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LEGAL UPDATE

April 17, 2017

To: **Superintendents and Special Education Directors, Member School Districts (K-12)**

From: **Jennifer E. Nix** JEN
Assistant General Counsel

Subject: **Recent Ninth Circuit Special Education Cases**
Memo No. 14-2017

The Ninth Circuit recently issued two cases in the area of special education of which you should be aware.

The first, *Avila v. Spokane School District 81*, No. 14-35965, was decided on March 30, 2017.[1] In that case, the Ninth Circuit held that the Individuals with Disabilities Education Act's ("IDEA") two-year statute of limitations with regard to filing a due process complaint does not prohibit a parent from filing a complaint seeking relief for alleged denials of free appropriate public education ("FAPE") that occurred more than two years prior to the filing of the complaint. The IDEA contains two "seemingly contradictory" provisions regarding the filing of due process complaints. (Slip Op. at 10). Section 1415(b)(6)(B) of Title 20 of the United States Code provides that each local educational agency ("LEA") is required to provide, among others:

> (6) An opportunity for any party to present a complaint—
> (A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and
> (B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D)

[1] At the same time as the release of this decision, the Ninth Circuit also issued an unpublished memorandum decision in the same case in which the court found that an assessment for "Specific Learning Disability" was appropriate because the district evaluated the student for reading and writing disorders. Parents had argued that the district should have assessed the student for dyslexia and dysgraphia.

> [specific misrepresentations by the LEA that it had resolved the problem forming the basis of the complaint; or the LEA withheld information from the parent that was required to be provided] shall apply to the timeline described in this subparagraph.

Section 1415(f) describes an "impartial due process hearing," including providing the timeline for requesting such a hearing, which is contained in Subsection 1415(f)(3)(C). That subsection states that:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.[2]

The two subdivisions of the IDEA present a contradiction because the two-year limitations period in Section 1415(b)(6)(B) runs backward instead of forward from the reasonable discovery date. The Ninth Circuit, in harmonizing these two provisions, held that the more specific provision—Section 1415(f)(3)(C) was the controlling provision. (Slip Op. at 17). Accordingly, parents have two years from the date they knew or should have known of the school district's actions that form the basis of their claims in which to file a due process complaint alleging a violation of FAPE. The true impact of this decision will be in how lower courts interpret the phrase "knew or should have known." It remains important to ensure that parents and guardians have copies of all documents relevant to the District's offer of FAPE in their native language, and that parents and guardians receive copies of and understand their parental rights.

The second case, *M.C. v. Antelope Valley Union High School District*, No. 14-56344, was decided on March 27, 2017. This decision contains a number of unique statements and holdings, including:

- "Because disabled students and their parents are generally not represented by counsel during the IEP process, procedural errors at that state are particularly likely to be prejudicial and cause the loss of educational benefits." (Slip Op. at 7).
- Underlying the issues in this case is a procedural error: the school district erroneously indicated on the IEP document that the student was to receive 240 minutes per month of services from a teacher of the visually impaired ("TVI"), when, in fact, the student was supposed to receive 240 minutes per week of TVI services. According to the decision, the parent did not find out that her child was receiving at least 240 minutes per week of TVI services until the first day of the due process hearing, which was approximately a month after the erroneous IEP document was generated. (Slip Op. at 8). The Ninth Circuit held that this lack of notice impeded the parent's right to monitor and enforce the services the student was supposed to receive (which the Ninth Circuit concluded is a facet

[2] California law is substantially similar to this provision: "A request for a due process hearing arising under subdivision (a) of Section 56501 shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request." Education Code § 56505(l).

of parental participation) because the parent was not aware she needed to monitor and enforce 240 minutes per week of TVI services. (Slip Op. at 13-14).

- The Ninth Circuit held that it was not clear if the procedural violation had resulted in educational harm to the student, who was receiving quadrupled instruction from a "teacher of the visually impaired"; however, the court stated that the parent's legal fees she incurred filing a due process complaint amounted to substantive harm and qualified as a denial of FAPE. (Slip Op. at 14 ("Incurring unnecessary legal fees is, of course, a form of prejudice that denies a student and his parents an educational benefit.")).
- The decision applies the "trial by consent" doctrine to the IDEA due process context. The trial by consent doctrine permits a court to decide issues raised at hearing but not plead in the complaint if the parties demonstrate express or implied consent to hearing of such unpled issues. In this case, because both parties "presented extensive evidence regarding the District's offer of TVI services," the District waived its right to object to the parent's unpled claim that the District committed a procedural violation by failing to adequately document its offer of TVI services. (Slip Op. at 9-10).
- The decision states that: "An IEP is a contract." (Slip Opinion at 11). This is in direct conflict with *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 820 (9th Cir. 2007), which held that "An IEP is not a contract."
- The decision questions the propriety of the school district in failing to notify the parent or parent's counsel of the mistake when it discovered the mistake—a week after the August 2, 2012, IEP was signed—and instead correcting five weeks later it in a September 17, 2012, IEP amendment. The decision requires the district court to determine if "this course of conduct was a deliberate attempt to mislead M.N. or a mere bungling on the part of the District and its lawyers," and ordered the district court to impose sanctions if it was the former. (Slip Op. at 11-13).
- The decision holds that if a school district does not provide an answer to a due process complaint within ten days, "the ALJ must not go forward with the hearing." Instead, the ALJ is supposed to order the school district to file an answer and order the school district to pay costs associated with the order and any delay in the hearing. In a footnote, the Court indicates that this rule might not apply equally to parents, particularly if they are unrepresented. (Slip Opinion at 16-17).
- Finally, the decision remands the case to the district court to consider whether the school district's offer of FAPE, made in 2012, provided a substantive FAPE under the standard established by the Supreme Court in *Endrew F.v. Douglas County School District*, 580 U.S. ___, slip op. at 11 (Mar. 22, 2017), indicating that the Ninth Circuit will apply Endrew F. retroactively.

Both decisions are attached to this Legal Update.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA AVILA; MIGUEL AVILA, *Plaintiffs-Appellants*, v. SPOKANE SCHOOL DISTRICT 81, *Defendant-Appellee.*	No. 14-35965 D.C. No. 2:10-cv-00408-EFS OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Argued and Submitted December 5, 2016
Seattle, Washington

Filed March 30, 2017

Before: M. Margaret McKeown, Richard C. Tallman, and Morgan Christen, Circuit Judges.

Opinion by Judge Christen

SUMMARY*

Individuals with Disabilities Education Act

The panel reversed the district court's dismissal, as barred by the statute of limitations, of claims under the Individuals with Disabilities Education Act.

The plaintiffs claimed that their child's school district failed to identify his disability or assess him for autism in 2006 and 2007. Agreeing with the Third Circuit, the panel held that 20 U.S.C. § 1415(f)(3)(C) requires courts to bar only claims brought more than two years after the parents or local education agency "knew or should have known" about the actions forming the basis of the complaint. Because the district court barred all claims "occurring" more than two years before the plaintiffs filed their administrative due process complaint, the panel remanded for the district court to determine when the plaintiffs knew or should have known about the actions forming the basis of their complaint.

The panel addressed another claim in a memorandum disposition filed concurrently with its opinion.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Mark A. Silver (argued) and Jeffrey A. Zachman, Denton US LLP, Atlanta, Georgia; Richard D. Salgado, Dentons US LLP, Dallas, Texas; for Plaintiffs-Appellants.

Gregory Lee Stevens (argued), Stevens Clay P.S., Spokane, Washington, for Defendant-Appellee.

OPINION

CHRISTEN, Circuit Judge:

The Avilas, parents of a student in Spokane School District 81, appeal the district court's order dismissing their claims that the District violated the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. The Avilas argue that the district court misapplied the statute of limitations in 20 U.S.C. § 1415(f)(3)(C) to their claims that the District failed to identify their child's disability or assess him for autism in 2006 and 2007.[1]

In a question of first impression for this court, we conclude that the IDEA's statute of limitations requires courts to bar only claims brought more than two years after the parents or local educational agency "knew or should have known" about the actions forming the basis of the complaint. Because the district court barred all claims "occurring" more than two years before the Avilas filed their due process

[1] The Avilas' claim that the District violated the IDEA by failing to assess their child for dyslexia and dysgraphia is addressed in an unpublished memorandum disposition filed concurrently with this opinion.

complaint, we remand so that the district court can determine when the Avilas knew or should have known about the actions forming the basis of their complaint.

BACKGROUND

Appellants Barbara and Miguel Avila are the parents of G.A., a student in Spokane School District 81. In 2006, when G.A. was five, the Avilas asked the District to evaluate him for special education services based on "[b]ehavior" issues. One of the reasons for this request was a preschool teacher's concern that G.A. might be "showing slight signs of autism." In December 2006, a school psychologist evaluated G.A. and concluded that although he displayed some "behaviors of concern," G.A.'s behavior was not severe enough to qualify for special education services under the IDEA. G.A.'s mother was given a copy of the evaluation report and signed a form stating that she agreed with the evaluation results.

In the fall of 2007, G.A. enrolled in kindergarten. A private third-party physician diagnosed him with Asperger's Disorder in October 2007, and the Avilas requested that the District reevaluate G.A.'s eligibility for special education services. A school psychologist concluded in a reevaluation dated April 14, 2008 that G.A. was eligible for special educational services under the category of autism and, from April 2008 until February 2009, the Avilas and representatives from the District met multiple times to discuss an Individualized Education Program (IEP) for him.[2] The

[2] The IDEA requires IEPs, which are "written statement[s] for each child with a disability," as part of its mandate of ensuring students are provided with a free appropriate public education. *See* 20 U.S.C. §§ 1401(9)(D), 1414(d).

Avilas and the District initially disagreed, but eventually signed an IEP in February 2009. G.A. then began attending ADAPT, a specialized program in the District for students with autism.

About a year later, the District reevaluated G.A., assessing his behavior, speech and language, occupational therapy needs, and academic achievements, including reading, writing, and mathematics. The District then drafted another IEP. The Avilas did not agree with the reevaluation's findings and did not sign it. Instead, they requested an Independent Educational Evaluation (IEE) at the District's expense. *See* Wash. Admin. Code § 392-172A-05005(1). The District denied this request.

The Avilas filed a request for a due process hearing with the Washington State Office of Administrative Hearings on April 26, 2010. As required by law after the denial of a parent's request for an IEE, the District also initiated a due process hearing with the Washington State Office of Administrative Hearings to consider whether the District's reevaluation was sufficient. *See* Wash. Admin. Code § 392-172A-05005(2)(c). Ultimately, the ALJ ruled that the District's reevaluation was appropriate and that the Avilas were not entitled to an IEE at the District's expense. In a separate order, the ALJ ruled in favor of the District on all other claims. Specifically, he concluded that eleven of the Avilas' pre-April 2008 claims were time-barred. These claims consisted of nine procedural claims concerning the District's alleged failure to give prior written notice to the Avilas and two substantive claims. The substantive claims alleged that the District denied G.A. a free appropriate public education (FAPE) by failing to identify him as a child with a disability in 2006, and that the District failed to assess his

suspected disability in 2006 and 2007. The ALJ concluded that no statutory exceptions applied and held that the Avilas' claims were time-barred, reasoning "[t]he Parents[']' due process complaint was filed on April 26, 2010 and any complaint by Parents regarding the District actions or inactions occurring prior to April 26, 2008 are barred by the statu[t]e of limitations."[3]

The Avilas timely appealed both decisions to the United States District Court for the Eastern District of Washington, where their appeals were consolidated. The consolidated appeal addressed seven of the claims the ALJ deemed time-barred: five of their prior written notice claims and the two substantive claims arguing denials of G.A.'s right to a FAPE.

The district court agreed with the ALJ's determination that neither exception to the statute of limitations applied and affirmed the ALJ's decision that the IDEA's two-year limitations period barred the Avilas' claims arising before April 26, 2008. The district court also affirmed the ALJ's ruling that the April 2010 reevaluation was appropriate, that the IEP provided G.A. with a FAPE, and that the Avilas were not entitled to an IEE at the District's expense. The Avilas timely appealed to this court. They argue that the district court improperly applied the IDEA's statute of limitations to their two substantive claims. They do not appeal the district court's ruling that their five remaining prior written notice claims lack merit.

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[3] There are two express exceptions to the IDEA's two-year statute of limitations: (1) when a local educational agency misrepresents that it has resolved issues underlying a claim; and (2) when a local educational agency withholds necessary information. 20 U.S.C. § 1415(f)(3)(D). The Avilas do not argue that either of these exceptions apply.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 20 U.S.C. § 1415(i)(2)(A) and 28 U.S.C. § 1331. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Our court reviews de novo the district court's conclusions of law, including the question whether a claim is barred by a statute of limitations. *See Butler v. Nat'l Cmty. Renaissance of Cal.*, 766 F.3d 1191, 1194 (9th Cir. 2014).

DISCUSSION

I. The IDEA's statute of limitations requires courts to apply the discovery rule.

A. Statutory overview

"The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). The IDEA seeks "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). "A FAPE is defined as an education that is provided at public expense, meets the standards of the state educational agency, and is in conformity with the student's IEP." *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1184 (9th Cir. 2016) (citing 20 U.S.C. § 1401(9)). Upon request of a parent or agency, a local educational agency must "conduct a full and individual initial evaluation" to determine whether a child has a disability and the child's educational needs. 20 U.S.C. § 1414(a)(1)(A)–(C). If a child is determined to

have a disability, a team including a local educational agency representative, teachers, parents, and in some cases, the child, formulates an IEP.[4] § 1414(d)(1)(B). The local educational agency must conduct a reevaluation of the child if it "determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if a reevaluation is requested by the child's parents or teacher. § 1414(a)(2)(A).

The IDEA permits parents and school districts to file due process complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." § 1415(b)(6)(A). The state educational agency or local educational agency hears due process complaints in administrative due process hearings. § 1415(f)(1)(A). If a party disagrees with the administrative findings and decision, the IDEA allows for judicial review in state courts and federal district courts. § 1415(i)(2)(A).

B. The IDEA's statute of limitations

Prior to 2004, the IDEA did not include a statute of limitations for due process hearings or complaints. *See* 20 U.S.C. § 1415(b)(6) (1999); *S.V. v. Sherwood Sch. Dist.*, 254 F.3d 877, 879 (9th Cir. 2001) ("The IDEA specifies no limitations period governing either a plaintiff's request for an

[4] An IEP includes the following: 1) a statement about the child's level of academic achievement; 2) "measurable annual goals"; 3) a description of how the child's progress towards the goals will be measured; and 4) a statement of the special education and other services to be provided. 20 U.S.C. § 1414(d)(1)(A).

administrative hearing *or* the filing of a civil action."). Congress amended the IDEA in 2004 to add a two-year statute of limitations period that is now codified in two different provisions of the IDEA: 20 U.S.C. § 1415(b)(6)(B) and 20 U.S.C. § 1415(f)(3)(C).[5] Our circuit has not addressed these amendments, but in *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015), the Third Circuit described § 1415(b)(6)(B) and § 1415(f)(3)(C) as alike "in almost all respects" except for one glaring ambiguity: "§ 1415(b)(6)(B)'s two-year limitations period runs backward instead of forward from the reasonable discovery date." *Id.* at 610.

The Avilas contend that § 1415(f)(3)(C) requires this court to apply a discovery rule to IDEA claims, meaning that the statute of limitations is triggered when "a plaintiff discovers, or reasonably could have discovered, his claim." *See O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1147 (9th Cir. 2002). The District does not dispute that the discovery rule should apply to trigger the statute of limitations, but argues that the district court *did* apply the discovery rule and that the Avilas' claims are barred because they failed to file suit within two years after they knew or should have known about their claims.

[5] The events underlying this action took place from 2006 to April 2010, and the applicable version of the IDEA was in effect from 2004 to October 2010. *See Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 882 n.1 (9th Cir. 2001) (applying the 1994 version of IDEA to events that took place in 1995, despite 1997 revision of IDEA). The 2010 amendments do not materially affect the analysis or outcome of this case. *See* Pub. L. No. 111-256, 124 Stat. 2643 (2010) (amending the IDEA to change references from "mental retardation" to "intellectual disabilities").

C. Analysis

The application of the IDEA's statute of limitations is a question of first impression for this court: we have not squarely addressed the "knew or should have known" standard in the IDEA or the seemingly contradictory provisions in § 1415(b)(6)(B) and § 1415(f)(3)(C). In the first federal appellate decision addressing how § 1415(b)(6)(B) and § 1415(f)(3)(C) should be reconciled, the Third Circuit concluded that the IDEA's statute of limitations requires courts to apply the discovery rule described in § 1415(f)(3)(C). *Ligonier*, 802 F.3d at 625. The statutory text of the IDEA, including its language and context, persuade us that the Third Circuit's approach in *Ligonier* is correct and that the IDEA's statute of limitations requires courts to apply the discovery rule described in § 1415(f)(3)(C). The Department of Education's interpretation of the 2004 statutory amendments and the associated legislative history support this reading of the statute.

"When interpreting a statute, we are guided by the fundamental canons of statutory construction and begin with the statutory text." *United States v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015) (citing *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Geo-Energy Partners-1983 Ltd. v. Salazar*, 613 F.3d 946, 956 (9th Cir. 2010) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "If the statutory text is ambiguous, we employ other tools, such as legislative history, to construe the meaning of

ambiguous terms." *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015).

Read in isolation, § 1415(f)(3)(C) appears straightforward. Entitled "Timeline for requesting hearing," it states:

> A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

§ 1415(f)(3)(C). However, an ambiguity arises when § 1415(f)(3)(C) is read in conjunction with § 1415(b)(6)(B). The latter states, under the heading "Types of procedures," that the IDEA allows:

> [An opportunity for any party to present a complaint] which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows . . . .

§ 1415(b)(6)(B).

The Third Circuit's *Ligonier* decision recognized that litigants have advanced various interpretations of the IDEA's statute of limitations: (1) the occurrence rule suggested by § 1415(b)(6)(B), under which the statute of limitations begins to run on the date the injury occurs; (2) the discovery rule provided in § 1415(f)(3)(C); or (3) the "2+2" rule. *Ligonier*, 802 F.3d at 607, 612–15. Under the 2+2 rule, the statute of limitations is triggered when a plaintiff knew or should have known of his claim, but the scope of redressable harm is limited to the "two years *before* the reasonable discovery date through the date the complaint was filed, which could be up to two years *after* the reasonable discovery date, for a maximum period of relief of four years." *Id.* at 607.

We first conclude that Congress did not intend the IDEA's statute of limitations to be governed by a strict occurrence rule. Both § 1415(b)(6)(B) and § 1415(f)(3)(C) include language pegging the limitations period to the date on which the parent or agency "knew or should have known about the alleged action that forms the basis of the complaint," not the date on which the action occurred. *See* § 1415(b)(6)(B), (f)(3)(C). If Congress intended a strict occurrence rule, there would have been no need to include the "knew or should have known" language in § 1415(b)(6)(B) and § 1415(f)(3)(C).

The text of the two provisions also undercuts the 2+2 rule. Both § 1415(b)(6)(B) and § 1415(f)(3)(C) allow the two-year statute of limitations to be replaced by "an explicit time limitation . . . in such time as the State law allows." § 1415(b)(6)(B), (f)(3)(C). If states adopt their own statutes of limitations pursuant to these provisions, § 1415(b)(6)(B) and § 1415(f)(3)(C) provide that the federal exceptions to the statute of limitations still apply, *see* 20 U.S.C.

§ 1415(b)(6)(B), (f)(3)(C)–(D), and it would make little sense to incorporate the federal exceptions for equitable tolling if § 1415(b)(6)(B) were a remedy cap rather than a preview of the statute of limitations set forth in § 1415(f)(3)(C). *See Ligonier*, 802 F.3d at 615. We hold that the text of the IDEA cannot support the "2+2" construction of the statute.

The next question is how to reconcile these two seemingly conflicting provisions. Looking to "the specific context in which the language is used and the broader context of the statute as a whole," *Geo-Energy Partners-1983*, 613 F.3d at 956, § 1415(b) provides an overview of the other provisions of § 1415, including § 1415(f), while § 1415(f)(3)(C) addresses in more specific language the allowable period for requesting a due process hearing. *See Ligonier*, 802 F.3d at 616–18. Section 1415 is entitled "Procedural Safeguards," with subsection (a) mandating that any state educational agency that receives federal assistance under the subchapter must establish and maintain certain procedures. Subsection (b), entitled "Types of procedures," broadly outlines the many procedures state educational agencies are required to adopt, including the opportunity for any party to present a complaint regarding the identification, evaluation or educational placement of the child, or the provision of a FAPE. § 1415(b).

In contrast, § 1415(f), entitled "Impartial due process hearing," describes in detail the procedures required whenever a parent or local education agency files a due process complaint under subsection (b)(6) or (k). Section 1415(f)(2) addresses evaluations and recommendations to be prepared in advance of a due process hearing. Section 1415(f)(3), entitled "Limitations on hearing," is divided into "Persons conducting hearing," "Subject matter of hearing,"

and "Timeline for requesting hearing." § 1415(f)(3)(A)–(C). It is this last provision, located in the subsection that expressly limits the right to a due process hearing, which specifies that the hearing must be requested within two years from the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. § 1415(f)(3)(C). Thus, the structure of § 1415 supports the conclusion that "§ 1415(b)(6)(B), though poorly penned, was intended merely as a synopsis of § 1415(f)(3)[(C)]'s" "knew or should have known" benchmark for the statute of limitations. *See Ligonier,* 802 F.3d at 618.

We have considered that Congress might have intended different limitations periods for presenting complaints and requesting due process hearings, but that possibility is inconsistent with the overall statutory scheme. Read that way, subsections (b) and (f) cannot be harmonized because § 1415(b) would bar a complaint arising from conduct occurring more than two years before the discovery date, but § 1415(f) would preserve the right to request a due process hearing concerning the same conduct. Our task is to harmonize the statutory scheme as a whole, and our interpretation of § 1415 as having just one applicable limitations period is consistent with the Department of Education's position that the two provisions provide the same limitations period, discussed *infra*. *See U.S. W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000) (stating the duty to harmonize statutory provisions is "particularly acute" when the provisions are enacted at the same time and are part of the same statute).

Other sources of statutory interpretation confirm this reading. First, the broader context of the IDEA shows that it

has a wide-ranging remedial purpose intended to protect the rights of children with disabilities and their parents. One express purpose of the IDEA is "to ensure 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). As the Supreme Court stated, "[a] reading of the [IDEA] that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245 (2009). The broad purpose of the IDEA is clear and has been acknowledged repeatedly by our court. *See E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 758 F.3d 1162, 1173 (9th Cir. 2014) (citing *Forest Grove*, 557 U.S. at 244–45); *Michael P. v. Dep't of Educ.*, 656 F.3d 1057, 1060 (9th Cir. 2011) (same); *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010) (same). Cutting off children's or parents' remedies if violations are not discovered within two years, as the occurrence rule and the 2+2 rule would do, is not consistent with the IDEA's remedial purpose. *See Ligonier,* 802 F.3d at 619–20 (concluding that applying the occurrence or 2+2 rules would go against the broad remedial purpose of the IDEA and serve as a *sub silentio* repeal of prior court decisions confirming the intent of the IDEA).

In commentary addressing its enabling regulations, the Department of Education (DOE) stated that it interprets § 1415(b)(6)(B) and § 1415(f)(3)(C) to provide the same limitations period. Assistance to States for the Education of

Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,706 (Aug. 14, 2006). The DOE's interpretation necessarily rejects the 2+2 rule, which assumes that § 1415(b)(6)(B) and § 1415(f)(3)(C) provide two different limitations periods, although the agency's interpretation does not offer any guidance on whether the discovery rule or occurrence rule should prevail. As the Third Circuit noted, the DOE's interpretation of its own regulation should be respected if "it has the 'power to persuade.'" *Ligonier*, 802 F.3d at 621 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The DOE's rejection of the 2+2 rule is in accord with the text of § 1415(f)(3)(C), our contextual reading of § 1415(b) as providing an overview of procedures required by the IDEA, and the IDEA's broader statutory scheme.

The IDEA's legislative history is in accord. When the 2004 IDEA amendments were crafted, the House of Representatives' initial proposal was for a one-year statute of limitations that relied on the occurrence rule and required that a complaint "set forth a violation that occurred not more than one year before the complaint is filed." H.R. Rep. 108-77, at 36 (2003). The Senate version of the bill included the wording that later became § 1415(f)(3)(C). S. Rep. 108-185, at 222 (2003) ("A parent or public agency shall request an impartial due process hearing within 2 years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint . . . ."). Considering the two draft bills, the Third Circuit concluded:

> The conference committee then incorporated the Senate's version at § 1415(f) and the House's version in the summary listing at

> § 1415(b). When it did so, however, it omitted to change the backward-looking framework of the House's version to the forward-looking framework of the Senate's. Thus was created the problem we grapple with today.

Ligonier, 802 F.3d at 623. This legislative history suggests that Congress intended to adopt the discovery rule, not the occurrence rule, in the final version of the 2004 amendments. *See id*.

The text and purpose of the IDEA, the DOE's interpretation of the Act, and the legislative history of the 2004 amendments all lead us to the same conclusion. We hold the IDEA's statute of limitations requires courts to apply the discovery rule without limiting redressability to the two-year period that precedes the date when "the parent or agency knew or should have known about the alleged action that forms the basis of the complaint." § 1415(f)(3)(C).

II. The district court erred by concluding that the IDEA's two-year statute of limitations necessarily barred claims arising in 2006 and 2007.

Having concluded that the IDEA's statute of limitations is triggered when "the parent or agency *knew or should have known* about the alleged action that forms the basis of the complaint," we turn to the Avilas' claims. *See* § 1415(f)(3)(C) (emphasis added). In dismissing the Avilas' complaint, the district court cited the correct standard from § 1415(f)(3)(C), but concluded, "Parents' due process complaint was made April 26, 2010. Accordingly, unless an exception is shown, the Court finds any alleged misconduct prior to April 26, 2008, was not timely raised by Parents." In

other words, apart from considering the two express exceptions to the IDEA's statute of limitations, the district court barred the Avilas' claims arising before April 26, 2008 based on when the actions complained of occurred, rather than applying the discovery rule.

The district court found that Ms. Avila signed forms agreeing with the 2006–2007 evaluation results, but this does not end the inquiry because the Avilas' awareness of the evaluations does not necessarily mean they "knew or had reason to know" of the basis of their claims before April 26, 2008. *Cf. A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1205 (9th Cir. 2016) (holding that parents' consent to a disabled child's placement does not waive later challenges to the placement under Title II of the Americans with Disabilities Act and § 504 of the Rehabilitation Act, "at least where the issue is one that requires specialized expertise a parent cannot be expected to have"). Other courts have held that the "knew or had reason to know date" stems from when parents know or have reason to know of an alleged denial of a free appropriate public education under the IDEA, not necessarily when the parents became aware that the district acted or failed to act. *See, e.g.*, *Somoza v. N.Y. City Dep't of Educ.*, 538 F.3d 106, 114 (2d Cir. 2008) (holding that the "knew or should have known" date occurred when parent viewed a child's rapid improvement in a new program); *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1288 (11th Cir. 2008) (holding the "knew or should have known date" occurred after new evaluation and declining to hold that "famil[ies] should be blamed for not being experts about learning disabilities").

Because the district court barred the Avilas' pre-April 2008 claims based on when the District's actions occurred,

we remand to the district court to make findings and address the statute of limitations under the standard we adopt here, namely when the Avilas "knew or should have known about the alleged action[s] that form[] the basis of the complaint." *See* § 1415(f)(3)(C).

Each party shall bear its own costs.

REVERSED and REMANDED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

M.C., by and through his guardian ad litem M.N.; M. N., Plaintiffs - Appellants, v. **ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT,** Defendant - Appellee.	No. 14-56344 D.C. No. 2:13-cv-01452-DMG-MRW **OPINION**

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted August 2, 2016
Pasadena, California

Before: **REINHARDT**, **KOZINSKI**, and **WARDLAW**, Circuit Judges.

KOZINSKI, Circuit Judge:

The Individuals with Disabilities Education Act ("IDEA") guarantees children with disabilities a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(d)(1)(A). We consider the interplay between the IDEA's procedural and substantive safeguards.

BACKGROUND

M.C. suffers from Norrie Disease, a genetic disorder that renders him blind. He also has a host of other deficits that cause him developmental delays in all academic areas. M.C.'s mother, M.N., met with several school administrators and instructors to discuss M.C.'s educational challenges and draft an individualized educational program ("IEP"). At the conclusion of this meeting, she signed an IEP document and "authorize[d] the goals and services but [did] not agree it provides a FAPE."

M.N. then filed a due process complaint alleging that the Antelope Valley Union High School District (the "District") committed procedural and substantive violations of the IDEA. The due process hearing took place before an Administrative Law Judge who denied all of M.C.'s claims and the district court affirmed.

DISCUSSION

The IDEA's "primary goal is 'to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services . . . .'" J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 947 (9th Cir. 2010) (quoting 20 U.S.C. § 1400(d)(1)(A)). A FAPE must be

"tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)." Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982) (quoting 20 U.S.C. § 1401(18)). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals" and "a statement of the special education and related services . . . to be provided to the child." 20 U.S.C. § 1414(d)(1)(A)(i). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA," M.L. v. Fed. Way Sch. Dist., 394 F.3d 634, 644 (9th Cir. 2005) (citing Rowley, 458 U.S. at 206–07), so that the process "will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians," Endrew F. v. Douglas Cty. Sch. Dist., 580 U.S. __, slip op. at 11 (Mar. 22, 2017).

I. STANDARD OF REVIEW

Judicial review in IDEA cases "differs substantially from judicial review of other agency actions, in which courts are generally confined to the administrative record and are held to a highly deferential standard of review." Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir. 1993). We review whether the state has provided a FAPE de novo. Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th

Cir. 1994). We can accord some deference to the ALJ's factual findings, but only where they are "thorough and careful," and "the extent of deference to be given is within our discretion." Id. (citations omitted).

The district court accorded the ALJ's findings substantial deference because the ALJ "questioned witnesses during a three-day hearing" and "wrote a 21-page opinion that reviewed the qualifications of witnesses and culled relevant details from the record." But neither the duration of the hearing, nor the ALJ's active involvement, nor the length of the ALJ's opinion can ensure that the ALJ was "thorough and careful."[1] J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist., 626 F.3d 431, 440 (9th Cir. 2010). And, in this case, the ALJ was neither thorough nor careful. As plaintiffs point out, the ALJ didn't address all issues and disregarded some of the evidence presented at the hearing. Even the district court recognized

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[1] In Timothy O. v. Paso Robles Unified Sch. Dist., for example, we reversed a lengthy ALJ opinion with detailed findings that were unsupported by the record. 822 F.3d 1105, 1117, 1123 (9th Cir. 2016). The district court nevertheless had deferred to the ALJ's findings, apparently impressed by the length and superficial plausibility of the ALJ's opinion. Id. at Dist. Ct. Dkt. No. 78. Such blind deference is not appropriate. Rather, the district judge must actually examine the record to determine whether it supports the ALJ's opinion. See, e.g., J.G. ex rel. Jimenez v. Baldwin Park Unified Sch. Dist., 78 F. Supp. 3d 1268, 1281–82 (C.D. Cal. 2015) (Olguin, J.) (according "substantially less deference" where "the ALJ's decision ignore[d] and mischaracterize[d] key evidence").

that the ALJ's analysis "is not entirely satisfying." Accordingly, the district court erred in deferring to the ALJ's findings.

II. PROCEDURAL VIOLATIONS

The IDEA contains numerous procedural safeguards that are designed to protect the rights of disabled children and their parents. See 20 U.S.C. § 1415. These safeguards are a central feature of the IDEA process, not a mere afterthought: "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard." Rowley, 458 U.S. at 205. Because disabled children and their parents are generally not represented by counsel during the IEP process, procedural errors at that stage are particularly likely to be prejudicial and cause the loss of educational benefits.

Therefore, compliance with the IDEA's procedural safeguards "is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important." Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 891 (9th Cir. 2001). "Procedural violations that interfere with parental participation in the IEP formulation process undermine

the very essence of the IDEA." Id. at 892.

Plaintiffs allege that the District violated the IDEA by (1) failing to adequately document the services provided by a teacher of the visually impaired ("TVI"), (2) failing to specify the assistive technology ("AT") devices provided and (3) failing to file a response to the due process complaint.

A. Failure to Adequately Document TVI Services

Plaintiffs claim that the District didn't provide a "'written record of reasonable expectations' to hold the District accountable for the provision of vision services to M.C." (quoting Amanda J., 267 F.3d at 891). A brief history of the District's shifting offer of TVI services is necessary: The IEP document signed by M.N. and the District included an offer of 240 minutes of TVI services per month. According to the District, it realized a week later this was a mistake. But the District did nothing to notify M.N. More than a month later, the District purported to unilaterally amend the IEP by changing the offer of TVI services to 240 minutes per week. The District didn't send M.N. a copy of the revised IEP or otherwise notify her of this change. In fact, she didn't learn of it until the first day of the due process hearing, a month later. Moreover, at the hearing, District witnesses testified that the District offered M.C. 300 minutes of TVI services per week.

Plaintiffs claim that the District's failure to accurately document the offer of TVI services denied M.C. a FAPE by precluding M.N. from meaningfully participating in the IEP process. Before discussing the merits of this claim we must address the District's argument that the claim is waived.

1. The district judge recognized that plaintiffs' due process complaint "arguably encompassed Plaintiffs' argument that the provision of TVI services was inadequate." The judge nevertheless found that plaintiffs "waived any argument that the District's failure to specify the frequency of TVI services in the August 2, 2012 IEP resulted in an actual denial of an educational benefit to M.C." because the due process complaint was superseded by the ALJ's restatement of issues, which omitted the adequacy of TVI services.

The district judge held that plaintiffs waived the issue by failing to object to

this omission.[2] But plaintiffs weren't aware that the District had unilaterally changed the IEP until after the ALJ had restated the issues, so they could hardly have raised that as a procedural violation. And it turns out that the amendment didn't even provide an accurate statement of the services that M.C. was offered. District witnesses later testified that the District intended to offer M.C. 300 minutes of TVI services per week.

The district judge purported to understand the difficult position that plaintiffs were in due to this sequence of events but still found that "there [was] no indication in the record that Plaintiffs ever sought during the administrative hearing to amend the issues to be addressed to include the District's failure to provide M.C. with adequate TVI services." But we generally treat issues as if they were raised in the complaint if they are tried by consent. Rule 15 of the Federal Rules of Civil Procedure provides that an issue "tried by the parties' express or implied consent . .

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[2] It is apparently common practice in IDEA cases is for ALJs to restate and reorganize the issues presented by the parties. See J.W., 626 F.3d at 442; Ford ex rel. Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1090 (9th Cir. 2002). We question the wisdom of such a procedure where the parents are represented by counsel and the complaint states the issues intelligibly, as was the case here. A party bringing a due process complaint is entitled to frame the issues it wishes to present and should not be put in the difficult position of contradicting the presiding official who will soon be the trier of fact. In such circumstances, failure to object will not be deemed a waiver of any claim fairly encompassed in the complaint.

. must be treated in all respects as if raised in the pleadings." Fed. R. Civ. P. 15(b)(2); see 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1491 (3d ed.). While we haven't previously recognized this practice in IDEA cases, it's often been applied in a variety of other agency adjudications: before the IRS, Lysek v. C.I.R., 583 F.2d 1088, 1091–92 (9th Cir. 1978), the Department of Labor, 20 C.F.R. § 901.40; Pierce County v. U.S. ex rel. Dep't of Labor, 699 F.2d 1001, 1004 (9th Cir. 1983), and the Patent and Trademark Office, US PTO Stip. § 507.03. We see no reason IDEA cases should be treated differently.

Both sides presented extensive evidence regarding the District's offer of TVI services. Multiple witnesses testified as to the initial offer of 240 minutes per month, the District's purported secret amendment of 240 minutes per week, and the District's actual offer of 300 minutes per week as presented at the hearing. The District's presentation of evidence on this point vitiated any waiver on M.N.'s part. Accordingly, we hold that plaintiffs' claim that the District committed a procedural violation of the IDEA by failing to adequately document its offer of TVI services

isn't waived.[3]

2. The IEP is a "formal, written offer [that] creates a clear record that will do much to eliminate troublesome factual disputes . . . about when placements were offered, what placements were offered, and what additional education assistance was offered to supplement a placement, if any." Union Sch. Dist., 15 F.3d at 1526. The IEP must specify "the anticipated frequency, location, and duration of [education] services." 20 U.S.C § 1414(d)(1)(A)(i)(VII). Such "a formal, specific offer from a school district will greatly assist parents in 'present[ing] complaints with respect to any matter relating to the . . . educational placement of the child.'" Union Sch. Dist., 15 F.3d at 1526 (quoting 20 U.S.C. § 1415(b)(1)(E)).

The district judge agreed with the ALJ's finding "that the September 17, 2012 Amendment merely corrected an unintentional error in the August 2, 2012 IEP." We fail to see how this can be so. An IEP is a contract. It is signed by the child's parents and the school's representatives, and thus embodies a binding

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[3] The District also makes a separate waiver argument: It claims that plaintiffs waived their objection to the admission of the amendment into evidence. While plaintiffs did waive their objection to the admissibility of the amendment, for the reasons described above, see supra at 7–10, the waiver does not extend to its legal significance.

commitment. It also provides notice to both parties as to what services will be provided to the student during the period covered by the IEP. The school district is not entitled to make unilateral changes to an IEP document any more than may any other party to a contract. If the District discovered that the IEP did not reflect its understanding of the parties' agreement, it was required to notify M.N. and seek her consent for any amendment. See 20 U.S.C. § 1414(d)(3)(D), (F) (discussing amendments to the IEP). Absent such consent, the District was bound by the IEP as written unless it sought to re-open the IEP process and proposed a different IEP.

Because the District did neither of these things, the IEP actually in force at the time of the hearing was that signed by the parties, not that presented by the District as the amended IEP. Allowing the District to change the IEP unilaterally undermines its function of giving notice of the services the school district has agreed to provide and measuring the student's progress toward the goals outlined in the IEP. Moreover, any such unilateral amendment is a per se procedural violation of the IDEA because it vitiates the parents' right to participate at every

step of the IEP drafting process.[4]

Finally, we must express our disapproval of the District's conduct with respect to this issue. The District discovered what it believed was a mistake in the IEP just a week after it was signed, yet failed to bring this problem to M.N.'s attention until weeks later, on the first day of the due process hearing. Even then, its lawyers didn't identify the purported amendment but rather buried it in a document production, leaving it to plaintiffs' counsel to stumble upon it. Had the District raised the issue immediately upon discovering the suspected error, it's entirely possible that M.N. would have found the amount of TVI services to be satisfactory. Plaintiffs might have avoided hiring a lawyer and taking the case to a due process hearing—saving attorneys' fees on both sides and perhaps disruption to M.C.'s education. We find no justification in the record for the District's failure to be forthright on this point and the District has offered none in its brief or when

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[4] The District's purported amendment was also improper for a separate reason: The District presented no evidence supporting its claim that the parties agreed to 240 minutes of TVI services per week when the IEP was drafted. Indeed, it is unclear how the District came up with this figure given that its witnesses at the hearing testified that M.C. was actually provided 300 minutes of TVI services per week. Nevertheless, the ALJ and the district court accepted this as true. However, a party's mere allegations are not proof.

questioned about it at oral argument.[5]

Because the District denied M.N. an opportunity to participate in the IEP drafting process by unilaterally revising the IEP, and because the IEP as initially drafted didn't provide M.N. with an accurate offer of the TVI services provided to M.C., the District committed two procedural violations of the IDEA. Union Sch. Dist., 15 F.3d at 1526. The district court nevertheless found that M.C. wasn't denied a FAPE, reasoning that "[a] procedural violation denies a child a FAPE when the violation seriously infringe[s] the parents' opportunity to participate in the IEP formation process." (emphasis in original) (internal quotation and citation omitted). But, as explained above, M.N. was denied an opportunity to participate in the IEP drafting process. Moreover, in enacting the IDEA, Congress was as concerned with parental participation in the enforcement of the IEP as it was in its formation. See Rowley, 458 U.S. at 205 (discussing Congress's intent to "giv[e] parents and guardians a large measure of participation at every stage of the administrative process" (emphasis added)). Under the IDEA, parental participation doesn't end when the parent signs the IEP. Parents must be able to use the IEP to

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[5] On remand, the district court shall determine whether this course of conduct was a deliberate attempt to mislead M.N. or mere bungling on the part of the District and its lawyers. If the district court determines that the former is the case, it shall impose a sanction sufficiently severe to deter any future misconduct.

monitor and enforce the services that their child is to receive. When a parent is unaware of the services offered to the student—and, therefore, can't monitor how these services are provided—a FAPE has been denied, whether or not the parent had ample opportunity to participate in the formulation of the IEP.

Whether, and to what extent, M.C. was prejudiced by these procedural improprieties is a more difficult question. Assuming that M.C. was receiving 300 minutes of TVI services per week, as the District apparently intended to offer, M.C. may not have suffered any substantive harm. M.N. nevertheless suffered procedural harm by not being apprised of the actual status of the services being provided, causing her to incur legal fees in attempting to protect that right. Because any TVI services provided beyond what was specified in the written IEP would have been gratuitous, M.N. could not be sure that the District would continue to provide them. With only 240 minutes per month (about an hour a week) specified in the IEP, the District was entitled to cut back these services to that level. M.N. was amply justified in seeking the aid of counsel to clarify the amount of services provided. Incurring unnecessary legal fees is, of course, a form of prejudice that denies a student and his parents an educational benefit. See Parents on Behalf of Student v. Julian Charter Sch., OAH No. 2012100933, at 2 (Jan. 17, 2013) (order denying motion to dismiss). The fact that the District could

have avoided the harm by promptly notifying M.N. that it was agreeing to provide far more services than specified in the IEP only makes matters worse.

B. Failure to Identify the AT Devices Provided

When a student requires "a particular device or service" California requires that the IEP "include a statement to that effect." Cal. Educ. Code § 56341.1(b)(5), (c). M.C.'s IEP initially indicated that M.C. didn't require AT devices or services. The District conceded that this was erroneous and issued an amendment that changed the checkbox for AT devices from "no" to "yes." But neither the IEP nor the amendment specified the devices that M.C. required.

The district judge recognized that "the language of [section 56341.1] requires the District to identify the particular types of AT devices and services to be provided to M.C." But the judge found that this procedural violation didn't "seriously infringe[] M.N.'s opportunity to participate in the IEP formulation process." As we've made clear, however, parents must be able to participate in both the formulation and enforcement of the IEP. See supra at 13–14. Even if M.N. was able to participate in the IEP's formulation, the District's failure to identify the AT devices that M.C. required rendered the IEP useless as a blueprint for enforcement.

The district judge noted that the IEP team discussed "at least some of the AT services and equipment to be provided to M.C." at the IEP meeting. But a discussion does not amount to an offer. M.N. could force the District to provide only those services and devices listed in the IEP, not those discussed at the IEP meeting but left out of the IEP document. See Union Sch. Dist., 15 F.3d at 1526 (requiring a "formal, written offer"). Indeed, items discussed at the IEP meeting but not included in the IEP document could be deemed to have been omitted on purpose.

Nor was this a case where "everyone involved in the individualized education team—including [the student's] parents—knew of the amounts [of services]" that were offered. J.L., 592 F.3d at 953. M.N. testified at the due process hearing that she didn't know which AT devices were offered to M.C. M.C.'s TVI services provider testified that M.C. received a laptop, a Book Port, software developed for the visually impaired, a screen reading program, a talking calculator and an Eye-Pal Solo. But M.N. was only aware that M.C. received a laptop, braille machine, braille calendar and a Book Port. M.N. also testified that the laptop didn't have the software that M.C. needed, but she didn't know which software was missing. Because the IEP didn't specify which AT devices were being offered, M.N. had no way of confirming whether they were actually being

provided to M.C. The District's failure to specify the AT devices that were provided to M.C. thus infringed M.N.'s opportunity to participate in the IEP process and denied M.C. a FAPE. Id. at 953.

C. Failure to Respond to the Complaint

The IDEA requires a school district to respond to a parent's due process complaint within 10 days. 20 U.S.C. § 1415(c)(2)(B)(i)(I). The District failed to do this and plaintiffs argue that this violated the IDEA. To be clear, the District didn't just miss a deadline: It failed to ever respond to the complaint. The district court found that the failure to respond didn't infringe M.N.'s opportunity to participate in the IEP formulation process and, therefore, wasn't a denial of a FAPE. But this misses the mark. The District's failure to respond may not have denied plaintiffs a FAPE but it still violated the IDEA and due process.

An answer to a complaint serves an important dual purpose: It gives notice of the issues in dispute and binds the answering party to a position. See, e.g., United States v. All Assets Held at Bank Julius Baer & Co., 959 F. Supp. 2d 81, 116 n.21 (D.D.C. 2013) (noting that "one function of an answer" is to identify "points of disagreement"); Lopez v. U.S. Fidelity & Guaranty Co., 18 F.R.D. 59, 61 (D. Alaska 1955) (explaining that the purpose of rules governing answers to a

complaint "is to prevent surprise"). Failure to file an answer puts the opposing party at a serious disadvantage in preparing for the hearing, as it must guess what defenses the opposing party will raise. The problem is particularly severe in IDEA cases because there is no discovery.

When a school district fails to file a timely answer, the ALJ must not go forward with the hearing. Rather, it must order a response and shift the cost of the delay to the school district, regardless of who is ultimately the prevailing party.[6] We remand for a determination of the prejudice M.N. suffered as a result of the District's failure to respond and the award of appropriate compensation therefor.[7]

III. SUBSTANTIVE VIOLATIONS

In order for M.C. to have received a FAPE, the IEP must have "(1) addresse[d] [his] unique needs, (2) provide[d] adequate support services so [M.C.] can take advantage of the educational opportunities, and (3) [been] in accord with

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[6] Even if a motion to compel a response isn't brought, the ALJ should raise the issue sua sponte at the pre-hearing conference. This is imperative in IDEA cases where parents often proceed without the aid of counsel and may not be aware that the IDEA requires a school district to respond to the complaint within 10 days. See 20 U.S.C. § 1415(c)(2)(B)(i)(I).

[7] We do not address the reverse situation where the due process case is brought by the school district and the parents fail to file a response. Different considerations may apply in such circumstances, especially if the parents are pro se. We leave that situation for a case that presents the issue.

the individualized education program." Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 893 (9th Cir. 1995) (citing Rowley, 458 U.S. at 188–89).

1. Plaintiffs argue that the District denied M.C. a FAPE by providing him with less than 300 minutes of TVI services per week. The District doesn't address the substance of plaintiffs' argument, arguing that the issue was waived. For the reasons explained above, plaintiffs haven't waived this issue. See supra at 7–10.

Both the ALJ and district judge placed the burden on M.N. to show that the services provided to M.C. were inadequate. Normally, the party alleging a violation of the IDEA bears the burden of showing that the services received amounted to a denial of a FAPE. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 57–58 (2005). But here there was a procedural violation that deprived M.N. of the knowledge of what services were being offered to M.C. If parents don't know what services are offered to the student—in kind or in duration—it's impossible for them to assess the substantive reasonableness of those services. In such circumstances, the burden shifts to the school district to show that the services the student actually received were substantively reasonable. We remand so the District can have an opportunity to make such a showing before the district court.

2. Plaintiffs also claim that the District denied M.C. a FAPE by failing to develop measurable goals in all areas of need, including "the areas of life skills, residential travel, and business travel." Additionally, plaintiffs argue that the District failed to provide adequate orientation and mobility services, as well as adequate social skills instruction. The district court found that plaintiffs failed to meet their burden of showing that the IEP wasn't "reasonably calculated to confer [M.C.] with a meaningful benefit." J.W., 626 F.3d at 439. In doing so, it relied on the Supreme Court's comment in Rowley that, by "an 'appropriate' education, it is clear that [Congress] did not mean a potential-maximizing education." 458 U.S. at 197 n.21. But Rowley "d[id] not attempt to establish any one test for determining the adequacy of educational benefits." Id. at 202. Recently, the Supreme Court clarified Rowley and provided a more precise standard for evaluating whether a school district has complied substantively with the IDEA: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F., slip op. at 11. In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," id. at 3 (citation omitted), commensurate with his non-disabled peers,

taking into account the child's potential. We remand so the district court can consider plaintiffs' claims in light of this new guidance from the Supreme Court.

IV. PREVAILING PARTY

The IDEA provides that a "court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parent or guardian of a child or youth with a disability who is a prevailing party." 20 U.S.C. § 1415(i)(3)(B)(i)(I). A parent need not succeed on every issue in order to be a prevailing party. Park v. Anaheim Union High Sch. Dist., 464 F.3d 1025, 1035 (9th Cir. 2006). Rather, parents are prevailing parties if they "succeed[] on any significant issue in litigation which achieves some of the benefit [they] sought in bringing the suit." Id. at 1034 (emphasis in original) (citation omitted). M.N. is the prevailing party in this appeal and is therefore entitled to attorneys' fees. See Ash v. Lake Oswego Sch. Dist., 980 F.2d 585, 590 (1992).

* * *

The District's failure to adequately document the TVI services and AT devices offered to M.C. violated the IDEA and denied M.C. a FAPE. These procedural violations deprived M.N. of her right to participate in the IEP process and made it impossible for her to enforce the IEP and evaluate whether the services

M.C. received were adequate. At the very least, plaintiffs are entitled to have the District draft a proper IEP and receive compensatory education to "place [M.C.] in the same position [he] would have occupied but for the school district's violations of [the] IDEA." R.P. ex rel. C.P. v. Prescott Unified Sch. Dist., 631 F.3d 1117, 1125 (9th Cir. 2011) (citations omitted). We remand the case to the district court for proceedings consistent with this opinion.

REVERSED and REMANDED.