

1 through 15-774, and implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through R7-2-406.

2
3 Procedural History

4 Petitioners filed the due process complaint on March 7, 2011. The complaint
5 claims that Respondent School District did not provide Student a free appropriate public
6 education ("FAPE") while Student attended school in Respondent School District from
7 December 2010 to March 2011. Respondent School District denied the claims in a
8 written response. When the parties could not resolve the matter during a Resolution
9 Session held March 21, 2011, the matter proceeded to hearing.

10 Evidence and Issues at Hearing

11 The parties presented testimony and exhibits at a formal evidentiary hearing held
12 on May 2, 2011. The parties presented testimony from the witnesses listed above and
13 offered into evidence Petitioners' Exhibits A, B, D, E, J, K, N, O, P, U, and V, and
14 Respondent School District's Exhibits 1 through 11.

15 After the Exhibits and testimony were admitted, the parties argued to the tribunal
16 the following issues:

- 17 1) Is Student eligible for special education as a child with an Emotional
18 Disability?
- 19 2) Was Parent given documentation of the IEPs or revisions in a timely
20 manner?
- 21 3) Did Student need a one-on-one aide for behavioral support, which the
22 IEP fails to provide?
- 23 4) Did Respondent School District violate the IDEA by failing to give
24 Parent timely progress reports?
- 25 5) Was Student entitled to ESY services, which the IEP did not provide?
- 26 6) If Student was not entitled to a one-on-one aide, did Student need a
27 smaller class?
- 28 7) Should Student's IEP have contained testing accommodations such
29 as extended time, reading help, and a small group testing
30 environment?

1 Parent argued that there were both procedural and substantive violations of the IDEA.
2 Her main contention is that Student is eligible for special education as a student with an
3 emotional disability. Respondent School District defends its findings and actions,
4 arguing that there has been no IDEA violation.

5 The Administrative Law Judge has considered the entire record, including the
6 testimony and Exhibits,³ and now makes the following Findings of Fact, Conclusions of
7 Law, and Order finding no violations of the IDEA and finding that Respondent School
8 District provided a FAPE to Student.

9 FINDINGS OF FACT

10 1. Student is a [REDACTED] grader with a medical diagnosis of Type I Diabetes. He is
11 insulin dependent and must carefully monitor his blood-sugar level. He also has
12 behavioral issues that can impede his education. Student began attending school in
13 Respondent School District in early December 2010. Prior to that, he had been
14 attending school in an adjacent school district from August 2010. Before August 2010,
15 Student was attending school in the State of [REDACTED]

16 2. The hearing record contains documentation from [REDACTED] in 2007 and 2008,
17 including a September 2008 evaluation report⁴ and an [REDACTED] IEP effective September
18 2009 to September 2010. The [REDACTED] documentation shows that Student's diabetes was
19 identified as an eligibility factor as well as "emotional disturbance."⁵ Student had an
20 Individual Health Plan to help him manage the diabetes and was also receiving
21 behavioral assistance, help with his fine motor skills, and speech therapy. In
22 September 2009, speech therapy was discontinued with the consent of Parent because
23 Student had mastered his goals in that area.

24 3. The hearing record contains two pages from a psychological evaluation that
25 was performed in April 2010 in [REDACTED] by a clinical psychologist.⁶ That documentation
26 shows that Student was diagnosed with Oppositional Defiant Disorder, a DSM-IV
27 diagnosis. The documentation does not provide corroboration or supporting information

28 ³ 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
the witness is not specifically mentioned in this Decision.

⁴ Exhibit A.

⁵ *Id.*

1 for that diagnosis because the copy of the report that was submitted is incomplete.
2 This tribunal does not give much weight to that documentation.

3 4. The hearing record also contains a letter from an "Intervention Specialist" who
4 worked with Student in [REDACTED]⁷ The letter describes the behavioral support services
5 Student received and states an opinion about Student's needs. The letter is addressed
6 "To Whom It May Concern" and is undated and unsigned by the author. Because of
7 the lack of foundation for this hearsay statement, its reliability is weak and this tribunal
8 does not give it any weight.

9 5. The hearing record also contains documentation from the adjacent Arizona
10 school district that Student attended before attending Respondent School District,
11 including the September 2010 and October 2010 IEPs from that district.⁸ Those IEPs
12 show that Student was identified as a student with diabetes and as a student with an
13 emotional disability based on the prior IEP from [REDACTED] That district did not re-evaluate
14 Student, but relied on the [REDACTED] evaluation documentation from 2008. That district
15 provided special education and related services for Student in the areas of behavior
16 support, math, reading comprehension, occupational therapy, and nursing. While
17 attending in that district, Student was placed in the general education classroom with
18 support services of a special education teacher and health aide. He was taken to a
19 special education classroom for math and reading comprehension. There is no
20 indication that Student had a one-on-one aide for academic or behavioral support while
21 in that district.

22 6. When Student began attending school in Respondent School District in
23 December 2010, Respondent School District adopted the IEP of the prior Arizona
24 school district, including behavior support services.⁹ However, Respondent School
25 District also wanted to re-evaluate Student and get updated information due to the fact
26 that the most recent evaluation was performed in 2008 and was completed before
27 Student was [REDACTED] years of age. Respondent School District wanted to have more
28 current information and evaluation results now that Student was over [REDACTED] years of

29 ⁶ Exhibit B.

⁷ Exhibit J.

⁸ Exhibit 2.

⁹ Exhibit 3.

1 age. A Multidisciplinary Evaluation Team ("MET") that included Parent met in mid-
2 January 2011 to review the available documentation. That team conclude that updating
3 the evaluation information was necessary.¹⁰ Parent agreed and on January 18, 2011,
4 signed a consent for evaluation of Student.

5 7. On January 24, 2011, Parent revoked her consent to evaluate Student in an
6 e-mail sent to Kathy Minard, Director of Student Services, TESD. It is clear from the e-
7 mail that Parent was attempting to manipulate the MET by restricting the information
8 that was available to it to the [REDACTED] information and information from the prior Arizona
9 district because those districts had found eligibility in the category of emotional
10 disability. Respondent School District discontinued the evaluation process because of
11 the revoked consent.¹¹

12 8. On February 16, 2011, the MET convened again with only the information that
13 was already available. The MET concluded that it did not have enough information to
14 find that Student met the categorical requirements for eligibility as a student with an
15 emotional disability.¹² It did, however, find that Student met the criteria for eligibility
16 under "Other Health Impairment" due to his diabetes.

17 9. Kathy Minard, who was a member of the MET and is knowledgeable and
18 experienced in special education, testified as to her concerns about the sufficiency of
19 the information from [REDACTED]³ She testified that Student was under the age of [REDACTED] at
20 the time that information was gathered and that the documentation was not complete or
21 organized (documents were unsigned and undated). She further testified that the
22 information obtained from Student's Regular Education Teacher and Special Education
23 Teacher was not showing behaviors consistent with emotional disability in the
24 classroom. That statement was corroborated by testimony from both Student's Regular
25 Education Teacher and Student's Special Education Teacher.

26 10. On March 10, 2011, the IEP team met again to consider whether the lack of
27 eligibility in the category of emotional disability had any effect on Student's needs (the
28 team concluded that it did not) and to substitute writing for reading in the academic area

29 ¹⁰ Exhibits 4 and 5.

¹¹ Exhibit 7.

¹² Exhibit 8.

¹³ The other Arizona district relied on the [REDACTED] information as well. It did not do any further evaluation.

1 of Student's needs.¹⁴ A modified IEP was created, which Parent signed consent for, on
2 March 23, 2011.¹⁵ That IEP provided for behavioral support services, a health plan for
3 assisting with Student's diabetes, education in the regular education setting except for
4 math and written expression in the special education classroom. The behavioral
5 support was to be provided by teachers or classroom aides in the classroom by
6 following a written Behavior Intervention Plan attached to the IEP.

7 11. Parent withdrew Student from Respondent School District on April 23, 2011.
8 The hearing record shows that, during the approximately five months Student was
9 enrolled with Respondent School District, Student had many absences, was often tardy,
10 and left school early at times.¹⁶

11 12. The March 2011 IEP team found that there was no data to support a finding
12 of significant regression or recoupment problems that would support the need for
13 Extended School Year services. Therefore, the March 2011 IEP concludes that
14 Student is not eligible for ESY services.

15 CONCLUSIONS OF LAW

16 1. Through the IDEA, Congress has sought to ensure that all children with
17 disabilities are offered a free appropriate public education that meets their individual
18 needs.¹⁷ These needs include academic, social, health, emotional, communicative,
19 physical, and vocational needs.¹⁸ To do this, school districts must identify and evaluate
20 all children within their geographical boundaries who may be in need of special
21 education and services. The IDEA sets forth requirements for the identification,
22 assessment and placement of students who need special education, and seeks to
23 ensure that they receive a free appropriate public education. A free appropriate public
24 education ("FAPE") consists of "personalized instruction with sufficient support services
25 to permit the child to benefit educationally from that instruction."¹⁹ The IDEA mandates
26

27 ¹⁴ Exhibit 9.

28 ¹⁵ Exhibit 10.

29 ¹⁶ Exhibit 1.

30 ¹⁷ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

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).

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

1 that school districts provide a "basic floor of opportunity," nothing more.²⁰ It does not
2 require that each child's potential be maximized.²¹

3 **APPLICABLE LAW**

4 2. Only children with disabilities that affect their education are eligible for special
5 education and related services under the IDEA. One of the categorical disabilities
6 defined by the IDEA is "emotional disability,"²² which means that the student has a
7 significant and chronic impairment in one of several areas including inappropriate
8 behaviors or feelings under normal circumstances, inability to build or maintain
9 relationships with peers or teachers, and a general pervasive mood of unhappiness or
10 depression.²³

11 3. Another category of eligibility is "Other Health Impairment" which can include
12 medical diagnoses such as asthma, epilepsy, diabetes and other health conditions that
13 affect educational performance.²⁴ After a child is evaluated, a team of educators,
14 professionals, and parents reviews the results and determines if eligibility categories
15 are met.²⁵

16
17 ²⁰ *Id.*, 458 U.S. at 200.

18 ²¹ *Id.* at 198.

19 ²² Arizona Revised Statutes (A.R.S.) § 15-761(7). Code of Federal Regulations ("C.F.R.") § 300.8(a)(4)
labels category as "emotional disturbance."

20 ²³ A.R.S. § 15-761(7) provides, in its entirety, the following:

"Emotional disability":

21 (a) Means a condition whereby a child exhibits one or more of the following
22 characteristics over a long period of time and to a marked degree that adversely affects
the child's performance in the educational environment:

23 (i) An inability to learn which cannot be explained by intellectual, sensory or health
factors.

24 (ii) An inability to build or maintain satisfactory interpersonal relationships with peers
and teachers.

(iii) Inappropriate types of behavior or feelings under normal circumstances.

25 (iv) A general pervasive mood of unhappiness or depression.

26 (v) A tendency to develop physical symptoms or fears associated with personal or
school problems.

27 (b) Includes children who are schizophrenic but does not include children who are
28 socially maladjusted unless they are also determined to have an emotional disability as
determined by evaluation as provided in section 15-766.

29 ³⁴ C.F.R. § 300.8(a)(4) referring to "emotional disturbance" is almost identical.

30 ²⁴ 34 C.F.R. § 300.8(a)(9).

²⁵ 34 C.F.R. § 300.306.

1 4. Once a child is determined eligible for special education services, a team
2 composed of the child's parents, teachers, and others formulate an IEP that, generally,
3 sets forth the child's current levels of educational performance and sets annual goals
4 that the IEP team believes will enable the child to make progress in the general
5 education curriculum.²⁶ The IEP tells how the child will be educated, especially with
6 regard to the child's needs that result from the child's disability, and what services will
7 be provided to aid the child. The child's parents have a right to participate in the
8 formulation of an IEP.²⁷ The IEP team must consider the strengths of the child,
9 concerns of the parents, evaluation results, and the academic, developmental, and
10 functional needs of the child.²⁸

11 5. If a parent disagrees with the results of an evaluation, the parent has a right
12 to receive an IEE, performed by a professional who is not employed by the school
13 district.²⁹ The results of the IEE must be considered by school district.³⁰

14 6. Some disabled students need "extended school year" ("ESY") services.³¹
15 ESY services are additional special education and related services given during times
16 that school is not in session (most commonly over a summer break).³² ESY services
17 are necessary when the benefits that a student gains during the regular school year
18 "would be significantly jeopardized if the pupil is not provided educational services" or if
19 the student "would experience severe or substantial regression" if such services are not
20 provided.³³ The determination of whether ESY services are needed for a student is to

21 ²⁶ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

22 ²⁷ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

23 ²⁸ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

24 ²⁹ 34 C.F.R. § 300.502.

25 ³⁰ *Id.*

26 ³¹ 34 C.F.R. § 300.106.

27 ³² A.R.S. § 7-881(E).

28 ³³ A.R.S. § 7-881(A) states:

29 Each school district shall make extended school year services available to all pupils with
30 disabilities for whom such services are necessary. Extended school year services are
31 necessary if either of the following applies:

32 1. The benefits that the pupil gained during the regular school year would be
33 significantly jeopardized if the pupil is not provided educational services.

1. The pupil would experience severe or substantial regression if the pupil is not
provided educational services during recesses or the summer months and the regression

1 be made by the IEP team using all available data, including evaluations of the
2 student.³⁴ ESY is not to be used as a substitute for day care or respite care, as a
3 program to maximize a student's academic potential, or as a summer recreation
4 program.³⁵

5 7. A parent who requests a due process hearing alleging non-compliance with
6 the IDEA must bear the burden of proving that claim.³⁶ The standard of proof is
7 "preponderance of the evidence," meaning evidence showing that a particular fact is
8 "more probable than not."³⁷ Therefore, Petitioners bear the burden of proving by a
9 preponderance of evidence that Respondent School District has failed to provide a FAPE
10 through the December 2010 and March 2011 IEPs.

11 8. This tribunal finds that Petitioners have not met their burden.

12 **DECISION**

13 Parent has raised several issues in the complaint and made several arguments at
14 the close of the evidence. The issues are hereby addressed in turn.

15 1) Is Student eligible for special education as a child with an
16 Emotional Disability?

17 **ALJ Decision: No**

18 The Administrative Law Judge has considered the question posed and finds that there
19 is not sufficient evidence to show that Student meets the criteria set forth in the IDEA
20 for categorical eligibility under "emotional disability." The MET's conclusion that the
21 evidence is not sufficient to show eligibility in that category is supported by the hearing
22 record.

23 2) Was Parent given documentation of the IEPs or revisions
24 in a timely manner?

25 would result in substantial skill loss of a degree and duration that would seriously impede
26 the pupil's progress toward educational goals.

27 ³⁴ A.R.S. § 7-881(B).

28 ³⁵ A.R.S. § 7-881(D).

29 ³⁶ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

30 ³⁷ *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 No.*
J-84984, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

1 **ALJ Decision: Yes**

2 The evidence shows that Parent was given documentation by Respondent School
3 District and was a full participant in the process.

4 3) Did Student need a one-on-one aide for behavioral
5 support, which the IEP fails to provide?

6 **ALJ Decision: No.**

7 The record shows that Student did not need the services of a one-on-one aide, which
8 would have restricted his learning environment more than necessary. The testimony
9 from Student's teachers shows that the behavioral support provided in the IEP was
10 adequate.³⁸

11 4) Did Respondent School District violate the IDEA by failing
12 to give Parent timely progress reports?

13 **ALJ Decision: No**

14 The Administrative Law Judge answers the question posed in the negative. The
15 evidence does not show the claimed violation.

16 5) Was Student was entitled to ESY services, which the IEP
17 did not provide?

18 **ALJ Decision: No**

19 The Administrative Law Judge concludes that there is no evidence in the record that
20 shows that Student needed ESY services in either the December 2010 IEP or the
21 March 2011 IEP.
22

23 (6) If Student was not entitled to a one-on-one aide, did
24 Student need a smaller class?

25 **ALJ Decision: No**

26 The Administrative Law Judge concludes that the evidence does not support the claim
27 that Student needed a smaller class. The testimony of his teachers is against that
28 claim and is accepted by the tribunal.
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³⁸ In addition, Kathy Minard testified that Parent never requested a one-on-one aide and the IEP team never discussed it.

1 7) Should Student's IEP have contained testing
2 accommodations such as extended time, reading help, and a
3 small group testing environment?

4 **ALJ Decision: No**

5 The Administrative Law Judge finds no violation regarding this claim. Parent has not
6 provided evidence showing that more accommodations than were provided in the IEPs
7 were needed by Student.³⁹

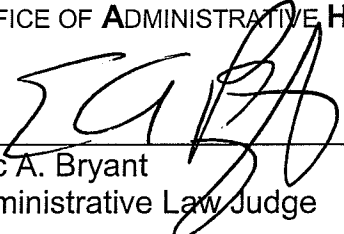
8 In conclusion, the December 2010 and March 2011 IEPs offered Student a
9 FAPE.

10 **ORDER**

11 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
12 the due process complaint filed by Petitioners on March 7, 2011 against Toltec
13 Elementary School District be **dismissed**.

14 Done this 20th day of May 2011.

15 **OFFICE OF ADMINISTRATIVE HEARINGS**

16 
17 _____
18 Eric A. Bryant
19 Administrative Law Judge

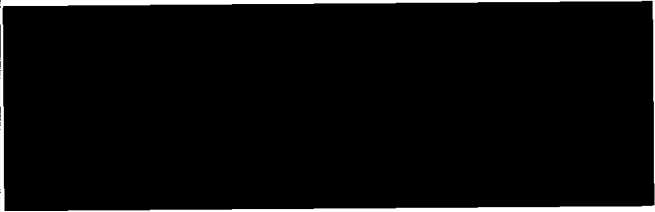
20 **RIGHT TO SEEK JUDICIAL REVIEW**

21 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this
22 Decision and Order is the final decision at the administrative level.
23 Furthermore, any party aggrieved by the findings and decisions made
24 herein has the right to bring a civil action, with respect to the complaint
25 presented, in any State court of competent jurisdiction or in a district court
26 of the United States. Pursuant to Arizona Administrative Code § R7-2-
27 405(H)(8), any party may appeal the decision to a court of competent
28 jurisdiction within thirty-five (35) days of receipt of the decision.
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30 ³⁹ A re-evaluation in 2011 might have shown the need for those items, but one was not conducted due to
Parent's withdrawal of consent.

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Copy sent by **electronic mail** and regular mail
this 20 day of May 2011, to:



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