

STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

_____, Student, by and through Parents _____
and _____,
Petitioner,
v.
Pointe Educational Services,
Respondent.

No. 13C-DP-053-ADE

ADMINISTRATIVE
LAW JUDGE DECISION

HEARING: April 1, 2013, and April 2, 2013, with the record left open to receive transcripts and post-hearing submissions.¹

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 Faith Thaw, Pointe Compliance Coordinator. Certified Court Reporter Diane Donoho, GRIFFIN & ASSOCIATES COURT REPORTERS LLC, was present and recorded the proceedings as the official record of the hearing.

WITNESSES:² Gay Hardy, School Psychologist, ACES; Faith Thaw, Compliance Coordinator, Pointe; Suzanne Smailagic, Principal, Pinnacle Pointe Academy; Kim Yamamoto, Advocate ("Student's Advocate"); Petitioner _____, ("Parent _____"); Nicole Goslin, Special Education Teacher, Pinnacle Pointe Academy; O. Robin Sweet, Executive Director and CEO, Gateway Academy; Kate Sprouls, School Psychologist, Eleutheria L.L.C.; Amy Bernstein, Special Education Teacher, Canyon Pointe Academy; Amy Rhone, Principal, Canyon Pointe Academy.

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

Parents bring this due process action, on behalf of Student, challenging an Individualized Educational Program ("IEP") adopted by Respondent Pointe, alleging

¹ Following the hearing, the parties agreed to an extension of the 45th day with no specific date set. Based on this extension and the conclusion of the hearing record, the 45th day is August 19, 2013.

² 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

predetermination with respect to Student's placement at the Austin Center for Exceptional Students ("ACES") private day school, and seeking an order of placement of Student at Gateway Academy. 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),³ 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

Petitioners filed the Due Process Complaint on February 12, 2013. The complaint set forth seven issues presented as follows:

1. Whether Pointe predetermined placement at ACES?
2. Whether ACES is an appropriate placement for Student?
3. Whether ACES is the LRE for Student?
4. Whether Gateway Academy (or similar school) is an appropriate placement for Student?
5. Whether Pointe wrongfully failed to consider and include Parents' input for the IEP?
6. Whether revised goals should have been included into IEP?
7. Whether Parents are entitled to attorney fees?

Petitioners sought compensatory education and services, a revision of the IEP, and placement at Respondent Pointe's expense at Gateway Academy or similar school with transportation provided. Respondent Pointe admitted it was responsible for some compensatory education and services, but denied any other violations of the IDEA.

Evidence and Issues at Hearing

bold type) will be used instead. Proper names of administrative personnel, service providers, and expert witnesses are used.

³ 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 The parties presented testimony and exhibits at a formal evidentiary hearing
2 held on April 1, 2013, and April 2, 2013. The parties presented testimony from the
3 witnesses listed above⁴ and offered into evidence Petitioners' Exhibits A through K and
4 Respondent Pointe's Exhibits 1 through 26.

5 After the Exhibits and testimony were admitted, the parties submitted written
6 arguments to the tribunal. Parents argued that there were both procedural and
7 substantive violations of the IDEA in the denial of a FAPE. Their main contention was
8 that Respondent Pointe had predetermined which school Student would attend under
9 the addendum to the August 2012 IEP. Petitioners also argued that the school chosen
10 by Respondent Pointe for Student was not an appropriate location. Respondent Pointe
11 defended its findings and actions, arguing that a FAPE has been offered to Student and
12 that there was no IDEA violation.

13 The Administrative Law Judge has considered the entire record, including the
14 testimony and Exhibits,⁵ and now makes the following Findings of Fact, Conclusions of
15 Law, and Order.

16 **FINDINGS OF FACT**

17 1. In August 2012, Student began attending Pinnacle Peak Academy
18 ("Pinnacle") as a [REDACTED] grader.⁶ During the 2011-2012 school year, Student attended a
19 different school district as a [REDACTED] student; that district had developed an IEP for
20 Student.

21 2. On September 25, 2012, an IEP was adopted for Student. Student was
22 found eligible for special education under the categorical eligibilities of Autism (primary)
23 and Speech/Language Impairment.⁷ The IEP included goals and services in
24 academics, speech and language, Occupational Therapy ("OT") and
25 social/emotional/behavioral supports.⁸ The IEP indicated a "B" service code, which
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27 ⁴ Transcripts of the testimony have been added to the record.

28 ⁵ The Administrative Law Judge has read and considered each admitted Exhibit, even if not mentioned in
29 this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if
30 the witness is not specifically mentioned in this Decision.

⁶ Pinnacle is a school within Respondent Pointe School District.

⁷ Exhibit 11 at p1.

⁸ Exhibit 11 at p15-25.

1 meant Student would be inside the regular classroom at least 40 percent of the day and
2 no more than 79 percent of the day.⁹ The remaining time was to be spent receiving
3 services in a resource room setting.

4 3. Student began exhibiting problem behaviors. These behaviors included
5 crying, whining, refusing to do his work, refusing to follow directions, and wandering
6 into other classrooms during transitions. By October 2012, Student's behaviors
7 became more frequent and escalated, including being defiant and disrupting other
8 students.

9 4. The IEP team reconvened to address Student's increasing behavior
10 issues. On November 26, 2012, an addendum to the September 2012 IEP was
11 adopted indicating the service code had changed from "B" to "C", which meant Student
12 would be inside the regular classroom less than 40 percent of the day.¹⁰ The IEP team
13 also developed a Behavior Plan to address Student's behavior issues.¹¹

14 5. On December 17, 2012, a Functional Behavioral Assessment ("FBA") of
15 Student was conducted.¹² The examiner observed Student's behaviors were consistent
16 with Attention Deficit Hyperactivity Disorder ("ADHD") and recommended that Parents
17 consider conferring with a child psychiatrist to obtain a differential diagnosis and
18 treatment plan.¹³

19 6. Following the November 26, 2012, addendum, Student's behaviors
20 continued and attempted interventions failed. Because of his behaviors, Student was
21 sent home from school on multiple days. Pursuant to Pinnacle's policy, the school
22 considered each time Student was sent home as a "suspension."

23 7. Because Student was approaching ten days of suspension for the school
24 year, Respondent Pointe performed a Manifestation Determination Review ("MDR") on
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⁹ Exhibit 11 at p1, see also Exhibit H at p2.

¹⁰ Exhibit 12 at p1, see also Exhibit H at p2.

¹¹ Exhibit 12 at p4.

¹² Exhibit 17. Petitioners alleged they were not notified of the FBA and did not receive a copy of the document until the disclosure deadline for the Due Process hearing.

¹³ Exhibit 17.

1 January 15, 2013. At the time of the MDR, Student's most recent behavior was
2 physically removing a teacher's hand from his arm.¹⁴

3 8. During the MDR, the team concluded that Student's behaviors were a
4 manifestation of his disability. The MDR transitioned into an IEP meeting. During the
5 IEP meeting, the team agreed that Student "would benefit from placement in a private
6 day school as the interventions implemented to address his behaviors have not been
7 successful."¹⁵

8 9. In the handwritten IEP addendum that was formulated during the January
9 15, 2013, IEP meeting, the level of service was denoted as "C".¹⁶ However, the typed
10 IEP addendum denoted the level of service as "EDP".¹⁷

11 10. On January 17, 2013, Ms. Thaw emailed Parent [REDACTED] to inform him that an
12 intake meeting had been scheduled at ACES based on the decision made at the
13 MDR.¹⁸

14 11. On January 21, 2013, Parent [REDACTED] responded that based on ACES'
15 schedule, his wife would be unable to drop off or pick up Student. Parent [REDACTED]
16 indicated that because Respondent Pointe had chosen ACES, it should be responsible
17 for Student's transportation. Parent [REDACTED] suggested that Respondent Pointe consider
18 Gateway Academy as a possible placement for Student as his wife would be able to
19 drop off and pick up Student.¹⁹

20 12. On January 21, 2013, Ms. Thaw replied that Respondent Pointe
21 "believe[s] Aces [sic] is the appropriate placement." Ms. Thaw stated that the issue of
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25 ¹⁴ The Due Process Complaint in this matter did not raise any substantive or procedural claims with
26 respect to the MDR.

27 ¹⁵ Exhibit 14 at p3.

28 ¹⁶ Exhibit 14 at p1.

29 ¹⁷ Exhibit 13 at p1. According to the Arizona Department of Education, "EDP" is not an appropriate level
30 of service code. EDP is a Need Code for "Emotional Disability (Separate Facility, Private School)". See
Exhibit H at p1. Rather, the level of service code that should have been listed was "D", which indicates
Student would be in "Public or Private Separate Day School for greater than 50% of the school day."
Exhibit H at p2.

¹⁸ Exhibit 23 at p1.

¹⁹ Exhibit 23 at p1.

1 transportation could be explored, but someone would need to be present to send
2 Student to school and be present when he arrived home after school.²⁰

3 13. On January 22, 2013, Parent [REDACTED] emailed Ms. Thaw requesting an IEP
4 meeting "to discuss appropriate placement for [Student]." Parent [REDACTED] indicated he
5 agreed with the MDR finding that Respondent Pointe could not meet Student's needs
6 set forth in the IEP, but requested the opportunity to explore appropriate private day
7 schools so he could "assist the IEP team in making an educated decision within the IEP
8 process." Parent [REDACTED] indicated he would be visiting ACES and asked that a
9 representative from Respondent Pointe visit Gateway Academy, New Way Learning
10 Academy, and any other schools that might be appropriate for Student. Parent [REDACTED]
11 acknowledged his initial concern with ACES involved transportation issues, but that he
12 wanted to ensure that the IEP team clearly understood Student's needs and goals and
13 to find a placement that would meet those.²¹

14 14. To address Parent [REDACTED]'s concerns regarding the placement, Respondent
15 Pointe scheduled an IEP meeting for January 29, 2013, to consider other locations for
16 Student's private day placement. The IEP meeting was postponed to February 6, 2013,
17 due to Ms. Thaw's illness.

18 15. On January 23, 2013, the Principal of Pinnacle emailed Parent [REDACTED] to
19 notify him that "[i]n light of the upcoming IEP meeting scheduled for Tuesday, January
20 29th at 9:00 am[,] you may continue to bring [Student] to Pinnacle until a resolution is
21 discussed."²²

22 16. On January 24, 2013, Respondent issued a Prior Written Notice ("PWN")
23 to Parents indicating the district proposed a change of placement for Student "to better
24 meet his needs." It was noted that Respondent Pointe "will place [Student] in a private
25 day school that is approved by the state of Arizona" and that "[t]he placement will be
26 funded by" Respondent Pointe.²³

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29 ²⁰ Exhibit 23 at p1.

²¹ Exhibit 18 at p1.

²² Exhibit B at p10.

²³ Exhibit 8 at p1.

1 17. During the February 6, 2013, IEP meeting, the IEP team discussed
2 private placements including ACES, New Way Learning Academy, and Gateway
3 Academy. A representative of Gateway Academy attended the meeting and shared
4 information regarding the school.

5 18. Nothing discussed at the February 6, 2013, IEP meeting resulted in
6 Respondent Pointe altering its determination that ACES was the appropriate location
7 for Student.

8 19. On February 6, 2013, Ms. Thaw sent an email to Parent [REDACTED], which read
9 as follows:

10 Please be advised that a bus from ACES will be at your home tomorrow to
11 take [Student] to ACES, the private day school the district has chosen to
12 best meet his needs. You will be contacted by ACES staff to facilitate
this.²⁴

13 20. Parent [REDACTED] retained counsel and the instant Due Process Complaint was
14 filed on February 12, 2013. In the Due Process Complaint, Petitioners requested
15 Student return to Pinnacle as his Stay Put placement.²⁵

16 21. Respondent Pointe refused to allow Student to return to Pinnacle as his
17 Stay Put placement.²⁶ Instead, Respondent Pointe arranged for Student to receive
18 educational services at his home. In total, Student was absent from Respondent Pointe
19 for 21 days following the January 15, 2013, MDR and IEP meeting before the education
20 services began at his home.²⁷

21 The IEPs

22 22. The September 25, 2012, IEP included a notation that Student "has a
23 sweet disposition and has a deep desire to please. He is quite responsive after 1 or 2
24 redirections and thrives on positive reinforcement."²⁸ It was also noted that Student
25 "often struggles with transitions (40% of the time)."²⁹ Goals were established in the
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27 ²⁴ Exhibit B at p24.

28 ²⁵ See Due Process Complaint.

29 ²⁶ Exhibit B at p33.

30 ²⁷ At the time, Student was receiving approximately 3.5 hours per day of specialized instruction and 1.5 hours per month of OT.

²⁸ Exhibit A at p6.

²⁹ Exhibit A at p6.

1 areas of Reading, Written Expression, Math, Study Skills-Organization, Social-
2 Emotional, Social-Pragmatic, Receptive/Expressive Language, and Occupational
3 Therapy.³⁰

4 23. In a September 28, 2012, Progress Report, it was noted that Student
5 "loves being on the computer."³¹

6 24. In the November 26, 2012, Addendum to the IEP, the only changes were
7 to increase Student from 135 resource minutes per day to 195 resource minutes per
8 day. The increase in resource minutes was intended to address his "academic needs
9 as well as behavior interferences."³² Also included was the Behavior Plan that was
10 intended to address Student's non-compliance, saying "no", crying/yelling/arguing, and
11 aggressive behaviors.³³

12 25. In the January 15, 2013, Addendum to the IEP, Student's placement was
13 changed to a private day school.³⁴

14 26. During the February 6, 2013, IEP meeting, Student's advocate, on behalf
15 of Petitioners, addressed a concern with the behavioral approach set forth in the IEP
16 and being used by Respondent Pointe. In essence, when Student became upset, he
17 was expected to communicate his frustrations verbally. Student's advocate believed it
18 would be more appropriate to let Student to take a break and cool off prior to asking
19 him to verbalize his frustrations. Student's advocate opined that requiring him to
20 verbalize his frustrations while he was upset may have been a contributing factor to the
21 escalating behaviors. The IEP was not amended to include Petitioners' request that
22 the behavior plan allow Student to take a break to cool off.

23 27. During the February 6, 2013, IEP meeting, Parent [REDACTED] also requested
24 that a goal addressing transitions be included in the IEP. While the IEP team agreed
25 transitions were an issue for Student, as had been noted in the September 25, 2012,
26 IEP, Petitioners' requested goal addressing transitions was not adopted.

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28 ³⁰ Exhibit A at p12-22.

29 ³¹ Exhibit A at p25.

30 ³² Exhibit 12 at p3.

³³ Exhibit 12 at p4.

³⁴ Exhibit A at p32.

ACES

1 28. Gay Hardy, School Psychologist at ACES, testified regarding the student
2 body, curriculum, and staff at ACES. According to Ms. Hardy, ACES is a school that
3 "deals with students with significant behavior concerns"³⁵ and "the students who come
4 to ACES are having difficulty managing their behavior in a public school setting, lots of
5 anger management, impulse control, that kind of thing."³⁶ ACES "work[s] hard on
6 helping our kids develop strategies and coping skills to deal with those issues."³⁷

7 29. Ms. Hardy acknowledged that the students who come to ACES "have
8 serious issues." In describing the students, Ms. Hardy stated:
9

10 But the students who come to us I would say probably 95 percent of the
11 students that are referred to us are what I call externalizers. When they
12 get upset, the entire world[] knows that they're upset, kicking, screaming,
13 crying, hitting, those kinds of things. Not necessarily attaching [sic]
14 anyone, but you know, sometimes when kiddos get upset, they might, if
15 they get a chance to throw something, anybody who's in the way is in
16 danger of being hit.³⁸

17 30. ACES has students who have been suspended or expelled from public
18 schools for weapons violations, acting out sexually, and drugs.³⁹

19 31. ACES has the Jump Start program for students in the autism spectrum
20 and is "a dedicated autism program."⁴⁰

21 32. Typically, ACES classes "have at least two grade levels together, no more
22 than three."⁴¹ Therefore, kindergarten and first grade students may be in a class
23 together with some second grade students, third and fourth grade students may be in a
24 class together, and fifth and sixth grade students may be in a class together. However,
25 for the academic subjects of reading, math, and writing, students are grouped
26

27 ³⁵ 4/1/13 Reporter's Transcript of Proceedings ("TR") at 17:14-15.

28 ³⁶ 4/1/13 TR at 17:9-11.

29 ³⁷ 4/1/13 TR at 17:12-13.

30 ³⁸ 4/1/13 TR at 19:15-22.

³⁹ 4/1/13 TR at 24:2-25:4.

⁴⁰ 4/1/13 TR at 18:4-5.

⁴¹ 4/1/13 TR at 18:14-15.

1 according to ability.⁴² Therefore, a sixth grade student who cannot read may be in a
2 class with kindergarten and first grade students of the same reading level.⁴³

3 33. For reading, writing, and math, Students at ACES spend "about half of the
4 day . . . changing classes for those academic subjects."⁴⁴

5 34. While ACES is legally allowed by the State of Arizona to have 14 students
6 per class, it prefers to limit classroom size to 12 students with 3 staff members.⁴⁵
7 According to Ms. Hardy's review of her records, Parent [REDACTED] and Student's advocate
8 toured ACES on January 23, 2013, and at that time, the class in which Student would
9 have been placed already had 14 students.⁴⁶ ACES had hired and was training a new
10 teacher at the time of the visit.⁴⁷ That teacher "opened her classroom probably the
11 week after" Parent [REDACTED] and Student's advocate visited.⁴⁸

12 35. According to Ms. Hardy, ACES uses the Wilson reading program in the
13 lower elementary levels.⁴⁹ Ms. Hardy acknowledged she was not a reading specialist
14 and was not aware of the specifics of the program used, but indicated Student's
15 advocate discussed the reading program with ACES reading specialist.⁵⁰ Student's
16 advocate testified she spoke to the reading specialist at ACES during the tour.
17 Student's advocate was informed ACES did not use the "early part" of the Wilson
18 program, Foundations.⁵¹ According to Student's advocate, the ACES reading specialist
19 stated ACES uses "a combination of other things" and listed a couple other reading
20 programs to get students to the reader level, which was not proven methodology.⁵²

21 36. Parent [REDACTED] visited ACES on two occasions. When asked why he did not
22 believe ACES was appropriate for Student, Parent [REDACTED] described the school as follows:

23 Bars on the outside of the school bent in. To me it looked like the last
24 stop before you go to prison, kids up against the wall like they're ready to

25 ⁴² 4/1/13 TR at 25:17-22.

26 ⁴³ 4/1/13 TR at 25:5-16.

27 ⁴⁴ 4/1/13 TR at 25:21-22.

28 ⁴⁵ 4/1/13 TR at 18:25-19:2.

29 ⁴⁶ 4/1/13 TR at 23:2-5.

30 ⁴⁷ 4/1/13 TR at 23:6-10.

⁴⁸ 4/1/13 TR at 23:10-11.

⁴⁹ 4/1/13 TR at 20:21-22.

⁵⁰ 4/1/13 TR at 21:1, 21:20-22:1.

⁵¹ 4/1/13 TR at 193:21-25.

⁵² 4/1/13 TR at 193:25-194:3.

1 be patted down by a policeman, with their – I think they call them minders
2 but really they're their bodyguards in case the kid lashes out to prevent
3 any physical harm. But yeah, both times actually kids were outside up
4 against the wall, being talked to, things like that.
5 . . . [L]istening to [Ms. Hardy's] description, we talked about the different
6 types of kids that come to this school. And when I listened to the
7 description of some of the types of kids that go to ACES, that's not my
8 son. My son does not do that stuff. And I'm just like, as a parent, aside
9 from transitions and the reading program and the class size and all of
10 other things, I just – my gut told me this is not the right place. This is not
11 where he belongs.⁵³

12 Gateway Academy

13 37. According to its literature, "Gateway Academy is the only not for profit
14 private day school in the State of Arizona specializing in a pure population of students
15 with Asperger's syndrome, High Functioning Autism, and PDD-nos."⁵⁴ Further, many of
16 the students at Gateway Academy "have experienced difficulties in mainstream school
17 settings" and "may have been excluded from school or have had problems at home
18 because of their complex and challenging needs."⁵⁵

19 38. Gateway Academy's website indicates it seeks students who "present no
20 significant behavior problems. Any behavioral problem must be able to be controlled
21 by verbal intervention without use of physical intervention."⁵⁶ However, it was noted
22 that Gateway Academy "specialize[s] in working with children and students whose
23 behavior can often be very challenging and whose individual needs are all very
24 different."⁵⁷

25 39. Ms. Thaw admitted she did not tour Gateway Academy or any other
26 location prior to Respondent Pointe making the decision to place Student at ACES.⁵⁸

27 40. Without the benefit of a tour and relying only on the website and what is
28 known about Gateway Academy "in the community," Ms. Thaw determined Gateway
29 Academy was not appropriate for Student because it is "a computer-based learning
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⁵³ 4/2/13 TR at 59:10-25.

⁵⁴ Exhibit C at p3.

⁵⁵ Exhibit C at p1.

⁵⁶ Exhibit C at p7.

⁵⁷ Exhibit C at p3.

⁵⁸ 4/1/13 TR at 96:17-19.

1 situation," it is "a very small community of like 35 students," student did not have the IQ
2 required by Gateway Academy for admission, and "in [her] opinion Gateway [Academy]
3 would not be able to handle the sorts of behaviors Student exhibits."⁵⁹

4 41. Parent [REDACTED] brought a representative from Gateway Academy to the
5 February 6, 2013, IEP meeting. At that meeting, the representative spoke about the
6 program, Student's classroom, the academics, the reading program, and Student's half-
7 day visit at Gateway Academy.⁶⁰ The representative stated Student was an appropriate
8 candidate for the Gateway Academy program and would fit in very well.⁶¹ Ms. Thaw did
9 not ask the Gateway Academy representative any questions during the IEP meeting.⁶²

10 42. At the request of Student's advocate, O. Robin Sweet, Executive Director
11 of Gateway Academy, prepared a letter for Ms. Thaw clarifying the admission criteria
12 and the program at Gateway Academy. According to the letter,

13 Gateway Academy does accept students with previous severe behavioral
14 issues from public/charter/private schools, as the majority of our typical
15 Asperger/HFA students are reacting to their perception of what is either
16 being said or done to them, and/or they are reacting to a sensory stimuli
17 which triggers a behavioral reaction. Upon attending Gateway
18 [Academy], we rarely see the dramatic behaviors exhibited in their
19 previous environment, as the students feel safe, heard, respected, and all
20 staff and faculty appeal to their intellect, which elicits a much more
21 positive response. . . .

22 All Asperger's and High Functioning Autistic students have serious
23 problems with change and transitions, and we address these issues with
24 our *in the moment* social coaching, which is integrated into every minute
25 of every day at Gateway Academy. . . .

26 Each Grade Level at Gateway [Academy] is divided into 1st-3rd Grades;
27 4th-5th Grades; 6th-8th Grades; 9th-10th Grades; 11th-12th Grades. We
28 follow the research based information which indicates integrating younger
29 students with older students or older students with younger students is
30 not recommended, which is why our levels are divided as such.⁶³

Canyon Pointe Academy

⁵⁹ 4/1/13 TR at 96:23-97:12

⁶⁰ 4/1/13 TR at 202:24-203:3.

⁶¹ 4/1/13 TR at 202:6-10.

⁶² 4/1/13 TR at 202:4-5.

1 43. After Petitioners filed the Due Process Complaint and during the
2 resolution period, Respondent Pointe proposed a placement at Canyon Pointe
3 Academy, a school within Respondent Pointe School District and a sister school to
4 Pinnacle.

5 44. The Canyon Pointe Academy placement was presented to Petitioners as
6 a new program that was being created in large part to serve Student. At the time it was
7 discussed, the Canyon Pointe Academy program was not actually in existence and had
8 no other students.

9 **CONCLUSIONS OF LAW**

10 1. A parent who requests a due process hearing alleging non-compliance
11 with the IDEA must bear the burden of proving that claim.⁶⁴ The standard of proof is
12 "preponderance of the evidence," meaning evidence showing that a particular fact is
13 "more probable than not."⁶⁵ Therefore, Petitioners bear the burden of proving their
14 claims and complaints by a preponderance of evidence.

15 2. This tribunal's determination of whether or not Student received a FAPE
16 must be based on substantive grounds.⁶⁶ If a procedural violation is alleged and found,
17 it must be determined whether the procedural violation either (1) impeded the child's
18 right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the
19 decision-making process; or (3) caused a deprivation of educational benefit.⁶⁷ If one of
20 the three impediments listed has occurred, the child has been denied a FAPE due to
21 the procedural violation.

22 **FAPE**

23 3. Through the IDEA, Congress has sought to ensure that all children with
24 disabilities are offered a FAPE that meets their individual needs.⁶⁸ These needs
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26 ⁶³ Exhibit F.

27 ⁶⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

28 ⁶⁵ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
(1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action*
29 *No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

30 ⁶⁶ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

⁶⁷ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

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

1 include academic, social, health, emotional, communicative, physical, and vocational
2 needs.⁶⁹ To do this, school districts must identify and evaluate all children within their
3 geographical boundaries who may be in need of special education and services. The
4 IDEA sets forth requirements for the identification, assessment and placement of
5 students who need special education, and seeks to ensure that they receive a free
6 appropriate public education. A FAPE consists of "personalized instruction with
7 sufficient support services to permit the child to benefit educationally from that
8 instruction."⁷⁰ The IDEA mandates that school districts provide a "basic floor of
9 opportunity," nothing more.⁷¹ It does not require that each child's potential be
10 maximized.⁷² A child receives a FAPE if a 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."⁷³

14 The IEP

15 4. Once a child is determined eligible for special education services, a team
16 composed of the child's parents, teachers, and others formulate an IEP that, generally,
17 sets forth the child's current levels of educational performance and sets annual goals
18 that the IEP team believes will enable the child to make progress in the general
19 education curriculum.⁷⁴ The IEP tells how the child will be educated, especially with
20 regard to the child's needs that result from the child's disability, and what services will
21 be provided to aid the child. The child's parents have a right to participate in the
22 formulation of an IEP.⁷⁵ The IEP team must consider the strengths of the child,
23 concerns of the parents, evaluation results, and the academic, developmental, and
24

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26 ⁶⁹ *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).

27 ⁷⁰ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

28 ⁷¹ *Id.* at 200.

29 ⁷² *Id.* at 198.

30 ⁷³ *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)).

⁷⁴ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

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

1 functional needs of the child.⁷⁶ To foster full parent participation, in addition to being a
2 required member of the team making educational decisions about the child, school
3 districts are required to give parents written notice when proposing any changes to the
4 IEP,⁷⁷ and are required to give parents, at least once a year, a copy of the parents'
5 "procedural safeguards," informing them of their rights as parents of a child with a
6 disability.⁷⁸

7 5. The IEP team must consider the concerns of a child's parents when
8 developing an IEP.⁷⁹ In fact, the IDEA requires that parents be members of any group
9 that makes decisions about the educational placement of a child.⁸⁰

10 6. In the present case, Parent [REDACTED] was included in each IEP meeting
11 including the January 15, 2013 IEP meeting in which Student's placement was changed
12 to a private day school. No evidence was submitted and no arguments were presented
13 that the IEP team was not in agreement as to that decision.

14 7. Petitioners alleged the IEP team failed to amend the September 25, 2012,
15 IEP to include a specific goal relating to transitions although the IEP noted that Student
16 "often struggles with transitions (40% of the time)" when it was initially adopted.⁸¹
17 Additionally, the cool off period suggested with respect to the behavior plan for Student
18 was not adopted.

19 8. While the proposed changes were not adopted into the IEP following the
20 January 15, 2013 IEP meeting, the evidence does not support a finding that Parents
21 were not allowed meaningful participation in the IEP process that would constitute a
22 procedural violation that deprived Student of a FAPE.

23 LRE

24 9. The Ninth Circuit established a four-part test regarding consideration of a
25 proposed educational placement in *Sacramento City School District v. Rachel H.*, 14 F.

26
27 ⁷⁶ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

28 ⁷⁷ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

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

29 ⁷⁹ 20 U.S.C. § 1415(d)(B).

⁸⁰ 20 U.S.C. § 1414(d)(3)(A)(ii); 34 C.F.R. §§ 300.324(a)(1)(ii).

30 ⁸¹ 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.327 and 300.501(c)(1).

⁸¹ Id.

3d 1398 (1994). The four factors are: (1) a comparison of the educational benefits available in the regular classroom, supplemented with appropriate aids and services, to the educational benefits of the special education classroom; (2) the nonacademic benefits to the disabled child of interaction with nondisabled children; (3) the effect of the presence of the disabled child on the teacher and other children in the regular classroom; and (4) the costs of supplemental aids and services necessary to mainstream the disabled child in a regular classroom setting.

10. The IDEA does not provide an absolute right to a particular placement or location as a child's LRE. Each proposed or alternative placement is simply required to have been "considered" by the IEP Team with regard to potential harmful effect on the student or potential harmful impact on the quality of the services that the child needs.⁸² Therefore, LRE and placement are required to be determined only after analyzing the student's unique needs (and the nature and severity of disabilities) against the federal mandate to educate disabled children "to the maximum extent appropriate" with his or her nondisabled peers. The IDEA preference for mainstreaming is also not an absolute.⁸³ The Administrative Law Judge acknowledges that the IDEA creates tension between provisions that require education to the maximum extent appropriate with nondisabled students and those that require meeting all the student's unique needs.

11. In the instant matter, the IEP team met on numerous occasions to revisit Student's placement. Each time a placement change was initiated, the IEP team was in agreement that a more restrictive environment was necessary to provide Student with the appropriate services.

12. Petitioners argued the option of placement at Canyon Pointe Academy, that was presented after the Due Process Complaint was filed, was evidence that there was a less restrictive environment that could have met Student's needs; however, an educational placement at Canyon Pointe Academy was not available on January 15,

⁸² See 34 C.F.R. § 300.116(d).

⁸³ See 34 C.F.R. §§ 300.114(a)(1) and (2). A school may, and should, remove a child from the regular educational environment if the nature and severity of the child's disability is such that, even with supplemental aids and services, the education of the disabled child cannot be satisfactorily achieved. See 34 C.F.R. §§ 300.114(a)(2)(ii) and 300.116(d).

1 2013, when the change in placement was adopted by the IEP team. This issue was not
2 presented in the Due Process Complaint; therefore, the Administrative Law Judge will
3 not consider whether Canyon Pointe Academy was a less restrictive environment.

4 13. Petitioners set forth the competing theories that ACES was not the LRE
5 for Student, but that Gateway Academy was the appropriate location. Thus Petitioners
6 appear to concede that a private day school is the LRE for Student, but disagree with
7 ACES as the location and/or the appropriateness of ACES. The Administrative Law
8 Judge concludes Petitioners failed to sustain their burden to show that a private day
9 school was not the LRE for Student at the time the change in placement was adopted
10 by the IEP team at the January 15, 2013, IEP meeting.

11 Prior Written Notice

12 14. The IDEA process for making changes to an IEP, including changing
13 educational placements, requires a school district to give parents written notice within a
14 reasonable time before taking the proposed action.⁸⁴ That notice (often called Prior
15 Written Notice or PWN) must contain certain information specified by the IDEA, such
16 as an explanation of why a decision is being made, the documentation used to make
17 the decision, and a reminder of parents' procedural rights. Of particular note is the
18 requirement that the PWN contain "[a] description of other options that the IEP Team
19 considered and the reasons why those options were rejected. . . ."⁸⁵ Thus, the PWN is
20 issued after an IEP team decision has been made, not before.

21 15. Petitioners alleged that Respondent Pointe failed to provide the PWN in a
22 timely manner. The January IEP meeting was held on January 15, 2013; the PWN was
23 sent to Petitioners on January 24, 2013.

24 16. The IDEA does not provide a specific timeframe in which a PWN must be
25 issued. Rather it must be issued a reasonable time before the proposed change is to
26 take effect. While the PWN may have been issued earlier, the failure to timely issue a
27 PWN would be a procedural violation. Petitioners failed to establish that the failure to
28 issue the PWN before January 24, 2013, impeded Student's right to a FAPE,

29 ⁸⁴ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).

30 ⁸⁵ 20 U.S.C. § 1415(c)(1)(E); 34 C.F.R. § 300.503(b)(6).

1 significantly impeded Parents' opportunity to participate in the decision-making
2 process, or caused a deprivation of educational benefit that denied Student a FAPE
3 due to the procedural violation.

4 Predetermination

5 17. The IDEA requires that parents be allowed "to participate in meetings with
6 respect to the identification, evaluation, and educational placement of the child."⁸⁶
7 However, a school district may discuss placement options in preparing for an IEP
8 meeting in that "preparatory activities that public agency personnel engage in to
9 develop a proposal or response to a parent proposal that will be discussed at a later
10 [IEP] meeting" do not constitute an IEP meeting.⁸⁷ "[S]chool officials must come to the
11 IEP table with an open mind. But this does not mean they should come to the IEP table
12 with a blank mind."⁸⁸

13 18. Petitioners alleged Respondent Pointe predetermined the change in
14 placement prior to the January 15, 2013, IEP meeting and predetermined that Student
15 would attend ACES.

16 19. Petitioners argued that Respondent Pointe's failure to share the FBA with
17 Parents prior to the MDR and IEP meeting was indicative of its predetermination to
18 change Student's placement. Petitioners did not establish in what way the failure to
19 provide the FBA showed predetermination. Petitioners argued that they were not able
20 to meaningfully participate in the MDR and IEP meeting because they were lacking
21 information. However, that issue was not raised in the Due Process Complaint and
22 therefore was not properly before this Tribunal.

23 20. The hearing evidence demonstrated that the change of placement was an
24 IEP team decision and was made after previous placements were not successful in
25 providing Student with the necessary services to provide FAPE. Petitioners did not
26 present any evidence to establish that Respondent Pointe did not come to the IEP table
27 with an open mind. In fact, the IEP team reached a decision together that Student's
28 educational placement should be changed to a private day school environment.

29 ⁸⁶ 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(c)(1).

30 ⁸⁷ 34 C.F.R. § 501(b)(3).

1 21. Petitioners also argued that Respondent Pointe's failure to consider the
2 other locations suggested by Petitioners, the expressed preference for ACES, and the
3 indifference shown to the Gateway Academy representative during the February 6,
4 2013, IEP meeting, evidences Respondent Pointe's predetermination that Student
5 would attend ACES.

6 22. The hearing evidence showed that Respondent Pointe had expressed a
7 preference to send students to ACES. Further, the hearing record established that
8 Parents had not provided any information regarding Gateway Academy until after the
9 January 15, 2013, MDR and IEP meeting at which the IEP team changed Student's
10 educational placement.

11 23. The record established that at the February 6, 2013, IEP meeting,
12 Respondent Pointe considered the multiple options presented prior to making the final
13 decision as to the location of Student's educational placement.

14 Appropriate Placement

15 24. After the IEP Team determines the educational placement, the school
16 district may select the location at which the services will be provided. "[C]hoosing
17 which school the student will attend is an administrative decision."⁸⁹ While it is an
18 administrative decision, the location must still be appropriate for Student in that it
19 provides the individualized educational services necessary to provide a FAPE to
20 Student.

21 25. The Administrative Law Judge concludes ACES is not an appropriate
22 location because of the excessive transitions, the inclusion of significantly older
23 students for academic classes, and the severe behavior issues prevalent in other
24 students. At ACES, Student would be expected to transition approximately half the
25 day. More significantly, those transitions would include students up to five years older
26 than Student transitioning into Student's academic classes. These significantly older
27 students exhibit more severe behavior issues than Student has been described as
28 having including physical aggression, sexual acting out, and drug issues.

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30 ⁸⁸ *T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 253 (2d Cir. 2009).

⁸⁹ *Deer Valley Unified Sch. Dist. v. L.P.*, 2013 U.S. Dist. LEXIS 61748 at *19-26 (D. Ariz. Mar. 20, 2013).

1 26. Also of note was that ACES was at capacity at the time Respondent
2 Pointe proposed to enroll Student. Therefore, even if ACES had been appropriate in
3 terms of meeting Student's needs, ACES was not appropriate at the time because it
4 was not an available option.

5 27. The evidence submitted by Petitioners establishes that Gateway
6 Academy is an appropriate location for Student. The classmates, curriculum, and
7 structure are appropriate for him to make progress towards the IEP goals. Student
8 would only be with other students his age. Its focus on autism spectrum students
9 ensures that Gateway Academy can address Student's behavioral and emotional
10 needs. While there are transitions, there are fewer transitions and the transitions are
11 used as teaching opportunities. Student attended Gateway Academy for a half day and
12 was deemed eligible for admission by the Gateway Academy staff.

13 28. Based on the IEP, the Administrative Law Judge concludes the
14 appropriate location is Gateway Academy.

15 Compensatory Education

16 29. Respondent Pointe acknowledged Student was eligible for three days of
17 compensatory services and one month of Occupational Therapy. Petitioners requested
18 21 days of compensatory services and one month of Occupational Therapy.

19 30. Student was denied FAPE following the MDR and IEP meeting on
20 January 15, 2013, when Respondent Pointe determined Student would be placed at
21 ACES. While Petitioners may have called in excused absences for Student during that
22 time, the absences were a direct result of Petitioners refusal to send Student to a
23 location that 1) was not available due to its capacity and 2) was not an appropriate
24 location for Student.

25 Conclusion

26 31. Respondent Pointe denied Student a FAPE. Parent is entitled to 73.5
27 hours of compensatory education and 1.5 hours of Occupational Therapy. Student
28 should be placed at Gateway Academy with tuition and transportation provided at the
29 expense of Respondent Pointe until Student's IEP team determines that another
30 educational placement is appropriate to meet Student's individualized needs.

ORDER

Based on the findings and conclusions above, IT IS HEREBY ORDERED that that the relief requested in the due process complaint is **granted** as set forth above. Respondent Pointe must provide 73.5 hours of compensatory education, provide 1.5 hours of Occupational Therapy, and place Student at Gateway Academy at Respondent Pointe's expense.

Done this day, August 12, 2013.

/s/ Tammy L. Eigenheer
Administrative Law Judge

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 August 13, 2013 to:

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