

STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

██████ Student, by and through Parent ██████
Petitioners,
v.
AMPHITHEATER Public Schools
Respondent

No. 20C-DP-060-ADE

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARING: Conducted on November 9, 2020 and November 10, 2020, followed by the receipt of the court reporter's transcript as official hearing record and Administrative Law Judge review of the hearing record.

APPEARANCES: ██████ Father, (herein, Parent) represented himself and ██████ (Student).

Denise M. Bainton, Esq., represented Amphitheater Public Schools (District); she was accompanied by District General Counsel, Michelle Tong, as the District representative.

WITNESSES:¹

- Student's Father (**Parent**)
- ██████ Assistant Principal, ██████ (Ms. A.)
- ██████ Special Education Teaching Assistant (**AIDE**)
- Student's Mother (**Mother**)
- ██████ Special Education Facilitator (**SPED Facilitator**)
- ██████ Former Special Education Teacher (**Former SPED**)
- ██████ Special Education Teacher (**SPED**)
- ██████ Assistant Principal, ██████, (Ms. S.)
- ██████ Assistant Director of Student Services, Administrator, ██████ (Ms. H.)

HEARING RECORD: Certified Court Reporter Raynbo Silva recorded the proceedings as the official record of the hearing.²

¹ Throughout the body of this Decision, proper names of Student, Parent, and Student's teachers are not used in order to protect the confidentiality of Student and to promote ease of redaction. Where necessary, pseudonyms (designated here in bold typeface) will be used instead. Pseudonyms are not necessarily used for administrators, service providers, evaluators, and other professionals, unless there may be some confusion as to their job or titles.

² The parties stipulated that the court reporter's transcript would be the official record of the proceedings. However, by statute, the Tribunal is required to make an audio recording. The Tribunal does not begin its review process with the use of a transcript until the hearing sessions are complete and any post-hearing

1 **ADMINISTRATIVE LAW JUDGE:** Kay A. Abramsohn
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3 Parent brings this due process action on behalf of Student, claiming that District
4 violated the Individuals with Disabilities Education Act (IDEA), alleging substantive errors.
5 The law governing these proceedings is the IDEA found at 20 United States Code
6 (U.S.C.) §§ 1400-1482 (as re-authorized and amended in 2004),³ and its implementing
7 regulations, 34 Code of Federal Regulations (C.F.R.) Part 300, as well as the Arizona
8 Special Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774,
9 and implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-
10 406.

11 **Procedural History**

12 The due process complaint notice (Complaint) in this matter was filed with the
13 Arizona Department of Education (ADE) on February 12, 2020. After continuances, a two-
14 day due process hearing was conducted through virtual means.

15 **Evidence and Issues at Hearing**

16 **EXHIBITS**

17 The parties provided pre-marked proposed Exhibits. Petitioners had pre-marked
18 Exhibits A through P. District objections to Exhibits D, H and N were noted for the record.⁴
19 District had pre-marked Exhibits 1 through 16. Parent indicated that he had not seen
20 pages 5 through 49 of Exhibit 16 prior to disclosure, but was not objecting to the
21 admission. All proposed exhibits were admitted to the hearing record.

22 **ISSUES**

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27 submissions are complete for the reason that parties often stipulate, concede, and/or withdraw issues that,
28 therefore, would not be considered or addressed in a final decision.

29 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.

30 ⁴ The Tribunal will consider them as to weight.

1 The Tribunal conducted a March 13, 2020 telephonic pre-hearing conference to
2 discuss the Complaint and the hearing process with the parties. At that pre-hearing
3 conference, Petitioners' Complaint issues were specifically clarified to be as follows:⁵

- 4 1. Related to Student's academic school year 2019-
5 2020,⁶ whether Respondent failed to provide a free and
6 appropriate public education (FAPE) when it failed to
7 implement the behavior intervention plan (BIP) set forth
8 in Student's current individualized education program
(IEP), particularly as to an incident on September 10,
9 2019.
- 10 2. Related to Student's academic school year 2019-2020,
11 whether Respondent failed to provide FAPE when it
12 failed to provide a 1:1 aide, particularly to support
13 Student's communication needs on September 10,
14 2019.
- 15 3. Related to Student's academic school year 2019-2020,
16 whether Respondent failed to provide to Student the
17 least restrictive environment (LRE), as to the
18 percentage of time in general education versus special
19 education pursuant to Student's IEP, and particularly
20 on September 10, 2019 when Respondent secluded
21 Student in a "quiet room" without his 1:1 aide.
- 22 4. Whether Student is entitled to any remedies.⁷

23 DISCUSSION

24 ⁵ Under the IDEA, Petitioners are limited to issues stated in the Complaint; therefore, the hearing is limited
25 to the issues as were specifically clarified at the pre-hearing conference. See 20 U.S.C. § 1415(f)(3)(B);
26 34 C.F.R. § 300.511(d).

27 ⁶The Complaint contained allegations regarding a behavioral incident on September 10, 2019, the incident's
28 categorization and the resultant discipline, along with a denial of a request to change Student's records.
29 However, Parent specified at the March 13, 2020 pre-hearing conference that, after going through a process
30 with District regarding those things, Parent had obtained the District's final determination on those things
and correction of records was not the issue for this Complainant. At that pre-hearing conference, Parent
specified that this Complaint dealt only with the implementation of the BIP and IEP in Student's high school
year, beginning in August 2019.

⁷ The remedies proposed in the Complaint were to "correct the record," to ensure "this problem" does not
happen to others, to ensure the District policies and procedures are reviewed for inconsistencies, and to
have "disciplinary or sanctioned action" [apparently to Respondent]. However, when the issue of remedies
was discussed at the March 13, 2020 pre-hearing conference, Parent had clarified because the issues for
hearing were implementation of Student's BIP and IEP in Student's 2019-2020 year, he would be seeking
available remedies as to those issues.

1 The Administrative Law Judge has considered the entire hearing record including
2 the testimony and the admitted Exhibits,⁸ and now makes the following Findings of Fact,
3 Conclusions of Law, and Decision that Petitioners failed to establish by a preponderance
4 of the evidence that District violated the IDEA as alleged in the Complaint.

5 **FINDINGS OF FACT**

6 1. The claims in the instant matter are based on alleged actions and alleged
7 inactions that occurred after Student began to attend [REDACTED] in August of 2019. The factual
8 findings, including the backdrop of the matter, are based on the entire hearing record;
9 however, the determinations herein are focused primarily on the period beginning when
10 Student began to attend [REDACTED].

11 **Prior Periods/Background**⁹

12 2. Student has attended District schools since pre-school. Student attended
13 District's [REDACTED] school for eighth grade. In August 2019, Student entered
14 [REDACTED].

15 3. Student is eligible for IDEA special education services under the category
16 of Moderate Intellectual Disability and Speech/Language Impairment.

17 4. Student's November 5, 2018 IEP included a BIP.¹⁰ In preparation for
18 Student to transition from [REDACTED]¹¹ an IEP addendum was developed in April
19 2019; that IEP was in effect at the time Student began attending [REDACTED].

20 5. The BIP within the November 2018 IEP was not modified at the April 2019
21 IEP Meeting.¹²

22 6. The November 2018 BIP contained goals and interventions as to
23 Transitions and as to Aggression.
24

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26 ⁸ The Administrative Law Judge has read and considered each page of each admitted Exhibit, even if not
27 mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every
28 witness, even if the witness is not specifically mentioned in this Decision.

29 ⁹ Some information was culled from the parties' pre-hearing documents and IEP documents.

30 ¹⁰ See Petitioner's Exhibit B.

¹¹ A student's school day in middle school would be experienced in a different manner than a school day in
high school.

¹² Until modified, the November 2018 BIP would be considered to remain in effect.

7. Regarding transitions in middle school, the goal was for Student to make transitions “between activities within the classroom and related services outside the classroom with 5 verbal cues.” The intervention list, both immediate and periodic/general, included the following in context:

- a. Using a visual timer “when available” to prepare Student for the transition;
- b. Using a First/Then pictorial prompt regarding the next activity;
- c. Positive reinforcement at the time of a successful transition;
- d. Related services could be provided outside the classroom to allow Student time to transition without interruption [*i.e.*, disruption] to other students in the classroom;
- e. Parents were providing transportation to and from school to assist in [the first] transition;¹³
- f. Student’s best time to transition was when the situation was “calmer” such as fewer students in the immediate area;
- g. Having a barrier for Student and the staff member as to others to reduce Student’s impulsive acts towards others; and
- h. Noting that Student did “better” in crowded situations when he was able to “lead the pack.”

8. Regarding aggression in middle school, the goal was for Student to reduce “hitting, pinching, kicking, [and] spitting) toward others, with the aggression being replaced by Student using verbal responses to express himself. The intervention list, both immediate and periodic/general, included the following in context:

- a. Reminding Student to “use his words” to express himself when he began to exhibit aggressive behaviors;
- b. Teachers stepping in front of Student when he began to exhibit aggressive behaviors to prevent him from further interaction with others;
- c. Removing other students from the room if their safety was a concern when Student continued to exhibit aggressive behaviors, and providing the other students with a fun activity in which Student will not be permitted to participate;

¹³ Student's progress in transitioning while at school was to be reviewed periodically.

- d. Providing Student with a timed time-out before he is permitted to return to other activities;
- e. Periodically using pictures of various emotions to help identify Student's feelings at that time;
- f. Using "social stories" to reinforce positive behaviors and positive interactions with others, perhaps prior to interactions with larger groups and less familiar peers;
- g. Providing a "quiet transition" time in the morning before Student joins the larger classroom, noting that Student does well with that opportunity;
- h. Allowing Student to use an I-pad as a "reward" after academic instruction;
- i. Increasing academic instruction time as Student "can handle" increased academic tasks; and
- j. Record data regarding the frequency of Student's aggressive actions during various periods.

9. On August 13, 2019, the IEP Team modified Student's BIP regarding aggressive behavior (hitting other students and adults; screaming, crying, kicks, and throwing items when upset).¹⁴ The intervention list, both immediate and periodic/general, included the following in context:

- a. Providing a scheduled "escape" before Student engaged in aggressive acts;
- b. Assisting Student into a safe situation without any verbal comments;
- c. Providing an "overabundance" of attention on a scheduled basis for appropriate behavior;
- d. Rewarding appropriate behavior;
- e. Having Student eat lunch in a location other than the cafeteria; and
- f. Scheduling restroom breaks.

10. Regarding specific procedures for Student's "Outbursts," the IEP Team specified the following:

¹⁴ See District Exhibit 6.

- a. Remove other students away from Student with staff using proximity as to Student to avoid physical contact;¹⁵
- b. Verbally direct and sign for Student “to sit on the floor;”
- c. Verbally say and sign STOP;
- d. Verbally say and sign “Use your brain;”
- e. After Student is calm and in control, move him into the sensory room “in A112;”¹⁶ SPED¹⁷ or SPED Coordinator to contact Mother, or Parent in the event unable to reach Mother;
- f. Provide Student with his “sensory” diet (examples, weighted blanket, music, dimmed lights, putty);
- g. Have Student complete the “Think Sheet;” and
- h. If Student remained at school following the outburst and incident, try to get Student to return to participation in the classroom.

11. Regarding Student’s self-skills, the IEP Team indicated that Student would receive training in using a personal schedule, in “functional” communication to request a break or request an activity, and how to use the “mini-task” schedule. Such training would involve staff, visual supports, incentive box or toys, a reinforcement schedule and preferred items.

12. Pursuant to the April 2019 IEP (for middle school), Student was scheduled to receive special education services in reading, written expression, math, vocation/work skills, social/emotional, and also participate in lunch and choir. Student’s April 2019 IEP called for him to participate with nondisabled peers while in his two electives (physical education and choir); however, Student would participate with disabled peers for

¹⁵ The use of “proximity” would indicate the opportunity to simply put the adult between Student and any others who might be in an unsafe situation.

¹⁶ During the hearing, Parent spent a great deal of time trying to have witnesses identify exactly what certain rooms were used for in the classroom area, honing in on the “quiet room” / “sensory room.” Overall, the testimony demonstrated that, per staff recollections, at times, the use of various rooms in the classroom area changed at times. For example, SPED recalled that A116 was her classroom and A112 was the “apartment” room (used living skills instruction; she also noted that A115 was Former SPED’s classroom. See Transcript (TR) Day One at 153-154.

¹⁷ At that time, it could have been Former SPED or SPED because they each taught Student during various periods of the day.

1 academic instruction, speech services, physical therapy, and adaptive PE. Student's
2 instruction within special education and time dedicated to related services, which were
3 provided *outside* the general education sphere, added up to 75% of the possible school
4 time.¹⁸ However, in high school, his general education exposure was music, with
5 marching band as an addition.¹⁹

6 13. Due to his behaviors, Student required a BIP and close supervision.
7 Regarding Student's social and emotional needs, his November 2018 and April 2019 IEPs
8 discussed the need to move Student to a quieter place, if he began to demonstrate
9 behavior or indicators of impending behaviors, so Student "can work independently with
10 a 1:1 adult."²⁰ Additionally, Student's November 2018 and April 2019 IEPs called for him
11 to have a 1:1 aide at all times.²¹ At [REDACTED], there were a minimum of two adults with
12 Student, which were usually a special education teacher and an instructional aide (IA).²²
13 At times, there were three adults with Student. Spending time between two special
14 education teachers, District employed four to six IAs within two special education
15 classrooms and also had other available "adult support" personnel, such as SPED
16 Coordinator and other administrators.

17 14. Student's [REDACTED] 2019-2020 academic year began on Thursday August 8,
18 2019.²³

21
22 ¹⁸ Student's November 2018 IEP and April 2019 IEP both indicated that his instructional environment, *i.e.*,
23 his least restrictive environment (LRE) called for participation inside a regular classroom for less than 40%
24 of the day, a Level C environment. See Petitioners' Exhibit A at page 15 and District Exhibit 4. At [REDACTED],
Student particular LRE at Level C was participating in academic instruction in the [REDACTED] self-contained
cross-categorical special education classrooms.

25 ¹⁹ See TR Day One at 158. Student's special education and related services were proposed to be 75% of
26 his school day. In middle school, Student had participated in choir. For high school, Parent was able to
27 arrange for Student to participate in Marching Band, the "zero" period of the day, a few days a week; Parent
28 would accompany Student to Marching Band and then accompany Student to meet up with District
29 personnel for the remainder of Student's academic day. See TR Day One at 68-69.

30 ²⁰ See Petitioners' Exhibit A at page 4 and District Exhibit 4.

²¹ As Marching Band was in the "zero" period of the day, *i.e.*, prior to the academic day, Student did not
have a 1:1 and Parent was required to accompany Student at Marching Band. See TR Day One at 68.

²² See TR Day Two at 252-253 and 269-273.

²³ See District Exhibit 13.

15. When Student began the [REDACTED] 2019-2020 academic year, Student's current IEP was the April 2019 IEP, which continued to contain the November 2018 BIP which was geared toward a middle school environment.

16. Following Student's multiple behavior incidents on August 12, 2019, the District developed a new BIP on August 13, 2019.

17. District developed the "quiet room" as a behavioral support for Student.²⁴ When Student had behavior issues and needed to recover or calm himself, Student was initially able to be separated somewhat within the special education classrooms from other students in the classrooms. However, District staff found that Student's loud vocalizations and behaviors would still be easily heard by, and be a distraction for, those other students. District next tried to use the "apartment room" but determined that it was not suitable as it contained multiple items that Student would throw and, if Student was in that room, the room was not available for the other students' instruction. The District determined that the next closest space in the hallway in that area was a suitable location enabling them to be able to supervise Student and continue all the instruction for all the students; District customized the quiet room for Student's needs.

18. The [REDACTED] data collection sheets provide for data on antecedents, strategies used, the behavior, the intensity level of the behavior and the consequence.²⁵

REGARDING COMPLAINT ISSUES

19. On Monday August 12, 2019, Student had multiple behavior incidents in the lunch room.²⁶ Three IAs documented Student's various aggressive actions at lunch that day: hitting a staff member, throwing a milk carton, throwing food at peers, throwing eyeglasses, and assaulting another student. Initially, pursuant to the interventions listed by the three IAs, Student's actions had been ignored, and then staff directed him to leave the table for his mild behaviors, but he refused. Student was then taken from the table and "proximity" was used as an intervention as his behaviors escalated. After the bell

²⁴ See TR Day Two at 249-252.

²⁵ See Petitioners' Exhibit E.

²⁶ *Id.*

1 rang, Student jumped up and assaulted another student, whereupon Student was
2 restrained and relocated to another area.

3 20. On August 28, 2019, Student had an aggressive behavior incident during
4 physical education (PE) as the class was chasing balls.²⁷ Student slapped another
5 student in the face and was given a rest to calm down. Student then threw the ball at that
6 student and attempted to strike the IA; he was given another rest to calm down. As they
7 were leaving, Student approached another student with his arm raised, but an IA
8 intervened and used “proximity” to prevent him from striking the student, whereupon
9 Student began striking the IA repeatedly. The referral sheet indicates that Student
10 received a reprimand and a short-term suspension. Based on reviewing the referral sheet
11 and the attendance sheet, it appears that Student left school after the incident but was
12 permitted to return to school the next day.

13 21. More often than not, Student refused to go to music class.²⁸ When
14 prompting did not persuade Student to participate in music class, he would stay in the
15 self-contained classroom for other instruction or be allowed to go to the quiet room. When
16 Student refused to go to music class and then became agitated, two District personnel
17 would accompany him to the sensory/quiet room for calming or preferred activities. SPED
18 Coordinator’s office was near the quiet room and she would leave her door open to be
19 ready to assist with Student if necessary.

20 22. On Tuesday, September 10, 2019, Student committed aggressive actions
21 in a behavior incident after refusing to go to music class.²⁹ After refusing to go to music
22 class, Student was being observed and accompanied by more than one adult in the
23 hallway near the quiet room. SPED went into that area and asked Student if he wanted
24 to practice yoga and Student replied “no.”³⁰ SPED then went into the quiet room, and

25 ²⁷ See Petitioners’ Exhibit F.

26 ²⁸ At hearing, Ms. S. testified that they were perplexed by Student so often refusing to go to music class
27 because they were aware that Student liked music in general. See TR Day Two at 239. She gave thought
28 to the possibility that it was simply the time of the day, *i.e.*, after lunch, when “75% of the school day is
29 almost over” and Student was fatigued - “kind of done for the day and it was a little too much for him to get
30 through the end of the day.” *Id.*

²⁹ See District Exhibit 7 and Petitioners’ Exhibit I; see *also* TR Day Two at 263-265 (SPED’s testimony
regarding the attack).

³⁰ SPED testified that Student had previously enjoyed participating in yoga. See TR Day One at 171-173.

1 SPED again attempted to interest Student in some yoga. Student got up from where he
2 had been sitting and, with no apparent antecedent at that moment, knelt down and struck
3 SPED in the face and continued to strike her while holding onto her arm, and then struck
4 the IA who was intervening for the safety of SPED, and the escalating situation required
5 intervention by Former SPED with ready assistance by another IA and SPED Coordinator.
6 Student was finally distracted from the attack on SPED by an IA suggesting he use the
7 exercise ball and, eventually, Student calmed through use of the exercise ball and by
8 resting.

9 23. District suspended Student for three days: September 11, 12, and 13.³¹

10 24. Student did not come to school on September 16, 2019, but did come on
11 September 17 and 18, 2019.³² Student did not return to school after September 18, 2019.
12 While Parents called in to excuse Student for some time, they eventually stopped calling
13 in.

14 25. At a duly-noticed review of existing data (RED) meeting on September 30,
15 2019, District and Parents agreed that more data was needed for Student's three-year
16 evaluation and annual IEP. At the September 30, 2019 RED meeting, Parent gave
17 consent for the assessments.³³

18 26. In October 2019, assessments were performed at Student's home, and on
19 November 13, 2019, after review of the collected data, a new IEP was developed.³⁴
20 However, Father withdrew Student on November 22, 2019.³⁵

21 27. Student has not returned to a District school.

22 28. At hearing, Student's teachers and the other District witnesses who had
23 interacted with Student in the referenced Student-refusals to participate and interacted
24 with Student in the referenced behavior incidents indicated behavior interventions. The
25

26
27 ³¹ See Petitioners' Exhibit G.

28 ³² See District Exhibit 13.

29 ³³ See District Exhibit 9. The form apparently was not filled out accurately by parents as it indicates that
30 Parent gave consent but Mother specifically did not.

³⁴ Father's pre-hearing chronology; District pre-hearing memorandum. See District Exhibits 10 and 11.

³⁵ See District Exhibit 12

1 data and discipline documents presented to the hearing record each mention various
2 behavior interventions used with Student in the referenced behavior incidents.

3 29. While Parent questioned witnesses about Student's behavior incidents and
4 about their recollections of other interactions with Student or with Parents, Parent
5 presented no contradictory evidence as to behavioral interventions used, or not used,
6 with Student between the start of school on August 8, 2019 and September 10, 2019.

7 30. Specific to the September 10, 2019 incident, and referring to the Outburst
8 interventions, Parent questioned SPED whether anyone had called the parents "during
9 the time where he was having this behavior."³⁶ However, Parent seemed to also
10 acknowledge that, as SPED referenced in her response, that they were attempting to
11 achieve the immediate emergent safety concerns regarding Student and staff.³⁷

12 31. Parent argued that District had not used behavioral interventions in
13 Student's IEP and, therefore, did not provide FAPE to Student. Parent expressed his
14 belief that District personnel should have called Parents more, as though inferring that
15 doing so would have resulted in Student not having escalated behaviors that culminated
16 in the September 10, 2019 situation.

17 32. Parent argued that District was out of compliance as to LRE, alleging that
18 Student was "kept" [*i.e.*, "secluded"] in the quiet room "until he had an extreme behavior"
19 and that such an "increasingly restrictive environment" took him away from all his peers
20 "educationally and socially."³⁸ In this regard, Parent made some calculations as to
21 minutes Student spent in various classes over the 19 days Student attended, and Parent's
22 estimation of time Student spent in the quiet room, which Parent believed demonstrated
23 that Student was not provided LRE because the quiet room was "restrictive" and not
24 LRE."³⁹

25
26 ³⁶ See TR Day One at 174.

27 ³⁷ See TR Day One at 174-176. The first intervention step regarding Outbursts is to remove or separate
28 Student from others and use proximity for physical safety purposes. See District Exhibit 6.

29 ³⁸ See TR Day Two at 335. However, SPED testified that Student did receive instruction, and worked on
30 his goals, while in the quiet room if that was where Student was. See TR Day Two at 257-259.

³⁹ See Petitioners' Exhibit N. Parent was equating the time Student spent at school (possibly in the quiet
room, and accounting for Marching Band time) with LRE.

33. Parent seemed to be arguing that because it appeared to him that District personnel did not understand Student's utterances and did not "return" Student's greetings, demonstrated that there was a lack of knowing Student's needs.⁴⁰ Parent further argued that Student's issues with communication were not correctly identified and that not being able to understand Student led to the Student's frustration and Student's hitting behaviors.⁴¹ In Closing, Parent argued that District had failed to recognize that FAPE was not being provided, and failed to act to correct Student's communication need.

34. In Closing, Parent argued that quiet rooms should be banned when there are communication needs.⁴² Parent argued that District must review its policies and procedures for inconsistencies and Parent referenced back to the Complaint's proposed remedies.⁴³ Parent argued no other particular remedies.

35. Regarding Issue #1, District argued that the hearing evidence demonstrated that District had, in fact, implemented Student's BIPs; District noted that when witnesses were questioned about interventions, they gave testimony supporting appropriate implementation. District argued that Petitioners had presented no evidence supporting Issue #1.

36. Regarding Issue #2, District noted that, as to the September 10, 2019 incident, the hearing record demonstrated that more than two adults were present, given that the two IAs and SPED were present. District argued there was no failure to have provided a 1:1 aide on that day or any other day.

37. Regarding Issue #3, District argued that Parent is mistakenly comparing LRE with the IEP's proposed/scheduled time Student would be spending in special education instruction versus general education. Noting that Student was never "secluded" as that term of art is defined, District argued that when Student refused to go

⁴⁰ During the hearing, at one point, Student came into the room from which Parent was appearing and repeatedly said "Hi" after which Parent indicated that Student gets "very stubborn" about saying "Hi" and does not understand when people don't say "Hi" back to him. See TR Day One at 58-59.

⁴¹ Based on the overall hearing record, it appears that Parent has a belief that a 1:1 aide was supposed to be Student's "communication piece" as Student's voice and advocate.

⁴² See TR Day Two at 336.

⁴³ However, at the March 13, 2020 pre-hearing conference, Parent had clarified that he would be asking for remedies dealing with the alleged failures to implement the BIP and IEP in Student's 2019-2020 academic year.

1 to music class, District staff used strategies to try to get him to go, and if Student continued
2 to refuse, the staff continued to work with him on his goals and instruction. Finally,
3 District's position is that it continued to offer FAPE to Student with its November 13, 2019
4 IEP and that Student has not returned to the District.

5 **CONCLUSIONS OF LAW**

6 **APPLICABLE LAW**

7 **FAPE**

8 1. Through the IDEA, Congress has sought to ensure that all children with
9 disabilities are offered a FAPE (free appropriate public education) that meets their
10 individual needs.⁴⁴ These needs include academic, social, health, emotional,
11 communicative, physical, and vocational needs.⁴⁵ To provide a FAPE, a school district
12 must identify and evaluate all children within their geographical boundaries who may be
13 in need of special education and services. The IDEA sets forth requirements for the
14 identification, assessment, and placement of students who need special education, and
15 seeks to ensure that they receive a FAPE. A FAPE consists of "personalized instruction
16 with sufficient support services to permit the child to benefit educationally from that
17 instruction."⁴⁶ The FAPE standard is satisfied if the child's IEP sets forth his or her
18 individualized educational program that is "reasonably calculated to enable the child to
19 receive educational benefit."⁴⁷ The IDEA mandates that school districts provide a "basic
20 floor of opportunity."⁴⁸ The IDEA does not require that each child's potential be
21 maximized.⁴⁹ A child receives a FAPE if a program of specialized instruction "(1)
22 addresses the child's "unique" needs, (2) provides adequate support services so the child
23

24 ⁴⁴ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

25 ⁴⁵ *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).

26 ⁴⁶ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

27 ⁴⁷ *Id.*, 458 U.S. at 207. In 2017, in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct.
988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard, adding
28 that a school "must offer an IEP that is reasonably calculated to enable a child to make progress appropriate
in light of the child's circumstances," but the Court declined to elaborate on what "appropriate progress"
would look like case to case (*i.e.*, in light of a child's circumstances).

29 ⁴⁸ *Rowley*, 458 U.S. at 200.

30 ⁴⁹ *Id.* at 198.

1 can take advantage of the educational opportunities and (3) is in accord with the child's
2 individualized educational program."⁵⁰

3 **The IEP**

4 2. Once a student is determined eligible for special education services, a team
5 composed of the student's parents, teachers, and others familiar with the student
6 formulate an IEP (individualized education program) that generally sets forth the student's
7 current levels of educational and functional performance and sets annual goals that the
8 IEP team believes will enable the student to make progress in the general education
9 curriculum.⁵¹

10 3. The IEP tells how the student will be educated, especially with regard to the
11 student's unique needs that result from the student's disability, and what services will be
12 provided to aid the student. The student's parents have a right to participate in the
13 formulation of an IEP.⁵² The IEP team must consider the strengths of the student,
14 concerns of the parents, evaluation results, and the academic, developmental, and
15 functional needs of the student.⁵³ However, nothing in the regulations "shall be construed
16 to require . . . [t]hat additional information be included in a child's IEP beyond what is
17 explicitly required in section 614 of the [IDEA]."⁵⁴ Neither functional behavioral
18 assessments (FBAs) nor BIPs are required separate components of an IEP under the
19 IDEA; those are options that can be considered by the IEP Team and are dependent on
20 the needs of the student.⁵⁵

21 **LRE**

22 4. The IDEA does not provide an absolute right to a particular placement or
23 location as a child's LRE. Each proposed or alternative placement is simply required to
24 have been "considered" by the IEP Team with regard to potential harmful effect on the
25

26 ⁵⁰ *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).

27 ⁵¹ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

28 ⁵² 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

29 ⁵³ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

30 ⁵⁴ 34 C.F.R. § 300.320(d).

⁵⁵ An FBA is an option, but it is not "inexorably a hard-and-fast requirement." *Pottsgrove Sch. Dist. v. D.H.*,
72 IDELR 271 (E.D. Pa 2018).

1 student or potential harmful impact on the quality of the services that the child needs.⁵⁶
2 Therefore, LRE and placement are required to be determined only after analyzing the
3 student's unique needs (and the nature and severity of disabilities) against the federal
4 mandate to educate disabled children "to the maximum extent appropriate" with his or her
5 nondisabled peers. The IDEA preference for mainstreaming is also not an absolute.⁵⁷

6 5. The Administrative Law Judge acknowledges that the IDEA creates tension
7 between provisions that require education to the maximum extent appropriate with
8 nondisabled students and those that require meeting all of a student's unique needs.

9 **Burden of Proof and Basis of Decision**

10 6. A parent who requests a due process hearing alleging non-compliance with
11 the IDEA must bear the burden of proving that claim.⁵⁸ The standard of proof is
12 "preponderance of the evidence," meaning evidence showing that a particular fact is "more
13 probable than not."⁵⁹ Therefore, in this case Petitioners bear the burden of proving by a
14 preponderance of evidence that District substantively violated the IDEA through the alleged
15 actions or inactions. If a procedural violation is alleged and demonstrated, Petitioners must
16 then show that the procedural violation either (1) impeded Student's right to a FAPE, (2)
17 significantly impeded Parents' opportunity to participate in the decision-making process, or
18 (3) caused a deprivation of educational benefit to Student.⁶⁰

19 **DECISION**

20 **ISSUE #1**

21 7. Petitioners failed to demonstrate that District did not implement Student's
22 BIP. Other than Parent's arguments, Petitioners presented no evidence that the
23 interventions set forth in the November 2018 and August 2019 BIP were not implemented.

24 ⁵⁶ See 34 C.F.R. § 300.116(d).

25 ⁵⁷ See 34 C.F.R. §§ 300.114(a)(1) and (2). A school may, and should, remove a child from the regular
26 educational environment if the nature and severity of the child's disability is such that, even with
supplemental aids and services, the education of the disabled child cannot be satisfactorily achieved. See
34 C.F.R. §§ 300.114(a)(2)(ii) and 300.116(d).

27 ⁵⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

28 ⁵⁹ *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, 371-72 (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-*
29 *84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

30 ⁶⁰ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

Personnel who interacted with Student at various times and locations testified regarding interventions and District documentation of behavioral incidents documents the use of various behavior interventions. Issue #1 is dismissed.

ISSUE #2

8. Petitioners failed to demonstrate that District failed to provide a 1:1 aide at any time, let alone failed to do so on September 10, 2019. The hearing record clearly demonstrated that District provided not only a 1:1 aide at all times for Student, but also rotated additional adult support personnel in and out of the various classrooms or in and out of the quiet room as needed. The hearing record documented the presence of three adults (IA "Patty," AIDE and SPED) at the scenario of the September 10, 2019 incident. Issue #2 is dismissed.

ISSUE #3

9. In this case, the evidence indicates that the [REDACTED] IEP Team believed, as did the [REDACTED] IEP Team, that Student's LRE continued to be Level C for the best environment to offer and provide FAPE to Student.

10. Petitioners incorrectly correlate LRE, an appropriate place in which a student can effectively be provided specialized instruction and related services unique to his or her needs, with the amount of specialized instruction and related services time a student is proposed to receive at that place, either outside of or inside of a regular classroom. An IEP Team considers various factors in determining LRE, such as the student's level of academic functioning, his or her adaptive behaviors, class size, class structure, staff to student ratio, and the specialized resources and supports available to allow staff to effectively provide instruction to the student. After consideration of a student's unique and individual needs, an IEP Team determines the types of, and what amount of, special education instruction and related services are necessary for a student to benefit from public school education. Percentages set forth on the special education services page in an IEP simply reflect the IEP-determined amount of special education services to be provided in accord with the amount of time available within a school day and week; those percentages do not demonstrate an LRE. In the instant case, Petitioners failed to demonstrate that District failed to provide Student with an appropriate LRE.

1 Petitioners' efforts to equate time, and/or estimated times, Student may have spent in any
2 particular location simply do not equate to the provision of, or a failure to provide, LRE.
3 The hearing record does not document any "seclusion" of Student at any time, whether
4 in the District "quiet room" or in any other room. The hearing record demonstrated the
5 use of the quiet room in the morning to assure that Student was "ready" for instruction
6 and, as needed, for behavior intervention, or allow Student to de-escalate and be calmed.
7 Issue #3 is dismissed.

8 11. The Administrative Law Judge concludes that the evidentiary record does
9 not demonstrate the alleged violations of IDEA by District; therefore, no remedies would
10 be fashioned. The Administrative Law Judge concludes that Petitioners' Complaint shall
11 be dismissed in its entirety.

12 **RULING**

13 Based on the findings and conclusions above,
14 IT IS HEREBY ORDERED that Petitioners' Complaint is dismissed in its entirety.
15 ORDERED this day, December 30, 2020.

16 /s/ Kay A. Abramsohn
17 Administrative Law Judge
18

19 **RIGHT TO SEEK JUDICIAL REVIEW**

20 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this
21 Decision and Order is the final decision at the administrative level.
22 Furthermore, any party aggrieved by the findings and decisions made
23 herein has the right to bring a civil action, with respect to the complaint
24 presented, in any State court of competent jurisdiction or in a District Court
25 of the United States. Pursuant to Arizona Administrative Code § R7-2-
26 405(H)(8), any party may appeal the decision to a court of competent
27 jurisdiction within thirty-five (35) days of receipt of the decision.
28
29
30

Copy e-mailed December 30, 2020 to:

[REDACTED]

Parent/Petitioners

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By