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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

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Student, by and through Parent
Petitioners,

No. 13C-DP-053-ADE-REM

v.

**ADMINISTRATIVE
LAW JUDGE DECISION**

Pointe Educational Services,
Respondent.

HEARING: January 9, 2014

APPEARANCES: Attorney Lori Kirsch-Goodwin, KIRSCH-GOODWIN & KIRSCH, PLLC, appeared on behalf of Petitioners, accompanied by Parent attorneys Todd Karchner and Aaron T. Martin, FENNEMORE CRAIG, P.C., appeared on behalf of Pointe Educational Services ("Pointe"), accompanied by school representative Amy Rhone, Pointe Director of Special Programs. Certified Court Reporter Kellie Konicke was present and recorded the proceedings as the official record of the hearing.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

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The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in 2004),¹ 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

Parents brought a due process action, on behalf of Student, challenging an Individualized Educational Program ("IEP") adopted by Respondent Pointe, alleging predetermination with respect to Student's placement at the Austin Center for

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

1 Exceptional Students ("ACES") private day school, and seeking an order of placement
2 of Student at Gateway Academy.

3 Following the due process hearing on the merits, this Administrative Law Judge
4 ordered that Respondent Pointe was to, among other things irrelevant to this
5 proceeding, place Student at Gateway Academy at Respondent Pointe's expense.
6 Respondent Pointe appealed the Administrative Law Judge's order in this matter to the
7 United States District Court for the District of Arizona. The matter was remanded for
8 clarification of the Administrative Law Judge's Order with respect to tuition and
9 transportation costs to be paid by Respondent Pointe. The sole issues to be
10 determined on remand are to clarify the amount of tuition to be paid by Respondent
11 Pointe to Gateway Academy and the manner of calculating transportation
12 reimbursement.

13 A hearing in this matter was held on January 9, 2014.

14 **FINDINGS OF FACT**

15 **Tuition**

16 1. The parties agreed that the tuition rates of Gateway Academy and ACES
17 were not factors during the IEP meetings when the decision was made to change
18 Student's placement to a private day school.

19 2. On July 15, 2013, Petitioners enrolled Student at Gateway as a private
20 placement student while awaiting the Administrative Law Judge's Order following the
21 due process hearing.

22 3. On August 12, 2013, the Administrative Law Judge's Order was issued
23 finding that Gateway Academy was the appropriate location for Student and that
24 Student was to be placed at Gateway Academy at Respondent Pointe's expense. As a
25 result, Student was redesignated as a district-placed student after August 12, 2013.

26 4. On September 5, 2013, O. Robin Sweet, Executive Director and CEO of
27 Gateway Academy, sent Ms. Rhone an email regarding a purchase order that provided
28 as follows:

29 Dear Amy – Thank you for the Purchase Order. However, we also need
30 the Purchase Order to include the number of academic days in our 2013

1 academic year from April 12th-May 24th 2013: \$15,000 Plus: 187 day in
2 our 2013-14 academic year:\$46,750. If you want to do a separate PO for
3 April 12th-May 24th for \$15,000, that would be fine or you could combine
4 the two for a total PO of \$61,750. Please know that we truly appreciate
5 your cooperation in this matter, and look forward to a revised PO to
include the Amount of the PO. Many thanks for your time and
consideration. Best Regards – Robin

6 Exhibit 3.

7 5. Ms. Rhone testified that she did not question Ms. Sweet about the tuition
8 total referred to in the email. Ms. Rhone stated she sent the requested purchase order,
9 but did not include a dollar amount.

10 6. On October 11, 2013, Gateway Academy sent a letter to Petitioners
11 indicating that Gateway Academy had not received the tuition payment for Student for
12 the months of August and September and Student would need to remain at home until
13 the tuition was paid in full. Exhibit 29.

14 7. Gateway Academy permitted Student to return to class because
15 Petitioners' attorney agreed to file an emergency action against Respondent Pointe
16 seeking compliance with the Administrative Law Judge's Order.

17 8. In an October 14, 2013, letter to the Arizona Department of Education,
18 Ms. Rhone indicated that Respondent Pointe "used Gateway Academy's published
19 tuition of \$22,500 (attached documentation) to calculate payment." Ms. Rhone
20 "enclosed documentation of Gateway's public rates gathered from numerous websites."
21 The letter went on to explain its rationale as follows:

22 As you can see from the enclosed invoice, Gateway is charging Point
23 \$250 per day in tuition for [Student]. According to its academic calendar,
24 Gateway has 174 full instruction days and 11 half days for a total of 185
25 days of instruction. Therefore, based on Gateway's invoices, Pointe is
26 being charged approximately \$46,250.00 per year for [Student's] tuition,
more than double the published rate.

27 Since the beginning of the Due Process proceedings it has been our
28 understanding that ACES was a *more* expensive option than Gateway.
Last year Pointe paid \$24,595 in tuition for a student placed at ACES.

29 Exhibit 9.
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1 9. Ms. Rhone testified there was a problem with the initial invoice received
2 from Gateway Academy because the attendance records included were for a different
3 student. Neither the erroneous invoice nor the corrected invoice was offered into
4 evidence. It was not clear from the record when the corrected invoice was received.

5 10. Once it received a corrected invoice, Respondent Pointe determined
6 Gateway Academy's published rate was \$121.63 per day based on its calculations.
7 Gateway Academy's attendance records showed Student attended 15 days in August
8 and 14 days in September. Therefore, Respondent Pointe submitted payment to
9 Gateway Academy of \$3,527.27 for Student's August and September tuition (29 days at
10 \$121.63 per day). Ms. Rhone acknowledged no one at Respondent Pointe contacted
11 Gateway Academy regarding the invoiced rate of \$250 per day versus what it found to
12 be the "public rates gathered from numerous websites" of \$121.63 per day.

13 11. Ms. Rhone also acknowledged that the public rates she found were not on
14 Gateway Academy's website. Rather, Respondent Pointe submitted the following as
15 their evidence regarding Gateway Academy's tuition rates: a www.azcentral.com
16 printout of an April 14, 2011, Arizona Republic article which indicated Gateway
17 Academy's tuition was \$22,000 per year; a www.azcentral.com printout of a September
18 3, 2011, Arizona Republic article which indicated Gateway Academy's tuition was
19 \$20,732 per year; a printout from www.phoenixautism.com which indicated Gateway
20 Academy's tuition was \$22,500 per year; and a printout from
21 www.privateschoolreview.com which indicated Gateway Academy's tuition was \$22,500
22 per year. Exhibits 25-28.

23 12. Ms. Sweet testified that Gateway Academy received random amounts
24 from Respondent Pointe, so it did not retain the payments and returned the checks to
25 Respondent Pointe.

26 13. Ms. Sweet testified that Gateway Academy's tuition was \$150 per day for
27 a privately-placed student and \$250 per day for a district-placed student and that those
28 rates had not changed since Gateway Academy opened 10 years ago. Ms. Sweet
29 explained Gateway Academy charged more for district-placed students because those
30 students required additional services and received additional protections under the

1 IDEA that were not required for privately-placed students. While Ms. Sweet
2 acknowledged that some of those requirements, such as an IEP, were provided for all
3 students regardless of their designation, other requirements, such as quarterly reports
4 to the district, were only provided to district-placed students.

5 14. Ms. Sweet and Petitioners acknowledged that the services Student
6 received were no different when he was a district-placed student than those he
7 received when he was a privately-placed student.

8 15. Because Student's tuition had not been paid from August 13, 2013,
9 through the end of the year, Petitioners were informed Student would not be allowed to
10 return to Gateway Academy when classes resumed on January 6, 2014.

11 16. At the time of the hearing, Student was not attending school at any
12 location.

13 Transportation

14 17. The Administrative Law Judge's Order also required that Respondent
15 Pointe provide transportation at no cost to Petitioners as a related service for Student
16 to attend Gateway Academy.

17 18. No evidence was brought during the initial due process hearing in this
18 matter with respect to Petitioners' existing transportation arrangements for their older
19 student who attended Gateway Academy and/or any changes that would be made to
20 those arrangements if Student was also placed at Gateway Academy.

21 19. In an undated letter to Petitioners, Respondent Pointe indicated that,
22 despite its appeal, it was "in good faith" still providing Petitioners reimbursement for
23 transportation costs. Exhibit 8. Respondent Pointe stated that it calculated the
24 transportation costs using the "federal medical mileage rate" of \$0.24 per mile to take
25 Student to Gateway Academy and then return him home on each day of attendance.
26 Respondent Pointe determined that Trip A, Home to Gateway, and Trip B, Gateway to
27 Home, were 26.72 miles each, for a total daily mileage of 53.44 miles. With 29 total
28 days of attendance from August 12, 2013, through September 20, 2013, Respondent
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1 Pointe calculated that Petitioners were to be reimbursed \$1,549.76.² It was unclear
2 from the record whether this amount was actually paid to Petitioners as a copy of the
3 check was not submitted into evidence.

4 20. On November 1, 2013, Respondent Pointe sent another letter to
5 Petitioners including "payment for transportation costs allegedly incurred in transporting
6 your son to Gateway Academy." Exhibit 14. Respondent Pointe's calculations still
7 employed 53.44 miles per day and the federal medical mileage rate of \$0.24 per mile
8 for the 19 days Student was in attendance from October 1, 2013, through October 31,
9 2013, for a total reimbursement of \$243.69. A copy of the check sent to Petitioners was
10 submitted into evidence. Exhibit 14.

11 21. On December 2, 2013, Respondent Pointe sent another letter to
12 Petitioners including "payment for transportation costs allegedly incurred in transporting
13 your son to Gateway Academy." Exhibit 20. Respondent Pointe's calculations still
14 employed 53.44 miles per day and the federal medical mileage rate of \$0.24 per mile
15 for the 15 days³ Student was in attendance from November 1, 2013, through November
16 30, 2013, for a total reimbursement of \$192.39. A copy of the check sent to Petitioners
17 was submitted into evidence. Exhibit 18.

18 22. Petitioners acknowledged that their older child also attended Gateway
19 Academy during the time period in question, but testified that in the previous academic
20 year, they participated in a carpool in which they drove only two days per week.
21 However, because Student was in a lower grade and was released from school
22 approximately 30 minutes earlier than the older child and the other members of the
23 carpool, they were no longer able to participate in the carpool. As a result, Petitioners
24 had to drive Student and the older child to Gateway Academy five days per week.

25 23. At hearing, Petitioners indicated they would be willing to accept
26 reimbursement for only the increase in transportation costs they assumed once Student

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28 ² The Administrative Law Judge notes that, using the figures employed by Respondent Pointe, the
29 calculations were inaccurate. In fact, 29 days at 53.44 miles per day totals 1,549.76 miles. Reimbursing
30 Petitioners \$1,549.76 equates to a reimbursement rate of \$1.00 per mile. Using the \$0.24 per mile
 reimbursement rate proposed by Respondent Pointe, Petitioners should have been reimbursed \$371.95.

³ The letter references 19 days in attendance, but the attendance sheet from Gateway Academy
indicates Student was in attendance for 15 days in November 2013. Exhibit 30.

1 was a district-placed student at Gateway Academy. However, Petitioners disagreed
2 with Respondent Pointe's determination that the federal medical mileage rate of \$0.24
3 per mile applied and that they should only be reimbursed for two one-way trips each
4 day. Rather, Petitioners argued they should be reimbursed at the federal standard
5 mileage rate of \$0.565 per mile for two round trips per day Student was in school up to
6 three days per week.

7 **CONCLUSIONS OF LAW**

8 1. A parent who requests a due process hearing alleging non-compliance
9 with the IDEA must bear the burden of proving that claim.⁴ The standard of proof is
10 "preponderance of the evidence," meaning evidence showing that a particular fact is
11 "more probable than not."⁵ Therefore, Petitioners bear the burden of proving their
12 claims and complaints by a preponderance of evidence.

13 **Tuition**

14 2. Under the prior order entered in this matter, Respondent Pointe was
15 ordered to place Student at Gateway Academy and pay the tuition.

16 3. Counsel for Respondent Pointe indicated in closing arguments that it was
17 expecting a much lower tuition rate and that it would have been "irresponsible" not to
18 question the significantly higher costs reflected in the invoices it received. However,
19 Respondent Pointe did not question those costs. Rather, when presented with an
20 invoice for Student's attendance at Gateway Academy, Respondent Pointe took it upon
21 itself to determine what it would pay in tuition based on information from third parties it
22 was able to find on the internet rather than contacting Gateway Academy directly to
23 clarify the invoice received.

24 4. Had Respondent Pointe made inquiries to Gateway Academy, it would
25 have discovered that Gateway Academy charged tuition of \$250.00 per day for all
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28 ⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 ⁵ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
30 (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 district-placed students due to the additional administrative requirements placed on
2 Gateway Academy for those students.

3 5. "[C]ost can be a legitimate consideration when devising an appropriate
4 program for individual students. Nevertheless, cost considerations are only relevant
5 when choosing between several options, all of which offer an 'appropriate' education.
6 When only one is appropriate, then there is no choice."⁶

7 6. As the parties agreed, the cost of ACES and/or Gateway Academy were
8 not a consideration when Student's IEP was being developed. Further, at the due
9 process hearing in this matter, the only options presented by the parties were ACES
10 and Gateway Academy. As this Administrative Law Judge determined ACES was not
11 an appropriate location for Student and Gateway Academy was the appropriate
12 location, there was only one appropriate choice and cost cannot be a consideration.

13 7. Respondent Pointe is required to pay Student's tuition at Gateway
14 Academy. As Petitioners established Gateway Academy's tuition for a district-placed
15 student is \$250.00 per day and Student attended Gateway Academy for 78 days from
16 August 12, 2013, through December 20, 2013, Respondent Pointe owes \$19,500.00 for
17 that time period. In the event Gateway Academy charges any late fees or other
18 administrative fees attributable to Respondent Pointe's failure to timely pay Student's
19 tuition for that time period, Respondent Pointe is also required to pay those fees.

20 Transportation

21 8. Respondent Pointe was also ordered to provide transportation to Student
22 to attend Gateway Academy at no cost to Petitioners. Because no evidence was
23 presented at the due process hearing with respect to the manner in which Respondent
24 Pointe could or would provide transportation, no determination was made regarding the
25 specific requirements. Since the order was entered, Respondent Pointe elected to
26 provide Petitioners reimbursement for the transportation they provide Student.

27 9. Respondent Pointe maintained that reimbursement for transportation
28 services should not be required because Petitioners were already transporting the
29 older child to Gateway Academy and Petitioners should not be granted a windfall as a
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1 result of the order in this matter. In the alternative, Respondent Pointe urged that it be
2 allowed to continue reimbursing Petitioners for two one-way trips each day at the
3 federal medical mileage rate of \$0.24 per mile.

4 10. Respondent Pointe directed this Administrative Law Judge to the Internal
5 Revenue Service (IRS) Publication 502 indicating that medical expenses for special
6 education are deductible including mileage at the rate of \$0.24 per mile. Specifically,
7 IRS Publication 502 provides as follows:

8 **Special Education**

9 You can include in medical expenses fees you pay on a doctor's
10 recommendation for a child's tutoring by a teacher who is specially trained
11 and qualified to work with children who have learning disabilities caused
12 by mental or physical impairments, including nervous system disorders.

13 You can include in medical expenses the cost (tuition, meals, and
14 lodging) of attending a school that furnishes special education to help a
15 child to overcome learning disabilities. A doctor must recommend that the
16 child attend the school. Overcoming the learning disabilities must be a
17 principal reason for attending the school, and any ordinary education
18 received must be incidental to the special education provided. Special
19 education includes:

20 Teaching Braille to a visually impaired person,
21 Teaching lip reading to a hearing disabled person, or
22 Giving remedial language training to correct a condition caused by a birth
23 defect.

24

25 **Transportation**

26 You can include in medical expenses amounts paid for transportation
27 primarily for, and essential to, medical care.

28 **You can include:**

29 Bus, taxi, train, or plane fares or ambulance service,
30 Transportation expenses of a parent who must go with a child who needs
medical care,
Transportation expenses of a nurse or other person who can give
injections, medications, or other treatment required by a patient who is
traveling to get medical care and is unable to travel alone, and
Transportation expenses for regular visits to see a mentally ill dependent,
if these visits are recommended as a part of treatment.

⁶ *Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 517 (6th Cir. 1984).

1 **Car expenses.** You can include out-of-pocket expenses, such as the cost
2 of gas and oil, when you use a car for medical reasons. You cannot
3 include depreciation, insurance, general repair, or maintenance
4 expenses.

5 If you do not want to use your actual expenses for 2013, you can use the
6 standard medical mileage rate of 24 cents a mile.

7 You can also include parking fees and tolls. You can add these fees and
8 tolls to your medical expenses whether you use actual expenses or the
9 standard mileage rate.

10 11. While Respondent Pointe attempted to shoehorn this situation into the
11 provisions cited above, it is obvious Student's attendance at Gateway Academy does
12 not fit under the definition of Special Education. No evidence was submitted to even
13 suggest that a doctor recommended that Student attend the school. Rather, it was the
14 IEP Team's decision that the appropriate placement for Student to receive a free
15 appropriate public education (FAPE) was a private day school.

16 12. Instead, reimbursement for transportation should be made using the
17 federal standard mileage rate in effect at the time the transportation was provided. The
18 federal standard mileage rate for the use of a car from January 1, 2013, through
19 December 31, 2013, was \$0.565 per mile. The federal standard mileage rate for the
20 use of a car beginning on January 1, 2014, is \$0.56.⁷

21 13. The evidence presented at hearing established Gateway Academy was
22 26.72 miles from Student's home, and neither party disputed that calculation. It was
23 also indicated that Student's mother drove Student and the older child to school and
24 returned home in the morning and then drove to the school to pick up Student and the
25 older child from school and returned home in the afternoon. Therefore, Student's
26 mother drove 106.88 miles per day to take Student to and from school.

27 14. Respondent Pointe argued it should only have to reimburse Petitioners
28 for two one-way trips each day, essentially taking Student from home to school and
29 from school to home, without any regard for what Student's mother did after dropping
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⁷ See <http://www.irs.gov/uac/Newsroom/2013-Standard-Mileage-Rates-Up-1-Cent-per-Mile-for-Business,-Medical-and-Moving> and <http://www.irs.gov/2014-Standard-Mileage-Rates-for-Business,-Medical-and-Moving-Announced>

1 Student off in the morning or how she got to the school to pick up Student in the
2 afternoon.

3 15. Petitioners acknowledged that in the prior school year, they participated
4 in a carpool for the older child and they were only required to drive twice a week.
5 Because of the differences in schedules, Petitioners were no longer able to participate
6 in the carpool. Therefore, once Student was placed at Gateway Academy, Petitioners
7 incurred three additional days of driving to and from Gateway Academy each week that
8 they would not have incurred.⁸

9 16. Based on Petitioners' representation that they would accept transportation
10 reimbursement for only three days per week, the increase in transportation costs they
11 incurred when they had to leave the carpool, Respondent Pointe shall reimburse
12 Petitioners at the federal standard mileage rate for two round trips per day (106.88
13 miles) for three days per week that Student is in attendance at Gateway Academy.

14 17. A review of the attendance records in evidence establishes that Student
15 attended Gateway Academy for 16 weeks⁹ between August 12, 2013, and December
16 20, 2013. Accordingly, Respondent Pointe should have reimbursed Petitioners a total
17 of \$2,898.59 for transportation costs during that time (106.88 miles per day x 3 days
18 per week x 16 weeks x \$0.565 per mile).

19 18. The evidence submitted at hearing indicates Respondent Pointe
20 reimbursed Petitioners \$1,985.84 for transportation from August 12, 2013, through
21 December 20, 2013. Therefore, Respondent Pointe still owes Petitioners \$912.75 for
22 transportation provided during that time.

23 Conclusion

24 19. Respondent Pointe should pay Gateway Academy's tuition rate for
25 district-placed students for each day Student attends.

26 ⁸ See *Harrison Township Bd. of Educ.*, 113LRP 49734 (NJ SEA October 23, 2013). In *Harrison*,
27 transportation costs were calculated as the difference between Parents' mileage from home to work and
28 the mileage from home to school to work for each trip, so as to account for the additional miles Parents
29 drove to take the student to the school. In this matter, if not for Student attending Gateway Academy,
30 Petitioners would not have to drive at all on the three days a week the older child previously went to
Gateway Academy via the carpool.

⁹ It is noted that two of the weeks were four day weeks, which makes no difference in these calculations
as Respondent Pointe is to reimburse Petitioners for three days per week.

RIGHT TO SEEK JUDICIAL REVIEW

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

Copy mailed/e-mailed this 31st day of January, 2014 to:

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