

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

█ a Student, by and through Parents

Petitioners,

v.

Pointe Educational Services,  
Respondent.

No. 15C-DP-027-ADE

ADMINISTRATIVE  
LAW JUDGE DECISION

**HEARING:** January 23, 2015, with the record held open until January 30, 2015.<sup>1</sup>

**APPEARANCES:** Petitioner Parents █ and █ (collectively "Parents") appeared and were represented by Hope N. Kirsch; Respondent Pointe Educational Services appeared through Superintendent Jody Johnson. Certified Court Reporter Amy E. Weaver was present and recorded the proceedings as the official record of the hearing.

**WITNESSES:**<sup>2</sup> Kristin M. Kelley-Lucas, Teacher; Suzanne Smailagic, Principal; Judith Zenna-Valgento, Director of Brightmont Academy; Kay Abram, Consultant; Stacey Lynch, Speech Therapist; Shannon Dawson, Reading Specialist; Parent D.G.; and Katie Sprouls, School Psychologist.

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

Parents brought this due process action, on behalf of Student, challenging the long-term suspension of Student by Respondent School initiated on December 10, 2014. The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as reauthorized and amended in 2004),<sup>3</sup> and its implementing regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well as the Arizona Special Education statutes, Arizona Revised Statutes ("A.R.S.") §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through R7-2-406.

Procedural History

<sup>1</sup> As explained *infra*, the parties agreed to extend the timeline with the 45<sup>th</sup> day being March 2, 2015.

<sup>2</sup> 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.

1 Petitioners filed the Expedited Due Process Complaint in this matter on  
2 December 18, 2014.<sup>4</sup> The complaint alleged that Respondent School had knowledge  
3 that Student was a child with a disability because Student's teacher expressed specific  
4 concerns about a pattern of behavior demonstrated by Student and that, as a result,  
5 Student was entitled to the protections of the IDEA regarding the long-term suspension.  
6 Petitioners asserted that the failure to provide those protections resulted in the denial  
7 of a free appropriate public education ("FAPE") for Student. Petitioners sought a return  
8 to Respondent School or a private day school and compensatory education.

9 Evidence and Issues at Hearing

10 The issues for hearing were determined as follows:

- 11 1. Pursuant to 34 C.F.R. § 300.534, was Student entitled to procedural  
12 safeguards because Respondent School had knowledge that Student was a  
13 child with a disability before the behavior that precipitated the disciplinary  
14 action occurred.
- 15 2. If Student was entitled to procedural safeguards, did Respondent School's  
16 imposition of a long-term suspension of Student effective December 2, 2014,  
17 result in a denial of a FAPE for Student.
- 18 3. If Respondent School did not have knowledge that Student was a child with a  
19 disability before the behavior that precipitated the disciplinary action  
20 occurred, did Respondent School complete the requested evaluations in an  
21 expedited manner

22 The parties presented testimony and exhibits at a formal evidentiary hearing  
23 held on January 23, 2015. The parties presented testimony from the witnesses listed  
24 above<sup>5</sup> and offered into evidence Petitioners' Exhibits A through I and Respondent  
25 School's Exhibit 1.

26  
27  
28 <sup>3</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of  
2004," IDEA 2004 became effective on July 1, 2005.

29 <sup>4</sup> The Due Process Complaint included non-expedited claims that were bifurcated because of the  
different timelines governing each type of claim.

30 <sup>5</sup> Transcripts of the testimony have been added to the record. The transcripts are the official record of  
the hearing.



1 The Administrative Law Judge has considered the entire record, including the  
2 testimony and Exhibits,<sup>6</sup> and now makes the following Findings of Fact, Conclusions of  
3 Law, and Order.

#### 4 FINDINGS OF FACT

5 1. On [REDACTED], Student turned five years old. On August 1, 2014,  
6 Student entered Kindergarten at Pinnacle Pointe Academy, a charter school within the  
7 Respondent School's system. Student attended a half-day preschool program from  
8 August 2013 through December 2013 and did not attend a kindergarten preparation  
9 program offered by Respondent School.

10 2. In Teacher's classroom, Teacher had a visual discipline method in which  
11 each student began the day on "green." With negative behavior, students' color can  
12 change to "yellow" and to "red," which results in different discipline.

13 3. During the first week of school, Student received the following colors and  
14 Teacher made the following notes:

15 Monday – Student was on "green." No notes were recorded.

16 Tuesday – Student was on "yellow." Student was "very chatty while  
17 teacher is talk[ing]" and was "not following directions."

18 Wednesday – Student was on "green." Student was "very emotional" and  
19 "cried when he got the wrong answer."

20 Thursday – Student was on "green." Student had an "emotional day."

21 Friday – Student was on "green." Student "had an accident at school  
22 during recess."

23 4. On August 5, 2014, Teacher emailed Parent [REDACTED] as follows:

24 I would like to start by saying that [Student] is an extremely sweet child  
25 and I love having him in class. However; [sic] he has become quite chatty  
26 over the last few days and does not seem to understand the severity of  
27 talking over the teacher. He will continue to chat with his neighbors once  
28 he is asked to stop what he is doing and direct his attention to the  
29 teacher. Unfortunately, he seems to be struggling in class, not only  
30 academically, but emotionally, as well. He got extremely frustrated today  
doing our letter detective page and was crying and yelling that he couldn't  
do it and didn't know how to find the letter or how to write his name. This  
concerns me, especially with the academically rigorous program that we

<sup>6</sup> 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 have at Pinnacle Pointe Academy and the fact that it will very rapidly get  
2 much more difficult. He has not successfully written his name for us and  
3 will start to cry when he is asked to write his name on his paper. We will  
4 continue to work with [Student], and I do realize that we are only on day 3  
of school, but I wanted to make sure that I made contact early on, that  
was if we continue to see these issues, it's not completely out of the blue.

5 5. On August 7, 2014, Teacher emailed Parent [REDACTED] as follows:

6 [Student] was very emotional this morning. He was asked to complete his  
7 work and he started crying. The classwork that they were working on was  
8 practicing writing the letter /a/ and the letter /c/. He needed to write each  
9 letter 3 times and he got very upset. He was extremely upset while writing  
10 his letters and did not complete the task. I will be sending this home for  
11 him to work on tonight. He will be bringing home some flashcards, it  
12 might be beneficial to work with him on those to strengthen letter  
13 recognition and I will be sending home some tracing sheets, as well.  
14 Please work with him at home on these skills. The thing I would stress  
15 most at home, at this point, would be writing his name. I will be working  
16 with him here on writing his name, and you can work with him at home, as  
well. He did not respond to one on one work today with [the instructional  
assistant]. He refused to do his work with her. If you have any insights to  
what works for him at home, we would love to try something new in the  
classroom, as well.

17 6. On August 8, 2014, Teacher completed a weekly progress report that was  
18 sent to Parents. Teacher identified that Student could improve his performance in the  
19 following areas by working at home: Pencil Grip, Follow Directions, Letter Recognition,  
20 Letter/Number Writing, Quiet while teacher is talking, Handwriting, Stay on Task,  
21 Follows the Rules, Number Recognition, Kindergarten Coloring, Working  
22 Independently. Teacher also noted that "[Student] is unable to write his letter/numbers.  
23 Please work on these skills at home. He has had a very emotional 1<sup>st</sup> week."

24 7. On August 13, 2014, Student was on "yellow." Teacher noted "Please  
25 practice manners at lunch and stomping on other students' feet."

26 8. On August 14, 2014, Student was on "red." Teacher noted "Constant  
27 talking – not working on classwork – Please discuss. Moved to Red for scribbling all  
28 over his desk & chair w/ crayon."  
29  
30

1           9.     On August 14, 2014, Teacher referred Student to the Child Study Team  
2 ("CST") for "poor grades in all subjects and his inability to focus in class, and poor  
3 handwriting." Teacher's informal classroom observation noted:

4                 [Student] is unable to write his name or any other letters/numbers by  
5 memory or with looking at an example. He needs constant redirection to  
6 hold his pencil correctly and he has low letter recognition and sounds, low  
7 number recognition.

8           10.    On August 15, 2014, Teacher completed a weekly progress report that  
9 was sent to Parents. Teacher identified that Student could improve his performance in  
10 the following areas by working at home: Pencil Grip, Follow Directions, Treats others  
11 with respect, Letter Recognition & Sounds, Letter/Number Writing, Quiet while teacher  
12 is talking (very chatty and making noises during learning time), Handwriting (Name,  
13 letters A-Z, and Numbers 1-20), Stay on Task, Follows the Rules, Number Recognition,  
14 Kindergarten Coloring, Working Independently (Needs lots of one-on-one time to  
15 complete work).

16           11.    On August 22, 2014, Teacher emailed Parent [REDACTED] that Student "is really  
17 having a hard time adjusting to Kindergarten." Teacher noted that "I am worried with  
18 how academically rigorous our program is, and I don't want him to fall behind."

19           12.    On August 22, 2014, Teacher completed a weekly progress report that  
20 was sent to Parents. Teacher identified that Student could improve his performance in  
21 the following areas by working at home: Pencil Grip, Letter Recognition & Sounds (A-  
22 Z), Letter/Number Writing, Handwriting (Name, Letters A-Z, Numbers 1-20), Stay on  
23 Task, Number Recognition, Kindergarten Coloring, Working Independently. Teacher  
24 also noted that Student was "very emotional."

25           13.    On August 25, 2014, Student was on "red." Teacher noted that Student  
26 was "very defiant, not sitting out in time out. Had to be told 5x. Had a[n] emotional  
27 day."

28           14.    On August 26, 2014, a CST meeting was held, which was attended by  
29 Principal Smailagic, Teacher, Parents, and Ms. Laspe, a Lead Teacher. Student was  
30 also present during parts of the meeting. At the meeting, the discussion addressed



1 Student's problems regarding a lack of focus, not sitting, needing direction and  
2 redirection, and being overactive, distractible, and unable to write his name. As a  
3 result of the discussion, several interventions were to be put into place including peer  
4 tutoring in class, individual behavior/discipline plan, and after school tutoring.

5 15. On August 27, 2014, Student was on "yellow." Teacher noted that  
6 Student was "playing during story time."

7 16. On September 2, 2014, Student was on "green." Teacher noted that  
8 Student was "very emotional staying for tutoring."

9 17. On September 3, 2014, Student was on "red." Teacher noted that  
10 "Destruction of school property. Drawing all over his chair with marker."

11 18. On or about September 14, 2014, Teacher completed a 45-Day  
12 Screening Report. On the report, Teacher marked the following area of concerns:

13 SOCIAL OR BEHAVIORAL

- 14 • Displays internalizing behaviors (fears, phobias, depression,  
15 withdrawn)
- 16 • Has difficulty with unstructured environments or transitions  
17 between activities
- 18 • Inappropriate types of behavior or feelings under normal  
19 circumstances

20 MOTOR

- 21 • Has a short attention span
- 22 • Problems with fine motor development (reaching, grasping,  
23 manipulation of objects)

24 COGNITIVE OR ACADEMIC

- 25 • Learns very slowly compared to peers
- 26 • Attention problems (short attention span, focused on less relevant  
27 stimuli)
- 28 • Below grade level in reading: 51%
- 29 • Below grade level in writing: 51%
- 30 • Below grade level in math: 56%
- Has difficulty acquiring, retaining, recalling, or manipulating  
information

ADAPTIVE DEVELOPMENT

- Poor self care skills related to personal hygiene, dress, maintaining  
personal belongings
- Poor ability to understand directions, communicate needs, and  
express ideas

- Lack of school coping behaviors related to attention to learning tasks, organization skills, questioning behavior, following directions, and monitoring time use

Principal Smailagic marked that the issues had been noted, that Parents had been notified within 10 school days if concerns were noted, and that the CST took place on August 26, 2014.

19. The notice sent to Parents indicated that concerns about your child were noted on the school's screening checklist, that the teacher is concerned for the following reasons: Social/Behavioral, Cognitive/Academically, Adaptive Development. It was also noted that the CST meeting took place on August 26, 2014.

20. On September 15, 2014, Teacher emailed Parent [REDACTED] and asked that she sign the Behavior Agreement and return as soon as possible. Teacher indicated this was the third attempt to have Parent [REDACTED] sign the form so Teacher could implement the behavior plan discussed at the CST meeting on August 26, 2014.

21. On September 15, 2014, Parent [REDACTED] replied via email that she had not noticed a signature was required and she would sign it that evening. Parent [REDACTED] also expressed a concern that if Student would be "taking half of the test," he may fall further behind.

22. On September 16, 2014, Teacher responded via email that Student would have less to study and focus on, but that she would give Student the entire test if Parent [REDACTED] disagreed. Teacher acknowledged receiving the signed form to implement the Behavior Plan.

23. According to the terms of the Behavior Agreement, Student was to work to improve the following:

- Be neater in my work
- Finish my work
- Turn my work in on time
- Follow directions
- Stay on task
- Be ready to begin class
- Use better self-control
- React appropriately under normal circumstances – no crying when spoken to.



1           24.    On September 16, 2014, Student was on "green." Teacher noted that  
2 Student had trouble in the following areas that day: Following procedures, Listening to  
3 directions, and Supplies/trash on floor. The note also indicated that Student would  
4 work on following first time directions the following day.

5           25.    On September 18, 2014, Student was on "red." Teacher noted that  
6 Student was "threatening the teacher for having him sit out for talking during class."  
7 Teacher also noted that Student had trouble in the following areas that day: Listening  
8 to directions, Self control, Respectful/kind words, Supplies/trash on floor. The note  
9 also indicated that Student would work on listening and following directions the  
10 following day.

11           26.    On September 18, 2014, Teacher emailed Parent [REDACTED] as follows:

12                I just wanted to let you know that we have noticed lately that there  
13 has been a strong urine smell coming from [Student]. I have spoken with  
14 him about if he maybe had an accident and every time, he said he didn't.  
15 His pants aren't visibly wet, I'm not sure if he had an accident maybe in  
16 the night and forgot to change. It definitely is stronger after recess with  
17 getting hot and sweaty, I just wanted to make sure you were aware.

18                [Student] was on red today because he threatened [the  
19 instructional assistant] after she had him missing 5 minutes of recess for  
20 talking during class. A few minutes before the bell rang for recess to be  
21 over, [Student] came up to [the instructional assistant] and told her, "I'm  
22 gonna send my mom to school to beat you up!" At that point, she told him  
23 to sit out the rest of recess (which was about 2 minutes) because it is  
24 unacceptable to talk to a teacher that way. After that, he had what can  
25 only be described as a meltdown and wouldn't get up or get in line to  
26 come back to class. I'm sure you know that I would assume this is an  
27 empty threat, however, it is a threat, nonetheless. In the future, this type  
28 of behavior will be treated with a suspension.

29           27.    On September 19, 2014, Student was on "red." Teacher noted that  
30 Student was "not listening or following directions."

          28.    On September 22, 2014, Student was on "red." Teacher noted that  
Student "was reminded about playground safety by the on duty teacher – after the 3<sup>rd</sup>  
time disobeying – she told him he needed to sit out. He fell to the floor crying and  
screaming for his sisters." Teacher also noted that Student had trouble in the following  
areas that day: Following procedures, Listening to directions, and Self control. The



1 note also indicated that the next day, Student would work on listening to the teacher the  
2 first time and would not throw a fit.

3 29. On September 23, 2014, Student was on "green." Teacher noted that  
4 Student had trouble in the area of self control that day. The note also indicated that the  
5 next day, Student would work on working quietly and independently.

6 30. On September 24, 2014, Teacher noted that Student had trouble in the  
7 areas of following procedures and listening to directions. The note also indicated that  
8 Student would work on following first time directions.

9 31. On September 25, 2014, Parent [REDACTED] emailed Teacher about Student's  
10 accident the day before as follows:

11 He has never had accidents like this at the pre school or his daycare[.] I  
12 don't know what's going on. I know that he says he is scared of you and  
13 doesn't want to ask you. I have been trying to explain to him that all kids  
14 have to go to the bathroom at different times and you would understand if  
15 he raised his hand and asked to go. I think that's part of the issue but not  
16 sure how else to explain it to him. I don't know if we can add to that he  
17 needs to go to the restroom Mid am and mid afternoon?  
18 He doesn't have accidents at home[.] [N]ot during soccer[.] [H]e knows  
19 when he has to go.

20 32. On September 25, 2014, Teacher reported that Student's grade dropped  
21 below a B in one or more subjects.

22 33. On October 20, 2014, it was noted that Student was not following  
23 directions, was distracted, and could not tell the teacher what he was supposed to do  
24 with his paper when he was at writing center.

25 34. On October 29, 2014, Student was on "green." Teacher noted that  
26 Student was "very chatty."

27 35. On October 29, 2014, the CST met again. The team reported that the  
28 following interventions had been put into place: one-on one work with an aide;  
29 preferential seating; shortened classwork; tracing work; tutoring; individual behavior  
30 plan; pull-out with reading specialist. Teacher reported Student had improved  
classroom behavior, was more cooperative, and was not crying in class. Ms. Dawson,  
the Reading Specialist, reported academic improvement. It was noted that Student was

1 no longer on an individual discipline plan in the classroom. Teacher reported that  
2 handwriting was still a concern and that Student had difficulty with fine motor skills in  
3 general.

4 36. On October 30, 2014, Student was on "red." Teacher noted that Student  
5 was "very defiant in the café – chose to smash his food on the ground & not clean up."

6 37. For the week ending October 31, 2014, Teacher noted that Student  
7 needed improvement in neatness, accuracy, completing work on time, handwriting,  
8 coloring, letter sounds, and numbers.

9 38. On November 3, 2014, Student was given a one day in-school  
10 suspension to be served on November 4, 2014, for the conduct code violation of  
11 "Insubordination." "Insubordination" is defined in the Pointe Student Handbook as  
12 "Refusing to comply with school rules or requests of school personnel." Ms. Laspe  
13 reported to Ms. Smailagic that Student "had been told not to do something and then he  
14 refused." The documentation indicates that Student was suspended because he was  
15 "insubordinate to two faculty members."

16 39. On November 5, 2014, Student was given a one day out-of-school  
17 suspension to be served on November 6, 2014, for the conduct code violations of  
18 "Insubordination" and "Disorderly Conduct." "Disorderly Conduct" is defined in the  
19 Point Student Handbook as "Any behavior or action that is disruptive to school climate  
20 or the educational process, including recklessness and endangerment." Student "failed  
21 to comply with staff directions" and "yelled at staff and other students." On this day,  
22 Student was on "red." Teacher noted that Student was "very chatty" and was "plugging  
23 ears when told to do something." Ms. Smailagic also emailed Parent [REDACTED] as follows:

24 [Student] had a very difficult time during dismissal today. He was rolling  
25 around on the floor and yelling at staff members and other students. He  
26 then went outside of the dismissal room and tried to run out of the gate.  
27 When the staff member at the gate stopped him he attempted to push her  
28 away. He then went into his classroom and continued to roll around and  
29 yell at the students. We had to evacuate the room. When I asked him  
30 what was going on he said he was playing ninjago ([I] am sure that[']s not  
the correct spelling), I discussed playing ninjago at home and not at  
school and he yelled at me and began running around the classroom.



1 Fortunately Grandma arrived to pick up. She went into the room and had  
2 to carry him out.

3 [Student] has received a day of out of school suspension for his  
4 inappropriate behavior this afternoon. I sent paperwork home with him for  
5 you to review and sign. [Student] will be out of school suspended  
6 tomorrow and may return to campus on Friday 11/17/14. Grandma  
7 explained a bit of what is going on at home and a break may be just what  
8 [Student] needs.

9 40. On November 7, 2014, Student was given a two day out-of-school  
10 suspension to be served on November 10, 2014, and November 12, 2014, for the  
11 conduct code violations of "Disorderly Conduct," "Insubordination," and "Cumulative  
12 Violations." "Cumulative Violations" is defined in the Pointe Student Handbook as  
13 "Documented violation of school rules, which occurs frequently enough to demonstrate  
14 a lack of intent to follow school rules." The behaviors for which Student was disciplined  
15 this time were that he "refused to follow teacher directives, yelled at the teacher, and  
16 hid under desks causing the other students to be evacuated from the classroom."

17 41. On November 14, 2014, Student was given a three day out-of-school  
18 suspension to be served on November 15, 2014, November 17, 2014, and November  
19 18, 2014, for the conduct code violations of "Disorderly Conduct," "Insubordination,"  
20 and "Cumulative Violations." The behaviors for which Student was disciplined this time  
21 were that he "was very hands-on in Early Bird. He refused to follow directions, threw a  
22 backpack at a staff member, and ran from teachers and staff who tried to talk to him."

23 42. On November 18, 2014, Teacher reported that Student's grade had  
24 dropped below a B in one or more subjects.

25 43. On November 20, 2014, Ms. Smailagic responded to an email from Parent  
26 [REDACTED] as follows:

27 It is unfortunate that you feel the school is "attacking" your son. I can  
28 assure you that is not the case. What's taking place is consistent  
29 discipline for student conduct code violations that include insubordination  
30 and disorderly conduct. [Student]'s academic success is not the issue in  
this situation; it is his behavior that is the issue. [Teacher's] comments  
during the CST meeting were in reference to his behaviors, at this point  
there are no other teacher tricks so to speak that are left to use. An  
individualized behavior plan was put into place, meetings with parents

1 have taken place, discipline has been put into place and yet the  
2 inappropriate behaviors continue.

3 . . . .

4 In regards to your statement concerning a "hands off policy" I have told  
5 you in a phone conversation that quick hugs between siblings are fine,  
6 however, when [Student] holds onto his sister and won't let go, causing  
7 her to call out for teacher assistance it has gone to[o] far. What then  
8 ensues is a teacher asking [Student] to let his sister go and his refusal. . .  
9 . [Student] was not suspended for giving his sister a hug as you[r] email  
10 states. He was suspended for not letting his sister go, refusing to follow  
11 staff directions, throwing a backpack at a staff member, and running away  
12 from staff.

13 . . . .

14 Your email states that you would have liked me to tell you that we are not  
15 the right fit for [Student], however, you as his parent are the only one who  
16 can make that determination. I can suggest that looking for a school that  
17 has different behavior expectations may be in [Student]'s best interest,  
18 but you as his parent are responsible for making those types of decisions.

19 . . . .

20 Finally, if [Student]'s inappropriate behaviors continue the next step is  
21 that [Student] will be recommended for long-term suspension at which  
22 point the Disciplinary Committee for Pointe Schools will determine the  
23 duration of the suspension. While we certainly do not want it to come to  
24 this, [Student]'s behaviors cannot continue to interrupt the educational  
25 environment.

26 44. On December 2, 2014, Student was given a seven day out-of-school  
27 suspension to be served from December 2, 2014, through December 10, 2014, pending  
28 an appearance before the Disciplinary Committee on December 10, 2014. The conduct  
29 code violations giving rise to this suspension were "Insubordination" and "Cumulative  
30 Violations." The behaviors for which Student was disciplined this time were that he  
"failed to comply with staff direction."

45. On December 10, 2014, the Disciplinary Committee decided that Student  
should be suspended for the remainder of the 2014-2015 school year.

46. On December 10, 2014, Parent [REDACTED] requested an evaluation for special  
education.

47. On December 12, 2014, Parent [REDACTED] appealed the long-term suspension  
in accordance with Respondent School's procedures.



48. On December 18, 2014, Parent [REDACTED] was sent a Developmental History form to complete. Parent [REDACTED] completed the form and returned it via email. In the interim, the person to whom she emailed the form left Respondent School and remaining staff were unable to access the email account for a period of time.

49. On January 2, 2015, Respondent School contacted Parent [REDACTED] to schedule the evaluation. Due to scheduling conflicts and Parents' need for two weeks' notice, the evaluation did not occur until later.

### Testimony at Hearing

50. Teacher testified that the behaviors Student exhibited at the beginning of the school year were consistent with behaviors she had seen in other kindergarteners during her years of teaching. Teacher stated that she had been informed Parents were going through a “nasty divorce” and she believed this was affecting Student’s behavior. Teacher understood that Student was very close to Parent [REDACTED] and observed Student sitting with him during the CST meeting. Teacher testified that the interventions put into place following the CST were effective and that Student’s negative behaviors had subsided.

51. Teacher also confirmed that she had observed differences in students who started kindergarten when they were younger, or closer to five years old, as opposed to older, or closer to six years old. Teacher stated that she also noted differences in students who attended the kindergarten readiness program offered by Respondent School and those who did not. Teacher testified she had referred approximately six students to the CST during the 2014-2015 school year.

52. Ms. Smailagic testified that Respondent School imposes discipline consistently across grades and a violation committed by a kindergartener would be disciplined the same way as the same violation committed by a sixth grader. Ms. Smailagic stated that she had issued a long-term suspension of a kindergarten student other than Student in previous years.

53. Ms. Smailagic also testified that after she emailed Parent [REDACTED] on November 5, 2014, Parent [REDACTED] asked that Ms. Smailagic call to discuss the matter. During that conversation, Parent [REDACTED] related that there had been an incident over the

1 prior weekend and that, as a result, Parent [REDACTED] had not been able to see Student. As  
2 Ms. Smailagic recalled, there was "an incident over the weekend at a soccer game  
3 where he possibly had been arrested or something had gone awry and so he wasn't  
4 able to see them according to [Parent [REDACTED]]"

5 54. Parent [REDACTED] testified that when she dropped Student off for school he  
6 would be excited and happy and there was some "disconnect" between then and when  
7 he would get in trouble at school. Parent [REDACTED] stated that on her birthday, Student was  
8 so excited because if he had a great day, he could take her out for ice cream, but he  
9 got suspended that day. Parent [REDACTED] asserted that Teacher stopped communicating  
10 with her after she indicated Student would not ask to go to the bathroom because he  
11 was afraid of Teacher.

12 55. Parent [REDACTED] acknowledged that she had not read the Pointe Student  
13 Handbook because she had never had an issue in prior years. Parent [REDACTED] stated she  
14 reviewed the Pointe Student Handbook after Student was suspended for "trying to hold  
15 on to his sister, give her a hug."

16 Information Provided After the Hearing

17 56. Following the hearing, the parties advised the Tribunal that the long-term  
18 suspension had been lifted and that Student was returning to Respondent School on  
19 February 13, 2015.

20 57. The parties agreed that because there was no longer an active discipline  
21 being imposed, the matter was no longer expedited. The parties agreed to extend the  
22 timeline to March 2, 2015.

23 CONCLUSIONS OF LAW

24 1. A parent who requests a due process hearing alleging non-compliance  
25 with the IDEA must bear the burden of proving that claim.<sup>7</sup> The standard of proof is  
26 "preponderance of the evidence," meaning evidence showing that a particular fact is  
27  
28  
29

30 <sup>7</sup> *Schafer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).



1 "more probable than not."<sup>8</sup> Therefore, Petitioners bear the burden of proving their  
2 claims and complaints by a preponderance of evidence.

3 2. This tribunal's determination of whether or not Student received a FAPE  
4 must be based on substantive grounds.<sup>9</sup> If a procedural violation is alleged and found,  
5 it must be determined whether the procedural violation either (1) impeded the child's  
6 right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the  
7 decision-making process; or (3) caused a deprivation of educational benefit.<sup>10</sup> If one of  
8 the three impediments listed has occurred, the child has been denied a FAPE due to  
9 the procedural violation.

### 10 FAPE

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

25 <sup>8</sup> *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279  
26 (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*  
27 *No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

<sup>9</sup> 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

<sup>10</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

<sup>11</sup> 20 U.S.C. § 1400(d); 34 C.F.R. § 300.1.

<sup>12</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  
29 U.S.C.C.A.N. 2088, 2106).

<sup>13</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

<sup>14</sup> *Id.* at 200.



educational opportunities and (3) is in accord with an individualized educational program.”<sup>16</sup>

Whether Student was Entitled to Protection Under the IDEA

4. The IDEA provides as follows:

**§ 300.534 Protections for children not determined eligible for special education and related services.**

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred –

....

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

....

(d) *Conditions that apply if no basis of knowledge.* (1) If a public agency does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph (d)(2) of this section.

(2)(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under § 300.530, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part . . . .

<sup>15</sup> *Id.* at 198.

<sup>16</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)).



1           5.     It is undisputed that at the time of the discipline, including the long-term  
2 suspension imposed on December 10, 2014, Student had not been determined eligible  
3 for special education. The question before this Tribunal is whether Respondent School  
4 should be deemed to have knowledge that Student was a child with a disability based  
5 on the events that occurred prior to the suspension.

6           6.     Petitioners argue that Student's ongoing behavior problems, Teacher's  
7 referral of Student to the CST, and Teacher's identified areas of concern on the 45 day  
8 screening were sufficient to deem Respondent School had knowledge that Student was  
9 a child with a disability.

10          7.     In contrast, Respondent School asserted that Student's behavior was not  
11 dissimilar to the behavior of other young kindergarteners who had not attended the  
12 kindergarten preparation program. Further, Respondent School understood that  
13 Student's negative behaviors were related to the emotional impact of his parents' "nasty  
14 divorce" proceedings.

15          8.     At the beginning of the year, Teacher reported concerns with Student's  
16 behavioral and academic performance. The academic concerns were attributed to  
17 Student's young age and that Student had not attended preschool for more than seven  
18 months prior to starting kindergarten. The behavioral concerns were not unlike those  
19 exhibited by other kindergarteners adjusting to the structure and expectations of  
20 school.

21          9.     To avoid Student falling further behind, Teacher referred Student to the  
22 CST two weeks into the school year. As a result, numerous interventions were put into  
23 place to assist Student to succeed in the classroom.

24          10.    At the second CST meeting, it was reported the Student's behavior had  
25 improved and that he was showing progress academically with the reading specialist.<sup>17</sup>

26          11.    It was approximately four school days later that Student received the one  
27 day in-school suspension. However, that was also the Monday following the weekend

---

28               <sup>17</sup> Petitioners assert that the reading specialist was providing specialized instruction and that Student's  
29 resulting progress established he was a child with a disability because he benefited from the specialized  
30 instruction. However, this argument is not convincing in that one may assume that any student receiving  
individualized instruction would show progress.

1 incident at the soccer game related by Parent [REDACTED] to Ms. Smailagic that resulted in  
2 Parent [REDACTED] being unable to see Student. After serving that suspension and returning  
3 On November 5, 2014, Student was playing Ninjago, a game Teacher understood  
4 Parent [REDACTED] had bought for him and that they played together, and his behavior  
5 resulted in a one day out-of-school suspension.

6 12. This Administrative Law Judge finds that, while Student exhibited  
7 numerous behaviors at the beginning of the school year, those behaviors were both  
8 typical of kindergarteners and had subsided as expected as students acclimate to the  
9 school structure. Further, Student's sudden onset of negative behavior in November  
10 2014 could reasonably be attributed to his parent's divorce proceedings.

11 13. As such, Petitioners failed to establish by a preponderance of the  
12 evidence that Respondent School must be deemed to have knowledge that Student  
13 was a child with a disability and that Student was entitled to the protections of the IDEA  
14 pursuant to 34 C.F.R. § 300.534. Because Respondent School was not deemed to  
15 have knowledge that Student was a child with a disability, Student could be subjected  
16 to the disciplinary measures applied to children without disabilities who engage in  
17 comparable behaviors and doing so is not a denial of a FAPE.

18 14. The Administrative Law Judge notes that Respondent School's student  
19 code of conduct and the manner in which it is applied is not under review during this  
20 proceeding. However, it was clear from the testimony provided that Respondent  
21 School has a high expectation of its students with respect to behavior and that it is rigid  
22 in its application of discipline.

23 Whether Respondent School Conducted an Expedited Evaluation

24 15. While Respondent School was not deemed to have knowledge that  
25 Student was a child with a disability based on the discussion above, Parents requested  
26 a evaluation of Student during the time Student was suspended. Therefore,  
27 Respondent School was required to conduct the evaluation in an "expedited manner."

28 16. Nothing in the IDEA or regulations define expedited manner to include a  
29 specific time frame. It is understood that expedited requires that the evaluation be  
30



1 completed in less than the 60 day requirement generally applicable to a parent  
2 requested evaluation.

3 17. Petitioners argued that Respondent School failed to conduct an expedited  
4 evaluation because it waited more than a week to send Parents the consent forms and  
5 waited at least three and a half weeks to contact Parent to schedule the evaluations.

6 18. At the time of the hearing, on January 23, 2015, the evaluations were not  
7 completed, but were in progress.

8 19. Given the holiday break that occurred following Parents' request and the  
9 notice requirements Parents imposed on scheduling the evaluations, Petitioners failed  
10 to establish by a preponderance of the evidence that the evaluations were not  
11 expedited.

### 12 **ORDER**

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

15 Done this day, March 2, 2015.

16 /s/ Tammy L. Eigenheer  
17 Administrative Law Judge  
18  
19  
20  
21

### 22 **RIGHT TO SEEK JUDICIAL REVIEW**

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

1  
2  
3 Copy mailed/e-mailed/faxed March 2, 2015 to:

4 Jody Johnson,  
5 Pointe Educational Services  
6 5940 W. Union Hills Drive, Ste. B-100  
7 Glendale, AZ 85308  
jjohnson@pointeschools.org

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

12 Kacey Gregson  
13 Arizona Department of Education  
14 1535 West Jefferson  
15 Phoenix, AZ 85007  
kacey.gregson@azed.gov

16 By: Cruz Serrano  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30