WO NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lori M. Hack, *et al.*,

Plaintiffs,

v.

Deer Valley Unified School District, *et al.*,

Defendants.

No. CV-15-02255-PHX-JJT

ORDER

At issue is an Administrative Law Judge's ("ALJ") denial of Plaintiffs' Due Process Complaint under the Individuals with Disabilities Education Act ("IDEA"). Plaintiffs filed a Complaint (Doc. 1, Compl.) with this Court seeking judicial review of that denial, and the Court now considers Plaintiffs' Opening Brief (Doc. 11, Br.), Defendant Deer Valley Unified School District's ("Deer Valley") Answering Brief (Doc. 12, Answer), and Plaintiffs' Reply Brief (Doc. 16, Reply). The Court will also resolve Plaintiffs' Citation of Supplemental Authorities (Doc. 18), to which Deer Valley filed a Motion to Strike (Doc. 19), Plaintiffs filed a Response (Doc. 20), and Deer Valley filed a Reply (Doc. 21). The Court finds these matters appropriate for decision without oral argument. *See* LRCiv 7.2(f).

I. BACKGROUND

Plaintiffs raise a claim against Deer Valley on behalf of themselves ("Parents," including "Mother" and "Father") and their minor son, L.M.H. ("Student"), to appeal an administrative decision under IDEA, 20 U.S.C. § 1415(i)(2). Plaintiffs allege that Deer

Valley committed a number of procedural violations of IDEA by refusing to hold a parent-requested Individualized Education Program ("IEP") meeting, failing to develop a new IEP after Student's 2013 IEP expired, and failing to offer an IEP for the 2014-2015 academic year. (Compl. at 2-3.) On November 26, 2014, Plaintiffs filed a Due Process Complaint with the Arizona Department of Education to raise five claims. (Doc. 10, Admin. Record ("R.") 1, Agency Record at 1-3.)

ALJ Kay A. Abramsohn dismissed the first two claims in Plaintiffs' Due Process Complaint on *res judicata* and/or statute of limitations grounds based on a prior due process hearing and the ALJ Decision in Case No. 14C-DP-022-ADE. (Compl., Ex. 1, ALJ Decision ("ALJ") at 2.) Because Plaintiffs do not raise substantive claims with respect to the dismissed claims in their Complaint to this Court, the Court does not address those claims here. ALJ Abramsohn held a hearing on the last three claims in Plaintiffs' Due Process Complaint on May 13, 2015, and issued a decision on October 6, 2015, denying those claims. (ALJ at 1-16.)

In their Complaint before this Court, Plaintiffs allege the ALJ was biased toward Deer Valley and erred by, among other things, finding that Parents did not intend to partake of services offered in the February 2013 IEP, that the record clearly demonstrated Parents did not intend for Student to attend kindergarten until he became six years old, and that Deer Valley had no IDEA obligation to offer or provide special education services to Student until Parents re-enrolled student. Plaintiffs request that the Court reverse the ALJ's October 6, 2015 decision, award Plaintiffs reimbursement for past private education and related expenses, and award Plaintiffs their attorneys' fees and costs in enforcing Student's special education rights. (Compl. at 17.)

The ALJ decision in this case is a 16-page order setting forth the witnesses, evidence, and issues at the hearing along with detailed findings of fact. The ALJ states she considered the entire record, including all the testimony and every exhibit. Because the Court finds the ALJ was thorough and careful in her findings, the Court concludes

they are entitled to significant weight. *JG v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 793 (9th Cir. 2008).

At a November 2012 IEP meeting, using an evaluation conducted that month, Student was determined eligible for special education services under the primary category of Speech Language Impairment. (ALJ ¶ 2.) Student received speech and language services from the District under the November 2012 IEP. (ALJ ¶ 2.) Subsequently, approximately one month after Deer Valley informed Mother that she could no longer attend Student's speech therapy sessions at the elementary school, Parents gave Deer Valley 10-day written notice that they intended "to secure private speech and language services . . . and seek reimbursement from the District for all costs associated with obtaining these services." (ALJ ¶ 2.)

On February 7, 2013, Student's primary eligible category was changed to developmental delay at a multidisciplinary evaluation team ("MET") meeting. (ALJ ¶ 3.) At an IEP meeting on February 28, 2013, Student's IEP team, including Father, created a new IEP for Student. (ALJ ¶ 4.) The anticipated duration for the IEP was February 28, 2013 through February 27, 2014. (ALJ ¶ 4.) According to the February 2013 IEP, Student was eligible for Extended School Year ("ESY") and was scheduled to begin pre-school services on March 11, 2013 at Deer Valley's Arrowhead Elementary School. (ALJ ¶ 4.) Deer Valley provided Parents with a prior written notice ("PWN") regarding the February 2013 IEP. (ALJ ¶ 4.)

Parents did not agree with the February 2013 IEP and proposed a home-based program of special education services for the IEP team's consideration. (ALJ ¶ 5.) An IEP meeting was scheduled for March 18, 2013, to discuss Parents' proposed home-based program, but Parents cancelled the meeting on March 17, 2013, and the IEP meeting was rescheduled for April 23, 2013. (ALJ ¶ 6.) Father attended the April 23, 2013 IEP meeting to discuss Parents' proposal. (ALJ ¶ 7.)

After the April 23 IEP meeting, Deer Valley issued a PWN to Parents rejecting the proposed home-based program because, although it offered speech therapy services, it

did not offer any occupational therapy services for which Student qualified. (ALJ ¶ 8.) In the PWN, Deer Valley again offered Student the February 2013 IEP services that would be provided at Arrowhead Elementary School "as soon as parents register [Student] . . . ." (ALJ ¶ 8.)

On May 2, 2013, a Deer Valley representative informed Mother that there were 12 days left in the academic year and asked whether Student would begin pre-school at Arrowhead that year. (ALJ ¶ 9.) On May 7, 2013, Mother contacted Deer Valley and reiterated Parents' belief that the February 2013 IEP did not offer sufficient services to meet Student's needs. (ALJ ¶ 11.) Mother updated Deer Valley on Parents' additions to the home-based program and stated, "[p]lease consider this letter as our 10 day Notice of Intent to you. We repeat, however, our willingness to meet with you before the school year ends so that we can develop, for the upcoming year, a plan for our son." (ALJ ¶ 11.)

On May 13, 2013, a Deer Valley representative contacted Mother to set a meeting for May 17, 2013, to discuss Parents' proposal. (ALJ ¶ 12.) Mother responded the next day, stating that she was not able to meet on May 17, 2013, asking to set the meeting for the following week, and requesting formal notice that it would be an IEP meeting. (ALJ ¶ 13.) On May 15, 2013, Deer Valley notified Parents that it had withdrawn Student from enrollment pursuant to Arizona laws, retroactively effective March 11, 2013, because Student had not attended school for more than 10 consecutive days. (ALJ ¶ 14.)

Deer Valley informed Parents that they were required to re-enroll Student if Parents wanted Student to attend pre-school for the remainder of the year or kindergarten in the fall of 2013. (ALJ ¶ 14.) Deer Valley also informed Parents that they could request an IEP meeting "at the time of enrollment and the team will be convened within 15 days of our receipt of your written request." (ALJ ¶ 14.) On May 20, 2013, Mother expressed disagreement regarding Student's withdrawal. (ALJ ¶ 15.)

Parents have four sons who were not enrolled in kindergarten by Parents until they had reached six years old. (ALJ ¶ 16.) At least one Deer Valley representative testified that by November 2012, Parents and/or their advocate indicated that they did not intend

to enroll Student in the developmental pre-school program and would not register Student in kindergarten until he was six years old. (ALJ ¶ 16.) Student turned six years old in the summer of 2014. (ALJ ¶ 16.)

II. LEGAL STANDARD

Under IDEA, any aggrieved party may bring a civil action in federal district court after receiving the final decision of an ALJ. 20 U.S.C. § 1415(i)(2)(A). The moving party bears the burden of proving the ALJ's decision was not met by a preponderance of the evidence. *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 908–10 (9th Cir. 2008). The district court "shall receive the records of the administrative proceedings," "shall hear additional evidence at the request of a party," and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C).

In a judicial proceeding under IDEA, a reviewing court is required to conduct a modified de novo review. *M.L. v. Fed. Way Sch. Dist.*, 341 F.3d 1052, 1061 (9th Cir. 2003). The Court reviews de novo the question whether a school district's proposed IEP provided a Free Appropriate Public Education ("FAPE") under IDEA, but reviews the district's findings of fact only for clear error. *Timothy O. v. Paso Robles Unified Sch. Dist.*, No. 14–55800, 2016 WL 2957215, at *9 (9th Cir. May 23, 2016). Mixed questions of law and fact are reviewed de novo, unless the question is primarily factual. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987). Courts must not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). However, it is a matter of district court discretion to decide the degree of deference to give in the ALJ's determination. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1474 (9th Cir. 1993). When reviewing the administrative record as a whole, courts must give "due weight" to administrative bodies, a standard that is less deferential than judicial review of other agencies. *Timothy O.*, 822 F.3d at 1118 (internal citation omitted).

III. ANALYSIS

A. May 2013 IEP Meeting

1. Failure to Hold Parent-Requested IEP Meeting

Plaintiffs claim that the ALJ erred in finding that Deer Valley did not violate IDEA by failing to convene an IEP meeting in May 2013. (Compl. at 3; Br. at 22.) The Court addressed this claim in a previous lawsuit brought by Plaintiffs, and the Court will not re-address it here. (*See L.M.H. v. Ariz. Dept. of Educ.*, Case No. CV-14-02212-PHX-JJT, Doc. 37 at 9-12.)

2. Delays and Requirements

Plaintiffs have also re-fashioned the above claim in their Complaint, maintaining that the ALJ erred in finding that Deer Valley did not violate IDEA by placing unnecessary delays and requirements on the May 2013 parent-requested IEP meeting. (Compl. at 3; Br. at 22.) Plaintiffs claim that Deer Valley violated IDEA by misleading Parents as to the unavailability of IEP team members for a meeting during the last week of the 2012-2013 school year and by unilaterally withdrawing Student from the District and requiring that Parents re-enroll Student before scheduling an IEP meeting. (Br. at 22-25.) Plaintiffs cite *Doug C. v. Hawaii* in support of this claim. 720 F.3d 1038, 1046 (9th Cir. 2013).

In *Doug C.*, a father cancelled and rescheduled an annual IEP meeting several times. *Id.* at 1041. Due to illness, the father could not re-schedule the meeting before the expiration of the previous school year's IEP. *Id.* at 1042. Because the previous IEP was soon to expire and school representatives had rescheduled so many times, the school held an IEP meeting without the father. *Id.* The father subsequently reviewed the IEP, but no substantive changes were made. *Id.* The court found that the Student was denied a FAPE because the school failed to include the father in the IEP revision meeting. *Id.*at 1047.

The Court finds important distinctions between the facts of this case and those in *Doug C.* Here, unlike in *Doug C.*, Parents had already provided Deer Valley with a 10 day Notice of Intent rejecting the February 2013 IEP, and Student had missed almost two

months of pre-school services offered through that IEP. In *Doug C.*, the father was actively trying to participate in creation of an IEP for which the student was to immediately partake. Unlike in *Doug C.*, the circumstances in this case leading up to May 2013 indicate that Student would not be immediately affected by failure to hold an IEP meeting before the end of the school year.

In May 2013, Parents indicated to school representatives that they wanted to discuss a plan "for the upcoming school year." (R. 100.) At that time, there were less than 12 school days left in the school year, and Deer Valley could still meet its IDEA obligations by holding an IEP meeting in August of the following school year. Unlike *Doug C.*, there was no immediate pressure necessitating an IEP meeting here. Assuming that Parents intended to enroll Student in the fall before he was six years old, Deer Valley would have had an IEP in effect at the beginning of the school year and could have scheduled an IEP meeting upon request from Parents within the 15 days required by IDEA. As this Court found in Plaintiffs' prior case, it was not unreasonable for Deer Valley to wait until the following school year to hold an IEP meeting upon request from Parents. (*See L.M.H. v. Ariz. Dep't of Educ.*, Case No. CV-14-02212-PHX-JJT, Doc. 37 at 11.)

Plaintiffs also claim that Deer Valley's unilateral withdrawal of Student pursuant to A.R.S. § 15-907(A)(1)(a)(i) was disingenuous because that statute only applies to pre-school students with disabilities who are enrolled more than 360 minutes per week. (Compl. at 4.) This claim also fails because, no matter which program the Court considers to determine the applicability of this statute, Student meets it. Services offered by Deer Valley under the February 2013 IEP, scheduled to begin on March 11, amounted to more than 600 minutes per week. (R. 94 at 4.) Under Parents' home-based program in which Student had been partaking since November 2012, Student was receiving between 10 to 20 hours of services each week. (R. 95.) Although the amount of services offered under the IEP by the Local Education Agency ("LEA") is the determining factor for the

applicability of A.R.S. § 15-907(A)(1)(a)(i), Plaintiffs' claim fails even if the Court considers Student's enrollment in Parents' home-based program.

Harmless procedural errors do not constitute a denial of a FAPE. *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 910 (9th Cir. 2008). This Court grants relief for a procedural error if the error "resulted in a loss of educational opportunity or significantly restricted parental participation." *Id.* (citation omitted). An educational opportunity is lost where, absent the error, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 657 (9th Cir. 2003) (Gould, J. concurring in part and concurring in the judgment).

Because the Court finds that Deer Valley did not violate the 15 day requirement to hold a parent-requested IEP meeting by postponing it until the following school year, Plaintiffs' claim fails. Even if the Court were to find that Deer Valley committed procedural error by postponing the IEP meeting until the following school year, the facts indicate that Student lost no educational opportunity as a result. For these reasons, the Court finds that Deer Valley did not deny Student a FAPE by placing alleged unnecessary delays or requirements on the May 2013 parent-requested IEP meeting.

B. Expiration of February 2013 IEP

Plaintiffs next claim that the ALJ erred in finding that Deer Valley had no IDEA obligation to create a new IEP for Student upon expiration of Student's February 2013 IEP in February 2014. According to Plaintiffs, there was no contact between Deer Valley and Parents between May 2013 and August 2014, at which time Mother contacted Deer Valley about an offer of a FAPE for the 2014-2015 school year. (Br. at 11.) Plaintiffs contend that Deer Valley still had an IDEA obligation to revise Student's IEP upon expiration of his prior IEP on February 27, 2014.

An LEA is required to review a child's IEP annually. 20 U.S.C. § 1414(d)(4)(A)(i). However, if at any time after the initial provision of special education and related services, the parent of a child revokes consent in writing for special education

and related services, the school is not required to convene an IEP team meeting for further services. 34 C.F.R. § 300.300(b)(4)(i); 20 U.S.C. § 1414(a)(1)(D)(i)(III).

Here, the Court agrees with the ALJ that Deer Valley had no IDEA obligation to create a new IEP upon expiration of Student's February 2013 IEP absent any contact with Parents. Parents had issued their 10 day Notice of Intent rejecting the February 2013 IEP the previous year, and there had been no contact between Deer Valley and Parents after May 2013. Parents had indicated that Student would not start kindergarten until he was six, and Student was to turn six several months later, during the summer of 2014. Just as Deer Valley had no IDEA obligation to hold a May 2013 IEP meeting after Parents rejected the services offered and provided their 10 day Notice of Intent, the District had no IDEA obligation to create a new IEP in February 2014 when Parents had neither contacted the school nor re-enrolled Student in the District. *See* 34 C.F.R. § 300.300(b)(4)(i); 20 U.S.C. § 1414(a)(1)(D)(i)(III).

C. IEP for 2014-2015 School Year

Plaintiffs finally claim that the ALJ erred in finding that Deer Valley had no IDEA obligation to have a new IEP in place for student at the beginning of the 2014-2015 academic year.[1] (Compl. at 2; Br. at 14.) Mother contacted a Deer Valley representative on August 10, 2014 to inform the District that it was still responsible for providing Student a FAPE. (R. 119.) At that time, Mother also offered Student's Present Level of Academic Achievement and Functional Performance ("PLAAFP") in pre-literacy to Deer Valley. (R. 119.) Deer Valley responded to Mother on August 12, 2014, stating that Deer Valley is "ready, able, and willing" to provide Student with a FAPE should Parents decide to re-enroll him, at which time it would reconvene an IEP team to consider the data. (R. 120.) Mother responded on August 13, 2014, that Parents disagreed with Deer Valley's position, believed Deer Valley is responsible for providing Student with a FAPE, and stated that they would "proceed as such." (R. 121.)

[1] Because the Court will remand this matter to the ALJ for further proceedings, it will not address Plaintiffs' contention that Deer Valley consented to Student's private placement in the fall of 2014 by not having a 2014-2015 IEP in place.

At the beginning of each school year, the LEA is required to have an IEP in effect for each child with a disability that resides in that agency's jurisdiction. 20 U.S.C. § 1414(d)(2)(A). "Pursuant to the IDEA, District must make a formal, specific written offer of placement." *J.W. ex rel. J.E.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 459 (9th Cir. 2010) (citation omitted).

In out-of-circuit cases with facts very similar to these, several district courts have agreed with Plaintiffs' position that a school violates IDEA when it withholds an offer of a FAPE from a student residing in that district until parents enroll the student. *See Dist. of Columbia v. Vineyard*, 971 F. Supp. 2d 103, 111 (D.D.C. 2013) (finding that while receipt of a FAPE is predicated on enrollment, an offer of a FAPE is not); *Moorestown Township Bd. of Ed. v. S.D.*, 811 F. Supp. 2d 1057, 1072 (D.N.J. 2001) (finding that upon the request of a parent, a school district is required to evaluate a disabled child in its district and make a FAPE available to him, even if he is enrolled in a private school in another district).

Student has resided in Deer Valley Unified School District since 2009. (Br. at 2.) Deer Valley was aware that Student was a child with a disability that qualified him for special education services. Moreover, Student had already received special education services from the District and had had an IEP in effect until February 2014. Deer Valley provides the Court with no support for its position that it had no obligation to create a new IEP for the 2014-2015 school year upon request by Parents. Even applying the rationale Deer Valley employed previously, Student was six at the time of Mother's request in August 2014, and Deer Valley believed that Parents intended to enroll Student in kindergarten at the age of six. (Answer at 6-7.) Under IDEA, Deer Valley had an obligation to offer Student a FAPE in August 2014 upon request of Parents. *See Fresno*, 626 F.3d at 459 (9th Cir. 2010) (citation omitted).

Upon review, the Court finds that Deer Valley erred by failing to create an IEP for the 2014-2015 school year. The Court grants relief for a procedural error if the error "resulted in a loss of educational opportunity or significantly restricted parental

participation." *Capistrano*, 556 F.3d at 910 (citation omitted). An educational opportunity is lost where, absent the error, there is a strong likelihood that alternative educational possibilities for the student would have been better considered. *Fed. Way*, 394 F.3d at 657. Because Deer Valley provided Parents with no offer of an IEP to consider against alternative possibilities, the Court finds that Deer Valley's procedural error resulted in the loss of an educational opportunity and denied Student a FAPE. The ALJ erred in concluding otherwise.

D. Claims Against Dr. James R. Veitenheimer

In addition to Deer Valley, Plaintiffs also raise their claims against Dr. James R. Veitenheimer, "in his official capacity" as superintendent. (Compl. at 1.) Suing an officer of a government entity in his official capacity is the same as suing the entity. *See Center for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't*, 533 F.3d 780, 799 (9th Cir. 2008). Therefore, the Court will grant Deer Valley's motion to dismiss Plaintiffs' claims against Dr. Veitenheimer (Answer at 4) because he is a redundant Defendant.

IV. CONCLUSIONS

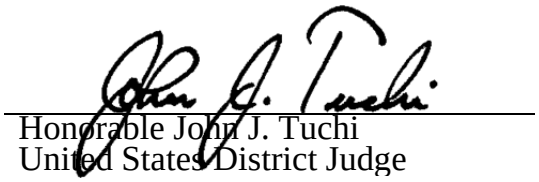
Considering Plaintiffs' claims of procedural violations with respect to the May 2013 IEP meeting and the expiration of the February 2013 IEP, the Court finds no error on the part of the ALJ and finds her decision denying Plaintiffs' claims was supported by evidence on the record. As to Plaintiffs' claim that Deer Valley erred by failing to create an IEP in the fall of 2014, the Court finds reversible error in the ALJ's decision. Although Plaintiffs' Citation of Supplemental Authorities (Doc. 18) did not change the Court's resolution of Plaintiffs' claims, the Court will deny Deer Valley's Motion to Strike (Doc. 19). The Court will also dismiss all of Plaintiffs' claims against Dr. James R. Veitenheimer.

IT IS THEREFORE ORDERED reversing the October 6, 2015 decision of the Administrative Law Judge only with respect to Deer Valley's obligation to provide Student a FAPE for the 2014-2015 school year upon Parents' request in August 2014, and remanding for further proceedings consistent with this Order.

IT IS FURTHER ORDERED denying Deer Valley's Motion to Strike (Doc. 19).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter judgment accordingly and close this case.

Dated this 14th day of July, 2017.



Honorable John J. Tuchi
United States District Judge