

STATE OF ARIZONA  
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

1  
2  
3 [REDACTED] Student, by & through Parent [REDACTED]  
4 Petitioners,  
5 v.  
6 MESA Unified School District  
7 Respondent.

No. 18C-DP-047-ADE

ADMINISTRATIVE LAW JUDGE  
DECISION

8  
9 **HEARING:** Convened on May 21, 2018 followed by review of the official record  
10 received on July 12, 2018.

11 **APPEARANCES:** Parent [REDACTED] ("Parent") represented Student [REDACTED] ("Student").  
12 Jessica Sanchez, Esq., represented Respondent Mesa Unified School District  
13 ("MUSD"), accompanied by Janine Cawthorne, Executive Director of Special Education  
14 for MUSD.

14 **WITNESSES:**<sup>1</sup>

- 15 • **Parent;**
- 16 • Kady Blau, Client Services Supervisor for Pediatric Long-Term Care at Team  
17 Select Home Care
- 18 • L.P.N. Bobbie Morgan, Nurse with Team Select Home Care
- 19 • R.N. Angela Shockley, District Nurse with Arizona Department of Economic  
20 Security, Division of Developmental Disabilities ("DDD")
- 21 • Vanessa Bustamante-Mangini, **Kindergarten Teacher**, [REDACTED] Elementary,  
22 MUSD
- 23 • Kayla Carlton, **Special Education Teacher**, [REDACTED] Elementary, MUSD
- 24 • R.N. Jesus (Susy) Urbalejo-Salcido, School Nurse, [REDACTED] Elementary, MUSD
- 25 • R.N. Nadine Miller, Director of Health Services, MUSD

23 **HEARING RECORD:** Certified Court Reporter Christine Johnson recorded the  
24 proceedings as the official record of the hearing.<sup>2</sup>

25 **ADMINISTRATIVE LAW JUDGE:** Kay A. Abramsohn

26  
27  
28 <sup>1</sup> Throughout the body of this Decision, proper names of Student, Parents, and Student's teachers are not  
29 used in order to protect the confidentiality of Student and to promote ease of redaction. Where necessary,  
30 pseudonyms (designated here in bold typeface) will be used instead. Pseudonyms are not used for  
administrators, service providers, evaluators, and other professionals.

<sup>2</sup> The parties stipulated that the court reporter's transcript would be the official record of the proceedings.  
The Tribunal received the entire transcript on July 12, 2018. The Tribunal does not begin its review process  
with the use of a transcript until the hearing sessions are complete and any post-hearing submissions are  
complete; the calculated 45<sup>th</sup>-day is August 14, 2018.

1 Parent brings this due process action on behalf of Student, claiming that MUSD  
2 violated the Individuals with Disabilities Education Act ("IDEA") and failed to provide a  
3 free and appropriate public education ("FAPE") by its failure or refusal to provide a 1:1  
4 skilled nurse within the classroom and on campus.

5 The law governing these proceedings is the IDEA found at 20 United States Code  
6 ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in 2004),<sup>3</sup> and its implementing  
7 regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well as the Arizona  
8 Special Education statutes, Arizona Revised Statutes ("A.R.S.") §§ 15-761 through 15-  
9 774, and implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through  
10 R7-2-406.

### 11 **PROCEDURAL HISTORY**

12 Petitioners' due process complaint notice ("Complaint") with four allegations was  
13 filed on April 9, 2018. At the May 10, 2018 pre-hearing conference, and in response to  
14 the MUSD May 4, 2018 Motion to Dismiss three of the four allegations in the Complaint,  
15 Petitioners withdrew those three allegations.<sup>4</sup> The remaining allegation, Allegation #2,  
16 was heard at due process. The parties presented testimony, exhibits, and argument at  
17 the formal evidentiary hearing session. The parties provided pre-marked proposed  
18 exhibits. Petitioners had pre-marked Exhibits 1 through 28.<sup>5</sup> Respondent had pre-  
19 marked Exhibits A through R.<sup>6</sup>

### 20 ***Issue for Hearing***

21 Based on the May 10, 2018 pre-hearing conference, the following issue, as  
22 numbered in the Complaint, was heard at due process hearing:

23 Allegation #2. MUSD is alleged to have failed to provide FAPE to Student when  
24 MUSD failed or refused to provide a 1:1 nurse for Student in the classroom and on  
25 campus.

### 26 ***Requested Remedy***

27  
28 <sup>3</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"  
29 IDEA 2004 became effective on July 1, 2005.

<sup>4</sup> This is reflected in ORDER dated May 10, 2018.

<sup>5</sup> Exhibits 1-3, 5-8, 10, 12-21, and 25- 27 were admitted.

<sup>6</sup> Exhibits F, H-O, and R were admitted; Exhibit R is a continuation of the documents in Exhibit L.

1 As a remedy, Parent requested that MUSD provide a 1:1 skilled nurse for Student.  
2 In due process matters, remedies are only considered regarding proven IDEA violations  
3 and all remedies must be related to a resolution of a proven IDEA violation.

4  
5 The Administrative Law Judge has considered the entire hearing record including  
6 the testimony and the admitted exhibits,<sup>7</sup> and now makes the following Findings of Fact,  
7 Conclusions of Law, and Decision finding that Petitioners have failed to demonstrate a  
8 violation of the IDEA by MUSD through Allegation #2 set forth in the Complaint.

9 **FINDINGS OF FACT**

10 1. Student has complex medical conditions that have been diagnosed over a  
11 period of time: [REDACTED]

12 [REDACTED]  
13 [REDACTED] As a result of having qualifying factors, Student qualifies for services through  
14 DDD.

15 2. Student has a G-tube through which he receives medication at home and  
16 hydration at school if needed (i.e., when he has not urinated).<sup>13</sup> Student wears diapers.<sup>14</sup>  
17 At school, Student wears [REDACTED]<sup>5</sup>

18  
19  
20  
21 <sup>7</sup> The Administrative Law Judge has read and considered each page of each admitted exhibit, even if not  
22 mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every  
23 witness, even if the witness is not specifically mentioned in this Decision.

24 <sup>8</sup> Student has a [REDACTED], which Parent indicated was implanted in December 2015.  
25 Transcript ("TR") at 53. School personnel have authority, permission, and instructions to utilize the [REDACTED]  
26 to activate Student's [REDACTED] if a seizure occurs. Exhibit M at NPS-177. On the instructions from a doctor,  
27 staff is able to use the [REDACTED] as many time as needed. TR at 139; Exhibit M at NPS-200.

28 <sup>9</sup> This is a very rare condition that causes [REDACTED]  
29 [REDACTED] which may last for minutes, hours, or days.

30 <sup>10</sup> Although the school records indicate [REDACTED] Parent indicates that Student is not [REDACTED] but simply  
has [REDACTED] TR at 46-47.

<sup>11</sup> Student is monitored while eating to prevent him from eating foods he should not eat and due to possible  
seizures and choking issues.

<sup>12</sup> Exhibit H.

<sup>13</sup> At hearing, the school nurse indicated that she had never had to give Student water through the G-tube.  
TR at 134.

<sup>14</sup> If he has not urinated at his bathroom breaks, he is given hydration.

<sup>15</sup> Exhibit 2.

1           3.     Student had previously been determined eligible for special education  
2 under the preschool category of developmental delay and the school age category of  
3 other health impaired ("OHI").

4           4.     For academic year 2017-2018 of Kindergarten, Student was determined to  
5 require a trained aide monitor on the bus, a trained aide support for safety to and from  
6 the bus, and trained aide support while in class and on campus to monitor for paralysis,  
7 oxygen, and for the need to trigger the [REDACTED]<sup>6</sup> Student was determined to need a health  
8 aide at all times. The Student's Individualized Education Program ("IEP") dated  
9 December 15, 2017 called for .5 hours daily of nursing services ([REDACTED], seizure  
10 monitoring by the school nurse, and emergency care plans in the nursing office and  
11 classroom.<sup>17</sup> The IEP further called for 29 hours per week of health aide services on  
12 campus/classroom for personal care and activities of daily living assistance.<sup>18</sup>

13           5.     In or about May of 2017, Parent asked for an IEP meeting requesting MUSD  
14 to provide a nurse as an aide rather than a trained instructional assistant (health aide).  
15 By prior written notice dated September 22, 2017, MUSD determined to continue to  
16 provide the trained health aide rather than a nurse aide.<sup>19</sup>

17           6.     At hearing, Parent argued that, for Student to receive FAPE, he must  
18 receive nursing care while in the class and on campus from a nurse, not from a school  
19 nurse when she is called upon (and may not arrive in time) and not from a trained health  
20 aide. Parent argued that Student's medical issues require that he be constantly  
21 monitored by a skilled nurse who has the background and training to recognize his  
22 condition at any time, the possible symptoms for his various conditions, and to provide  
23 the necessary medical care in the event of a seizure or temporary paralysis.<sup>20</sup> Parent  
24 argued that Student is not permitted to attend any after-school activity without a DDD  
25

26 <sup>16</sup> *Id.* at NPS-51. All such personnel were trained as to Student's particular medical monitoring needs.

27 <sup>17</sup> *Id.* at NPS-55; also Exhibit M.

28 <sup>18</sup> *Id.* at NPS-57.

29 <sup>19</sup> Determinations for IEP services are an IEP Team determination taking into account known information,  
30 evaluations, and recommendations. Exhibit F. Thereafter, Parent requested mediation, which did not  
change the aide versus nurse issue in Parent's favor. MUSD statement at hearing. TR at 179-80.

<sup>20</sup> Parent indicated that the paralysis could include his organs, such as his lungs, and if no one is paying  
attention or a nurse is not there to see the paralysis, Student could easily die in the absence of quick  
intervention. TR at 57.

1 nurse and this same type of care should be provided by MUSD for the school day.<sup>21</sup>  
2 Parent argued that, despite the Arizona law not requiring it, a nurse should be required  
3 for Student based on his particular medical needs. Parent offered testimony from service  
4 nurses who each opined that Student should go to school with a nurse.<sup>22</sup>

5 7. L.P.N. Morgan has worked with Student approximately three years; she  
6 works with him in after-school hours, currently several days a week.<sup>23</sup> She changes his  
7 diapers, gives him baths, gives him medications, does blood sugars, and monitors him  
8 (*i.e.*, assesses him) regarding his seizure activity. She noted that Student's seizures had  
9 changed over that time period and are now considered to be "drop seizures." She  
10 indicated that he exhibits something like a [REDACTED] with [REDACTED] over which he  
11 has no control and is a form of a seizure. She indicated that he can experience temporal  
12 lobe seizures, going from having normal behavior to becoming angry, emotional and  
13 frustrated, during which he might hit and kick.

14 8. L.P.N. Morgan opined that the school health notes were likely not accurate,  
15 doubting their statements about Student being potty-trained at school and indicating few  
16 seizures.<sup>24</sup> She opined that the school personnel do not have a good grasp of Student's  
17 seizure activity and are missing his various "health signs" during the day. She opined  
18 that a nurse is better qualified to make assessments of Student's health symptoms and  
19 that a nurse would catch health signs earlier and prevent more serious medical situations  
20 from occurring.

21  
22  
23 

---

<sup>21</sup> TR at 62-63.

24 <sup>22</sup> Parent provided physician recommendations for a nurse in addition to a health aide at school, due to the  
25 "episodic nature of his seizures." Dr. Briggs is a neuropsychologist and his report is found at Exhibit 4,  
26 page 20. Dr. Holland is an endocrinologist and his letter dated April 19, 2017, is found at Exhibit 8. Dr.  
27 Holland's recommendation is based on Student having seizures at school; however, the school health notes  
28 in the hearing record begin with April 25, 2017. Of note, Parent has not signed releases for school  
29 personnel to talk to Student's doctors. TR at 65. However, physicians or other providers have given  
30 authorization for medical procedures to be done at school. Exhibit M at NPS-177, NPS-182, NPS-190,  
NPS-200, and NPS-202.

<sup>23</sup> L.P.N. Morgan has finished nursing school but had not yet completed testing to become designated as a  
registered nurse.

<sup>24</sup> School health notes are in Exhibit K, dated from April 25, 2017 through and into May 2018 (the last note  
is undated). L.P.N. Morgan further opined that if there were better health notes from the school, Student's  
transition from school to home would be more seamless.

1           9. R.N. Shockley was specific in indicating that, as a nurse, she did not  
2 diagnose but only made recommendations for services.<sup>25</sup> She opined a nurse was  
3 required at school due to Student's [REDACTED] and "potential to seizure  
4 behavior that he may have at any time."<sup>26</sup> She opined that a trained layperson does not  
5 have the critical thinking skills or nursing training regarding the various diagnoses (*i.e.*,  
6 "the ins and outs of a diagnosis") and taking into account all of the health signs and  
7 symptoms and be best able to determine what to do next, such as requiring oxygen or  
8 calling in emergency services.<sup>27</sup>

9           10. Parent argues that federal rules require that schools provide medical  
10 services to medically fragile children who need nursing services. Parent argued that  
11 Student's IEP needs to be individualized and that, for Student, his IEP should require  
12 skilled nursing by his side throughout the school day.

13           11. An incident that Parent referenced as being one in which school personnel  
14 had not noticed signs of [REDACTED] is recited through the emails found in Exhibit  
15 19.<sup>28</sup> However, the specific time frame in the example is unknown and it must be noted  
16 the aide had indicated to Parent that Student "looked fine" when he left school and Parent  
17 was taking him to therapy. Therefore, while the DDD nurse thought Student looked pale  
18 when he arrived at therapy, it was later *during therapy* that Student "started declining"  
19 and had the episode of [REDACTED].<sup>29</sup> Parent, after picking Student up and during  
20 the transport, apparently was not alerted to any symptoms; if she was, the email does not  
21 so indicate. Parent opined that, if there had been a 1:1 nurse with him, the episode "could  
22 have been prevented."<sup>30</sup>

23           12. To support her argument that Student needs a nurse aide at school, Parent  
24 referenced another incident that took place at home.<sup>31</sup> Parent argued that one of the

25 <sup>25</sup> TR at 45.

26 <sup>26</sup> *Id.* (emphasis added). In Exhibit 10, R.N. Shockley notes that the other basis for her recommendation is  
27 "postical seizure behavior." Emphasis added. Postical behavior refers to the altered state of  
28 consciousness after an epileptic seizure of varying length and accompanied with multiple disorienting  
29 symptoms. Exhibit 10 is only one of 8 pages of an annual report prepared by DDD with regard to his DDD  
30 services. TR at 48-50.

<sup>27</sup> TR at 46-47.

<sup>28</sup> TR at 60.

<sup>29</sup> Exhibit 18, page 2; the time noted was 2:37 p.m.

<sup>30</sup> Exhibit 19.

<sup>31</sup> TR at 62; Exhibit 14.

1 service provider employees, who is not a nurse but who has been on the child's case  
2 management team, and who was at the home at the time, was not aware that Student  
3 was having a [REDACTED]

4 13. Multiple other incidents Parent was questioned about were also ones that  
5 took place at home, when leaving home, or in or near a grocery store.<sup>32</sup> Mother indicated  
6 that the nurse is there with the child to keep him safe when she is not at home and, while  
7 Parent is not a nurse, she has learned how to adapt and take care of her child and make  
8 medical decisions and judgments based on his needs.<sup>33</sup>

9 14. Parent fears that she will receive a call from school regarding some medical  
10 issue that has happened that "could have been prevented."<sup>34</sup> Parent indicated that  
11 Student's seizures are not obvious and that there had been "incidences where people  
12 have not been properly taking care of [Student] because they did not know how to . . .  
13 take care of his high medical needs."<sup>35</sup> Parent argues that she should not be afraid to  
14 send Student to school just because he has a health aide there when he needs a nurse,  
15 a qualified person, to take care of him<sup>36</sup> and "[make] sure that he is medically safe at all  
16 times because something can happen to him in an instant."<sup>37</sup>

17 15. Kindergarten Teacher indicated that, during the past school year (2016-  
18 2017), she had only sent Student to the nurse three or four times, as he was sleepy, in  
19 addition to his regular two times a day visits for using the bathroom, snack, and hydration  
20 after morning recess, and for using the bathroom and hydration after afternoon recess.<sup>38</sup>  
21 The visits to the school nurse do not interfere with classroom learning as all students have  
22 a bathroom break at that time. She noted that Adult health/support aide ("Adult"), or  
23 another trained aide, is always with Student.<sup>39</sup> Kindergarten Teacher has seen Adult  
24 swiping the [REDACTED] Kindergarten Teacher has never seen Student have a seizure at school  
25 and has never had to call the school nurse to care for Student; she noted that, in the event

26 <sup>32</sup> TR 68-76; see also Exhibit 26.

27 <sup>33</sup> TR at 76-77.

28 <sup>34</sup> TR at 195.

29 <sup>35</sup> TR at 56. No further details of any such incidences were provided.

30 <sup>36</sup> TR at 63.

<sup>37</sup> TR at 64, regarding Student's [REDACTED]

<sup>38</sup> TR at 81-82.

<sup>39</sup> TR at 82, 83, and 90.

1 of a seizure, Adult is trained to make sure there is nothing around him and to do the things  
2 that are to be done.<sup>40</sup> Kindergarten Teacher has never seen an incident of temporary  
3 paralysis with Student, but another person had told her about one on the playground that  
4 lasted about a minute.

5 16. Kindergarten Teacher indicated that Student both exhibited academic  
6 growth and social growth over the year, was ready to go to First Grade, and that the  
7 provision of a nurse would not have provided Student with any more access to the  
8 classroom, *i.e.*, education and curriculum, than he already had.<sup>41</sup>

9 17. Special Education Teacher noted that Student had made progress on all his  
10 IEP goals and had matured and become more independent over the school year.<sup>42</sup>  
11 Special Education Teacher did not experience any medical situations with Student and  
12 did not need to call the school nurse or emergency personnel over the school year.<sup>43</sup> She  
13 further noted that she was unaware of any seizures at school over the school year. She  
14 is knowledgeable regarding the health plan in the event of a seizure and is trained in how  
15 to address use of the [REDACTED]<sup>44</sup> She opined that the provision of a nurse would not have  
16 provided Student with any more access to the classroom, *i.e.*, education and curriculum,  
17 than he already had.<sup>45</sup>

18 18. R.N. Salcido is a full time school nurse; she indicated that there had been  
19 no significant health issues with Student over the school year.<sup>46</sup> She is knowledgeable  
20 about the health plans in place for Student and she is familiar with all the assistance,  
21 monitoring, and support services that Adult provides to Student; there is backup  
22 personnel for Adult.<sup>47</sup> Adult informed R.N. Salcido of one "drop seizure" Student had, that  
23 had occurred right in front of the health office; Adult brought him into the health office and  
24 R.N. Salcido then observed Student for 20 minutes looking for any classical effect  
25

26 <sup>40</sup> In the event of a seizure, Kindergarten Teacher is to call the school nurse while her classroom aide takes  
27 all other students out of the classroom. TR at 84.

<sup>41</sup> TR at 79 and 88.

<sup>42</sup> TR at 100; Exhibit J.

<sup>43</sup> TR at 102.

<sup>44</sup> TR at 103-4.

<sup>45</sup> TR at 108-9.

<sup>46</sup> TR at 122-23.

<sup>47</sup> TR at 123-25.



1 symptoms.<sup>48</sup> R.N. Salcido believed that Student may have had an “absent seizure” one  
2 time in the bathroom at her office, and when he responded to her query, she realized he  
3 was alright.<sup>49</sup> Parent had given R.N. Salcido specific information regarding what  
4 Student’s seizures looked like for her to understand what the school might see in the  
5 event of a seizure.<sup>50</sup>

6 19. R.N. Salcido timed how long it would take her to reach Student’s classroom,  
7 which was one minute, and to reach the farthest classroom, one and one half minutes.  
8 She noted this in relation to the need to wait to administer any emergency seizure  
9 medication which is only for seizures that are lasting for more than three minutes.<sup>51</sup> R.N.  
10 Salcido noted that there were two people staffing the health nursing office and that both  
11 are trained to give the emergency medication.<sup>52</sup> R.N. Salcido opined that it was not  
12 necessary to change how the school was responsive to Student’s needs or to provide a  
13 1:1 nurse as Student’s aide.<sup>53</sup>

14 20. Arizona has no statute or administrative rules requiring that a school nurse  
15 be a registered nurse and no statute or administrative rules regarding qualifications for  
16 who can provide health services in a school setting.<sup>54</sup>

17 21. MUSD praised Parent for her collaboration with the school personnel about  
18 Student’s needs, and how to assess him, and the training that the school personnel  
19 received regarding Student.<sup>55</sup>

20 **CONCLUSIONS OF LAW**

21 **APPLICABLE LAW**

22 ***FAPE***

23 1. Through the IDEA, Congress has sought to ensure that all children with  
24 disabilities are offered FAPE that meets their individual needs.<sup>56</sup> These needs include  
25

26 <sup>48</sup> TR at 135-36.

27 <sup>49</sup> TR at 137.

28 <sup>50</sup> TR at 137; Exhibit M at NPS-198.

29 <sup>51</sup> TR at 142-43.

30 <sup>52</sup> TR at 146.

<sup>53</sup> TR at 143.

<sup>54</sup> TR at 158; also Exhibit N.

<sup>55</sup> TR at 174.

<sup>56</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

1 academic, social, health, emotional, communicative, physical, and vocational needs.<sup>57</sup>  
2 To provide FAPE, a school district must identify and evaluate all children within their  
3 geographical boundaries who may be in need of special education and services. The  
4 IDEA sets forth requirements for the identification, assessment, and placement of  
5 students who need special education, and seeks to ensure that they receive a FAPE. A  
6 FAPE consists of “personalized instruction with sufficient support services to permit the  
7 child to benefit educationally from that instruction.”<sup>58</sup> The FAPE standard is satisfied if  
8 the child’s IEP sets forth his or her individualized educational program that is “reasonably  
9 calculated to enable the child to receive educational benefit.”<sup>59</sup> The IDEA mandates that  
10 school districts provide a “basic floor of opportunity.”<sup>60</sup> The IDEA does not require that  
11 each child’s potential be maximized.<sup>61</sup> A child receives FAPE if a program of specialized  
12 instruction “(1) addresses the child’s ‘unique’ needs, (2) provides adequate support  
13 services so the child can take advantage of the educational opportunities and (3) is in  
14 accord with the child’s individualized educational program.”<sup>62</sup>

### ***The IEP***

15 2. Once a student is determined eligible for special education services, a team  
16 composed of the student’s parents, teachers, and others familiar with the student  
17 formulate an IEP that generally sets forth the student’s current levels of educational and  
18 functional performance and sets annual goals that the IEP Team believes will enable the  
19 student to make progress in the general education curriculum.<sup>63</sup> The IEP tells how the  
20 student will be educated, especially with regard to the student’s unique needs that result  
21 from the student’s disability, and what services will be provided to support or aid the  
22 student in accessing education. The student’s parents have a right to participate in the  
23

24 <sup>57</sup> *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983  
U.S.C.C.A.N. 2088, 2106).

25 <sup>58</sup> *Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

26 <sup>59</sup> *Id.*, 485 U.S. at 207. In 2017, in *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. \_\_\_\_, 137 S. Ct.  
27 988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard, adding  
that a school “must offer an IEP that is reasonably calculated to enable a child to make progress appropriate  
28 in light of the child’s circumstances,” but the Court declined to elaborate on what “appropriate progress”  
would look like case to case (*i.e.*, in light of a child’s circumstances).

29 <sup>60</sup> *Rowley*, 458 U.S. at 200.

30 <sup>61</sup> *Id.* at 198.

<sup>62</sup> *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9<sup>th</sup> Cir. 2006) (citing *Capistrano Unified  
Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9<sup>th</sup> Cir. 1995)).

<sup>63</sup> 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

1 formulation of an IEP; however, the determination of specialized instruction and any  
2 requisite related services is an IEP Team decision and parents may not dictate the terms  
3 of an IEP.<sup>64</sup> The IEP team must consider the strengths of the student, concerns of the  
4 parents, evaluation results, and the academic, developmental, and functional needs of  
5 the student.<sup>65</sup>

### 6 ***Substantive versus Procedural***

7 3. A determination of whether a student received FAPE must be based on  
8 substantive grounds.<sup>66</sup> For a substantive analysis of an IEP, the review of the IEP is limited  
9 to the contents of the document.<sup>67</sup> Therefore, any question regarding whether an IEP is  
10 reasonably calculated to provide educational benefit to a student must be decided on the  
11 basis of the content of the IEP itself.

12 4. Procedural violations in and of themselves do not necessarily deny a student  
13 FAPE. If a procedural violation is alleged and found, it must be determined whether the  
14 procedural violation either (1) impeded the student's right to a FAPE; (2) significantly  
15 impeded the parents' opportunity to participate in the decision-making process; or (3)  
16 caused a deprivation of educational benefit.<sup>68</sup> If one of those three impediments has  
17 occurred, the student has been denied FAPE due to the procedural violation.

### 18 ***Burden of Proof and Basis of Decision***

19 5. A parent who requests a due process hearing alleging non-compliance with  
20 the IDEA bears the burden of proving that claim.<sup>69</sup> The standard of proof is  
21 "preponderance of the evidence," meaning evidence showing that a particular fact is "more  
22 probable than not."<sup>70</sup> Therefore, in this case Petitioners bear the burden of proving by a

23 <sup>64</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1). The IEP process to develop the IEP at issue in  
24 this matter was not discussed at hearing.

<sup>65</sup> 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

<sup>66</sup> 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

<sup>67</sup> *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6<sup>th</sup> Cir. 2001) ("only those services identified or  
26 described in the . . . IEP should have been considered in evaluating the appropriateness of the program  
27 offered) (relying on *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9<sup>th</sup> Cir. 1994) (IDEA requirement of a  
28 formal, written offer should be enforced rigorously)).

<sup>68</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

<sup>69</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

<sup>70</sup> *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279  
29 (1993) 9quoting *In re Winship*, 397 U.S. 358, 371-72 (1970) 0; see also *Culpepper v. State*, 187 Ariz. 431,  
30 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No.*  
*J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

1 preponderance of evidence that Respondent substantively violated the IDEA through the  
2 alleged actions or inactions. If a procedural violation is alleged and demonstrated,  
3 Petitioners must then show that the procedural violation either (1) impeded Student's right  
4 to a FAPE, (2) significantly impeded Parents' opportunity to participate in the decision-  
5 making process, or (3) caused a deprivation of educational benefit to Student.<sup>71</sup>

### 6 DECISION

7 6. Parent alleges that MUSD failed to provide FAPE when it refused to provide  
8 a 1:1 nurse as Student's support aide. Parent argues that Student must have continuous  
9 1:1 nurse presence as his support aide in order to receive FAPE. Parent argues that  
10 Student requires monitoring by a nurse, a nurse who is qualified to monitor the child's  
11 needs through nursing training. Parent argues that only a medical doctor is qualified to  
12 say that a child requires nursing services in the classroom and that Student's doctors all  
13 say that Student needs a nurse in the classroom.<sup>72</sup> Parent believes that Student's  
14 medical issues impact his learning and that his IEP is required to be individualized for his  
15 needs, which she argues includes 1:1 skilled nursing support. Parent referenced federal  
16 rules mandating that a medically fragile child who needs nursing service must receive  
17 them in order to receive FAPE; however, Parent failed to cite to any particular rule. Parent  
18 did cite reliance of the *Garrett F.* case, decided in 1999.<sup>73</sup>

19 7. Parent's reliance on *Garret F.* is misplaced. In that case, the school  
20 declined to finance the services that the student's parents had been providing through an  
21 L.P.N. parents had hired, and the issue was whether the IDEA required the school to  
22 provide, as "related services," the nursing services Garret F. received during the school  
23 day.<sup>74</sup> The Supreme Court determined that the school was required to provide, as related  
24 services under the IDEA, the nursing services that Garret F. needed during the school  
25 day, not that the services being provided needed to be provided by a nurse. In the instant

26 <sup>71</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

27 <sup>72</sup> Thus, Parent argues that the IEP Team is not qualified to make this determination.

28 <sup>73</sup> *Cedar Rapids Comm'ty Sch. Dist. v. Garret F.*, 526 U.S. 66, 106 F.3d 822 (1999).

29 <sup>74</sup> Garret F. was a ventilator-dependent student in a wheelchair and his specific health care services  
30 included urinary bladder catheterization once a day, suctioning of the tracheotomy tube as needed but at  
least every six hours, someone manually pumping an air bag attached to the tracheotomy tube when the  
ventilator was being checked, feeding assistance with food and drink at lunchtime, and being placed in a  
reclining position for five minutes every hour.

1 case, MUSD is providing a trained health aide to provide, as related services set forth in  
2 his IEP, various supportive services to Student. Other than constant monitoring, Student  
3 requires no particular medical services during the day as a result of his various diagnoses  
4 and conditions. Based on the hearing record, Parent's concern is the possibility of an  
5 emergency and preventing any medical issue from being out of control; her belief is that  
6 only a nurse could best sense a problem arising for Student as to any of his conditions  
7 and, thus, take the appropriate action to prevent it from becoming worse.<sup>75</sup> However,  
8 there are specific health plans and emergency plans in place, and the evidence  
9 demonstrated that those plans are known to Adult, Kindergarten Teacher, Special  
10 Education Teacher, and R.N. Salcido.<sup>76</sup> The general parameter for related services are  
11 those services that are required "to assist a child with a disability to benefit from special  
12 education."<sup>77</sup> In this case, Student's IEP provides "related services" during the entire  
13 school day that assist and support Student so that he has access to and can benefit from  
14 his special education curriculum.

15 8. Overall, Parent's issue is whether, without a nurse, but with the trained adult  
16 health aide, Student is being provided meaningful access to an education. 34 C.F.R. §  
17 300.34 defines related services to include school health services and school nurse  
18 services, which are themselves described as those services "designed to enable a child  
19 with a disability to receive FAPE as described in the child's IEP."<sup>78</sup> School nursing  
20 services are services provided by a qualified school nurse and school health services are  
21 services that may be provided either by a qualified school nurse or another qualified  
22 person.<sup>79</sup> The IDEA is silent on any requirement for an IEP to specify the qualifications  
23 or training of services providers.<sup>80</sup>

## 24 CONCLUSION

25  
26  
27 <sup>75</sup> Risks inherent in schools for emergencies that might occur with regard to any child simply are not within  
the purview of the IDEA.

28 <sup>76</sup> It is presumed that all such health plans and training would be provided to Student's new or changing  
teachers or aides.

29 <sup>77</sup> 34 C.F.R. § 300.34(a).

30 <sup>78</sup> 34 C.F.R. § 300.34(c)(13).

<sup>79</sup> *Id.*

<sup>80</sup> *R.E.B. v. State of Haw. Dep't of Educ.*, 870 F.3d 1025, 1028 (9<sup>th</sup> Cir. 2017).

1 9. The Administrative Law Judge concludes that Student's IEP was  
2 reasonably calculated to enable Student to make progress in light of his circumstances.<sup>81</sup>  
3 The IDEA does not require that school health services be provided by a nurse but allows  
4 that such services may be provided either by a nurse or by a qualified person. Adult,  
5 Kindergarten Teacher, and Special Education Teacher are all trained regarding Student  
6 and his needs; each of them are knowledgeable regarding Student; his various needs,  
7 and his multiple health plans. The evidentiary record does not demonstrate any violation  
8 of the IDEA by MUSD and, therefore, the Administrative Law Judge concludes that  
9 Petitioners' Allegation #2 in the Complaint shall be dismissed.

#### 10 **RULING**

11 Based on the findings and conclusions above,

12 **IT IS ORDERED** that Allegations #1, #3 and #4, as withdrawn by Petitioners, are  
13 dismissed as moot, and

14 **IT IS FURTHER ORDERED** Petitioners' Allegation #2 in the Complaint is  
15 dismissed.

16 ORDERED this day, August 8, 2018.

17 */s/ Kay A. Abramsohn*  
18 Administrative Law Judge

#### 19 **RIGHT TO SEEK JUDICIAL REVIEW**

20 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this  
21 Decision and Order is the final decision at the administrative level.  
22 Furthermore, any party aggrieved by the findings and decisions made  
23 herein has the right to bring a civil action, with respect to the complaint  
24 presented, in any State court of competent jurisdiction or in a MUSD court  
25 of the United States. Pursuant to Arizona Administrative Code § R7-2-  
26 405(H)(8), any party may appeal the decision to a court of competent  
27 jurisdiction within thirty-five (35) days of receipt of the decision.  
28  
29  
30

---

<sup>81</sup> See *Endrew F.*

1 Copy mailed/e-mailed August 8, 2018 to:



2  
3  
4 Parent/Petitioner's representative



6  
7 Copy e-mailed August 8, 2018 to:

8 Jessica Sanchez, Esq.  
9 Udall Shumway  
10 [jss@udallshumway.com](mailto:jss@udallshumway.com)  
11 Counsel for MUSD

12 Arizona Department of Education  
13 ATTN: Kacey Gregson, Dispute Resolution  
14 [kacey.gregson@azed.gov](mailto:kacey.gregson@azed.gov)

15 By Felicia Del Sol