

STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

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2
3 [REDACTED] a Student, by and through Parent
4 [REDACTED]
5 Petitioners,
6 v.
7 OSBORN Elementary School District,
8 Respondent.

No. 15C-DP-007-ADE

**ADMINISTRATIVE
LAW JUDGE DECISION**

9 **HEARING:** Hearing session October 21, 2014, followed by the post-hearing
10 submission period for receipt of the hearing transcript. Record reopened for
11 consideration of Petitioners motion, the 45th day was recalculated as February 27,
12 2015.

13 **APPEARANCES:** [REDACTED] Student's Mother ("**Mother**"), represented
14 herself and Student. Jennifer MacLennan, Esq., represented Osborn Elementary
15 School District ("District" or "Osborn").

16 Certified Court Reporter Marta M. Johnson, Griffin & Associates, recorded the
17 proceedings as the official record of the hearing.

18 **WITNESSES:**¹ Mother; Virginia Schuss, Ed.D., Osborn Director of Student
19 Services; Kimberly DeLongchamp, Osborn Special Education Teacher ("**Osborn
20 SPedT**"); Alicia Bolan, Children's Center for Neurodevelopmental Studies Special
21 Education Teacher ("**CCNS SPedT**"); Sara Bucknavich, Osborn Speech Language
22 Pathologist; and, Jennifer Bradley, Osborn Occupational Therapist.

23 **ADMINISTRATIVE LAW JUDGE:** Kay A. Abramsohn

24 Parent brings this due process action, on behalf of Student, seeking continued
25 educational placement at the private day school The Children's Center for
26 Neurodevelopmental Studies ("CCNS"). Parent opposes the proposed placement at
27 District in a self-contained classroom with nine students, one teacher, and one aide.
28 Parent also opposes the proposed one hour per day reduction in specialized services
29 regarding activities of daily living.

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

PROCEDURAL HISTORY

On September 8, 2014, the Tribunal received Petitioners' due process complaint notice ("Complaint"). Thereafter, this matter was noticed for a formal due process hearing regarding Petitioners' Complaint; the hearing was noticed to be convened on October 21, 2014, if necessary.²

On September 16, 2014, the Administrative Law Judge issued a pre-hearing order setting forth due process information, hearing procedures, pre-hearing dates for telephonic conference and disclosure, and representation information.

On September 16, 2014, Respondent filed its Response to the Complaint ("Response")

On September 22, 2014, Respondent filed its Motion to Dismiss ("Motion").

On October 6, 2014, Respondent filed a supplement to its Response ("Supplement").

On October 7, 2014, the Administrative Law Judge convened a telephonic pre-hearing conference at which time the issues raised in the Complainant were reviewed with the parties.

At that time, the following issues were identified as having been raised in Petitioners' Complaint:

1. Petitioners allege that Respondent violated state law by denying Parent's request for "copies of all meeting notes relating to [Student] dating from March 2010 to present ... known as the 'working file'." Petitioners allege that it is "illegal" to destroy a student's school record without first informing the parents.³

² The "45th day" is November 22, 2014; that date can be extended for good cause by request of either party.

³ Parent quoted from the final NOTE on a prior written notice form, which states: Special Education records are held for five years after a student exits the school district. Public notice is provided prior to the shredding of special education documents. Parent indicated that they were told Student's "working file" had been destroyed and alleged that this was in violation of state law.

1 2. Petitioners allege that the June 12, 2014 individualized education program
2 ("IEP") fails to provide FAPE because it removed one hour per day of a 1:1
3 aide for Student.⁴

4 2a. Petitioners allege that the June 12, 2014 IEP fails to provide FAPE
5 because it proposes to change Student's placement from CCNS to a District
6 placement.

7 3. Petitioners allege that the June 12, 2014 IEP fails to provide FAPE because
8 it proposes a District placement in a classroom with a ratio of nine students
9 to two professionals (one teacher and one aide).⁵

10 4. Petitioners allege that Respondent and Respondent's Speech Language
11 Pathologist changed Student's speech goals in violation of the "ASHA"
12 licensing requirements.⁶

13 On October 10, 2014, Parent filed her response to Motion.

14 By ORDER dated October 10, 2014, the Administrative Law Judge dismissed
15 Issue #1 and Issue #4, determining that Issues #2, #2a and #3 were allowed to proceed
16 to hearing.⁷

17 The law governing these proceedings is the Individuals with Disabilities
18 Education Act ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-
19 authorized and amended in 2004),⁸ and its implementing regulations, 34 Code of
20 Federal Regulations ("C.F.R.") Part 300, as well as the Arizona Special Education
21 statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and
22

23 ⁴ Parent indicated that this was an aide whose role was to assist and oversee Student in activities of daily
24 living. Parent alleged that such reduction meant that Student would be unsupervised for at least one
25 hour per day and that this would expose him "to many dangers."

26 ⁵ The June 12, 2014 IEP does not contain any reference to the total staffing levels within the Osborn self-
27 contained proposed placement.

28 ⁶ ASHA is the acronym for American Speech-Language-Hearing Association.

29 ⁷ Regarding Issue #1, the Administrative Law Judge ruled that it failed to state an IDEA claim and that
30 state laws were not reviewed under the IDEA process. Considering Parent's allegation in the most
favorable possible light, *i.e.*, that she intended to make the claim under the IDEA, the Administrative Law
Judge ruled that Parent had provided no support for her argument/position that the "meeting notes" she
sought were "educational records" as defined under the IDEA and FERPA. Regarding Issue #4, the
Administrative Law Judge ruled that it failed to state an IDEA claim and that claims regarding licensing
standards of specialists and professionals were more properly asserted to the appropriate licensing
authority.

1 implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through R7-2-
2 406.

3 Evidence at Hearing

4 The parties presented testimony and exhibits at a formal evidentiary closed
5 hearing held on October 21, 2014. The parties presented testimony from the witnesses
6 listed above and offered into evidence Osborn's Exhibits 1 through 27 and Petitioners'
7 Exhibit A. The court reporter's transcript ("Transcript") is the official record of the
8 hearing.⁹ The parties filed written closing arguments to the Tribunal.

9 By ORDER dated January 16, 2015, the Tribunal denied Parent's November 20,
10 2014 requests for subpoenas for the purpose of submitting additional documents into
11 the hearing record regarding the actual payment dates of tuition by Osborn to CCNS,
12 determining that Parent's recent concerns with regard to the tuition payments was not
13 an issue raised in the Complaint and, therefore, was not an issue for determination in
14 this matter.

15 The hearing record concluded with the extended 45th day as of February 27,
16 2015.

17 Introduction

18 The Administrative Law Judge has considered the entire record, including the
19 testimony and Exhibits,¹⁰ and now makes the following Findings of Fact, Conclusions of
20 Law, and Order finding that Parent has failed to demonstrate that Osborn failed to offer
21 Student FAPE with the proposed educational placement and services that are set forth
22 in the June 12, 2014 IEP. Petitioners' remedy request is, therefore, denied.

23 FINDINGS OF FACT

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26 ⁸ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of
2004," IDEA 2004 became effective on July 1, 2005.

27 ⁹ Pursuant to Parent's request for a written record of the hearing, the hearing was recorded and
28 transcribed by a court reporter at no cost to the parent. See 34 C.F.R. § 300.512(a)(4). The court
reporter's transcript of the hearing session has been added to the record. By state law, the Tribunal also
29 created an audio record of the due process hearing, which is available to the parties at no cost.

30 ¹⁰ The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned
in this Decision. The Administrative Law Judge has also considered the testimony of every witness,
even if the witness is not specifically mentioned in this Decision.

1 1. Student is receiving special education services under the primary
2 eligibility category of Autism and a secondary eligibility category of speech/language
3 impairment. Enrolled at Osborn, Student has been attending CCNS since sometime in
4 the Fall of 2010.¹¹

5 2. Osborn convened Student's three-year reevaluation meeting on May 9,
6 2014. After discussing Student's previous evaluations, placements, and most recent 3rd
7 quarter classroom and functional performance indicators, the multidisciplinary
8 evaluation team ("MET") determined that Student remained eligible for special
9 education services and was in need of specially designed instruction and related
10 services in order to benefit from an educational program.¹²

11 3. On May 14, 2014, Osborn issued a prior written notice ("PWN") regarding,
12 generally, its discussions at the MET meeting with Mother regarding Student's least
13 restrictive environment ("LRE"), his current level of functioning, and his current
14 placement. The PWN indicates that the parties would meet again to revise Student's
15 IEP and discuss LRE. See Exhibit 8.

16 4. On June 12, 2014, Osborn convened Student's IEP team to review and
17 revise Student's IEP for the annual period of June 13, 2014, to June 12, 2015. The IEP
18 team determined:

19 [Student] needs a highly structured setting with familiar adults providing
20 supervision for his safety. [Student] is a runner and needs to have staff
21 supervising him at all times or he will tend to wander off.

22 The IEP distinguishes "running" from "wandering" as follows:

23 [R]unning is when there is an open environment and he has the opportunity to
24 run from staff to an unsafe place, such as roads or parking lot. "Wandering"
25 would be an example of getting distracted when transitioning from one point in
26 the classroom to another point with staff and students in the same environment
27 without the same level of safety of concern as running.¹³

28 ¹¹ Mother's post-hearing Closing Argument.

29 ¹² See Exhibit 9.

30 ¹³ At hearing, Mother testified that Student was "not so much a runner as he ... just slips away and he goes [a]nd he doesn't tell anybody ...". Transcript, page 216. Mother stated that Student cannot run because he has flat feet, and he is a wanderer. Transcript, page 217. Mother further indicated that Student has no sense of danger and that he has wandered out of hotel rooms in the middle of the night leaving the door open. Transcript, page 217. Mother also indicated that, the previous Saturday, Student

1 The IEP team specified that Student "had no incidences of running from staff" during
2 this IEP cycle. See Exhibit 4, page DIS008. The IEP specified that Student's
3 "[b]ehavior does significantly and adversely impact the progress in the general
4 curriculum." See Exhibit 4, page DIS009.

5 5. The June 2014 IEP sets forth the classroom strategies used to assist
6 Student; these strategies are geared toward the classroom setting and structure,
7 motivating, prompting, redirecting, and reinforcing positive behaviors. See Exhibit 4,
8 page DIS009. Regarding supervision and ratio, the IEP states "[a]dult supervision at all
9 times – A CCNS staff member is assigned to [Student] at all times to ensure his safety
10 due to a history of running from staff. This staff member will remain within 2 feet of
11 [Student] at all times."

12 6. Student's September 2013 IEP indicates that Student "is in need of a 1:1
13 assistant to ensure his safety when transitioning around campus and within a
14 designated area." See Exhibit 13, page DIS058. Regarding transportation, the
15 September 2013 IEP specifies that one of Student's special needs in transportation is
16 "transfer from one authorized adult to another...". See Exhibit 13, page DIS060.

17 7. Regarding specialized instruction in activities of daily living, Student's
18 June 2014 IEP indicates that Student is to receive 90 minutes per day of specialized
19 instruction. See Exhibit 4, page DIS020. The IEP service level chart is footnoted
20 regarding activities of daily living and personal care, noting the various types of such
21 activities, and indicating Student would have access to a "health aide" for those listed
22 activities and does not restate any particular number of minutes. See Exhibit 4, page
23 DIS022.

24 8. Student's September 2013 IEP services page indicated Student's service
25 level for specially designed instruction in activities of daily living was at 150 minutes
26 per day. See Exhibit 13, page DIS058. However, the IEP service level chart is
27 footnoted regarding activities of daily living and personal care, noting the various types
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30 had wandered away from the home, being unwatched "about 15 seconds," and was found in the car.
Transcript, page 227.

1 of activities, indicating Student would have access to a health aide "between 90 and
2 120 minutes per day."¹⁴ See Exhibit 13, page DIS060.

3 9. Regarding LRE, Student's June 12, 2014 IEP indicates that Student's
4 most appropriate environment would be a self-contained classroom in Osborn. See
5 Exhibit 4, page DIS021. Both parents were in attendance at the June 12, 2014 IEP
6 meeting, and the IEP indicates that Parents disagreed with the proposed educational
7 placement "based on safety concerns and educational needs." See Exhibit 4, page
8 DIS021.

9 10. Student's September 2013 IEP indicated Student's most appropriate
10 environment was the private day school setting "due to his need for an individualized
11 curriculum, intensive therapies embedded within the school day, and the need for high
12 staff to student ratio. It is also important that [Student] be in a setting where his safety is
13 a factor as he is a runner." See Exhibit 13, page DIS059.

14 11. With regard to his educational setting, the September 2013 IEP further
15 contained "exit criteria" for Student. The exit criteria stated "[Student's] program needs
16 will be reviewed when [Student] is able to demonstrate no aggressive behaviors 100%
17 of the school day for 16 consecutive weeks." See Exhibit 13, page DIS059.

18 12. Osborn issued its PWN regarding the June 12, 2014 meeting identifying
19 the IEP review of all areas and explaining that the IEP revision was based on
20 "educational needs" identified by the IEP team. See Exhibit 3.

21 13. Osborn issued a PWN on June 16, 2014 proposing to implement the IEP
22 developed for Student on June 12, 2014, "including changing the level of least
23 restrictive environment ('LRE') by having [Student] return to the District from a private
24 day placement ... [to] placement in a self contained classroom with access to typical
25 peers." See Exhibit 2. Osborn indicated that the implementation was proposed to
26 begin on August 6, 2014, in the self-contained classroom at [REDACTED] Elementary.

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30 ¹⁴ This discrepancy between the charted 150 minutes and the stated 90 to 120 minutes was not
explained at hearing.

1 14. Prior to the May 9, 2014 MET meeting, Dr. Shuss observed Student at
2 CCNS on April 3, 2014.¹⁵ Dr. Shuss observed Student participating, with
3 encouragement, in the gym in sensory activities, and she observed that he was the
4 most docile of the children in that activity. Dr. Shuss observed Student in the next
5 activity of a music session, observing that Student sat calmly in that room with the other
6 students while awaiting a music teacher and during a music session, in which, with
7 encouragement, she observed Student participate. Dr. Shuss observed Student in his
8 CCNS classroom where, at a table with another student and one paraprofessional,
9 Student was calm and fine. Dr. Shuss indicated that the classroom was noisy. Dr.
10 Shuss testified that, during the observation, Student "made no attempt to get up and
11 leave the room or wander" and she observed Student responding to redirection. Dr.
12 Shuss opined that, of the students she saw with Student at CCNS, Student was the
13 highest functioning behaviorally.¹⁶

14 15. Prior to the May 9, 2014 MET meeting, **Osborn SPEDT** had observed
15 Student at CCNS.¹⁷ She observed Student participating in the sensory activities where
16 there were several "stations" for participation one student at a time. She observed
17 Student in the music session, observing that, with some assistance, Student was able
18 to participate. She observed Student reading for his teacher, **CCNS SPEDT**, who later
19 reported to **Osborn SPEDT** that Student had been independently reading basic words.
20 She indicated that the classroom was noisy.¹⁸

21 16. **CCNS SPEDT** has worked with Student for two years, and she described
22 Student as "one of my higher functioning students."¹⁹ She reported that, "when he
23 came to me," Student had a 2:1 ratio for an aide (two students to one adult); she was
24 not certain whether the year before that it had been a 2:1 or a 1:1 ratio.²⁰ She reported
25 that Student "was able to function, transition, participate in activities, keep up with the
26 expectation and not be left behind ... or without the proper needs met for activities,
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28 ¹⁵ Transcript, page 51.

29 ¹⁶ Transcript, pages 70-76.

30 ¹⁷ Transcript, page 121.

¹⁸ Transcript, pages 121-123.

¹⁹ Transcript, page 155.

1 transitions, self care, whatever ... the classroom was doing at that time he was able to
2 keep up with.”²¹

3 17. **CCNS SPedT** testified that the overall goal for Student while at CCNS
4 was to “create ... independence in order for [Student] to integrate back into a District
5 school to have exposure to his typical peers.”²² She opined that Student was “ready” to
6 integrate back into a District school.²³ The factors **CCNS SPedT** considered in this
7 determination were (a) he had met the exit criteria; (b) he had met goals; (c) the District
8 could provide the services set forth in the IEP; and, (d) the behaviors that had caused
9 the CCNS placement were not still so severe to prevent him from going back to a
10 District setting.²⁴ With the exception of one incidence of physical contact with a staff
11 member at the beginning of the school year, Student had met the exit criteria not just
12 for 16 weeks but for the entire remaining school year.²⁵ Over two academic years, she
13 had seen his previously-reported aggressive behaviors (banging his head, pulling hair,
14 “bopping” others on the head) stop and that, other than the one incident, there had
15 been no aggression contact to peers or staff.²⁶ **CCNS SPedT** also reported that she
16 was well aware of Student’s history of being a “runner” but that in the two years she
17 had been his teacher, Student had not had an incident of running.²⁷

18 18. Regarding student and staffing levels at the Osborn self-contained
19 proposed placement, the hearing record demonstrated that there are currently eight
20 students who are supervised by the one teacher, **Osborn SPedT**, and two instructional
21 aides.²⁸ If transitioned to the proposed placement, Student would make the ninth
22 student in the self-contained classroom. When another student comes into this self-
23 contained classroom, District will place one more instructional aide in the classroom,
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26 ²⁰ Transcript, pages 166-167.

27 ²¹ Transcript, page 167.

28 ²² Transcript, page 155.

29 ²³ Transcript, page 155.

30 ²⁴ Transcript, pages 155-156.

²⁵ Transcript, page 156.

²⁶ Transcript, page 158.

²⁷ Transcript, page 164.

²⁸ Transcript, page 106; *see also* Transcript, page 24.

1 creating nearly a 2 to 1 ratio of adults to students (four adults to nine children).²⁹ The
2 June 12, 2014 IEP identified Student's "need of a 2:1 assistant to ensure his safety
3 when transitioning around campus and within a designated area."

4 19. In her Closing, Parent argued that Student has flourished at CCNS, that
5 due to his Autism he needs all the help he can get, and that he should be allowed to
6 stay at CCNS. Parent argued that Student had not met the exit criteria, relating
7 unsupported testimony regarding Student shoving others.³⁰ Parent argued that Student
8 needed a 1:1 staff to student ratio at all times for his safety.³¹ In her Closing, Parent
9 argued that pursuant to his IEP, Student was legally entitled to a 1:1 ratio.³² In her
10 Closing, Parent argued that neither Dr. Shuss nor **Osborn SPEdT** were able to provide
11 details during the hearing about a "buddy" program that Osborn may be using,
12 indicating that she had been told this would be beneficial for Student in the proposed
13 placement. Overall, Parent argued that Student is an escape risk and must have a 1:1
14 ratio, as he had at CCNS.

15 20. Parent presented no expert or supportive testimony regarding Student's
16 behaviors (aggression, wandering, or running/escape) and either the impact of such on
17 Student's instructional needs or disputing that Student met the September 2013 IEP
18 exit criteria. Parent simply argued that Student needs a 1:1 ratio at all times for his
19 safety and that the June 12, 2014 IEP not providing such is a failure by Osborn to offer
20 or provide FAPE.

21 21. Parent made no allegation regarding inappropriateness of the specialized
22 academic instruction services and goals set forth in the June 12, 2014 IEP. Parent
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24 ²⁹ Transcript, page 48.

25 ³⁰ At hearing, Parent related being told by the aides of a recent instance, or an August 2014 instance, of
26 Student shoving staff or others in an after-school setting in his efforts to obtain more treats. Transcript
(various statements), pages 226-233.

27 ³¹ At hearing, Parent began to relate historical information regarding both Student and his older brother
28 during prior Osborn attendance (which would have been prior to the Fall of 2010); however, the
Administrative Law Judge directed Parent to restrict her testimony to the relevant issues. Transcript,
29 pages 208-209. Parent indicated that Student had gotten away from staff the last time he was in an
Osborn school; however, the Administrative Law Judge again directed Parent that such historical
information was not relevant to the issues in the Complaint. Transcript, pages 220-221.

30 ³² Because Petitioners' Complainant expresses disagreement with the June 12, 2014 IPE, it must be
presumed that Parent was referring here to Student's September 2013 IEP.

made no allegation regarding inappropriateness of the supporting or related services set forth the June 12, 2014 IEP.

22. Parent alleged that the failure to continue to offer or provide 150 minutes per day of specialized instruction (as set forth in the September 2013 IEP) in activities of daily living was a failure to provide FAPE. Parent presented no testimony supporting her claim that Student continued to need 150 minutes per day of specialized instruction in activities of daily living and that the June 12, 2014 "reduction" to 90 minutes per day was a failure by Osborn to offer or provide FAPE. Regarding such services, the hearing record was inconsistent on whether the September 2013 IEP provided 150 minutes per day or only 90 to 120 minutes per day.

CONCLUSIONS OF LAW

APPLICABLE LAW

Free and Appropriate Public Education - FAPE

1. Through the IDEA, Congress has sought to ensure that all children with disabilities are offered a free appropriate public education that meets their individual needs.³³ These needs include academic, social, health, emotional, communicative, physical, and vocational needs.³⁴ To do this, school districts must identify and evaluate all children within their geographical boundaries who may be in need of special education and services. The IDEA sets forth requirements for the identification, assessment and placement of students who need special education, and seeks to ensure that they receive a free appropriate public education. A FAPE consists of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."³⁵ The IDEA mandates that school districts provide a "basic floor of opportunity," nothing more.³⁶ It does not require that each child's potential be maximized.³⁷ A child receives a FAPE if a program of instruction "(1) addresses his unique needs, (2) provides adequate support services so he can take

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

³⁴ *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)).

³⁵ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

³⁶ *Id.*, 458 U.S. at 200.

³⁷ *Id.* at 198.

1 advantage of the educational opportunities and (3) is in accord with an individualized
2 educational program."³⁸

3 The Individualized Education Program - 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 IEP that, generally,
6 sets forth the child's current levels of educational performance and sets annual goals
7 that the IEP team believes will enable the child to make progress in the general
8 education curriculum.³⁹ The IEP tells how the child will be educated, especially with
9 regard to the child's needs that result from the child's disability, and what services will
10 be provided to aid the child. The child's parents have a right to participate in the
11 formulation of an IEP.⁴⁰ The IEP team must consider the strengths of the child,
12 concerns of the parents, evaluation results, and the academic, developmental, and
13 functional needs of the child.⁴¹ Annually, the IEP team must review the student's IEP to
14 determine whether the annual goals are being achieved and to revise the IEP as
15 appropriate to address the lack of progress toward the annual goals, the results of any
16 re-evaluation, information about the child provided by parents, the child's anticipated
17 needs and any other relevant matters.⁴² To foster full parent participation, in addition to
18 being a required member of the team making educational decisions about the child,
19 school districts are required to give parents written notice when proposing any changes
20 to the IEP,⁴³ and are required to give parents, at least once a year, a copy of the
21 "procedural safeguards," informing them of their rights as parents of a child with a
22 disability.⁴⁴

23 The IEP Team

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26 ³⁸ *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 ³⁹ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

28 ⁴⁰ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(1).

29 ⁴¹ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).

30 ⁴² 20 U.S.C. § 1414(d)(4); 34 C.F.R. § 300.324(b)(1).

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

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

20 U.S.C. § 1415(d)(B).

3. The IDEA provides that the public agency, the school, must “ensure” that the IEP team includes certain persons, typically those with specific and/or particular knowledge of the student and the types of resources and services available for a child with that student’s disabilities.⁴⁵ Additionally, a parent has the discretion to include other persons “who have knowledge or special expertise regarding the child, including related services personnel as appropriate.”⁴⁶ The determination of knowledge and expertise is made by the party who invited the other person to be a member of the IEP team.⁴⁷ When conducting MET and IEP meetings, and other administrative matters regarding the IDEA procedural safeguards, the parties “may agree to use alternative means of meeting participation, such as video conferences and conference calls.”⁴⁸ Finally, an IEP meeting may take place in the absence of parents if the public agency/school is unable to convince the parents to attend; the public agency/school must keep a record of its efforts to arrange “a mutually agreed time and place” for the meeting.

Prior Written Notice- PWN

4. The IDEA process for making changes to an IEP, including identification, eligibility and changing educational placements, requires a school district to give parents written notice before taking the proposed action.⁴⁹ Designated as the Prior Written Notice (or PWN), that notice must contain certain information specified by the IDEA, such as an explanation of why that decision is being made, the documentation used to make the decision, and a reminder of parents' procedural rights. Of particular note is the requirement that the PWN contain "[a] description of other options that the IEP Team considered and the reasons why those options were rejected. . . ." ⁵⁰ Thus, the PWN is issued after an IEP team decision with regard to identification, eligibility or educational placement has been made, not before.

Burden of Proof

⁴⁵ 20 U.S.C. § 1414(d)(1)(B) - (D); 34 C.F.R. § 300.321(a).

⁴⁶ 20 U.S.C. § 1414(d)(1)(B)(vi); 34 C.F.R. § 300.321(a)(6).

⁴⁷ 34 C.F.R. § 300.321(c).

⁴⁸ 20 U.S.C. § 1414(f); 34 C.F.R. § 300.322(c); *see also* 34 C.F.R. § 300.328.

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

⁵⁰ 20 U.S.C. § 1415(c)(1)(E); 34 C.F.R. § 300.503(b)(6).

1 5. A parent who requests a due process hearing alleging non-compliance
2 with the IDEA, failure to provide FAPE, must bear the burden of proving that claim.⁵¹
3 The standard of proof is "preponderance of the evidence," meaning evidence showing
4 that a particular fact is "more probable than not."⁵² Therefore, in this case, Petitioners
5 bear the burden of proving by a preponderance of evidence that Osborn failed to offer
6 or provide Student FAPE under the June 12, 2014 IEP.

7 **DECISION**

8 6. A FAPE consists of "personalized instruction with sufficient support
9 services to permit the child to benefit educationally from that instruction."⁵³ A child with
10 a disability receives a FAPE if the educational program of instruction "(1) addresses his
11 unique needs, (2) provides adequate support services so he can take advantage of the
12 educational opportunities and (3) is in accord with an individualized educational
13 program."⁵⁴ Based on the hearing record in this case, Petitioners have failed to
14 demonstrate that the June 12, 2014 IEP developed by Osborn failed to offer or failed to
15 provide a FAPE. Based on the hearing record in this case, Petitioners have failed to
16 demonstrate that Student must have a 1:1 ratio of staff as support services necessary
17 for access to educational benefit. In contrast, at hearing, Osborn presented credible
18 evidence that demonstrated the proposed June 12, 2014 IEP addresses Student's
19 unique needs and also provides adequate support service such that Student will be
20 able to benefit from educational instruction. The hearing record further demonstrated
21 that the level of support services, a 2:1 ratio (two students to one paraprofessional),
22 was the level being provided at CCNS.⁵⁵ The hearing record demonstrated that
23 Student met the exit criteria set forth in the September 2013 IEP for the projected
24 consideration and review of his education program. The September 2013 IPE had an
25 annual period of 9-13-13 to 9-12-14; the summer before starting a new school year was

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27 ⁵¹ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

28 ⁵² *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
29 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-372 (1970)); see also *Culpepper v. State*, 187 Ariz. 431,
30 437, 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).

⁵³ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

⁵⁴ *Anaheim Union High Sch. Dist.*, 464 F.3d at 1033 (citing *Capistrano*, 59 F.3d at 893).

1 an appropriate time to make such review, given the available data at Student's three-
2 year reevaluation, at the May 2014 MET meeting.

3 7. Based on the foregoing, the Administrative Law Judge concludes that
4 Osborn offered Student a FAPE through the development of the June 12, 2014 IEP,
5 including the transition of Student from the private day school placement to the Osborn
6 self-contained program. The Administrative Law Judge concludes that the June 12,
7 2014 IEP was reasonably calculated to provide meaningful educational benefit to
8 Student, a child whose disabilities were such that he needs specially designed
9 instruction in order to access the education curriculum and to provide meaningful
10 benefit.⁵⁶

11 **ORDER**

12 Based on the findings and conclusions above,
13 IT IS ORDERED Petitioners' Complaint is dismissed.
14 ORDERED this 27th day of February, 2015.

15 **OFFICE OF ADMINISTRATIVE HEARINGS**

16
17 /s/ Kay A. Abramsohn
18 Administrative Law Judge
19

20 **RIGHT TO SEEK JUDICIAL REVIEW**

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

29 ⁵⁵ CCNS SPedT testimony.

30 ⁵⁶ *Aaron P. v. Dept. of Educ., State of Hawaii*, No. 10-00574, 2011 U.S. Dist. LEXIS 126450, at *50 (D. Haw. Oct. 31, 2011).

1 405(H)(8), any party may appeal the decision to a court of competent
2 jurisdiction within thirty-five (35) days of receipt of the decision.
3
4
5

6 Copy sent by electronic mail and regular mail
7 this 27th day of February, 2015 to:

8 
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By: Cruz Serrano