

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021010613

PARENTS ON BEHALF OF STUDENT,

v.

VENTURA UNIFIED SCHOOL DISTRICT.

DECISION

July 28, 2021

On January 22, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Ventura Unified School District. On February 2, 2021, OAH granted Student's request to file an amended complaint and deemed it filed that same date. On February 5, 2020, OAH granted the parties' request to continue the hearing dates. Administrative Law Judge Theresa Ravandi heard this matter on May 25, 26, and 27, and June 3, 4, and 9, 2021, by videoconference.

Attorney Kelly Kaeser represented Parents and Student. Mother, referred to here as Parent, attended each day of hearing on Student's behalf. Attorney Melissa Hatch represented Ventura. Marcus Konantz, Director of Special Education, attended all hearing days on Ventura's behalf.

At the parties' request the matter was continued to July 6, 2021, for written closing briefs. Upon timely submission of the briefs, the record was closed, and the matter submitted.

At hearing, Student moved to limit the time frame for the sole issue to and including March 5, 2020. Ventura did not oppose, and the motion was granted.

ISSUE

Did Ventura deny Student a free appropriate public education, called FAPE, by failing to ensure the attendance of Student's one-to-one licensed vocational nurse provider of Student's individualized education program or IEP intensive intervention services, or otherwise allow this provider to attend Student's IEP team meetings from January 24, 2019, through March 5, 2020?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, referred to as the IDEA, its regulations, and California statutes and regulations. (20

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA, are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected.

(20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §1415(b)(6) & (f); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proving the issue for hearing. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

At the time of hearing, Student was an eight-year-old second grader who resided with Parents within Ventura's school district boundaries at all relevant times. Student was eligible for special education and related services under the category of other health impairment.

STUDENT'S NEED FOR NURSING SERVICES

The evidence established the following facts. Student was diagnosed with refractory epilepsy and suffered intractable seizures which meant they were not controlled by medication. Her diagnosis placed her at risk of sudden unexplained death, and she spent much of her young life in the hospital and at medical appointments. At one point, the hospital recorded 170 seizures in a 24-hour period. Student experienced focal seizures, characterized by subtle facial twitching, eye fluttering, and limb trembling, as well as grand mal seizures where she dropped to the ground, convulsed, and at times lost consciousness. Many things triggered Student's seizures, and the triggers changed over time, as did the frequency, duration, and intensity of the seizures. Before kindergarten, Student had two brain surgeries with limited success.

Seizures injure the brain. Each seizure came with the risk of triggering cluster seizures, which impeded a return to baseline functioning and carried the potential for greater brain injury or death. As such, understanding triggers, preparing for and recognizing Student's seizures, and learning ways to minimize their duration and impact was critical to her health and safety as well as her educational progress. Beginning around September 2018, Ventura provided Student the medical support of a nurse to meet her health and safety needs, initially under a Section 504 plan pursuant to the Rehabilitation Act of 1973.

Parent is a staunch, passionate advocate for Student. She learned all she could about Student's seizures and shared this information with Ventura. At the beginning of the 2018-2019 school year, Parent spent many days at school making sure Ventura nursing personnel, specifically the coordinator of health services Ann Marie Bidlingmaier, and school nurse Debbie Gennaro, knew what to look for regarding

Student's seizure activity and how to keep her safe. Ventura members of Student's IEP team were knowledgeable about and prepared to address her medical fragility, largely because of Parent's detailed updates on Student's evolving medical condition.

ISSUE: DID VENTURA DENY STUDENT A FAPE BY FAILING TO ENSURE THE ATTENDANCE OF STUDENT'S ONE-TO-ONE LICENSED VOCATIONAL NURSE PROVIDER OF STUDENT'S IEP INTENSIVE INTERVENTION SERVICES, OR OTHERWISE ALLOW THIS PROVIDER TO ATTEND STUDENT'S IEP TEAM MEETINGS FROM JANUARY 24, 2019, THROUGH MARCH 5, 2020?

Student contends the one-to-one nurse was a required IEP team member because she provided Student's main and most important related service, and Parent requested her attendance. Student argues the one-to-one nurse spent the most time with Student and had unique observational data about Student's medical and educational needs that the IEP team required. Student maintains Ventura's failure to ensure that the one-to-one nurse attend the IEP team meetings was a procedural violation that denied her a FAPE by impeding Parent participation and denying Student educational opportunity.

Ventura contends Student's one-to-one nurse was not a mandatory member, and, in her absence, the IEP team was fully informed of and able to discuss Student's needs and develop an appropriate program. Ventura asserts the one-to-one nurse was not a special education or related service provider; it was not required to compel her attendance; and it did not prohibit her attendance, rather, she declined an invitation. Ventura argues Student failed to prove a FAPE denial or that OAH has the authority to compel the one-to-one nurse to attend IEP team meetings.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006), and 300.501 (2006); Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a) and 56363 subd. (a).)

Related services are developmental, corrective, and other supportive services, including school nurse services, as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34 (2006).) State law adopts this definition of related services which it calls “designated instruction and services.” (Ed. Code, § 56363, subd. (a).) Health and nursing services are specifically included as related services in California. (Ed. Code, § 56363, subd. (b)(12).) Health and nursing services may include providing services by qualified personnel and managing the student’s health problems on the school site. (Cal. Code Regs., tit. 5, § 3051.12, subds. (a)(1), (2).)

Each meeting to develop, review, or revise the IEP of an individual with exceptional needs must be conducted by an IEP team. (Ed. Code, § 56341, subd. (a).) The IEP team must include:

- one or both of the parents or a representative chosen by the parents;
- not less than one regular education teacher if the student is, or may be, participating in the regular education environment;
- not less than one special education teacher, or where appropriate, one special education provider to the student;

- a representative of the school district who is qualified to provide, or supervise the provision of, specially designed instruction, and knowledgeable about the general education curriculum and the availability of school district resources;
- an individual who can interpret the instructional implications of any assessment results;
- at the discretion of the parent or school district, other individuals with knowledge or special expertise regarding the student; and
- if appropriate, the student.

(20 U.S.C., § 1414(d)(1)(B); 34 C.F.R. § 300.321(a) (2007); Ed. Code, § 56341, subd. (b).)

The first five designated participant categories are mandatory team members. A mandatory member of the IEP team is not required to attend an IEP meeting, if the parents and school district agree that the attendance of such a member is not necessary because the member's area of the curriculum or related service is not being modified or discussed at the meeting. (20 U.S.C. § 1414(d)(1)(C)(i); Ed. Code, § 56341, subds. (f) and (h) [agreement must be in writing].) A mandatory member may be excused from attending an IEP team meeting when the meeting involves a modification to or discussion of the member's area of the curriculum or related service if the parent and district consent in writing to the excusal, and the member submits written input to the team before the meeting for development of the IEP. (20 U.S.C. § 1414(d)(1)(C)(ii) and (iii); Ed. Code, § 56341, subd. (g).)

VENTURA'S NURSING STAFF

Parent asked Ventura to invite Student's kindergarten one-to-one nurse to Student's initial IEP team meeting on January 24, 2019. Tamme Koehn, school

psychologist and program specialist, denied the request. Koehn informed Parent that Parent could invite community members to the IEP team meeting, but Ventura determined who attended from the school team. Ventura decided a credentialed school nurse who oversaw and directed the one-to-one nurse would attend. It designated Student's case manager to serve the special education teacher role.

Nurse Bidlingmaier served as Ventura's Coordinator of Health Services and Prevention Programs since 2016. She was a California licensed registered nurse and completed additional educational requirements to obtain a school nursing credential. She supervised, trained, and evaluated all of Ventura's nurses and health technicians. Nurse Bidlingmaier was responsible for ensuring Ventura understood and appropriately supported Student's health care needs. To fulfill this responsibility, she trained all Ventura nurses on Student's specific needs and health plans, and discussed medical updates with the one-to-one nurse. Nurse Bidlingmaier regularly discussed Student's health needs with Nurse Gennaro ranging in frequency from a couple times a day to every week or so. She regularly reviewed the seizure log where nursing staff documented Student's seizures.

Nurse Gennaro had been involved in Student's health care and educational needs since the 2018-2019 school year, initially serving as a member of Student's Section 504 team with Koehn. She was licensed by California as a registered nurse in 1986 and served as a credentialed school nurse with Ventura for 12 years. The school nurse is especially prepared and uniquely qualified in preventive health, health assessment, and referral procedures. (Ed. Code, § 49426.) Nurse Gennaro attended all of Student's IEP team meetings, providing her expertise on the medical piece of Student's programming and needs. She spoke directly with Student's medical team as needed, and ensured Ventura had current doctor orders for Student's emergency medications and specialized

equipment such as a wheelchair. She was responsible for designing and evaluating Student's health and emergency care plan and nursing services, and making sure they were implemented. Nurse Gennaro regularly discussed Student's medical needs with the one-to-one nurse. The one-to-one nurse frequently called her and informed her of Student's seizures.

During the 2019-2020 school year, Student's first grade one-to-one nurse was Cheri Michalec, a non-credentialed registered nurse. She was responsible for watching Student for seizures and implementing her health and safety care plan including documenting seizures. She worked closely with and under the guidance of Nurse Bidlingmaier and Nurse Gennaro.

INITIAL IEP TEAM MEETING, JANUARY 2019

Ventura convened Student's initial IEP team meeting on January 24, 2019. Parent, Student's attorney, Koehn, Nurse Bidlingmaier, Nurse Gennaro, Principal Todd Tyner as the district representative, Student's general education teacher, a special education teacher, and the speech, occupational therapy, physical therapy, and adaptive physical education assessors all attended. Student's one-to-one nurse did not attend. Ventura presented its assessments. Nurse Gennaro reviewed the results of her Health and Developmental Summary which she completed with Parent input. Her assessment informed the team of Student's medical, developmental, and educational history, and current health status and social-emotional functioning. Parent actively participated. She updated the team on Student's medical needs and presentation. Teachers and assessors answered Parent's questions and those of her attorney. The meeting was continued to January 31, 2019.

On January 31, 2019, Konantz sent Parent a prior written notice denying her request for Student's one-to-one nurse to attend all IEP team meetings. His response mirrored that of Koehn's, reiterating that it was up to Ventura to invite district staff it believed were appropriate and necessary to thoroughly discuss Student's needs. At hearing, Konantz and Nurse Bidlingmaier explained that the school nurse, by virtue of her credential and more advanced practice, was best suited to address Student's health needs and provide and interpret required data at IEP team meetings. Ventura considered the school nurse a mandatory team member for Student's IEP meetings. It was not Ventura's practice to have one-to-one aides, including nurses, attend IEP team meetings.

All the same participants attended part two of Student's initial IEP team meeting. Nurse Gennaro reviewed with the team a detailed health and emergency care plan she developed, based on her assessment, to address Student's seizures. The plan described the two types of seizures Student experienced, what to look for, and how to respond. It also specified what to document in the seizure log, namely, time of onset of the seizure, its length, involved body parts, Student's level of consciousness, and triggers. Parent had no concerns with Student's health and emergency care plan.

The evidence demonstrated that Student's disability impacted not only her health and safety but also the ability to participate in school due to absences, fatigue, physical weakness, and decreased mental stamina. As such, Student was found eligible for special education under the category of other health impairment. Among others, Student's IEP team developed a self-advocacy goal which called for Student to verbally inform an adult of a pending seizure. Student's teachers and nurse were responsible for implementing this goal. Ventura recognized its staff needed specialized medical training to meet Student's health needs. Therefore, the IEP offered specialized physical

health care services in the form of 30 weekly minutes of health and nursing consultation services by the school nurse, and monthly staff training.

The initial IEP also offered specialized academic instruction, occupational therapy, adaptive physical education, and full time intensive individualized services for medical and safety reasons, commonly referred to as one-to-one nurse services. The accommodations included a seizure log for nurses to document and review seizure activity, and a daily communication log which allowed direct contact between Parents and the one-to-one nurse to share about Student's presentation and seizures. Parent actively participated in team discussions. Ventura team members appreciated Parent's expertise in Student's medical condition and worked collaboratively with her to develop Student's IEP. Parent consented to Student's initial IEP on February 22, 2019.

COMMUNICATION LOG AND PARENT EMAIL UPDATES

It was Ventura's practice that Parent and Nurse Michalec communicate primarily through the communication log, or Nurse Gennaro as needed. Parent wrote detailed entries in the communication log about Student's seizure activity and asked questions which Nurse Michalec answered. At Parent's request, the one-to-one nurse logged when Student had a seizure, was tired, or asked for a bathroom break, and what the class was doing at the time.

At hearing, Parent complained that Ventura IEP team members never discussed Student's school seizures or described a witnessed seizure. She believed this was required information that the one-to-one nurse could have provided had she attended. However, the evidence established that Parent and her attorney, who attended each IEP meeting, never asked Ventura team members to describe Student's seizures. Cory Buxton, Student's first grade general education teacher, and Nurse Gennaro would have

provided this information if asked. Ventura nursing staff described Student's school seizures in the seizure log as well as the daily communication log.

In October 2019, Parent showed videos of Student's seizures to Nurse Michalec and Buxton. Parent also provided Ventura IEP team members regular, detailed emails about Student's evolving health needs, seizure activity, functioning, hospitalization, and medication changes. Ventura welcomed Parent's detailed accounts. Parent complained at hearing that Ventura IEP team members did not provide her the same level of detail. However, the evidence demonstrated that Parent did not ask Ventura to provide more detailed accounts and did not express concerns with the communication log entries.

Ventura IEP team members shared Parent's email updates with Nurse Michalec. Nurse Michalec reviewed the emails and, at Parent's request, stapled them into the communication log so Parent knew she received them. Additionally, Ventura sent Parent several emails confirming her information was received and timely shared.

Nurse Gennaro testified at hearing in a thoughtful and sincere manner. She did not agree with Ventura's practice of limiting Parent's communication with the one-to-one nurse. Nurse Gennaro explained that the IEP team's number one goal was to take care of Student. To that end, Ventura team members ensured the one-to-one nurse timely received Parent's emails and IEP team meeting updates. Nurse Gennaro appreciated the significance of Student's medical condition and her role on Student's IEP team. She witnessed some of Student's seizures and obtained necessary information to help mitigate the impact of Student's disability on her education. She provided weekly nursing consultation services to staff including Nurse Michalec. Nurse Gennaro established that the IEP team had the necessary information to discuss and address

Student's educational needs without the one-to-one nurse attending IEP meetings. Her testimony was credible, compelling, and entitled to substantial weight.

PARENT REQUESTED IEP TEAM MEETINGS, FALL 2019

Ventura scheduled a Parent requested IEP team meeting for September 26, 2019, to discuss her concerns with Student's academic progress. On the notice of meeting, Ventura designated education specialist Sue Slavin as the case manager and special education teacher. Student's health needs were not the focus of this meeting, and Parent did not ask Ventura to invite Nurse Michalec. Parents, Student's attorney, Koehn, Slavin, Buxton, Tyner, and Nurse Gennaro attended. Nurse Gennaro informed the team that Student had experienced small seizures at school. Aside from minor medication changes, Parent did not have any medical updates to discuss. Parent and her attorney expressed concerns and shared ideas which Ventura considered. Ventura team members answered their questions. After an extensive discussion of Student's academic needs, Ventura offered additional specialized academic instruction.

On November 21, 2019, Ventura convened an emergency IEP team meeting at Parent's request to discuss Student's educational needs following a lengthy hospitalization. Parent, Student's attorney, Koehn, Slavin, Nurse Gennaro, Buxton, Tyner, and the adaptive physical education and occupational therapists attended. At this meeting, Parent renewed her requests that Nurse Michalec attend IEP team meetings and that they be allowed to communicate directly by email and phone. Tyner explained Ventura's practice that the school nurse attend IEP team meetings. Nurse Michalec worked contracted hours, and her primary duty was to watch Student for seizures and keep her safe, rather than field Parent's calls or emails. Tyner shared that he and Nurse

Bidlingmaier had the duty and ability, around the clock, to speak with Parent and immediately communicate medical updates to staff.

Given Student's decreased functioning, Ventura agreed to have the occupational and adaptive physical education therapists obtain data on Student's baseline skills and offered a physical therapy assessment plan which Parent signed. Koehn offered to create a new form for documenting Student's seizures that better met the doctors' needs once Parent provided suggested changes.

On December 5, 2019, Ventura convened an IEP team meeting at Parent's request. Parent, Student attorney, Koehn, Slavin, Nurse Gennaro, Buxton and Tyner attended. Koehn emphasized Ventura's commitment to convening IEP team meetings as often as needed to discuss the impact of Student's seizures and determine necessary supports. Parent updated the team on Student's recent hospitalization and medical challenges. Given Student's new vision deficits, Ventura offered a functional vision assessment and Parent consented. At the meeting, Nurse Gennaro acknowledged Parent's concern that Ventura did not designate Nurse Michalec as a point of contact aside from the communication log. However, she noted there had not been any communication problems regarding Student's medical needs. Parent shared her greatest fear was not being with Student if she suffered a catastrophic seizure at school. Ventura team members assured her they were committed to Student, following the emergency plan, and doing all they could to keep Student safe and Parent informed. Ventura IEP team members understood and appreciated that Student's diagnosis presented a matter of life and death.

Parent testified that no Ventura IEP team member addressed the impact of Student's disability on her education at the September, November, and December 2019

IEP team meetings. Parent believed the team could not have these discussions as Nurse Michalec was not present. However, the September 2019 IEP team meeting notes and transcript detailing discussions of Student's educational performance and needs refuted Parent's testimony. Buxton testified at hearing. As Student's teacher, she was well aware of the impact of Student's disability on her classroom functioning. She worked individually with Student each day and spoke daily with Nurse Michalec about Student's needs. Buxton shared with the IEP team her observations of Student's academic performance and needs, alertness, requests for naps, fine motor skills, and time in the wheelchair. No team member, including Parent, ever asked Buxton to describe a witnessed seizure.

Further, as to the November and December 2019 IEP team meetings, Parent's testimony that Nurse Michalec's absence prevented the team from addressing Student's needs was not substantiated. These two meetings were convened in response to Student's hospitalizations. Student had been absent from school, her physical condition had declined, and medications were impacting her functioning. The focus of these meetings was to discuss medical updates, and Parent was the team member best able to provide this information.

ANNUAL IEP MEETING 2020 AND FURTHER SURGERY

On January 14, 2020, Parent informed Ventura that she would not agree to hold Student's annual IEP team meeting without the one-to-one nurse present. Koehn invited Nurse Michalec, but she declined. On January 16, 2020, Koehn informed Parent of this and explained that Nurse Michalec's employment contract did not require her to attend. Koehn asked Parent what information she wanted Nurse Michalec to address

and offered to have her write a statement for the IEP team to discuss. Parent did not take Koehn up on this offer.

Ventura convened Student's annual IEP team meeting on March 5, 2020. Parent, Student's attorney, Koehn, Slavin, Buxton, Nurse Gennaro, Nurse Bidlingmaier, Tyner, the occupational and adaptive physical education therapists, the vision specialist and physical therapist assessors, private occupational and physical therapists, and Ventura's attorney all attended. The team reviewed private therapy reports and Ventura's physical therapy and functional vision assessments. These reviews necessarily included information on the impact of Student's disability on her educational performance. Parent's testimony to the contrary was not persuasive. The assessors answered many questions from Parent and her attorney who actively participated. Ventura offered vision specialist and physical therapy consultation services if the need arose. The team reviewed Student's progress on goals. Slavin reported on Student's self-advocacy goal with input from Nurse Michalec.

Student's annual IEP meeting was continued to June 9, 2020. The same members attended with the exception of the private providers. Ventura updated Student's present levels in the area of health with Parent input. Student's medical condition continued to decline. She was experiencing 10 to 15 seizures per day, trying new medications, and had been unable to participate in distance learning. Nurses Gennaro and Bidlingmaier updated Student's health plan. Ventura continued to offer specialized academic instruction, one-to-one nursing services, health and nursing consultation services, occupational therapy, and adaptive physical education services.

On October 26, 2020, Student underwent another surgery related to her epilepsy. At the time of hearing, she had been seizure free since the surgery, a period of seven months.

STUDENT'S 1:1 NURSE WAS NOT A MANDATORY TEAM MEMBER

Extensive procedural requirements govern the creation of an IEP including who must participate. It is not necessary for the purposes of this Decision to determine whether Student's one-to-one nurse was a related service provider. While it may be beneficial for related service providers to attend an IEP team meeting, the IDEA and California state law do not expressly require their attendance. However, such a provider may be a required member if the district has designated them to serve on the IEP team as the child's "special education provider." (34 C.F.R. § 300.321(a)(3) (2007); *Letter to Rangel-Diaz* (OSEP April 25, 2011) 58 IDELR 78, p. 1 (*Rangel-Diaz*)). The individual serving as the child's special education teacher or provider at the team meeting should be the person who is, or will be, responsible for implementing the child's IEP. (*Rangel-Diaz*; *supra*, at p. 1; See *R.B. v. Napa Valley Unified School. Dist.* (9th Cir. 2007) 496 F.3d 932, 939 (*R.B.*) [the teacher chosen as an IEP team member should be knowledgeable about the child and implementation of the IEP developed].) In Student's case, many individuals could have served the role of the special education teacher or provider, including her special education teacher or any of her related service providers, including the school nurse, all of whom had a role in implementing her IEP.

Proper composition of the IEP team is the district's responsibility. "It is critically important to the provision of FAPE that the public agency require individuals to attend IEP Team meetings who are in the best position to address the educational program for, and the unique needs of, each child with a disability." (*Rangel-Diaz, supra*, 58 IDELR 78

at p. 2.) Ventura used its discretion to determine that the school nurse, a higher credentialed and more advanced practice staff member than the one-to-one nurse, would be in the best position to identify and address, and thus minimize the impact of Student's unique health needs on her educational program. Therefore, it required Nurse Gennaro to attend each of Student's IEP team meetings.

By law, Student's one-to-one nurse was not a mandatory member of the IEP team as Ventura did not designate her as the representative special education provider. Ventura exercised its right to determine the specific personnel to fill the required roles on Student's IEP team. The federal regulations state,

it is important to emphasize that it is the public agency that determines the specific personnel to fill the roles for the public agency's required participants at the IEP Team meeting. A parent does not have a legal right to require other members of the IEP Team to attend an IEP Team meeting.

(Analysis of Comments and Changes, Final Part B Regulations, 71 Fed. Reg. 46,674 (Aug. 14, 2006).) Student's closing brief argues that Ventura misconstrued this federal regulation when it erroneously designated a school nurse to fill the role of the one-to-one nurse. Ventura did not select Nurse Gennaro to fill in for Nurse Michalec. Rather, it determined that a school nurse was best equipped to consider and address Student's health needs. Student's argument is not persuasive as it presupposes, without legal support, that the one-to-one nurse is a required participant.

As long as the team is made up of the required members, parents do not have veto power over who serves on the IEP team, and they cannot insist that a specific individual attend. "It is, therefore, an essential part of the IDEA scheme that the designation of specific school and [local educational agency] personnel to serve on the

IEP team is the sole prerogative of the school and the [local educational agency].” (*Fitzgerald v. Fairfax County School Bd.* (E.D. Va. 2008) 556 F.Supp.2d 543, 553 (*Fitzgerald*)). Further, just because Student’s other related service providers attended, the one-to-one nurse, assuming she provided a related service, was not required to also attend.

Student argues that because the one-to-one nurse spent the most time with Student, she was the most important provider to invite. However, a similar argument was rejected by the Ninth Circuit Court of Appeals in *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d. 431. In *J.W.*, the student argued that the identified special education teacher was not qualified to serve that role on an IEP team because he only worked with the student four hours per month. Because the teacher was a special education provider within the meaning of the IDEA, the Ninth Circuit affirmed the district court’s holding that the administrative law judge did not err in concluding that the district met the team composition requirements. (*Id.* at p. 457.)

The designation of mandatory IEP team members is not conditioned on who has the most information about Student. In the case of *R.B.*, the Ninth Circuit determined that a student’s current general education teacher was not required to be present at an IEP meeting. Rather, it is only necessary for a general education teacher who has instructed the child in the past or who may instruct the child in the future to be present. (*R.B.*, *supra*, 496 F.3d 932, 938-940.) Similarly, the Ninth Circuit held the child’s current special education teacher or provider was not required to participate, though this role must be filled by someone who has actually provided instruction or services to the student. (*Id.* at pp. 940-942.)

The law provides a list of those individuals who must participate in designing an IEP; an expert on the child's specific disability is not required. (*B.D. v. Puyallup School Dist.* (9th Cir. 2011) 456 Fed. Appx. 644, 645; *R.P. v. Prescott Unified School Dist.*, (9th Cir. 2011) 631 F.3d 1117, 1122 (*R.P.*).) Here, Student argues her one-to-one nurse had the most observational data and a unique perspective throughout her school day, essentially maintaining the one-to-one was an expert on Student's medical and educational functioning, and thus a required member. The Ninth Circuit in *R.P.* rejected this reasoning holding that an expert in autism, the student's suspected area of disability, was not a required IEP team member. (*R.P.*, *supra*, 631 F.3d at 1122.)

In her closing brief, Student argues the one-to-one nurse was required to attend IEP meetings because without her, the team lacked critical observational data and could not develop an IEP to meet Student's unique needs. Student, however, did not prove at hearing that the IEP team lacked critical information solely available to it through Nurse Michalec's direct participation. Student points to the House and Senate Committee Reports from 1997 which discuss that related service providers should attend an IEP team meeting at parent's request if their service will be discussed. (H. Rep. No. 105-95, p. 103 (1997); S. Rep. No. 105-17, p. 23 (1997)). Yet, the IDEA and implementing regulations do not require such attendance. The federal regulations suggest it would be appropriate for related service providers to be included as discretionary IEP team members if their related service is discussed. (64 Fed. Reg. 12,478 (March 12, 1999).) Student did not argue, nor establish, the IEP team needed to discuss, or Parent wanted to discuss, the one-to-one nurse services such as the nature, frequency, or amount of the services to be provided. Rather, Parent wanted Nurse Michalec to share information she believed no other team member had. The evidence at hearing refuted this belief.

Student failed to provide any persuasive authority for her contention that Ventura was required to ensure the attendance of Student's one-to-one nurse at her IEP team meetings. Nor did the testimony of Student's expert establish that the one-to-one nurse was a required member of Student's IEP team. Regardless, it is a legal judgment that Congress has made, not one to be determined by expert opinion.

STUDENT'S EDUCATIONAL EXPERT

Student's expert Jeanne Kane was the founder and coordinator of a school reentry program for medically fragile children and had 43 years of experience teaching and attending IEP team meetings. She reviewed Student's records and IEP team meeting transcripts, and spoke with Parent, Student's attorney, and one of Student's doctors. Kane opined that Student's IEP team lacked critical information on Student's school functioning and missed instructional time from seizures because the one-to-one nurse did not attend the meetings. She concluded that without the one-to-one nurse, the IEP team could not and did not develop a comprehensive plan to help Student make up missed lessons. Kane's testimony was not persuasive as she neither spoke with any Ventura team members nor did she know what information Nurse Michalec shared with the team members. Further, Kane's opinion was contradicted by substantial evidence that Buxton logged Student's absences, tracked missed lessons, and spent extra time individually instructing Student upon her return. State regulations highlight the importance of the IEP team addressing a special education student's medical absences. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d); see Cal Code Regs., tit. 5, § 3051.17, subd. (c).) However, whether Ventura failed to appropriately address the impact of Student's disability, including missed instructional time, on her educational progress was not at issue in this case.

Kane's opinion that Nurses Gennaro and Bidlingmaier were not qualified to serve as substitute team members for the one-to-one nurse because they did not have adequate observational data was equally flawed. Kane based this opinion on her erroneous belief that Nurse Gennaro only met with the one-to-one nurse 30 minutes a week. In fact, both Nurse Gennaro and Nurse Bidlingmaier had regular, often daily, communication with Nurse Michalec regarding Student, regularly reviewed the seizure log, and were qualified to inform the team of the medical impact of Student's health on her education and to develop a plan to minimize that impact.

STUDENT'S 1:1 NURSE WAS A DISCRETIONARY TEAM MEMBER

There are also discretionary IEP team members, namely those invited by the parent or district who have knowledge or special expertise regarding the child. (20 U.S.C., § 1414(d)(1)(B)(vi); 34 C.F.R. § 300.321(a)(6) (2007); Ed. Code, § 56341, subd. (b)(6).) The determination of the knowledge or special expertise of any individual described in this section must be made by the party who invited the individual to be a member of the IEP team. (*Ibid.*) "Parents' participation in determining the makeup of the IEP team is limited to inviting individuals who, in their opinion, 'have knowledge or special expertise regarding the child.'" (*Fitzgerald, supra*, 556 F.Supp.2d 543, 554; see *Cone v. Randolph County Schools* (M.D.N.C.2004) 302 F.Supp.2d 500, 507, *aff'd sub nom. Cone v. Randolph County Schools* (4th Cir. 2004) 103 Fed. Appx. 731.)

Because Ventura did not designate the one-to-one nurse as Student's representative special education provider, her IEP team participation was governed by the provisions related to discretionary invitees. (64 Fed. Reg. 12, 585 (March 12, 1999).) Parents have the right to invite district personnel with knowledge or expertise regarding the child, but they are not required to attend. (71 Fed. Reg. 46, 674 (Aug. 14, 2006).)

Further, the excusal provisions do not apply to discretionary members. Neither an agreement nor written consent between the parent and the public agency to excuse individuals who are invited to attend IEP team meetings at the discretion of the parent, or the public agency is required. (See 20 U.S.C. § 1414(d)(1)(C)(i); Ed. Code, § 56341, subds. (f) and (g); 71 Fed. Reg. 46,675 (Aug. 14, 2006).)

The IDEA and its regulations do not expressly require public agencies to make an employee available for IEP team meetings at parent request. "Whether other teachers or services providers who are not the public agency's required participants at the IEP Team meeting can attend an IEP Team meeting is best addressed by State and local officials." (71 Fed. Reg. 46,675 (August 2006).) In *Letter to Byrd*, the Office of Special Education Programs, called OSEP, indicated that in the absence of federal regulations, the determination of whether a public agency must ensure the attendance at an IEP meeting of one of its employees when invited by the parent, may be addressed by state and local policy. (*Letter to Byrd* (OSEP Aug. 28, 2003) 41 IDELR 94 [IDEA did not require district to ensure a former teacher attend IEP meeting upon parent invite].) Student provides no basis to interpret the federal regulations any differently. OSEP's interpretation of the statute and regulations it is entrusted to administer is entitled to deference. (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837 [104 S.Ct. 2788, 81 L.Ed.2d 694] ; *Stinson v. United States* (1993) 508 U.S. 36, 45 [113 S.Ct. 1913, 123 L.Ed.2d 598] [agency's interpretation of its regulations carries controlling weight unless plainly erroneous or inconsistent with the regulations themselves]; *National Association of Home Builders v. Norton* (9th Cir. 2003) 340 F.3d 835, 843.)

California has passed legislation requiring the participation of additional IEP team members, such as California Children's Services evaluators, in special circumstances.

(See Gov. Code, § 7572, subd. (c)(1) [parent may require the qualified medical personnel who conducted the occupational or physical therapy assessment to attend the IEP team meeting].) However, California has not addressed the issue of whether a district must ensure that a district employee, invited by a parent, attend IEP team meetings.

A 2016 matter before the Colorado State Educational Agency, presented a similar situation to the case here. The State Complaints Officer addressed the issue of whether parents may compel a school district to include school district employees, chosen by parents, in an IEP meeting where the district has selected different employees to serve as mandatory members. (*Pikes Peak BOCES*, Colorado State Educational Agency (April 19, 2016) 68 IDELR 149 (*Pikes Peak*).) Parents wanted student's paraprofessionals present, contending no other staff had more knowledge about the student's day-to-day functioning. (*Id.* at p 2.) The Complaint Officer held the school district did not err in denying parents' request to include the paraprofessionals, citing the Ninth Circuit decision in *B.D. v. Puyallup School Dist.* (9th Cir. 2011) 456 F. Appx 644, Minnesota and Ohio state agency decisions from 2015, federal regulations allowing districts to designate which employees will serve as mandatory members, and OSEP's guidance in *Letter to Byrd*. (*Pikes Peak, supra*, 68 IDELR 149 at p. 4.) Colorado state special education law expressly incorporates the federal requirements regarding IEP team composition and does not give parents the right to compel the attendance of district employees whom the district did not include. (*Ibid.*) California law is the same.

As Student's one-to-one nurse was a discretionary IEP team member, Ventura was not required to ensure her attendance. Student failed to meet her burden of proving a procedural violation occurred.

ANY ERROR WAS HARMLESS

While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, superseded on other grounds by statute (*Target Range*).) A procedural error results in a denial of a FAPE only if the violation impeded the student's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision making process; or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2) (2006); Ed. Code, § 56505, subds. (f)(2) & (j); *Target Range, supra*, at p. 1484; *L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) The Ninth Circuit has held that a procedural error resulting in a loss of an educational opportunity denies a student a FAPE. (*Doug. C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047).) "Where a school district improperly constitutes an IEP team, 'IDEA procedural error may be held harmless[.]'" (*R.B., supra*, 496 F.3d, 932, 938, citing *M.L. v. Federal Way School. Dist.*, (9th Cir.2005) 394 F.3d 634, 652 (Gould, J., concurring).)

The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904] "[T]he informed involvement of parents" is central to the IEP process.].) Parents participate meaningfully in the IEP process when they are informed of the child's problems, have an opportunity to discuss a proposed IEP, express disagreement and suggest changes, and have their

concerns considered by the IEP team. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693, 695; *Fuhrmann v. East Hanover Board of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

Assuming arguendo, Nurse Michalec was a required IEP team member, Student did not establish her absence resulted in educational harm or substantially impeded Parent's ability to participate meaningfully in the IEP team discussions. Student argues in her closing brief that she suffered a loss of educational opportunity because Ventura failed to record missed instructional time from seizure activity. This was not an issue for hearing. Further, the argument acknowledges the one-to-one nurse also lacked this information and could not have shared it even if she attended the IEP team meetings.

The intent behind the mandatory composition of the IEP team is to ensure a well-informed team. "A properly constituted IEP team is in the best position to develop an IEP that suits the peculiar needs of the individual student." (*R.B., supra*, 496 F.3d 932, 941, citing *Board of Education of Hendrick Hudson Central School Dist. V. Rowley* (1982) 458 U.S. 176, 206 [102 S.Ct. 303, 473 L.Ed.2d 690] [procedural compliance would almost always achieve what Congress intended with respect to the substantive IEP provisions]; see *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.).

Student did not establish that the IEP team lacked the requisite knowledge to develop her IEP's. Ventura IEP team members were well-informed of Student's medical needs and their impact on her education. Nurse Gennaro possessed the necessary qualifications to conduct and explain the results of health assessments and implications of medical updates, and develop a health and emergency plan, and she did so. Nurse Gennaro served as the team's medical expert along with Nurse Bidlingmaier, who attended Student's initial and annual IEP team meetings. Team member Koen assessed

Student and knew of her changing medical needs since the time of her Section 504 plan. Buxton observed and instructed Student throughout her school day.

Nurse Michalec could have provided pertinent information but much of that information was already known and available to Student's IEP team, including Parent. (See *Cone v. Randolph*, *supra*, 302 F.Supp.2d 500, 507, *aff'd sub nom. Cone v. Randolph County Schools*, *supra*, 103 Fed. Appx. 731, citing *Briley v. Board of Educ. of Baltimore County* (D.Md.1999) 87 F.Supp.2d 441, 444 [no procedural violation where all mandatory members present, especially where the team had access to any information the non-required team member might have provided].) The one-to-one nurse communicated with Parent through the daily communication log. She was responsive to Parent's request to log specific information. Koehn offered to obtain any further information from Nurse Michalec that Parent requested. The school nurses met regularly with the one-to-one nurse and reviewed her documentation in the seizure log. Teacher Buxton met daily with Nurse Michalec to discuss Student's needs.

Student's closing arguments that the IEP team did not have required health and safety information to perform its duties are not persuasive as they misconstrue excerpts from the IEP meeting transcripts and are at odds with witness testimony. For example, Student criticizes Ventura team members for not recognizing or being able to discuss Student's left side weakness and gait issues at the November 2019 IEP team meeting. However, Student had been at school for only two days following a hospital stay and was in a wheelchair per doctor orders. Further, that the IEP team could not address Student's ability to handle additional work following a hospitalization reflects a lack of information because of her changed circumstances and recent return, not because of a missing participant. Parent did not ask questions the team could not answer because Nurse Michalec was absent.

There is no support in the evidentiary record that absent the attendance of the one-to-one nurse at each of the IEP meetings from January 24, 2019, through March 5, 2020, Student's IEP team was unable to perform its duties; that Parent was unable to meaningfully participate; or that Student was deprived of educational benefit or lost an educational opportunity. Student did not meet her burden of proof.

In addition to being informed, Student's IEP team was collaborative, willing to meet as often and as long as necessary to ensure Student was supported and successful. Ventura team members were committed to Student and welcomed Parent's active involvement. Parent was able to and did participate meaningfully with counsel at all of Student's IEP team meetings. Student's attorney extensively questioned Ventura team members on Parent's and Student's behalf. Student did not establish a denial of FAPE by failing to ensure the attendance of Student's one-to one nurse at Student's IEP team meetings from January 24, 2019, through March 5, 2020

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

Ventura did not deny Student a FAPE, by failing to ensure the attendance of Student's one-to-one licensed vocational nurse provider of Student's IEP intensive intervention services, or otherwise allow this provider to attend Student's IEP team meetings from January 24, 2019, through March 5, 2020. Ventura prevailed on the sole issue in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Under Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Theresa Ravandi

Administrative Law Judge

Office of Administrative Hearings