



1 an order of placement of Student in that special private school. The law governing  
2 these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United  
3 States Code ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in 2004),<sup>2</sup> and its  
4 implementing regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well  
5 as the Arizona Special Education statutes, Arizona Revised Statutes  
6 (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative  
7 Code ("A.A.C.") R7-2-401 through R7-2-406.

### 8 Procedural History

9 Petitioners filed the due process complaint on July 26, 2012, and filed an  
10 amended complaint in November 2012. The complaint as amended claims that  
11 Respondent, a charter school, did not offer Student a free appropriate public education  
12 in a January 2012 Individualized Education Program ("IEP") and also in a June 2012  
13 IEP, for multiple reasons that are both substantive and procedural. Petitioners seek  
14 reimbursement for a unilateral parental placement and an order that Student remain at  
15 that parental placement at Respondent's expense. Respondent denies the claims.

### 16 Evidence and Issues at Hearing

17 The parties presented testimony and exhibits at a formal evidentiary hearing  
18 held February 6-8, 2013. The parties presented testimony from the witnesses listed  
19 above<sup>3</sup> and offered into evidence Petitioners' Exhibits A through CC and Respondent's  
20 Exhibits A through F.<sup>4</sup>

21 After the Exhibits and testimony were admitted, the parties submitted written  
22 arguments to the tribunal. The last memorandum was filed on April 29, 2013.

23 Petitioners make the following claims:

- 24 1) FALA denied Student FAPE by failing to evaluate Student as a  
25 student with a suspected disability from August 2010 to January  
26 2012.
- 27 2) FALA denied Student FAPE by failing to provide Parent with a copy of  
28 the IDEA procedural safeguards prior to June 2012.

29 <sup>2</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of  
30 2004," IDEA 2004 became effective on July 1, 2005.

<sup>3</sup> Transcripts of the testimony are part of the record.

<sup>4</sup> The Exhibits consist of approximately 3000 pages of documentation, a portion of which is duplicative.

- 1 3) FALA denied Student FAPE by failing to assess Student in all  
2 suspected areas of disability in January 2012.
- 3 4) FALA denied Student FAPE by failing to find Student eligible for  
4 special education as a Student with an Emotional Disability in  
5 January 2012.
- 6 5) FALA denied Student FAPE by failing to create an IEP in January  
7 2012 that addressed all of Student's needs and offered Student  
8 meaningful educational benefit.
- 9 6) FALA denied Student FAPE by failing to create an IEP in June 2012  
10 that addressed all of Student's needs and offered Student  
11 meaningful educational benefit.
- 12 7) FALA denied Student FAPE by failing to include all required members  
13 of the IEP team when creating the January 2012 IEP and the June  
14 2012 IEP.
- 15 8) FALA denied Student FAPE by predetermining Student's placement in  
16 the June 2012 IEP.
- 17 9) MLA is an appropriate placement for Student.
- 18 10) Student requires a residential placement such as MLA to receive  
19 educational benefit.
- 20 11) Parent is entitled to reimbursement for the expense of obtaining a  
21 Neuropsychological Evaluation of Student from Amy Serin, Ph.D.

22 Parent argues that there were both procedural and substantive violations of the IDEA in  
23 during Student's attendance at FALA. However, the main contention is that neither the  
24 January 2012 IEP nor the June 2012 IEP offered Student a FAPE. Therefore, Parent  
25 argues, unilateral parental placement was warranted and MLA is an appropriate  
26 placement. In this circumstance, Parent continues, the IDEA authorizes reimbursement  
27 of tuition and other expenses for Student to attend MLA, and authorizes a ruling that  
28 MLA is an appropriate placement for Student through May 2014. Respondent defends  
29 its findings and actions by arguing that the IEPs offered Student a FAPE and that MLA  
30 is not an appropriate placement for Student.

1 The Administrative Law Judge has considered the entire record, including the  
2 testimony and Exhibits,<sup>5</sup> and now makes the following Findings of Fact, Conclusions of  
3 Law, and Decision finding that Respondent did not offer Student a FAPE and that  
4 Student's current placement in MLA is appropriate and should be maintained.<sup>6</sup>

### 5 FINDINGS OF FACT

6 1. Student began attending FALA in August 2010, for her seventh grade year.  
7 Her parents are divorced and have joint custody. At that time, she split time living with  
8 Parent<sup>7</sup> and her other parent. When she began at FALA, Student had a diagnosis of  
9 Attention Deficit Hyperactivity Disorder ("ADHD")<sup>8</sup> and struggled with organization,  
10 impulsivity, and distractibility.<sup>9</sup> In October 2010, Parent met with the school and they  
11 created a plan to track daily assignments.<sup>10</sup> There was no discussion of special  
12 education or accommodations for students with disabilities under Section 504 of the  
13 Rehabilitation Act of 1973 ("504").<sup>11</sup> Nor was there any suggestion that Student be  
14 evaluated for special education disability.<sup>12</sup>

15 2. The assignment tracking plan did not work very well, likely because it relied  
16 on Student to carry papers back and forth between teachers and Parent and have them  
17 signed.<sup>13</sup> Student's grades were suffering and her behaviors at school were becoming  
18 worse.<sup>14</sup> Parent hired a tutor to help Student with homework,<sup>15</sup> but this did not seem to  
19 be making much difference.

20 <sup>5</sup> The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned in  
21 this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if  
22 the witness is not specifically mentioned in this Decision.

23 <sup>6</sup> Because the IDEA generally mandates that the Administrative Law Judge's determination of whether a  
24 student received a FAPE must be based on substantive grounds (34 C.F.R. § 300.513(a)(1)), and  
25 because the Administrative Law Judge finds substantive violations of the IDEA, not all of Petitioners'  
26 claims are addressed herein. This Decision addresses whether the January 2012 IEP and the June 2012  
27 IEP offered Student a FAPE. Finding that they do not, the Administrative Law Judge then addresses  
28 whether MLA is an appropriate placement for Student. The only other issue addressed herein is Parent's  
29 claim for reimbursement of expenses in obtaining the evaluation from Dr. Serin.

30 <sup>7</sup> Parent is a highly educated medical professional. Her testimony at hearing is found to be generally  
credible and consistent with the available documentation.

<sup>8</sup> Exhibit A2.

<sup>9</sup> Exhibit L1-5.

<sup>10</sup> Reporter's Transcript of Proceedings ("RTP"), Vol. II at 150-51.

<sup>11</sup> *Id.* at 153.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 151-52.

<sup>14</sup> Exhibit L10-L70 (emails between Parent and teachers); Exhibit B1-3 (behavior incident logs).

1 3. In March 2011, Parent requested a meeting with teachers and “special ed  
2 staff” to discuss her concerns about Student’s “academic performance.”<sup>16</sup> At the  
3 meeting, Parent asked if Student was eligible for 504 or special education.<sup>17</sup> In  
4 response, FALA developed a 504 plan for Student.<sup>18</sup> No offer to evaluate Student was  
5 made and FALA did not provide Parent with a Procedural Safeguards Notice.<sup>19</sup> Student  
6 finished the school year with the 504 plan, but continued to struggle. During this time,  
7 FALA became aware that Student was talking and writing about suicide, pregnancy,  
8 and violence.<sup>20</sup> A school counselor addressed these things with Student.

9 4. Her eighth grade year started with the same problems. She had “outbursts”  
10 and other problem behaviors in class.<sup>21</sup> The school counselor learned that Student was  
11 cutting herself and discussed it with her.<sup>22</sup> By the end of September, Student had  
12 detention.<sup>23</sup> Teachers asked advice from Parent as to how to help Student.<sup>24</sup> Parent  
13 told one teacher that Student was “2-3 years behind her peers, both cognitively and  
14 social/emotional IQ-wise” and that Student “suffers from a cognitive disability that is  
15 difficult to quantitate [sic] and tantalizingly easy to dismiss as an unwillingness to put  
16 forth effort.”<sup>25</sup> FALA then called a meeting in October 2010 to address Student’s  
17 problems and the 504.

18 5. There is no notice for that meeting in the record, but FALA Special Education  
19 Director testified that the purpose of the meeting was to consider exiting Student from  
20 the 504 plan and consider her for special education.<sup>26</sup> At the meeting, Parent informed  
21 FALA that she suspected that Student might have Asperger’s Syndrome or some other  
22 condition on the autism spectrum and had obtained an appointment for Student to be  
23 evaluated by a neuropsychologist in November 2011. FALA Special Education Director

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24 <sup>15</sup> Exhibit L10-70.

25 <sup>16</sup> Exhibit L72.

26 <sup>17</sup> RTP, Vol. II at 157.

27 <sup>18</sup> Exhibit C7-8.

28 <sup>19</sup> Exhibit C1.

29 <sup>20</sup> Exhibits L89, L91.

30 <sup>21</sup> Exhibits L99, L107.

<sup>22</sup> Exhibit B7.

<sup>23</sup> Exhibit L115.

<sup>24</sup> Exhibit L123.

<sup>25</sup> Exhibit L126.

1 informed Parent that FALA could evaluate Student, but Parent declined, stating that the  
2 appointment was only a few weeks away and she did not want to cancel it.<sup>27</sup> Due to the  
3 impending evaluation, no decisions were made at that meeting. Everyone agreed to  
4 wait for the results of the evaluation.

5 6. In November 2011, Student was evaluated by Amy Serin, Ph.D., a clinical  
6 neuropsychologist who has been in practice since completing her internship at Phoenix  
7 Children's Hospital in 2004.<sup>28</sup> She is currently in private practice. She performed a  
8 Neuropsychological Evaluation that included interviews with Parent and Student;  
9 behavior questionnaires filled out by Parent, Student, and a teacher; and a battery of  
10 tests to determine cognitive functioning, executive functioning, and other areas of  
11 Student's functioning. Dr. Serin's written evaluation report is comprehensive and  
12 thorough, and carries a great deal of weight.<sup>29</sup>

13 7. Dr. Serin diagnosed Student with Anxiety Disorder NOS (Not Otherwise  
14 Specified), Reading Disorder, and Learning Disorder NOS (Nonverbal Learning  
15 Disability).<sup>30</sup> She found rule out diagnoses of ADHD, Combined Type, Cyclothymic  
16 Disorder, and Dysthymic Disorder.<sup>31</sup> She also had a rule out diagnosis of Borderline  
17 Personality Disorder.<sup>32</sup> These findings show a student with significant disabilities that  
18 interfere with her ability to learn. The opening paragraph of Dr. Serin's Summary  
19 portion of the written evaluation provides a helpful description of Student's overall  
20 assessment:

21 [Student] is a 14-year-old teenager whose overall cognitive ability cannot  
22 easily be summarized because her verbal reasoning abilities are much  
23 better developed than her nonverbal reasoning abilities. This pattern of  
24 scores can be indicative of a Nonverbal Learning Disability (NLD), which  
25 is relative dysfunction in the right hemisphere. Further evidence for this is  
[Student]'s relative difficulty with math calculation, and her overall  
weaknesses in visuospatial skills. Individuals with NLD often appear to

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26 <sup>26</sup> RTP, Vol. I at 58.

27 <sup>27</sup> RTP, Vol. II at 163-64.

28 <sup>28</sup> She testified that she has a Ph.D. in clinical psychology with a concentration in neuropsychology.

29 <sup>29</sup> Exhibit D4-21.

30 <sup>30</sup> Exhibit D21.

31 <sup>31</sup> *Id.*

32 <sup>32</sup> *Id.* She explained at hearing that Student was too young to carry that diagnosis, but was "developing"  
it.

1 have Asperger's Disorder as the two disorders share several traits. The  
2 difference is that individuals with NLD commonly have lower perceptual  
3 reasoning (nonverbal abilities) and therefore math disabilities. It appears  
4 the lack of integration between the hemispheres and the inefficient  
5 processing in the right hemisphere create a lack of social awareness and  
6 difficulties reading nonverbal communication cues. The result is a lack of  
7 social accommodations for life skills such as navigation, balancing a  
8 checkbook, and math computation. [Student] will learn better verbally and  
9 should not rely on visual maps or visual cues to aid in her learning.<sup>33</sup>

10 Dr. Serin also notes that Student has a weakness in decoding ability that is suggestive  
11 of Dyslexia. Her inability to overcome that weakness has resulted in "reading abilities  
12 [that] are not at the level that would be expected given her verbal intellectual  
13 abilities."<sup>34</sup> Dr. Serin further noted a high level of anxiety and a poor "style" of  
14 attachment in relationships.<sup>35</sup>

15 8. Student's level of functioning compromised with respect to daily living skills.  
16 She appears to be higher functioning than she actually is because of her higher verbal  
17 abilities. Dr. Serin noted that "all individuals who teach, treat, and work with [Student]  
18 should be aware of her unique constellation of strengths and weaknesses."<sup>36</sup> Dr. Serin  
19 also noted Student's "many executive functioning deficits," and attached to her report a  
20 "comprehensive list of interventions" to address daily living skills and executive  
21 functioning skills.<sup>37</sup>

22 9. Finally, Dr. Serin recognized that Student had "so many issues that warrant  
23 treatment and made specific recommendations for addressing those issues at school.  
24 Although Dr. Serin does not expressly state it, it is clear that she believed that Student  
25 was eligible for special education.

26 10. In preparation for a meeting to determine special education eligibility for  
27 Student, Parent sent Dr. Serin's report to FALA in early January 2012, except that  
28 Parent removed the first three pages of the copy of the report she sent to FALA. She

29 <sup>33</sup> Exhibit D19.

30 <sup>34</sup> *Id.*

<sup>35</sup> Exhibit D19-20.

<sup>36</sup> Exhibit D20.

<sup>37</sup> *Id.* The attached document is a 22-page "Executive System Intervention" narrative that describes approaches to intervention for executive functioning. Exhibit D22-44.

1 explained in an email that she was doing this because Student's "social history" was  
2 "not pertinent to her school difficulties."<sup>38</sup> Those first three pages contain names, dates  
3 and other data identifying the evaluation, as well as sections addressing the reason for  
4 the evaluation, a list of the testing instruments used, Student's background information  
5 (social history), and Dr. Serin's behavioral observations. At the hearing, FALA Special  
6 Education Director expressed frustration that the pages were missing and indicated  
7 that FALA could not fully evaluate Student without them.<sup>39</sup> However, while there is  
8 some truth to FALA Special Education Director's testimony, the Administrative Law  
9 Judge has reviewed the written evaluation and finds that the absence of those pages  
10 did not significantly restrict FALA's ability to assess Student's needs.<sup>40</sup>

11 11. On January 10, 2012, a Multidisciplinary Evaluation Team ("MET") that  
12 included Parent met and, without any other psychological evaluation than Dr. Serin's,  
13 found Student eligible for special education in the categories of Specific Learning  
14 Disability ("SLD") and Other Health Impairment.<sup>41</sup> The areas of eligibility for SLD were  
15 found to be Basic Reading Skills, Written Expression, Mathematics Calculation,  
16 Mathematics Problem Solving, and Reading Fluency.<sup>42</sup> The same team immediately re-  
17 formed as an IEP team and created an IEP for Student. Her placement was to be at  
18 FALA in a general education setting at least 80% of the day.<sup>43</sup> The team found that  
19 Student's behavior significantly and adversely affected her progress in the general  
20 curriculum.<sup>44</sup> The IEP notes that Student often needs prompting to initiate work and  
21 stay on task, and needs supervision when working.<sup>45</sup> The IEP also provides a long list  
22 of accommodations for Student, including preferential seating, extra time on written  
23 assignments, and other helpful interventions.<sup>46</sup>

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25 <sup>38</sup> Exhibit L149.

26 <sup>39</sup> RTP, Vol. I, at 125-30. FALA received the full document a few months later.

27 <sup>40</sup> In addition, FALA could have performed its own evaluation, but did not do so.

28 <sup>41</sup> Exhibit F1.

29 <sup>42</sup> *Id.*

30 <sup>43</sup> *Id.*

<sup>44</sup> Exhibit F4.

<sup>45</sup> Exhibit F6. There is no formal Functional Behavioral Assessment ("FBA") or Behavioral Intervention Plan ("BIP").

<sup>46</sup> Exhibit F10.



1 12. The goals written in the January 2012 IEP are extremely brief. Only four  
2 goals were written: two for language arts, one for math, and one for behaviors. The  
3 language arts goals concern accuracy of identification of similes and metaphors when  
4 reading a grade level text, and creating an outline for a writing assignment of a four  
5 paragraph essay.<sup>47</sup> The math goal concerns proper sequencing for solving algebra  
6 problems.<sup>48</sup> Finally, the behavior goal requires her to comply with prompts to get back  
7 on task.<sup>49</sup>

8 13. Dr. Serin testified at the hearing that the January 2012 IEP failed to include  
9 goals to address a host of Student's needs that were identified in the written evaluation,  
10 such as visuospatial skills, perceptual reasoning, social deficits, social skills and life  
11 skills, and disabilities in basic reading and reading fluency.<sup>50</sup> She also criticized the  
12 IEP for failing to address Students emotional disabilities with goals or services (such as  
13 counseling) that would remediate those issues.<sup>51</sup> She testified that the behavioral goal  
14 in the January 2012 IEP was not viable for Student because it did not address "the  
15 underlying undercurrent of significant anxiety and some depression. . . ."<sup>52</sup> She  
16 testified that the language arts goals were not appropriate because the outlining goal  
17 was not basic enough and the identification of metaphors and similes did not address  
18 basic reading skills or reading fluency.<sup>53</sup> And, finally, she described "a whole host of  
19 problems" with the math goal using algebra, including that Student has a hard time with  
20 basic math operations and word problems.<sup>54</sup>

21 14. The evidence shows that the January 2012 IEP did not contain appropriate  
22 goals for Student. Thus, the January 2012 IEP did not offer Student a FAPE.

23 15. FALA implemented the January 2012 IEP and Student's problems  
24 continued. Student's problem behaviors were escalating, both at school<sup>55</sup> and at home.

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26 <sup>47</sup> Exhibit F7.

27 <sup>48</sup> Exhibit F8.

28 <sup>49</sup> Exhibit F9.

29 <sup>50</sup> RTP, Vol. III at 136-51.

30 <sup>51</sup> *Id.* at 134-35.

<sup>52</sup> *Id.* at 136.

<sup>53</sup> *Id.* at 137-40.

<sup>54</sup> *Id.* at 142-43.

<sup>55</sup> See Exhibit B, the disciplinary log. See also Exhibits L272 and L284.

1 During the night on a weekend in late March 2012, Student snuck out of Parent's home  
2 and was missing for five hours.<sup>56</sup> When Student returned home, she became angry  
3 with Parent, locked herself in the bathroom, and gave herself multiple, mostly  
4 superficial cuts.<sup>57</sup> Parent saw this as a need for emergency help and contacted a  
5 hospital. At the hospital, behavioral health professionals attempted to find an available  
6 psychiatric bed for Student, but could not.<sup>58</sup> Eventually, Parent placed Student in a  
7 wilderness program in Utah.<sup>59</sup> Student was in that program for about six weeks.<sup>60</sup>

8 16. Parent had been considering residential placement for Student since at  
9 least March 2012. Shortly after the bathroom cutting incident and wilderness  
10 placement, Parent informed FALA that she planned to place her in a residential setting  
11 after that and seek reimbursement from FALA.<sup>61</sup> In late May 2012, Parent placed  
12 Student at Maple Lake Academy in Utah.

13 17. MLA is a small residential school for girls with learning disabilities and  
14 emotional problems.<sup>62</sup> Many of the 16 students at MLA have a learning disability  
15 similar to Student's.<sup>63</sup> MLA is a state-accredited school with certified teachers and a  
16 curriculum that aligns with Utah standards.<sup>64</sup> MLA Psychologist, who treats Student,  
17 and MLA's Educational Director testified about the school and Student at the hearing.

18 18. MLA Psychologist testified that MLA has an intensive program of wrap-  
19 around services, high staff-to-student ratio, and, for Student, a one-on-one arm's length  
20 aide.<sup>65</sup> The aide is not for safety but to prompt Student to stay on task, to clarify  
21 misunderstandings about work to be done, to calm Student when she is disruptive and  
22 impulsive, to take her for a walk or out of the classroom as needed, to help her process  
23 her feelings, to return her to class, to help mediate situations with peers and teachers,  
24

25 <sup>56</sup> Testimony of Parent, RTP Vol. 2 at 196.

26 <sup>57</sup> *Id.* at 196-98.

27 <sup>58</sup> *Id.* at 198-99.

28 <sup>59</sup> *Id.* at 200-02.

29 <sup>60</sup> Parent is not requesting reimbursement for that program.

30 <sup>61</sup> Exhibits L302, L303.

<sup>62</sup> Testimony of MLA Psychologist, RTP Vol. at 181-82.

<sup>63</sup> *Id.* at 182.

<sup>64</sup> Exhibit T116-48; Testimony of MLA Education Director, Vol. II at 6-8.

<sup>65</sup> RTP Vol. I at 188-89 and 216-17.

1 and to help her be successful.<sup>66</sup> MLA staff understand the pathology of NLD and the  
2 treatment is research based.<sup>67</sup> The one-on-one aide is not stigmatizing at MLA  
3 because most of the other girls have one or have had one.<sup>68</sup> The residential and the  
4 school staff work together and meet weekly.<sup>69</sup>

5 19. MLA Educational Director testified that she directs all education at MLA,  
6 supervises teachers, supervises instruction of students, occasionally provides direct  
7 instruction, observes classes and is part of the treatment team that discusses students  
8 each week.<sup>70</sup> Student's school day at MLA starts at 8:15 AM and includes four classes  
9 of instruction (Math including math computation and fluency, Earth Science, English,  
10 and American history), and two other classes such as fine arts, dance, drama, or  
11 equine science (for which she receives school credit as it is aligned with core standards  
12 under career technical education).<sup>71</sup> Classes have a ratio of one certified teacher and  
13 one residential staff to five or six students per class, with some students having a one-  
14 on-one aide.<sup>72</sup> Homework is assigned based on a student's ability.<sup>73</sup> All teachers are  
15 trained in NLD and members of the Learning Disabilities Association.<sup>74</sup> The entire  
16 program is structured.<sup>75</sup> The campus has dedicated classrooms.<sup>76</sup> Student receives  
17 grades.<sup>77</sup> Teachers address anxiety in the classroom and there is a study skills class  
18 where students work on assignments, complete homework, and are taught study  
19 skills.<sup>78</sup> Since she began at MLA, Student has progressed in writing (including  
20 grammar and punctuation), math, executive function and managing assignments (she  
21  
22  
23

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24 <sup>66</sup> *Id.*

25 <sup>67</sup> Testimony of Dr. Serin, RTP Vol. III at 150-51.

26 <sup>68</sup> Testimony of MLA Psychologist, RTP Vol. I at 217.

27 <sup>69</sup> *Id.* at 183, 215.

28 <sup>70</sup> RTP Vol. II at 5-6.

29 <sup>71</sup> *Id.* at 7-9, 16.

30 <sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 18.

<sup>75</sup> *Id.* at 9.

<sup>76</sup> Exhibit T15-17.

<sup>77</sup> Testimony of MLA Education Director, RTP Vol. II at 33.

<sup>78</sup> *Id.* at 10.

1 now barely misses assignments).<sup>79</sup> Her anxiety in school has decreased.<sup>80</sup> MLA's  
2 school program is year round; Student attended MLA during Summer 2012.<sup>81</sup>

3 20. At MLA, Student receives specially-designed instruction.<sup>82</sup>

4 21. Based on the testimony of the witnesses from MLA, who the Administrative  
5 Law Judge finds to be credible and reliable witnesses, the evidence shows that Student  
6 requires a school setting that is highly-structured where she is taught proper social  
7 interaction with peers and adults and how to control her anxiety.<sup>83</sup> She has done well  
8 at MLA because it is highly structured and consistent, addresses her academic, social  
9 and emotional needs, provides extra help with homework and executive functioning  
10 from staff throughout the day who are specially trained in NLD.<sup>84</sup> The educational  
11 component cannot be separated from the clinical/therapeutic component for Student;  
12 they are intertwined; the social and emotional aspects affect the her academic  
13 performance.<sup>85</sup>

14 22. Students at MLA typically stay there 18 to 24 months.<sup>86</sup> MLA prepares them  
15 to function in a less restrictive environment.<sup>87</sup>

16 23. Upon receiving Parent's April 16, 2012 notice of unilateral placement, FALA  
17 sent Parent a letter acknowledging the parental placement, characterizing it as a  
18 "withdrawal" and denying the reimbursement claim.<sup>88</sup> FALA invited Parent to "re-enroll"  
19 Student and schedule an IEP meeting to address Student's needs. While Parent  
20 disagreed that she had withdrawn Student from FALA, she reluctantly re-enrolled  
21 Student and requested an IEP meeting.<sup>89</sup> That meeting occurred on June 8, 2012, and  
22 was called as a meeting to consider amending the January 2012 IEP.<sup>90</sup>

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24 <sup>79</sup> *Id.* at 11-13. Exhibit T74-108.

25 <sup>80</sup> Testimony of MLA Education Director, RTP Vol. II at 12.

26 <sup>81</sup> *Id.* at 25-26.

27 <sup>82</sup> *Id.* at 13-14.

28 <sup>83</sup> *Id.* at 14-15.

29 <sup>84</sup> *Id.* at 31.

30 <sup>85</sup> *Id.* at 15, 20-21, 31.

<sup>86</sup> Testimony of MLA Psychologist, RTP Vol. I at 211.

<sup>87</sup> *Id.*

<sup>88</sup> Exhibit L309.

<sup>89</sup> Exhibit L317.

<sup>90</sup> Exhibit O1.

1 24. Student's IEP team created an amended IEP for Student in June 2012.  
2 Parent objected to the IEP. The June 2012 IEP builds on the January 2012 IEP,  
3 making several changes. First, the team added the eligibility category of Emotional  
4 Disability. Also, placement was changed to a general education setting for at least  
5 40% of the day and no greater than 80% of the day.

6 25. A significant change occurred with the goals. Three goals from the January  
7 2012 IEP remained: the language arts goal relating to similes and metaphors, the  
8 algebra problems math goal, and the language arts outlining goal, which was retained  
9 but modified to outlining one paragraph instead of four.<sup>91</sup> In addition, new goals were  
10 added: a decoding goal in language arts, a math calculation skills goal in math, two  
11 daily living skills goals, and three social/emotional goals.<sup>92</sup> Although this IEP was an  
12 improvement from the January 2012 IEP, Dr. Serin testified that it was not adequate to  
13 offer Student educational benefit.<sup>93</sup>

14 26. Dr. Serin noted that some of the goals did not indicate how they would be  
15 implemented, so that there was no way to tell if they would be effective. For example,  
16 Dr. Serin did not have a problem with the language arts decoding goal.<sup>94</sup> However, she  
17 wondered what reading program would be used to implement it. When she was told  
18 that other evidence suggested that the Wilson reading program would be used, Dr.  
19 Serin testified that Wilson would be inappropriate for Student and that Student should  
20 be using Lindamood-Bell due to her NLD.<sup>95</sup> Another big concern that Dr. Serin  
21 expressed concerned placement. As noted, the level of service statement in the June  
22 2012 IEP required a significant amount of time out of the general education setting.  
23 But the services page of the IEP indicated that all instruction would be given in a  
24 general education classroom.<sup>96</sup> Furthermore, Dr. Serin testified that Student needed  
25 intensive behavioral support.<sup>97</sup> And by that she meant continuous, 24-hour support.<sup>98</sup>

26  
27 <sup>91</sup> Exhibit O8-9.

28 <sup>92</sup> Exhibit O8-11.

29 <sup>93</sup> RTP Vol. III at 152-73.

30 <sup>94</sup> *Id.* at 154.

<sup>95</sup> *Id.* at 155.

<sup>96</sup> Exhibit O19.

<sup>97</sup> RTP Vol. III at 164.

1 This means that only a residential setting would be appropriate. So, Dr. Serin did not  
2 believe that the June 2012 IEP was adequate.<sup>99</sup>

3 27. The evidence shows that Student needs an intensive program of behavioral  
4 support in order to receive educational benefit. Thus, the June 2012 IEP did not offer  
5 Student a FAPE.

6 28. In July 2012, Parent filed this due process complaint, requesting  
7 reimbursement for placement at MLA.

## 8 **CONCLUSIONS OF LAW**

### 9 **APPLICABLE LAW**

#### 10 **FAPE**

11 1. Through the IDEA, Congress has sought to ensure that all children with  
12 disabilities are offered a free appropriate public education that meets their individual  
13 needs.<sup>100</sup> These needs include academic, social, health, emotional, communicative,  
14 physical, and vocational needs.<sup>101</sup> To do this, school districts must identify and  
15 evaluate all children within their geographical boundaries who may be in need of  
16 special education and services. The IDEA sets forth requirements for the identification,  
17 assessment and placement of students who need special education, and seeks to  
18 ensure that they receive a free appropriate public education. A free appropriate public  
19 education (“FAPE”) consists of “personalized instruction with sufficient support services  
20 to permit the child to benefit educationally from that instruction.”<sup>102</sup> The IDEA mandates  
21 that school districts provide a “basic floor of opportunity,” nothing more.<sup>103</sup> It does not  
22 require that each child’s potential be maximized.<sup>104</sup> A child receives a FAPE if a  
23 program of instruction “(1) addresses his unique needs, (2) provides adequate support  
24  
25

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26 <sup>98</sup> *Id.*

27 <sup>99</sup> *Id.* at 172.

28 <sup>100</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

28 <sup>101</sup> *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983  
U.S.C.C.A.N. 2088, 2106).

29 <sup>102</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

29 <sup>103</sup> *Id.*, 458 U.S. at 200.

30 <sup>104</sup> *Id.* at 198.

1 services so he can take advantage of the educational opportunities and (3) is in accord  
2 with an individualized educational program.”<sup>105</sup>

3 The IEP

4 2. Once a child is determined eligible for special education services, a team  
5 composed of the child’s parents, teachers, and others formulate an Individualized  
6 Education Program (“IEP”) that, generally, sets forth the child’s current levels of  
7 educational performance and sets annual goals that the IEP team believes will enable  
8 the child to make progress in the general education curriculum.<sup>106</sup> The IEP tells how  
9 the child will be educated, especially with regard to the child’s needs that result from  
10 the child’s disability, and what services will be provided to aid the child. The child’s  
11 parents have a right to participate in the formulation of an IEP.<sup>107</sup> The IEP team must  
12 consider the strengths of the child, concerns of the parents, evaluation results, and the  
13 academic, developmental, and functional needs of the child.<sup>108</sup> To foster full parent  
14 participation, in addition to being a required member of the team making educational  
15 decisions about the child, school districts are required to give parents written notice  
16 when proposing any changes to the IEP,<sup>109</sup> and are required to give parents, at least  
17 once a year, a copy of the parents’ “procedural safeguards,” informing them of their  
18 rights as parents of a child with a disability.<sup>110</sup>

19 Reimbursement for Private School Placement

20 3. Parents who dispute whether an IEP provides a FAPE to a child, and who as  
21 a result enroll that child in a private school, may receive reimbursement for the costs of  
22 that private-school enrollment under certain circumstances.<sup>111</sup> The program offered by  
23 the school district must fail to provide a FAPE to the child and the private school must  
24

25  
26 <sup>105</sup> *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9<sup>th</sup> Cir. 2006) (citing *Capistrano Unified  
Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9<sup>th</sup> Cir. 1995).

27 <sup>106</sup> 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

28 <sup>107</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

29 <sup>108</sup> 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

30 <sup>109</sup> 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

<sup>110</sup> 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503. Safeguards may also be posted on the Internet.

20 U.S.C. § 1415(d)(B).

<sup>111</sup> 34 C.F.R. § 300.148.

1 be an “appropriate” placement.<sup>112</sup> A private school placement may be appropriate even  
2 if it does not operate under public school standards.<sup>113</sup> Under these circumstances,  
3 parents may “enroll the child in a private preschool, elementary school, or secondary  
4 school without the consent of or referral by the [school district]. . .” and seek  
5 reimbursement from the school district for the expense of that enrollment from a court  
6 or hearing officer.<sup>114</sup> Indeed, parents have “an equitable right to reimbursement for the  
7 cost of providing an appropriate [private] education when a school district has failed to  
8 offer a child a [free appropriate public education].”<sup>115</sup> Furthermore, the placement does  
9 not have to meet IDEA requirements.<sup>116</sup>

10 4. However, an award for reimbursement can be reduced or denied in various  
11 circumstances.<sup>117</sup> An award may be reduced or denied if the parents have not given  
12 adequate notice as set forth in the IDEA.<sup>118</sup> There is no claim by FALA of inadequate  
13 parental notice in this case. Therefore, reimbursement, if warranted, will not be  
14 reduced or denied for inadequate parental notice.

#### 15 **DECISION**

16 5. A parent who requests a due process hearing alleging non-compliance with  
17 the IDEA must bear the burden of proving that claim.<sup>119</sup> The standard of proof is  
18 “preponderance of the evidence,” meaning evidence showing that a particular fact is  
19 “more probable than not.”<sup>120</sup> Here, Parent seeks reimbursement for her unilateral  
20 placement of Student at MLA. Therefore, Petitioners bear the burden of proving by a  
21 preponderance of evidence that Respondent failed to provide Student a FAPE through  
22

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23 <sup>112</sup> *Id.*

24 <sup>113</sup> *Id.*

25 <sup>114</sup> 34 C.F.R. § 300.148(b) and (c).

26 <sup>115</sup> *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9<sup>th</sup> Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960  
27 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1992)).

28 <sup>116</sup> *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

29 <sup>117</sup> 34 C.F.R. § 300.148(d).

30 <sup>118</sup> 34 C.F.R. § 300.148(d)(1). *Anchorage School District v. M.P.*, 689 F.3d 1047, 1059 (9<sup>th</sup> Cir. 2012)  
lists other equitable factors that might reduce reimbursement, none of which have been raised here.

<sup>119</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

<sup>120</sup> *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279  
(1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,  
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action*  
*No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).



1 the January 2012 IEP and the June 2012 IEP, and that placement at MLA was  
2 appropriate.

3 6. Furthermore, this tribunal's determination of whether or not Student received  
4 a FAPE must be based on substantive grounds.<sup>121</sup> If a substantive violation is found,  
5 there is no need to address whether a procedural violation has occurred.<sup>122</sup>

6 7. This tribunal finds that Petitioners have met their burden by showing  
7 substantive violations of the IDEA. This tribunal also finds, for the reasons stated  
8 below, that Parent's unilateral private placement is appropriate and must remain the  
9 current placement for Student. This tribunal does not find that Parent is owed  
10 reimbursement for the expense of Dr. Serin's evaluation.

11 *The January 2012 IEP*<sup>123</sup>

12 8. This tribunal's review of the January 2012 IEP and the June 2012 IEP is  
13 limited to the contents of the documents.<sup>124</sup> Therefore, the question of whether the  
14 IEPs are reasonably calculated to provide educational benefit to Student must be  
15 decided on the basis of the contents of the IEP themselves.

16 9. As found above, the January 2012 IEP was inadequate to offer Student  
17 educational benefit because did not address all of her needs or areas of disability. As  
18 such, it did not offer a FAPE to Student.

19 *The June 2012 IEP*<sup>125</sup>

20 10. Similarly, the June 2012 IEP was not calculated to provide Student  
21 educational benefit. Although it improved the goals, it still did adequately address all  
22 areas and did not provide enough specificity to exhibit that it would provide educational  
23 benefit to Student. Most notably, the placement at FALA was not appropriate for  
24 Student. The evidence shows that Student needs an intensive program like MLA.

25 <sup>121</sup> 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

26 <sup>122</sup> 34 C.F.R. §§ 300.513(a)(2). Because this tribunal finds substantive violations of the IDEA,  
27 Petitioners' procedural claims are not addressed.

28 <sup>123</sup> Parent's other claims are not addressed because Parent chose to unilaterally place Student and seek  
29 reimbursement. If the January IEP offered Student a FAPE, Parent would not be entitled to tuition  
30 reimbursement.

<sup>124</sup> *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6<sup>th</sup> Cir. 2001), *see also Union Sch. Dist. v. Smith*,  
15 F.3d at 1526 (IDEA requirement of a formal, written offer should be enforced rigorously).

1 11. Therefore, FALA cannot be an appropriate placement for Student. The  
2 placement decision in the June 2012 IEP was, thus, a substantive violation of the IDEA  
3 and denied Student a FAPE.

4 Appropriate Placement

5 12. Petitioners contend that MLA is an appropriate placement because the  
6 teachers and staff are familiar with students who have NLD (indeed, many of the  
7 students attending MLA have that condition) and because Student needs a residential  
8 environment with constant behavior support to help her learn academic skills,  
9 functional life skills, and how to be an independent member of society. Respondent  
10 argues that a residential setting is not necessary for Student to be educated.

11 13. The requirement that the parental placement be appropriate is “essential to  
12 ensuring that reimbursement awards are granted only when such relief furthers the  
13 purposes of the [IDEA].”<sup>126</sup> In a situation in which the parent has placed a student in a  
14 residential facility, the Ninth Circuit has held that the placement is appropriate only if it  
15 is necessary to provide special education and related services.<sup>127</sup> This requirement  
16 furthers the purposes of the IDEA.<sup>128</sup> Thus, the question that must be answered is  
17 “[w]hether a residential placement is necessary to provide special education and  
18 related services;” or alternatively, “whether the ‘student is incapable of deriving  
19 educational benefit outside of a residential placement.’”<sup>129</sup>

20 14. The Ninth Circuit has also held that, in the context of a parental placement  
21 to a residential facility, the analysis “must focus on whether [the residential] placement  
22 may be considered necessary for educational purposes, or whether the placement is a  
23 response to medical, social, or emotional problems that is necessary quite apart from  
24  
25

---

26 <sup>125</sup> This claim is addressed because, if the June 2012 IEP offered Student a FAPE, Parent would not be  
27 entitled to reimbursement for any period after the offer.

28 <sup>126</sup> *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 P.3d 1004, 1009 (9<sup>th</sup> Cir. 2009) (quoting *Forest  
29 Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242 n.9, 129 S. Ct. 2484, 2493 n.9, 174 L. Ed. 2d 168, 181 n.9  
(2009)).

30 <sup>127</sup> *R. J.*, 588 P.3d at 1009 (quoting *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d at 1500).

<sup>128</sup> *R. J.*, 588 P.3d at 1009.

<sup>129</sup> *R. J.*, 588 P.3d at 1009 (quoting *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d at 1499).

1 the learning process.”<sup>130</sup> And more recently, the Ninth Circuit adopted a standard  
2 established by the Second Circuit:

3 To qualify for reimbursement under the IDEA, parents need not show that  
4 a private placement furnishes every special service necessary to  
5 maximize their child's potential. They need only demonstrate that the  
6 placement provides educational instruction specially designed to meet the  
7 unique needs of a handicapped child, supported by such services as are  
8 necessary to permit the child to benefit from instruction.<sup>131</sup>

9 Therefore, to be an appropriate parental placement under Ninth Circuit standards, the  
10 residential placement must be necessary for the student to derive educational benefit  
11 and must provide educational instruction specially designed to meet the unique needs  
12 of the student, along with services that are necessary for the child to benefit from the  
13 instruction.

14 15. The evidence shows that MLA meets that requirement. At MLA, Student  
15 receives specially designed instruction in a setting that provides intensive behavioral  
16 support and life skills training. This is critical for Student, as she is heading into her  
17 final years of secondary school. MLA's goal is to prepare Student for a less restrictive  
18 setting. This should be accomplished in an 18-24 month period.

19 16. MLA is an appropriate placement for Student and should remain her  
20 placement for 18-24 months.

#### 21 Reimbursement for Dr. Serin's Evaluation

22 17. The final issue to address in this matter is Parent's request for  
23 reimbursement of the expense of Dr. Serin's evaluation. However, by Parent's own  
24 testimony she was informed that FALA could evaluate Student and Parent chose to go  
25 ahead with Dr. Serin rather than have FALA do an evaluation.<sup>132</sup> The rules applicable  
26 to Independent Educational Evaluations are not relevant here, as this was not the

27 <sup>130</sup> *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 P.3d 1175, 1185 (9<sup>th</sup> Cir. 2009) (quoting *Clovis*  
28 *Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 643 (9<sup>th</sup> Cir. 1990)).

29 <sup>131</sup> *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006) (citation and internal quotation marks  
30 omitted) (quoted and adopted in *C. B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159-60 (9<sup>th</sup>  
Cir. 2011)).

<sup>132</sup> RTP Vol. II at 163-64.

1 situation that those rules cover. Parent made a choice and must be responsible for that  
2 choice.

3 Conclusion

4 18. Respondent School District denied Student a FAPE. Parent placed Student  
5 in an appropriate private placement. Parent is entitled to reimbursement of the tuition  
6 and expense she has paid for placing Student in MLA. Furthermore, Student shall  
7 remain at her current placement at Respondent's expense for 18-24 months and until  
8 her FALA IEP team determines that another placement is appropriate.

9 **DECISION**

10 Based on the findings and conclusions above, IT IS HEREBY ORDERED that  
11 Respondent reimburse Parent for MLA tuition she has paid.<sup>133</sup>

12 IT IS FURTHER ORDERED that Respondent pay Student's tuition at MLA, going  
13 forward, for 18-24 months from her admission date and until her FALA IEP team  
14 determines that another placement is appropriate.

15 IT IS FURTHER ORDERED that Respondent reimburse Parent for expenses  
16 associated with Student's placement at MLA.<sup>134</sup>

17 IT IS FURTHER ORDERED that Parent's request for reimbursement of expense  
18 for Dr. Serin's evaluation is denied.

19 Done this day, June 15, 2013.

20  
21 /s/ Eric A. Bryant  
22 Administrative Law Judge

23  
24 **RIGHT TO SEEK JUDICIAL REVIEW**

25 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this  
26 Decision and Order is the final decision at the administrative level.

27 Furthermore, any party aggrieved by the findings and decisions made  
28 herein has the right to bring a civil action, with respect to the complaint  
29

30 <sup>133</sup> See Exhibit Z4-14.

1 presented, in any State court of competent jurisdiction or in a district court  
2 of the United States. Pursuant to Arizona Administrative Code § R7-2-  
3 405(H)(8), any party may appeal the decision to a court of competent  
4 jurisdiction within thirty-five (35) days of receipt of the decision.

5  
6 Copy sent by **electronic mail** and regular mail  
7 this 15 day of June 2013, to:

8 Hope N. Kirsch  
9 KIRSCH-GOODWIN & KIRSCH, PLLC  
10 8900 E. Pinnacle Peak Road, Suite D-250  
11 Scottsdale, Arizona 85255  
12 **hope@kgklaw.com**

13 Copy sent by **electronic mail** and regular mail  
14 this 15 day of June 2013, to:

15 Jeffrey D. Dollins, Esq.  
16 Kenneth H. Brendel, Esq.  
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21 **kbrendel@mwsrlaw.com**

22 By: eab

23 Transmitted electronically to:

24 Arizona Department of Education  
25 Dispute Resolution Unit  
26 ATTN: Kacey Gregson, Dispute Resolution Coordinator  
27 Arizona Department of Education  
28  
29

30 <sup>134</sup> Exhibits Z17, Z19, Z26, Z28, Z29, Z30, Z33.