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

IN THE MATTER OF:THE EDUCATION OF	)	**FINAL ORDER**
	)	
	)	
STUDENT AND	)	
NORTH BEND SCHOOL DISTRICT	)	OAH Case No. 2017-ABC-00223
	)	Agency Case No. DP 16-118

HISTORY OF THE CASE

On October 17, 2016, Parents filed a Request for a Due Process Hearing (Complaint) with the Oregon Department of Education on behalf of BS (Student). This initial due process complaint named North Bend School District (the District), South Coast Education Service District (SCESD), and Coos Bay School District (CBSD) as responsible parties.

On October 18, 2016, the Oregon Department of Education (ODE) referred the case to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Joe L. Allen to conduct the due process hearing and issue a Final Order in this case.

On October 24, 2016, CBSD filed a motion to dismiss. Parents filed a response to that motion on October 31, 2016. CBSD filed a reply brief on November 1, 2016. On October 27, 2016, SCESD also filed a motion to dismiss. On November 2, 2016, Parents filed a response to SCESD's motion to dismiss.

On November 21, 2016, Senior ALJ Allen presided over a telephonic prehearing conference. The Parents participated in the conference through their attorney, Stefyni Allen. Joel Hungerford, attorney at law, appeared and represented the District and CBSD. Kelly Noor, attorney at law appeared on behalf of SCESD. At the conference, the judge notified the parties that the motions to dismiss filed by SCESD and CBSD would be granted.[1] The remaining parties agreed to the issued statements for hearing. Also, during the conference, Parents requested and the District agreed to extend the final order due date to April 10, 2016 pursuant to ORS 343.167(5). The parties also agreed to an in-person hearing on February 6 through 9, 2017 in North Bend, Oregon. On November 22, 2016, Parents filed an Amended Request for Due Process Hearing (Amended Complaint).[2]

[1] A Consolidated Ruling Dismissing Coos Bay School District and South Coast Educational Service District was issued by the OAH on January 12, 2017.

[2] On October 13, 2015, Parents filed a due process complaint which covered the 2014-2015 school year as well as the 2015-2016 school year up to the date of filing. Ex. D79. That matter went to hearing before Senior ALJ Alison Webster of the OAH on January 4 and 5, 2016. Senior ALJ Webster issued a

On December 5, 2016, the District filed a partial motion for summary determination (MSD). Parents filed a response to the MSD on December 19, 2016. The parties appeared through counsel to argue the motion on January 23, 2017. At that time, Senior ALJ Allen denied to motion through an oral ruling from the bench.

On January 4, 2017, Parents filed Student's Motion to Compel Production seeking an order compelling the District to provide discovery responses. On January 5, 2017, the District filed its own motion to compel production. On January 30, 2017, prior to a ruling on the discovery motions, the parties filed and exchanged hearing exhibits and witness lists. On February 2, 2017, the parties informed the OAH that written rulings on the outstanding discovery motions were no longer necessary based on the exchange of proposed hearing exhibits.

The hearing was held as scheduled before Senior ALJ Allen at the District's offices in North Bend, Oregon. Attorney Stefyni Allen represented the Parents. Attorney Joel Hungerford 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 open to the public.

The following witnesses testified at the hearing: Kathleen Stauff, SCESD Nursing Program Administrator for SCESD;[3] Dan Drechsel, SCESD Physical Therapist;[4] Rorry Keane, SCESD Augmentative Communication Specialist; Laurie Foster, SCESD Occupational Therapist; Marsha Edwards, R.N. with SCESD; Lindsay Reeves, R.N., formerly with SCESD;[5] Rosemary Bean, R.N., formerly with SCESD; Chelsey Sicheneder, Special Education Teacher;[6] Mindy Dubisar, Secretary for the District; Allyson McNeill, Special Education Director for the District;[7] Carla McKelvey, M.D.[8], Student's pediatrician; Rachelle Shands, Scott Shands, and Elisha Shands.

At the close of the hearing, the record was left open for receipt of the hearing transcript and the parties' written closing arguments. Naegeli Reporting provided the completed transcript on February 23, 2017. The parties written closing briefs were received on March 9, 2017 and the

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Final Order in that matter, DP 15-115, on March 2, 2016. *See*, Ex. D1. The present Amended Complaint covers that portion of the 2015-2016 school year not covered by the Final Order in DP 15-115, to wit October 13, 2015 through the June 2016, referred to herein as the period in issue.

[3] Kathleen Stauff was designated as an expert in the administration of nursing services.

[4] Dan Drechsel was designated as an expert in the field of physical therapy.

[5] Lindsay Reeves was designated as an expert in the field of nursing.

[6] Chelsey Sicheneder was designated as an expert in the field of special education.

[7] Allyson McNeill was also designated as an expert in the field of special education.

[8] Dr. McKelvey was designated as an expert in the field of pediatric medicine.

hearing record closed on that date.

ISSUES

1. Whether the District denied Student a free appropriate public education (FAPE) during the 2015-2016 school year by failing to complete the necessary assessments and by failing to develop medical protocols for Student in a timely manner.

2. Whether the District denied Student a FAPE during the 2015-2016 school year by failing to properly implement nursing services, contained in Student's Individual Education Program (IEP), necessary for Student to access his/her education.[9]

3. Whether the District denied Parents the opportunity to meaningfully participate in the provision of a FAPE to Student during the 2015-2016 school year.

EVIDENTIARY RULING

Parents' Amended Due Process Complaint and Post-Hearing Brief contain variations on the issue statements/violations alleged. *See,* Amended Complaint at 13 and 14 and Parent's [sic] Post-Hearing Brief at 1 and 2. In the Amended Complaint, Parents allege five enumerated violations of the IDEA phrased, in relevant part, as follows:

1. * * * [Student] was denied a Free Appropriate Public Education ("FAPE") by North Bend School District's failure to complete [Student's] assessments and develop medical protocols in a timely manner.
2. NBSD failed to consider the unique needs of the child when choosing and training a 1:1 nurse, thereby depriving [Student] a FAPE.
3. NBSD failed to retain a 1:1 nurse for [Student], thereby failing to provide [Student] a FAPE.
4. NBSD failed to provide 1:1 nursing services to [Student] thereby preventing [Student] from receiving a FAPE.
5. * * * NBSD violated this provision of the IDEA [34CFR 300.322, 34 CFR 30.327, and 34 CFR 300.501] by not implementing the plan agreed upon at the IEP meetings on November 13, 2015, February 26, 2015, and April 1, 2016.

(Amended Complaint at 13 and 14.)

By contrast, Parents' Post-Hearing Brief states the legal issues as follows:

1. Whether the District denied Student a FAPE during the 2015-2016 academic year when it failed to timely convene an IEP meeting to determine related services for the Student, including hiring a 1:1 nurse to develop appropriate medical protocols; and to complete

[9] In the Amended Complaint, Parents raise this as three separate issues, enumerated as violations 2 through 4, stated above in the evidentiary rulings. This order consolidates the issue statements pertaining to nursing services (see also, alleged violations 2 through 4 of the Amended Complaint) into this single issue statement. Each of Parents' concerns is addressed below in the Opinion section.

the Student's assessment to develop the Student's academic goals for the 2015-2016 academic year.

2. Whether the District denied the Student a FAPE during the 2015-2016 academic year when it failed to implement the Student's IEP by nor retaining a 1:1 nurse for Student throughout the 2015-2016 academic year.
3. Whether the District denied the Student a FAPE during the 2015-2016 academic year when it failed to implement the Student's IEP by not properly training the 1:1 nurses assigned to the Student throughout the 2015-2016 academic year in the unique needs of the Student; in lifting and transferring the Student from wheelchair to any other equipment or surface; and in feeding the Student.
4. Whether the District denied the parent's [sic] participation in the provision of a FAPE during the 2015-2016 academic year.

(Parents' Post-Hearing Brief at 1 and 2.)

At hearing, the District objected to questioning by Parents' counsel aimed at the timeliness of the IEP meeting during the period in issue. The ALJ allowed the line of questioning but permitted a standing objection by the District to be addressed in the Final Order. The District's objection is now sustained. The issue was addressed in the Final Order in case DP 15-115. See, Ex D1 at 24. Further, I do not find the Amended Complaint contains sufficient information to put the District on notice that Parents intended to challenge the timeliness of the IEP meeting for the period in issue. Accordingly, this order does not address Parents' claim, in the post-hearing brief, that the District failed to timely convene an IEP meeting during the period in issue and retains Parents' original statement of the issue for alleged violations related to assessments and medical protocols.

Exhibits D1 through D78, D81, D82, and D83, offered by the District, were admitted into the record without objection. Exhibits D79 and D80 were admitted into the record over Parents' objection. Exhibit D84 was excluded because it was not provided to Parents at least five days prior to the hearing.

Exhibits S1through S7, S9 through S34, S38, S39, S44 through S57, S59 through S67, and S72 through S78, offered by the Parents, were admitted without objection. Exhibits S8, S40 through 43, and S79 were admitted over the District's relevance objections. Exhibits S35 through S37 were excluded from the record as irrelevant. Exhibits S58, and 68 through 71 were withdrawn by Parents.

FINDINGS OF FACT

1. Student was born in 2001. He/She has been diagnosed with spina bifida, secondary hydrocephalus, neurogenic bladder, and epilepsy. Student also has numerous allergies, including latex and various foods. (Ex. S7 at 1; Tr. v II at 245:16-21.) Student is wheelchair bound and needs assistance with standing and transferring from his/her wheelchair to other surfaces. (Ex. S7 at 1 and S26.)

2. Student has required nursing services each year he/she has been enrolled in the

District. Student has had several medical protocols, or written instructions, on file with the District to address each of his/her medical needs. (Tr. v III at 669:1-9 and 681:5 through 682:25.) Student's written protocols include a variety of seizure protocols, medication protocols, shunt protocols, allergy protocols, and a lifting and transfer protocol. (Exs. S11 through S26.) When a new protocol is written and approved by a student's physician, it replaces and supersedes any prior written protocol. (Tr. v III at 683:10-13.)

3. Written protocols for each student are maintained in a central location and reviewed by each nurse prior to working with Student. (Tr. v II at 400:7 through 401:5.)

4. Student has resided within the boundaries of the District and attended school within the District since kindergarten. (Tr. v. II at 395: 23-24.)

5. On or about October 3, 2014, Parents stopped sending Student to school due to their belief that Student had been injured at school. Parents asserted that they did not feel safe sending Student back to school at that time. (Ex. D1 at 3.) On or about October 16, 2014, after missing in excess of 10 consecutive school days, the District withdrew Student from school enrollment. (Ex. D1 at 4.)

6. On or about October 24, 2014, Student's treating physician provided a letter to the District excusing Student from school for an indefinite period due to medical conditions. Parents provided the letter to the District on or about October 30, 2014. (Ex. D1 at 6.) Student remained medically unable to attend school for the remainder of the 2014-2015 school year. The 2015-2016 school year began on September 9, 2015. (Ex. D1 at 9.) Student was not released to attend school until September 18, 2015. Parents did not notify the District that Student was released to attend school until approximately October 6, 2015. (Ex. D1 at 10.)

7. The District requires all students to register for school prior to the beginning of the school year, typically during the month of August. Parents did not enroll Student into any school within the District during normal registration periods. (Ex. D1 at 8.)

8. On September 2, 2015, Student's mother met with Allyson McNeill regarding re-enrolling Student into the District. (Tr. v IV at 790:24; Ex. S41 at 1.) Student needed to be enrolled in the District before attending school. The District needed to have an IEP and the necessary nursing services in place prior to Student attending school. (Tr. v IV at 794:19-795:4.)

9. During the September 2, 2015 meeting, McNeill contacted the registrar for Student's high school to coordinate an appointment for Parents to enroll Student. Parents did not follow up at that time to enroll Student in the District. (Ex. D1 at 9.) Student's case manager for the District, Chelsey Sicheneder, contacted Parents on September 9, 2015, about setting up an IEP meeting for Student prior to the beginning of Student's attendance for the school year. Mother declined the meeting because Student was not yet medically released to return to school and because Parents were exploring alternative options including private school and a highs school outside the District. (Tr. v II at 259: 9-17; Exs. D1 at 9 and D8 at 1; *See also*, Ex. D8 at 8.)

10. On October 6, 2015, Parents delivered a letter to McNeill informing the District that they would like Student to attend Marshfield High School, in CBSD, for the 2015-2016 school year. (Ex. D8 at 8.)

11. On or about October 9, 2015, Parents sent a letter to McNeill requesting an IEP meeting be held October 30, 2015. In that letter, Parents requested that the IEP meeting be held with Student's eighth grade IEP team, despite the fact that the District considered Student to be a ninth grade student for the 2015-2016 school year. (Ex. D8 at 9; see also Ex. D1 at 9.) Parents also requested that McNeill arrange to have the Special Education Director for CBSD and Special Education teacher for Marshfield High School attend the IEP meeting. (Ex. D8 at 9.)

12. On October 14, 2015, the District responded to Parents' October 9, 2015 request for an IEP meeting. In its response, the District advised Parents that the October 30, 2015 date proposed by Parents would not work for several members of the IEP team. The letter provided contact information for Student's case manager and requested that Parents contact the case manager to coordinate a date and time for the IEP meeting that would work for Parents and all other IEP team members. The District also informed Parents that they were welcome to invite individuals from CBSD to attend, but that the District would not be responsible for guaranteeing their attendance. (Ex. D8 at 11.)

13. On or about October 23, 2015, Parents responded to the District via letter to McNeill requesting an IEP meeting on November 6, 2015.[10] (Ex. D8 at 16; Tr. v IV at 837:17-22.) Also on that date, Parents and District personnel met for a resolution session for a then-pending due process complaint filed by Parents (DP 15-115). During that meeting, Parents requested and the District provided an inter-district transfer (IDT) form that would enable Parents to transfer Student to CBSD. (Exs. D1 at 12 and D8 at 12 and 13.)

14. Because McNeill was unavailable on November 6, 2015, the District sent out a Notice of Team Meeting, on October 31, 2015, scheduling an IEP team meeting for November 13, 2015. (Exs. D2 at 1 and D8 at 18; Tr. v IV at 837:23 through 838:1.) The District scheduled the IEP meeting for November 13, 2015 because it was the first Friday after the proposed November 6, 2015 date and Parents had requested IEP meetings be scheduled only on Fridays to enable them to attend. (Tr. v IV at 838: 7-14.)

15. The District convened an IEP meeting on November 13, 2015. Father of Student attended that meeting.[11] (Ex. S1 at 1 and 2; Tr. v IV at 838:2-5.) During that meeting, Parents indicated their intent to enroll Student in the District. Based on that representation, the District began the process of hiring a 1:1 nurse for Student. (Ex. D7 at 1; Tr. v IV at 840:22 through 841:17.)

16. At the time of the November 13, 2015 IEP meeting, Student had not attended school for approximately one year. As such, the IEP team did not have current data for Student's

[10] While the letter is dated October 22, 2015, the evidence in the record demonstrates that Parents delivered the letter to the District during the resolution session in Case DP 15-115 held October 23, 2015.

[11] Mother also attended for a portion of the meeting, but left before it concluded. (Tr. v II at 283:22-25.)

then-present levels of performance and achievement. To complete the IEP, the team utilized data available from Student's progress as of March and June 2014. The IEP team agreed on an IEP that would serve Student until current assessments could be performed in the school setting and Student's present levels could be ascertained and current goals could be established. (Exs. D2 at 6 through 16 and 29 through 32 and S48 at 1; Tr. v II at 284:5-14.)

17. In addition, at the November 13, 2015 IEP meeting, the team agreed to utilize medical protocols on file with the District from Student's previous school attendance. (Ex. D2; Tr. v II at 282: 15-17.) Based on Parents' preferences for Student's start date, the IEP team decided Student would begin attending school on January 4, 2016, when all other students returned from winter break. (Tr. v II at 282:9-11; Ex. D9 at 3.)

18. IEP team meetings typically last between 30 and 40 minutes. The November 13, 2015 IEP meeting convened at 1:00 p.m. and did not conclude until approximately 4:00 p.m. (Ex. D2 at 2 and 34.) Generally, the purpose of an IEP meeting is to design the IEP necessary to serve a student, rather than to discuss specifics of IEP implementation within the classroom setting. (Tr. v III at 645:15-18 and v IV at 821:11 through 822:18.)

19. At the end of the November 3, 2015 team meeting, Parents maintained certain concerns over how the District would implement Student's IEP. (Tr. v IV at 827:21 through 828:17.)

20. According to Student's IEP developed at the November 13, 2015 meeting, Student required 1:1 support from a licensed nurse throughout the school day, including on the bus to and from school. (Ex. D2 at 18.)

21. Parents re-enrolled Student in the North Bend School District on November 23, 2015. (Tr. v II at 275:4-14.) There were approximately 15 days of school between Student's enrollment date and the Parents' preferred start date of his/her attendance. (Tr. v IV at 847:4-20.)

22. The District contracts with South Coast Educational Service District (SCESD) to provide special education related services to students, including nursing, feeding, occupational therapy, speech therapy, and physical therapy services. (Tr. v II at 395: 9-15; see also, Exs. D7 at 4 and S1at 30.)

23. On November 25, 2015, the District sent Parents a letter along with a copy of the IEP document developed at the November 13, 2015 team meeting. That letter informed Parents that the District had begun work to establish a 1:1 nurse for Student before the projected start date. In addition, the letter informed Parents how the District intended to handle Student's medical protocols and assessments. (Tr. v IV at 849:2 through 580:5; Ex. D9 at 4.)

24. Specifically, the letter advised Parents that the District was arranging for all necessary personnel to be available on January 4, 2016, Student's first day of school, to observe Student and perform the necessary protocol assessments. The District made this determination because it believed this to be the best way to observe Student in a realistic classroom setting and

obtain the best possible data for developing the necessary protocols. (Tr. v IV at 849:2 through 850:5; Ex. D9 at 4.)

25. Typically, when drafting medical protocols for a student, the District nurses work with a student's physician to draft protocols from the doctor's orders. Protocols are then sent to the physician for approval and signature. In this case, the nursing staff also reached out to Parents in order to obtain input on updated health information for Student. (Tr. v II at 396:7 through 397:1.)

26. The District had medical protocols on file, signed by Student's pediatrician, from Student's previous attendance within the District. Those medical protocols covered all of Student's medical conditions. (Tr. v II at 396:4-6, v II at 419:21-23, and v IV at 806:23 through 807: 2; Ex. D9 at 4.)

27. In late November and early December 2015, the District began making arrangements for Student to attend school. On November 22, 2015, McNeill emailed SCESD and informed them that the District needed a 1:1 nurse for Student beginning January 4, 2016. (Ex. D7 at 1; Tr. v III at 656:5-12 and v IV at 855:14 through 856:8.)

28. SCESD assigned Daniel Drechsel, Physical Therapist, to work with Student during the 2015-2016 school year. Drechsel was responsible for performing assessments to determine Student's then current physical abilities and developing a program for Student to improve his/her functional mobility and wheelchair and transition safety. (Tr. v III at 506:13 through 507:5.) Drechsel had worked with Student previously and developed a lifting and transfer protocol for staff to utilize when lifting Student from his/her wheelchair and other surfaces. (Ex. D26 at 3-5.) Drechsel also developed a lifting and transfer protocol for the period in issue. Drechsel also utilized those protocols to train any staff members, not otherwise trained, on safe lifting and transfer procedures for Student. (Tr. v III at 511:24 through 513:24.) During Student's attendance within the District, Drechsel had worked with him/her for approximately 12 years. (Tr. v III at 527:17-21.)

29. Upon being contacted by the District, Kathleen Stauff, Nursing Program Administrator for SCESD, began recruitment efforts for a 1:1 nurse for Student. Stauff was familiar with Student and had previously served as Student's special education teacher and case manager in kindergarten and first grade. (Tr. v II at 395:19 through 396:3.) Stauff began recruiting immediately because she was aware that hiring nurses for in-school services can be very difficult. (Tr. v II at 409:20 through 410:14.)

30. Sometime in mid-December, McNeill and Stauff communicated about the possibility that a 1:1 nurse might not be available for Student on the projected start date of January 4, 2016. As a contingency, on or about December 14, 2015, the District offered to provide in-home instruction and assessments to Student for the week of January 4, 2016. Parents refused the District's offer of home instruction. (Tr. v IV at 801:6-18; Ex. D12 at 1.)

31. Stauff continued to work with medical staffing agencies, while out of state over the winter break, in order to obtain a 1:1 nurse for Student. (Tr. v. II at 413:16 through 414:7

and 436:17-24.) Because of the historically strained relationship between Parents and the District, Stauff wanted to find a new nurse to serve Student in order to provide a "fresh start" between nursing staff and Student/Parents. (Tr. v II at 429:5 through 430:17.)

32. SCESD hired Ryan Cristobal, R.N. (Nurse Ryan) to act as Student's 1:1 nurse for the 2015-2016 school year. (Exs. D7 at 1 and 4 and D13; Tr. v IV at 796:4-6, 850:19:22, and 877:17 through 878:3.) Stauff and the District believed Nurse Ryan was equipped to provide services to Student before January 4, 2016. (Tr. v II at 417:23 through 418:12 and v IV at 732:20-23 and 733:5-7.)

33. Nurse Ryan attempted to contact Parents on multiple occasions prior to January 4, 2016 in order to schedule a time to perform nursing assessments of Student. Parents were unwilling to schedule any time for Nurse Ryan to meet with Student prior to January 4, 2016. (Ex. D18 at 1; Tr. v II at 290:16 through 291:2, 295:2-7, and v IV at 855:14 through 856:8.)

34. In addition to Nurse Ryan, SCESD also trained other nurses to serve as Student's 1:1 nurse in the event his/her primary nurse was unavailable for any reason. Those individuals included Marsha Edwards, R.N. (Nurse Marsha) and Rosemary Bean, R.N. (Nurse Rosemary). In addition, Lindsay Reeves, R.N. (Nurse Lindsay), provided consultation and training for new nurses as well as providing services directly to Student during the period in issue. (Tr. v. III at 667:17 through 668:21; see also. v IV at 721:12-21.) Nurse Lindsay has known Student since he/she was in first grade and has previously served as a 1:1 nurse for Student as well as serving as a member of his/her feeding team. (Tr. v IV at 725:11-18.)

35. As part of their education and training in nursing school, registered nurses are taught how to lift and transfer medically fragile patients from a variety of surfaces. They are also trained to review and follow any written patient-specific medical instructions for the safe movement of the patient. (Tr. v IV at 722:19 through 723:3 and 731:5-19.)

36. Drechsel believed that nurses employed by SCESD did not need to participate in lifting/transfer trainings he conducted because they were already trained on how to safely move medically fragile patients. Instead, Drechsel conducted the lifting/transfer training for educational assistants and bus staff who may be required to perform lifting and transferring of Student. (Tr. v III at 532:9 through 533:4.)

37. Parents elected not to send Student to school for the week of January 4, 2015. (Tr. v IV at 800:5-12.) Parents believed Nurse Ryan was not adequately trained to serve as Student's 1:1 nurse because he had yet to participate in the lifting/transfer training developed by Student's physical therapist. In addition, Parents did not believe the District's medical protocols were sufficient to keep Student safe. Parents refused to bring Student to school until new medical protocols were approved by Student's pediatrician. (Tr. v II at 301:5-12, v III at 592:10-12, and 593:2-8; *see also*, Ex. D16.)

38. To address Parents' concerns regarding the current protocols, Nurse Ryan drafted updated nursing protocols for Student and sent them to his/her pediatrician, Dr. McKelvey, on or about January 11, 2016 (Ex. D31 at 3 through 25; Tr. v II at 454:22-25.)

39. Typically, protocols are drafted by the nursing staff and sent to either a District physician or a particular student's physician to be approved. Those protocols are not generally sent to parents for input or approval. Instead, if necessary, the physician will contact the parent to ascertain if there is any additional information to be included in the protocol. (Tr. v II at 452:19-20 and v IV at 894:16-24.) Prior to the 2015-2016 school year, Parents had not participated in the drafting of protocols for Student. (Tr. v IV at 732:14-19.)

40. On or about January 13, 2016, Dr. McKelvey contacted Melissa Johnson, R.N., with SCESD, and informed her that Dr. McKelvey had reviewed the protocols and would be happy to sign off on them as soon as Parents or their attorney permitted her to do so. (Tr. v II at 455:6-11 and 456:18 through 457:12; Exs. D17 and D29.)

41. Parents refused to allow Student's pediatrician to sign new physician's orders approving the protocols written by Nurse Ryan on January 11, 2016 because they had not been sent directly to Parents. (Tr. v II at 300:11-19, 301:13-15, and 302:4-22; *see also* Ex. D28.) Nursing staff was unable to obtain any updated information from Parents for the 2015-2016 protocols until the IEP meeting held February 26, 2016. (Tr. v IV at 744:23 through 745:3.)

42. Parents were unwilling to bring Student to school during the weeks of January 4 or 11, 2016. Therefore, nursing staff made several attempts to reach out to Parents to make arrangements for certain assessments to be conducted outside the school setting. (Exs. D16 and D18.) Parents responded through counsel on January 12, 2016 asking why assessments needed to be done in an alternative setting and stating a preference for all assessments to be conducted in the classroom. (Ex. D19 at 1; see also Tr. v IV at 857:13-24 and 858:13-859:4.)

43. In or about mid-January, Parents decided they wanted Student's medical protocols addressed through another IEP team meeting, with Dr. McKelvey in attendance, rather than through the traditional protocol process. (Exs. D19 at 2 and D29; Tr. v II at 303:1-5 and 546:13-17.)

44. Parents refused to bring Student to school, without one of them present with him/her in the classroom, until after another IEP meeting was held. The primary reason for Parents' decision was that Parents believed Drechsel had not been able to train nursing staff on the lifting/transfer protocols for Student. (Ex. D27 at 1.)

45. Parents began bringing Student to school on select Tuesdays and Thursdays, from 10:00 a.m. until 1:00 p.m. based on Mother's availability, beginning on January 19, 2016. (Ex. D19 at 4; Tr. v IV 795:17-24.) When Student arrived at school on January 19, 2016, nursing staff and other District personnel began conducting the various assessments required to serve Student's needs. (Ex. D23.)

46. On or about February 11, 2016, Parents contacted Student's case manager and expressed concerns about the District training a back-up nurse for Student. Mother stated that she wanted to see trust built between Student and his/her primary 1:1 nurse before a back-up nurse was introduced. (Exs. D30 and D32.)

47. On February 18, 2016, Student's school staff realized that there was not a pre-prepared meal ready for Student that met his/her feeding protocols. Kitchen staff offered to immediately prepare an appropriate meal for Student. Mother declined the offer and elected to take Student home instead. (Ex. D36.)

48. Also on February 18, 2016, counsel for Parents notified the District, through its attorney, that, based on the incident at lunch that day, Student would not be attending school the following week, February 22 through 26, 2016. (Ex. D36.)

49. On February 22, 2016, the District notified Parents that Nurse Ryan had to leave town due to a family emergency and would not be at school that week. The District further notified Parents that Nurse Lindsay was available to work with Student that week, in the event that Parents decided to send Student to school that week. (Ex. D38 at 1.)

50. The earliest opportunity the District had to convene an IEP meeting that worked for Parents and other team members was February 26, 2016. The team met for an IEP meeting on that date with both Parents in attendance as well as Dr. McKelvey. (Ex. D3.) At the meeting, Dr. McKelvey, nursing staff, and Parents reviewed the medical protocols for Student. The IEP team agreed about the substance of the medical protocols for Student. (Tr. v II at 424:17-21 and 427:21 through 428:2.)

51. Despite the prior IEP provisions requiring a nurse to accompany Student on the bus to and from school, Parents asked, during the February 26, 2016 meeting, to have the nurse replaced with a bus monitor because Parents did not want the nurse at their home. (Ex. D3 at 19; Tr. v III at 537:12 through 538:13 and v IV at 749:3 through 750:3.)

52. On March 3, 2016, the nursing staff sent Student's medical protocols, updated at the February 2016 IEP meeting, to Dr. McKelvey for sign off. (Tr. v. II at 424:22 through 425:9; Ex. D80 at 1.) Dr. McKelvey did not sign the protocols until March 8, 2016 because she was waiting for approval from Parents. (Tr. v II at 425:10-24; Ex. D81.) Nurse Lindsay picked up the signed protocols from Dr. McKelvey's office on or about March 8, 2016. (Ex. D41 at 2-3.)

53. Also on March 3, 2016, the District notified Parents that Nurse Ryan would be unavailable until after Spring break due to a family emergency. The District also notified Parents that, as a backup, the District had arranged for Nurse Marsha to act as Student's 1:1 nurse until Nurse Ryan returned. The District chose Nurse Marsha, in part, because she was familiar with Student and had worked with him/her in the past. (Ex. D40 at 1-2.) Spring break occurred during the week of March 21 through 25, 2016. (Ex. S2 at 29; Tr. v II at 308:2-3.)

54. On March 6, 2016, Parents responded, through counsel, and reminded the District that the IEP team had agreed that Student would transition back to school with Nurse Ryan for the first two weeks. Counsel for Parents advised the District to inform Parents when Nurse Ryan would be returning so that Student's transition schedule could be adjusted to coincide with his return. Parents' counsel expressed her client's concerns that Nurse Marsha had not been trained by Drechsel in the lifting and transferring of Student. (Ex. D40 at 6; Tr. v II at 311:18 through

312:11.)

55. On March 7, 2016, Parents' counsel sent an email, in response to a District inquiry, clarifying that Parents would not send Student to school until Nurse Ryan returned after Spring break. The District's earlier inquiry raised concerns about completing Student's three-year re-eligibility evaluations and assessment by the deadline. (Ex. D40 at 4.)

56. On March 8, 2016, counsel for the District responded to Parents' counsel reiterating the likelihood that the evaluations and assessments would not be complete in time for Student's re-eligibility date if Parents elected not to bring him/her to school until Nurse Ryan returned. Counsel for the District also reminded Parents that the District had all necessary personnel and services in place to implement Student's IEP immediately. (Ex. D40 at 3-4.)

57. Also on March 8, 2016, counsel for Parents responded to District counsel's email stating, in part, "If the District decides not to honor what they committed themselves to in [the IEP], that is their choice, but they don't then get to turn around and make it about [Parents] being uncooperative." (Ex. D40 at 3.)

58. On March 17, 2016, Student's case manager email Parents and asked that they bring Student to school the following day, between 10:00 a.m. and noon, to allow the District to conduct evaluations and assessments for Student's three-year re-eligibility determination. Parents did not respond to this request nor did they bring Student to school on the requested date. (Exs. D43 and D44.)

59. On March 22, 2016, the District informed Parents, through counsel, that Nurse Ryan would not be returning to work for SCESD. (Ex. D45 at 2; Tr. v II at 438:4-10 and 440:14-21.) Parents' counsel responded the following day expressing Parents' belief that the District did not have a nurse available who was, "1. [t]rained by Dan [Drechsel] to properly lift and move [Student], 2. who is familiar with [Student's] protocols, and 3. who has seen/understands how [Student] does [his/her] toileting." (Ex. D45 at 1.)

60. On March 24, 2016, counsel for the District responded to Parents' counsel informing Parents that Nurse Marsha, who had previously worked with Student, would be assigned as his/her 1:1 nurse while SCESD recruited another nurse to replace Nurse Ryan. The District's response also informed Parents that the educational assistants and special education teacher had been trained in the lifting and transferring of Student, guaranteeing at least three trained lifters for Student at all times. (Ex. D45at 1.)

61. Nurse Marsha arrived at Student's home with the school bus on March 28, 2016. Parents refused to send Student out of the house to attend school. (Tr. v I at 167:1-4 and 178:6-18, and v II at 444:13-17; Ex. D45 at 3-5.) That same day, counsel for Parents submitted an email containing several questions about Nurse Marsha's physical condition and capabilities to act as Student's 1:1 nurse. (Ex. D45 at 7.) The following day, the District responded to Parents' inquiries by assuring them that Nurse Marsha, who walks with a cane due to a back condition, was fully capable of performing the duties of her job as Student's 1:1 nurse. (Ex. D45 at 6.)

62. On March 31, 2016, Parents brought Student to school at approximately 12:30 p.m. to allow Drechsel to conduct additional lifting and transfer training for Student's bus monitor(s). (Ex. D47.) Also on that date, counsel for Parents contacted the District and arranged for Student's father to demonstrate Student's toileting and catheterization procedure to Nurse Marsha. That demonstration occurred on April 1, 2016. (Ex. D49.)

63. On April 1, 2016, the IEP team met for Student's re-eligibility meeting. During that meeting, Parents requested an updated transition period to get Student back to full-time school attendance. The District believed it was already prepared to serve Student's needs at school full-time but agreed to accommodate Parents' request. (Tr. v IV at 813:25 through 814:17; Ex. D50.)

64. On April 11, 2016, the District notified Parents that it had scheduled an additional bus training previously requested by Parents. In addition, the District informed Parents of the decision to assign Nurse Rosemary as Student's 1:1 nurse and to have her train with Nurse Lindsay to be able to serve Student's needs. (Ex. D52.)

65. On April 23, 2016, Parents emailed Stauff at SCESD and expressed concerns that Student did not have a permanent 1:1 nurse who was "building a relationship" with Student. (Ex. D60.) In that email, Parents also expressed concerns over their understanding that Nurse Rosemary was already assigned to another student and, therefore, could not serve as Student's 1:1 nurse. (*Id*.)

66. On April 25, 2016, Stauff replied to Parents' email and informed them that Nurse Rosemary would, in fact, be Student's permanent 1:1 nurse and that she was only serving other students on those days when Student did not attend school. (Ex. D60.)

67. On April 26, 2016, counsel for Parents sent a letter to the District that indicated that Parents did not believe Nurse Rosemary could serve as Student's 1:1 nurse because she did not have an established relationship with Student. (Ex. D62 at 2.)

68. On April 28, 2016, in an effort to increase Student's attendance at school without mother's attendance, the District sent Parents a revised "phase in/phase out" plan. (Ex. D63.)

69. Parents stopped taking Student to school after the end of April 2016. (Tr. v II at 342:15-17.)

70. On May 2, 2016, counsel for Parents responded to the District's revised phase in plan via email. In that response, Parents' expressed their belief that Nurse Rosemary was not fully trained because she had "not been trained on feeding with the PT" [physical therapist]. (D66 at 1.)

71. Also on May 2, 2016, Parents provided two documents to the District. The first was a letter from Parents to the District advising the District that, because they believed the District was not prepared to provide nursing services to Student, Parents intended to withdraw Student from the District and enroll him/her in a private school. Parents also advised the District

that it would seek reimbursement from the District for the cost of the private school. (Ex. D65 at 1.)

72. The second document provided to the District on May 2, 2016 was a letter from Parents' counsel requesting an IEP meeting on Friday, May 6, 2016. In that letter, Parents indicated they would not demand the IEP meeting if the District would agree to nine separate changes to the February 2016 IEP document. Those changes included the provision that Student would work with the same 1:1 nurse on a daily basis, a provision requiring nursing staff to participate in the lifting/transfer training with Drechsel, and a requirement that all nurses assigned to Student would spend a minimum of two weeks building a relationship with Student before being assigned any duties with Student or working with him/her on a 1:1 basis. In addition, the letter requested that the District add a bus monitor to the school bus in addition to the nurse. (Ex. D65 at 2-3.)

73. On May 6, 2016, Student's IEP team met to address the concerns in Parents' May 2, 2016 letter. At the meeting, the team decided to add a bus monitor to the school bus. (Tr. v IV at 760:3-6, 765:13-21, and 769:11-13; Exs. D5 and D72 at 3.)

74. Since beginning kindergarten within the District and up through the time of hearing, Student has had approximately 12 different 1:1 nurses assigned to work with him/her in the school setting. Each of those nurses was able to provide the necessary services to Student even if they did not have an opportunity to build a personal relationship with him/her before serving as Student's 1:1 nurse. (Tr. v II at 417:10-19.)

75. In the event that Student requires a substitute or back-up nurse, SCESD and the District maintain a "sub binder" containing all relevant information for Student so any properly licensed nurse can step in and provide services to Student. (Tr. v IV at 728:17 through 729:7.)

76. During the period in issue, Parents insisted on bringing Student to school only on days and hours that at least one parent was available to accompany him/her to the classroom. During the period in issue, Parents only brought Student to school on Tuesdays and Thursdays for limited hours during the day. (Tr. v III at 638:3 through 639:8.) This limited exposure to Student impacted the ability of District personnel to provide instruction and related services to Student, as well as nursing staff's ability to develop a relationship with Student. (Tr. v III at 635:8-24.)

77. During the period in issue, Student had four nurses assigned to work with him/her on a 1:1 basis; Ryan Cristobal, Lindsay Reeves, Rosemary Bean, and Marsha Edwards. Each of those individuals was a licensed Registered Nurse in the State of Oregon. (Tr. v II at 415:12-24.)

78. During the 2015-2016 school year, Stauff spent an average of 20-30 hours per month working on related services for Student. (Tr. v II at 412:24 through 413:9.) During the period in issue, Stauff had seven other 1:1 nurses assigned to students. Stauff spent a combined total of approximately 15 hours of work per month on those seven other files. (Tr. v II at 414:16-23.)

79. Parents did not send Student to school more than two days per week, for limited hours each day, during the period in issue. (Tr. v III at 635:14-17.) District staff believed Parents made this choice based on Parents' belief that the District was not able to keep Student safe throughout the school day. (Tr. v III at 636:12-15.)

80. On or about August 3, 2016, an inter-district transfer agreement for Student was executed between the District and CBSD transferring Student to CBSD for the 2016-2017 schoolyear. (Ex. D78 at 3.)

CONCLUSIONS OF LAW

1. The District did not fail to complete the necessary assessments and develop medical protocols for Student in a timely manner.

2. The District did not fail to properly implement nursing services in Student's IEP during the period in issue.

3. The District did not deny Parents the opportunity to meaningfully participate in the provision of a FAPE to Student during the period in issue.

OPINION

In due process proceedings 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 17, 2016, and an amended complaint on November 22, 2016, alleging procedural and substantive violations of the IDEA resulting in a denial of FAPE for their child during a portion of the 2015-2016 school year. Specifically, the amended complaint covers the period from October 13, 2015 through the end of the academic year in June 2016. Parents seek compensatory education, control over the hiring and training of Student's 1:1 nurse, reimbursement for private physical therapy and speech services contracted by Parents during the period in issue, and attorney fees incurred by Parents in bringing this action. The burden rests on the Parents to prove the violations alleged in the amended complaint and the appropriateness of the remedies sought.

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 FAPE. 20 U.S.C. §1412(1). The IDEA defines FAPE 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 IEP 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 those 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*). Further, the United States Supreme Court recently determined that, in order for an IEP to be deemed sufficient to meet the stated goals, it must be appropriately ambitious in light of the child's unique needs and circumstances. *Endrew F. v. Douglas County School District*, 580 U.S. ___ (2017).

In this case, Parents allege procedural and substantive violations of the IDEA. They assert that Student was unable to attend school, during the bulk of the period in issue, and therefore missed out on specially designed instruction and related services because the District failed to hire and properly train a 1:1 nurse for Student. Tr. v III at 520:25 through 521:5. In contrast, the District argues it was ready, willing, and able to fully implement Student's IEP beginning on the date Parents agreed he/she would start school. The Districts further asserts that any perceived violations of the IDEA are the result of Parents' unwillingness to allow Student to work with any of the nurses provided and to attend school full-time.

Each of Parents' contentions is addressed below. Because this order finds that Parents' actions, rather than the District's failure to act, deprived Student of the bulk of his/her instructional hours, an in-depth discussion of Student's present levels, short/long term goals, or other details of Student's IEP(s) is unnecessary. Rather, Parents acknowledge that the disputes in this case revolve around the implementation, rather than design or content, of the IEP.

Because Parents' claims center on the provision, or lack thereof, of 1:1 nursing services for Student, this order addresses that legal issue first.

1. *Failure to properly implement nursing services in Student's IEP.*

Student has several medical conditions, most of which he/she has dealt with since birth. These medical conditions necessitate the provision of a 1:1 nurse, within the school setting, to allow Student to access his/her education. It is undisputed that the District was required to provide 1:1 nursing services to Student throughout his/her school day, including during bus rides to and from school. Further, it is undisputed that this requirement appears in each of Student's IEPs. In the Amended Complaint, Parents allege three separate violations, each of which centers on the provision of nursing services to Student during the period in issue. Parents alleged that the District 1) failed to consider the unique needs of the child when choosing and training a 1:1 nurse; 2) failed to retain a 1:1 nurse for Student; and 3) failed to provide 1:1 nursing services to Student, thereby preventing him/her from receiving a FAPE. As discussed more fully below, the record reveals that these disputes revolve not around the qualifications, or lack thereof, of any

particular nurse selected for Student, but around the subjective requirements established by Parents for any nurse assigned to their child.

Student has resided within the boundaries of the District since at least kindergarten. From that time, through the period in issue, Student has attended public schools within the District. Student was withdrawn from school and dis-enrolled from the District in October 2014 due to a medical condition. Student did not attend school during the 2014-2015 school year after October 2014. Parents did not register Student for the 2015-2016 school year during the designated registration days in August 2015. Parents first contacted the District about Student's possible return to school in early September 2015. On September 2, 2015, Mother met with the District's Special Education Director, Allyson McNeill, and informed her that Student was not yet released to attend school but was likely to be released soon. At that time, the District was informed that Parents were looking into other educational options for Student outside the District, including private school and Marshfield High School in Coos Bay. McNeill advised Parents that Student's IEP team needed to meet and Parents would need to enroll Student in the high school before the District could resume providing services. Parents did not enroll Student in any school within the District nor commit to attend an IEP meeting at that time. The record demonstrates that, as of September 2, 2015, Parents were still undecided about Student's placement once he/she was released to attend school.

On or about October 6, 2015, Parents notified the District that Student was medically released to return to school. On October 9, 2015, Parents requested an IEP meeting on October 30, 2015. Parents asked that the attendees include Student's eighth grade IEP team, Student's attending physician, and special education staff from the Coos Bay School District, because Parents were still exploring the option of transferring Student to a school outside the District. Thereafter, on October 13, 2015, Parents filed the due process complaint in case DP 15-115. *See*, Ex. D1. Student's IEP team met on November 13, 2015, prior to Parents enrolling Student in the District.

The record demonstrates that the November 13, 2015 IEP meeting lasted just over three hours; approximately six times longer than the average IEP meeting. Parents participated in the meeting, although Student's mother had to leave early on that date. Nonetheless, Student's father remained for the entirety of the meeting. At the meeting, the team discussed the lack of current data available for Student because he/she had not attended school in over a year. The team agreed that the most expedient method for obtaining current data regarding Student's present physical and academic levels of performance would be to conduct evaluations and assessments in the classroom as soon as Student started attending school. At the meeting, Parents requested that Student not begin school until January 4, 2016, after Winter break. The District agreed to accommodate Parents' requested start date and immediately began recruiting a 1:1 nurse for Student. Parents did not enroll Student at North Bend High School until November 23, 2015.

Because Student had been out of school for an extended period, the IEP team determined that the most appropriate course of action was to utilize medical protocols on file from Student from the beginning of his/her eighth grade year. Nothing in the record indicates that, at the time of the November 13, 2015 IEP meeting, the previous medical protocols on file with the District

were inadequate to address Student's medical needs. Further, there is no evidence in the record showing that, between the time Student last attended school and the November IEP meeting, Student's medical condition had changed in any way. Expert testimony at hearing demonstrated that medical protocols are updated by nursing staff upon changes in a student's medical condition or medication needs.

During the period in issue, Parents brought Student to school only on select Tuesdays and Thursday and then only for limited hours each day. The record reveals that Parents elected to limit Student's attendance to permit one parent or the other to attend school with him/her. At no time during the period in issue did Student attend school without a parent present.

The evidence shows the District retained a registered nurse, Ryan Cristobal, prior to January 4, 2016, to serve as Student's 1:1 nurse. Nonetheless, Parents refused to send Student to school on January 4, 2016 because they asserted Nurse Ryan was not properly trained to serve Student's unique needs. The record reveals this assertion of based on Parents' belief that Nurse Ryan 1) had not participated in the lifting/transfer training with Student's physical therapist, Dan Drechsel, and 2) did not have sufficient trust built with Student to serve as his/her nurse, and 3) had not developed current medical protocols necessary to keep Student safe at school. Based on the expert testimony provided at hearing, I do not find any of these to be a valid basis for finding the District was not ready, willing, and able to provide Student a FAPE during the period in issue.

Based on the evidence in the record, Nurse Ryan was hired prior to January 4, 2016 and had reviewed all the necessary protocols for Student in order to be prepared for his/her arrival on January 4, 2016. On or about March 3, 2016, Nurse Ryan had to leave town to attend to a family emergency. Between January 4, 2016 and that date, Nurse Ryan was available to act as Student's 1:1 nurse for all hours and days of the Student's academic week. Parents' argument that Nurse Ryan had not yet drafted current protocols is unavailing. Nothing in the record demonstrates that the protocols on file with the District as of January 4, 2016 were inadequate to serve Student's needs. Further, the IEP team, which included Parents, determined that those protocols could serve Student on a temporary basis while Nurse Ryan evaluated and assessed Student to determine any necessary changes to the protocols.

At hearing, the evidence demonstrated that in or about mid-January 2016, Nurse Ryan drafted new medical protocols for Student and sent them to Dr. McKelvey for approval. Nonetheless, the record demonstrates the District took such steps not because the current medical protocols were unacceptable or insufficient but because Parents refused to send Student to school until this task was complete. Further, the evidence reveals that Parents obstructed the physician's approval of the January protocols by refusing to authorize Dr. McKelvey to sign off on them. The record demonstrates that Dr. McKelvey had reviewed the protocols and was willing to sign off on them without changes in January 2016 but refused to do so without the authorization of Parents or their attorney. Additionally, Parents demanded, and the District convened, an IEP meeting in February 2016 to address concerns about the medical protocols.[12]

[12] The record shows that, after the February 2016 IEP meeting, Nurse Lindsay provided Dr. McKelvey with medical protocols which the doctor signed and provided to the District on or about March 8, 2016. This order does not address those protocols in any significant detail because Parents failed to show that

Importantly, the evidence in the record fails to establish what, if anything, about the earlier protocols was insufficient to serve Student in the educational environment. Any lack of current medical protocols as of January 2016 was caused by Parents and not the District. Parents cannot hold the District liable for circumstances preventing Student's attendance when Parents are the direct and sole cause of those circumstances.

Likewise, Parents' argument that Nurse Ryan had not completed the lifting/transfer training with Drechsel is similarly unpersuasive. At hearing, Drechsel, an expert in physical therapy, testified that none of the nurses employed by SCESD needed to be trained by him as each had more extensive training in such areas by nature of their nursing education and training. Similarly, each of the nurses, including Lindsay Reeves, an expert in the field of nursing, testified that they received education and training on lifting and transferring medically fragile patients. The evidence in the record is insufficient to demonstrate that any of the nurses assigned to Student during the period in issue needed more than the current protocols, including Drechsel's lifting/transfer protocol, in order to safely serve as Student's 1:1 nurse.

Finally, I am not persuaded by Parents' argument that any nurse assigned to Student needed to establish a trust relationship *prior* to providing services to Student. The evidence in the record shows that, throughout his/her time attending school in the District, Student has worked with approximately 12 different 1:1 nurses. Excluding the four nurses assigned during the period in issue, Student had successfully worked with approximately eight different nurses between kindergarten and eighth grade. That equates to roughly one nurse per year. It is reasonable to infer that, for at least some of those years, Student began the academic year working with a nurse that he/she was not yet familiar with and who had not yet established a relationship of trust with him/her. The record is devoid of any evidence to demonstrate that any of the prior Student/nurse relationships were unsuccessful because of that lack of trust.

At hearing, Parents elicited much testimony about best practices in the continuity of care. That testimony revealed that, under ideal circumstances, a patient or student would best be served by a provider whom he/she trusted and was familiar with. Nonetheless, each of the witnesses testifying on this subject, including Student's own pediatrician, acknowledged that a nurse can successfully and safely provide services to a patient or student with whom they are not familiar. Nothing in the IDEA requires a District to provide services under only ideal circumstances. Accordingly, I find that the District had an adequately trained 1:1 nurse available for Student beginning on Parents' requested start date, January 4, 2016.

Next, Parents argue that Nurse Ryan became unavailable at some point during the period in issue and the District failed, thereafter, to retain an appropriately trained 1:1 nurse for Student. The record does not support Parents' allegation.

As addressed above, Nurse Ryan became unavailable on or about March 3, 2016, due to a family emergency. On that same date, the District notified Parents of that fact and identified Nurse Marsha as Student's 1:1 nurse in the interim. The evidence shows that Nurse Ryan was

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earlier medical protocols were insufficient to serve Student's needs during the period in issue. Instead, the record indicates that these new protocols, like those drafted by Nurse Ryan in January 2016, were drafted in an attempt to appease Parents and expedite Student's return to the classroom.

initially expected to return to the District after Spring break.[13] District schools were out of session for Spring break during the week of March 21 through 25, 2016. Rather than accept substitute nursing services offered by the District, Parents elected to keep Student home until Nurse Ryan returned to the District. Parents' objections to Nurse Marsha were similar to those of Nurse Ryan and are unavailing for the same reasons. Nonetheless, Parents arguments regarding Nurse Marsha are even more tenuous because the record demonstrates that Nurse Marsha had worked for SCESD for several years, was familiar with Student's unique needs, and had even acted as Student's 1:1 nurse in prior school years.

With regard to Nurse Marsha, Parents also raised an additional concern not applicable to Nurse Ryan. Nurse Marsha had been diagnosed with a back condition and, as a result, walks with a cane. Parents raised concerns with the District regarding Nurse Marsha's ability to provide nursing services to Student, including medication administration and lifting/transferring student. In response, the District assured Parents that Nurse Marsha was fully capable of performing all duties of her job, despite any apparent physical limitations. The evidence at hearing showed Nurse Marsha was able to both lift/transfer Student, if necessary, and safely administer Student's medications, if required. Further, the evidence revealed that Nurse Marsha was never solely, or even primarily, responsible for lifting/transferring Student. Rather, Drechsel testified that there were several educational assistants and bus staff that he trained to lift/transfer Student safely. According to the record, there were no less than three such assistants available to assist Nurse Marsha while Student was on campus. In addition, as discussed more fully below, the District added additional trained personnel to Student's bus to alleviate Parents' concerns.

The record demonstrates that, had Parents accepted Nurse Marsha, she would have been assigned to Student for the remainder of the school year. Accordingly, the District did not fail to retain an appropriately trained nurse after Nurse Ryan became unavailable.[14] The District appears to have gone to extensive lengths to accommodate Parents on this issue. However, those efforts to accommodate Parents do not create legal obligations to provide personnel with the extensive level of training and experience desired by Parents. Rather, the requisite level of training and experience for nursing staff assigned to Student is dictated by Student's unique needs. The record is devoid of any evidence to show that any of the nurses offered by the District was unqualified to meet those unique needs.

Parents failed to establish that the protocols on file with the District were inadequate to serve Student's needs as of the projected January 4, 2016 start date or any time thereafter. Parents also failed to establish that any of the registered nurses assigned to provide 1:1 nursing services to Student were not properly trained on Student's unique needs. Accordingly, Parents

[13] Evidence in the record reveals that, on or about March 22, 2016, the District was notified, and in turn notified Parents, that Nurse Ryan had elected not to return to the District. Thereafter, the District offered Nurse Marsha as Student's permanent 1:1 nurse.

[14] The record also demonstrates that the District also attempted to pair Student with other 1:1 nurses during the period in issue, including Nurse Rosemary. Nonetheless, the evidence in the record shows this was done in an attempt to appease Parents and expedite Student's return to school, rather than to replace Nurse Marsha due to lack of training, skills, or ability. As such, this order does not address the District's attempts to provide those alternative nursing services in any detail.

failed to establish that the District denied Student a FAPE during the period in issue based on a failure to provide nursing services.

2. *Failure to complete the necessary assessments and develop medical protocols for Student in a timely manner.*

Next, Parents allege the District failed to perform assessments and develop medical protocols for Student in a timely manner. As discussed above, the record in this matter demonstrates that the District had protocols in place as of January 4, 2016. The record also demonstrates that, as of November 2016, the IEP team, including Parents, agreed that current assessment and evaluations of Student would be performed as soon as Student began attending school on January 4, 2016. As discussed above, Parents, rather than the District, were primarily, if not solely, responsible for preventing Student from attending school. This, in turn, hindered the District's ability to perform evaluations and assessments of Student. Further, also addressed above, Parents prevented the approval of updated medical protocols prepared by the District in January 2016.

Despite Parents' refusal to bring Student to school during the bulk of the period in issue, the District continued to offer instruction and assessments outside the school setting. According to the record, Parents were never amenable to any of the offers made by the District.

Although not binding precedent, 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. *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."); see also, *Edgerton School District*, 20 IDELR 126 (SEA WI 1993). Here, the record demonstrates that, as of January 4, 2016, it was Parents who impeded implementation of Student's IEP by refusing to allow him/her to attend school as agreed at the November 2015 IEP meeting. Thereafter, Parents' insistence on limiting Student's attendance to only those days on which a parent was available to accompany him/her, and then further limiting the hours Student attended, created additional impediments to the District's timely evaluation and assessment of Student.

The record indicates that Parents repeatedly found new reasons to object to the personnel and service offered by the District despite the best efforts of the District to accommodate Parents. Whether those objections were motivated by the strained relationship between Parents and the District, by Parents' desire to move Student into a private educational institution, or by some unknown factors, it is clear from the evidence that Parents hindered numerous efforts by the District to provide instruction and related services, including assessments, to Student during the period in issue.

Parents have failed to show the District denied Student a FAPE by failing to timely complete assessments and/or medical protocols for Student.

3. *Denial of Parents' opportunity to meaningfully participate in the provision of a FAPE.*

Finally, Parents argue that the District violated relevant provisions of the IDEA and its implementing regulations when it repeatedly denied Parents the opportunity to meaningfully participation in the provision of FAPE to Student during the period in issue. The IDEA guarantees parental participation in the IEP and education process and requires state educational agencies to establish procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE.

20 U.S. Code § 1414 provides, in relevant part:

(1) Definitions In this chapter:

* * * * *

(B) Individualized education program team The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(Bold in original.)

In addition, 20 U.S. Code § 1415 provides, in part:

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and 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, and to obtain an independent educational evaluation of the child.

(Bold in original.)

34 CFR §300.322 provides for parent participation in the IEP development process and provides:

(a) *Public agency responsibility—general.* Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at

each IEP Team meeting or are afforded the opportunity to participate, including—

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) *Information provided to parents.*

(1) The notice required under paragraph (a)(1) of this section must—

(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(ii) Inform the parents of the provisions in §300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and §300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).

(2) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must—

(i) Indicate—

(A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with §300.320(b); and

(B) That the agency will invite the student; and

(ii) Identify any other agency that will be invited to send a representative.

(c) *Other methods to ensure parent participation.* If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with §300.328 (related to alternative means of meeting participation).

(d) *Conducting an IEP Team meeting without a parent in attendance.* A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) *Use of interpreters or other action, as appropriate.* The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) *Parent copy of child's IEP*. The public agency must give the parent a copy of the child's IEP at no cost to the parent.

34 CFR §300.327, titled "Educational placements" provides:

Consistent with §300.501(c), each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

34 CFR §300.501 is titled, "Opportunity to examine records; parent participation in meetings" and provides, in relevant part:

* * * * *

(b) *Parent participation in meetings.* (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(2) Each public agency must provide notice consistent with §300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.

(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) *Parent involvement in placement decisions.* (1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

> (2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in §300.322(a) through (b)(1).
>
> (3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.
>
> (4) A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

(*Italics* in original.)

Parents argue the District repeatedly and consistently ignored Parents' communications as to the "unique needs" of Student. Petitioner's Hearing Brief at 6. The record reveals that the crux of Parents' argument is that the District did not allow Parents to control certain aspects of the hiring and training decisions for 1:1 nurses assigned to Student.

Generally, staffing and other administrative decisions are left to the discretion of the school district tasked with providing services under the IDEA. *Rowley*, 458 U.S. 176 (1982) (once requirements of the act are met, questions of methodology are for resolution by the states.); *See also, Letter to Wessels*, 16 IDELR 735 (OSEP 1990) (clarifying that the assignments of particular individual(s), such as a classroom teacher, is an administrative decision left to the school districts). Nonetheless, Parents argue that, in certain circumstances, a parent may override a school district's staffing decisions. Parents cite to two administrative hearing decisions, *Freeport School District 145*, 34 IDELR 104 (SEA IL 2000) and *Vidor Independent School District*, 27 IDLER 679 (SEA TX 1998) to support this proposition.

As an initial observation, I note that neither decision provides controlling authority as both are administrative level decisions from outside this state. Further, neither case supports Parents' position here that, in order for Student to receive a FAPE, they should be permitted to supplant the District's hiring or assignment decisions with regard to 1:1 nurses. Most notably, however, neither decision actually found in favor of the parents in those cases. Rather, in *Freeport*, (where parents argued that the aide assigned to their child did not have sufficient rapport with him/her to provide for the child's health, safety, and welfare) the hearing officer found selection and retention of the aide was an administrative function that was left to the discretion of the school district unless such selection or retention deprived the child of a FAPE or posed a danger to the health, safety or welfare of the child. The hearing officer found the aide did not interfere with implementation of the IEP and was not a danger to the child and therefore determined the district had discretion to choose as long as the aide was qualified and adequate. 34 IDELR 104 (SEA IL 2000). In *Vidor*, (where parents asserted the aide assigned to their student put the child in danger of harm on more than one occasion) the hearing officer refused to

interfere with the discretionary authority of the district to select and assign staff. Further, the hearing office denied parents' request to require mutual agreement between parents and district on the selection of aides assigned to their student stating such decisions were administrative functions of the district. 27 IDLER 679 (SEA TX 1998).

Here, Parents have been unable to establish the District's selection or retention of 1:1 nurses for Student deprived him/her of a FAPE or posed a danger to the health, safety, or welfare of Student. Rather, like the parents in *Freeport*, Parents here argue that any 1:1 nurse assigned to Student must establish a relationship of trust with him/her before being permitted to act as the 1:1 nurse. As discussed more fully above, each individual offered by the District was a registered nurse with the education, skills, and experience to serve as Student's 1:1 nurse after reviewing the appropriate protocols on file for Student. Accordingly, I find the district has discretion to choose Student's 1:1 nurse as long as the nurse assigned is qualified and adequate.

4. Conclusion.

In conclusion, I find the District did not fail to timely complete the necessary assessments and develop medical protocols for Student, did not fail to properly implement nursing services in Student's IEP, and did not deny Parents the opportunity to meaningfully participate in the provision of a FAPE to Student during the period in issue. Consequently, Parents' request for relief, in the form of compensatory education, control of the hiring and training of Student's 1:1 nurse, and reimbursement for physical therapy and/or speech services is denied.

ORDER

Parents' request for relief, pursuant to the Amended Request for Due Process Hearing dated November 22, 2015 is **DENIED**.

Joe L. Allen
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 6 day of April, 2017, with copies mailed to:

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