

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2  
3 E.V.T., a Student, by and through Parent  
D.V.T.

4 Petitioners,

5 v.

6  
7 Legacy Traditional School - Surprise  
Respondent

**No. 23C-DP-031-ADE**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

8  
9 **ARGUMENTS PRESENTED:** January 4, 2023

10 **APPEARANCES:** Father [REDACTED] appeared on behalf of Petitioners.  
11 David D. Garner, Osborn Maledon, P.A., appeared on behalf of Legacy Traditional School  
12 – Surprise (Respondent School District).

13 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

14  
15 Parent brought this due process action, on behalf of Student, challenging  
16 Respondent School District's denial of Parent's request that it provide compensatory  
17 minutes to Student during the school day. The law governing these proceedings is the  
18 Individuals with Disabilities Education Act (IDEA), 20 United States Code (U.S.C.) §§  
19 1400-1482 (as re-authorized and amended in 2004),<sup>1</sup> and its implementing regulations,  
20 34 Code of Federal Regulations (C.F.R.) Part 300, as well as the Arizona Special  
21 Education statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and  
22 implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.

23 **Procedural History**

24 On or about December 2, 2022, Petitioners filed the Due Process Complaint  
25 (Complaint). The Complaint set forth the following issue:

26 Legacy Traditional School-Surprise is refusing to provide compensatory  
27 minutes to our daughter during the regular school day. They are only  
28 offering to service her before or after school, and/or on school breaks. After  
many emails back and forth, and one meeting with district representative,

29  
30 <sup>1</sup> 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 they have officially declined to provide compensatory services at a time that  
2 is best for [Student], which is during the regular school day.

3 On or about December 13, 2022, Respondent School District submitted a  
4 Response to and Motion to Dismiss Complaint (Motion). In the Motion, Respondent  
5 School District argued that Respondent School District could not “Rob Peter to Pay Paul”  
6 and could not “Restrict Student’s Ability to be Educated with Her Typical Peers.”  
7 Respondent School District asserted that it could not change Student’s Least Restrictive  
8 Environment (LRE) to provide compensatory education during the school day as that  
9 would remove Student from the general education classroom.

10 On or about December 16, 2022, Petitioners submitted a Response to Respondent  
11 School District’s Motion (Response). In the Response, Petitioners argued that removing  
12 Student from the general education classroom for the provision of the compensatory  
13 education would not result in her being out of the general education classroom more than  
14 80 percent of the school day. Petitioners asserted that, because the Arizona Department  
15 of Education (Department) defines LRE in terms of levels, if Student did not move from  
16 “Level A” to “Level B” with the provision of compensatory education during the school day,  
17 her LRE would not change.

18 On or about December 20, 2022, Respondent School District submitted a Reply in  
19 Support of Motion to Dismiss Complaint (Reply).

20 During the prehearing conference in this matter that convened on January 4, 2023,  
21 the parties agreed that the matter was a purely legal question. The parties presented  
22 arguments on the Motion and additional information relating to the issue raised, and the  
23 matter was submitted for consideration.

24 **FINDINGS OF FACT**

- 25 1. Student, age 9, was in 2<sup>nd</sup> grade during the 2022 - 2023 school year.
- 26 2. Student had been receiving pull-out services consisting of speech  
27 articulation services.
- 28 3. Student was owed 240 minutes of speech therapy as compensatory  
29 education services.

1 4. While neither party was certain, they generally agreed that Student was  
2 receiving 75 minutes of pull-out services every two weeks with a 30 minute session one  
3 week and a 30 minute session and a 15 minute session the other week.

4 5. Parent proposed that Student be pulled from the general education  
5 classroom for a 15 minute or a 30 minute session on the weeks she was currently  
6 scheduled for just one session until the 240 minutes of compensatory education had been  
7 provided.

8 6. Respondent School District proposed providing the compensatory  
9 education services before school, after school, on half-days, or during school breaks.

10 7. Parent indicated that Student benefited socially from before school activities  
11 with her friends and was too exhausted after school to receive additional services.

12 8. Following the prehearing conference, Petitioners provided additional  
13 arguments related to the provision of compensatory education. Specifically, Petitioners  
14 referenced guidance from the Department on its website that provided as follows:

15 **Q: Can a PEA provide compensation education throughout the**  
16 **school day during times a student is not already receiving special**  
17 **education services? (Posted 5/5/20)**

18 Compensatory educational services may be provided during the regular  
19 school day; over school breaks; in intensive, targeted, individualized  
20 programs; or by outside service providers. **If compensatory**  
21 **educational services are to be provided during the school day, the**  
22 **student's least restrictive environment, as documented in the IEP,**  
23 **cannot be altered due to the provision of the compensatory**  
24 **educational services.** Because the provision of compensatory  
25 educational services is an equitable remedy, PEAs are encouraged to  
26 be creative in designing a plan to deliver compensatory educational  
27 services that meets the needs of the individual student in remedying the  
28 failure or inability of the PEA to provide a FAPE.<sup>2</sup>

29 **CONCLUSIONS OF LAW**

30 **APPLICABLE LAW**

***Free Appropriate Public Education (FAPE)***

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2 <sup>2</sup> <https://www.azed.gov/specialeducation/special-education-guidance-for-covid-19-for-school-year-2020-2021-reentry> as an entry under the section entitled "Compensatory Educational Services – Last update: 7/30/20".

1           1.       Through the IDEA, Congress has sought to ensure that all children with  
2 disabilities are offered a FAPE that meets their individual needs.<sup>3</sup> These needs include  
3 academic, social, health, emotional, communicative, physical, and vocational needs.<sup>4</sup>

4           2.       To provide a FAPE, a school district must identify and evaluate all children  
5 within their geographical boundaries who may be in need of special education and  
6 services. The IDEA sets forth requirements for the identification, assessment, and  
7 placement of students who need special education, and seeks to ensure that they receive  
8 a FAPE.

9           3.       A FAPE consists of “personalized instruction with sufficient support services  
10 to permit the child to benefit educationally from that instruction.”<sup>5</sup> The FAPE standard is  
11 satisfied if the child’s IEP sets forth his or her individualized educational program that is  
12 “reasonably calculated to enable the child to receive educational benefit.”<sup>6</sup> The IDEA  
13 mandates that school districts provide a “basic floor of opportunity.”<sup>7</sup> The IDEA does not  
14 require that each child’s potential be maximized.<sup>8</sup> A child receives a FAPE if a program  
15 of specialized instruction “(1) addresses the child’s “unique” needs, (2) provides adequate  
16 support services so the child can take advantage of the educational opportunities and (3)  
17 is in accord with the child’s individualized educational program.”<sup>9</sup>

18                               ***Least Restrictive Environment (LRE)***

19           4.       The IDEA does not provide an absolute right to a particular placement or  
20 location as a child’s LRE. Each proposed or alternative placement is simply required to  
21 have been “considered” by the IEP Team with regard to potential harmful effect on the  
22

23 <sup>3</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

24 <sup>4</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>5</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

26 <sup>6</sup> *Id.*, 485 U.S. at 207. In 2017, in *Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_\_ , 137 S. Ct.  
988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard, adding  
27 that a school “must offer an IEP that is reasonably calculated to enable a child to make progress appropriate  
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).

28 <sup>7</sup> *Rowley*, 458 U.S. at 200.

29 <sup>8</sup> *Id.* at 198.

30 <sup>9</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)).

1 student or potential harmful impact on the quality of the services that the child needs.<sup>10</sup>  
2 Therefore, LRE and placement are required to be determined only after analyzing the  
3 student's unique needs (and the nature and severity of disabilities) against the federal  
4 mandate to educate disabled children "to the maximum extent appropriate" with his or her  
5 nondisabled peers. The IDEA preference for mainstreaming is also not an absolute.<sup>11</sup>

6 5. The Administrative Law Judge acknowledges that the IDEA creates tension  
7 between provisions that require education to the maximum extent appropriate with  
8 nondisabled students and those that require meeting all the student's unique needs.

### 9 **Compensatory Education**

10 6. Compensatory education is a means of providing "services prospectively to  
11 compensate for a past deficient program."<sup>12</sup>

12 7. Compensatory services must be provided in addition to the educational  
13 services to which the student is entitled and may not supplant such services, *see, e.g.*:

- 14 • *M.P. v. Campus Cmty. Sch., No. CV 16-151*, 2018 WL 4926448, at \*9 (D. Del.  
15 Oct. 10, 2018) (extending statutory eligibility under IDEA in order to allow student  
16 to "take advantage of his comp. ed. outside of normal school hours").
- 17 • *Bensalem Township Sch. Dist.*, 122 LRP 46415 (SEA Penn. 2022) (ordering  
18 compensatory education to "occur after school hours, on weekends, and/or during  
19 the summer months" and requiring that the added time "shall be in addition to, and  
20 shall not be used to supplant, educational and related services that should  
21 appropriately be provided by the District through Student's IEPs to assure  
22 meaningful educational progress").
- 23 • *Marysville Sch. Dist.*, 122 LRP 46623 (SEA Wash. 2022) (requiring compensatory  
24 education for time missed to be provided "on weekends or during District breaks").

25  
26 \_\_\_\_\_  
27 <sup>10</sup> See 34 C.F.R. § 300.116(d).

28 <sup>11</sup> See 34 C.F.R. §§ 300.114(a)(1) and (2). A school may, and should, remove a child from the regular  
29 educational environment if the nature and severity of the child's disability is such that, even with  
30 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).

<sup>12</sup> *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008).

- *Sharpville Area Sch. Dist.*, 121 LRP 7019 (SEA Penn. 2020) (requiring compensatory services to be provided “after school, on weekends and/or during the summer months . . .”).
- *Hood River Cnty. Sch. Dist. v. Student*, No. 3:20-CV-1690-SI, 2021 WL 2711986, at \*20 (D. Or. July 1, 2021) (affirming ALJ order that school distribute compensatory education over the summer months).
- American Speech-Language-Hearing Association, IDEA Part B: Missed Sessions (noting that, when compensatory education is required to make up missed speech sessions, it should be implemented “before or after school, or during vacations or summer recess”);
- Ariz. Dep. of Ed., Exceptional Student Services, Covid-19 Special Education Reentry Q&A, at 15 (Feb. 25, 2021) (“Compensatory educational services cannot interfere with the services the student is to receive under a current IEP.”).

***Burden of Proof and Basis of Decision***

8. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.<sup>13</sup>

9. The standard of proof is “preponderance of the evidence,” meaning evidence showing that a particular fact is “more probable than not.”<sup>14</sup>

10. Therefore, in this case Petitioners bear the burden of proving by a preponderance of evidence that Respondent substantively violated the IDEA through the alleged actions or inactions.

**DECISION**

11. The IDEA requires Respondent School District to minimize the time that Student spends not being educated with her general education peers.

12. While the Department generally classifies LRE by levels for funding purposes, that classification does not grant school districts the authority to remove a

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<sup>13</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

<sup>14</sup> *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, 371-72 (1970); see also *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

1 student from a classroom for any amount of time that would fall within the level identified  
2 in the student's IEP.

3 13. Were Respondent School District to remove Student from the general  
4 education classroom to provide compensatory education services, it would, in fact, alter  
5 Student's LRE, even if Student remained within the Level A LRE as defined by the  
6 Department.

7 14. The guidance cited by Petitioners that was posted on May 5, 2020, is not  
8 persuasive as to how this matter should be considered. The guidance was posted at the  
9 outset of the COVID-19 pandemic when schools were shut down and children were not  
10 being educated in the same setting as they had previously. If students were only logging  
11 into online classes at set times of the day, there may have been opportunities to provide  
12 compensatory services during other times of the day that would not remove a student  
13 from their general education "classroom."

14 15. Notably, the Department website is devoid of any more current guidance  
15 that would indicate a school district could provide students with compensatory education  
16 during the regular school day when they are attending school in person.

17 16. While the Administrative Law Judge is sympathetic to Petitioners' concerns  
18 regarding the provision of compensatory education at other times of the day, the IDEA  
19 requires Respondent School District to minimize the time that Student spends outside the  
20 company of her general education peers. This requirement applies to all aspects of an  
21 eligible child's education—including in the implementation of compensatory education.<sup>15</sup>

22 17. Because Respondent School District would violate the IDEA by offering  
23 compensatory education during the school day and, thereby, increasing the time she was  
24 removed from her general education peers, the Complaint fails to state a claim for which  
25 relief can be granted.

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26 <sup>15</sup> See U.S. Dep. of Ed., Off. Of Spec. Ed. & Rehab. Svcs., Return to School Roadmap: Development and  
27 Implementation of Individualized Education Programs in the Least Restrictive Environment under the  
28 Individuals with Disabilities Education Act (Sep. 30, 2021) ("IEP Teams should consider how any additional  
29 services determined necessary can be delivered in a manner that does not diminish the child's opportunities  
30 to interact with nondisabled peers to the maximum extent appropriate, and to participate in extracurricular  
and other nonacademic activities.").

**ORDER**

1 Based on the findings and conclusions above, **IT IS HEREBY ORDERED** that that  
2 the relief requested in the Complaint is **denied** as set forth above and Petitioners'  
3 Complaint is dismissed.  
4

5 Done this day, February 15, 2023.

6 /s/ Tammy L. Eigenheer  
7 Administrative Law Judge

8 **RIGHT TO SEEK JUDICIAL REVIEW**

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

17 Transmitted electronically or by mail to:

18 Jeff Studer  
19 Arizona Department of Education  
20 Director of Dispute Resolution  
21 100 N. 15th Ave  
22 Phoenix, AZ 85007  
23 Jeffrey.Studer@azed.gov

24   
25 David D. Garner  
26 Osborn Maledon, P.A.  
27 2929 North Central Avenue, Suite 2100  
28 Phoenix, Arizona 85012  
29 dgarner@omlaw.com

30 By: OAH Staff