

1  
2  
3  
4  
5  
LAW OFFICES OF  
**KIRSCH-GOODWIN & KIRSCH, PLLC**  
8900 E. PINNACLE PEAK ROAD, SUITE 250  
SCOTTSDALE, ARIZONA 85255  
(480) 585-0600  
FAX (480) 585-0622  
Hope N. Kirsch, #018822  
Email: [hope@kgklaw.com](mailto:hope@kgklaw.com)  
*Attorneys for Defendants/Counerclaimants*

6  
7  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

8  
9  
10  
11  
12  
13  
14  
15  
**FLAGSTAFF ARTS AND LEADERSHIP  
ACADEMY,**

Plaintiff/Counterdefendant,

vs.

E.S., a Student by and through Parent,  
**MICHELLE GRUA**

Defendants/Counterclaimants.

No. 3:13-CV-08171-PCT-HRH

**ANSWER AND COUNTERCLAIM FOR  
ATTORNEYS' FEES AND EXPENSES  
UNDER THE IDEA**

(BEFORE THE HONORABLE H.  
RUSSELL HOLLAND)

16  
17  
18  
For their Answer to Plaintiff's Complaint, Defendants E.S., a Student by and through Parent, Michelle Grua, herby admits, denies and affirmatively allege as follows:

- 19 1. Defendants deny every allegation of the Complaint not specifically admitted in  
20 this Answer.
- 21 2. Paragraphs 1 through 4 state legal conclusions to which no response is  
22 necessary. To the extent the Court requires a response, Defendants admit jurisdiction and  
23 venue are proper in this court, and Defendants acknowledge Plaintiff filed a Motion for  
24 Injunctive Relief, but denies it has merit.
- 25 3. Defendants admit the allegations in paragraph 5.
- 26 4. Answering paragraph 6, Defendants admit E.S. is a minor child whose residence  
27  
28

1 is with Parent, Michelle Grua, and that Student is a child with disability entitled to  
2 services under the IDEA. The remaining allegations of paragraph 6 are denied. FALA  
3 apparently disenrolled, or attempted to disenroll, Student.  
4

5 5. Answering paragraph 7, Defendants admit that FALA met with Parent and that  
6 FALA offered an IEP in January 2012 and an IEP in June 2012, but Defendants deny that  
7 either of the IEP's were properly developed to provide Student with a free and  
8 appropriate public education ("FAPE"). Defendants deny there was an IEP offered in  
9 May 2012. Defendants affirmatively allege an IEP was offered in June 2012 for the  
10 following school year at FALA; the IEP designated FALA as the home school and as the  
11 attending school. Defendants affirmatively assert that the Office of Administrative  
12 Hearings ("OAH"), through the Honorable Eric A. Bryant, specifically found, as a matter  
13 of fact, that FALA violated the IDEA's substantive mandate. Judge Bryant held that "the  
14 January 2012 IEP was inadequate to offer Student educational benefit because it did not  
15 address all of her needs or areas of disability. It failed to provide goals to properly  
16 address basic reading, reading fluency, life skills, and other areas of need. As such, it did  
17 not offer a FAPE to Student." Judge Bryant further held that the June 2012 IEP also "was  
18 not calculated to provide Student educational benefit" in that it too "still did adequately  
19 address all areas and did not provide enough specificity to show that it would provide  
20 educational benefit to Student."  
21  
22  
23  
24

25 6. Answering paragraph 8, Defendants deny Parent enrolled Student at Maple Lake  
26 Academy after rejecting the IEP. Defendants affirmatively alleges that Parent placed  
27 Student at Maple Lake Academy after the failure of the January 2012 IEP. Thus, as a  
28

1 result of FALA's substantive violations of the IDEA, Parent exercised her legal right to  
2 unilaterally place Student at Maple Lake Academy ("MLA"), a private residential school  
3 approved by the Department of Education of the State of Utah to provide special  
4 education to students with the same severe disabilities as Student, and that Parent  
5 appropriately sought reimbursement at public expense through the meritorious due  
6 process complaint that was filed. Judge Bryant, for reasons more fully explained in his  
7 decision, emphasized that "the placement at FALA was not appropriate for Student" and  
8 that the "evidence shows that Student needed, and still needs, an intensive program like  
9 MLA."  
10

11  
12 7. Defendants admit the allegations in paragraphs 9 and 10, except that Defendants  
13 filed the Due Process Complaint July 26, 2012.  
14

15 8. Answering paragraph 11, Defendants admit that Administrative Law Judge  
16 Bryant issued a thorough and reasoned decision granting all the substantive relief  
17 requested in the Due Process Complaint. Defendants admit that the decision of Judge  
18 Bryant is attached to the Plaintiff's Complaint and asserts that the decision speaks for  
19 itself. Defendants admit that Judge Bryant concluded that FALA failed to provide  
20 Student a FAPE, failed to offer a FAPE, and that FALA is not an appropriate placement  
21 for Student. Defendants affirmatively assert that Judge Bryant found that "the January  
22 2012 IEP was inadequate to offer Student educational benefit" and that the June 2012  
23 IEP also "was not calculated to provide Student educational benefit."  
24  
25

26  
27 9. Answering paragraph 12, Defendants deny the allegation that the findings and  
28 decision of the ALJ were erroneous and Defendants further denys the allegation that the

1 ALJ improperly granted relief to Defendant. Defendants further deny each and every one  
2 of the allegations in paragraph 12 (i) – (xi) and  
3 affirmatively asserts that Judge Bryant’s decision is thorough and well-reasoned, that his  
4 factual conclusions and his legal conclusions were correct. Specifically, Defendants  
5 assert:  
6

7 (i.) Judge Bryant did not improperly delegate authority to an IEP team to  
8 determine how long E.S. should remain at Maple Lake Academy. He  
9 properly concluded, based on the evidence, that Maple Lake Academy is  
10 the appropriate placement for Student, and that Student should remain at  
11 Maple Lake Academy for 18 to 24 months and until her FALA IEP team  
12 determines that another placement is appropriate. He properly ruled that  
13 after the 18 to 24 months, it is for the IEP team to determine if another  
14 placement is appropriate or if Student should remain at Maple Lake  
15 Academy. Judge Bryant properly ruled that 18 to 24 months is the  
16 minimum Student should remain at Maple Lake Academy based on the  
17 testimony of the psychologist from Maple Lake Academy that its students  
18 typically, on average, stay 18 months with many students staying two years,  
19 as that is the time it takes to prepare the students to function independently  
20 in a less restrictive environment. FALA presented no contrary evidence.  
21

22 (ii.) Judge Bryant did not “exceed his authority as a matter of law” by  
23 improperly designating FALA as the responsible School to provide Student  
24 services. FALA was and remains the Student’s Public Educational Agency.  
25  
26  
27  
28

1 Student was enrolled at FALA in January 2012 when the initial IEP was  
2 created that denied FAPE, and Student was enrolled at FALA in May 2012  
3 and June 2012 when the IEP team met to create the IEP for the following  
4 school year, wherein IEP designated FALA as the location and placement  
5 of services. The FALA members of the IEP team determined to place  
6 Student at FALA continuing with the 2012-2013 school year. Parent never  
7 withdrew or un-enrolled Student. Rather, FALA claims that Student was  
8 no longer its student after Parent filed her Due Process Complaint.  
9

10  
11 (iii.) Judge Bryant properly determined as a matter of fact that FALA did not  
12 provide Student a FAPE and would not provide Student a FAPE. This  
13 conclusion was supported by the record and is not clearly erroneous.  
14

15 (iv.) Judge Bryant properly concluded, as a matter of fact, based on substantial  
16 evidence, that the January 2012 IEP created by the IEP team “was  
17 inadequate to offer Student educational benefit because it did not address  
18 all of her needs or areas of disability. It failed to provide goals to properly  
19 address basic reading, reading fluency, life skills, and other areas of need.  
20 As such, it did not offer a FAPE to Student.” Judge Bryant also found that  
21 the June 2012 IEP as created by the IEP team did not offer Student a FAPE  
22 because “it still did adequately address all areas and did not provide enough  
23 specificity to show that it would provide educational benefit to Student.  
24 Most notably, the placement at FALA was not appropriate for Student [and  
25 that the] placement decision in the June 2012 IEP was, thus, a substantive  
26  
27  
28

1 violation of the IDEA and denied Student a FAPE.” Judge Bryant also  
2 expressed that “The evidence shows that Student needs an intensive  
3 program of behavioral support in order to receive educational benefit [and  
4 thus] the June 2012 IEP did not offer Student a FAPE. These conclusions  
5 were supported by the record and are not clearly erroneous.  
6

7 (v.) Judge Bryant did not express that he was awarding compensatory  
8 education. To the extent the award was compensatory in nature, Judge  
9 Bryant was nevertheless not required to set out and label the number of  
10 hours of compensatory education. Compensatory education services are  
11 awarded as equitable relief.<sup>1</sup> Courts have discretion on how to craft the  
12 relief and there is no obligation to provide an hour-for-hour or day-for-day  
13 compensation for services that were denied.<sup>2</sup> Judge Bryant’s decision sets  
14 forth the basis for the reimbursement.  
15  
16

17 (vi.) Judge Bryant did not err as a matter of law by failing to address whether  
18 MLA is the least restrictive environment (LRE) at which Student can be  
19 educated. LRE is not a consideration when analyzing the appropriateness of  
20 a parentally chosen placement.<sup>3</sup>  
21  
22

23  
24 <sup>1</sup> 20 U.S.C. § 1415(i)(2)(B)(iii) (“shall grant such relief as the court determines  
appropriate”); *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1496–  
97 (9th Cir.1994).

25 <sup>2</sup> *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d at 1497 (9th Cir.1994).

26 <sup>3</sup> *Cleveland Heights-University City Sch. Dist. v. Boss*, 144 F.3d 391, 399 (6th  
27 Cir. 1998)(at n7); *Knable v. Bexley City Sch. Dist.* 238 F. 2d 755, 770 (6th Cir.  
28 2001); accord *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, (3d Cir.  
1999). See also *Board of Educ. V. Illinois State Bd. Of Education*, 41 F. 3d 1162,

1 (vii.) Judge Bryant considered all relevant evidence, expressly stating in his  
2 decision that he “read and considered each admitted Exhibit, even if not  
3 mentioned in this Decision [and] also considered the testimony of every  
4 witness, even if the witness is not specifically mentioned in this Decision.”  
5 There was no evidence presented that Parent interfered with the “IDEA  
6 process,” although FALA claimed that Parent withheld pages from a  
7 neuropsychological report, which Judge Bryant addressed specifically  
8 stating that he “reviewed the written evaluation and [found] that the  
9 absence of those pages did not significantly restrict FALA’s ability to  
10 assess Student’s needs.” Judge Bryant properly considered all relevant  
11 evidence of Student’s educational performance and performance at school,  
12 and acknowledged and considered Student’s educational needs. FALA  
13 alleges that Judge Bryant “failed to properly consider ... the impact of  
14 [Student’s] conduct outside of the educational environment.” That  
15 allegation suggests schools can excuse their failure to offer FAPE for some  
16 students.  
17  
18  
19  
20  
21

22 (viii.) The allegation is non-sensical. Parent offers the following Answer to  
23 address FALA’s allegation that that Judge Bryant improperly weighed  
24

---

25 1168 (7th Cir. 1994), cited with approval in *Seattle School Dist. No. 1v. B.S.*, 82  
26 F. 3d 1493, 1502 (9th Cir. 1996) (where school district failed to propose a  
27 satisfactory alternative, court was not required to locate another school that  
28 would satisfy the least restrictive requirement based on the entire pool of schools  
available, but rather was required simply to determine whether that one available  
choice would provide an appropriate education).

1 testimony. It is important to note that FALA improperly labels Student's  
2 neuropsychologist as Parent's expert witness, that the neuropsychologist,  
3 Dr. Amy Serin, evaluated Student and FALA adopted Dr. Serin's  
4 evaluation. FALA subsequently requested Dr. Serin conduct additional  
5 testing for FALA. FALA offered no evidence to contradict Dr. Serin's  
6 testimony. Dr. Serin's diagnostic impressions were supported by a full and  
7 complete evaluation, including a battery of tests. The weight Judge Bryant  
8 gave the testimony of Dr. Serin was not clearly erroneous. Beyond  
9 FALA's complaint about the weight Judge Bryant gave Dr. Serin, this  
10 allegation is so vague and ambiguous that Defendants cannot reasonably  
11 prepare a response.  
12

13  
14  
15 (ix.) FALA was and remains the Student's Public Educational Agency. The  
16 FALA members of the IEP team determined to place Student at FALA  
17 continuing with the 2012-2013 school year. Parent never withdrew or un-  
18 enrolled Student. Rather, FALA claims that Student was no longer its  
19 student after Parent filed her Due Process Complaint.  
20

21  
22 (x.) FALA was and remains the Student's Public Educational Agency. The  
23 FALA members of the IEP team determined to place Student at FALA  
24 continuing with the 2012-2013 school year. Parent never withdrew or un-  
25 enrolled Student.  
26

27 (xi.) Judge Bryant clearly set out and identified the associated expenses to date,  
28 citing to the Exhibits (documentary evidence) submitted by Parent in



1 support of her request for associated expenses.

2 With respect to the Complaint's prayer for relief, Defendants specifically assert  
3 that FALA is not entitled to any relief and that FALA's request for fees and costs is  
4 without any legal basis under the IDEA and is interposed for an improper purpose,  
5 specifically intimidation. The request for fees is not made in good faith; it is not  
6 warranted by existing law or by a non-frivolous argument for extending, modifying or  
7 reversing existing law or for establishing new law. As such, Plaintiff's request for fees  
8 violates Rule 11 of the Federal Rules of Civil Procedure and should be subject to  
9 sanctions.

10 **WHEREFORE**, having answered Plaintiff's Complaint, Defendants pray that  
11 Plaintiff takes nothing thereby and the Court enter judgment against Plaintiff dismissing  
12 Plaintiff's action in its entirety with prejudice and awarding Defendants their reasonable  
13 fees and costs (including attorneys' fees and expenses under the IDEA) as provided by  
14 law and all other relief as the Court deems just and proper, including under Rule 11 of the  
15 Rules of Civil Procedure relating to Plaintiff's improper claim for attorneys' fees in this  
16 matter.

17  
18  
19  
20  
21  
22 **COUNTERCLAIM**

23 Counter-claimants, E.S., a minor, by and through her parent, Michelle Grua,  
24 brings this counterclaim to establish that counterclaimants are the prevailing parties and  
25 entitled to an award of attorneys' fees and costs in connection with the underlying  
26 administrative hearing. The administrative hearing was brought pursuant to 20 U.S.C.  
27 §1415 (i)(3)(B) of the Individuals with Disabilities Education Act (IDEA).  
28

1 Counterclaimant is seeking fees and costs (taxable and non-taxable) incurred to compel  
2 Flagstaff Arts & Leadership Academy District (Plaintiff-Counter-Defendant) (hereinafter  
3 “FALA”) to comply with the requirements of the IDEA and pursue this cause of action.  
4

5 1. This Court has original jurisdiction over this action pursuant to 28 U.S.C.  
6 §1331 in that it arises under 20 U.S.C. §1415 (i)(3)(B) of the Individuals Disability  
7 Education Act (“IDEA”).  
8

9 2. Jurisdiction is vested in this Court under the IDEA, 20 U.S.C. §1415  
10 (i)(3)(A). Venue in the Court is also proper under 28 U.S.C. §1391(b)

11 3. Counterclaimant is a minor student whose residence is with her parent,  
12 Michelle Grua. At all times material hereto, E.S. (“Student”) was a student with  
13 disabilities and eligible for special education and related services under the IDEA.  
14

15 4. FALA is a charter school district duly organized and existing under the laws  
16 of the state of Arizona and, at all times material hereto, was the Public Education Agency  
17 responsible for providing a Free and Appropriate Public Education (“FAPE”) for Student.  
18

19 5. On July 26, 2012, Parent filed a due process complaint on Student’s behalf  
20 with the Arizona Department of Education. The case was assigned to the Honorable Eric  
21 A. Bryant, Administrative Law Judge and given the case number 13C-DP-005-ADE.  
22 Over the course of three days, Judge Bryant heard testimony, received exhibits and issued  
23 a comprehensive, detailed and well-reasoned decision on June 15, 2013. In the decision,  
24 Judge Bryant ordered the substantive relief requested by the Parent. A copy of the  
25 decision was attached as Exhibit A to Plaintiff’s Complaint and is a matter of record.  
26 Defendants request that the Court take official / judicial notice of the decision.  
27  
28

1           6. Counterclaimants are the prevailing party pursuant to 20 U.S.C. §1415  
2 (i)(3)(B) and is entitled to an award of reasonable attorneys' fees and costs (taxable and  
3 non-taxable) in the administrative proceedings, plus such additional fees and costs as may  
4 be incurred to present this complaint for fees. *Barlow-Gresham Union High School*  
5 *District No. 2 v. Mitchell*, 940 F. 2d 1280, 1286 (9th Cir. 1991).

7           7. Counterclaimants retained counsel to pursue and vindicate Student's rights  
8 under the IDEA. Attorneys' fees will be sought based upon the number of hours  
9 reasonably expended to pursue student's federally protected rights multiplied by the  
10 prevailing market rates in the community for similar services by lawyers of reasonably  
11 comparable skill, experience and reputation comparable to those of Counterclaimant's  
12 counsel in the administrative hearing as well as counsel in this court. 20 U.S.C. §  
13 1415(i)(3)(C); *Blum v. Stenson*, 465 U.S. 886, 895-6 n. 11 (1984); *Hensley v. Eckerhart*,  
14 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

15           8. Counterclaimants will seek reasonable rates based on current, rather than  
16 historic, hourly rates for attorneys. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989).  
17 Counterclaimant will submit appropriate documentation and affidavits to support the  
18 claim for fees and costs in this case.

19           7. Counterclaimants are requesting interest as a matter of law from the time  
20 judgment for fees and costs is entered pursuant to 28 U.S.C.§1961.  
21  
22

23  
24  
25  
26                           **Prayer for Relief**

27           **WHEREFORE**, Counterclaimants demand judgment against Flagstaff Arts &  
28 Leadership Academy and prays for the following relief:

- 1 A. An Order declaring Counterclaimants as the prevailing party;  
2 B. Judgment for reasonable attorneys' fees and costs (taxable and non-taxable)  
3 incurred in the administrative proceedings, and for pursuing this complaint for  
4 fees and costs in this court, which amounts will be established by motion filed  
5 pursuant to the local rules of procedure for the District Court;  
6 C. Interest on the Judgment at the highest lawful rate and from the earliest lawful  
7 date until paid; and  
8 D. For such other and further relief as the Court deems proper.  
9

10 RESPECTFULLY SUBMITTED July 23, 2013.

11 KIRSCH-GOODWIN & KIRSCH, PLLC  
12 By: /s/ Hope N. Kirsch  
13 Hope N. Kirsch  
14 *Attorneys for Defendants/Counterclaimants*

15 CERTIFICATE OF SERVICE

16 I hereby certify that on July 23, 2013, I electronically transmitted the attached  
17 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
18 Notice of Electronic Filing to the following CM/ECF registrants:

19 Kenneth H. Brendel  
20 Jeffrey D. Dollins  
21 Mangum Wall Stoops & Warden PLLC  
22 PO Box 10  
23 Flagstaff, AZ 86002-0010  
24 (928) 773-6951  
25 *Attorneys for Plaintiff*

26 By: /s/ Hope N. Kirsch

27 A courtesy copy with a copy of the Notice of Electronic filing is also being mailed to  
28 HONORABLE H. RUSSELL HOLLAND on this same date at the following address:

29 HONORABLE H. RUSSELL HOLLAND  
30 United States District Court  
31 District of Alaska  
32 222 West 7th Avenue, #4  
33 Anchorage, AK 99513

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28