

Procedural History

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Petitioners filed the instant Due Process Complaint (Complaint) on September 21, 2017. The Complaint alleged that the during the second of three IEP Team meetings to develop Student's 2017 – 2018 IEP, General Education Teacher was not present and was not excused from attendance constituting a procedural violation of the IDEA.⁴ Petitioners' proposed remedy was that the 2017 – 2018 IEP be "found to be insufficient in regards of not being reasonably calculated to allow [Student] to obtain educational benefit (i.e. providing FAPE)." Petitioners also requested the creation of a new annual IEP to be completed during three separate hour and a half IEP meetings with a specified agenda to be held under the supervision of a third-party facilitator. It must be noted that Petitioners did not allege that the 2017-2018 IEP was, independent of the procedural violation, insufficient. While Petitioners were granted leave to amend the complaint to detail how or why the IEP was insufficient, Petitioners elected not to do so. Therefore, the appropriateness of the 2017 – 2018 IEP was not an issue for the due process hearing in this matter.

Evidence and Issues at Hearing

The parties presented testimony and exhibits at a formal evidentiary hearing on January 12, 2018. When the hearing convened, the issue to be addressed had been identified as follows:

Whether the absence of the general education teacher during the fourth of five IEP Team meetings to develop the 2017 – 2018 IEP that was held on August 31, 2017 constituted a procedural violation of the IDEA that significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Student.

The parties presented testimony from the witnesses listed above⁵ and offered into evidence Petitioners' Exhibits A through Z and Respondent School District's Exhibits 1 through 6, including all subparts.

⁴ While the Complaint asserted there were only three IEP Team meetings to develop Student's 2017 – 2018 IEP, the evidence presented at hearing established there were a total of five IEP Team meetings between May 2017 and September 2017 related to the development of Student's 2017 – 2018 IEP.

⁵ A transcript of the hearing has been added to the record. The transcript is the official record of the hearing.

1 The Administrative Law Judge has considered the entire record, including the
2 testimony and Exhibits,⁶ and now makes the following Findings of Fact, Conclusions of
3 Law, and Order.

4 **FINDINGS OF FACT**

5 1. Student is eligible for special education services in the categories of [REDACTED]
6 [REDACTED] During the 2016 –
7 2017 school year, Student received special education services in a self-contained setting
8 for most of the day, but was included with his general education peers for part of the day.

9 **Creation of the 2017 – 2018 IEP**

10 2. The IEP process for the 2017 – 2018 school year began in May 2017. IEP
11 Team meetings convened on May 9, 2017, May 18, 2017, August 22, 2017, August 31,
12 2017, and September 12, 2017.

13 3. Prior to the 2017 – 2018 school year, Dr. Alley became the Director of
14 Student Support Services for Respondent School District.

15 4. Beginning with the August 22, 2017 IEP Team meeting, Dr. Alley created a
16 checklist to work through the IEP creation process.

17 5. During the August 31, 2017 IEP Team meeting, General Education Teacher
18 was not present because she needed to attend to a family situation out of state. Special
19 Education Teacher signed the attendance sheet in the role of both the general education
20 teacher and the special education teacher. Parents were neither asked to nor agreed to
21 excuse General Education Teacher's presence at the August 31, 2017 IEP Team
22 meeting.

23 6. During the August 31, 2017 IEP Team meeting, the IEP Team reviewed the
24 changes resulting from the August 22, 2017 IEP Team meeting and continued the
25 development of Student's 2017 – 2018 IEP. At no point during the August 31, 2017 IEP
26 Team did Parents raise any concerns regarding the absence of General Education
27 Teacher.

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29 ⁶ The Administrative Law Judge has considered each admitted Exhibit, even if not mentioned in this
30 Decision. Specifically, the Administrative Law Judge listened to the August 31, 2017 IEP Team meeting
and the September 12, 2017 IEP Team meeting in their entirety. The Administrative Law Judge has also
considered the testimony of every witness, even if the witness is not specifically mentioned in this Decision.

1 7. Following the August 31, 2017 IEP Team meeting, Parents filed a State
2 Complaint with the Arizona Department of Education.

3 8. At the outset of the September 12, 2017 IEP Team meeting, Respondent
4 School District indicated that based on its checklist, the team was ready to move on to
5 consideration of Form I of the IEP. However, Parents raised their concern that General
6 Education Teacher was not at the August 31, 2017 IEP Team meeting and stated that
7 everything that was discussed during that meeting would need to be covered again to
8 ensure General Education Teacher had the opportunity to participate in the discussion.

9 9. Parent [REDACTED] suggested, "What we need to do is the same as we started last
10 time is we need to go back through our original list and say what we considered in our
11 8/31 meeting incomplete." Dr. Alley responded, "If you wanted to just run through those,
12 that would be fine."⁷

13 10. After Parent [REDACTED] spent approximately 13 minutes going over a number of
14 items that had been addressed in the August 31, 2017 IEP Team meeting, Dr. Alley
15 asked, "Are we good then, [Parent [REDACTED]]? Are we ready to move on to Form I?" Parent
16 [REDACTED] responded, "Well, we obviously need to discuss Form E and Form F as we also
17 discussed that in our last meeting." Dr. Alley answered, "Okay."⁸

18 11. After more than 20 minutes of further comments and input mainly from
19 Parent [REDACTED], Dr. Alley asked, "Does that complete then Form E and Form F?"⁹ Parent
20 [REDACTED] asked about updated test scores, which Dr. Alley indicated were in her car and she
21 left to retrieve them. Parents raised some issues while Dr. Alley was out of the room
22 getting the test results. After Dr. Alley returned with the test scores, made copies and
23 handed them out, the principal then asked, "So are we ready to go to Form I?"¹⁰ After a
24 brief question about the test results, Dr. Alley again asked, "So are we ready to move on?
25 We got about 10 minutes."¹¹

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28 ⁷ Exhibit 6, File 3 at 8:42-9:05.

29 ⁸ Exhibit 6, File 3 at 23:30-23:45.

30 ⁹ Exhibit 6, File 3 at 46:07-46:11.

¹⁰ Exhibit 6, File 3 at 51:38-51:40.

¹¹ Exhibit 6, File 3 at 52:36-52:40.

1 12. At approximately 53 minutes into the September 12, 2017 IEP Team
2 meeting, the discussion moved to the sections of Student's 2017 – 2018 IEP not
3 previously discussed.

4 13. Approximately 10 minutes later, the principal asked, "Do we have a
5 signature page? [General Education Teacher] needs to . . ." General Education Teacher
6 stated, "I need to go." The principal then asked, "Is it alright if she goes and we have her
7 sign out?" Parent ██████ responded, "That's fine."¹²

8 14. The recording of the September 12, 2017 IEP Team meeting ends at
9 1:34:36, more than 30 minutes beyond the projected end time of the meeting. At the
10 conclusion of the IEP Team meeting, the parties indicated consensus at the 2017 – 2018
11 IEP was complete with the understanding Parents would submit their comments on the
12 completed IEP the following day.

13 15. During the hearing, Parents did not testify. Nothing in Parents' opening
14 statement, questioning of witnesses, or closing arguments alleged any substantive
15 shortcomings with the 2017 – 2018 IEP as ultimately developed and adopted. As
16 previously noted, Petitioners were afforded an opportunity to amend the Complaint to
17 detail how or why the IEP was insufficient and Petitioners elected not to do so.

18 16. In their closing argument, Petitioners argued that "[p]arental participation is
19 not just the parents' position, but it's the understanding and hearing the other participants
20 and their opinions and everything else. It's not just the parents asking questions."¹³
21 Petitioners also asserted in closing argument that, "even though the District keeps going
22 on about opportunity for the parent to ask the question, what they fail to discuss is the
23 fact that the ability for the general education [teacher] to participate in that August 31st
24 meeting and be able to spontaneously put information in, receive that information, wasn't
25 there."¹⁴

26 ¹² Exhibit 6, File 3 at 1:03:24-1:03:35. Petitioners attempted to question witnesses regarding General
27 Education Teacher's absence from the end of the fifth IEP Team meeting during the due process hearing.
28 However, the Complaint in this matter specifically related to General Education Teacher's absence from
29 the fourth of the five IEP Team meetings. At no time prior to the due process hearing did Petitioners raise
30 any allegations regarding General Education Teacher's absence from the end of the fifth IEP Team meeting
even though that information was known to Petitioners at the time of filing the Complaint and was premised
on the same set of facts and circumstances presented in the Complaint.

¹³ Tr. 137:2-6.

¹⁴ Tr. 139:9-15.

1 17. While Respondent School District argued in preliminary Motions to Dismiss
2 that the absence of General Education Teacher from the August 31, 2017 IEP Team
3 meeting was not a procedural violation of the IDEA, Respondent School District argued
4 that any procedural violation was remedied by General Education Teacher's presence at
5 the September 12, 2017 IEP Team meeting. Respondent School District argued that
6 Parents had opportunities throughout the September 12, 2017 IEP Team meeting to ask
7 General Education Teacher any questions they may have had that arose during the
8 August 31, 2017 IEP Team meeting. As such, Respondent School District maintained
9 that Petitioners failed to establish that the General Education Teacher's absence
10 significantly impeded the parents' opportunity to participate in the decision-making
11 process regarding the provision of a FAPE to Student

12 CONCLUSIONS OF LAW

13 1. A parent who requests a due process hearing alleging non-compliance with
14 the IDEA must bear the burden of proving that claim.¹⁵ The standard of proof is
15 "preponderance of the evidence," meaning evidence showing that a particular fact is "more
16 probable than not."¹⁶ Therefore, Petitioners bear the burden of proving their claims and
17 complaints by a preponderance of evidence.

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

25 FAPE

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27 ¹⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

28 ¹⁶ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
29 (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.*
30 *J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

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

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

1 3. Through the IDEA, Congress has sought to ensure that all children with
2 disabilities are offered a FAPE that meets their individual needs.¹⁹ These needs include
3 academic, social, health, emotional, communicative, physical, and vocational needs.²⁰
4 To do this, school districts must identify and evaluate all children within their geographical
5 boundaries who may be in need of special education and services. The IDEA sets forth
6 requirements for the identification, assessment and placement of students who need
7 special education, and seeks to ensure that they receive a free appropriate public
8 education. A school offers a FAPE by offering and implementing an IEP “reasonably
9 calculated to enable [a student] to make progress appropriate in light of [the student’s]
10 circumstances.”²¹ FAPE does not require that each child’s potential be maximized.²² A
11 child receives a FAPE if a program of instruction “(1) addresses his unique needs, (2)
12 provides adequate support services so he can take advantage of the educational
13 opportunities and (3) is in accord with an individualized educational program.”²³

14 4. Once a child is determined eligible for special education services, a team
15 composed of the child’s parents, teachers, and others formulate an IEP that, generally,
16 sets forth the child’s current levels of educational performance and sets annual goals that
17 the IEP Team believes will enable the child to make progress in the general education
18 curriculum.²⁴ The IEP tells how the child will be educated, especially with regard to the
19 child’s needs that result from the child’s disability, and what services will be provided to
20 aid the child. The child’s parents have a right to participate in the formulation of an IEP.²⁵
21 The IEP Team must consider the strengths of the child, concerns of the parents,
22 evaluation results, and the academic, developmental, and functional needs of the child.²⁶
23 To foster full parent participation, in addition to being a required member of the team
24 making educational decisions about the child, school districts are required to give parents

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26 ¹⁹ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.
27 ²⁰ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983
28 U.S.C.C.A.N. 2088, 2106).
29 ²¹ *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ____ (2017).
30 ²² *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).
²³ *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)).
²⁴ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.
²⁵ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).
²⁶ 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

1 written notice when proposing any changes to the IEP,²⁷ and are required to give parents,
2 at least once a year, a copy of the parents' "procedural safeguards," informing them of
3 their rights as parents of a child with a disability.²⁸

4 5. The membership of the IEP Team is detailed in the applicable regulation.

5 Specifically, the public agency must ensure that the IEP Team includes:

- 6 (1) The parents of the child;
7 (2) Not less than one regular education teacher of the child (if the child is,
8 or may be, participating in the regular education environment);
9 (3) Not less than one special education teacher of the child, or where
10 appropriate, not less than one special education provider of the child;
11 (4) A representative of the public agency who—
12 (i) Is qualified to provide, or supervise the provision of, specially designed
13 instruction to meet the unique needs of children with disabilities;
14 (ii) Is knowledgeable about the general education curriculum; and
15 (iii) Is knowledgeable about the availability of resources of the public
16 agency.
17 (5) An individual who can interpret the instructional implications of
18 evaluation results, who may be a member of the team described in
19 paragraphs (a)(2) through (a)(6) of this section;
20 (6) At the discretion of the parent or the agency, other individuals who have
21 knowledge or special expertise regarding the child, including related
22 services personnel as appropriate; and
23 (7) Whenever appropriate, the child with a disability.²⁹

24 6. However, it is possible for a IEP Team member to be excused from
25 attendance.

- 26 (1) A member of the IEP Team described in paragraphs (a)(2) through (a)(5)
27 of this section is not required to attend an IEP Team meeting, in whole or in
28 part, if the parent of a child with a disability and the public agency agree, in
29 writing, that the attendance of the member is not necessary because the
30 member's area of the curriculum or related services is not being modified or
discussed in the meeting.
(2) A member of the IEP Team described in paragraph (e)(1) of this section
may be excused from attending an IEP Team meeting, in whole or in part,
when the meeting involves a modification to or discussion of the member's
area of the curriculum or related services, if—
(i) The parent, in writing, and the public agency consent to the excusal; and

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

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

²⁹ 34 C.F.R. § 300.321(a).

1 (ii) The member submits, in writing to the parent and the IEP Team, input
2 into the development of the IEP prior to the meeting.³⁰

3 7. Procedural violations of the IDEA do not require a remedy unless the
4 procedural violation impeded Student's right to a FAPE, significantly impeded Parents'
5 opportunity to participate in the decision-making process, or caused a deprivation of
6 educational benefit that denied Student a FAPE.³¹

7 Parental Participation

8 8. Petitioners claim that Respondent School District violated the IDEA by
9 failing to have General Education Teacher present during the fourth of five IEP Team
10 meetings to develop Student's 2017 – 2018 IEP without obtaining an excusal from
11 Parents. Respondent School District argued that Special Education Teacher, who also
12 holds a general education certification, could appropriately attend the August 31, 2017
13 IEP Team meeting in the roles of the general education teacher and the special education
14 teacher.

15 9. Federal regulation lists five individuals who are required to attend the IEP
16 Team meeting: a parent, a special education teacher, a general education teacher, a
17 representative from the district, and an individual who can interpret results. With respect
18 to the individual who can interpret results, the regulation specifically permits that this
19 person "may be a member of the team described in paragraphs (a)(2) through (a)(6) of
20 this section."³² Thus, an IEP Team meeting may include only four individuals if one of the
21 parties is filling that dual role. However, the regulations do not explicitly allow for any
22 other roles to be combined on the IEP Team.

23 10. Statutes and regulations are to be construed to give effect to all provisions
24 "so that no part will be inoperative or superfluous, void or insignificant, and so that one
25 section will not destroy another unless the provision is the result of an obvious mistake or
26 error."³³

27 11. Here, the regulations did not allow Special Education Teacher to act as both
28 the special education teacher and the general education teacher during the August 31,

28 ³⁰ 34 C.F.R. § 300.321(e).

29 ³¹ 20 U.S.C. § 1415(f)(3)(E); *Bd. Of Educ. of the Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S.
176, 206-07 (1982).

30 ³² 34 C.F.R. § 300.321(a)(5).

³³ *U.S. v. Higgins*, 128 F.3d 138, 142 (3d Cir. 1997).

1 2017 IEP Team meeting. Thus, the failure to have General Education Teacher or a
2 different general education teacher present was a procedural violation.

3 12. For a procedural violation to rise to the level of a substantive violation,
4 however, the procedural violation must significantly impede Parents' opportunity to
5 participate in the decision-making process regarding the provision of FAPE to Student.
6 The Administrative Law Judge must review the totality of the circumstances when
7 determining whether such was the case.

8 13. There is no question that different educators with varying experiences and
9 viewpoints are an asset to an IEP Team when discussing a student's education with the
10 parents, as contemplated by the IDEA and the applicable regulations.

11 14. In this matter, General Education Teacher was present during the first,
12 second, third, and fifth IEP Team meetings convened to formulate Student's 2017 – 2018
13 IEP. Parents raised no concerns or questions regarding General Education Teacher's
14 absence from the fourth IEP Team meeting at any point during the meeting. During the
15 fifth and final IEP Team meeting, Parents spent approximately 40 minutes of the meeting
16 going over what was discussed at the fourth IEP Team meeting, allowing General
17 Education Teacher to hear everything that was discussed during her absence. At no time
18 did Parents direct any questions to General Education Teacher regarding what was
19 covered in the prior meeting and did not solicit General Education Teacher's opinion on
20 any topic relating to the content of the prior meeting.

21 15. Parent's did not provide any testimony regarding questions they may have
22 had for General Education Teacher during the August 31, 2017 IEP Team meeting that
23 they were unable to ask because General Education Teacher was absent. Rather,
24 Parents' argument appeared to be that, due to her absence, *General Education Teacher*,
25 was denied the opportunity to participate in the decision-making process. While that may
26 be the case to some extent, the IDEA and applicable regulations do not concern
27 themselves with the opportunity of any members of the IEP Team to participate other than
28 the parents.

29 16. Parents provided no evidence to establish that General Education
30 Teacher's absence from the August 31, 2017 IEP Team meeting significantly impeded

1 Parents' opportunity to participate in the decision-making process regarding the provision
2 of FAPE to Student.

3 17. It is further noted that Petitioners' proposed resolution, that a new annual
4 IEP be created under the direction of an independent third-party trained facilitator during
5 three separate hour and a half IEP meetings has no relation to the alleged violation in
6 that Petitioners have not raised any substantive issues with the Student's 2017 – 2018
7 IEP. Given that presumption that Student's 2017 – 2018 IEP, as written, provides FAPE,
8 there is no logical reason to require the IEP Team to meet for at least four and a half
9 hours to create a new IEP that would also presumably provide FAPE.

10 **ORDER**

11 Based on the findings and conclusions above, IT IS HEREBY ORDERED that that
12 the relief requested in the due process complaint is **denied**.

13 Respondent School District is determined to be the prevailing party in this matter.

14 Done this day, February 7, 2018.

15
16 /s/ Tammy L. Eigenheer
17 Administrative Law Judge
18

19
20 **RIGHT TO SEEK JUDICIAL REVIEW**

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

29 Copy sent by mail this 7th day of February 2018 to:
30 Certified # 7014-2870-0000-0599-5773

Kacey Gregson, Director of Dispute Resolution

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