BEFORE THE IDAHO STATE DEPARTMENT OF EDUCATION
(Administrative Hearing)

IN THE MATTER OF THE DUE PROCESS HEARING REQUEST [redacted] by and through Parent, [redacted], Petitioner. v. West Ada School District No. 2, Respondent.	)	No: H-20-04-06a Memorandum Decision on Motions for Summary Judgment and Order

INTRODUCTION

This is an administrative proceeding under the Individuals with Disabilities in Education Act (IDEA). The Petitioner is the Parent ("the Parent") of [redacted] student ("the Student") attending West Ada School District #2 ("the District"). The Parent contends in the Due Process Hearing Request that the District violated the IDEA and denied the Student a Free and Appropriate Public Education (FAPE). Specifically, the Parent contends that the District failed to implement the Student's IEP by refusing to permit the Parents to interview, select and adequately train nurses hired to provide the Student with health services; refusing to permit the Student's parents from serving as "other qualified persons" (as that term is used in the IDEA); and permitting a substitute nurse to shadow and work in place of the Student's regular nurse without parental consent and failing to convene an Individual Education Program (IEP) Team Meeting.

The Parent requests that District implement the Student's IEP by allowing the Parent to interview, select and adequately train the nursing staff assigned to the school to provide health services to the Student; that the District allow the Student's parents to accompany the Student at school and observe the Student's nurse as they deem necessary; that the Student's parents be allowed to fill in and serve as other qualified persons providing school health services when the Student's nurse is unavailable for any reason; and that the District provide the Student with compensatory education when the Student did not attend school in November and December 2019 for 26 days and for additional time when the

Student did not attend school when the nurse was unavailable to accompany the Student at school in the spring of 2020 and prior to the District's "soft closure" as result of COVID 19.

The Parties have waived in writing the timelines of 34 C.F.R. § 300.515 for the Hearing Officer's decision.

The Parties have filed contemporaneous and competing Motions for Summary Judgment consistent with a Pretrial Order. The Administrative Record is identified in the Transmittal of the Record. This Memorandum Decision constitutes the Hearing Officer's Findings of Fact and Conclusions of Law and Decision.

PREHEARING MOTIONS

The Parties have filed a variety of objections or motions to strike with respect to the form of or the actual evidence or support for the arguments submitted by the other. It is within the Hearing Officer's responsibilities to determine what is relevant. Those evidentiary motions, regardless of how they are characterized by the Parties, are denied. The Parties, as set out below, have agreed on the material facts necessary for a decision in this matter. Any disagreement about how those facts may have been submitted or the basis for the arguments submitted are resolved based on the Parties' agreement as to the material facts.

APPROPRIATENESS OF SUMMARY JUDGMENT AND THE BURDEN OF PROOF

The IDEA does not provide an administrative framework for prehearing practice, deferring to state administrative practice and procedure. The Idaho Administrative Procedure Act permits dispositive prehearing motions including motions for summary Judgment. IDAPA 04.11.01.565.

The standard for determining summary judgment is the same in an administrative proceeding as set forth in the Idaho Rules of Civil Procedure. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). Since the Parties ask that evidence which was not part of the original pleadings be considered, a ruling on a motion to dismiss is not appropriate. *See* I.R.C.P. 12(d).

The Parent as the party bringing the Request for the Due Process Hearing bears the burden of proof to prevail in this matter. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005).

FINDINGS OF FACT

These findings are based upon the Parties' Statements of Fact and Undisputed Facts. The facts may be weighted differently than suggested by the Parties or an interpretation of written evidence may be different than argued by the Parties.

The Student, [redacted], is disabled and qualifies for special education under the category of multiple disabilities. The Medical Information statement in the IEP indicates that (the Student):

[redacted]

The Student needs assistance with most activities of daily living and generally in the school setting with a [redacted]

The Student's IEP dated April 9, 2019, contains communication, mathematics, and written language goals. In addition to academic supports, the Student receives related services, including Occupational Therapy, Speech Therapy, Physical Therapy consultation, Hearing Impaired Interpreter Services and Nursing Services.

The IEP Service Grid provides that the Student receives 2400 minutes of nursing services weekly (8 hours a day). In the Optional Statement of Service Delivery, the IEP includes the following: (the Student) "has a private duty nurse that accompanies (the Student) at school and assists with [redacted] (IEP, p. 11 of 16). The Student participates in the general education environment approximately three quarters of the school day.

The IEP's Consideration of Special Factors indicates that the Student requires a Health Care Plan (HCP) which is "attached" (emphasis added). The HCP that is included in the Exhibits offered by the Parties is dated September 20, 2019, and for these purposes was treated as the HCP referenced in the April 9, 2019, IEP. The IEP Team Meeting Notes of April 9, 2019, do not contain any reference to a discussion of the development or implementation of the HCP.

The Health Care Plan provides the following (in this format):

Nursing Diagnosis	Goal	Intervention	Outcome
Coverage for absence	The Student will be safe in the school environment	If the Student is absent the school communicates with Agency.	
		If the Agency provider is absent, Agency informs family. The Agency may or may not be able to provide a substitute private duty nurse. Team determines if parent providing care at school is appropriate. Family may opt to keep student home.	

The Individualized HCP is signed by the School Nurse but not by the Parent or the Primary Care Physician. There is no evidence as to the process of the creation of the HCP or who might have participated in the HCP creation. The Parent did not object to the content or the process of the creation of the HCP.

The District contracts with a private nursing agency (Agency) to provide LPN and RN Skilled Nursing Services. In pertinent part, the Contract provides that the Agency will "…render the professional services enumerated on the IEP Services page and the student plan of care…," that those professional services may not be assigned and that the services provided must be approved by the District.

The Agency provided a private duty nurse at the beginning of the 2019-2020 school year, to provide the nursing services provided in the Student's IEP. The private duty nurse had been "interviewed, selected and trained" by the Parent.

The Student's Private Duty Nurse (Nurse) advised the District and Parent that because of a personal medical issue, the Nurse was going to be unavailable for work beginning November 6, 2019, and continuing potentially through the end of December 2019.

The Parent anticipated filling in for the Nurse until the Nurse's return. However, the District had made arrangements with the Agency for qualified substitute nursing services and notified the Parent of those arrangements on November 4, 2019. Several conversations occurred between the District and the Parent about the circumstances of the substitute nursing services. The Parent objected to the lack of training and the lack of opportunity to confirm that the substitute nurse would be acceptable to the Parent.

Based on the Parent's objection to the substitute nursing arrangements made by the District, the Student did not attend school between November 6 and December 20, 2019. The Student returned to school on January 6, 2020, upon the return of the regular Nurse but was removed by the Parent any time that the Nurse was not available for portions of the school day. The Student had not attended school since Thursday, March 12, 2020.

Beginning March 16, 2019, the District began a soft closure of school buildings which ultimately resulted in school building closures because of COVID 19, which continued until the filing of the due process complaint.

ANALYSIS

The Parent argues that the District failed to implement the Student's IEP, resulting in a denial of a FAPE. For purposes of the analyzing the Parent's claims and the District's response, the issues are organized as identified by the Parent in the Request for a Due Process Hearing:

1. Did the District fail to implement the Student's IEP by refusing to allow the Parents to interview, select and adequately train any nurses hired to provide (the Student) with health services.
2. Did the District fail to implement the Student's IEP by refusing to allow the Student's Parents to serve as "other qualified persons" for purposes of providing health services.

3. The District failed to implement the Student's IEP by permitting a substitute nurse to shadow and work in place of the Student's nurse during her absence, without parental consent and without convening an IEP Team Meeting.

The District's alleged failure to implement the Student's IEP if proven by the Parent could result in a denial of a FAPE and would result in a violation of the IDEA.

The IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education and providing financial assistance to enable states to meet their educational needs. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992) (citing *Honig v. Doe*, 484 U.S. 305, 310 (1988)). The IDEA ensures that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]" 20 U.S.C. § 1400(d)(1)(A). The IDEA defines FAPE as special education and related services that –

> (A) have been provided at public expense, under public supervision and direction, and without charge;
> (B) meet the standards of the State educational agency;
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

To appreciate the Parties' arguments, the analysis begins with the language of the Student's IEP and attached Health Care Plan. The Student's IEP is effective for the period of April 9, 2019, through April 8, 2020.

An IEP Team Meeting was held on April 9, 2019, and no subsequent IEP Team Meeting occurred prior to the filing of the Request for a Due Process Hearing. There is nothing in the record that suggests that the Parent objected to the text of the IEP or suggested at the IEP Team Meeting or at any other time that the IEP was inadequate or failed to address the Student's unique circumstances.

The Student is to receive the related service of "nursing services," provided by a "school nurse," the entire school day as set out in the IEP Service Grid.

The IEP's Optional Statement of Service Delivery further describes the nurse as a "private duty nurse" accompanying the Student at school and assisting with toileting, suctioning, feeding and mobility. The definition of a private duty nurse is not provided. The services required to be provided by the IEP were provided by the District. Additionally, there is no reference in the IEP dated April 9, 2019, to the Parent's participation in the selection of the school nurse.

The Student requires a Health Care Plan which is "attached." It should be noted, however, that the Health Care Plan by this reference can only be considered informational. The Health Care Plan is not incorporated by reference, and the Health Care Plan which the Parties agree applies was created after the April 2019 IEP Team Meeting. This does not mean that the Health Care Plan was not effective at the time applicable here; this finding only calls into question the relationship of the Health Care Plan and the IEP.

The Health Care Plan indicates that the Student's Agency Nurse supplies the necessary nursing but contains no reference to the Parent providing nursing services. No mention of the Student's IEP is found in the Health Care Plan. The Health Care Plan reflects that the District contracts with a private nursing agency to supply qualified school nurses based on the District's determinations of the nurse's qualifications.

Though not satisfying the specific question, the requirements of the IDEA were satisfied where the IEP noted the "student's peanut allergy and [the] school district had [a] separate medical plan to address the allergy." *Albertville City Bd. of Educ. v. Moore*, 2020 WL 2767284, at *5 (N.D. Ala. May 28, 2020) (citing *Barney v. Akron Bd. of Educ.*, 763 F. App'x 528, 533 (6th Cir. 2019)).

The only reference in the HCP to the Parent's participation (other than general references to collaboration as needed to address the Student's health) is the following:

> *If the Agency provider is absent, Agency informs family. The Agency may or may not be able to provide a substitute private duty nurse. Team determines if parent providing care at school is appropriate. The family may opt to keep student home.*

(emphasis added).

Neither the Parent nor the District provides any evidence as to the source or origin of this language or the process by which the Health Care Plan was drafted.

The Agency notified the Parent and the District that the person who had been serving as the Agency nurse was going to be absent. The Agency then provided a substitute private duty nurse. However, based on the language in the HCP, it was not necessary for "the Team" (whatever that reference may mean) to meet to determine if it was appropriate for the Parent to provide care at school. Based on the language of the HCP, it would only be necessary for "a Team" to meet if the Agency would not be able to provide a substitute private duty nurse.

The Parent removed the Student from school during the time that the original Nurse was absent.

1. Did the District fail to implement the Student's IEP by refusing to allow the Parents to interview, select and adequately train any nurses hired to provide (the Student) with health services.

There is no provision in the IEP or the HCP that permits the Parent to interview, select or train nurses who provide the Student necessary Health Services.

Even if there was such language in the Student's IEP, the District would not be required to employ or utilize personnel that the Parent recommended or chose. It is generally acknowledged that the District is responsible for the selection and assignment of personnel. Though not entirely on point, *Slama ex rel. Slama v. Independent Sch. Dist. No. 2580,* 259 F. Supp. 2d 880 (D. Minn. 2003), offers in dicta that this rationale applies with equal force to personnel decisions. The IDEA and the Rehabilitation Act do not permit parents to make decisions regarding the personnel a school district hires and assigns to provide educational services. "The applicable law does not permit parents to usurp the school district's role in selecting its staff to carry out the IEP's provisions." *G.K. ex rel. C.B. v. Montgomery Cnty. Intermediate*

Unit, 2015 WL 4395153, at *15 (E.D. Pa. July 17, 2015) (citing *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley,* 458 U.S. 176, 209 (1982)). Moreover, while "parents are members of the IEP team and entitled to full participation in the IEP process, they do not have the right to control it." *G.K.*, 2015 WL 4395153, at *15 (quoting *K.C. ex rel. Her Parents v. Nazareth Area Sch. Dist.*, 806 F. Supp. 2d 806, 829 (E.D. Pa. 2011)). In affirming an IHO decision and without citing any authority, a federal court determined that the "failure to use the parent's preferred nurse" did not violate the IDEA. *Swanson by Swanson-Houston v. Yuba City Unified School District*, 68 IDELR 215, 116 LRP 43873 (E.D. Cal. Oct. 13, 2016).

It is understandable that the Parent would want to participate in the process of choosing the individuals providing the Student with the necessary nursing care so that the Student can participate in the District's general education curriculum, particularly because it is clear that the Parent not only is capable of providing such necessary care, but has done an admirable job in providing for the Student's heath care needs. This decision is in no way intended to suggest that the Parent does not have the best interest of the Student at heart.

If the private duty nursing agency also supplies the Parent with nursing services for the Student at home, it would make sense that the Parent would have participated in the interviewing, selection and training of the Student's private duty nurse. However, the courtesy that the Agency may have extended or the contractual right that the Parent has to choose who would supply private duty nursing services in its relationship with the Agency for nursing care at home does not as a matter of law extend to the process by which the District would provide the necessary nursing services at school.

No authority has been offered for the proposition that the fact that the Parent may have participated in the "interview, selection and training" of the private duty nurse provided by the Agency somehow obligates the District, other than arguing that the IEP and HCP require the District to utilize the personnel chosen by the Parent. Though not argued by the District, the actions of the Parent and the Agency do not estop the District from contracting for qualified nursing providers based on its contract with the Agency.

The District did not fail to implement the Student's IEP by refusing to allow the Parents to interview, select and adequately train any nurses hired to provide the Student with the nursing services set forth in the Student's IEP.

2. Did the District fail to implement the Student's IEP by refusing to allow the Student's parents to serve as "other qualified persons" for purposes of providing health services.

The Student's HCP does not require that the Team (without clarifying which "Team") meet to consider if the Parent could appropriately provide care at school when the Agency provides a substitute private duty nurse. There would be no reason for the "Team" to consider the appropriateness of the Parent supplying care if an Agency-designated substitute has been made available.

Though the IDEA may permit the use of other qualified persons to provide health services, 34 C.F.R. § 300.34(c)(13), the IEP identified that the Student was to receive "nurse services" (IEP, p. 10 of 16). The IDEA regulations provide that *"(s)chool nurse services are services provided by a qualified school nurse." Id.*

The District retains the authority to determine the qualifications of the staff to supply the Student the necessary nursing-related services as described above. The Parent only indicates that there are situations in which a parent or family member has been treated by a school district as an "other qualified person," not that a parent may require that the District utilize a parent as an "other qualified person."

As found above, the District retains the right to select the personnel to provide the Student with the services described in the Student's IEP.

The Parent also relies on several letters from the Student's Primary Care Provider (the "Physician"), who recommended that the Parent is capable and has done an amazing job of providing the necessary care for the Student. There is no question of the Parent's abilities and more than appropriate care of the Student; however, the Physician was not a member of the IEP Team. The Student's Physician's recommendations, made after the date of the IEP Team Meeting, indicate that the Parent could provide the substitute nursing services but are not binding on the IEP team. Nor is there any showing that the Physician participated in the development of the Health Care Plan or reviewed the Health Care Plan.

The District and Agency's nursing services contract determines the circumstances of providing nursing services to the District.

The District did not fail to implement the Student's IEP by refusing to allow the Student's parents to serve as "other qualified persons" for purposes of providing health services.

3. Did the District fail to implement the Student's IEP by permitting a substitute nurse to shadow and work in place of the Student's nurse during her absence, without parental consent and without convening an IEP Team Meeting.

This issue is characterized as the District's failure to permit parental participation in several ways: is parental consent required for the substitute nurse provided by the agency to shadow the Student's private duty nurse; is parental consent required for the District to request that the Agency provide a substitute nurse; is parental consent required for the District to use a substitute nurse; was prior written notice required of the District's decision to use a substitute nurse and was an IEP Team Meeting necessary to consider the District's use of a substitute nurse? These allegations are procedural in nature.

"Procedural flaws in the IEP process do not always amount to the denial of a FAPE." *L.M. v. Capistrano Unified Sch. Dist.,* 556 F.3d 900, 909 (9th Cir. 2009) (citations omitted). Once a procedural violation of the IDEA is identified, the court "must determine whether that violation affected the substantive rights of the parent or child." *Id.* (citations omitted). "[P]rocedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." *Id.* (citation omitted).

Prior Written Notice (PWN) must be sent at "a reasonable time" before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a).

There was no change to the Student's identification as a "student with a disability eligible to receive special education," nor did the District propose to conduct an evaluation of the Student without parental consent.

The Student's educational placement is not changed as a result of the District providing a substitute private nurse.

The Student's educational placement was changed because of the actions taken by the Parent to remove the Student when the Nurse was not available. Consistent with the HCP, the Parent could make that choice; however, that was not a decision that was considered by the Student's IEP Team. The Parent did not show that an IEP Team Meeting was requested and denied by the District.

The Parent did not argue that the IEP or the HCP was inadequate or that at some relevant time prior to the District providing a substitute nurse, the Student's IEP was developed without parental participation. The Parent only argued that the failure to permit the Parent from participating in the process of providing a substitute nurse affected the Parent's participation.

Generally, if the parents have not been denied the opportunity for meaningful participation in the IEP Team process and the student has not suffered any loss of educational opportunity, then the student may have received a FAPE regardless of procedural violations. *Tennessee Dep't of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466 (6th Cir. 1996). The Parent offered no evidence of a loss of an educational opportunity.

The IDEA requires parental consent for district actions in conjunction with preplacement evaluations and reevaluations and the initial placement of the Student pursuant to that eligibility determination. 34 C.F.R. § 300.300. Parental consent is not required for the assignment of District personnel, including a substitute school nurse. Again, the relationship of the Agency and Parent does not diminish the District's ability to approve the Agency's personnel ultimately assigned to a District student.

Nor does the fact that the District may not have permitted the Parent to shadow the substitute nurse affect the Parent's participation in the IEP Process. There was no showing that the request to shadow the substitute nurse was for any other purpose than to train the substitute. There is no requirement in the IDEA permitting a parent to observe their child in the classroom.

Finally, there is nothing in the Student's IEP Team Meeting process which indicates that the IEP Team considered the implementation of the Student's HCP.

The District did not fail to implement the Student's IEP. The Student was provided a free and appropriate public education.

DECISION AND ORDER

The Parent did not meet its burden to demonstrate that the Student's IEP was not implemented. The Parent did not demonstrate that a procedural violation of the IDEA occurred nor was there a loss of an educational opportunity. The actions by the District complained of did not result in the Student being denied a free and appropriate public education. The District is entitled to Summary Judgment.

The Request for a Due Process Hearing shall be and is hereby dismissed.

Dated this 18th day of June, 2020.

Edwin L. Litteneker
Hearing Officer

Memorandum Decision
And Order
emailed June 18, 2020 to:

Courtney R. Holthus
courtney@disabilityrightsidaho.org

Chris Hansen
chhansen@ajhlaw.com

NOTICE

Any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 20 U.S.C. § 1415(i)(2)(A). The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. See 20 U.S.C. § 1415(i)(2)(A).

20 U.S.C. § 1415(i)(2)(B) provides that: "The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, ***if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows***." (emphasis added).

IDAPA 08.02.03.109.05(g) provides that "An appeal to civil court must be filed ***within forty-two (42) calendar days*** from the date of issuance of the hearing officer's decision." (emphasis added).