BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF EDUCATION

IN THE MATTER OF THE EDUCATION OF	)	**CORRECTED FINAL ORDER**
	)	
STUDENT and NORTH BEND SCHOOL DISTRICT	)	Case No.: DP 15-115
	)	

HISTORY OF THE CASE

On October 13, 2015, Student's parents filed a request for a due process hearing with the Oregon Department of Education.

On October 14, 2015, the Oregon Department of Education (ODE) referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Alison Greene Webster to conduct the due process hearing and issue a Final Order in this case.

On October 23, 2015, the parties participated in a resolution session but did not resolve the dispute. On November 18, 2015, ALJ Webster presided over a prehearing conference. The Parents participated in the conference through their attorney, Stefyni Allen. The North Bend School District (District) participated through their attorney, Joel Hungerford. During the conference, the parties agreed to extend the decision deadline to March 4, 2016 pursuant to ORS 343.167(5). The parties also agreed to hold the hearing January 4 through 6, 2016 in North Bend, Oregon.

The hearing was held as scheduled before ALJ Webster on January 4 and 5, 2016 at the District's offices in North Bend, Oregon. Attorney Stefyni Allen represented the Parents. Attorneys Joel Hungerford and Richard Cohn-Lee represented the District. The District provided a court reporter for the hearing. Naegeli Reporting prepared written transcripts of the hearing sessions. At the Parents' request, the hearing was closed to the public.

The District presented its case first. The following witnesses testified on the District's behalf: Patricia Johnson, Special Education Director for the District (retired); and Allyson McNeill, Special Education Director for the District. The following witnesses testified on the Parents' behalf: Ralph Brooks, Vice Principal, North Bend Middle School; Father and Mother.

At the close of the hearing, the record was left open for receipt of the final hearing transcript and the parties' written closing arguments. Naegeli Reporting provided the completed transcript on January 15, 2016. The parties written closing briefs were received on February 5, 2016 and the hearing record closed on that date.

ISSUES

1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) by not providing prior written notice before disenrolling Student from school.

2. Whether the District violated the IDEA by not ensuring the Parents' meaningful participation before disenrolling Student from school.

3. Whether the District denied Student a FAPE during the 2014-2015 school year by not providing educational and related services in an alternative setting during the time Student was withdrawn from school due to a medical condition.

4. Whether the District denied Student a FAPE by not providing educational and related services once Student was medically released to attend school on September 18, 2015.

EVIDENTIARY RULINGS

Exhibits D1 through D23, offered by the District, were admitted into the record without objection.

Exhibits S1, S3 through S19 and 21, offered by the Parents, were admitted without objection. Exhibits S2 and S20 were admitted over the District's relevancy objections.

FINDINGS OF FACT

1. Student, born in 2001, has spina bifida, secondary hydrocephalus and epilepsy. Student also has numerous allergies, including latex and certain foods. (Tr. 2 at 23.) Student is wheelchair bound and needs assistance with activities of daily living. (*Id.* at 30.) Student's significant medical needs require a highly modified school day and academic curriculum. (Ex. S1 at 5.)

2. Student needs assistive technology devices and services to access his/her education. Student also has communication needs and s/he occasionally exhibits behavior that impedes his/her learning or the learning of others. (Ex. S1 at 5.)

3. The North Bend School District contracts with South Coast Educational Service District (ESD) to provide special education related services to students, including nursing services. (Tr. 1 at 130-131; Tr. 2 at 153.)

4. Student has attended school in the District since kindergarten. (Tr. 2 at 22.) In March 14, 2014, during Student's seventh grade year, Student's IEP team met to review Student's IEP and update Student's goals and objectives. During the meeting, the team reviewed Student's service summary, including specially designed instruction (including communication/language/social skills, community instruction, functional mobility/gross motor,

functional academics, daily living, and personal hygiene), related services (including speech/augmentative communication therapy, occupational therapy, physical therapy, transportation , and a 1:1 nurse all school hours and on the bus) and supplementary aids and services. The team agreed to remove Student from general education approximately 60 percent of the school day for Student's motor, hygiene, community instruction and functional skills instruction. The team also agreed that extended school year services would be provided to Student. (Ex. S1 at 5.) In terms of placement, the IEP team selected that the option of "Adaptive Life Skill classroom with push-in to general education classroom for about 40 percent of the day." (*Id.* at 24.) Parents received notice of the changes made to Student's IEP pursuant to a Prior Notice of Special Education Action issued March 14, 2014. (*Id.* at 25.)

5. On August 18, 2014, additional changes were made to Student's IEP pursuant to a mediation session agreement. The changes included modifications to Student's hygiene goals and training on Student's behavior intervention plan for all staff, both District and South Coast Educational Service District, who work with Student. (Ex. S1 at 6-7.) During the mediation session, the IEP team also agreed to complete a Functional Behavioral Assessment (FBA) and a Behavior Intervention Plan (BIP) with the Parents' input by October 15, 2014. (Ex. D6.)

6. Student was not medically released to attend school at the outset of the 2014-2015 school year. Once Student was medically released to attend school (on or about September 16, 2014), s/he began his/her eighth grade year at North Bend Middle School. Student attended school through October 2, 2014. (Ex. D16.)

7. On October 3, 2014, Mother sent a letter to Pat Johnson, the then Special Education Director for the District, expressing her dismay over an incident involving Student that had occurred at school the prior day.[1] Mother concluded the letter with the following:

> Furthermore, due to the unprofessional behavior and anger that has been expressed toward out child by the North Bend School District staff as well as ESD Nurses[,] [Father] and I feel it currently is unsafe to send [Student] back to school.
>
> Please contact me * * * to discuss this matter further.

(Ex. D1.)

8. On October 6, 2014, Parents met with Ms. Johnson to discuss their concerns about the events on October 2. Parents expressed their belief that Student had been mistreated and injured by an ESD nurse. They expressed their desire to have better communication among Student's providers and the members of Student's IEP team. They also expressed their desire to have a "safe start to school this year" and to have Student's needs "met and understood by all." (Ex. D2 at 5.) In her notes of the meeting with Parents, Ms. Johnson wrote and circled the words

[1] Parents believe, and in a separate legal proceeding have alleged, that Student was injured during a catheterization procedure at school on October 2, 2014. However, Parents have not asserted in this proceeding that the alleged injury caused a violation of the IDEA or led to a denial of FAPE. The issues in this case are limited to those set out in Parents' October 13, 2015 due process complaint. Therefore, the events at school on October 2, 2014 fall outside the scope of this due process hearing.

"Need FBA and BIP updated." (*Id.* at 6.)

9. In a letter dated to Parents dated October 8, 2014, Ms. Johnson and Kathleen Stauff of the ESD shared the results of their investigation into the events at school on October 2, 2014. The letter concluded with the following:

> While we do not want to discount your letter of complaint, we are unable to corroborate your allegations with information you provided and our investigation. If you have further information regarding your concerns that you shared, we will follow up on it. If you would like to speak with us further regarding your report, please let us know.

(Ex. D3 at 3.)

10. On or about October 16, 2014, after missing 10 consecutive days of school, Student was withdrawn from school enrollment pursuant to the District's "10 day drop" policy and the State of Oregon's compulsory attendance laws.[2] (Ex. D16 at 4; Tr. 2 at 13, 19.)

11. On October 24, 2014, the District issued a Prior Notice of Special Education Action to Parents proposing to change the completion date for Student's FBA and BIP. The Notice stated:

> [Student] was not released to attend school until September 16, 2014 and then attended school until October 2, 2014 and has not attended since. The team would like to complete the FBA and develop a BIP based on current needs in the school setting but cannot do so until [Student] returns to school.

(Ex. D6.)

12. That same date, October 24, 2014, Ms. Johnson sent a letter to Parents advising as follows:

> I want you to be assured that the North Bend School District:
>
> 1. Stands ready to provide special education and related services if your child is enrolled in the district.
>
> 2. The district offers an IEP meeting to consider special education and related services for your child.

[2] Because school funding is tied to attendance, Oregon law requires schools to withdraw students who miss ten or more consecutive days of school. If a student is absent for any reason for 10 consecutive days, the student will be dropped from enrollment and must re-enroll upon his or her return to school. (Tr. 1 at 61-62; Tr. 2 at 13.) OAR 581-023-0006(4)(b), which addresses student accounting records and state reporting, provides, in pertinent part as follows: "A student whose attendance is reported as hours of instruction must be withdrawn from the active roll on the day following the tenth consecutive day of absence from the program in which they are enrolled. A student must be present for at least one hour of instruction in order to restart the count of consecutive days' absence."

> In summary, I want you to know the School District is willing to assist you in your child's education. Don't hesitate to call me at any time if I may be of assistance.

(Ex. D8; Ex. S4.)

13. Also on October 24, 2014, Christopher Austin, M.D., one of Student's treating physicians at Doernbecher Children's Hospital, wrote a letter excusing Student from school for an indefinite period. The letter stated as follows:

> To School personnel:
>
> [Student] has been unable to attend school since October 2 due to a medical condition. Please excuse [his/her] absence. Mother will be in touch with school when [Student] is able to return to school.

(Ex. D7; Ex. S3.) Mother delivered a copy of this letter to Student's school on October 30, 2014. (Ex. D11.)

14. Meanwhile, in a letter to Ms. Johnson and others dated October 27, 2014, Mother wrote as follows:

> I would like you to know that we have received Pat's voice mails requesting a meeting. [Student] is still seeking medical treatment for the injuries sustained while at school. We do not feel a meeting at this time would be productive. As [Student] is currently not medically released to attend school.

(Ex. S5.)

15. On November 7, 2014, after receiving notice that Student was excused from school for medical reasons, Ms. Johnson wrote a letter to the Parents stating, in pertinent part, as follows:

> I am also concerned about [Student] not receiving instruction at this time and would like to talk to you about how North Bend School District can assist. If [Student] is medically unable to attend school the District can offer instructional hours in an alternative setting. If you would like to provide services yourself please contact the ESD about signing [Student] up for home school.
>
> * * * * *
>
> Please call me to arrange a meeting to discuss [Student's] educational needs.

(Ex. D9 at 1; Ex. S6.) Aside from Dr. Austin's October 24, 2014 letter excusing Student from school due to a "medical condition," the District received no other information from Student's

medical providers regarding Student's medical condition and/or the anticipated length of Student's absence from school. (Tr. 1 at 43, 48.)

16. On November 12, 2014, Mother wrote Ms. Johnson with questions and concerns about the District's attendance policy. The letter stated, in pertinent part, as follows:

> Is there anything else you need me to do to address [Student's] attendance. [Student's] medical note states [Student] is not released to attend school. So the question I have to ask you is if [Student] receives services in an alternative setting or if I were to sign [Student] up for home school, is that not allowing [Student] to attend school, even though [s/he] is not medically released?
>
> So when you send me the attendance policy could you please highlight for me the portion that address[es] when a student is injured while at school by school staff what are [his/her] parents responsibilities are [*sic*] regarding [his/her] attendance because as I mentioned before the actions I have taken are actions that I hope comply with the attendance policy.

(Ex. D11 at 2-3; Ex. S8 at 1-2.)

17. In a letter dated November 24, 2014, Ms. Johnson wrote to the Parents as follows:

> I left you a phone message regarding a meeting time to discuss how North Bend School District can provide school services to [Student] while [s/he] is recovering. As I stated on the phone I could meet tomorrow afternoon or the first week of December at the following times: December 1st anytime after 11:00 am, December 2nd anytime after 10:00 am or December 5th anytime after 10:00 am. Please let me know if any of these times will work to meet with you. If a time works I will attempt to confirm the meeting with [Student's] IEP providers.
>
> I want to confirm with you that North Bend School District offers to hold an IEP meeting to discuss [Student's] current needs. In addition, the District stands ready to provide all educational services including special education and related services to [Student].
>
> Please contact me to arrange an IEP meeting for [Student].

(Ex. D12.)

18. By letter dated December 4, 2014, Father responded to Ms. Johnson as follows:

> I appreciate you letting us know and offering us so many scheduling times, for the IEP meeting the district would like to hold per your letter dated November 24, 2014. Unfortunately, and I thought I had done enough already to explain to the district that [Student] is not medically released to attend school. Per your phone voice mail which was left on November 12th you said that you would let us know

about instructional hours.

> I have no idea what that means. I also do not understand at this time how an IEP meeting can address [Student's] current needs. It is also disturbing to us that the North Bend School District still says they stand ready to provide all educational services including special education and related services to [Student]. As we have made them aware we question their ability to keep our child safe and educated. As the day [Student] endured on October 2, 2014 is unacceptable to us and leads us to have reasonable fear for [Student] as the North Bend School District fails to recognize that actions taken by staff, that day has substantially impacted [Student's] educational future.

(Ex. D13; Ex. S10.)

19. The following date, December 5, 2014, Ms. Johnson wrote the Parents the following:

> Thank you for your recent letter updating us on [Student's] status. I am sorry for the confusion about the offer of instructional hours. We will need to hold an IEP meeting to discuss [Student's] current needs and determine what services to provide for the instructional hours if [s/he] is unable to attend school. The district stands ready to discuss providing instructional hours and programming for [Student] in an alternative setting. In order to provide those services we need to hold an IEP meeting to determine the specific services and details about the instructional hours. Please contact me to set up a meeting. We look forward to hearing from you soon.

(Ex. D14; Ex. S11.)

20. On December 8, 2014, Mother wrote to Ms. Johnson and Joyce Merchant, Student's special education teacher, requesting records from Student's special education case file, including Student's prior IEPs. (Ex. D15 at 1; tr. 1 at 55.) In a follow up letter dated December 10, 2014 regarding the Parents' request for Student's special education records, Mother asked that all communication between Parents and the District regarding Student's special education be "in writing with follow up letters" except in the case of emergency. (*Id.* at 15.)

21. It was Ms. Johnson's belief at the time that Parents did not want to have an IEP meeting until Student was medically released to attend school. Ms. Johnson's belief in this regard was based on communications she received from Parents, including voicemail messages and letters. (Tr. 1 at 47-56.) Also, Ms. Johnson had no information as to when Student would return to the school setting. (*Id.* at 51, 53-58.)

22. Student remained medically withdrawn from school for the remainder of the 2014-2015 school year. Parents did not contact Ms. Johnson or anyone else in the District to discuss Student's special education needs while Student was withdrawn from school. (Tr. 1 at

57.)

23. Parents did not contact the District for the remainder of the 2014-2015 school year and did not wish to attend an IEP meeting because Student remained medically unable to attend school. (Tr. 2 at 116.) Parents believed that an IEP would be unproductive because Student was medically unable to attend school.[3] (*Id.* at 122, 127.) Parents did not understand what Ms. Johnson meant by offering to provide "instructional hours" in an "alternative setting." (*Id.* at 118-19, 126-27.) In addition, Parents did not want Student receiving school instruction or special education services in the home, as they believed it would be upsetting and/or confusing to Student.[4] (*Id.* at 44-45, 85.)

24. The District requires students to register for school at the beginning of every school year. This means that on designated days, usually during the month of August, each student or his or her parent must go to the student's school and complete enrollment paperwork to register for the upcoming school year. (Tr. 1 at 203-06.)

25. Parents did not register Student for school during the designated August registration days for the 2015-2016 school year. On September 1, 2015, Mother went to the District offices to pick up a registration packet for Student, as she knew that Student was going to be medically released to return to school in the near future. Mother was advised to go to the school to get the packet. When Mother went to North Bend Middle School, she was told by a staff member that she needed to meet with Allyson McNeill, the District's new Director of

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[3] At hearing, Mother was asked whether she wanted someone coming into the home to provide services to Student while Student was released from school. In response, the following exchange occurred:

> A. I didn't know what an alternative setting was. It doesn't say my home. It says an alternative setting. To me, that could be the ESD offices. It could be here. It could be – I didn't understand.
>
> Q. Okay, And you didn't contact them to – about setting up a meeting to get that explained to you?
>
> A. It would need an IEP meeting, and I – to me, it wouldn't be productive. I couldn't participate. There's no current needs we could discuss to determine service. And I told her [Ms. Johnson] "[Student is] not medically released. Are we break – by doing all this, are we breaking the medical – you know, are we say – [student] is not medically released."

(Tr. 2 at 122.) Later, Mother confirmed her belief that she could not discuss Student's current needs in an IEP meeting because "[Student] wasn't medically released to determine [] anything." (*Id.* at 127.)

[4] When asked at hearing about having Student receive special education services in the home, Father testified as follows: "The home is [Student's] safe place. Having them trying to give [Student] services in the house, they did that once and it seemed to confuse [Student]. * * * It was not something [Student] was familiar with, and it definitely confused [Student] on [Student's] role there at the house." (Tr. 2 at 44.) Mother similarly testified that "Home – we call it – home is [Student's] safe haven. Home is home. School is school." (*Id.* at 85.)

Special Education,[5] to discuss Student's enrollment for the 2015-2016 school year. (Tr. 2 at 61-63.)

26. Mother met with Ms. McNeill the following day. During the meeting, Mother advised Ms. McNeill that Student was not yet released to return to school, although it was expected that s/he would be released to do so soon. Mother expressed her desire to have Student return to eighth grade. Mother also told Ms. McNeill that she and Father were looking into other educational options for Student. Ms. McNeill recommended that Student enroll at North Bend High School as a ninth grader. Ms. McNeill explained that, due to the District's student retention policy, Student's age (14) and peer group, and Student's educational goals, the high school's Life Skills special education program was the preferred setting. During the meeting, Ms. McNeill contacted the high school registrar to coordinate an appointment for Student's registration. Ms. McNeill advised Mother that she would need to enroll student at the high school. They agreed that Student's IEP team would need to meet before Student's start date in the high school. (Ex. D18; Tr. 1 at 122-23; Tr. 2 at 132- 34.)

27. Mother did not follow up with the high school registrar after meeting with Ms. McNeill. Mother was also hesitant to speak to the high school Life Skills special education teacher, Chelsey Sicheneder, or to commit to an IEP meeting date because, at that point, Student was not yet released to attend school and the Parents were still until undecided about Student's school placement for the 2015-2016 school year. (Tr. 2 at 70-73.) Parents were still looking into other educational options, including private school and/or Marshfield High School in the Coos Bay School District.[6] (*Id.* at 73-76.)

28. The District's 2015-2016 school year began on September 9, 2015. (Tr. 1 at 121.) That day, Ms. McNeill called Mother and left a voicemail proposing to convene an IEP meeting for Student on the afternoon of September 18, 2015. (Ex. D17 at 2; Tr. 1 at 151-52.) Parents did not return Ms. McNeill's call. (Tr. 1 at 152.)

29. On September 14, 2015, Ms. McNeill wrote to Parents regarding Student's educational status. The letter concluded as follows:

> As of today, September 14, 2015, [Student] has still not been enrolled at the North Bend School District and neither Chelsey Sicheneder nor I have received a response from you regarding our request to set up an IEP meeting.
>
> If you have decided to continue to home school [Student] for the 15-16 school year, I want you to be assured that the School District:
>
> 1. Stands ready to provide special education and related services if your child

[5] Ms. McNeill became the District's Special Education Director in July 2015, following Ms. Johnson's retirement from the position in June 2015. (Tr. 1 at 25, 114.)

[6] Parents later determined that the private schools in the area would not be able to support Student, and that Marshfield High School's life skills program was at capacity and did not have a space for Student. (Tr. 2 at 73-77.)

is enrolled in the district.

2. The district offers an IEP meeting to consider special education and related services for your child in conjunction with home schooling.
In summary, I want you to know the School District is willing to assist you in your child's education. If you plan on enrolling [Student] at North Bend High School as discussed, please let us know so that we can plan an IEP team meeting to prepare for [his/her] attendance.

(Ex. D18.)

30. On September 23, 2015, Mother hand delivered a letter to Ms. McNeill's office. In the letter, dated September 21, 2015, Mother summarized [him/her] understanding of what the District was offering Student for the 2015-2016 school year. Mother concluded the letter with the following:

> I will say one last time that it is [*sic*] not [Father] or I desired to home school [Student]! We are not teachers, we are parents! [S/he] was not medically released to attend school because of an injury [s/he] sustained while at North Bend Middle School and North Bend School District decided to dis enroll her for their own purposes without our consent. Currently, I am waiting for the written medical release from [Student's] doctor. [Father] and I have been looking at all of [Student's] educational options. I do agree that an IEP meeting will be necessary. Could you please explain what [Student's] nursing options are? Is nursing through the district or assisted life skills? What is the difference between the two for North Bend School District?
>
> In conclusion, I would like to thank you for your follow up letter. I look forward to setting up an IEP meeting with the North Bend School District to discuss [Student's] educational options and goals, as soon as I receive the written medical release form from [his/her] doctor which North Bend School District would have to have to move forward with an IEP meeting. No matter what option we choose for [Student's] education. Currently we are considering all [Student's] educational options.

(Ex. D19 at 3.)

31. By letter dated September 18, 2015, received by the Parents several days later,[7] Dr. Austin released Student to attend school. The letter further noted that Student "must be catheterized every 3-4 hours during the day time according to mother's schedule." (Ex. S14.)

32. On October 6, 2015, Mother hand delivered another letter to Ms. McNeill's office. In the letter, Mother advised that Student was "currently medically released to attend school" but has "no school to attend." (Ex. D20.) Mother noted that Student wanted to attend

[7] I infer from the content of Mother's September 21, 2015 letter to Ms. McNeill that Parents had yet to receive Dr. Austin's September 18, 2015 note releasing Student to return to school.

Marshfield High School in the Coos Bend School District, and she asked about steps that Student and the family "would have to take that would allow the North Bend School District to allow [Student] an education?" (*Id.*) Mother also asked that Student's nursing services be provided through the Coos Bay School District and not through the ESD, and stated her belief that the North Bend School District should be responsible for Student's transportation because the District "displaced" Student and "chose to dis enroll [him/her] for their own reasons." (*Id.*)

33. On October 9, 2015, Parents wrote to Ms. McNeill requesting her to set up an IEP meeting on October 30, 2015 with Student's "8th grade IEP team." Parents also asked that Ms. McNeill include others, including Student's attending physician, Marshfield High School's special education teacher, and the Coos Bay School District's Special Education Director to the IEP meeting. (Ex. D21.)

34. In an October 13, 2015 letter to Parents, Ms. McNeill responded to the questions and concerns raised in Mother's recent correspondence. Ms. McNeill explained that if presented with documents requesting an interdistrict transfer, the District would "sign off" on Student's transfer to the Coos Bay School District. Ms. McNeill noted that the Coos Bay School District would also need to approve the transfer and, in doing so, would then become Student's resident district and would take on responsibility for Student's nursing services. Ms. McNeill also noted that if Student transferred to the Coos Bay School District, then the North Bend School District would not be responsible for transportation. In addition, Ms. McNeill explained that both North Bend School District and Coos Bay School District contract with the ESD to provide 1:1 nursing services, and therefore the ESD would likely be involved in Student's nursing services if Student attended school in either district. Ms. McNeill concluded the letter with assurances that the District stood ready to provide special education and related services to Student if Student enrolled in the District, and that if Parents chose to request an interdistrict transfer to Coos Bay the District would assist them with the necessary paperwork. Ms. McNeill also added that if Parents intended on enrolling Student at North Bend High School, to let her know so that she could plan an IEP meeting to prepare for Student's attendance. (Ex. D22.)

35. On October 13, 2015, Parents filed the Due Process Complaint at issue, alleging among other things that the District denied Student a FAPE by not providing educational services in an alternative setting during the time Student was not medically released to attend school, and by not providing services subsequent to September 18, 2015, the date Student was medically released to attend school. (Pleading.)

36. On October 14, 2015, Ms. McNeill responded in writing to Parents' request for an IEP meeting on October 30, 2015. Ms. McNeill advised that several members of Student's IEP team were not available on that particular date. She asked that Parents contact her or Ms. Sicheneder to schedule a different date that worked well for the team. Ms. McNeill also advised that although the Parents have the legal right to invite others to the IEP team meeting, the District would not be inviting Coos Bay School District staff to the meeting, and could not guarantee that staff from Coos Bay School District would be in attendance. (Ex. 22 at 2; Ex. S16.)

37. By letter dated October 22, 2015, Parents requested that an IEP meeting be scheduled for November 6, 2015 with the same team members that participated in the

development of Student's IEP the prior year. Parents also asked that others, including Student's primary care physician, be invited to attend. (Ex. S17.)

38. On October 23, 2015, Ms. McNeill and others from the District met with Parents in a resolution session to discuss issues raised in the Due Process Complaint. At that time, Parents were still considering an interdistrict transfer to the Coos Bay School District. On Parents' request, Ms. McNeill provided them with an interdistrict transfer form. During the meeting, Ms. McNeill advised Parents that if the transfer were approved by both districts, then Coos Bay School District would be responsible for Student's IEP and special education services. Ms. McNeill further advised that if the interdistrict transfer was not accepted by Coos Bay School District, the Parents could reenroll Student at North Bend High School, at which time the District would be responsible for Student's IEP and special education services. (Ex. D23.)

39. On October 31, 2015, the District issued Notice of Team Meeting, inviting Parents to an IEP meeting on November 13, 2015. (Ex. S18 at 2.) In a letter accompanying the notice, Ms. McNeill advised Parents that she and other team members were not available on November 6, the date requested by Parents. Ms. McNeill also explained as follows:

> Because North Bend School District recognizes [Student] as a 9th grader, the participants from our district will be predominantly from the high school, not the middle school as you have requested. This decision follows the outcome of our meeting on September 2, 2015 when the district stated it would be appropriate for [Student] to be considered a 9th grader for the 2015-16 school year. We are inviting the middle school Life Skills teacher to the meeting as she has the most recent knowledge of [Student] as a student.

(*Id.* at 2.)

40. On November 13, 2015, Student's IEP team met to develop an IEP and determine Student's placement for the 2015-2016 school year. The Prior Notice of Special Education Action dated November 13, 2015 states as follows:

> The district anticipates that the student will be re-enrolled into school fall/winter 2015 and qualifies for special education. The student needs a new IEP created prior to attending school again (to ensure that related service and medical protocols are in place for student safety and specially designed instruction needs).

(Ex. S1 at 1.)

41. On November 23, 2015, Parents enrolled Student at North Bend High School. (Tr. 1 at 140-41.)

CONCLUSIONS OF LAW

1. The District had no obligation under the IDEA to provide prior written notice before disenrolling Student from school pursuant to Oregon's compulsory attendance laws.

2. The District had no obligation under the IDEA to ensure the Parents' meaningful participation before disenrolling Student from school pursuant to Oregon's compulsory attendance laws.

3. Parents have failed to establish that the District denied Student a FAPE during the time Student was withdrawn from school due to a medical condition.

4. Parents have failed to establish that the District denied Student a FAPE during the period of September 18, 2015 to October 13, 2015.

OPINION

In an administrative hearing alleging violations of the IDEA, 20 U.S.C § 1400 *et seq*., the party seeking relief has the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005). In this matter, the Parents filed a due process complaint on October 13, 2015 alleging procedural violations of the IDEA and a denial of FAPE during the 2014-2015 school year and the first two months of the 2015-2016 school year. The Parents seek compensatory education, in the form of an educational trust or additional services, for the alleged denial of FAPE. The burden rests on the Parents to prove the violations alleged in the complaint and the compensatory education and services they seek.

In administrative hearings, a party who bears the burden must establish each fact or position by a preponderance of the evidence. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Division*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390 (1987).

Under the IDEA, all children deemed eligible for special education have a right to a free and appropriate public education (a "FAPE"). 20 U.S.C. §1412(1). A FAPE is defined under the IDEA as special education and related services that: (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program required under §1414(a)(5) of the IDEA. 20 U.S.C. §1401(a)(18); *Amanda J. v. Clark County School Dist.*, 267 F3d 877, 890 (9th Cir. 2001). In determining whether a district provided the student with a FAPE the inquiry is twofold: (1) whether the district complied with the procedures set forth in the IDEA; and (2) whether the IEP developed through the Act's procedures was reasonably calculated to enable the child to receive educational benefits. *Board of Educ. of Hendrick Hudson School District v. Rowley*, 458 US 176 (1982) (*Rowley*).

In this case, Parents allege procedural violations of the IDEA. They assert that the District was obligated to provide special education and related services to Student

notwithstanding his/her inability to attend school due to a medical condition. More specifically, Parents contend that the District's disenrollment of Student from school on or about October 16, 2014 (after 10 consecutive days' absence) constituted a unilateral change of placement in violation of the IDEA. Parents further assert that the District was obligated to send a prior written notice to Parents before withdrawing Student from school, that the District should have involved Parents in the determination to withdraw Student from school, and that even in the absence of parental involvement, the District was required to provide special education services to Student while Student was out of school.[8] In addition, Parents contend that the District's failure to have an IEP in effect at the outset of the 2015-2016 school year, once Student was medically released to attend school on September 18, 2015, constitutes a denial of FAPE. These contentions are addressed below.

1. *Student's Disenrollment from school under Oregon's compulsory attendance law*

As noted above, Parents contend that Student's disenrollment from school constituted a change of placement under the IDEA, triggering the District's obligation to send a prior written notice and to involve the Parents in the placement determination. As explained below, this contention is not persuasive.

Student's March 14, 2014 IEP, modified pursuant to a mediation agreement on August 18, 2014, determined Student's placement for the 2014-2015 school year. Student was placed in an Adaptive Life Skills classroom with push-in to the general education classroom about 40 percent of the day. Upon Student's medical release to attend school on September 16, 2014, Student began the school year with this placement. Student attended school through October 2, 2014. On October 3, 2014, Parents kept Student at home and notified the District of their belief that Student was not safe at school. On or about October 16, 2014, after missing 10 consecutive days of school, Student was withdrawn from enrollment pursuant to OAR 581-023-0006(4)(b) and the District's "10 day drop" policy. On October 24, 2014, Student's physician signed a letter excusing Student from school for medical reasons for an indefinite period.

Contrary to the Parents' contention, Student's drop from enrollment in October 2014 did not constitute a change of placement. As stated above, pursuant to Oregon's compulsory attendance law, a student will be dropped from a school's enrollment any time the student is absent from school for 10 or more consecutive days for any reason. Upon return to school, the student must re-enroll. In this case, it was not the compulsory attendance law and the act of withdrawing Student from the active roll that impeded Student's education. Rather, it was Student's inability to attend school in the classroom setting that prevented the District from

[8] In their Post Hearing Brief, Parents also argue that the District committed a procedural violation of the IDEA "when it failed to hold an annual IEP meeting by March 15, 2015." (Petitioner's Post Hearing Brief at 18.) Parents did not, however, allege this particular violation in their Due Process complaint, nor was the issue listed in the Notice of Hearing and Rights. Because the issue was not raised in the Parents' hearing request, it falls outside the scope of this hearing. OAR 581-015-2360(2) ("The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the hearing request unless the other party agrees otherwise.") Nothing in the record indicates that the District agreed to litigate the annual IEP review issue in this case.

implementing Student's March 2014 IEP subsequent to October 2, 2015. Student could have reenrolled at North Bend Middle School at any point during the school year, as soon as s/he was medically released to attend school. In other words, the cessation of special education services under the March 2014 IEP did not result from Student's disenrollment under the compulsory attendance laws, but from Student's inability to attend school for medical reasons.

Because Student's inability to attend school was due to medical reasons, and not disenrollment under the compulsory attendance laws, Parents' reliance on *Parent, on behalf of Student v. Camptonville Academy*, CA OAH Case No. 2008090659 (2009) is misplaced. In that case, the student had been enrolled in Camptonville Academy, a public charter school that used a personalized learning/independent study model. The student had been placed at home, and had received instruction primarily from her parent with support and direction from the Academy. At the beginning of a new school year, the parent refused to sign a Master Agreement, a state law-mandated written agreement that set forth the student's courses and course material for the school year. The parent refused to sign the agreement because she did not approve of the courses and materials that had been selected for the student. Based on the parent's refusal to sign the Master Agreement, the district disenrolled the student from the Academy. The district also refused the parent's request for an IEP meeting because the student was not enrolled in the school. Under these circumstances, an ALJ held that the school's disenrollment of the student constituted a unilateral change of placement in violation of the IDEA because it was done without prior written notice and parent input. The ALJ further found that the district's failure to convene an IEP meeting at the parent's request constituted a procedural violation of the IDEA that impeded the student's right to a FAPE.

In the present case, the District disenrolled Student from the school's active roll after 10 consecutive days' absence, but it did not refuse to reenroll Student and did not refuse to convene a requested IEP meeting. The disenrollment of Student pursuant to OAR 581-023-0006(4)(b) did not constitute a change in Student's education placement. At no point did the District propose changing Student's educational placement. District staff remained ready to resume Student's IEP in the school setting. In addition, the District had no information on the nature of Student's medical condition or the expected duration of his/her absence from school. Thus, the District had insufficient information to determine whether a change of educational placement was necessary. Given these circumstances, the District had no obligation to send a prior written notice, and no obligation to obtain input from the parents before completing the ministerial task of removing Student from the school's active roll.

2. *Failure to provide educational and related services in an alternative setting while Student was withdrawn from school due to a medical condition.*

Parents next contend that the District denied Student a FAPE by not providing educational and related services in an alternative setting (*i.e.*, home education) during the time Student was unable to attend school due to a medical condition. While it is undisputed that Student only received special education and related services under the March 2014 IEP for a few weeks of the 2014-2015 school year, Parents have not established that the District violated the IDEA during the period of Student's withdrawal for medical reasons and have not shown an entitlement to compensation for Student's lack of education and related services during this time.

As found above, Student stopped attending school as of October 3, 2014. That same date, Parents notified the District of their decision to keep Student at home because they believed it was unsafe for Student at school. On October 24, 2014, the District notified Parents that it stood ready to provide special education and related services to Student and to hold an IEP meeting to consider any changes in Student's special education. On October 27, 2015, Parents notified the District that Student was seeking medical treatment, that Student was not medically released to attend school, and that "a meeting at this time would not be productive." (Ex. S5.) On October 30, 2015, the District received the letter from Student's physician advising that Student had been "unable to attend school since October 2 due to a medical condition"[9] and that "Mother will be in touch with school when [Student] is able to return to school." (Ex. D7.)

On November 7, 2015, the District notified Parents that if Student was unable to attend school for medical reasons, "the District can offer instructional hours in an alternative setting." (Ex. D9.) The District requested that Parents call to arrange a meeting to discuss Student's educational needs. Parents did not do so. On November 24, 2015, the District again offered to provide school services to Student while s/he was recovering. The District confirmed its offer to hold an IEP meeting to discuss Student's current needs and its readiness to provide special education and related services to Student while s/he was medically unable to attend school. The District also offered meeting dates and asked Parents to make contact to arrange an IEP meeting. In response, Parents expressed confusion over the offer of instructional hours and the need for an IEP meeting. On December 5, 2014, the District attempted to clear up Parents' confusion. Ms. Johnson advised the Parents as follows: "*We will need to hold an IEP meeting to discuss [Student's] current needs to determine what services to provide for the instructional hours if [s/he] is unable to attend school*." (Ex. D14, emphasis added.) The District confirmed that it was ready to provide special education services to Student, but "*in order to provide those services we need to hold an IEP meeting to determine the specific services and details about instructional hours*." (*Id.*) Parents did not contact anyone at the District to arrange a meeting or to discuss Student's special education services for the remainder of the school year because Parents believed that Student's release from school for medical reasons prevented Student from receiving school services.

Parents now contend that regardless of the level of their cooperation or involvement, the District had an obligation under the IDEA to provide special education and related services to Student while Student was unable to attend school. Citing cases such as *Doug C. v. Hawaii Dept. of Education*, 720 F3d 1038 (9th Cir. 2013) and *Anchorage School Dist. v. M.P.* 689 F3d 1047 (9th Cir. 2012), Parents maintain that the District cannot abdicate its affirmative duties under the IDEA and cannot excuse its failure to satisfy the IDEA's procedural requirements by blaming the parents. As explained below, these cases are distinguishable. Furthermore, Parents have not shown that the District failed to satisfy the obligations imposed by Congress in the IDEA by not providing special education services while Student was medically unable to attend school.

[9] The record does not disclose the nature of the medical condition that prevented Student's attendance at school.

When Parents chose not to respond to Ms. Johnson's December 5, 2014 letter explaining the need for an IEP meeting to determine Student's educational needs while Student was medically withdrawn from school, the District had two options: (1) schedule and convene an IEP meeting to discuss these matters without the Parents' participation[10] (and without knowing the nature of Student's medical condition and the anticipated length of Student's absence from school); or (2) wait on the provision of educational services until Parents agreed to a meeting or Student returned to school. The question to be answered here is whether, under the circumstances, the District can be faulted for choosing the second option.

This is a unique fact pattern and I have found no governing case law directly on point. *Doug C. v. Hawaii Dept. of Education*, cited by Parents, is not analogous. In that case, the court that held a district violated the IDEA by not accommodating the parents' scheduling requests and by holding the student's annual IEP meeting without parental participation. There, the student was attending school at a private special education facility. The Department of Education held the IEP meeting despite the parent's stated inability to attend the meeting on that date. During the meeting, the team changed the student's placement, moving him to a program at his local high school. The court held that under these circumstances, the Department of Education acted unreasonably when it placed a higher priority on strict compliance with the annual IEP review deadline than on parental participation.

Here, unlike *Doug C.*, the District did not go forward with an IEP without the Parents. Also, Parents did not express scheduling concerns. They simply declined to meet while Student was medically excused from attending school.

The situation at hand also distinguishable from *Anchorage School Dist. v. M.P.*, where the court found the school district denied the student a FAPE by not updating the student's IEP pending a determination on a prior due process complaint filed by the parents. There, the parents did not attend a meeting in which the district formulated a draft IEP, but they provided written input, including comments and suggestions that they wanted incorporated into the proposed IEP. After receiving the parents' input, the district unilaterally postponed any further efforts to develop an undated IEP until after a final determination in a state court appeal of a hearing officer's determination on the prior due process complaint. The district's failure to revise and complete the IEP forced the student's school to rely on an outdated IEP to measure the student's performance and provide education services. The court held that the school district should have either worked with the parents to develop a mutually acceptable IEP or unilaterally revised the IEP and filed an administrative complaint to obtain approval of the IEP, but its failure take either action – its "take it or leave it" approach – violated the IDEA.

Unlike *M.P.*, the District did not unilaterally refuse to develop a new IEP in this case. To the contrary, the District repeatedly reached out to Parents to meet to discuss Student's education while Student was medically excused from attending school. Parents declined the invitation through their inaction. The evidence here demonstrates that the District was willing to develop a new IEP will full input from Parents.

[10] A preponderance of the evidence demonstrates that the parents would not have participated in scheduled IEP meeting at the time, because of their belief that Student's medical excuse from school prevented Student from receiving school instruction and services in an alternative setting.

One decision that provides some guidance in this case is *K.A. v. Cupertino Union School District*, 75 F Supp 3d 1088 (N.D. Cal 2014). There, after filing a due process complaint, the parents refused to attend a follow up IEP meeting on the mistaken belief that the IDEA's stay put provision prevented further consideration of a draft IEP during the pendency of the due process complaint. The parents attended the initial meeting, where many of the student's goals were discussed, but no placement offer was made. That meeting was adjourned to be reconvened at a later date. A few weeks later, after failing in its attempts to procure the parents' participation at the follow up meeting, the district sent the parents a completed IEP offer letter that included a placement recommendation. In reviewing the school district's efforts to comply with the IDEA, the district court held that, under the circumstances, the school district's decision to make an offer of FAPE based on a partially completed IEP meeting was a better choice than proceeding with an outdated IEP.

In so holding, the *K.A.* court noted that the parents' mistaken interpretation of the law placed the district in an untenable position of going forward without parental input or violating its obligation to have an updated IEP offer and placement determination each year. The court further noted that the district could not be held liable for the parents' misunderstanding of the law. Rather, the district could only be found liable for failing to "make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE." 75 F Supp 3d at 1102, citing *Doug C.,* 720 F3d at 1046.

Here, too, the District cannot be held liable for Parents' misunderstanding about the provision of services in an alternative setting and the need for an IEP meeting to make any changes to Student's plan or placement while Student was unable to attend school. The District can only be faulted for failing to make a reasonable determination when confronted with the choices set out above, that being to convene an IEP meeting without Parents' participation to discuss Student's educational needs while Student was medically withdrawn from school or to wait until Parents agreed to a meeting or until Student returned to school to resume Student's education. The District did not have the option of proceeding with the March 2014 IEP as formulated because Student was medically withdrawn from school.

For the reasons set out below, I find that, under the circumstances presented, the District made a reasonable determination to await parental participation or Student's return to school. Although not governing law, other courts have held that a school district was not liable under the IDEA for failing to provide educational services to a student who was withdrawn from school and whose parents were uncooperative in the IEP process. For example, in *Horen v. Board of Education of the City of Toledo Public School District*, 63 IDELR 264, 113 LRP 48072 (N.D. Ohio 2013) the district court held that although the student was denied a FAPE when the school district did not develop an IEP for the 2009-10 school year, it was the parents, and not the school district, that prevented the creation of the IEP. The court further held that because it was the parents who impeded the process necessary for developing the IEP,[11] they were not entitled to

[11] The district's student services director wrote the parents requesting their participation at meeting and consent to reevaluate the student. Noting that the student had not been in school for the prior two years, the director also asked the parents for updated information regarding the student's present levels of performance, if any. The director enclosed an invitation to a meeting, and advised that if the date and

any compensation for their child's lack of a FAPE. In affirming a determination by an independent hearing officer (IHO) and a State Level Review Officer (SLRO), the district court noted that the record clearly and convincingly supported the finding that the parents' actions, which included refusing to consent to a reevaluation of the student, refusing to attend an evaluation or IEP meeting, and withholding the student from school, essentially prevented the district from creating an IEP and offering the student a FAPE.[12]

Another case suggesting that the District made a reasonable determination to await the provision of education and related services pending the Parents' cooperation with the IEP process or Student's return school is *Edgerton School District*, 20 IDELR 126 (SEA WI 1993). There, a reviewing judge held that the IDEA did not obligate a school district to provide special education services to a student who had withdrawn from public school and registered in a private home-based educational program. In that case, the parent made it clear that she did not wish to accept any special education services offered by the district. The reviewing judge found that, given the parent's refusal, the school district was not required to make any further efforts to deliver such services. The reviewing judge interpreted the language of the IDEA[13] and the corresponding Wisconsin statute to mean the following:

> [*T*]*he school district must be prepared to provide services, and to actually provide them if the student requests and/or accepts them, but not to force them on an uncooperative family*. This interpretation is more reasonable because nothing in either the federal or the state act addresses the not insignificant problems associated with providing services to a reluctant family.

Id. (Emphasis added.)

Although in this case Parents did not withdraw Student from school in favor of home schooling, they were nevertheless reluctant to meet with the District to discuss the District's offer to provide services in an alternative setting while Student was medically unable to attend school. They expressed their belief at the time that an IEP meeting would be unproductive. Parents' reluctance to meet with District personnel and their lack of response to the offer of an IEP meeting to discuss such services were tantamount to a refusal to accept the offer of services

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time on the invitation were not workable, to contact him with dates and times that the parents were available. The parents asked that the district stop sending them correspondence. They did not attend the scheduled meeting, did not propose an alternative date, and did not agree to an evaluation of student.

[12] In a previous case involving the same parties, the court similarly held the school district was not liable for failing to provide an IEP for the 2007-2008 schoolyear because parents unreasonably refused to participate in the IEP process. *Horen v. Board of Education of the City of Toledo Public School District*, 984 FSupp2d 793, 61 IDELR 103, 113 LRP 23332 (N.D. Ohio 2013), *aff'd* 115 LRP 47752 (6th Cir. 2014, unpublished opinion).

[13] The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C §1400(d)(1).

while Student was medically withdrawn from school.

There are cases that hold that a district did not violate the IDEA by going forward with an IEP meeting without the parents' participation, *see, e.g., K.D. ex rel. CL v. Department of Education, Hawaii,* 665 F3d 1110 (9th Cir 2011), however, the cases are distinguishable and do not involve the situation where the student is withdrawn from school for medical reasons. I have found nothing in the IDEA that compels a school district to conduct an IEP meeting without parental participation under the circumstances presented here: That is, when a student is withdrawn from school for an indefinite period due to an unidentified medical condition and the parents have declined the offer of an IEP meeting to determine the need for special education services in an alternative setting. Furthermore, as the court recognized in *Garcia v. Board of Educ., Albuquerque Public Schools,* 520 F3d 1116, 1121 (10th Cir. 2008), "a school cannot provide FAPE to a student who is not there."[14]

While the IDEA requires that parents receive written notice prior to any proposed change in the educational placement of their child, 20 U.S.C. §1415(b)(3),[15] in this case, as discussed

[14] In *Garcia*, the appellate court, unlike the district court, declined to decide the "thorny" issue of whether the school district's procedural failures caused a student to suffer an educational loss. 520 F3d at 1127. Instead, the court held that regardless of the school district's liability, no award of compensatory educational services was warranted as a matter of equity. In that case, a high school-aged student had dropped out of school and showed an unwillingness to return. The court noted that both the student and parent affirmatively avoided the school district's attempts to cooperate in formulating new IEPs, and that the school district for the most part had made diligent and extensive efforts to provide the student whatever special services that could assist her in progressing toward graduation. In addition, in denying the award of compensatory education, the court noted that the compensatory services sought would be available if and when she decided to return to school: "Myisha is, after all, *already* guaranteed the provision of a FAPE at any time she chooses to return to school, so long as she remains eligible to receive benefits under IDEA (that is, until she reaches 21)." *Id.* at 1129 (emphasis in original).

[15] 20 U.S.C. §1415 addresses procedural safeguards with respect to the provision of FAPE. Subsection (b) provides, in pertinent part:

> (b) Types of procedures
>
> The procedures required by this section shall include—
>
> (1) an opportunity for the parents of a child with a disability to * * * participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child * * *;
>
> * * * * *
>
> (3) written prior notice to the parents of the child whenever such agency—
>
> (A) proposes to initiate or change; or
>
> (B) refuses to initiate or change;

above, the District had no obligation to send a prior written notice because it was not proposing to change Student's placement. At no point during the 2014-2015 school year did Parents make the District aware of the nature medical condition precluding Student's attendance at school or the anticipated length of Student's absence.[16] Given these circumstances, the District's repeated offers to convene an IEP meeting to discuss the provision of instructional hours in an alternative setting pending Student's return to school did not trigger any prior written notice requirement. Only once Parents consented to a meeting to discuss changes to Student's IEP would a prior notice of that meeting been required.

To summarize, in this case, Parents have failed to prove that the District violated the IDEA by not providing educational and related services to Student while Student was unable to attend school due a medical condition. Upon Student's withdrawal from school, the District repeatedly offered to convene the IEP team to discuss providing instruction and services in an alternative setting. Parents were reluctant to meet with District personnel to discuss the offer of in-home instruction and services pending Student's release to return to school. The District could not provide special education and related services to Student in an alternative setting in the absence of a new IEP, and Parents were unwilling to participate in the formulation of that IEP. The District cannot be liable for the Parents' misunderstanding of the need for an IEP as a prerequisite to the provision of special education and related services during the period of Student's medical withdrawal from school. Accordingly, under the circumstances presented, Parents have not shown that the District denied Student a FAPE during this time.

3. *Failure to provide educational and related services once Student was medically released to attend school on September 18, 2015*

Parents also assert that the District denied Student a FAPE by not having an IEP in effect as of September 18, 2015, when Student was medically released to attend school. Because Parents' due process complaint was filed on October 13, 2015, my analysis of this issue is limited to whether the District denied Student a FAPE for the approximate one month period between September 18, 2015 and October 13, 2015.

As set out in the findings above, Student was withdrawn from school in October 2014 due to a medical condition. Parents did not register Student for the 2015-2016 school year during the designated registration days in August 2015. Mother first contacted the District about Student's anticipated return to school on September 1, 2015. On September 2, 2015, Mother told Special Education Director McNeill that Student was not yet released to attend school but would likely be released soon. Mother also advised that she and Father were looking into other educational options for Student outside the District. Ms. McNeill advised that Student's IEP team needed to meet and Parents needed to enroll Student in the high school before the District could resume providing services to Student. Mother did not enroll Student at the high school and did not commit to attend an IEP meeting. At that time, the Parents were still undecided about Student's placement and Student had yet to be released to attend school.

[16] Dr. Austin's note, the only medical information provided to the District, advised that student had a "medical condition" and that "Mother will be in touch with school when [Student] is able to return to school." (Ex. D7.)

School began for the District on September 9, 2015. On that date, Ms. McNeill called and left a voicemail for Parents proposing that an IEP meeting be scheduled for September 18, 2015. Parents did not return Ms. McNeill's call. By letter dated September 14, 2015, Ms. McNeill advised Parents that, among other things, Student had not yet enrolled at the high school and Parents had not yet responded to the request to set up an IEP meeting. On September 23, 2015, Parents advised Ms. McNeill that they were still considering different educational options for Student. They had yet to register Student for school. Two weeks later, on October 6, 2015, Mother notified the District that Student was medically released to return to school, but has "no school to attend." (Ex. D20.)

On October 9, 2015, although Parents had yet to commit to reenrolling Student in the District, they wrote to Ms. McNeill and requested an IEP meeting on October 30, 2015. Parents asked that the attendees include Student's "8th grade IEP team," Student's attending physician, and staff from the Coos Bay School District. Thereafter, on October 13, 2015, Parents filed the due process complaint at issue. Subsequently, Student's IEP team met on November 13, 2015. Parents enrolled Student at North Bend High School on November 23, 2015.

The IDEA requires that "at the beginning of each school year" each school district have and IEP in effect, for each child with a disability within the district's jurisdiction. 20 U.S.C. §1414(d)(2)(A). Thus, as a general rule, a district's failure to have a student's IEP in place at the beginning of the year is a violation of this mandate. However, a school district will only be liable for failing to satisfy this procedural requirement when the violation results in substantive harm, and thus constitutes a denial of FAPE. *See Amanda J v. Clark County School Dist.*, 267 F3d 877, 892 (9th Cir. 2001) (noting that procedural inadequacies that result in the loss of educational opportunity, or that seriously infringe the parents' opportunity to participate in the IEP formulation process result in a denial of FAPE). Furthermore, recognizing the essential nature of parental participation in the development of an IEP prior to the start of a school year, courts have held that when the lack of an IEP results from the parents' unreasonable delay or refusal to cooperate in the IEP development process, a school district's failure to have an IEP in effect does not cause a loss of FAPE. *See, e.g. Doe v. Defendant I,* 898 F2d 1186 (6th Cir. 1990); *accord Roland M. v. Concord School Committee*, 910 F2d 983 (1st Cir. 1990) ("The law ought not to abet parties who block assembly of the required team and then, dissatisfied with the ensuing IEP, attempt to jettison it because of problems created by their own obstructionism."); *Pedraza v. Alameda Unified School Dist.*, 57 IDELR 227 (N.D. Cal. 2011) (noting that, under the IDEA, "a local school district cannot be held liable for failing to provide services to a student when the failure is caused by the parents' lack of cooperation.").

In *Doe v. Defendant I,* the parent delayed the IEP development process by directing the school not to provide special education intervention to the student for the first six weeks of the school year, because the parent wanted to see how the student performed on his own. In rejecting the parent's claim for reimbursement for private school expenses, the court held that the parent could not assert that the public school, in honoring the parent's request to postpone the IEP process, failed to comply with the IDEA. *See also Horen v. Board of Education of the City of Toledo Public School Dist.*, 115 LRP 47752 (6th Cir. 2014) (unpublished opinion, affirming a district court's determination that the school district was not liable for failing to have an IEP in

place at the beginning of the 2007-2008 school year where the failure to develop an IEP resulted from the parents' refusal to cooperate); *C.H. v. Cape Henlopen School District* 606 F3d 59, 70 (3rd Cir. 2010) (declining to hold a school district liable for procedural violations "that are thrust upon it by uncooperative parents."); *C.G.v. Five Town Community School Dist.*, 513 F3d 279 (1st Cir. 2008) (concluding that no actionable violation of the IDEA occurs when the parents' actions unreasonably obstruct the IEP process and prevent development of a final IEP); *M.M. ex rel. D.M. v School Dist. of Greenville County*, 303 F3d 523 (4th Cir. 2002) (declining to hold the school district liable for the procedural violation of failing to have the IEP completed and signed when that failure was the result of the parents' lack of cooperation); *A.R. v. State of Hawaii Dept. of Education*, 56 IDELR 202 (D.C. Hawaii 2011) (holding that parent may not prevail on a procedural violation when the failure to have an IEP in effect at the start of the school year was due to parent's obstruction and delay and/or lack of cooperation); *Garden Grove Unified School District*, 110 LRP 57620 (OAH CA 2010) (finding no procedural violation for the district's failure to have an IEP in place at the beginning of the school year where the district had no access to the student and student's guardian protracted the assessment process and unreasonably delayed to IEP process).

Although, in this case, the District failed to have an IEP in place for Student at the beginning of the 2015-2016 school year (or as of the date it became aware of Student's medical release to attend school),[17] I find no actionable violation of the IDEA under the circumstances. As in the cases discussed above, the failure to have an IEP in place for the 2015-2016 school year is attributable to Parents' unwillingness to participate in an IEP meeting until Student was medically released to return to school.

On September 1, 2015, after Student had been medically withdrawn from school for eleven months, the Parents first notified the District of Student's anticipated return to school. At that time, Parents were unwilling to consent to an IEP meeting until after Student was medically released. Indeed, in her September 21, 2015 letter to Ms. McNeill, Mother wrote: "I look forward to setting up an IEP meeting with North Bend School District to discuss [Student's] educational options and goals, *as soon as I receive the written medical release form from [his/her] doctor which North Bend School District would have to have to move forward with an IEP meeting.*" (Ex. D19 at 3, emphasis added.) Parents were also unwilling to commit to enrolling Student at North Bend High School, and they advised Ms. McNeill they were considering other schools outside the District. Parents did not respond to Ms. McNeill's request to convene an IEP meeting on September 18, 2015. Even after Parents became aware of Student's medical release (at some point after September 21, 2015) they were still unwilling to commit to reenrolling Student in the District. Given the Parents' lack of communication with the District prior to September 1, 2015, the Parents' unwillingness to attend an IEP meeting until after Student was medically released and the District's lack of access to and ability to assess Student while withdrawn from school, the District did not deny Student a FAPE by not having an IEP in effect at the beginning of the school year.

In conclusion, the District had no obligation to send a prior written notice or involve

[17] Student was released to return to school by letter dated September 18, 2015, but the District was not notified of the release until October 6, 2015. (Exs. S14 and D20.)

Parents in the ministerial task of withdrawing Student from the school's active roll following the tenth consecutive day of absence. In addition, the District is not liable for failing to provide educational services in an alternative setting while Student was medically withdrawn from school, because the failure to provide services resulted from Parents' lack of cooperation and unwillingness to participate in the IEP formulation process for such services. Similarly, the District is not liable for failing to have an IEP in effect at the beginning of the 2015-2016 school year, because the District had no access to Student prior to the start of the school year, Parents were unwilling commit to reenrolling Student the District, and Parents refused to participate in the IEP process until after Student was medically released to return to school. Consequently, Parents' request for relief, in the form of compensatory education and related costs, is denied.

ORDER

Parents' request for relief, pursuant to the request for due process hearing dated October 13, 2015 is **DENIED**.

Alison Greene Webster
Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

NOTICE TO ALL PARTIES: If you are dissatisfied with this Order you may, within 90 days after the mailing date on this Order, commence a nonjury civil action in any state court of competent jurisdiction, ORS 343.175, or in the United States District Court, 20 U.S.C. § 1415(i)(2). Failure to request review within the time allowed will result in **LOSS OF YOUR RIGHT TO APPEAL FROM THIS ORDER.**

ENTERED at Salem, Oregon this 2nd of March, 2016 with copies mailed to:

Jan Burgoyne, Oregon Department of Education, Public Services Building, 255 Capitol Street NE, Salem, OR 97310-0203.