BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019040565

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

DECISION

JANUARY 31, 2020

On April 11, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Bellflower Unified School District. On August 15, 2019, OAH granted Student's motion to amend the due process hearing request and Student's amended complaint was deemed filed the same day. On September 27, 2019, OAH continued Student's case for good cause. Administrative Law Judge Linda Johnson heard this matter in Bellflower, California on December 10, 11, 12, and 13, 2019.

Attorneys Lauren-Ashley Caron and Phillip VanAllsburg represented Student. Mother attended all hearing days on Student's behalf. Student and Father did not attend the hearing. Attorney Eric Bathen represented Bellflower. Matthew Adair, Bellflower's Special Education Program Administrator, attended all hearing days on Bellflower's behalf.

At the parties' request, OAH continued the matter to January 6, 2020, for written closing briefs. The record was closed, and the matter was submitted on January 6, 2020.

ISSUES

1. Did Bellflower fail to fulfill its child find obligations by not referring Student for a special education evaluation until November 2017?
2. Did Bellflower fail to assess Student in all areas of suspected disability as part of its November 2017 assessment?
3. Did Bellflower deny Student a free appropriate public education by failing to provide prior written notice in response to Parents' various requests?
4. Did Bellflower deny Student a free appropriate public education by failing to make an appropriate offer of placement, services, and goals in the January 18, 2019 individualized education program?
5. Did Bellflower deny Student a free appropriate public education during the 2018-2019 and 2019-2020 school years by failing to convene an annual individualized education program team meeting in February 2019?
6. Is Bellflower required to provide Student compensatory education as a result of its failure to offer Student a free appropriate public education in its February 2018 initial individualized education program?

7. Did Bellflower deny Student a free appropriate public education by failing to have an individualized education program in place for him at the beginning of the 2019-2020 school year?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, §56000, subd. (a).)

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as FAPE, to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see

20 U.S.C. § 1415(i)(2)(C)(iii).) Student had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 11 years old and in sixth grade at the time of the hearing. Student lived within the boundaries of Bellflower with his Parents at all relevant times. Bellflower first assessed Student for special education eligibility in November 2017. Bellflower found Student eligible for special education under other health impairment.

ISSUE 1: DID BELLFLOWER FAIL TO FULFILL ITS CHILD FIND OBLIGATIONS BY NOT REFERRING STUDENT FOR A SPECIAL EDUCATION EVALUATION UNTIL NOVEMBER 2017?

Student contends Bellflower failed to fulfill its child find obligations because it did not refer Student for an assessment for special education until November 14, 2017. In his closing brief, Student contends that he should have been assessed during third grade, by April 11, 2017, because Bellflower had knowledge of, or at least reason to suspect, that Student had a disability that impacted his access to education. Student further contends Bellflower had an affirmative obligation to propose an assessment despite Mother's June 2017 revocation of her May 2017 assessment request.

Bellflower contends that although Mother asked for an assessment for special education in May 2017, she revoked her request for the assessment in June 2017. Bellflower contends that once Student started exhibiting behavior problems during the beginning of the 2017-2018 school year, Bellflower and Mother worked together to determine if an assessment for special education was necessary. Bellflower further contends that it did offer to assess Student in November 2017 and any delay was a procedural error that did not amount to a denial of FAPE.

A school district is required to actively and systematically seek out, identify, locate, and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services, regardless of the severity of the disability, including those individuals advancing from grade to grade. (20 U.S.C. § 1412(a)(3)(A); Ed. Code, § 56171, 56301, subds. (a) and (b).) This duty to seek and serve children with disabilities is known as "child find." A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Ed., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 (*Cari Rae S.*).) The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

If a school district has notice that a child has exhibited symptoms of a disability covered under the IDEA, it must assess the child for special education, and cannot evade that responsibility by substituting informal observations or the subjective opinion of a staff member. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121 (Timothy O.).) At the same time, a medical or psychological diagnosis pursuant to the Diagnostic and Statistical Manual of Mental Disorders, referred to in this Decision as the Diagnostic Manual, is not synonymous with eligibility under the IDEA. (*Letter to Coe*, 32 IDELR 204, Sept. 14, 1999.)

Student attended Stephen Foster Elementary School in Bellflower from kindergarten through the end of third grade. Student performed well academically and socially in kindergarten. While Student exhibited some social challenges in first grade, he still performed well academically. During Student's second grade year his writing

declined slightly, his work habits needed improvement, and his social development needed improvement, but his reading, speaking and listening, and mathematic abilities all remained at grade level. Student performed at or above grade level in all academic areas for third grade during the 2016-2017 school year, however, he struggled behaviorally.

Student's third grade behavior challenges were disruptive in nature. He refused to remain in his seat, made inappropriate noises during class, was noncompliant with work assignments, and engaged in aggressive behavior including hitting his brother and another student.

Student had three discipline incidents during the 2016-2017 school year. The first was on October 26, 2016, when he received after-school detention assigned by his teacher for missing four homework assignments. The second was on April 20, 2017, when Student again received after-school detention for inappropriate classroom behavior. Student's third discipline incident was on June 5, 2017, when he lost recess for writing inappropriate words in his language arts journal.

At the request of Stephen Foster Elementary personnel, Caroline Thompson, Bellflower's board certified behavior analyst, observed Student in the classroom in May 2017 to gather information about Student's behavior. Ms. Thompson was not asked to determine if Student required an assessment for special education eligibility. As part of Ms. Thompson's observation she spoke with Mother about Student's behavior. After speaking with Ms. Thompson, sometime toward the end of May 2017, Mother sent Ms. Thompson an email that requested an assessment for special education for Student. Both Mother and Ms. Thompson recalled the request but neither could remember the exact date Mother requested the assessment. Student did not submit the

email as evidence during the due process hearing. Ms. Thompson forwarded the request to the school psychologist at Stephen Foster Elementary.

The last day of school for Bellflower for the 2016-2017 school year was June 15, 2017. Parents decided to transfer Student from Stephen Foster Elementary to Bellflower's Las Flores Educational Center, an independent study program for his fourth grade year because they believed he was bullied during third grade and mocked by his teacher. Parents believed their concerns about Student's behavior could be explained by the bullying and therefore believed that an assessment for special education was unnecessary. Sometime in June 2017, Mother emailed Ms. Thompson to revoke her request for a special education assessment. On July 6, 2017, Tracy McSparren, Bellflower's then Assistant Superintendent, confirmed with Mother that she no longer wanted Bellflower to assess Student for special education. Parents spoke to Tamara Zylla, Las Flores's principal, and Laura Sanzaro, Student's fourth grade teacher at Las Flores, prior to the start of the 2017-2018 school year and were hopeful that Student would not have behavior problems in the new environment. Consequently, Parents determined an assessment for special education was premature as they wanted to wait and see how he performed at the new school.

Student started the 2017-2018 school year at Las Flores on August 28, 2017. Las Flores was a hybrid program where Student attended school three days a week and homeschooled two days per week. By October 11, 2017, Student exhibited behavior problems and Parents and his teacher, Ms. Sanzaro, were communicating regularly. Student pushed boundaries and tried to make friends by acting out and acting like the class clown.

Parents requested accommodations under Section 504 of the Rehabilitation Act of 1973, referred to as a 504 Plan, for Student on October 19, 2017. On October 27, 2017, before moving forward with the 504 Plan process, Mother, Ms. Zylla and Ms. Sanzaro met with Student to discuss his behavior. In lieu of a 504 Plan Kevin Yoshioka, Las Flores's school psychologist proposed an assessment plan for special education on November 14, 2017. Parents signed the assessment plan two days later which Bellflower received on November 27, 2017, and Bellflower assessed Student for special education through February 2018.

Bellflower did not violate its child find obligations by failing to assess Student for special education prior to November 2017 based on Parent request. Mother first requested an assessment for special education by email in late May 2017. However, before Stephen Foster Elementary created an assessment plan, Mother revoked her request for assessment. Bellflower was not required to assess in response to Mother's May 2017 request for assessment because Mother withdrew her request for assessment in June 2017. Further, Student did not establish that Bellflower needed to provide Parents with an assessment plan despite Parents' withdrawal of consent as even under the low *Cari Rea S.* standard, Student was able to access the educational curriculum as his behavioral problems were not that significant.

Parents' second request, on October 19, 2017, was for a 504 Plan, not a request for a special education assessment. Las Flores met with Parents and Student regarding the request and ultimately Las Flores proposed an assessment plan on November 14, 2017. Student did not demonstrate that Bellflower violated its child find obligations in response to Parents' initial request for an assessment and subsequent request for a 504 Plan.

The school district's duty for child find is not dependent on any request by the parent for special education testing or services. (*Reid v. Dist. of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 518.) Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S.*, *supra*, 158 F. Supp. 2d at p. 1194; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031 (Park).)

States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*).) In *Target Range, supra,* the court recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the individualized education program process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if it:

- impeded the child's right to a FAPE;
- significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child; or
- caused a deprivation of educational benefits.

(20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

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

The actions of a school district with respect to whether it had knowledge of, or reason to suspect a disability, and that special education services may be necessary to address the disability must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, (citing *Fuhrmann v. East Hanover Board of Ed*. (3rd Cir. 1993) 993 F.2d 1031).) Further, a student shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized. (Ed. Code, § 56303.)

Turning to Bellflower's obligations under the doctrine of child find, which are imposed upon Bellflower regardless of any request by Parents for an assessment, Bellflower met its obligations under the law during the 2016-2017 school year. Student performed at or above grade level during the 2016-2017 school year. Student only had three discipline incidents and all were handled by the teacher with after-school detention or missing recess. Although school personnel requested that Ms. Thompson observe Student during May 2017, her role was to collect data on Student's behavior. Bellflower had an obligation to utilize the resources of the regular education program prior to referring Student for a special education assessment. (*Panama-Buena Vista*

Union School Dist. v. A.V. (E.D. Cal. Dec. 5, 2017, No. 1:15-cv-01375-MCE-JLT) 2017 WL 6017014, **5-6.)

Here, Student was performing well academically and while he had some social and behavioral challenges, Student did not prove that his behavioral challenges during the 2016-2017 school year were a reason for Bellflower to suspect a disability. Student had three behavioral incidents during the 2016-2017 school year, one missing assignment, one incident of inappropriate behavior, and one incident of writing inappropriate words in his journal. Student did not prove that the behavior incidents triggered Bellflower's duty to assess. Furthermore, Student did not prove that Ms. Thompson observed Student because Bellflower suspected he had a disability. Student did not meet his burden that Bellflower had reason to suspect Student had a disability during the 2016-2017 school year.

However, when Student started exhibiting more significant behavioral challenges during the 2017-2018 school year, Bellflower should have proposed an assessment for special education earlier than November 14, 2017. Both Ms. Zylla and Ms. Sanzaro were aware of Parents' concerns about Student's behavior as Parents discussed these concerns with Las Flores prior to the start of the 2017-2018 school year. Although Parents were hopeful that Student's behavior would improve at Las Flores, almost immediately he began to have behavior challenges. Despite almost daily communication between Parents and Ms. Sanzaro it was not until Parents requested a 504 Plan on October 17, 2017, that Las Flores suggested meeting to discuss Student's behaviors. Although Las Flores worked with Parents to determine a solution and ultimately proposed a special education assessment plan, it did not provide an assessment plan to Parents until November 14, 2017. Bellflower should have proposed an assessment plan earlier during the 2017-2018 school year, at the very least it should

have proposed an assessment plan by mid-October when Student's behaviors required almost daily communication between Parents and Ms. Sanzaro. However, Bellflower's violation of its child find mandate is procedural and Student did not prove that Bellflower's delay in providing an assessment plan impeded his right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or deprived Student of educational benefits. Student did not present any evidence on how Bellflower's procedural violation amounted to a denial of FAPE. (*J.L.N. v. Grossmont Union High School District* (S.D. Cal., Sept. 30, 2019, Case No.: 17-cv-2097-L-MDD) 2019 WL 4849172.)

ISSUE 2: DID BELLFLOWER FAIL TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY AS PART OF ITS NOVEMBER 2017 ASSESSMENT?

Student contends that Bellflower did not assess him in all suspected areas of disability because it did not conduct a speech and language communication assessment as part of the November 14, 2017 assessments it conducted. Student contends that Bellflower was on notice that he exhibited social skills deficits and had trouble interacting with his peers and its failure to conduct a speech and language communication assessment denied Student a FAPE because Bellflower did not have the information to make an appropriate offer of special education and related services.

Bellflower contends that the November 2017 assessment plan covered all areas of suspected disability and it had no reason to suspect that Student had a deficit in the area of speech and language.

A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park, supra,* 464 F.3d 1025, 1031-1033.) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that particular disability or disorder. (*Timothy O., supra,* 822 F.3d 1105, 1119.) In *Timothy O.*, the Ninth Circuit Court of Appeals in *Timothy O.* held a school district's failure to assess a child for autism using standardized tests and instead relying on informal staff observation during an initial evaluation of the child substantially hindered parents' ability to participate in the child's educational program, and seriously deprived parents, teachers and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services. (*Id.*)

In November 14, 2017, Mr. Yoshioka developed an assessment plan for Student based on Parents' and Los Flores' concerns about Student's behavior. Los Flores assessed Student's academic achievement, health, intellectual development, motor development, social emotional behavior, and conducted a functional behavior assessment. All of Parents' and Bellflower's concerns noted prior to the assessment were behavior and social and emotional concerns. Mr. Yoshioka was not aware of any reason to add speech and language on the assessment plan nor did his assessment raise any concerns for further assessment in speech and language.

Parents did not request a speech and language assessment prior to hearing. Mother was not aware that a speech and language assessment addressed anything other than articulation when she signed the assessment plan in November 2017. However, later she found out that speech and language can also address pragmatics and social language.

Between September 8, 2018, and January 18, 2019, Gregory Endelman, PH.D. conducted an independent educational evaluation of Student in the following areas: psychoeducation, educationally related mental health services, and functional behavior. At the time of the hearing, Dr. Endelman was a licensed educational psychologist who had worked for school districts, special education local plan areas, and nonpublic schools for over 20 years. During that time, he conducted over 500 assessments. Parents requested an independent educational evaluation because they disagreed that Bellflower assessed in all areas of disability, accurately identified all of Student's present levels of performance, and offered an appropriate individualized education program, known as an IEP. Dr. Endelman's evaluation looked at Student's academic and intellectual functioning. Dr. Endelman also conducted an educationally related mental health assessment and a functional behavioral assessment. After assessing Student, Dr. Endelman concluded Student did not have any deficits in verbal, nonverbal, or expressive or receptive language, and any impairment Student had in social interactions could be attributed to behavior and mental health factors. Dr. Endelman did not recommend a speech and language assessment for Student among his numerous recommendations.

Student did not prove that Bellflower failed to assess Student in all areas of suspected disability by not conducting a speech and language assessment. Student failed to provide any evidence that he required a speech and language assessment aside from Mother's testimony that Student struggled with pragmatics. Even Student's expert, Dr. Endelman failed to offer any testimony supporting Student's claim that he required a speech and language assessment. Bellflower did not deny Student a FAPE by not conducting a speech and language assessment.

ISSUE 3: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE IN RESPONSE TO PARENTS' VARIOUS REQUESTS?

Student contends that Bellflower should have provided prior written notice to Parents when they sent a February 27, 2018 letter with their partial consent to the February 12, 2018 initial IEP and when they asked Bellflower to remove the discipline reports from Student's file by their May 14, 2018 letter to Bellflower. Student contends Bellflower failed to respond to the Parents' letter listing the reasons they believed the February 2018 IEP was inappropriate, and that because Student was eligible for special education, Parents' request to remove two discipline letters required a prior written notice.

Bellflower contended that it properly responded to Parents' February 27, 2018 partial consent letter by repeatedly attempting to schedule a follow up IEP team meeting between April 2018 and May 2018, and when it was unable to schedule the meeting sent a letter on September 13, 2018, again requesting to schedule an IEP team meeting. Bellflower further contends it responded to Parents' concerns listed in the May 14, 2018 letter regarding the removal of two behavioral incidents from Student's file and that the May 2018 letter did not require a prior written notice because Parents' request was not a change in the identification, evaluation, or educational placement of the child, or the provision of a FAPE to Student.

A parent must be provided written prior notice when a school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4.) The notice must include:

- a description of the action refused by the school district;

- an explanation of why the school district refuses to take the action;
- a description of each assessment procedure, test, record, or report used as a basis for the refused action;
- a description of any other factors relevant to the school district's refusal;
- a statement that the parents have protection under the procedural safeguards of IDEA; and
- sources for the parents to contact to obtain assistance. (20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.)

Bellflower held Student's initial IEP team meeting over two days on February 12, 2018, and February 13, 2018. Bellflower found Student eligible for special education and related services under the category of other health impairment. Bellflower's offer of special education and related services included 1,425 minutes weekly of specialized academic instruction in the behavior emotional and social teaching program, referred to as BEST, at Washington Elementary School, 1,200 minutes of counseling and guidance yearly, and a behavior intervention plan. Parents did not consent to Student's initial IEP.

On February 27, 2018, Parents sent Ms. Zylla a letter detailing their stipulated consent to the initial IEP and disagreement with several portions of the IEP. Parents agreed Student had a disability and met the eligibility category of other health impairment. Parents disagreed that Bellflower assessed in all areas of disability and that the assessments were comprehensive. Parents also disagreed that Bellflower accurately determined Student's present levels of performance, identified his areas of unique need, and properly determined all areas of eligibility. Parents did not agree that Bellflower allowed them to participate in a meaningful way in the IEP process. Parents did not agree that Bellflower's goals were structurally sound or measurable and they did not

agree that the behavior intervention plan was comprehensive or accurate. Finally, Parents did not agree that Bellflower considered the full continuum of special education services or offered Student placement in the least restrictive environment. Parents disagreed with Bellflower's offer of special education and related services, but consented to Bellflower implementing the goals, behavior intervention plan, and accommodations. Parents stated they intended to exhaust their administrative remedies to bring a quick resolution to their outstanding disputes, however, they also wanted to work with Bellflower in a non-adversarial manner. In the February 27, 2018 letter, Parents did not specifically request a change in the identification, evaluation, or educational placement for Student. Parents also did not specifically request a change in the provision of a FAPE. Parents did not specifically request Bellflower do anything as a result of their letter, rather they listed their points of disagreement with the initial IEP.

Bellflower responded to Parents' letter by trying to schedule several additional IEP team meetings. The IEP may serve as the school district's prior written notice as long as it meets all the legal prior written notice requirements. (71 Fed. Reg. 46691 (Aug. 14, 2006).) By email dated April 17, 2018, Matthew Adair, Bellflower's special education program administrator, proposed an IEP team meeting on May 8, 2018. Parents initially agreed to attend the IEP team meeting however, Mother canceled the meeting because she had a work obligation. By email dated May 2, 2018, Mr. Adair then proposed an IEP team meeting for June 12, 2018, however, Parents could not attend that meeting. On July 17, 2018, Student sent a letter to Bellflower disagreeing with the February 2018 assessments and requested independent educational evaluations. Bellflower granted Student's requested and authorized independent educational evaluations in the areas of psychoeducation, functional behavior analysis, and educationally related mental health services. On September 13, 2018, Bellflower sent Parents a letter detailing their attempts to schedule a follow up IEP team meeting and

scheduled an IEP team meeting for October 1, 2018. On September 21, 2018, Parents informed Bellflower they would not attend an IEP team meeting until the independent educational evaluations they requested in July had been completed.

Student did not prove that Bellflower was required to send a prior written notice in response to the February 27, 2018 letter. School districts are required to send prior written notice to parents when the school district proposes, or refuses, to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. Student's February 27, 2018 letter stated his disagreement with Bellflower's FAPE offer. Student did not ask Bellflower to do anything as a result of the letter. Although a prior written notice was not required, Bellflower attempted to address Parents' concerns by scheduling another IEP team meeting. Parents were unable to attend then refused to attend any further IEP team meetings until the independent educational evaluations were completed.

Even if Student's letter could be read as requesting a change to the provision of FAPE, Student did not prove that the procedural violation impeded his right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or deprived Student of educational benefits.

On May 14, 2018, Parents sent Ms. Zylla a letter disagreeing with two discipline referrals for Student. Parents asked that Bellflower remove the referrals from Student's educational file because he had an IEP, Student's misconduct was not considered in light of his disability, and Parents believed one of the referrals was retaliation for their prior request for litigation. In the May 14, 2018 letter, Parents did not specifically request a change in the identification, evaluation, or educational placement for Student, or the provision of a FAPE. Bellflower did not send a prior written notice in response to Parent's May 14, 2018 letter.

Bellflower was not required to send a prior written notice in response to Parents' May 14, 2018 letter. The discipline referrals did not propose or refuse to initiate or change, anything about Student's identification, evaluation, placement, or provision of FAPE and Parents' May 2018 letter did not ask Bellflower to initiate or change Student's identification, evaluation, placement or provision of FAPE. The procedure to challenge a discipline record, outside of a manifestation determination review which was not applicable here, was a general education process and did not require a prior written notice. This is especially true as IDEA permits school districts to discipline special education students like general education until specific events occur, such as suspending a student for more than 10 school days. (20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).) Student does not contend that Bellflower's actions triggered the disciplinary requirements under the IDEA. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 48915.5, subd. (a).)

ISSUE 4: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO MAKE AN APPROPRIATE OFFER OF PLACEMENT, SERVICES, AND GOALS IN THE JANUARY 18, 2019 IEP?

Student contends that the January 18, 2019 IEP was inappropriate because Bellflower made almost no changes to the February 12, 2018 IEP despite reviewing Dr. Endelman's independent educational evaluation at the January 18, 2019 IEP team meeting. Student contends he needed academic goals however, Bellflower did not add any additional goals to Student's February 12, 2018 IEP. Student also contends Bellflower's offer of the BEST program was not appropriate and he required a nonpublic school placement. Student contends he requires a higher level of mental health services. Student contends Bellflower should have proposed a transition plan to facilitate Student's transition from a homeschool program to a comprehensive campus

and should have clarified the transportation services as it was inappropriate to expect Student to access corner pick-up transportation services.

Bellflower contends that it reviewed Dr. Endelman's independent educational evaluation at the January 18, 2019 amendment IEP team meeting but disagreed with the recommendation for nonpublic school. Bellflower further contends Dr. Endelman's report did not disclose any reason to add additional goals to those proposed in the February 2018 IEP and that the team discussed the fact that Student would have an increase in behaviors due to any change in his placement. Bellflower's closing brief did not address Student's contentions regarding transportation, the necessity for a transition plan, and a higher level of counseling services.

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

An IEP is a written statement for each child with a disability that should include:

- the child's present levels of academic achievement and functional performance;
- a statement of measureable annual goals;
- a description of how the child's progress on the annual goals will be measured;
- a statement of special education and related services;
- any program modifications or supports necessary to allow the child to make progress;

- an explanation of the extent to which the child will not be educated with nondisabled children in general education classes; and
- the frequency, location, and duration of the services.

(20 U.S.C. § 1414(d)(1)(A); Ed. Code, § 56345, subd (a.).)

The IEP must show a direct relationship between the present levels of performance, the goals, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) An IEP must contain a statement of measurable academic and functional annual goals, designed to meet the child's needs related to a disability, to enable the child to be involved in and make progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

As part of Bellflower's offer of a free appropriate public education, Student's initial IEP dated February 12, 2018, contained three goals, a behavior goal, a social emotional goal, and a prosocial goal. Bellflower also offered Student accommodations that were not an issue for hearing. Bellflower offered Student 1,200 minutes yearly of counseling and guidance, 1,425 minutes weekly of specialized academic instruction in a separate setting, and a behavior intervention plan. Bellflower also offered corner pick-up transportation. Parents disagreed with Bellflower's offer of FAPE, but consented to Bellflower implementing the goals, behavior intervention plan, and accommodations. Although Parents originally consented to the counseling services, on May 16, 2018, Parents revoked consent for Mr. Yoshioka to provide counseling and requested that Bellflower fund private counseling for Student. On May 16, 2018, Bellflower sent a prior written notice refusing to fund private counseling for Student.

Initially, Parents started to see Student making some progress behaviorally after Bellflower began partially implementing the February 12, 2018 IEP during Student's fourth grade year. However, the progress was short lived and Student continued to have behavior problems through the end of the 2017-2018 school year. Behaviorally, Student continued to struggle completing and turning in work. Student received a discipline referral for yelling at kindergarten students while on a walk on May 11, 2018. Student continued to act out and disrupt the class.

Student's end of the 2017-2018 school year grades in English language arts ranged from meeting grade level standards in reading foundation and language, to approaching standards in literature and informational text, to not meeting standards in writing and speaking and listening. Student's effort in English language arts was unsatisfactory. Student met grade level standards for Mathematics operations and algebraic thinking and number operations in base ten and fractions. Student was approaching grade level standards in measurement and data as well as geometry. Student's effort in mathematics needed improvement. Student was approaching grade level standards in science and his effort was satisfactory. Student met grade level standards in technology and had satisfactory effort. Student had outstanding effort in health and physical education and satisfactory effort in visual and performing arts. Student's effort was satisfactory in organization, needed improvement in using time effectively and completing homework and classwork. Student's effort was unsatisfactory in respecting others, accepting responsibility, self-control, and following rules. Overall, Student's academic performance declined significantly from previous years while he was at Las Flores.

Student continued to struggle both academically and behaviorally during the beginning of the 2018-2019 school year during his fifth grade year. Student produced very little work and his behaviors impacted his ability to learn in the classroom. Parents withdrew Student from Las Flores on December 6, 2018, to homeschool him after sending a letter to Bellflower informing it they would be privately placing Student and seeking reimbursement.

In conducting his evaluation of Student, Dr. Endelman used cognitive testing, academic achievement testing, autism rating scales, behavior rating scales, and visual motor and visual perception assessments. Dr. Endelman concluded that Student met the criteria for specific learning disability as a severe discrepancy existed between his intellectual ability and academic achievement in reading comprehension, mathematic calculations, and written expression and he demonstrated a processing disorder in attention. Dr. Endelman concluded Student did not meet eligibility criteria for autism as his verbal reasoning skills were a strength, he did not exhibit any deficits in expressive or receptive language, and he had appropriate nonverbal skills. Although Student exhibited a history of impaired social interaction starting in second grade, Dr. Endelman attributed that to behavior and mental health factors. Dr. Endelman also concluded Student met the eligibility criteria for other health impairment due to attention deficit hyperactive disorder and anxiety with obsessive compulsive features. Finally, Dr. Endelman concluded Student met the eligibility criteria for emotional disturbance due to an inability to learn, inability to build and maintain satisfactory relationships, inappropriate behavior, and a pattern of task refusal, tardiness, and school avoidance. Dr. Endelman recommended the IEP team consider eligibility under specific learning disability and emotional disturbance as well as Student's current eligibility under other health impairment.

Dr. Endelman also recommended intensive behavior programing, academic intervention such as the Orton-Gillingham approach, which is a multisensory teaching method, a highly structured environment with a low staff to student ratio, a writing program such as Step Up to Writing, parent training, social skills training, individual and family mental health services, special education transportation, and an extended school year program. Dr. Endelman also recommended applied behavioral analysis techniques, social skills training to teach replacement behaviors, and parent and staff training in de-escalation and crisis management including self-defense and restraint.

Student's IEP team held an amendment IEP team meeting on January 18, 2019, to discuss Dr. Endelman's independent educational evaluations. Mr. Adair, Mr. Yoshioka, Ivan Varela, Bellflower's behavior intervention psychologist, Ms. Thompson, Lindsay Hunt, Bellflower's education specialist, and Maryn Foote, Bellflower's general education teacher attended the January 18, 2029 IEP team meeting in person. Mother, her attorney, Dr. Endelman, and Bellflower's attorney participated in the IEP team meeting telephonically. The IEP team discussed eligibility and Dr. Endelman's recommendations that Student met specific learning disability and emotional disturbance criteria. Ultimately, Bellflower did not make any changes to Student's eligibility from that offered in the February 2018 IEP.

The IEP team also discussed what placement was appropriate for Student. Dr. Endelman recommended a program with direct instruction and built-in behavior supports. The team discussed the BEST program which had a had a low student to staff ratio, built in behavior supports, and an applied behavioral analysis focus. Dr. Endelman opined that the BEST program was not appropriate for Student because he saw Student's behavior as a symptom of his need for an academically focused program. Dr. Endelman recommended a nonpublic school placement such as Prentice. The IEP

team did not review or update Student's present levels of performance, goals, accommodations, or modifications contained in the February 12, 2018 IEP. Bellflower continued to offer 1,425 minutes per week of specialized academic instruction in the BEST program. Bellflower removed counseling and guidance and offered parent counseling and mental health counseling.

Student proved the January 18, 2019 IEP denied Student FAPE because it failed to offer Student appropriate goals and services. The law does not require Bellflower to accept the recommendations of an independent assessor's report. Bellflower is only required to consider the report. (*G.D. v. Westmoreland School Dist.* (1st Cir. 1991) 930 F.2d. 942, 947.) However, Student's last IEP took place in February 2018, almost a full year prior to the January 18, 2019 IEP at issue. Student ended his fourth grade year not meeting most grade level standards. By the time of the January 18, 2019 IEP, Student had been homeschooled for over a month. Despite Student's poor academic performance, coupled with Dr. Endelman's findings that Student had deficits in reading comprehension, mathematic calculations, and written expression, and required academic goals, Bellflower did not update Student's present levels of performance or goals. Student did not have any academic goals in his previous February 2018 IEP, yet the evidence demonstrated that Student struggled in reading comprehension, mathematic calculations, and written expression. Because the present levels of performance were not updated, the January 18, 2019 IEP team did not consider all the relevant data in designing a program of special education and related services to address Student's academic needs in a manner consistent with the law.

An IEP must show a direct relationship between the present levels of performance, the goals, and the specific educational services to be provided. Here, Bellflower did not make any changes to the present levels of performance or goals

based on all the new assessment data from Dr. Endelman and it had been almost a year since Student's last IEP. Without updating the present levels of performance, or offering goals in all areas of need there is not a direct relationship between Student's needs and the services offered. This is a procedural violation that impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE, and deprived Student of educational benefit. Bellflower denied Student a FAPE on this ground.

Bellflower offered Student transportation to the BEST program but its offer was not clear and Parents did not understand what Bellflower offered. Bellflower offered corner pick-up because the program offered was not at Student's home school but did not specify where Student would be picked up, if the corner was a corner by his house or if the corner was by his homeschool.

Student did not, however, prove that Bellflower denied him a FAPE in its offer of mental health services or placement. Student did not prove Bellflower denied him FAPE by failing to offer a transition plan from the homeschool environment to the BEST program. Bellflower continued to offer Student placement in the BEST program in the January 18, 2018 IEP. Student required a low student to staff ratio, direct instruction, and applied behavior analysis. Bellflower offered that with the BEST program. Although Dr. Endelman opined that the BEST program was not appropriate for Student because Student did not require a behavior focused program, his testimony was contradictory and not persuasive. Dr. Endelman opined that Student's behaviors were a result of unaddressed academic needs however, he also concluded Student met eligibility criteria of emotional disturbance. Student did not provide any evidence as to the type, amount, or duration of counseling services he required. Dr. Endelman opined that Student required mental health services not counseling and guidance but did not explain how

Bellflower's offer of sixty minutes per week of educationally related mental health services counseling and 45 minutes per week of parent counseling was not appropriate.

Student's contention that he required a transition plan from the homeschool environment to the BEST program was not supported by any evidence. Student failed to meet his burden on the issue of placement, counseling services, or a transition plan. Student proved Bellflower denied him a FAPE by failing to update his present levels of performance and offer academic goals. As a result of those failures the services Bellflower offered were not appropriately tailored to Student's needs.

ISSUE 5: DID BELLFLOWER DENY STUDENT A FAPE DURING THE 2018-2019 AND 2019-2020 SCHOOL YEARS BY FAILING TO CONVENE AN ANNUAL IEP TEAM MEETING IN FEBRUARY 2019?

Student contends Bellflower denied him FAPE by failing to hold an annual IEP team meeting during the 2018-2019 school year. Student contends Bellflower's failure to hold an annual IEP team meeting denied him a FAPE because Bellflower did not provide a new offer of placement, services, or goals based on his unique needs and denied Parents the right to participate in the IEP process.

Bellflower contends it repeatedly tried to convene an IEP team meeting beginning on September 13, 2018, however parents refused to meet and repeatedly obstructed Bellflower's attempts to convene an IEP team meeting. Bellflower further contends Parents withdrew Student from Bellflower in December 2018 and refused to attend its proposed individual services plan meeting.

An IEP meeting must be held at least annually. (Ed. Code, § 56343.). A school district must ensure that the IEP team revises the IEP, as appropriate, to address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." (20 U.S.C. § 1414 (d)(4)(A); 34 C.F.R. § 300.324(b)(2).) California law provides that an IEP team "shall meet" whenever "[t]he pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

Bellflower held Student's initial IEP team meeting on February 12, 2018. Although Bellflower attempted to hold another IEP team meeting between May 2018 and October 2018, that proposed meeting was to address Parents' concerns and not an attempt to convene annual IEP team meeting. On each of the IEP team meeting notices Bellflower sent, it listed the purpose of the meeting as an amendment IEP team meeting.

On November 9, 2018, Parents informed Bellflower they disagreed with the offer of FAPE and intended to privately place Student and seek reimbursement. On November 27, 2018, Bellflower sent Parents a prior written notice regarding their intent to privately place and seek reimbursement. Bellflower disagreed that there was a need to privately place Student and did not agree to reimburse a private placement. Parents subsequently disenrolled Student from Las Flores and homeschooled him until June 4, 2019.

Bellflower held an IEP team meeting on January 18, 2019, to review Dr. Endelman's independent educational evaluation. The purpose of the meeting was an addendum IEP team meeting to review the assessments. Bellflower did not update Student's present levels of performance, did not review progress on goals, and did not create new goals for Student. The January 18, 2019 IEP team meeting was not an annual IEP team meeting.

On June 4, 2019, Parents informed Bellflower they did not believe it had provided FAPE to Student therefore they were placing Student at Fusion Academy, a private school, which is not certified by the California Department of Education, and seeking reimbursement. Bellflower sent a prior written notice on June 27, 2019, reminding Parents that they consented to the February 12, 2018, IEP in its entirety on February 13, 2019, and declined to reimburse Parents for Student's private placement at Fusion Academy.

Bellflower did not hold an annual IEP team meeting for Student until August 7, 2019, more than six months after his annual IEP was due. Although Student was no longer attending a Bellflower school, he was still Bellflower's responsibility.

Bellflower was obligated to hold an annual IEP team meeting to review Student's progress on goals, update his present levels of performance, create new goals, and offer supports and services based upon the updated goals. Bellflower's failure to call an IEP team meeting until August 7, 2019, impeded Student's right to a FAPE and deprived him of educational benefit. It also significantly impeded Parents' participatory rights. An annual IEP team meeting would have given Bellflower the opportunity to understand how Student was performing in the homeschool environment, provided a forum for updating Student's present levels of performance and the creation of new annual goals, as well as an updated offer of special education and related services based on current information. Without an annual IEP team meeting, Student was not provided with an updated offer based on updated information necessary to meet his needs and Parents were unable to make an informed decision regarding Student's placement. Bellflower's failure to convene an IEP team meeting until August 7, 2019, denied Student a FAPE.

ISSUE 6: IS BELLFLOWER REQUIRED TO PROVIDE STUDENT COMPENSATORY EDUCATION AS A RESULT OF ITS FAILURE TO OFFER STUDENT A FAPE IN ITS FEBRUARY 2018 INITIAL IEP?

Student contends that because OAH, in an April 15, 2019 decision, found that Bellflower's February 12, 2018, initial IEP did not offer him FAPE, Student is entitled to compensatory education. Student also contends Parents had no choice but to remove him from Las Flores in November 2018 and ultimately place him at Fusion Academy June 2019.

Bellflower contends Student is not entitled to compensatory education because OAH could have awarded compensatory education as a remedy in the previous decision, but did not, and that Student is now barred from re-litigating the issue under the doctrines of res judicata and collateral estoppel.

On April 15, 2019, OAH issued a Decision finding Bellflower's February 12, 2018 IEP did not offer Student FAPE. Prior to that, on January 18, 2019, Bellflower held another IEP team meeting and made a new offer of special education and related services. Bellflower's January 18, 2019 FAPE offer was an issue in this hearing, therefore, any award of compensatory education based on District's failure to offer FAPE in the February 12, 2018 IEP is limited to the time frame between February 12, 2018, and January 17, 2019.

The doctrine of collateral estoppel "prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, 189 Cal.Rptr.3d 809, 352 P.3d 378.) "[I]ssue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one

who was a party in the first suit or one in privity with that party." (*Id.* at p. 825, 189 Cal.Rptr.3d 809, 352 P.3d 378.) A party who asserts collateral estoppel as a bar to further litigation bears the burden of proving that the requirements of the doctrine have been satisfied. (*Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 489, 229 Cal.Rptr.3d 99.)

Whether an issue is "identical" to a previously adjudicated issue for purposes of collateral estoppel depends on the burden and standard of proof applicable in each proceeding or action in relation to the party who obtained a favorable finding in the prior action and who then invokes collateral estoppel in the subsequent proceeding with regard to that finding. In *The Grubb Co., Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, 1503, 124 Cal.Rptr.3d 894, the appellate court stated: "[C]ollateral estoppel does not apply when the factual finding in the prior proceeding was arrived at based on a lower standard of proof than the one required in the subsequent proceeding." (See *People v. Esmaili* (2013) 213 Cal.App.4th 1449, 1463, 153 Cal.Rptr.3d 625 ["collateral estoppel does not apply where the two proceedings at issue have different burdens of proof [citations] or where the burden of proof falls on a different party in each proceeding"].)

Bellflower had the burden of proving that the February 12, 2018 IEP offered Student a FAPE. OAH found in the April 15, 2019 Decision that Bellflower failed to meet its burden. Here, Student carries the burden of proof that as a result of Bellflower's failure to offer FAPE in the February 12, 2018 IEP he is entitled to compensatory education. The IDEA specifically allows a parent to file a separate due process complaint on an issue separate from a due process complaint already filed. (20 U.S.C. § 1415(o); 34 C.F.R. § 300.513(c); Ed. Code, § 56509). Student was entitled to file a separate due process complaint for a determination of whether he is entitled to compensatory

education resulting from Bellflower's failure to offer FAPE in the February 12, 2018 IEP. Therefore, the doctrine of collateral estoppel does not prevent Student from seeking in this proceeding a remedy for denial of FAPE resulting from the February 2018 IEP.

OAH found that Bellflower did not establish it complied with all of the IDEA's procedural requirements in developing the February 2018 IEP and it failed to establish the special education and related services it offered substantively complied with the law. OAH found two of the three annual goals developed were not appropriate objective measures for determining Student's progress in his areas of unique needs. OAH found the February 12, 2018 IEP substantively deficient in the 1200 minutes of counseling services per year was not offered in a frequency sufficient for Student to receive a FAPE. OAH found that Bellflower did not accurately represent the amount of time Student would be in special education versus general education, however, the previous Decision did not address the appropriateness of the BEST program. OAH found the transportation services offered were not sufficiently specific and the amount of time in general education and in special education was not clear.

Student did not prove that he is entitled to compensatory education as a result of Bellflower's failure to offer him FAPE in the February 12, 2018 IEP. Although OAH found Bellflower's February 12, 2018 IEP procedurally deficient, Student did not prove how the procedural violations impeded his right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or deprived Student of educational benefits. Under *Schaffer v. Weast*, *supra*, 546 U.S. 49, this burden is placed on Student. Student carried the burden here, not Bellflower, as to how the violations denied him FAPE. Student failed to provide evidence to establish he required compensatory education as a result of OAH's May 15, 2019

Decision. Student also failed to provide any evidence as to the type, amount, or duration of counseling services he required.

ISSUE 7: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO HAVE AN IEP IN PLACE FOR HIM AT THE BEGINNING OF THE 2019-2020 SCHOOL YEAR?

Student contends Bellflower denied him FAPE by failing to have an IEP in place at the beginning of the 2019-2020 school year and that Bellflower did not have an offer in place until September 27, 2019. Student further contends that without an IEP offer when the school year began on August 15, 2019, Parents were unable to participate in the IEP process and consider Bellflower's FAPE offer.

Bellflower contends it used its best efforts to hold an IEP team meeting prior to the start of the 2019-2020 school year. Bellflower contends it held an IEP team meeting on August 7, 2019, prior to the start of the school year however, the team needed a second IEP team meeting to finish reviewing the IEP and Parents were not available until September 27, 2019. Bellflower further contends the brief delay in concluding the IEP team meeting from the start of the 2019-2020 school year until September 27, 2019, did not result in a denial of FAPE.

A school district's obligation to provide special education and related services do not expire; and terminate only upon one of three conditions; (1) the student ages out on his/her 22nd birthday; (2) the student graduates with a regular high school diploma; or (3) the student's parents revoke consent to the provision of special education and related services in writing. (34 C.F.R. § 300.101(a); 34 C.F.R. § 300.102 (a)(3)(i); 34. C.F.R. § 300.300(b)(4)(iii).

Parents may revoke consent for the continued provision of special education and related services under the IDEA at any time. (34 C.F.R. § 300.9(c).) If the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency will not be considered in violation of the requirement to make a FAPE available to the child because of the failure to provide the child with further special education and related services and is not required to convene an IEP team meeting or develop an IEP for the child for further provision of special education and related services. (34 C.F.R. § 300.300(b)(4)(iii) & (iv).)

The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in the district's preferred course of action. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055.) Re-enrollment in the public school is not required to receive an IEP. It is residency, rather than enrollment, that triggers a district's IDEA obligations.

A school district must have an IEP in place at the beginning of each school year for each child with exceptional needs residing within the district. (20 U.S.C. § 1414(d)(2)(A); Ed. Code, § 56334, subd. (c).)

On August 7, 2019, Bellflower held part one of Student's annual IEP team meeting. Mr. Adair, Mr. Yoshioka, Ms. Thompson, Ms. Hunt, Ms. Foote, and Bellflower's attorney all attended in person. Mr. Varela also attended in person, but joined the meeting late. Mother, her attorney, Fusion Academy's head of school, Robin Podway, and Connor Mufich, Fusion Academy's assistant director, all participated telephonically. The team discussed Student's recent enrollment at Fusion Academy. The IEP team had an extensive discussion about Student's eligibility and whether or not he qualified as a Student with a specific learning disability or emotional disturbance. Ms. Podway

explained Student's current program at Fusion Academy and his progress thus far after he attended two summer classes in music and art.

The team again reviewed Dr. Endelman's report regarding Student's anxiety and discussed Student's present levels of performance. Neither Ms. Podway nor Mr. Mufich could address Student's present levels of performance as he had not completed any academic work at that time. Mother explained the work Student completed while she homeschooled him. While being homeschooled Student completed several sections in a fifth grade math book and worked on reading, critical thinking, and spelling, but Student refused most work and Mother was concerned Student did not receive educational benefit. The team concluded the August 7, 2019 meeting without reviewing goals, accommodations, modifications, related services, or placement.

Bellflower's 2019-2020 school year started August 15, 2019. Subsequent to that, the IEP team reconvened on September 27, 2019, to finish Student's annual IEP. The team revisited eligibility and agreed Student qualified under other health impairment and emotional disturbance. Bellflower's FAPE offer was drastically different from its previous IEP offer in January 2019. Bellflower offered nine goals, a reading comprehension goal, a statistics and probability goal, a written expression goal, two behavior goals, an executive functioning goal, a social emotional goal, a peer interaction goal, and a parent communication goal. Bellflower offered Student extended time, multiple or frequent breaks, visual cues, reduced distractions, positive praise and feedback for appropriate behaviors, supplemented visual information with text, and multiple options for homework to demonstrate mastery of the subject. Bellflower offered 60 minutes once a month of parent counseling, 60 minutes once a week of individual counseling, 30 minutes once a week of counseling and guidance, 1,846 minutes weekly of intensive individual services from a nonpublic agency in the

form of one to one behavioral and social emotional support, and 600 minutes monthly of behavior intervention services from a nonpublic agency to supervise the intensive individual services provider and consult with the teacher and school staff regarding Student's needs. Bellflower offered the intensive individual services in the general education classroom at Stephen Foster Elementary.

The IEP team discussed the offer and Mr. Yoshioka explained that based on reports that Student did well at Fusion Academy with one to one support Bellflower felt one to one support in the general education class would work for Student. At hearing Mr. Yoshioka opined that general education with an aide was not appropriate, but the BEST program was appropriate for Student. Parents disagreed with Bellflower's offer of special education and related services, maintained Student's placement at Fusion Academy and continued to seek reimbursement.

Student proved Bellflower denied him FAPE by failing to have an IEP in place at the beginning of the 2019-2020 school year, especially since Bellflower had failed to make an annual IEP offer since the original IEP offer in February 2018. Although Bellflower convened an IEP team meeting prior to the start of the 2019-2020 school year, it did not complete the IEP or offer Student FAPE. Bellflower's argument that the brief delay in concluding the IEP team meeting from the start of the 2019-2020 school year until September 27, 2019, did not result in a denial of FAPE is not persuasive. Bellflower's FAPE offer at the September 27, 2019 IEP team meeting was drastically different than its previous FAPE offer. Up until the September 27, 2019 IEP, Bellflower offered Student 1,425 minutes of specialized academic instruction weekly in a self-contained special education classroom. Bellflower's September 27, 2019 FAPE offer was general education with one to one nonpublic aide support. Bellflower changed its offer

of a self-contained special education classroom to a general education classroom with a one to one aide.

Bellflower's failure to complete the IEP prior to the start of the 2019-2020 school year left Student without an offer of placement and services. Bellflower had not held an annual IEP team meeting for Student since his initial IEP team meeting on February 12, 2018. Without an annual IEP team meeting and an updated IEP offer of special education and related services based on current information, Parents could not make an informed decision regarding Student's placement. By the time Bellflower made its FAPE offer on September 27, 2019, Student had already started academic classes at Fusion Academy and had been governed by an expired IEP for about six months.

REMEDIES

As a remedy, Student requests $30,848.95 in reimbursement for educational expenses, tuition, and mileage for his placement at Fusion Academy from June 2019 through November 2019. Student also requests Bellflower fund prospective placement at Fusion Academy with related services and transportation until Bellflower offers Student FAPE. Student also requests compensatory education as a result of the inappropriate February 2018 IEP, and training for Bellflower staff.

Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*).) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Ibid*; *Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallap*).) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid.*) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265; *Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11–1253 JVS(MLGx)) 2012 WL 2478389, *12.)

These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524; *R.P. ex rel. C.P v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F. 3d 1117 , 1122.)

A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed.

Code, § 56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington , supra,* 471 U.S. at pp. 369-370 (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361].)

The ruling in *Burlington* is not so narrow as to permit reimbursement only when the placement or services chosen by the parent are found to be the exact proper placement or services required under the IDEA. (*Alamo Heights Independent School Dist. v. State Board of Education* (5th Cir. 1986) 790 F.2d 1153, 1161; *J.P. ex rel. Popowitz v. Los Angeles Unified Sch. Dist.* (C.D. Cal. Feb. 16, 2011, No. CV 09-01083 MMM MANX) 2011 WL 12697384, at *23.) Although the parents' placement need not be a "state approved" placement, it still must meet certain basic requirements of the IDEA, such as the requirement that the placement address the child's needs and provide them educational benefit. (34 C.F.R. § 300.148(c); *Florence County, supra,* 510 U.S. at p. 14.)

As found herein, Bellflower denied Student a FAPE by failing to make an appropriate offer of goals and services in its January 18, 2019 IEP, failing to convene an annual IEP team meeting in February 2019, and failing to have an IEP in place that the beginning of the 2019-2020 school year. As such, Student is entitled to reimbursement and compensatory education.

REIMBURSEMENT

Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private

placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.) These rules may be equitable in nature, but they are based in statute.

Student is not entitled to reimbursement for educational expenses incurred as a result of his homeschool placement.

On December 6, 2018, Parents withdrew Student from Las Flores and homeschooled him until June 2019. Student performed poorly in the private homeschool environment. Student refused anything with the mention of school in it and threw tantrums when asked to complete schoolwork. Student did not receive any academic benefit from the private homeschool. Student claims he incurred $9,630.44 in expenses for the period he was homeschooled. This amount includes a parent training class at University of California at Irvine and mileage reimbursement for one round trip for each of the six classes. It also includes a family field trip to Lake Arrowhead, California. The majority of the requested reimbursement is for items purchased through Amazon and although most of the items appear to be educationally related, the items were purchased as far back as May 2017, prior to Student's initial IEP.

In *C.B. v. Garden Grove Unified School Dist*. (9th Cir. 2011) 635 F.3d 1155 (*Garden Grove*), the Ninth Circuit set forth the standards to be applied in determining whether a private placement is appropriate for the purpose of reimbursement. There, a student had benefited substantially from a private placement, but parents were awarded only partial reimbursement because the placement did not address all of the student's special education needs. (*Id.* at pp. 1157-1158.) The Court of Appeals held that parents were entitled to full reimbursement because the IDEA "does not require that a private school placement provide all services that a disabled student needs in order to permit full reimbursement." (*Id*. at p. 1158.) In reaching this conclusion the Ninth Circuit relied upon a standard set forth by the Second Circuit. The Court concluded that, for a parent

to qualify for reimbursement, parents need not show that a private placement furnished every special service necessary to maximize their child's potential. They need only to demonstrate that the placement provided educational instruction specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from instruction. (*Id.* at p. 1159 [quoting *Frank G. v. Bd. of Education* (2d Cir. 2006) 459 F.3d 356, 365 (citations and emphases omitted)].) Here, the private homeschool placement did not address Student's needs and provide him with educational benefit. Student did not receive any special education services while homeschooled nor did he receive any educational benefit. This is significantly different from *C.B.* in that Student did not benefit at all from the private homeschool placement. As such, Parents are not entitled to reimbursement for expenses while Student was privately homeschooled between December 6, 2018 through June 2019.

Student is not entitled to the $769.50 Parents paid to Fusion Academy for the two classes he took during June 2019. Student did not prove that he required two nonacademic classes during the summer as compensatory education. Although Mr. Mufich and Ms. Podway opined that because Student had been out of school since December 2018 he would need time to acclimate to a school environment, their testimony was not persuasive. Neither Ms. Podway nor Mr. Mufich were credentialed special education teachers nor had they observed Student in a school environment prior to making that determination. Finally, Student did not show that he required extended school year services to receive a FAPE. (*Hoeft v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301.)

As a result of Bellflower's failure to have an IEP in place at the beginning of the 2019-2020 school year Student is entitled to reimbursement for tuition and mileage at

Fusion Academy for the 2019-2020 school year. When the 2019-2020 school year began Bellflower did not have an IEP in place and had not made an offer of special education and related services for the 2019-2020 school year. Student performed well at Fusion Academy and made academic progress. Student continued to struggle to complete independent work, but was able to successfully work one on one with his teachers at Fusion Academy. Student took a mathematics class, an English class, and an earth science class beginning on August 27, 2019. Student began a physical education class on September 23, 2019. Student's academic classes were all taught one on one. Student's physical education class was surfing and at times there were one or two other students in the class. Although Student was to choose the tasks he completed in his academic classes his choices were between different activities that addressing grade level skills. Student received educational benefit at Fusion Academy during the 2019-2020 school year therefore, Parents are entitled to reimbursement for Student's tuition and mileage at Fusion Academy from August 27, 2019, through the date of this decision. Student's recovery is not limited to the period prior to Bellflower's September 27, 2019 offer of special education and related services because Bellflower's own psychologist testified that the September 27, 2019 IEP did not include an appropriate offer of placement.

Parents are entitled to reimbursement for the $19,943.84 they paid for Student's tuition at Fusion Academy for the period from August 27, 2019, through November 30, 2019. That amount includes three academic classes as well as a tutoring and mentoring package for a physical education class and a Mandarin language class. Parents are also entitled to mileage reimbursement for one round trip between Student's home and Fusion Academy in the sum of $8.48 for each day that Student attended Fusion Academy during the period from August 27, 2019, through November 30, 2019. Student attended Fusion Academy for a total of 57 days between

August 27, 2019, and November 30, 2019. As such, Parents are entitled to $483.36 in mileage reimbursement.

COMPENSATORY EDUCATION

For the period between January 18, 2019, through the end of the 2018-2019 school year, Student is entitled to compensatory education for Bellflower's failure to make an appropriate offer of goals and services in the January 18, 2019 IEP and its failure to hold an annual IEP team meeting by February 12, 2019.

Dr. Endelman opined that Fusion Academy was an appropriate bridge program to transition Student back to a comprehensive campus. Although Dr. Endelman did not observe Student at Fusion Academy, based on his assessment and understanding of Fusion Academy's one to one teaching model, Dr. Endelman's opinion that Student would receive academic benefit was credible. Dr. Endelman opined that between six and 18 months is typical for a student to gain consistency and success prior to another transition and Student required a small Student to teacher ratio and focus on academics that Fusion Academy provided. Student is entitled to reimbursement at Fusion Academy as compensatory education from the date of this Decision through the end of the 2019-2020 school year. Tuition reimbursement is limited to $4,644 per month, which is Fusion Academy's semester rate of $23,220 divided equally between the five months of the semester. Student is also entitled to mileage reimbursement for one round trip per day of attendance at Fusion Academy at a rate of $0.57 per mile from his home to Fusion Academy from the date of this decision through the end of the 2019-2020 school year.

PROSPECTIVE PLACEMENT

A hearing officer may not render a decision which results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school if the school has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).) However, the District Court for the Northern District of California upheld an ALJ's authority to reimburse, as compensatory education, a pupil's ongoing placement at a noncertified school. (*Ravenswood City School Dist. v. J.S.,* (N.D. Cal. 2012) 870 F. Supp. 2d 780. 787-788.)

Student's request for prospective placement at Fusion Academy is denied. Student is not entitled to order of prospective placement at Fusion Academy because it is not a certified nonpublic school.

CONCLUSIONS AND PREVAILING PARTY

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

1. Bellflower did not fail to fulfill its child find obligations by not referring Student for a special education evaluation until November 2017. Bellflower prevailed on Issue 1.
2. Bellflower did not fail to assess Student in all areas of suspected disability as part of its November 2017 assessment. Bellflower prevailed on Issue 2.
3. Bellflower did not deny Student a free appropriate public education by failing to provide prior written notice in response to Parents' various requests. Bellflower prevailed on Issue 3.

4. Bellflower denied Student a free appropriate public education by failing to make an appropriate offer of services, and goals in the January 18, 2019 individualized education program. Bellflower did not deny Student a free appropriate public education by failing to make an appropriate offer of placement in the January 18, 2019 individualized education program. Student partially prevailed on Issue 4.
5. Bellflower denied Student a free appropriate public education during the 2018-2019 and 2019-2020 school years by failing to convene an annual individualized education program team meeting in February 2019. Student prevailed on Issue 5.
6. Bellflower is not required to provide Student compensatory education as a result of its failure to offer Student a free appropriate public education in its February 2018 initial individualized education program. Bellflower prevailed on Issue 6.
7. Bellflower denied Student a free appropriate public education by failing to have an individualized education program in place for him at the beginning of the 2019-2020 school year. Student prevailed on Issue 7.

ORDER

1. Within 45 days of this Decision, Bellflower shall reimburse Parents $19,943.84 for the cost of Student's tuition at Fusion Academy for the period of August 27, 2019, through November 30, 2019, and mileage reimbursement in the amount of $483.36 for the same period. No further proof of payment is required as sufficient proof was submitted at hearing.

2. Bellflower shall reimburse Parents for Student's tuition at Fusion Academy, not to exceed $4,644 per month, and mileage at $0.57 per mile for one round trip between Student's home and Fusion Academy for each day he attends school from December 1, 2019 through the end of the 2019-2020, school year as compensatory education.
3. All of Student's other requests for relief are denied.

RIGHT TO APPEAL THIS DECISION

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

/s/
Linda Johnson
Administrative Law Judge
Office of Administrative Hearings