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IN THE OFFICE OF ADMINISTRATIVE HEARINGS

██████, a Student, by and through Parent
██████
Petitioner,
v.
Sedona-Oak Creek JUSD
Respondent.

No. 16C-DP-057-ADE
No. 16C-DP-061-ADE
No. 16C-DP-062-ADE

**ADMINISTRATIVE LAW JUDGE
DECISION**

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HEARING: This matter was submitted on written arguments and no hearing was held.

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APPEARANCES: Petitioners appeared on their own behalf. Respondent School District was represented by Patrice M. Horstman and Alex D. Ivan.

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ADMINISTRATIVE LAW JUDGE: Tammy L. Eigenheer

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Parent brought these due process actions, on behalf of Student, alleging that Respondent School District failed to properly implement three separate Individualized Educational Programs (IEPs), specifically the August 2013 IEP, the August 2014 IEP, and the September 2015 IEP (collectively, the IEPs), when it allowed someone other than the Special Education Teacher to provide service minutes included in the IEPs. The law governing these proceedings is the Individuals with Disabilities Education Act (IDEA), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-authorized and amended in 2004),¹ and its implementing regulations, 34 Code of Federal Regulations (C.F.R.) Part 300, as well as the Arizona Special Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.

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Procedural History

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Petitioners filed a Due Process Complaint on May 3, 2016, alleging Respondent School District failed to implement the August 2013 IEP (Complaint 1). Petitioners filed a separate Due Process Complaint on May 17, 2016, alleging Respondent School District

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

1 failed to implement the August 2014 IEP (Complaint 2).² Petitioners filed a separate Due
2 Process Complaint on May 24, 2016, alleging Respondent School District failed to
3 implement the September 2015 IEP (Complaint 3). Complaint 1, Complaint 2, and
4 Complaint 3 (collectively, the Complaints) were consolidated as they presented the same
5 issue.

6 Respondent School District stipulated that the service minutes at issue in the IEPs
7 were not provided exclusively by the Special Education Teacher and that some of the
8 service minutes were provided by a paraprofessional. Respondent School District
9 acknowledged that if the Special Education Teacher was required to provide all the
10 service minutes identified in the IEPs, it had failed to implement the IEPs. Therefore, the
11 question to be resolved was not whether the Special Education Teacher provided the
12 service minutes, but whether the Special Education Teacher was required to provide the
13 service minutes. Based on the arguments presented to the tribunal, the Administrative
14 Law Judge restated the issue presented in the Complaints as follows:

- 15 1. May the service minutes identified in the operant IEPs be provided by someone
16 other than the Special Education Teacher?

17 Based on the issue raised by the Complaints, Respondent School District argued
18 that a hearing was not necessary as the issue presented a purely legal question.
19 Petitioners disagreed and requested a hearing to determine whether Respondent School
20 District failed to implement the IEPs. The Administrative Law Judge determined that the
21 issue presented a purely legal question and established a briefing schedule on the issue
22 presented in the Complaints. The Administrative Law Judge noted that if, upon review of
23 the briefs, it appeared additional evidence was necessary to determine the matter, a
24 hearing would be scheduled for that purpose.

25 Evidence and Issues at Hearing

26 The parties presented briefs outlining their arguments. Further, the IEPs were
27 included with the Complaints and were reviewed by the Administrative Law Judge.
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² By order dated June 6, 2016, the Administrative Law Judge ruled that the tribunal would consider the
30 alleged failure to implement the August 2013 IEP only from May 3, 2014, going forward pursuant to 34
C.F.R. § 300.511(e).

1 The Administrative Law Judge has considered the entire record, has determined
2 that no additional evidence is necessary to decide the matter, and now makes the
3 following Findings of Fact, Conclusions of Law, and Order.

4 **FINDINGS OF FACT**

5 1. Student, age ■ is a student in the Respondent School District. Student is
6 eligible for special education in the categories of Autism, Moderate Intellectual Disability,
7 and Speech Language Impairment.

8 2. During the relevant time period, Student received special education
9 services in a self-contained setting for most of the day, but was included with his general
10 education peers for part of the day.

11 August 2013 IEP

12 3. The August 2013 IEP included eight goals identifying the "Service
13 Provider(s) for this goal" as "Special Education Teacher" and two goals identifying the
14 "Service Provider(s) for this goal" as "Special Education Teacher OT/OTA."

15 4. The Services and Environment page of the August 2013 IEP listed Special
16 Education Services in the areas of Activities of Daily Living, Basic Reading Skills, Math,
17 Written Expression, Interper./Soc. Skills, Oral Expression, and Listening Compreh. Each
18 area identified the Provider of those services as "Special Education Teacher;
19 Paraprofessional." In the "Clarification" section of the Special Education Services section,
20 it was noted that "Special education staff will take data daily. . . . [Student] will be exposed
21 to a variety of staff provided [sic] including; Special Education Teacher, Special
22 Educational Paraprofessionals and Service Providers. A variety of materials and a variety
23 of verbal commands will be utilized to generalize his skills across a variety of domains
24 and persons." In the "Clarification" section of the Supplementary Aids/Assistive
25 Technology and Services section, it was noted that "[f]or the majority of [Student's] day,
26 there is one paraprofessional designated to focus specifically on [Student]'s needs and
27 implementing [Student]'s IEP. Student will have a consistent 1:1 aide as much as
28 possible."

29 August 2014 IEP

30 5. The August 2014 IEP included eight goals identifying the "Service
Provider(s) for this goal" as "Special Education Teacher;" one goal identifying the "Service

1 Provider(s) for this goal” as “Special Education Teacher OT/OTA;” and two goals
2 identifying the “Service Provider(s) for this goal” as “Occupational Therapist Special
3 Education Teacher.”³

4 6. The Services and Environment page of the August 2014 IEP listed Special
5 Education Services in the areas of Basic Reading Skills, Math Reasoning, Interper./Soc.
6 Skills, and Workplace Skills. Each area identified the Provider of those services as
7 “Special Education Teacher.” In the “Clarification” section of the page, it was noted that
8 “[f]or the majority of [Student’s] day, there is one paraprofessional designated to focus
9 specifically on [Student]’s needs and implementing [Student]’s IEP. Student will have a
10 consistent 1:1 aide as much as possible.”

11 September 2015 IEP

12 7. During the creation of the September 2015 IEP, the IEP Team met on
13 multiple occasions. At the time the IEP Team was discussing the topic of special
14 education service minutes, the Special Education Teacher offered that, based on the
15 goals and objectives included in the proposed IEP and that had been agreed upon at that
16 point, Student should receive 1,080 minutes per week.

17 8. Reportedly, when Parents questioned why Student’s special education
18 service minutes were not increasing year to year when Student was spending more time
19 in school than in prior years, the Special Education Teacher responded that the special
20 education service minutes were reflective of “[o]nly the minimum of what he gets of the
21 instructional time from myself.”⁴

22 9. Reportedly, Joe Donaldson, licensed school psychologist serving as an IEP
23 facilitator at the meeting, stated, “You have to specifically account for special ed[ucation]
24 instruction.”⁵ With respect to electives, Mr. Donaldson reportedly said, “Since general
25 ed[ucation] can do that, a paraprofessional can do that, I would not include those as
26 service minutes.”⁶

27 10. The September 2015 IEP included eleven goals identifying the “Service
28 Provider(s) for this goal” as “Special Education Teacher Paraprofessional;” one goal

29 ³ Two additional goals identify the “Service Provider(s) for this goal” as “SLP/SLPA/SLT.”

30 ⁴ The Complaints.

⁵ *Id.*

⁶ *Id.*

1 identifying the "Service Provider(s) for this goal" as "Special Education Teacher OT/OTA
2 Paraprofessional;" and two goals identifying the "Service Provider(s) for this goal" as
3 "Occupational Therapist Special Education Teacher Paraprofessional."

4 11. The Services and Environment page of the September 2015 IEP listed
5 Special Education Services in the areas of Basic Reading Skills, Math Reasoning,
6 Interper./Soc. Skills, and Workplace Skills. Each area identified the Provider of those
7 services as "Special Education Teacher." Under the section entitled "Supplementary
8 Aids/Assistive Technology and Services for Students," it was noted that Student will have
9 a Paraprofessional in the Special Education Classroom for 1200 minutes per week. In
10 the "Clarification" section of the page, it was noted that "[f]or the majority of [Student's]
11 day, there is one paraprofessional designated to focus specifically on [Student]'s needs
12 and implementing [Student]'s IEP. Student will have a consistent 1:1 aide as much as
13 possible."

14 Petitioners' Argument

15 12. Based on the comments made during the formation of the September 2015
16 IEP, Parent concluded that Student did not receive the full number of service minutes in
17 direct special education instruction from the Special Education Teacher as set forth in the
18 prior years' IEPs. Parent asserted in the Complaints that Respondent School District "has
19 specifically clarified the expectation in the September 15, 2015 IEP meeting that the
20 special education service minutes stated in the IEP are the measurement of the direct
21 instructional intervention done by the Special Education Teacher in relation to the specific
22 goals and objectives in the IEP."

23 13. Petitioners asserted in their opening brief that "if the service minutes
24 identified in the operant IEP also specifically identifies that the provider of said service
25 minutes is the Special Education Teacher, then only the Special Education Teacher can
26 provide those said service minutes."

27 14. Petitioners argued that paraprofessionals are not certified to teach and
28 therefore, paraprofessionals could not provide the special education service minutes.

29 15. Notably, Parent did not assert that he, as a member of each of the IEP
30 teams, understood at the time that the service minutes detailed in the Services and
Environment page of the IEPs would be provided exclusively by the Special Education

1 Teacher. By comparing each IEP at issue in this matter to the others, Parent argued in
2 his brief that the IEP Team could have listed the Special Education Teacher and the
3 Paraprofessional as the service provider for the specific goals and/or the provider of the
4 special education service minutes, but made a choice not to do so. However, Parent did
5 not indicate that any such a conversation occurred resulting in a specific decision as to
6 who would be the provider of the special education service minutes during any of the IEP
7 Team meetings.

8 Respondent School District's Argument

9 16. Respondent School District argued in its brief that to accept Petitioners'
10 argument would render meaningless provisions in the IEPs referencing the
11 paraprofessional and that each IEP had to be read as a whole in interpreting the
12 documents.

13 17. Respondent School District asserted that those areas identifying the
14 Special Education Teacher as a provider were intended to mean that the Special
15 Education Teacher "is responsible for designing curriculum, overseeing its
16 implementation, and actual or supervised delivery of instruction in compliance with the
17 law, which explicitly allows a paraprofessional to 'provide instructional services,' See No
18 Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1119(g)(2)(G), 115 Stat. 1425, 1507
19 (2001), if she is 'working under the direct supervision of a [special education] teacher.'"
20 Citation omitted; alteration in original.

21 18. Respondent School District also pointed to a prior due process complaint
22 filed by Petitioners in which Parent argued that based on his strict reading of the IEP only
23 the Occupational Therapist (OT) could deliver the Sensory Diet services to Student
24 because the OT was identified as the provider on the Services and Environment page of
25 the 2012-2013 IEP. Reading the IEP as a whole, the Tribunal found that another service,
26 the Picture Exchange Communication System (PECS), was clearly meant to be used
27 throughout the day, but listing the Special Education Teacher as a provider only implied
28 that she created, oversaw, and implemented the PECS. Therefore, the Tribunal
29 concluded that it was "evident" the notation of "Occupational Therapist" beside Sensory
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1 Diet was not indicating an expectation or a requirement that the OT was the only staff
2 member to implement that service.⁷

3 19. Respondent School District drew the parallel that in the IEPs at issue in this
4 matter, the designation of the Special Education Teacher as a provider was intended to
5 mean only that the Special Education Teacher was responsible for designing the
6 curriculum, directly overseeing its implementation, and actual or supervised delivery of
7 instruction. It concluded that this was especially true when the IEPs directed that “[f]or
8 the majority of [Student’s] day,” the paraprofessional was “designated to focus specifically
9 on . . . implementing [Student’s] IEP.”

10 **CONCLUSIONS OF LAW**

11 1. A parent who requests a due process hearing alleging non-compliance with
12 the IDEA must bear the burden of proving that claim.⁸ The standard of proof is
13 “preponderance of the evidence,” meaning evidence showing that a particular fact is “more
14 probable than not.”⁹ Therefore, Petitioners bear the burden of proving their claims and
15 complaints by a preponderance of evidence.

16 2. This tribunal’s determination of whether or not Student received a FAPE must
17 be based on substantive grounds.¹⁰ If a procedural violation is alleged and found, it must
18 be determined whether the procedural violation either (1) impeded the child’s right to a
19 FAPE; (2) significantly impeded the parents’ opportunity to participate in the decision-
20 making process; or (3) caused a deprivation of educational benefit.¹¹ If one of the three
21 impediments listed has occurred, the child has been denied a FAPE due to the procedural
22 violation.

23 **FAPE**

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26 ⁷ Parent appealed the Tribunal’s decision in that matter to the U.S. District Court. The District Court
27 recalculated the compensatory education awarded by the Tribunal, but did not reverse the Tribunal on this
28 issue. Order at 18-24, March 22, 2016 (No. CV-14-08166-PCT-JAT).

29 ⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

30 ⁹ *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).

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

¹¹ 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.¹² These needs include
3 academic, social, health, emotional, communicative, physical, and vocational needs.¹³
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. The IDEA “requires an educational program reasonably calculated to enable
9 a child to make progress appropriate in light of the child’s circumstances.”¹⁴ It does not
10 require that each child’s potential be maximized.¹⁵ A child receives a FAPE if a program
11 of instruction “(1) addresses his unique needs, (2) provides adequate support services so
12 he can take advantage of the educational opportunities and (3) is in accord with an
13 individualized educational program.”¹⁶

14 The IEP

15 4. Once a child is determined eligible for special education services, a team
16 composed of the child’s parents, teachers, and others formulate an IEP that, generally,
17 sets forth the child’s current levels of educational performance and sets annual goals that
18 the IEP team believes will enable the child to make progress in the general education
19 curriculum.¹⁷ The IEP tells how the child will be educated, especially with regard to the
20 child’s needs that result from the child’s disability, and what special education and related
21 services and supplementary aids and services would be provided to the student. Further,
22 the IEP must “stipulate the provision of instructional or support services by a special
23 education teacher, certified speech-language therapist, and/or ancillary service
24 provider(s) as appropriate.”¹⁸

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26 ¹² 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

27 ¹³ *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).

28 ¹⁴ *Andrew F. v. Douglas County Sch. Dist.*, 580 U.S. ____ (2017).

¹⁵ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

29 ¹⁶ *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)).

30 ¹⁷ 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

¹⁸ A.A.C. R7-2-401(G)(4).

1 (G) to provide instructional services to students in accordance with
2 paragraph (3).

3 (3) ADDITIONAL LIMITATIONS.—A paraprofessional described in
4 paragraph (1)—

5 (A) may not provide any instructional service to a student unless the
6 paraprofessional is working under the direct supervision of a teacher
7 consistent with section 1119; and

8 (B) may assume limited duties that are assigned to similar personnel
9 who are not working in a program supported with funds under this
10 part, including duties beyond classroom instruction or that do not
11 benefit participating children, so long as the amount of time spent on
12 such duties is the same proportion of total work time as prevails with
13 respect to similar personnel at the same school.

14 No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1119(g) (emphasis added).

15 8. Similarly, 34 C.F.R. § 200.59 outlines the duties of paraprofessionals as
16 follows:

17 (a) A paraprofessional covered under §200.58 may not be assigned a duty
18 inconsistent with paragraph (b) of this section.

19 (b) A paraprofessional covered under §200.58 may perform the following
20 instructional support duties:

21 (1) One-on-one tutoring for eligible students if the tutoring is
22 scheduled at a time when a student would not otherwise receive
23 instruction from a teacher.

24 (2) Assisting in classroom management.

25 (3) Assisting in computer instruction.

26 (4) Conducting parent involvement activities.

27 (5) Providing instructional support in a library or media center.

28 (6) Acting as a translator.

29 (7) Providing instructional support services.

30 (c)(1) A paraprofessional may not provide instructional support to a student
unless the paraprofessional is working under the direct supervision of a
teacher who meets the requirements in §200.56.

(2) A paraprofessional works under the direct supervision of a
teacher if—

(i) The teacher plans the instructional activities that the
paraprofessional carries out;

(ii) The teacher evaluates the achievement of the students
with whom the paraprofessional is working; and

(iii) The paraprofessional works in close and frequent physical
proximity to the teacher.

(d) A paraprofessional may assume limited duties that are assigned to
similar personnel who are not working in a program supported with funds

1 under subpart A of this part—including non-instructional duties and duties
2 that do not benefit participating students—if the amount of time the
3 paraprofessional spends on those duties is the same proportion of total
work time as the time spent by similar personnel at the same school.

4 9. Parent, relying on 34 C.F.R. § 200.59, asserted that a paraprofessional may
5 only provide “instructional support duties” to a student if the paraprofessional is working
6 under the “direct supervision” of a special education teacher. Thus, Parent concluded
7 that Student’s Paraprofessional was not able to provide any of the special education
8 service minutes outlined in the IEPs. This is an incorrect reading of the regulation and
9 the issue in these cases.

10 10. As to the regulation, 34 C.F.R. § 200.59(b) identifies “instructional support
11 duties” to include a variety of functions including assisting in classroom management,
12 acting as a translator, and “[p]roviding instructional support services.” 34 C.F.R. §
13 200.59(c)(1) then qualifies that a paraprofessional may not provide “instructional support
14 to a student unless the paraprofessional is working under the direct supervision of a
15 teacher.” “Direct supervision” is then detailed to require that the teacher plans the
16 instructional activities, the teacher evaluates the achievement of the students, and that
17 the paraprofessional is in close and frequent physical proximity to the teacher.

18 11. It is noteworthy that when a paraprofessional assists in classroom
19 management or acts as a translator, there is little chance that the teacher plans any
20 “instructional activity” or that the teacher would evaluate “the achievement of the students”
21 in those situations. Thus, the “instructional support” offered under the “direct supervision
22 of a teacher” does not apply to the entire list of “instructional support duties” set forth in
23 34 C.F.R. § 200.59(b). Rather, that provision of the regulation applies only to the
24 “instructional support services” identified in 34 C.F.R. § 200.59(b)(7).

25 12. Petitioners did not provide any persuasive authority to establish that the
26 IDEA or the implementing regulations prohibit a paraprofessional from providing the
27 service minutes identified in an IEP.

28 13. As a result, the only question remaining is whether the operant IEPs
29 required the Special Education Teacher to provide the identified service minutes or if the
30 Paraprofessional was permitted to provide those service minutes.

1 14. If one were to accept Petitioners' argument that the Special Education
2 Teacher had to provide all 1080 minutes per week of special education services, it is
3 unclear why the Paraprofessional would be needed 1200 minutes per week.

4 15. While the new Special Education Teacher indicated a different
5 interpretation of the meaning of the service minutes during the creation of a new IEP,
6 such statements do not retroactively alter the prior IEPs as those IEPs are a reflection of
7 the parties' understandings at the time they were created.

8 16. Consistent with prior due process complaints filed by Petitioners and
9 decided by the Tribunal relating to the OT with the sensory diet and the Special Education
10 Teacher with the PECS, the designation of the Special Education Teacher in the IEPs
11 was not intended to require the Special Education Teacher to provide all the service
12 minutes identified. Rather, the Special Education Teacher was to be responsible for
13 designing the curriculum, directly overseeing its implementation, and actual or supervised
14 delivery of instruction.

15 Conclusion

16 17. Petitioners failed to establish by a preponderance of the evidence that the
17 service minutes identified in the operant IEPs had to be provided by the Special Education
18 Teacher.

19 **ORDER**

20 Based on the findings and conclusions above, IT IS HEREBY ORDERED that the
21 relief requested in the Complaints are **denied** as set forth above and Petitioners'
22 Complaints are dismissed with prejudice.

23 Done this day, September 21, 2017.

24
25 /s/ Tammy L. Eigenheer
26 Administrative Law Judge


27
28 **RIGHT TO SEEK JUDICIAL REVIEW**

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

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

9 Copy mailed/e-mailed/faxed September 21, 2017, to:

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