

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019071112

PARENTS ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

DECISION

DECEMBER 30, 2019

On July 22, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf Student, naming Los Angeles Unified School District. Administrative Law Judge Chris Butchko heard this matter in Van Nuys, California, on October 29 and 30, 2019.

Student's Parent represented Student. Both of Student's Parents attended all hearing days on Student's behalf. Student did not attend the hearing. Attorney Patrick Balucan represented Los Angeles. Administrator Patrick D. Johnson attended the first

day of hearing on Los Angeles' behalf. Administrator Genethha E. Hicks-Cleveland attended the second day of hearing as Los Angeles' representative.

At the parties' request the matter was continued until December 6, 2019, for written closing briefs. The record was closed and the matter was submitted on December 6, 2019.

ISSUES

1. Did Los Angeles deny Student a free appropriate public education, referred to as a FAPE, by conducting an individualized education program, referred to as an IEP, team meeting on May 31, 2019, without Parent?
2. Did Los Angeles deny Student a FAPE by including a behavior support plan and behavior support services in Student's IEP of May 31, 2019?

SUMMARY OF DECISION

Parents proved that Los Angeles held the May 31, 2019 IEP Team Meeting without them and failed to get their consent to do so. Parents did not prove that the inclusion of behavior support in the IEP denied Student a FAPE.

FACTUAL FINDINGS

PREVIOUS DUE PROCESS ACTIONS

On September 7, 2017, Parents and Los Angeles entered into a settlement agreement that resolved an action between the parties, and certain terms of that agreement were written into an implementation IEP following an IEP team meeting on October 3, 2017. Assessments were conducted and reviewed at an IEP team meeting on November 13, 2017, which resulted in the last IEP agreed to by the parties.

Two decisions have been issued by OAH concerning disputes between Parents and Los Angeles in the four months prior to the filing of this case. Some of the background information in this decision is taken from factual findings made in those earlier cases.

The first decision resulted from a case filed by Student on June 11, 2018, which was given OAH case number 2018060459. Student claimed that she had not been appropriately evaluated by Los Angeles' assessors and that she had been denied FAPE by Los Angeles' failures to appropriately and fully assess her, to promptly hold an IEP team meeting following Parents' request, or to offer her extended school year services. Los Angeles then filed on October 12, 2018, an action to defend the appropriateness of its assessments, offer of extended school year services and whether it held an IEP team meeting after a Parent request. Student's and Los Angeles' cases were consolidated. The consolidated matter was decided on April 9, 2019.

Los Angeles prevailed in the first case, as the ALJ found the assessments were appropriate and Los Angeles had responded promptly to the Parents' request for an IEP team meeting. In addition, one of Student's claims was barred by the September 2017 settlement agreement. Although the ALJ did find that Los Angeles should have offered extended school year services to Student, the ALJ did not find a need to award compensation for the error because Los Angeles did eventually provide those services to Student.

The second recent case was filed by Los Angeles on March 19, 2019, before the decision in the first case was released on April 9, 2019. In the second matter, Los Angeles wanted a ruling by OAH that its offer of services at the August 16, 2018 IEP team meeting offered Student a FAPE and that it could implement that program without Parents' agreement to the plan.

In that case, the ALJ found that Los Angeles did not carry its burden of proving that the FAPE offer was appropriate because the offer was not sufficiently clear and coherent for Parents to understand what would be provided and because it lacked measurable annual goals in all areas of need for Student. These procedural violations were held by the ALJ to materially interfere with Parents' ability to participate in the planning of Student's educational program. As a result, the plan offered at the August 16, 2018, IEP team meeting did not offer a FAPE and could not be imposed without Parents' agreement. The decision in the second case was issued on June 21, 2019.

There is a high level of distrust between Parents and Los Angeles, which has resulted in four due process hearing requests being filed over the last three IEP team meetings. Los Angeles has found it easier to communicate with Parents by email, and does not attempt to telephone them.

STUDENT

Student was 8 years old and eligible to be in third grade at the time of hearing, although she has not regularly attended school since the 2017 to 2018 school year. Student resided within Los Angeles' geographic boundaries at all relevant times. Student was eligible for special education as a child with characteristics of autism. Student also had developmental delays, including speech and language issues, and physical limitations.

One limitation, caused by an injury to the brachial plexus nerve network, was a significant area of concern for Parents. Because of this injury to the nerves running between Student's arm and spinal cord, Student did not have full use of her arms. Among other effects, it caused her significant difficulty in attending to her hygiene after

toileting. Parents were determined to ensure that Student would receive assistance in toileting so that she would not suffer illness or be stigmatized.

PARENTS' CONCERNS ABOUT TOILETING

Parents' concern deepened as Student progressed from first grade to second grade. Student would come home with soiled underclothing, and would tell Parents that she did not get assistance in toileting from her aide. Sometimes Student would be imperfectly cleaned and sometimes she had had accidents that were not addressed.

Even when Student was given assistance, Parents were concerned that it was not done properly. Parents believed that Student was being cleaned with soap and water and dried with rough paper towels, which caused Student pain and irritation. Parents believed that Los Angeles' staff did not like having to help with Student's toileting and that staff retaliated against Student when Parents voiced their concerns.

THE AUGUST 2018 IEP TEAM MEETING

At the end of Student's first grade year, Student filed an action challenging the appropriateness and completeness of the assessments of Student conducted by Los Angeles and alleging procedural violations. While that action was pending, an IEP team meeting was held on August 16, 2018, at the start of Student's second grade year. Because that meeting was Student's annual review meeting, the next IEP team meeting had to be held within one year of that date.

The report for that IEP team meeting noted that Student needed to learn to advocate for her needs, such as when she needed to go to the bathroom. It further reported that Student's autism made it difficult for her to self-advocate and negatively impacted her educational participation and progress. Parents did not agree to the offer

of FAPE, and Los Angeles later filed an action in March 2019 to impose the offer of FAPE made at the August 2018 IEP team meeting without Parents' consent.

THE 2018 TO 2019 SCHOOL YEAR

Parents believed that Student's toileting needs were being neglected by Los Angeles and that staff was retaliating against Student because of Parent's expressions of concern. Based on these beliefs, Parents kept Student out of school during substantially all of the 2018 to 2019 school year. Student was receiving a substantial amount of compensatory educational services during that time as a result of a compliance complaint Parent filed with the California Department of Education, but Student was not attending school or advancing her social skills. That compensatory education was used up by time of hearing here.

Student's case about the appropriateness of Los Angeles' assessments was still pending when Los Angeles filed in March 2019 seeking to implement the August 2018 offer of FAPE. Shortly afterwards in April, OAH released its decision finding that the assessments were proper and that the procedural violations did not deprive Student of FAPE. Los Angeles' case about the August 2018 offer of FAPE was heard from April 30, 2019 to May 10, 2019.

THE MAY 2019 IEP TEAM MEETING

While the second hearing was in progress, the Assistant Principal at Student's school realized that there was a potential problem. Although the August 2018 annual IEP team meeting was held a few days after the start of the school year, it would not be possible to hold the next meeting after the start of the 2019 school year. While the school year in 2018 began on August 14, the next school year would not begin until August 20. As a result, to meet the statutory time line for Student's annual IEP team

meeting, the annual meeting had to be held before the teachers went on summer break on June 10, 2019.

The Assistant Principal worked under a number of constraints on his ability to hold IEP team meetings. The Assistant Principal cannot hold IEP team meetings on everyone's first choice of time and dates because he attends a large number of meetings in a year for multiple school sites. He schedules up to three IEP team meetings per day, holding them at either at 8:15 AM, 10:30 AM, or 1:00 PM. At the end of the school year the Assistant Principal cannot make staff available for late afternoon meetings because there is a shortened class schedule at the end of the year. He cannot hold IEP team meetings during summer because he cannot get staff to attend during vacation. For these reasons, the Assistant Principal had a limited number of options to offer Parents for the date and time of the annual IEP team meeting.

LOS ANGELES' EFFORTS TO SCHEDULE A MEETING

With less than six weeks remaining to hold the meeting, the Assistant Principal took action on May 3, 2019, sending Parents a notice of the scheduling of an IEP team meeting. The notice stated that the purpose of the meeting was to review Student's IEP, which is the standard language used for an annual IEP team meeting. It set the meeting for 10:30 AM on May 16, 2019. The Assistant Principal believed that 10 days' notice are required for notice of an IEP team meeting.

There were four spaces for Parents to check to respond. One expressed intention to be there, but granted Los Angeles permission to proceed without parents if they were unable to attend. The second reported that parents would not attend and asked that Los Angeles send a copy of the IEP for the parents to review and sign. The third choice also stated an intent to attend, but asked Los Angeles to contact parents to reschedule

or conduct the meeting by teleconference. The last option reported that the time was not convenient and requested that Los Angeles contact parents to reschedule.

Parents wanted to have the annual review in August, and they incorrectly believed that it was somehow improper or illegal for Los Angeles to hold an IEP team meeting before OAH issued a decision in the case filed by Los Angeles in March 2019. Parents did not respond to the notice sent by the Assistant Principal until May 14, 2019, when they replied by email.

THE MAY 31, 2019 RESCHEDULED MEETING

In that email, Parents expressed confusion, asking the Assistant Principal what he wished to review at the meeting. The Assistant Principal responded less than thirty minutes later, telling Parents that he was giving notice of Student's Annual IEP team meeting, and telling Parents that the meeting had to be held during the current school year because of the next school year's late start. Because the IEP team meeting was now only two days away, the Assistant Principal offered to reschedule the meeting to either May 24, 2019, at 1:00 PM or May 31, 2019, at either 10:30 AM or 1:00 PM. He asked that Parents decide quickly because the end of the year was "fast approaching."

Parents did not respond promptly, and on the afternoon of May 15, 2019, the Assistant Principal sent another email. He cancelled the meeting for May 16, and asked Parents to let him know if the alternate dates he proposed would work to hold Student's annual IEP team meeting.

On May 16 and 17, 2019, the Assistant Principal sent by US mail and email another notice of the scheduling of an IEP team meeting. The meeting was to be held on May 31, 2019, at 10:30 AM. Along with the notice form, the Assistant Principal sent a letter stating that he was again offering Parents the choice of having an IEP team

meeting on May 24, 2019, at 1:00 PM or May 31, 2019, at either 10:30 AM or 1:00 PM. The letter told Parents that if they could not make those meetings, they would have until May 22, 2019 to propose a different date and time. Any proposed times by Parents would have to be between 8:00 AM and 1:00 PM, and the meeting date had to be between May 24 and June 5, 2019.

PARENTS' RESPONSE TO THE RESCHEDULED MEETING

Parents did not respond until the late afternoon of May 30, 2019, when Mother sent an email stating that she wanted to be at the IEP team meeting but needed to reschedule it. She wrote that she had a doctor's appointment, but would see if she could get out earlier than expected. Mother also asked why the meeting could not be held in August.

Mother emailed again about a half hour later, telling the Assistant Principal that she believed it was improper to hold an IEP team meeting while the prior IEP was under review by OAH. She complained that every time an IEP team meeting was held it failed to provide Student with appropriate services or placement. Mother closed by writing that she would "try to make it at 10:30 AM however [please] contact me to reschedule if I cannot make it. I have a [doctor's] appointment but I'll see if I can get out earlier than expected."

The Assistant Principal did not receive these emails until the morning of the next day, when the annual IEP team meeting was scheduled to take place. He wrote back shortly after 8:00 AM, again telling Mother that the annual IEP team meeting had to be held before the end of the school year because the law required a meeting every year and the school staff would not be working during the summer vacation. He suggested that Parents attend by telephone, and told Mother he would call her if she could not

attend the meeting. He wrote that she could request another IEP team meeting during the next school year.

Mother sent a lengthy response shortly after 10:00 AM. She asked a number of questions and repeated complaints she had about how Student had been mistreated at school. At one point, she wrote "Hopefully if I cannot make it you'll be able to make the right decisions this time around because [Student] too deserves to be in school just like every child does." After raising a number of allegations of mistreatment, Mother then wrote "Hopefully I'll be available when you call if not I hope that you have a great plan full of services and resources so my child can have a great education as every child should." She then warned that she did not want to file another due process action.

THE MAY 31, 2019 IEP TEAM MEETING

The Assistant Principal did not respond until after the IEP team meeting. He informed Parents that the IEP team meeting had been completed without Parents. He wrote that he had called Mother and left a voicemail for her to participate by phone, and was sorry that she could not attend. He told her that he would be sending her a copy of the IEP report for Parents to review and sign, and would include a self-addressed stamped envelope for her to return the consent page.

All communication between Parents and the Assistant Principal took place by email. Until the phone call on May 31, 2019, during the IEP team meeting, Los Angeles never tried to reach Parents by telephone despite their lack of responsiveness. From May 1 to May 31, the full extent of Los Angeles' efforts to reach parent to schedule the IEP team meeting was six emails and the one attempt during the IEP team meeting to reach Parents by telephone. In the Parent Participation grid in the IEP team meeting report, the choice was marked to report that Parent was notified three times of the

meeting time and place and Parents did not respond to any of the notices. Seven notifications are listed. One of these is the May 3, 2019 notification sent by the Assistant Principal, and the remaining six are three emails and three letters sent by him on May 16, 2019.

Parent consistently expressed a desire to attend the IEP team meeting and asked that it be delayed or rescheduled. The Assistant Principal believed that Parent asked to attend the meeting by telephone, but based this solely upon her statement that she would try to get out early from her doctor's appointment. Similarly, he believed that Parent gave him permission to hold the meeting without her, basing his belief on the two cited parts of her email where she wrote that she hoped he would make "the right decisions this time" and come up with "a great plan full of services and resources." At no time did he directly ask for permission to hold the meeting without Parents. Parents had never before failed to appear for a scheduled IEP team meeting.

THE OFFER OF BEHAVIOR SUPPORT SERVICES

The May 31, 2019 IEP team meeting report describes Student's present performance level for behavior as interfering with her educational progress. It notes that she "needs to be able to self-advocate, such as when needing to use the bathroom or when she is uncomfortable with her environment or peers." A goal was written in behavior support for her to use "agreed upon strategies designed within her comfort level" to advocate for her wants and needs.

As part of its offer of FAPE, Los Angeles offered Student 1800 minutes weekly of behavior intervention implementation services during the school year and 1200 minutes weekly of behavior intervention implementation services during the extended school year. The behavior intervention plan attached to the IEP noted that Student's behavior

caused her a lack of work production and loss of instructional time, but that she had only a moderate need for a plan. In addition, it noted that Student's behavior was not disruptive to other students. The plan would provide Student with social skills instruction, task structuring, and a communication system. The plan was intended to help Student express her needs.

LEGAL CONCLUSIONS

In this discussion, unless otherwise indicated, this introduction's legal citations are incorporated into each issue's conclusion. All references to the Code of Federal Regulations are to the 2006 version.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, 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 Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, 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).)

EDUCATIONAL DUE PROCESS HEARINGS FRAMEWORK

A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. This statement describes the child's needs, academic and functional goals related to those needs. It also provides a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the Individuals with Disabilities Education Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley*

interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (Id. at pp. 200, 203-204.)

In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “[E]very child should have a chance to meet challenging objectives.” (Ibid.) *Endrew F.* explained “[t]his standard is markedly more demanding than the ‘merely more than de minimis’ test [¶] . . . The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (Id. at pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was “[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court’s analysis in that case.” (Id. at p. 1001.) The Court noted that “[a]ny review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” (Id. at p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535, 537.)

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; Ed. Code, §§ 56501, 56502, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Student requested the hearing in this matter, and therefore Student has the burden of proof on her issues.

ISSUE 1: HOLDING AN IEP TEAM MEETING WITHOUT PARENTS

Student contends that Los Angeles violated the IDEA by holding the May 31, 2019, IEP team meeting without them. Los Angeles argues that it acted reasonably in holding the meeting because Parents were given notice of the meeting, knew that it had to be held before the end of the school year, and had told Los Angeles that she would try to attend.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code § 56500.4.) The parents' right to be involved in the development of their child's educational plan is among the most important of procedural safeguards. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044. (*Doug C.*)) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss

a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

The emphasis put on parental participation in educational planning recognizes the central role parents play in supporting their children's education. *Honig v. Doe*, 484 U.S. 305, 311 (1988) ("Congress repeatedly emphasized throughout the [IDEA] the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness.") "Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know." *Amanda J. v. Clark Cnty. Sch. Dist.*, (9th Cir.2001) 267 F.3d 877, 882.

School districts are required to "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded an opportunity to participate" including providing ample notice and "scheduling the meeting at a mutually agreed on time and place." 34 C.F.R. § 300.322(a). Moreover, if a parent cannot attend, the agency must offer other methods of participation such as video or teleconferencing. 34 C.F.R. §§ 300.322(c), 300.328. Most importantly, a meeting may only be conducted without a parent if "the public agency is unable to convince the parents that they should attend." When that happens, the agency must keep a detailed record of its attempts to include the parent. § 300.322(d). The Ninth Circuit has held that parental "involvement in the 'creation process' requires the [District] to include the [parents in an IEP meeting] unless they affirmatively refused to attend." *Shapiro v. Paradise Valley Unified Sch. Dist.*, (9th Cir.2003) 317 F.3d 1072, 1078, superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B).

In *Doug C.*, the school district and the parents had a difficult relationship, which the district blamed upon the parent. The Ninth Circuit noted that a district may not avoid its responsibilities by blaming the parents because the IDEA protects the Student's interests, not the parents. (*Id.*, 720 F.3d at 1045.) Unless a district is unable to convince parents that they should attend the IEP team meeting, it may not take place without them. 34 C.F.R. §§ 300.322(d). *Doug C.* held that a school district may not "prioritize" the schedules of its own staff or its need to meet statutory deadlines over parental attendance. (*Id.*, 720 F.3d at 1045.) Further, it noted that delays in meeting IEP deadlines do not deny students a FAPE where they do not deprive a student of any educational benefit, citing *A.M. v. Monrovia*, (9th Cir.2010) 627 F.3d 773, 779. Only in rare circumstances will a student's immediate need for services outweigh the importance of parental participation. (*Id.*, 720 F.3d at 1047.)

The facts here follow a similar track. Los Angeles faced a rapidly-approaching deadline because of the late start to the 2019-2020 school year. The Assistant Principal realized in early May that he had little time to complete all annual IEPs done in early August 2018. He sent notice to Parents on May 3, 2019, for a meeting on May 16, 2019. When Parents did not respond until May 14, 2019, he cancelled the meeting and sent out notices on May 16 and 17 for three different meeting times. One was on May 24, and the other two were on May 31, 2019. The primary choice was the 10:30 AM time on May 31, 2019.

Parents did not respond until May 30, 2019. At hearing, Parent testified that she tried to get the Assistant Principal to reschedule the meeting and called the school's principal and the Local Plan Area director for help. However, her testimony about the calls was not clear, and, in any event, is not necessary to the decision. When Parent did

respond, she stated that she would try to attend but asked that the meeting be rescheduled.

The Assistant Principal did not get Parents' responses until the next morning. He did not offer to reschedule the meeting despite Parents' request, and instead suggested that Parents attend by telephone. He said the IEP team meeting could not be rescheduled, but told Parents that they could call to request an IEP team meeting during the next school year. It is possible that the Assistant Principal believed that the IEP team meeting could not be rescheduled because there were only 10 days before the teachers left on June 10. He believed that 10 days' notice was required before an IEP team meeting could be scheduled. The IDEA does not impose specific timelines in connection with the IEP team meeting notice requirement. It simply requires that the school district notify the parents of the IEP team meeting early enough to ensure that they will have an opportunity to attend. (34 C.F.R. 300.322(a)(1).) Ten days is a customary period, and is generally considered adequate time for parents to make whatever arrangements are necessary to attend. (Letter to Constantian (OSEP 1990) 17 IDELR 118.) As noted above, however, even if it were a procedural violation, it would be one that did deprive Student of educational benefit. (*A.M. v. Monrovia, supra.*)

The Assistant Principal believed that Parents requested to appear by telephone and that Parents implicitly authorized him to hold the meeting without them. To its credit, Los Angeles did not present such counterfactual arguments in its briefing. Parents clearly did not seek telephone participation at the IEP and did not give permission for the meeting to be held without them. Parents wanted to participate, and did not need to be convinced to attend.

Instead, Los Angeles argues that it acted reasonably by holding the IEP team meeting without her. It notes that Parents had adequate notice of each proposed IEP

team meeting. The IEP team meeting had to be held before the end of that school year, since the new school year school did not start until after the August 16, 2019 anniversary date. Los Angeles argues that it had to hold the IEP to be in compliance with Federal law and state regulations, and that it informed Parents of that necessity. Last, Los Angeles argues that it acted reasonably because Parent never definitively stated that she would not attend the May 31, 2019 meeting.

This argument does not confront the concerns set out in *Doug C.* The fact that Los Angeles provided adequate notice is not a factor considered in evaluating whether a meeting may go forward without parents. Likewise, the fact that the IEP needed to be completed before the teachers left on June 10 does not justify holding the meeting on May 31, 2019. If the need to hold the IEP before June 10 was so overridingly important, it is inconsistent that the only times Parents could select from to hold an IEP meeting were from 8:00 AM to 1:00 PM between May 24 and June 5, and that they had to make their decision before May 22, 2019. By limiting Parents' choices in that way, Los Angeles made clear that it was prioritizing its staff's scheduling over parental participation in violation of the holding in *Doug C.* Similarly, the fact that Parent never definitively said that she would not attend the May 31, 2019 IEP team meeting is not a reason to hold the meeting without her. Given that Parent communicated her desire to attend but informed Los Angeles about a medical conflict, the meeting should have been suspended, not conducted to completion, when Parent did not show up. This is not a case where a parent has abused the system by agreeing to dates and then not attending. Parents had never before failed to attend a scheduled IEP team meeting, and they requested that the meeting be rescheduled when a parent could attend.

Los Angeles further argues that the error in holding the IEP team meeting without Parents should be excused because it did not implement the IEP without

Parent's consent and because it offered to convene a new IEP team meeting in the following school year. As noted in *Doug C.*, such "[a]fter-the-fact parental involvement is not enough" because the IDEA contemplates parental involvement in the "creation process." (*Id.*, 720 F.3d at 1048, citing *Shapiro*, 317 F.3d at 1078.)

The May 31, 2019 IEP team meeting should not have been held. Although it was clearly difficult for Los Angeles to communicate with Parents, that difficulty does not excuse failure to follow the law. Parents have carried their burden of proof on Issue One.

ISSUE 2: OFFERING BEHAVIORAL SERVICES

Student contends that Los Angeles denied her FAPE by adding behavioral services to her IEP plan at the May 31, 2019 IEP team meeting because those behavior services were a pretext to have student marked as a behavior problem and a bad kid. Los Angeles argues that the services were reasonably calculated to meet her needs caused by her disability.

An IEP team must consider the use of positive behavioral interventions, supports and strategies when a child's behavior impedes his or her learning or that of others. (34 CFR §300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The team may address the behavior through annual goals (34 CFR §300.320(a)(2)(i)), and may include modifications, support for teachers, and any related services necessary in the IEP to achieve those behavioral goals (34 CFR §300.320(a)(4).)

Student's autism caused her communication difficulties and social withdrawal. Student's physical limitations made toileting difficult for her, and her shyness made it difficult for her to express her needs. The IEP team responded to her needs by establishing her performance levels and deriving goals from them, and then establishing

supports and services to meet those needs. The behavior supports set out in the IEP are, at least, not inappropriate. Parents do not argue that they were inadequate, but that no such services should have been offered. Parents' belief that a bad motive, perhaps connected to their complaints about how Los Angeles has responded to Student's toileting needs, drives the inclusion of these services is not supported by facts presented in this matter. Parents have presented no evidence of those things other than their own suspicions and beliefs, and so have not carried the burden of proof to show that Los Angeles' offer of behavior services denied Student a FAPE. The issue is moot, however, as the IEP team meeting should not have been held without allowing parental participation, and the claim is denied on that basis.

REMEDY

Student is represented by Parents, who do not have legal training. Students did not present evidence of the type, amount, duration, and need for any compensatory education. In their closing brief, Parents requested \$20,000,000 in compensatory damages, which are not recoverable in actions before OAH, and that Student and her sister be placed in private school at Los Angeles' expense. These requested remedies are not appropriate. In addition, Parents have kept Student out of school for all or nearly all of the 2018-2019 school year. The amount of services necessary to meet Student's needs and to put her in the position she would have been but for Los Angeles' failure to offer FAPE is impossible to calculate based upon the evidence presented and due to Parents' decision to keep Student home from August to the end of May in the 2018 to 2019 school year.

There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to

determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) However, this is not a case where Parents are seeking reimbursement and their actions may reduce remedy. A student should not be punished for a parent's missteps. No reduction in compensatory services has been made in this award of relief.

Equitable considerations require educational compensation for Los Angeles' failure to allow parental participation at the May 31, 2019 IEP team meeting. If Parents had attended and participated, it is possible that an acceptable education plan could have been worked out and Student would have been receiving instruction from that date. It is also possible that the meeting would have ended in impasse, and Parents would have held Student out of school. However, that possibility should not affect Student's entitlement to compensation.

Home and Hospital Instruction generally provides one hour of instruction per school day, with some students receiving more and some less. This decision adopts that calculation, and will award one hour of instruction from a Los Angeles Home and Hospital Instruction provider or a non-public tutoring service, at Parents' choice, for each day of missed instruction at Los Angeles Unified Schools at Student's grade level from June 1, 2019, until a new IEP team meeting has been convened with Parents' participation and an offer of FAPE has been made. Parents shall propose a set of at least five dates and times for the IEP team meeting during normal weekday hours. This compensatory award shall cease accruing if Parents fail to show at an agreed-upon meeting time they proposed and no later than three months after the date of this decision unless both parties agree that the IEP team meeting and offer of FAPE needs to be delayed beyond that time.

In addition, the IEP team members currently employed by Los Angeles who attended the May 31, 2019 IEP team meeting shall take a minimum of four hours training on the scheduling of IEP team meetings within two months of the date of this order.

ORDER

Los Angeles shall provide Student with one hour of instruction from a Los Angeles Home and Hospital Instruction provider or a non-public tutoring service, at Parents' choice, for each day of missed instruction at Los Angeles Unified Schools at Student's grade level from June 1, 2019, until a new IEP team meeting has been convened with Parents' participation and an offer of FAPE has been made. Within 10 school days of this decision, Parents shall propose five dates that are within 40 school days of this decision for the convening of Student's IEP team meeting, on a school day and time during normal school hours. The earliest date proposed by Parents must be no earlier than 10 school days after the date of this decision. Los Angeles shall respond in five school days to Parents' choice of dates and time and select one date and time. This compensatory award shall cease accruing if Parents fail to show at an agreed-upon meeting time they proposed and no later than three months after the date of this decision unless both parties agree that the IEP team meeting and offer of FAPE needs to be delayed beyond that time.

Los Angeles shall provide each of Student's IEP team members currently employed by Los Angeles who attended the May 31, 2019 IEP Team meeting with a minimum of four hours training on the scheduling of IEP team meetings within two months of the date of this order.

Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. Student prevailed on the first issue and neither party prevailed on the second issue as the issue was moot.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings