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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

█████, a Student, by and through Parents
█████ and █████
Petitioners,

v.

Gilbert Unified School District
Respondent.

No. 16C-DP-033-ADE

ADMINISTRATIVE LAW JUDGE
DECISION

HEARING: May 16, 2016, through May 20, 2016, with the record left open to receive transcripts and post-hearing submissions.¹

APPEARANCES: Attorney Susan Marks, SUSAN MARKS & ADVOCATES, PLLC, appeared on behalf of Petitioners, accompanied by Parent █████ and Parent █████;² attorneys Erin H. Walz and Heather R. Pierson, UDALL SHUMWAY, appeared on behalf of Gilbert Unified School District ("Respondent School District"), accompanied by school representative Fran Grossenbacher. Certified Court Reporters Kate Roundy and Christine Johnson were present and recorded the proceedings as the official record of the hearing.

WITNESSES:³ Caron Price Lloyd, █████ General Education Teacher ("Teacher"); Brittany Rider, Case Manager and Special Education Teacher ("Resource Teacher"); Jennifer Kurth, Assistant Professor; █████ ("Mother"); Aimee Rios, Academic SCILLS Teacher ("Academic SCILLS Teacher"); Sara Word, Special Education Elementary Programs Coordinator; Sarah Davis, Petitioners' Advocate; Suzanne Carlson, Principal at Ashland Ranch Elementary; Katherine Muldoon, ("Preschool Teacher"); Kelly Jarrett, District Support Teacher, L. Juane Heflin, Board-Certified Behavior Analyst; Ashley Schoonover, Occupational Therapist ("Occupational Therapist")

ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

¹ Following the hearing, the parties agreed to an extension of the 45th day to July 29, 2016.

² With the filing of Petitioners' closing brief attorney

³ Throughout this Decision, proper names of parents and Student's teachers are not used in order to protect confidentiality of Student and to promote ease of redaction. Pseudonyms (appearing above in bold type) will be used instead. Proper names of administrative personnel, service providers, and expert witnesses are used.

1 Parents bring this due process action, on behalf of Student, challenging an
2 Individualized Educational Program ("IEP") adopted by Respondent School District,
3 alleging Student's proposed placement in an Academic SCILLS⁴ program on a campus
4 other than Student's home school was an improper change of placement. The law
5 governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"),
6 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in
7 2004),⁵ and its implementing regulations, 34 Code of Federal Regulations ("C.F.R.")
8 Part 300, as well as the Arizona Special Education statutes, Arizona Revised Statutes
9 ("A.R.S.") §§ 15-761 through 15-774, and implementing rules, Arizona Administrative
10 Code ("A.A.C.") R7-2-401 through R7-2-406.

11 Procedural History

12 At an IEP meeting on January 19, 2016, Respondent School District members of
13 the IEP team proposed that Student move from Ashland Ranch Elementary ("Ashland
14 Ranch") to Pioneer Elementary ("Pioneer").⁶ Additionally, Respondent School District
15 members of the IEP team proposed that Student receive 10 additional minutes of
16 specialized math instruction and of specialized written expression instruction per day.
17 Petitioners filed the Due Process Complaint on January 28, 2016 ("Complaint"). The
18 Complaint set forth two issues presented as follows:

- 19 1. Respondent School District failed to show that a change in placement or
20 increase in pull-out services was necessary to ensure Student received a
21 free appropriate public education ("FAPE") in the least restrictive
22 environment ("LRE").
- 23 2. Respondent School District failed to provide a qualified one-to-one
24 paraprofessional as listed on Student's IEP.

25 On February 5, 2016, Respondent School District filed a Motion to Dismiss
26 arguing that the proposed change was merely a change in location, an administrative
27

28 ⁴ SCILLS stands for "Specialized Classroom for the Intensive Learning of Language and Skills."

29 ⁵ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of
30 2004," IDEA 2004 became effective on July 1, 2005.

⁶ Both Ashland Ranch and Pioneer are schools within Respondent School District.

1 decision not governed by the IDEA. By order dated March 1, 2016, that Motion to
2 Dismiss was denied.

3 The parties participated in mediation but no resolution was reached. On April
4 28, 2016, Petitioners moved to amend their Complaint, which was allowed by an order
5 dated May 5, 2016. The Amended Complaint set forth three new issues presented as
6 follows:

- 7 3. Respondent School District failed to provide Student FAPE when it did not
8 provide an evidence-based reading program that would meet Student's
9 needs.
- 10 4. Respondent School District failed to provide Student FAPE when it did not
11 provide appropriate and effective modifications necessary for Student to
12 meaningfully access the general education curriculum.
- 13 5. Respondent School District failed to provide Student FAPE when it did not
14 use effective procedures for designing and implementing positive behavior
15 intervention and supports to address behaviors that interfered with Student's
16 learning and access to the general education curriculum.

17 Petitioners sought an order that Student remain at Ashland Ranch, that Parents
18 be provided information regarding paraprofessionals, that paraprofessionals receive
19 specific training, that Student receive compensatory services in reading instruction, that
20 Student receive compensatory services, and that an appropriate BIP be developed.
21 Respondent School District denied any violations of the IDEA.

22 *Evidence and Issues at Hearing*

23 The parties presented testimony and exhibits at a formal evidentiary hearing
24 held from May 16, 2016, through May 20, 2016. The parties presented testimony from
25 the witnesses listed above⁷ and offered into evidence Petitioners' Exhibits J, K, AA
26 through CC, and OO through SS, and Respondent School District's Exhibits 1-15, 18-
27 37, 39-40, 43-48, 50-52, 57, 59, 61, 63, 65, 67 and pages 1563-71 of Exhibit 41, pages
28 1572-74 of Exhibit 42, pages 1577-80 of Exhibit 68, and pages 1619-22 of Exhibit 69.

29
30 ⁷ Transcripts of the testimony have been added to the record.

1 After the Exhibits and testimony were admitted, the parties submitted written
2 arguments to the tribunal. In their closing brief, Petitioners withdrew any claim for
3 compensatory services and concluded that "the only remedy Petitioner[s] [are] seeking
4 is an order finding that the District's proposed change, whether denominated as a
5 change of location or placement, is not appropriate, will not provide FAPE in the LRE
6 and cannot be implemented." Respondent School District argued that the proposed
7 change was a change of location that is an administrative decision that does not need
8 to be made or adopted by the IEP team. Respondent School District also presented
9 argument relating to the other issues raised in the Complaint and Amended Complaint
10 that Petitioners ultimately withdrew.

11 The Administrative Law Judge has considered the entire record, including the
12 testimony and Exhibits,⁸ and now makes the following Findings of Fact, Conclusions of
13 Law, and Order.

14 **FINDINGS OF FACT**

15 1. Student, age [REDACTED] is a student in the Respondent School District. Student
16 has [REDACTED]

17 2. Student began attending Respondent School District in February 2013,
18 when he was enrolled in the MAGIC preschool program on the Spectrum Elementary
19 campus. The preschool program was a combination of a fully self-contained classroom
20 and an integrated preschool classroom during which Student spent time in both
21 classrooms each day. Preschool Teacher testified that Student made the most
22 progress when he spent 60 to 75 percent of his time in the self-contained classroom
23 portion of the preschool. Mother acknowledged that Student was "soaring" in the
24 MAGIC classroom, but she considered it "one of the biggest mistakes" she had made
25 as a parent because "once [she] labeled him, [she] would never get him out" of the self-
26 contained classroom.

29 ⁸ The Administrative Law Judge has read and considered the exhibits submitted, even if not mentioned
30 in this Decision. The Administrative Law Judge has also considered the testimony of every witness,
even if the witness is not specifically mentioned in this Decision.

1 3. In early 2015, a multi-disciplinary evaluation team ("MET") meeting was
2 convened for Student. After numerous assessments were conducted, a MET report
3 was created on April 30, 2015. The following summary was included in the MET report.

4 Psychoeducational – Student's cognitive testing was done in two shorter
5 sessions to accommodate Student's attention span. Student's cognitive
6 scores ranged from very low to low. The report also detailed Student's
7 adaptive behavior assessments ranged from moderately low to low.
8 Student's BASC teacher assessment included Attention scores in the "at
9 risk" range and Functional Communication scores in the "clinically
10 significant" range. Student's BASC parent assessment also included
11 Activities of Daily Livings scores in the "clinically significant" range.
12 Student's Social Emotional skills on the DAYC fell in the very poor range.
13 It was noted that Student's social emotional functioning should be
14 considered an area of delay.

15 Speech/Language – Student had difficulty completing the assessments
16 and following directions, needed frequent reminders to respond and
17 participate, and refused some tasks. Student had difficulty following
18 directions to complete classroom tasks and attending to adult-directed
19 activities. Student used words and phrases, but not complete sentences.
20 Student was intelligible at the single word level, but his speech
21 intelligibility decreased in connected speech. Student's speech and
22 language scores, both expressive and receptive, were in the severely
23 delayed range.

24 Occupational Therapy – Student had "difficulties with consistent fine and
25 visual motor skills including use of a functional grasp on his
26 writing/coloring utensils and when obtaining a variety of sized items from
27 table top, along with tracing/copying shapes and letters of his first name
28 with physical and visual cues." It was noted that Student responded well
29 to verbal cues for redirection, but on occasion would refuse to complete
30 non-preferred tasks, which required extra time for participation in class.

1 Student's fine motor/visual perceptual skills scores were significantly
2 below average.

3 4. When developing Student's IEP for the 2015-2016 school year, members
4 of the IEP team from Respondent School District recommended that Student be placed
5 in the Academic SCILLS program. Parents argued against the placement and
6 eventually, the IEP team agreed to place Student at his neighborhood school with 105
7 minutes per day of specialized instruction in the areas of reading, math, and written
8 expression as pull-out services in a resource classroom.

9 5. On May 8, 2015, an IEP was adopted for Student. Student was found
10 eligible for special education under the categorical eligibility of Developmental Delay.
11 The IEP included goals and services in academics, speech and language, self-help,
12 adaptive physical education, Occupational Therapy ("OT") and
13 social/emotional/behavioral supports. The IEP indicated a "B" service code, which
14 meant Student would be inside the regular classroom at least 40 percent of the day and
15 no more than 79 percent of the day. The remaining time was to be spent receiving
16 services in a resource room setting.

17 6. Student's May 8, 2015 IEP provided the following summary of Student's
18 challenges and needs:

19 [Student's] receptive language deficits negatively impact his ability to
20 comprehend classroom information and accurately follow directions. His
21 expressive language and articulation deficits adversely affect [his] ability
22 to intelligibly convey his wants, needs, thoughts, and ideas to his peers
23 and teachers. [Student's] cognitive and social/emotional delays indicate
24 a need for direct teaching strategies to assist him in working at a
25 reasonable pace, strategies to start and complete tasks/stay on task, and
26 link newly learned information to what has already been taught. His
27 needs in motor development directly impact [Student's] ability to
28 independently work on tasks and participate in small and large group
29 activities involving fine and gross motor tasks. [Student's]
30 social/emotional deficits indicate a need [for] frequent feedback (visual,
verbal, tactile cues) from an adult to maintain his attention to task, follow
directions, and complete tasks in a timely manner. His social/emotional
needs in the area of task avoidance indicate a need for frequent adult
feedback to provide proximity control and redirection, and to
simplify/repeat directions.

1 7. As required by the terms of the IEP, the team met regularly during the fall
2 semester to discuss Student's progress. In September 2015, the IEP team discussed
3 increasing Student's speech and language minutes to address his communication
4 device, but Parents were against the increase as it would decrease his time in the
5 general education classroom.

6 8. On or about September 24, 2015, Student's IEP was amended. At that
7 time, it was noted that Student was in a Level B placement, or "Inside Regular Class
8 40%-79% of day." In the Special Education Services section, it was noted that the
9 Special Education Teacher will provide, in the resource classroom, 60 minutes per day
10 for basic reading; 30 minutes per day for basic math; and 15 minutes per day for written
11 expression. Under the LRE Explanation, it was reported as follows:

12 [REDACTED] [Student] is currently receiving special education services
13 as a student with a Developmental Delay. He is in a [REDACTED] general
14 education classroom with pull-[o]ut support. In order to make progress on
15 his goals, [Student] needs the services of a specifically trained Special
16 Education Teacher, occupational therapy and speech personnel. Services
17 may be provided in a setting other than the general education classroom
18 in order to provide intense instruction to learn the skills identified in the
19 IEP. There will be less interaction with his typically developing peers,
however the team determined that any detrimental factors from [reduced
time with] typical peers would be offset by the benefits of small group
instruction.

20 9. During an IEP team meeting on December 3, 2015, the Respondent
21 School District members of the IEP team proposed changing Student's IEP so that he
22 would attend school at Pioneer in the Academic SCILLS program. Parents were taken
23 off guard by the suggestion as they believed Student was doing well and did not
24 believe he needed any changes to his IEP. Parents were encouraged to visit the
25 Academic SCILLS program to have a better understanding of the program and what it
26 could offer Student.

27 10. During the January 19, 2016 IEP team meeting, Parents indicated they
28 had reservations about placing Student in the Academic SCILLS classroom. Parents
29 wanted Student to remain at his home school where he had been making some
30

1 progress. Parents also disagreed with the Respondent School District's proposed
2 increase in Student's writing minutes from 15 to 30 minutes per day and in Student's
3 math minutes from 30 to 45 minutes per day.

4 11. Following the meeting, Respondent School District issued a Prior Written
5 Notice on January 22, 2016, stating that Student would begin attending the
6 [REDACTED] Academic SCILLS program at Pioneer on February 1, 2016. At that time,
7 it was noted that Student would remain in a Level B placement, or "Inside Regular
8 Class 40%-79% of day. In the Special Education Services section, it was noted that
9 the Special Education Teacher will provide, in the Academic SCILLS classroom, 60
10 minutes per day for basic reading; 40 minutes per day for basic math; and 25 minutes
11 per day for written expression.⁹ Under the LRE Explanation, it was reported as follows:

12 [REDACTED] (Effective 02/01/2016-05/07/2016): Upon transition to an
13 Academic SCILLS Special Education Classroom, [Student] will continue
14 to receive the specialized instruction services listed in the IEP. In order
15 to make progress on his goals, [Student] requires the services of a
16 specifically trained Special Education Teacher, Occupational Therapist,
17 Speech/Language Pathologist, and Adapted PE Teacher. Services will
18 be provided in a setting other than the general education classroom in
19 order to provide intense instruction to learn the skills identified in the IEP.
20 There will be less interaction with his typically developing peers, however
21 the team determined that any detrimental factors of being pulled from
22 typical peers would be offset by the benefits of small group instruction.

23 12. Following the Complaint and Amended Complaint being filed, Student
24 remained at Ashland Ranch as his stay put placement.

25 13. Extensive testimony regarding Student's performance during the 2015-
26 2016 school year, his program, and the Academic SCILLS program was provided at
27 hearing.

28 Student's Performance

29 Teacher

30 ⁹ There appears to be a typographical error in the January 19, 2016 IEP in that the Special Education Services Section includes not only the increased time in the Academic SCILLS classroom, but the minutes from the prior IEP in the resource classroom. The parties agreed at hearing that the only changes proposed were an increase of 20 minutes per day and the move from Ashland Ranch to Pioneer.

1 14. Teacher testified that she was surprised when she realized Student's low
2 levels of readiness as to behaviors, attention, and academic ability. As a result,
3 Student required more teaching to those levels directly from a teacher and more time to
4 receive that instruction.

5 15. Teacher stated that her provision of modified curriculum was supported
6 by "a very collaborative team," who provided her with activities that were differentiated
7 to Student's level of readiness so Student could participate in the general education
8 classroom. Ms. LaPrise, Respondent School District's inclusion specialist, provided
9 Teacher with modified curriculum so Student could work on different activities that were
10 aligned with the standard the classroom was working on but modified to Student's level
11 of readiness. Teacher provided several examples of such modifications she employed
12 in the classroom.

13 16. Student needed significant repetition of instruction and tasks. It took
14 Student longer to accomplish tasks and Student was inconsistent in his ability to retain
15 learned tasks.

16 17. Because of Student's lack of skills, Student was often working on a level
17 of modified work that did not look like his peers' work. Teacher stated that Student was
18 like his "own learning island in my classroom" and it was just Student working with his
19 paraprofessional.

20 18. Because Student's classroom work was directed by adults, Teacher did
21 not feel Student had the opportunity to grow and learn at his own pace.

22 19. Teacher acknowledged that Student had problem behaviors earlier in the
23 year, but that they had improved by January 2016. Teacher denied that the proposed
24 change had anything to do with Student's behavior.

25 20. Teacher stated that she never felt that Student's needs were being met in
26 the general education classroom as much as they could have been.

27 21. Teacher testified regarding the [REDACTED] standards, which include,
28 but are not limited to, the following:

- 29 • Identify all letters and letter sounds;
30 • Write all upper and lower case letters;

- Read consonant/vowel/consonant words;
- Read long vowel sounds;
- Read 50 sight words;
- Compare characters in stories;
- Identify details from informational text;
- Write two to three sentences about a topic with a capital letter, period at the end, and phonetic spelling and drawing a picture regarding the same;
- Count to 100;
- Write numbers up to 20; and
- Add and subtract numbers with sums and differences up to five.

22. With respect to those standards, Teacher testified that as of March 2016, Student was able to complete the following:

- Copy/imitate a vertical line, horizontal line, circle, and right diagonal line;
- Trace 4/5 letters of his name;
- Independently copy and “e” and “n” from his name;
- Answer simple questions about his personal information (e.g. his name, his teachers’/therapists’ names when he saw them);
- Use three word simple sentences when looking at a picture when given a verbal model;
- Drawing a person with details (eyes, ears, neck, mouth, etc.) with visual and verbal prompts including a model from which to copy;
- Identifies upper and lower case letters with 80 percent or greater accuracy;
- Identifies 20 sight words with 35 percent accuracy;
- Identifies the numbers 1 through 13 with 54 percent accuracy; and
- Counts 13 objects with adult support.

Resource Teacher

23. Resource Teacher testified that at the beginning of the 2015-2016 school year, she had significant concerns with Student’s readiness skills including his inability to walk in line, sit quietly, attend to tasks, and his limited communication and language skills.

24. Student required more practice and repetition of concepts over longer periods of time. It could take Student a week to learn a skill that was expected to take one day. Resource Teacher stated she had to go back and reteach skills Student had learned or he could lose a newly-acquired skill. Resource Teacher found Student’s pace was significantly slower than other students in her classroom.

1 25. Resource Teacher believed that Student did not make sufficient progress
2 on his academic goals because he did not spend sufficient time in her classroom.
3 Resource Teacher noted that Student was not making adequate progress in math or
4 writing and would have benefited from more time in her classroom in both areas.
5 Resource Teacher also indicated that she did not believe 15 minutes per day was
6 sufficient to address Student's writing needs when he was still working on prewriting
7 strokes. Resource Teacher found that Student made the most progress in reading
8 when he had 60 minutes in her classroom in two longer periods of time.

9 26. Resource Teacher noted that because Student came to her room in
10 "chunks" of time, he often lost instruction time due to behaviors or adjusting to the
11 transition. Resource Teacher stated that Student did better during the 30 minutes
12 sessions with her.

13 *Occupational Therapist*

14 27. At the beginning of the 2015-2016 school year, Student did not have the
15 pre-skill of ownership of his name to begin to learn to trace or copy his name.

16 28. Student was working on the basic pre-skills of writing horizontal and
17 vertical lines before he could learn any higher-level motor skills with her.

18 29. Occupational Therapist was unable to push-in Student's OT sessions to
19 the general education classroom because he was very distractible.

20 30. Occupational Therapist stated that Student was inconsistent in his
21 retention of learning and required significant repetition of directions and tasks.

22 Resource Program

23 31. Respondent School District's resource program was not intended to
24 replace the general education instruction model. It was intended to assist students who
25 are able to meaningfully participate in the general education classroom with instruction
26 in specific areas of skill deficits.

27 32. Resource Teacher testified that she was responsible for providing
28 specialized instruction in the areas of reading, writing, and math, and supports in the
29 areas of executive functioning skills, behavior supports, and activities of daily living,
30 including mobility around campus, feeding, and toileting.

1 33. The resource program supports students with a wide range of eligibility
2 categories, including specific learning disabilities, other health impairment,
3 developmental delay, and autism.

4 34. In the resource program, students are grouped by grade levels for each
5 subject area. Because the only other special education student in Student's grade had
6 different needs than Student, they did not attend the resource classroom at the same
7 time. As a result, Student received his specialized instruction in the resource
8 classroom on a one-to-one basis. Without small group instruction, Student does not
9 have exposure to peers demonstrating desirable skills and behaviors during instruction
10 times.

11 35. Resource Teacher used the general education curriculum, *Foundations*, for
12 reading.

13 36. Occupational Therapy was originally pushed-in to the general education
14 classroom, but when that proved problematic, was done in the resource classroom.

15 Academic SCILLS

16 37. Academic SCILLS is a special education classroom that is intended for
17 students who require significant modifications to the general education standards
18 and/or curriculum. Students are grouped by ability levels in the Academic SCILLS
19 classroom.

20 38. The majority of instruction for students in the Academic SCILLS program
21 occurs in the Academic SCILLS classroom. Students are assigned to a homeroom
22 class where they start their days. Depending on their IEPs, the students go to the
23 general education classrooms for science, social studies, all specials, lunch, parties,
24 birthday celebrations, and any other special events.

25 39. Academic SCILLS Teacher testified that she would be able to implement
26 Student's IEP in the Academic SCILLS class.

27 40. Academic SCILLS Teacher also stated that all the students currently in
28 her class were level C placements, i.e. they spend more than 70 percent of their day in
29 the Academic SCILLS classroom.

30 41. The Academic SCILLS program uses the PC program for reading.

1 42. Students in the Academic SCILLS program have reduced transitions
2 throughout the day which maximizes the instruction time.

3 43. Related services, including occupational therapy and speech therapy, are
4 usually push-in services in the Academic SCILLS classroom which allows for less
5 disruption in the students' day.

6 44. Preschool Teacher testified that she believed in May 2015 that the
7 Academic SCILLS program was appropriate for Student because she did not believe
8 supports and services would enable Student to make meaningful progress in the
9 general education classroom.

10 45. Teacher testified that she believed the Academic SCILLS program was
11 appropriate for Student because the Academic SCILLS classroom could properly pace
12 the lessons to attempt to maximize Student's learning. Teacher also noted that Student
13 would be able to work with peers and see himself working on skills similar to those
14 around him.

15 46. Resource Teacher testified that the curriculum used in the Academic
16 SCILLS program was more appropriate and could be paced properly for Student.
17 Resource Teacher noted there were no peers in the resource classroom and Student
18 was missing out on the social interactions the Academic SCILLS class would offer.

19 47. Occupational Therapist testified that she believed the Academic SCILLS
20 program was appropriate for Student because Student would be less distracted by the
21 small group instruction.

22 48. Academic SCILLS Teacher testified that she believed Student would do
23 well in the program because he was working on acquiring the same skills as the
24 students in her class. Also, Academic SCILLS provides more opportunities for
25 repetition of skills, providing Student with the time necessary to master a skill
26 necessary to move to the next skill.

27 49. Ms. Word testified that she believes the Academic SCILLS program was
28 appropriate for Student because all of Student's individualized instruction was being
29 provided in one-on-one settings and Student was missing out on access to small group
30 instructions and the positive models.

Petitioners' Argument

50. Mother testified that Student was a member of the Ashland Ranch community and she did not want him to lose that connection, especially given that Student's sister attends Ashland Ranch. Mother indicated that Student had been invited to birthday parties and had been widely accepted by the students in the class and the school in general.

51. Mother stated that if it came down to a choice between Student's social interactions and his academic progress, she would prioritize his social interactions over his academic learning.

52. Mother asserted interactions with general education peers was important to teaching Student new skills and related a story in which Student observed a student use a urinal in the bathroom and Student then started using a urinal appropriately.

53. Mother had concerns after her observation of the Academic SCILLS classroom. Mother stated that she observed negative behaviors including a child jumping off the tables. Mother also indicated she knew, through the parent, of a child in the classroom who was still in diapers and exhibited behaviors including biting, hitting, and kicking.

54. Petitioners argued that the only requirement under the IDEA was that Student make "some" progress towards his goals to show that his placement in the resource classroom was appropriate.¹⁰

CONCLUSIONS OF LAW

1. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.¹¹ The standard of proof is "preponderance of the evidence," meaning evidence showing that a particular fact is

¹⁰ The Administrative Law Judge notes that Petitioners have withdrawn the claims raised in the Complaint and Amended Complaint that Respondent School District denied Student a FAPE when it failed to provide a paraprofessional, failed to provide an evidence-based reading program, failed to provide appropriate and effective modifications, and failed to design and implement positive behavior interventions as they are inconsistent with this new argument that Student must only make "some" progress to show he is being educated in his least restrictive environment.

¹¹ *Schafer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

1 “more probable than not.”¹² Therefore, Petitioners bear the burden of proving their
2 claims and complaints by a preponderance of evidence.

3 2. This tribunal’s determination of whether or not Student received a FAPE
4 must be based on substantive grounds.¹³ If a procedural violation is alleged and found,
5 it must be determined whether the procedural violation either (1) impeded the child’s
6 right to a FAPE; (2) significantly impeded the parents’ opportunity to participate in the
7 decision-making process; or (3) caused a deprivation of educational benefit.¹⁴ If one of
8 the three impediments listed has occurred, the child has been denied a FAPE due to
9 the procedural violation.

10 FAPE

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

25 ¹² *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
26 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,
27 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action*
28 *No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

29 ¹³ 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).

30 ¹⁴ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

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

¹⁶ *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).

¹⁷ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

¹⁸ *Id.* at 200.

educational opportunities and (3) is in accord with an individualized educational program.”²⁰

The IEP

4. Once a child is determined eligible for special education services, a team composed of the child’s parents, teachers, and others formulate an IEP that, generally, sets forth the child’s current levels of educational performance and sets annual goals that the IEP team believes will enable the child to make progress in the general education curriculum.²¹ The IEP tells how the child will be educated, especially with regard to the child’s needs that result from the child’s disability, and what services will be provided to aid the child. The child’s parents have a right to participate in the formulation of an IEP.²² The IEP team must consider the strengths of the child, concerns of the parents, evaluation results, and the academic, developmental, and functional needs of the child.²³ To foster full parent participation, in addition to being a required member of the team making educational decisions about the child, school districts are required to give parents written notice when proposing any changes to the IEP,²⁴ and are required to give parents, at least once a year, a copy of the parents’ “procedural safeguards,” informing them of their rights as parents of a child with a disability.²⁵

5. The IEP team must consider the concerns of a child’s parents when developing an IEP.²⁶ In fact, the IDEA requires that parents be members of any group that makes decisions about the educational placement of a child.²⁷

LRE

¹⁹ *Id.* at 198.

²⁰ *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)).

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

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

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

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

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

²⁶ 20 U.S.C. § 1415(d)(B).

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

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

1 6. Respondent School District proposed that Student receive 10 additional
2 minutes of specialized math instruction and of specialized written expression instruction
3 per day.

4 7. Any increase in service minutes, by definition, decreases a student's time
5 in the general education setting and may affect a student's LRE.

6 8. The IDEA does not provide an absolute right to a particular placement or
7 location as a child's LRE. Each proposed or alternative placement is simply required to
8 have been "considered" by the IEP Team with regard to potential harmful effect on the
9 student or potential harmful impact on the quality of the services that the child needs.²⁸
10 Therefore, LRE and placement are required to be determined only after analyzing the
11 student's unique needs (and the nature and severity of disabilities) against the federal
12 mandate to educate disabled children "to the maximum extent appropriate" with his or
13 her nondisabled peers. The IDEA preference for mainstreaming is also not an
14 absolute.²⁹ The Administrative Law Judge acknowledges that the IDEA creates tension
15 between provisions that require education to the maximum extent appropriate with
16 nondisabled students and those that require meeting all the student's unique needs.

17 9. The Ninth Circuit established a four-part test regarding consideration of a
18 proposed educational placement in *Sacramento City School District v. Rachel H.*, 14
19 F.3d 1398 (1994). The four factors are: (a) a comparison of the educational benefits
20 available in the regular classroom, supplemented with appropriate aids and services, to
21 the educational benefits of the special education classroom; (b) the nonacademic
22 benefits to the disabled child of interaction with nondisabled children; (c) the effect of
23 the presence of the disabled child on the teacher and other children in the regular
24 classroom; and (d) the costs of supplemental aids and services necessary to
25 mainstream the disabled child in a regular classroom setting.

26
27
28 ²⁸ See 34 C.F.R. § 300.116(d).

29 ²⁹ See 34 C.F.R. §§ 300.114(a)(1) and (2). A school may, and should, remove a child from the regular
30 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 10. Petitioners argued that the results of this analysis require a finding that
2 the proposed increase in service minutes is not appropriate.

3 a. As to the first factor, it cannot be determined with any accuracy what
4 percentage of Student's educational progress during the year is
5 attributable to the general education classroom versus the resource
6 classroom. The testimony at hearing, however, demonstrated that
7 Student was not able to meaningfully participate in the general education
8 classroom based on his skills and readiness. According to Teacher,
9 Student was "his own learning island" in the general education classroom.
10 Meanwhile, Student made the most progress during the year on his
11 reading goals, which he received 60 minutes per day of specialized
12 instruction in the resource classroom.

13 b. As to the second factor, Mother testified as to Student's use of the
14 urinal after observing a typical peer using the urinal. Of course, there is a
15 social benefit to Student being in the general education classroom.
16 However, it was also noted that Student sometimes gets overstimulated in
17 the general education classroom and will find a quiet place to be alone.
18 Student has experienced non-academic benefits of interaction with
19 children who are not disabled, but sometimes has issues being in the
20 classroom.

21 c. As to the third factor, Student's behaviors have greatly improved since
22 the beginning of the school year. However, Student continues to
23 occasionally exhibit disruptive behaviors requiring intervention by the
24 general education teacher.

25 d. As to the fourth factor, no evidence was submitted related to this
26 factor.

27 11. The Administrative Law Judge concludes that the four factors support the
28 20 minute per day increase in service minutes.

29 Educational Placement versus Location
30

1 12. The only remaining issue is whether a change from the resource program
2 to the Academic SCILLS classroom constitutes a change of educational placement or a
3 change of location.

4 13. It is settled law that a student's "educational placement" is an IEP Team
5 decision, whereas the physical "location" is an administrative decision. See *Deer*
6 *Valley Unified School District v. L.P.*, 942 F.Supp.2d 880 (D. Ariz. 2013).

7 [T]he term "educational placement" in the regulations refers only to the
8 general type of educational program in which the child is placed.
9 "Educational placement" refers to the general educational program – such
10 as the classes, individualized attention and additional services a child will
11 receive – rather than the "bricks and mortar" of the specific school.
12 [T]here is no requirement in the IDEA that the IEP name a specific school
13 location. [A]n IEP's failure to identify a specific school location will not
14 constitute a per se procedural violation of the IDEA. The location of
services in the context of an IEP generally refers to the type of
environment that is the appropriate place for provision of the service. For
example, is the related service to be provided in the child's regular
classroom or resource room?

15 *Id.* at 887 (alterations in original) (citations and quotations omitted).

16 14. The IDEA requires that every local educational agency ("LEA") "must
17 ensure that a continuum of alternative placements is available to meet the needs of
18 children with disabilities for special education and related services" including "regular
19 classes, special classes, special schools, home instruction, and instruction in hospitals
20 and institutions." 34 C.F.R. § 300.115(a)-(b)(1).

21 15. It is possible for a change in location to constitute a change of
22 educational placement. To determine whether such a change has occurred, the effect
23 of the change in location on the following factors must be considered:

- 24 a. whether the educational program set out in the child's IEP has
25 been revised;
26 b. whether the child will be able to be educated with nondisabled
27 children to the same extent;
28 c. whether the child will have the same opportunities to participate
29 in nonacademic and extracurricular services; and
30 d. whether the new placement option is the same option on the
continuum of alternative placements.

1 *Letter to Fisher*, 21 IDELR 992 (OSEP July 6, 1994).

2 16. Petitioners argue that, based on the factors set forth by the Office of
3 Special Education Programs ("OSEP") in *Letter to Fisher*, moving Student from the
4 resource program to the Academic SCILLS program was a change in educational
5 placement.

6 a. As to the first factor, in both the resource program and the Academic
7 SCILLS program, a special education teacher would provide all of
8 Student's minutes of specialized instruction. The testimony of Academic
9 SCILLS Teacher established that Student's IEP could and would be
10 implemented as written. Thus, this factor weighs against the proposed
11 move being considered a change in educational placement.

12 b. As to the second factor, no evidence was submitted that Student would
13 not be educated with nondisabled students to the same extent.
14 Petitioners do point out that Student will be educated with disabled
15 students to a greater extent because he will no longer receive one-to-one
16 instruction in the resource classroom. While not a factor identified by
17 OSEP, the Administrative Law Judge notes that Student was not intended
18 to receive one-to-one instruction pursuant to his IEP and received such
19 only as a result of a lack of similar peers, which could change at any time.
20 Thus, this factor weighs against the proposed move being considered a
21 change in educational placement.

22 c. As to the third factor, no evidence was submitted regarding Student's
23 opportunity to participate in nonacademic and extracurricular services at
24 Ashland Ranch or at Pioneer. Petitioners argued that even if such
25 opportunities existed at Pioneer, they would be significantly different
26 because he would be "the new kid" and the activities would be outside his
27 community where he is known. To accept Petitioners' argument would
28 render this factor meaningless. Thus, this factor weighs against the
29 proposed move being considered a change in educational placement.
30

1 d. As to the fourth factor, the resource classroom and the Academic SCILLS
2 classroom are both special classes as contemplated by 34 C.F.R. §
3 300.115(b)(1-2). In both settings, Student would be in the class for
4 greater than 40 percent and less than 70 percent of the school day, a
5 Level B placement. Petitioners' argument that the other students in the
6 classroom being Level C placements renders the classroom a Level C
7 placement is not persuasive. The amount of time someone else spends
8 in the classroom does not determine how the classroom is viewed on the
9 continuum of placements for Student. Thus, this factor weighs against the
10 proposed move being considered a change in educational placement.

11 17. The Administrative Law Judge concludes that based on the four factors,
12 the proposed move from the resource classroom at Ashland Ranch to the Academic
13 SCILLS classroom is not a change in educational placement, but is a change in
14 location from one special class to another special class.

15 Appropriateness of Academic SCILLS

16 18. Because the proposed move from the resource classroom to the
17 Academic SCILLS classroom was a change in location and not a change of educational
18 placement, the decision was an administrative decision that may be made by
19 Respondent School District. However, the new location must be an appropriate
20 location to meet the student's needs.

21 19. The weight of the evidence presented established that the Academic
22 SCILLS classroom was an appropriate location for Student. The resource program was
23 not intended to provide all of a student's instruction, but was intended to fill gaps
24 students may have. The Academic SCILLS classroom, however, was intended to
25 provide specialized instruction for students who need significant modifications to the
26 general education standards and/or curriculum. The Academic SCILLS classroom was
27 a structured class designed to infuse instruction with the general education classes.
28 Student benefitted from instruction in smaller group settings and the Academic SCILLS
29 classroom provided that. Student was working on acquiring the same skills as the
30

1 students in the Academic SCILLS classroom. Finally, the Academic SCILLS classroom
2 allowed for the pace of the lessons to be adjusted to meet Student's needs.

3 20. Petitioners argued that the Academic SCILLS classroom was not
4 appropriate because the IDEA requires that a student attend the school the student
5 would attend if the student was not disabled, generally the student's neighborhood
6 school.

7 21. The IDEA provides that "[i]n determining the educational placement of a
8 child with a disability, . . . each public agency must ensure that . . . [u]nless the IEP of a
9 child with a disability requires some other arrangement, the child is educated in the
10 school that he or she would attend if nondisabled." 34 C.F.R. § 300.116(c).

11 22. In this case, the January 19, 2016 IEP provides that Student was to
12 receive his specialized instruction in basic math, written expression, and basic reading
13 in the Academic SCILLS classroom. That classroom did not exist at Ashland Ranch.
14 Therefore, the IEP required an arrangement other than Student attending his
15 neighborhood school.

16 23. Petitioners argued that Student made "some progress" during the 2015-
17 2016 school year, which was satisfactory to them. Therefore, Petitioners asserted that
18 Student's placement in the resource room was appropriate because the IDEA does not
19 require an LEA to maximize a student's potential, just to provide a "basic floor of
20 opportunity."

21 24. It is true that the IDEA does not require the states to provide students with
22 the best education possible. "This does not mean, however, that the states do not have
23 the power to provide handicapped children with an education which they consider more
24 appropriate than that proposed by the parents." *Wilson v. Marana*, 735 F.2d 1178 (9th
25 Cir. 1984)

26 Conclusion

27 25. Petitioners failed to establish by a preponderance of the evidence that
28 Respondent School District's proposed increase in Student's service minutes and
29 change of location to the Academic SCILLS classroom was inappropriate to meet
30 Student's individualized needs.

ORDER

Based on the findings and conclusions above, IT IS HEREBY ORDERED that that the relief requested in the Complaint and the Amended Complaint is **denied** as set forth above and Petitioners' Complaint and Amended Complaint are dismissed.

Done this day, July 29, 2016.

/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/faxed July 29, 2016, to:

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