed by the special education teacher.

4 4. Prior to the first day of school, Parent emailed Mr. Remus and stated that
5 having Student start school at 8:00 a.m. "would be self-defeating at this point and result
6 in a negative experience for him." Parent stated that Parents would be doing parent drop-
7 off at the school at 10:00 a.m. "for the next several days." Exhibit 2.

8 5. On August 3, 2016, the first day of school, Student became upset and
9 started crying and hitting himself on this ears during a physical education (PE) class. Staff
10 were able to calm Student down eventually and reported the incident to Parents via
11 Student's Buddy Book.

12 6. On the evening of August 3, 2016, Parent emailed Mr. Remus and Special
13 Education Teacher and requested a meeting regarding the incident on the first day of
14 school.

15 7. On August 9, 2016, Parents met with Special Education Teacher, the
16 principal, and the counselor. During that meeting, Parents shared that Student was
17 experiencing a big change going from [REDACTED] School to [REDACTED]
18 [REDACTED] School and noted that PE was a new class in a new location in a new schedule
19 compared to his summer schedule. Special Education Teacher stated she had increased
20 time working on Student's goals. Parent [REDACTED] suggested that Special Education Teacher
21 work on the goals she had been doing over the summer because Student was feeling
22 successful. At the meeting, the participants agreed that Student would attend school
23 starting at 8:00 a.m. with a 1:00 p.m. release time, which would increase for 30 minute
24 intervals after parent-teacher conferences to discuss the appropriateness of the increase.
25 Special Education Teacher and the counselor were to write up a daily routine schedule
26 with 15 minute intervals to begin on Monday, August 15, 2016.

27 8. On August 23, 2016, August 30, 2016, and September 6, 2016, the IEP
28 Team convened to develop and finalize the September 2016 IEP. The September 2016
29 IEP included 15 goals with 5400 minutes per month of special education services to be
30 provided. The September 2016 IEP also provided for the use of an Alternative
Augmented Communication (AAC) device with the LAMP program being used as directed

1 by the special education teacher and speech language pathologist. Seven of the goals
2 specifically referenced the AAC and/or Speech Generating Devices (SGD).

3 9. Knowing that the IEP team was intending to introduce the use of the LAMP
4 program in the September 2016 IEP, Ms. Pelphrey sought additional information on the
5 LAMP program via the website and literature during the summer of 2016. Ms. Pelphrey
6 had not used the LAMP program prior to Student's use of the program, but did have
7 experience with other AAC and SGD.

8 10. On September 11, 2016, Ms. Pelphrey emailed Parent regarding a free live
9 webinar training regarding the use of the LAMP program. Parents did not respond to the
10 email and opted not to attend the training with Respondent School District staff.

11 11. On September 27, 2016, Parents, Special Education Teacher, and the
12 principal met for a parent-teacher conference. At that time, the parties agreed that
13 Student's school day would be extended by 30 minutes, from 8:00 a.m. to 1:30 p.m.,
14 starting the following week. Use of the LAMP program was also reviewed at this meeting.

15 12. On November 2, 2016, Parents, Special Education Teacher, and Ms.
16 Pelphrey met for a parent-teacher conference. At that time, Parent stated he had spoken
17 to someone from Prentke Romich Company (PRC), the developer of the LAMP program.
18 Parent indicated he would like Respondent School District to revise how the pages on the
19 LAMP program were set up according to his conversation with the PRC representative
20 for Arizona.

21 13. On November 8, 2016, Parent emailed Mr. Remus and stated that he was
22 "very disappointed, concerned, and frustrated with what [he] found about how the District
23 has implemented LAMP so far." Parent suggested that Respondent School District invest
24 in LAMP training for all school personnel that would interact with Student and for Parents
25 as well. Parent indicated that Respondent School District had the LAMP program since
26 May 2016, so Student had lost six months of opportunity due to lack of training.¹¹

27 14. On November 8, 2016, Mr. Remus responded to Parent's email and stated
28 that the day before, he had approved Ms. Pelphrey's request for four staff members to
29 attend a training on the LAMP program.

30 ¹¹ The September 2015 IEP did not provide for the use of LAMP program. The LAMP program was first
required under the September 2016 IEP.

1 15. On or about November 10, 2016, the IEP team met to review Student's
2 shortened school day. The IEP team concluded that because Student had not exhibited
3 any further self-injurious behaviors, it was appropriate to return Student to a full school
4 day beginning on November 14, 2016.

5 16. On December 6, 2016, and December 7, 2016, Special Education Teacher,
6 Ms. Pelphrey, two of Student's paraprofessionals, and Parents attended a LAMP program
7 training.

8 17. On or about December 13, 2016, the IEP team met to review the training.
9 At that time, the IEP team agreed that to teach Student with most natural form of language
10 acquisition with the LAMP program, seven of Student's IEP goals would be removed and
11 replaced with a single communication goal. The single communication goal was, "Given
12 communicative exchanges in a variety of natural environments and contexts, [Student]
13 will meaningfully use 80 unique words in an AAC device through the school week
14 measures using daily frequency data collection." It was also determined that the Realize
15 Language data tracker in the LAMP program would be activated.

16 18. On January 31, 2017, the IEP team met. Most of the meeting was spent
17 hearing the concerns of Parents with little input from other team members. No changes
18 were made to the IEP at that meeting.

19 19. On or about February 21, 2017, Respondent School District provided Parent
20 with some data from the LAMP program data tracking component. Parent requested "the
21 raw data" that would "be representative of frequency, fluency, context, and commonality."
22 Exhibit 25.

23 20. On March 7, 2017, Parent reiterated his request for "logs from LAMP."
24 Exhibit 26.

25 21. On March 7, 2017, Ms. Pelphrey responded to Parent's email indicating that
26 the next set of logs would be sent home on or about March 21, 2017, but stated she was
27 unclear what log Parent was requesting that would provide the time between keystrokes
28 and the context in which each word was utilized.

29 22. On March 7, 2017, Parent responded to the email detailing what full reports
30 he was expecting to receive from the Realize Language data tracking.

1 23. On March 7, 2017, Special Education Teacher responded to Parent via
2 email and stated:

3 [Respondent School District was] happy to provide you with requested logs,
4 due out March 21st, as previously discussed. We did notice that when we
5 viewed the logs, that the device does not appear to be being used much at
6 all when it is home with [Student]. We cannot express enough how
7 important carryover of use of his device is in ALL settings. We are
8 disappointed to see that his device is being used at best, minimally, when it
9 goes home with him.

10 Exhibit 29.

11 24. On March 7, 2017, Parent acknowledged that Student was not using the
12 LAMP program device at home because they were "awaiting for a more established use
13 of his AAC, plus some understanding of his vocabulary, thus the need for the detailed
14 monthly reports." Exhibit 30.

15 25. On March 17, 2017, Ms. Pelphrey emailed Parent with the logs from
16 January 2017 through March 2017.

17 26. On March 22, 2017, Ms. Pelphrey emailed Parent in response to an inquiry
18 he made on March 29, 2017. Ms. Pelphrey stated that the Realize Language logs were
19 not aligned with how Student's communication goal was tracked. Ms. Pelphrey indicated
20 that the Realize Language logs were provided to Parents as a courtesy, but that the team
21 never indicated they would utilize the data contained in the logs. Specifically, Ms.
22 Pelphrey pointed out that the Realize Language tracking date did not show whether the
23 Student used the LAMP program independently or had to be prompted, which was
24 captured by the manual data collection method used by Respondent School District. Ms.
25 Pelphrey also stated that Respondent School District could not provide Parent access to
26 the Realize Language account as it was tied to Respondent School District's iTunes
27 account.

28 27. On March 23, 2017, Parent replied to the email. Parent asserted that he
29 understood the use of the Realize Language tracking "would eliminate the need for the
30 manual collection of data." Parent pointed out that the IEP referenced "daily frequency
data collection" that he understood to mean the Realize Language tracking.

1 28. Between March 23, 2017, and March 29, 2017, Parent and Ms. Pelphrey
2 exchanged numerous emails regarding the Realize Language tracking data.

3 29. On April 5, 2017, the IEP team met to review the IEP. At that time, three
4 new goals were created to replace goals Student had mastered. Respondent School
5 District agreed to purchase a second LAMP device and install the Realize Language
6 tracking system so Student would have one device for school and one device for home.
7 Respondent School District also informed Parents that on numerous occasions, the
8 LAMP device had been sent home in the locked position, but when it was returned to the
9 school, it was noted that the electronic database from the LAMP application had been
10 cleared or deleted. Respondent School District did not know who or what caused the
11 LAMP device to be unlocked and the LAMP database to be cleared or deleted.

12 30. During the hearing, Special Education Teacher testified that she believed
13 Parents' decision to bring Student to school two hours late on the first day of school
14 caused Student to become upset and engage in the self-injurious behavior. Special
15 Education Teacher stated that there were no mentions of the service minutes during the
16 meetings on August 9, 2016, and September 27, 2016, because "[i]t was assumed that
17 everyone was aware of what . . . was occurring."¹² Special Education Teacher testified
18 that she believed she was able to provide all of the service minutes required by the
19 September 2015 IEP by focusing on the goals and foregoing "doing fun extracurriculars"
20 like PE and assemblies. Special Education Teacher was less clear about her ability to
21 provide all of the service minutes under the September 2016 IEP during the shortened
22 school day, but indicated she was able to add time back in to the goals during Student's
23 day.

24 31. Special Education Teacher also testified that at the beginning of the 2016 –
25 2017 school year, she made a professional decision not to implement some of the goals
26 from the September 2015 IEP. At that time, Special Education Teacher noted that
27 Student had mastered certain goals, had expressed frustration with other goals, and
28 some goals were not appropriate to the new campus. Given the shortened school day
29 and Parent's request that she focus on goals Student had worked on over the summer,
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¹² Tr. Vol. I p. 205:10-11.

1 Special Education Teacher focused on goals that Student was familiar with, but had not
2 yet mastered. When queried why she did not have Student work on goals he had
3 mastered during this time based on the premise that his ability to do those tasks would
4 reduce his frustration, the Special Education Teacher stated that Student would often
5 become more frustrated when asked to perform a task he had already demonstrated
6 mastery of.

7 32. After the September 2016 IEP was created, Special Education Teacher
8 delayed the implementation of certain goals given the still shortened school day and
9 Student's frustration levels. Two of the goals Special Education Teacher delayed
10 implementing were Student's only math goals in the September 2016 IEP. The
11 September 2016 IEP provided that Student would receive 720 minutes per month in the
12 area of math. Special Education Teacher testified that math can come in in other parts
13 of other subjects, that "[a]ll of the goals can go and cross each other, depending on what
14 activity we are doing to go and reach a particular point that day. It depends on the
15 lesson."¹³

16 33. With respect to the LAMP program, Special Education Teacher
17 acknowledged that one of the components of the motor planning aspect was that the icon
18 for the word would not move. However, Special Education Teacher did indicate that it
19 would be acceptable to start with an icon on the initial screen and eventually move it to a
20 secondary screen as long as the icon was found through an icon in the same place on
21 the initial screen. Special Education Teacher used the example of "iPad" on the initial
22 screen as it was a high interest item for Student. After Student advanced in his use of
23 the LAMP program, the "iPad" icon could be replaced with the "Find" icon and after
24 pressing the "Find" icon, the secondary screen would have the "iPad" icon. Therefore,
25 the pattern of button presses to get to the "iPad" icon would not change, but would expand
26 from one touch to two touches.

27 34. With respect to the Realize Language system, Special Education Teacher
28 stated that it took some time to activate it because Respondent School District had to
29 obtain a purchase order. Special Education Teacher also testified that sometime in March
30

¹³ Tr. Vol. II p. 272:9-14.

1 2017 while she was on medical leave she was informed that all the data in the Realize
2 Language system was gone. Special Education Teacher was asked if she could come in
3 and look at it, but she declined as she was still on medical leave. When she returned to
4 work on April 3, 2017, she reviewed the Realize Language system and found that all the
5 data was gone, but could not identify how it occurred.

6 35. Special Education Teacher noted there were numerous times the LAMP
7 program was returned to the school with icons missing, with the guided access system
8 unlocked, and without being charged. Special Education Teacher acknowledged there
9 were certain password portions of the program that only she and Ms. Pelphrey could
10 access, but that it was conceivable a technologically sophisticated person could figure
11 out the passwords.

12 36. Special Education Teacher also testified that she did not see any purpose
13 for the Realize Language tracking system in Student's educational program.

14 37. During the hearing, Ms. Pelphrey testified that the LAMP program had three
15 different levels as individuals become more adept at using the program and as they
16 expand their vocabulary with the three levels being one-hit, transition, and full. Ms.
17 Pelphrey acknowledged that moving icons in the LAMP program was not recommended,
18 but that did not mean it never happened.

19 38. Ms. Pelphrey stated that Student would not have been given the full screen
20 of 84 icons when he was first introduced to the program, but additional icons would have
21 been added over time. Ms. Pelphrey testified that Student moved from the one-hit phase
22 to the transition phase fairly quickly, but she did not remember exactly when that occurred.
23 Ms. Pelphrey maintained she did not remember replacing any icons with "red" and
24 "yellow" on the main screen, but she believed "chip" was added to the initial screen.

25 39. Ms. Pelphrey stated she was not interested in how the Realize Language
26 tracking worked as it was not necessary to track Student's goals. Ms. Pelphrey also
27 explained that the Realize Language tracking did not track whether Student used the
28 device independently or required prompting and whether Student used the device in a
29 meaningful way, *i.e.* proper in the context. As an example, Ms. Pelphrey noted that if
30 Student was asked what he wanted to eat and Student responded "bounce," that use of
the LAMP program would not be meaningful even though it was recorded in the Realize

1 Language tracking system. However, if Student responded with "yogurt," that use of the
2 LAMP program would have been meaningful and would have been recorded by
3 Respondent School District staff on the manual tracking sheets. As Student's goal was
4 to *meaningful* use 80 unique words in the AAC device, the Realize Language tracking
5 system did not aid in the tracking of that goal.

6 40. Mr. Remus testified that he only learned of Student's shortened school day
7 a couple of weeks before the November 10, 2016 IEP team meeting. Mr. Remus stated
8 that he wanted to see Student returned to a full school day because students need to be
9 in school.

10 41. Mr. Remus also testified that he had no issue with Special Education
11 Teacher delaying implementation of certain IEP goals given that teachers know the
12 students best.

13 42. Mr. Remus testified that he was uncertain what the Realize Language
14 system tracks, but that Parents requested that it be implemented. Mr. Remus stated that
15 he expected Parents would be provided the data and understood it was provided to
16 Parents on a monthly basis.

17 43. Parents did not testify, and as previously addressed, did not present any
18 exhibits.

19 CONCLUSIONS OF LAW

20 1. A parent who requests a due process hearing alleging non-compliance with
21 the IDEA must bear the burden of proving that claim.¹⁴ The standard of proof is
22 "preponderance of the evidence," meaning evidence showing that a particular fact is "more
23 probable than not."¹⁵ Therefore, Petitioners bear the burden of proving their claims and
24 complaints by a preponderance of evidence.

25 2. This tribunal's determination of whether or not Student received a FAPE must
26 be based on substantive grounds.¹⁶ If a procedural violation is alleged and found, it must
27

28 ¹⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 ¹⁵ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
30 (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).

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

1 be determined whether the procedural violation either (1) impeded the child's right to a
2 FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-
3 making process; or (3) caused a deprivation of educational benefit.¹⁷ If one of the three
4 impediments listed has occurred, the child has been denied a FAPE due to the procedural
5 violation.

6 3. Through the IDEA, Congress has sought to ensure that all children with
7 disabilities are offered a FAPE that meets their individual needs.¹⁸ These needs include
8 academic, social, health, emotional, communicative, physical, and vocational needs.¹⁹
9 To do this, school districts must identify and evaluate all children within their geographical
10 boundaries who may be in need of special education and services. The IDEA sets forth
11 requirements for the identification, assessment and placement of students who need
12 special education, and seeks to ensure that they receive a free appropriate public
13 education. A school offers a FAPE by offering and implementing an IEP "reasonably
14 calculated to enable [a student] to make progress appropriate in light of [the student's]
15 circumstances."²⁰ FAPE does not require that each child's potential be maximized.²¹ A
16 child receives a FAPE if a program of instruction "(1) addresses his unique needs, (2)
17 provides adequate support services so he can take advantage of the educational
18 opportunities and (3) is in accord with an individualized educational program."²²

19 4. Once a child is determined eligible for special education services, a team
20 composed of the child's parents, teachers, and others formulate an IEP that, generally,
21 sets forth the child's current levels of educational performance and sets annual goals that
22 the IEP team believes will enable the child to make progress in the general education
23 curriculum.²³ The IEP tells how the child will be educated, especially with regard to the
24 child's needs that result from the child's disability, and what services will be provided to
25

26 ¹⁷ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

27 ¹⁸ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

28 ¹⁹ *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).

29 ²⁰ *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ____ (2017).

30 ²¹ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

²² *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)).

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

1 aid the child. The child's parents have a right to participate in the formulation of an IEP.²⁴
2 The IEP team must consider the strengths of the child, concerns of the parents, evaluation
3 results, and the academic, developmental, and functional needs of the child.²⁵ To foster
4 full parent participation, in addition to being a required member of the team making
5 educational decisions about the child, school districts are required to give parents written
6 notice when proposing any changes to the IEP,²⁶ and are required to give parents, at
7 least once a year, a copy of the parents' "procedural safeguards," informing them of their
8 rights as parents of a child with a disability.²⁷

9 5. The IEP team must consider the concerns of a child's parents when
10 developing an IEP.²⁸ In fact, the IDEA requires that parents be members of any group
11 that makes decisions about the educational placement of a child.²⁹

12 Implementation of the September 2015 IEP and the September 2016 IEP

13 6. The Ninth Circuit has held that "a material failure to implement an IEP
14 violates the IDEA. A material failure occurs when there is more than a minor discrepancy
15 between the services a school provides to a disabled child and the services required by
16 the child's IEP."³⁰ This standard "does not require that the child suffer demonstrable
17 educational harm in order to prevail."³¹ However, the Court noted that "the child's
18 educational progress, or lack of it, may be probative of whether there has been more than
19 a minor shortfall in the services provided."³²

20 7. Petitioners argued that Respondent School District failed to provide the
21 special education service minutes under the IEPs from August 15, 2016, through
22 November 14, 2016, due to the shortened school day that was enacted following Parents'
23 request. Respondent School District argued that it was a procedural violation to fail to
24

25 ²⁴ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

26 ²⁵ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

27 ²⁶ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

28 ²⁷ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.

29 ²⁸ 20 U.S.C. § 1415(d)(B).

30 ²⁹ 20 U.S.C. § 1414(d)(3)(A)(ii); 34 C.F.R. §§ 300.324(a)(1)(ii).

31 ³⁰ 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.327 and 300.501(c)(1).

32 ³¹ *Van Duyn v. Baker School District* 5J, 502 F.3d 811, 815 (9th Cir. 2007).

³² *Id.*

Id.

1 update the IEPs to reflect the reduction in special education service minutes during the
2 time Student had a shortened school day.

3 8. The evidence was clear that Student's school day was shortened by two
4 hours based solely on Parents' request. Respondent School District did not suggest the
5 shortened day and agreed to it to allow Student time to acclimate to the new school
6 campus. The uncontroverted evidence was that everyone involved in the decision to
7 shorten Student's school day by two hours a day knew that the decision would impact the
8 ability for Respondent School District to provide all of the service minutes provided in the
9 IEP.

10 9. The evidence presented established that Parents requested, were aware
11 of, and acquiesced to a reduction of, not only of Student's time in school each day, but
12 his service minutes until Student returned to school full time. Parents' claim that they had
13 no idea that Student's service minutes would be affected by a shortened school day is
14 disingenuous, at best.³³

15 10. Therefore, the failure of Respondent School District to formally amend the
16 September 2015 IEP, to amend the September 2016 IEP, and/or to issue PWNs to reflect
17 the reduced service minutes constituted a procedural violation.

18 11. Parents requested the shortened school day and were in constant
19 communication with Respondent School District during the time period in question.

20 12. The progress reports show that Student made progress on all of his goals
21 and significant progress on many of the goals. Petitioners conceded that Student made
22 progress on all of his goals during the 2016 – 2017 school year and agreed that was not
23 an issue for this hearing. Thus, Parents presented no evidence that Student suffered any
24 educational harm from any alleged failure to fully implement the IEPs.
25
26

27 ³³ As previously noted, Parent has filed 21 due process complaints against Respondent School District
28 since May 21, 2013. At one point, Parent filed a due process complaint alleging that Respondent School
29 District had failed to implement the effective IEP based on his calculations, to the second, as to how long it
30 would take to perform the discrete trial testing reflected in the data tracking sheets. See Office of
Administrative Hearing case number 14C-DP-021-ADE That Parent would accept a proposed reduction of
Student's school day of two hours per day without any thought as to how it would affect the delivery of
Student's special education service minutes is simply not credible. This is especially true given that Parent
did not testify at the due process hearing or make such a claim under oath.

1 13. As to the procedural violation, it did not significantly impede Parents'
2 opportunity to participate in the decision-making process and did not cause a
3 deprivation of educational benefit to Student. Therefore, the procedural violation did not
4 result in a denial of FAPE.

5 14. Even assuming it was not a procedural violation, but should be analyzed as
6 a substantive violation, no evidence was presented to establish that Respondent School
7 District failed to provide the service minutes required under the IEPs. Special Education
8 Teacher was clear that under the September 2015 IEP, she provided all the service
9 minutes. While Special Education Teacher was less clear about the September 2016
10 IEP, Special Education Teacher testified she limited Student's participation in other
11 activities in an effort to maximize his time receiving special education services. Special
12 Education Teacher indicated her ability to provide the required minutes varied from day
13 to day. However, no evidence was presented to establish that Student did not receive
14 the total number of special education service minutes from August 15, 2016, through
15 November 14, 2016.

16 15. Special Education Teacher acknowledged that for a time following the
17 September 2016 IEP, she had delayed implementation of the two math goals in the IEP
18 given Student's unique circumstances at the time. That IEP provided for 720 minutes per
19 month of special education services in the area of math. Parent argued that the failure to
20 implement those two math goals meant that Student did not receive any specialized math
21 instruction until Student returned to school full-time on November 14, 2016. However,
22 Special Education Teacher testified that Student was provided math instruction through
23 other means as subjects can cross categories. Further, Special Education Teacher
24 provided a valid pedagogical reason for the temporary delay in implementation of the
25 math goals given Student's frustration levels during the transition.

26 16. Thus, Parents failed to sustain their burden of proving by a preponderance
27 of the evidence that Respondent School District failed to provide all of the special
28 education service minutes in the IEP from August 15, 2016, through November 14, 2016.
29 That portion of the Complaint is denied.

30 17. The Complaint also referenced the failure to provide the service minutes
under the September 2016 IEP from November 14, 2016, through the end of the school

1 year. However, Petitioners did not raise this portion of the Complaint during the
2 prehearing conference. Therefore, Respondent School District was not prepared to
3 defend against that claim at the hearing, and did not present any exhibits related to that
4 claim. Parent mentioned a schedule he received at some point that he maintained
5 showed a failure to provide those service minutes. Because of the disclosure issues set
6 forth previously, Petitioners did not submit any exhibits related to the claim. Further, as
7 Parents did not testify on their own behalf, they presented no evidence to support this
8 assertion.

9 18. As such, Petitioners failed to sustain their burden of proof to establish that
10 Respondent failed to provide the service minutes under the September 2016 IEP from
11 November 14, 2016, through the end of the school year. That portion of the Complaint is
12 denied.

13 Implementation of the LAMP program

14 19. Petitioners specified that their claims regarding the failure to adequately
15 implement the LAMP program were 1) the lack of training and/or expertise on the use of
16 the LAMP program; 2) the Realized Language tracking system was not activated
17 promptly; and 3) the Realize Language tracking data was not provided to Parent.

18 20. As to the lack of training and/or expertise on the use of the LAMP program,
19 the uncontroverted evidence established that Ms. Pelphrey researched the LAMP
20 program over the summer before it was added to the September 2016 IEP. Further,
21 shortly after the September 2016 IEP was created, Ms. Pelphrey and Special Education
22 Teacher attended a webinar that Parents were also invited to attend. Ms. Pelphrey,
23 Special Education Teacher, and two paraprofessionals attended a further training on the
24 LAMP program in December 2016. Nothing in the relevant IEP required additional
25 training in excess of that which was attended.

26 21. As to Petitioners' claim that Respondent School District staff lacked
27 expertise to implement the LAMP program, Parent did not provide any evidence as to
28 exact claimed failure to implement. From the questioning of Respondent School District
29 staff, it appears Parent's main complaint was the possibility that icons on the initial screen
30 were later moved to secondary screens. Special Education Teacher credibly testified that
she understood the purpose of the consistency and provided an example in which the

1 icon on the initial screen would change, but the placement of touches to ultimately get to
2 that icon would not change and would only expand to more touches.

3 22. While Petitioners may surmise that Respondent School District improperly
4 moved icons during the use of the LAMP program, Petitioners did not present any credible
5 evidence to support that claim.

6 23. Repeatedly throughout his emails with Respondent School District, Parent
7 referenced months of lost opportunity with the LAMP program because staff improperly
8 used the device. It is noted that Student may have been exposed to the LAMP program
9 at some earlier point, but Respondent School District was not obligated to provide the
10 LAMP program to Student until the implementation of the September 2016 IEP.

11 24. As to Petitioners' claim that the Realize Language tracking data was not
12 activated promptly, Petitioner appears to argue that because the IEP team agreed to do
13 so during the December 13, 2016 IEP team meeting, it should have been activated the
14 following day.

15 25. Respondent School District staff credibly testified that a purchase order was
16 needed to purchase the Realize Language tracking system before it could be activated.
17 The testimony varied, but no one disagreed that the Realize Language tracking system
18 was activated in mid to late January 2017. Given the holiday break, such a delay is not
19 unreasonable.

20 26. As to Petitioners' claim that the Realize Language tracking data was not
21 provided to Parents, Parents argued that the December 13, 2016 IEP Addendum required
22 Respondent School District to provide Parents with the raw data.

23 27. Student's communication goal in the December 13, 2016 IEP Addendum
24 provided the goal would be measured "using daily frequency data collection."³⁴ The
25 December 13, 2016 IEP Addendum also provided that the Realize Language data
26 tracking system would be activated and it "will track LAMP button hits."³⁵

27 28. Parent argued that taken together, one could only conclude that the Realize
28 Language data tracking system was intended to be the "daily frequency data collection"

29 ³⁴ Exhibit 21 p. 11.

30 ³⁵ Exhibit 18 p. 19. Petitioners erroneously asserted in their closing brief that "the IEP clearly states that the Realize Language Tracking was *to be used 'to track LAMP button hits.'*" Petitioners' Closing Brief p. 6 (emphasis added).

1 referenced in the communication goal. That argument, however, is contrary to the plain
2 language of the IEP Addendum and the testimony presented at the hearing.

3 29. As quoted above, the December 13, 2016 IEP Addendum merely stated the
4 function of the Realize Language data tracking system as it was understood at that time
5 (i.e. that it would track LAMP button hits), not that the function would be used or useful to
6 Respondent School District in its implementation of the IEP Addendum.

7 30. As Student's communication goal required Student to "meaningfully" use
8 unique words on the AAC device, the tracking of LAMP button hits would provide no
9 information as to whether Student had made any progress on that goal.

10 31. Parent seemed to imply during his questioning that if the LAMP button hits
11 were available, a staff member could review the words used at a later time and reflect on
12 whether the use of those words at those times was, in fact, meaningful. Parent, however,
13 discounted the ability of Ms. Pelphrey, Special Education Teacher, and the
14 paraprofessionals to determine, in the moment, whether the word was meaningful. As
15 the hypothetical revealed, Student's response of "iPad" to a question about lunch would
16 be recorded in the Realize Language data tracking system as a button hit, but would not
17 be recorded by staff as a meaningful use of the LAMP program.

18 32. Ms. Pelphrey, Special Education Teacher, and Mr. Remus credibly testified
19 that the Realize Language data tracking system was activated as a courtesy to Parents,
20 but that Respondent School District had nothing to do with the collection or maintenance
21 of that data. Ms. Pelphrey or Special Education Teacher would provide Parent with the
22 reports generated in the system as a courtesy, even though nothing in the December 13,
23 2016 IEP Addendum required that those reports be provided to Parents.

24 33. Petitioners failed to sustain their burden to prove by a preponderance of the
25 evidence that Respondent School District failed to implement the September 2016 IEP
26 as it related to the LAMP program.

27 ORDER

28 Based on the findings and conclusions above, IT IS HEREBY ORDERED that that
29 the relief requested in the due process complaint is **denied**.

30 Done this day, January 5, 2018

1
2 /s/ Tammy L. Eigenheer
3 Administrative Law Judge
4

5 **RIGHT TO SEEK JUDICIAL REVIEW**
6

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

15 Copy sent by mail this 5th day of January 2018 to:

16 Kacey Gregson, Director of Dispute Resolution
17 Arizona Department of Education
18 1535 West Jefferson
19 Phoenix, AZ 85007
20

21 Patrice Horstman, Esq.
22 Alex D. Ivan, Esq.
23 Hufford, Horstman, Mongini, Parnell & Tucker, P.C
24 120 N. Beaver Street
25 P.O. Box B
26 Flagstaff, AZ 86002
27

28 By: Felicia Del Sol
29
30