

STATE OF ARIZONA
OFFICE OF ADMINISTRATIVE HEARINGS

Student, by and through Parent

No. 11C-DP-007-ADE

Petitioners,

-v-

Benson Unified School District,

Respondent.

ADMINISTRATIVE
LAW JUDGE
DECISION

HEARING: February 10-11, 2011; February 18, 2011

APPEARANCES: Parents and ¹ ("Parents") appeared and were represented by attorney Gary C. Cargill; attorney Denise Bainton, DECONCINI, McDONALD, YETWIN & LACY, PC, appeared on behalf of the Benson Unified School District ("BUSD"), accompanied by Christy Castro, Director of Special Education, BUSD. Certified Court Reporter Raynbo Silva was present and recorded the proceedings as the official record of the hearing.

WITNESSES: For Petitioners:²

Michael Gray, M.D.

Patricia Black, Student's Homebound Instructor

Byrl Crago, Ph.D.

Robert Snyder, Director of Ed. & Training, Pilot Parents Program

Angela Grizzle, Principal, San Pedro Valley Online Academy

Donna White, Student's Homebound Instructor

Shad Housely, Principal, Benson Middle School

Mother

Father

For Respondent School District:

Jeanne Koba, Ed.D., Asst. Superintendent of Special Education,
Roosevelt Elementary School District

Shad Housely, Principal, Benson Middle School

David Woodall, Ph.D., Superintendent BUSD

Donna White, Student's Homebound Instructor

¹ Due to health reasons, participated in the entire hearing via telephonic connection.

² Throughout this Decision, proper names of teachers and parents are not used in order to protect confidentiality of Student and to promote ease of redaction. Each witness is identified by the name listed above in bold type.

Mary Paynter, **Special Education Teacher**, BUSD
Patricia Studley, Student's [REDACTED] **Homebound Instructor**

ADMINISTRATIVE LAW JUDGE: Eric A. Bryant

Parents bring this due process action, on behalf of Student, challenging an individualized educational program ("IEP") adopted by Respondent School District. 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.

Petitioners filed the original due process complaint on September 7, 2010. The complaint alleged that an IEP created in August 2010 did not provide Student a free appropriate public education ("FAPE"), raising a challenge to the educational placement of the IEP. Respondent School District responded in defense of the proposed IEP.

Thereafter, the parties filed cross-motions for summary judgment. After the motions were fully briefed, this tribunal held telephonic argument on the cross-motions on November 10, 2010. Both motions were denied by Order dated November 18, 2010. However, Petitioners were allowed to amend their due process complaint. Petitioners did so on November 30, 2010.

The amended due process complaint was then set for hearing on the following four issues, two procedural claims and two substantive claims:

(A) Did Respondent School District give timely prior written notice regarding the changes in the August 25, 2010, IEP?

(B) Did Respondent School District predetermine the placement of Student to an online academy in the August 25, 2010, IEP?

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 (C) Does the August 25, 2010, IEP fail to provide Student an
2 adequate amount of in-person instruction from a certified
3 teacher to Student?

4 (D) Does the August 25, 2010, IEP provide Student a FAPE?

5 The parties presented testimony and Exhibits at a formal evidentiary hearing
6 held on February 10, 11, and 18, 2011. The parties presented testimony from the
7 witnesses listed above and offered into evidence Petitioners' Exhibits A through CCC,
8 with some exclusions,⁴ and Respondent School District's Exhibits 1 through 11. After
9 the evidentiary record closed, the parties orally argued their positions to the tribunal.

10 The Administrative Law Judge has considered the entire record, including the
11 testimony and Exhibits,⁵ and now makes the following Findings of Fact, Conclusions of
12 Law, and Order finding no violations of the IDEA and finding that Respondent School
13 District has provided a FAPE to Student.

14 FINDINGS OF FACT

15 1. Student is an [REDACTED] year-old [REDACTED] grader who is at grade-level academically,
16 but who suffers from a medical condition known as multiple chemical sensitivities
17 ("MCS").⁶ As described by Student's parents and doctors, MCS

18 is an acquired chronic disorder characterized by recurrent symptoms
19 occurring in response to low levels of exposure to multiple, unrelated
20 chemicals. Symptoms generally occur in one of four categories: central
21 nervous system, circulatory, respiratory and mucous irritation, or
22 metabolic (including enzymes, blood, kidneys, GI tract, etc). Patients with
23 MCS have maladaptive reactions to chemicals found in perfumes,
24 pesticides, detergents, household cleaners, and other products.⁷

25 Because of this condition, Student cannot safely enter public buildings, including
26 schools. If Student is reacting to chemicals, her cognitive abilities are affected in that
27 she loses the ability to focus and process information. Because of her medical

28 ⁴ Exhibits X and PP were withdrawn. Exhibits ZZ and AAA were offered but were ruled inadmissible due
29 to irrelevancy.

30 ⁵ 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.

⁶ As explained by Student's treating physician, Dr. Michael Gray, M.D., MCS is a colloquial term for
"chemical hyperactivity." Student also suffers from "mixed mold mycotoxicosis."

⁷ Respondent Exhibit 6 at 60 ("Safety Protocol for [Student]'s School Environment").

1 condition, the parties are in agreement that Student should receive homebound
2 instruction.

3 2. Student's Mother also suffers from MCS. Based on the medical testimony at
4 hearing, her symptoms seem to be generally more severe than Student's.

5 3. Since enrolling in Respondent School District in 2008, Student has been
6 found eligible for special education as a student who is "Other Health Impaired." She
7 has received homebound instruction from a certified teacher from Respondent School
8 District. Her teacher must follow protocols set up by her parents and doctors. These
9 protocols include that the teacher be fragrance-free, meaning free of any added
10 fragrance and free of soaps, deodorants, lotions and other fragranced sprays.⁸ The
11 teacher must change clothes upon arrival to the home and before contact with
12 Student.⁹ Student's learning materials must be as paperless as possible since she
13 could react to ink in certain printed material.¹⁰ Also, air circulation in the study area is
14 important.¹¹ Since Student's enrollment in Respondent School District, Student's
15 teachers have been following those protocols when giving Student instruction in her
16 home.

17 4. For the 2009-2010 school year, Student was in [REDACTED] grade and received
18 instruction under an IEP that called for twelve (12) hours per week of homebound
19 instruction by a certified teacher, along with a computer as an assistive device. Student
20 made good progress and graduated to [REDACTED] grade.

21 5. The annual IEP meeting to review information and create an IEP for Student
22 for the 2010-2011 school year was held on August 25, 2010. Prior to that meeting, on
23 August 13, 2010, Respondent School District sent Parents a "Team Meeting Notice"¹²
24 and agenda.¹³ The agenda informed the team members that the meeting would
25 include, among other topics, a presentation about the San Pedro Valley Online
26 Academy (hereinafter "online program") by Angela Grizzle, the Principal of that
27 program. There would also be a presentation about a program called "Core Knowledge

28 ⁸ *Id.*

29 ⁹ *Id.*

30 ¹⁰ *Id.*

¹¹ *Id.*

¹² Respondent School District Exhibit 4.

1 Curriculum” by Mother, who would participate in the meeting through a Skype internet
2 connection.

3 6. At the meeting, all of the necessary team members were present. The two
4 programs noted above were presented and discussed. The online program is an
5 interactive program that uses online learning and testing activities as well as textbooks
6 and other materials. Each [REDACTED]-grade online student is assigned a teacher who is
7 immediately available to that student through the telephone, text messaging, and e-
8 mail. In addition, each online student has a learning coach, usually a parent, who helps
9 the student access the curriculum and reports daily attendance. The Core Knowledge
10 Curriculum is not an online program. Because Petitioners did not present much
11 evidence about the Core Knowledge Curriculum, not much information is reflected in
12 this record.

13 7. The majority of the IEP team members decided that the online program would
14 be best for Student because of its outstanding curriculum. The majority rejected the
15 curriculum proposed by Mother not because there was any problem with it but because
16 the online program was better for Student in their estimation. Parents disagreed with
17 the majority, objecting to the online program because it did not offer, in their view,
18 enough one-on-one interaction with a teacher and because neither parent was available
19 to be a learning coach. The IEP team added six hours per week of paraprofessional
20 support at Student’s home to address those concerns. Therefore, Student’s IEP for the
21 2010-2011 school year calls for Student to attend the online program from home with
22 six hours per week of support services from an aide, a computer to assist her, and
23 transportation to and from school activities she may be able to attend.¹⁴

24 8. The day after the IEP was created, Angela Grizzle sent Parents an e-mail that
25 told them how to transfer Student to the online program and what to do so that Student
26 could start the program by the next Monday. In addition, Respondent School District
27 ordered the online program books for Student and scheduled them for shipment directly
28 to Student’s home. That night, Parents responded by e-mail, objecting to the transfer
29

30 ¹³ Respondent School District Exhibit 7 at 66-67.

¹⁴ Respondent School District Exhibit 1 at 9.

1 and stating that they did not agree to the online program.¹⁵ The records show that
2 Respondent School District was trying to expedite the process so that Student could
3 start the program as soon as possible and not miss education time.

4 9. On August 27, 2010, Respondent School District sent Prior Written Notice to
5 Parents formally informing them of the decision at the IEP meeting.¹⁶ Further Prior
6 Written Notices were sent on September 7, 2010 and September 14, 2010, each one
7 providing more explanation of the decision to place Student in the online program.
8 When Petitioners filed the original due process complaint on September 7, 2010, stay-
9 put provisions provided that Student be educated according to the prior IEP and so
10 Student went back to having a certified teacher at her house for twelve hours per week.

11 10. At hearing, Petitioners called Student's and Mother's treating physician, Dr.
12 Michael Gray, M.D. He testified about both Student's and Mother's medical conditions
13 as described above, emphasizing the need for as paperless an educational program as
14 possible. He opined that Mother could not act as the learning coach described by the
15 online program because of chronic fatigue and disability from her medical condition. He
16 also opined that the online program would increase Student's contact with plastic
17 computer equipment and printed materials that could increase her symptoms.
18 However, he admitted on cross-examination that he does not know how much time
19 Student regularly spends on the computer or how much printed material she is exposed
20 to in her schoolwork. Therefore, his concerns about the online program are
21 speculative.

22 11. Petitioners also called B. Robert Crago, Ph.D., a psychologist who works in
23 clinical neuropsychology and treats Mother and Student. He has diagnosed Student
24 with Adjustment Disorder with mixed features of depression and anxiety and toxic
25 encephalopathy/chemical exposure. He testified that her functioning levels can
26 fluctuate from day to day, sometimes allowing her to function at high levels and at other
27 times causing her to have cognitive issues. He gave an opinion that Student would not
28 be able to perform well in an online program because she could not self-motivate. He
29 also stated concerns with respect to Student having social interactions with peers and

30 ¹⁵ The e-mails are in Respondent School District Exhibit 7.

¹⁶ Respondent School District Exhibit 3.

1 teachers. He was not informed, however, of the level of interaction that Student would
2 have with the certified teacher through the online program. This diminishes the weight
3 of his testimony.

4 12. Petitioner called Student's [REDACTED] Grade Homebound Instructor to testify at
5 the hearing. She taught Student at the home from November 2008 through May 2009,
6 first for four hours per week and then for twelve hours per week during the second half
7 of the school year. She explained her efforts to keep paper out of the home by
8 scanning documents and using the computer instead. She testified that Student did not
9 perform well independently and that Student needed a "tutoring" relationship with the
10 teacher. She acknowledged that she is not familiar with the online program being
11 proposed for Student and that she last taught Student in June 2009.

12 13. Student's [REDACTED] Grade Homebound Instructor also testified at the hearing.
13 She taught Student during the 2009-2010 school year. She testified that she worked
14 with Student on maintaining focus and attention for longer and longer periods and that it
15 was successful. She also testified that Student had social activities with her daughter at
16 her house along with other homeschooled children. Furthermore, she testified that
17 Student is mature enough to independently work in an online program. She testified
18 that it would be beneficial for Student to do more and more independent work and have
19 less one-on-one instruction. This tribunal finds Student's [REDACTED] Grade Homebound
20 Instructor to be a credible witness who knows Student well and whose testimony is
21 entitled to a great deal of weight. She was part of Student's IEP team and feels that the
22 online program would be good for Student.

23 14. Angela Grizzle, the Principal of the online program, testified about the
24 program. She noted that 90% of the materials for the program are available online and
25 the other 10% could be scanned and put online for Student. Additionally, she testified
26 that Student's teacher could meet in person with Student during the week if those
27 arrangements are made with the family. Her testimony addressed Petitioners' concerns
28 regarding exposure to printed materials and in-person time with a teacher. She also
29 testified that the role of the learning coach could be quite minor depending on a
30 student's needs.

1 15. Finally, this tribunal heard testimony from Student's current [REDACTED] Grade
2 Homebound Instructor. She has been teaching Student since September 2010. She is
3 familiar with the online program and believes that it would meet Student's needs and be
4 good for her.

5 16. None of the teachers who have worked with Student testified about any
6 problems she had with reacting to the computer plastic she has been exposed to during
7 schoolwork.

8 CONCLUSIONS OF LAW

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

21 APPLICABLE LAW

22 2. Only children with disabilities that affect their education are eligible for special
23 education and related services under the IDEA. One of the categorical disabilities
24 defined by the IDEA is "Other Health Impairment" which can include medical conditions
25
26

27 ¹⁷ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

28 ¹⁸ *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).

29 ¹⁹ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

30 ²⁰ *Id.*, 458 U.S. at 200.

²¹ *Id.* at 198.

1 such as Student has.²² After a child is evaluated, a team of educators, professionals,
2 and parents reviews the results and determines if eligibility categories are met.²³

3 3. Once a child is determined eligible for special education services, a team
4 composed of the child's parents, teachers, and others formulate an IEP that, generally,
5 sets forth the child's current levels of educational performance and sets annual goals
6 that the IEP team believes will enable the child to make progress in the general
7 education curriculum.²⁴ The IEP tells how the child will be educated, especially with
8 regard to the child's needs that result from the child's disability, and what services will
9 be provided to aid the child. The child's parents have a right to participate in the
10 formulation of an IEP.²⁵ The IEP team must consider the strengths of the child,
11 concerns of the parents, evaluation results, and the academic, developmental, and
12 functional needs of the child.²⁶

13 4. A parent is an equal participant in the decision-making process of the IEP
14 team.²⁷ Thus, a parent must receive adequate and timely notice of IEP team
15 meetings.²⁸ In addition, a parent is entitled to receive written notice from a school
16 district before the district proposes or refuses to initiate or change the identification,
17 evaluation, or educational placement of the parent's child and before the district
18 proposes or refuses to initiate or change the provision of FAPE to the child.²⁹ That
19 "prior written notice" to a parent must contain information prescribed by the IDEA; for
20 example, a description of the action being proposed or refused and an explanation of
21 why the action is being proposed or refused, along with other relevant information.³⁰
22 And, prior written notice must be given "a reasonable time before" the district's action.³¹

23 5. In summary, the IDEA requires that an IEP offer the disabled child an
24 opportunity to receive educational benefit and must meet that child's unique needs.

25 ²² 34 C.F.R. § 300.8(a)(9).

26 ²³ 34 C.F.R. § 300.306.

27 ²⁴ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

28 ²⁵ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

29 ²⁶ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

30 ²⁷ 20 U.S.C. § 1414(e); 34 C.F.R. §§ 300.501(b) and (c).

31 ²⁸ 34 C.F.R. §§ 300.322(a)(1) (A school district must "[n]otify[] parents of the meeting early enough to ensure that they will have an opportunity to attend.")

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

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

³¹ 34 C.F.R. §§ 300.503(a).

1 Additionally, the IEP safeguards parental rights by requiring that the parent be afforded
2 the opportunity to be a full participant in making educational decisions for the child and
3 that the parents be given adequate and timely notice for meetings concerning the
4 child's education and before educational changes are made or refused.

5 6. The decision of whether or not a child has received a FAPE must be based
6 on substantive grounds only.³² If a school district violates IDEA procedure, it has
7 deprived the child of a FAPE only if the procedural violation impedes the child's right to
8 FAPE, significantly impedes a parent's opportunity to participate in the decision-making
9 process, or causes deprivation of educational benefit.³³

10 7. A parent who requests a due process hearing alleging non-compliance with
11 the IDEA must bear the burden of proving that claim.³⁴ The standard of proof is
12 "preponderance of the evidence," meaning evidence showing that a particular fact is
13 "more probable than not."³⁵ Therefore, Petitioners bear the burden of proving by a
14 preponderance of evidence that Respondent School District has failed to provide a FAPE
15 through the August 25, 2010 IEP proposed for Student.

16 8. This tribunal finds that Petitioners have not met their burden for the following
17 reasons:

18 DECISION

19 9. Petitioners first argue that the notices given to Parents were not in compliance
20 with the IDEA. However, the record shows that Parents received proper notice of the
21 August 25, IEP meeting³⁶ and then received the appropriate Prior Written Notice ("PWN")
22 after the IEP meeting.³⁷ The PWN formally informed Parents of Respondent School
23 District's intention to implement the IEP that had been created. This tribunal finds no
24 violation with regard to the notices given Parents.

25
26 ³² 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. §§ 300.513(a).

27 ³³ *Id.*

28 ³⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 ³⁵ *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).

³⁶ In compliance with 34 C.F.R. §§ 300.322(a)(1).

³⁷ In compliance with 34 C.F.R. §§ 300.503(a).

1 10. In addition, there is no evidence of predetermination on this record. The IEP
2 team listened to presentations about two programs for Student and a majority of
3 members decided that the online program was better for Student. The evidence shows
4 that Parents were given a full opportunity to present the information they wanted to the
5 IEP team and exercised their right to express their opinion on the issue. The evidence
6 does not show that the decision to place Student in the online program was
7 predetermined.

8 11. The final claim brought by Petitioners concerns the adequacy and
9 appropriateness of the online program for Student. As noted above, Student's current
10 teacher and most recent prior teacher both firmly believe that the online program is not
11 only appropriate for Student, but will be good for her as well. Parents' objections
12 regarding printed materials and the learning coach have been addressed as well. The
13 online program can be completely paperless and the paraprofessional can fill the role of
14 learning coach and helper. In addition, the evidence shows that a certified teacher is
15 available to Student through many different means, including in-person if that is
16 necessary.

17 12. The evidence shows that the August 25, 2010, IEP offers a FAPE to Student.

18 **ORDER**

19 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
20 the due process complaint filed by Petitioners on September 7, 2010, as amended on
21 November 30, 2010, against the Benson Unified School District be **dismissed**.

22 Done this 31st day of March 2011.

23 OFFICE OF ADMINISTRATIVE HEARINGS

24 
25 _____
26 Eric A. Bryant
27 Administrative Law Judge

28 **RIGHT TO SEEK JUDICIAL REVIEW**

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

1 Furthermore, any party aggrieved by the findings and decisions made
2 herein has the right to bring a civil action, with respect to the complaint
3 presented, in any State court of competent jurisdiction or in a district court
4 of the United States. Pursuant to Arizona Administrative Code § R7-2-
5 405(H)(8), any party may appeal the decision to a court of competent
6 jurisdiction within thirty-five (35) days of receipt of the decision.

7
8 Copy sent by **electronic mail** this 31 day of March 2011
9 and by regular mail this 1 day of April 2011, to:

10 Gary B. Cargill
11 Law Office of Gary Cargill
12 8746 E. Wallen Ridge Dr.
13 Tucson, AZ 85710
14 Attorney for Petitioners
15 **garycargill@cox.net**

16 Copy sent by **electronic mail** this 31 day of March 2011
17 and by regular mail this 1 day of April 2011, to:

18 Denise Bainton
19 DECONCINI, McDONALD, YETWIN & LACY, PC
20 2525 E. Broadway Boulevard, Suite 200
21 Tucson, Arizona 85716-5300
22 Attorney for Respondent School District
23 **dbainton@dmyl.com**

24 Copy mailed by interdepartmental mail this 1 day of April 2011, to:

25 Colette Chapman, Exceptional Student Services
26 Arizona Department of Education
27 ATTN: Kacey Gregson
28 1535 West Jefferson
29 Phoenix, AZ 85007

30
By 