

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017050338

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings on May 5, 2017, naming Bellflower Unified School District. OAH continued the matter for good cause on June 13, 2017.

Administrative Law Judge Linda Johnson heard this matter in Bellflower, California, on September 26 and 27, 2017.

Tania Whiteleather, Attorney at Law, represented Student. Miho Murai, Attorney at Law, and Christopher Russell, Student's educational advocate, assisted Ms. Whiteleather during the second day of the hearing. Student's mother attended both hearing days.¹ Student's father and Student did not attend the hearing.

Eric Bathen and Marcia Brady, Attorneys at Law, represented District. Tracy McSparren, District's Assistant Superintendent, attended all of the hearing.

¹ A Spanish language interpreter assisted Mother during the second day of the hearing.

On September 27, 2017, OAH granted the parties' request for a continuance to allow the parties to file written closing briefs. The record closed on October 16, 2017, upon receipt of written closing briefs.

ISSUES²

(1) Did District deny Student a free appropriate public education by failing to timely convene an individualized education program team meeting in 2015 and 2016, after receiving Parents' request for an IEP team meeting?

(2) Did District deny Student a FAPE by failing to timely conduct Student's triennial assessment?

(3) Did District deny Student a FAPE and prevent Parents' from participating in a meaningful way in Student's 2017 annual IEP team meeting by failing to conduct appropriate assessments in all areas of suspected disability?

SUMMARY OF DECISION

Student met her burden on all issues. District denied Student a FAPE because it failed to hold an IEP team meeting despite Parents' multiple requests as District's defense that Student needed to first enroll in a District school was without merit. By failing to hold an IEP team meeting and offer Student a FAPE, Parents did not have the option to choose between District's offer and a private school. District also deprived Parents of the opportunity to meaningfully participate in the development of Student's educational program because it failed to assess Student. Without updated assessment information the IEP team was not able to make an appropriate FAPE offer and Parents

² The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

were not able to meaningfully participate in the IEP team meeting.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTIONAL MATTERS

1. Student was a 16-year-old girl at the time of the hearing who resided at all relevant times with Parents within District's boundaries. Student attended school in District from preschool in 2004 until sixth grade in 2014. Student's last triennial assessment was in 2012.

2. District held an IEP team meeting on June 3, 2014, to transition Student from sixth grade at an elementary school to seventh grade at a middle school, and made an offer of FAPE. District did not offer extended school year. Parents did not consent to the June 3, 2014 IEP at the meeting, but their attorney consented to the entirety of the IEP on their behalf via a letter dated July 3, 2014.

PRIVATE PLACEMENT IN 2014-2015 SCHOOL YEAR

3. Parents withdrew Student from District on September 8, 2014, and privately placed her at a parochial school located within the boundaries of the Norwalk-La Mirada Unified School District. Parents continued to live within District's boundaries.

4. Parents enrolled Student in a private parochial school outside of District because they were increasingly concerned about Student's safety. They were also concerned about how District was responding to Student's allegations of harassment. Although Parents voiced their concerns to their then attorney, neither Parents nor their attorney informed District about the concerns until April 2015.

5. On October 9, 2014, Norwalk-La Mirada held an individual service plan meeting. The purpose of the meeting was to determine what, if any, services Norwalk-La Mirada would offer Student as a parentally placed private school student. District's assistant superintendent Tracy McSparren attended the meeting on District's behalf.

Norwalk-La Mirada offered five 60 minute speech and language consultation sessions per year with its case carrier and the private parochial school teacher. Parents requested direct speech and language services for Student. Norwalk-La Mirada declined to provide direct services and Parents were advised to reenroll Student in District to receive direct services. Parents did not reenroll Student in District.

2015 AND 2016 REQUESTS FOR IEP TEAM MEETING AND FAPE OFFER

6. Ms. McSparren communicated with Parents multiple times during the 2015-2016 and 2016-2017 school years. Ms. McSparren was responsible for special education and student support for District. Ms. McSparren has a master's degree in education from California State University as well as a teaching credential and a bachelor's degree in biology. Ms. McSparren has 22 years of experience with special education.

7. On April 23, 2015, Parents sent a letter to District informing it they had previously removed Student from District because they were concerned for her safety, and because they believed at that time she was not making academic progress. Parents wanted Student to return to District and asked for an IEP team meeting and an offer of FAPE for the 2015-2016 school year.

8. District responded to Parents' letter on April 28, 2015; District explained it would not hold an IEP team meeting for Student until she reenrolled in District. If Student reenrolled in District, District would place Student based on her last consented to IEP and hold an IEP team meeting within 30 days of Student attending a District school.

9. On May 12, 2015, Parents sent a letter to District informing it they had previously disagreed with the June 3, 2014 IEP, provided 10 day notice of their intent to seek reimbursement for the private school placement, and again asked for an IEP team meeting and offer of FAPE at District.

10. District responded on May 14, 2015, to Parent's May 12, 2015 letter with a prior written notice. District informed Parents it would not reimburse Parents for Student's tuition at her private parochial school. District again explained that if Student reenrolled in District, it would place her based on her last consented to IEP and hold an IEP team meeting within 30 days of Student's reenrollment in District. Parents declined to enroll Student at District for the 2015-2016 school year, and Student remained at the private parochial school.

11. On April 8, 2016, Parents sent a letter to District asking for an educational placement at District for Student for the 2016-2017 school year. Parents requested an IEP team meeting to develop a FAPE for Student because they did not agree with District's offer in the June 3, 2014 IEP.

12. On April 11, 2016, District sent a Prior Written Notice to Parents explaining that it would not hold an IEP team meeting or make an offer of FAPE for a student who was not enrolled in District. If Student reenrolled in District it would make a parallel placement and hold an IEP team meeting within her first 30 days of attendance at a District school to develop an IEP and offer FAPE. Student did not enroll in District before the end of the 2015-2016 school year.

13. On September 6, 2016, Parents sent an electronic mail to District requesting an IEP team meeting and an offer of FAPE at District for the 2016-2017 school year. Parents explained they understood District's position that Student must first be enrolled in District before it would hold an IEP team meeting. However, Parents disagreed with that approach, and Student remained at the private school.

14. District sent a prior written notice on September 14, 2016, in response to Parents' September 6, 2016 communication, declining to hold an IEP team meeting. District again informed Parents it would not hold an IEP team meeting or make a FAPE offer until Student reenrolled in District.

15. Ms. McSparren opined at hearing that, based on practices within the greater Los Angeles area special education local plan areas' private school agreements, District was not responsible for assessing Student, holding an IEP team meeting, or making an offer of FAPE until Student reenrolled in District. The private school agreement gives guidance to districts when a student is privately placed in a private school located in a different district from where the family resides. The private school agreement defines the district where the family resides as the district of residence, and the district where the private school is located as the district of location. The agreement directs the district of residence to refer the family to the district of location for assessments and directs the district of location to assess students and offer an individual service plan. However, the private school agreement directs the district of residence to conduct the assessment if the Student will be attending a public school in the future. The private school agreement also directs the district of residence to hold an IEP team meeting and provide an offer of FAPE if at any time the parent indicates that they would prefer the student to attend public school. Ms. McSparren's testimony was not persuasive as it was contrary to the directions in the private school agreement.

FEBRUARY 15, 2017 IEP TEAM MEETING

16. On February 15, 2017, while Student was still attending the private parochial school, District held an IEP team meeting for Student.³ The following District staff attended: Maricela Harvin, general education teacher; an administrator designee; two service coordinators; a special education teacher; and Eric Bathen, District's

³ On January 17, 2017, the California Department of Education issued an investigation report as a result of a compliance complaint Student filed against District. The California Department of Education ordered District to convene an IEP team meeting for Student on or before March 10, 2017.

attorney. Mother and her advocate, Christopher Russell, attended the meeting as well as Cathy Garcia, the principal at Student's private parochial school.

17. Ms. Garcia reviewed Student's program, supports, and progress at the private school during the IEP team meeting. Student's program had one teacher to 15 students with one to one support available as needed. Typically students worked on assignments individually with support available if they asked for it. However, Student's teacher checked on her periodically without waiting for her to ask for assistance. Student's program was not designed as independent study. Each classroom was comprised of students in multiple grades, and students were working on different levels of curriculum, and therefore information was not presented in a lecture format. Ms. Garcia discussed Student's present levels in general terms, but, no specific assessments or special education testing were done to determine Student's present levels in reading, written language, math reasoning or calculation, language or comprehension levels.

18. Mr. Russell expressed concern at the IEP team meeting about creating an appropriate program for Student without specific updated information. Student struggled with frustration tolerance and tended to get overwhelmed. Student would break pencils or bend pieces of metal when she was overwhelmed. Student was also immature in her social interaction.

19. District offered Student four periods of specialized academic instruction for English, math, science, and social studies, study skills as an elective and general education physical education, based on the June 3, 2014 IEP. District's education specialist noted at the IEP team meeting that District needed additional information to develop a comprehensive offer of FAPE. District presented an assessment plan at the meeting to assess Student in the areas of: academic achievement; health; intellectual development; language and speech communication development; motor development; social and emotional; adaptive behavior; and post-secondary transition. Mother signed

the assessment plan on February 15, 2017. District reminded Parents that it would not assess Student until she enrolled in and was attending a District school. Parents did not reenroll Student in District, and District did not assess Student.

ACADEMIC PROGRESS AT PRIVATE SCHOOL

20. When Student first began at the private parochial school, the parochial school gave her a diagnostic test that found her performing around the fourth grade level. After attending the private parochial school for three years Student worked on grade level curriculum and passed her ninth grade classes. Student took five core classes: English, math, science, history, and etymology, as well as physical education and an elective. Although religious concepts were interwoven in all academic classes, Student had not yet started taking the religion classes because she was so far behind. The focus for Student was on catching up to grade level.

21. Each of the core classes consisted of 12 packets of accelerated Christian education. To demonstrate mastery students took a test at the end of each packet. If a student failed a test at the end of a packet they retook the test. The private parochial school charged \$10 for each repeated test. Student retook one test during the 2015-2016 school year and retook four tests during the 2016-2017 school year.

PARENTS' EXPENDITURES

22. For the 2015-2016 school year, Parents paid \$5,175 to the private parochial school for enrollment, tuition, fees, and other expenses. Of that, \$4,500 was for enrollment and tuition for the regular school year, \$35 on November 2, 2015, was for a fundraiser and \$640 on June 7, 2016, was for summer school. Additionally, Parents paid \$10 on May 2, 2016, to repeat a test Student initially failed.

23. For the 2016-2017 school year, Parents paid \$5,183 to the private parochial school for enrollment, tuition, fees, and other expenses. Of that, \$4,550 was for

enrollment and tuition, \$37 was for an art class, and \$596 of the total was not accounted for during the hearing. Additionally, Parents paid \$40 for Student to retake four tests.

24. Parents also transported Student to and from the private parochial school every day. Parents lived 4.79 miles from the private parochial school. One round trip from Student's home to the private parochial school and back to Student's home was 9.58 miles.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁵ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and 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 (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. §

⁴ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

1401(9); 34 C.F.R. § 300.17.) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School District*, the court stated that the IDEA

guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School Dist. (March 22, 2017, No. 15-827)* 580 U.S.____ [137 S.Ct. 988, 996, 197 L.Ed.2d 335]).

5. 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, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; *see* 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, District had the burden of proof for the issue alleged in this matter.

ISSUE 1: FAILURE TO CONVENE AN IEP TEAM MEETING

6. Student contends District denied her FAPE by not holding an IEP team meeting after Parents requested one in 2015 and 2016. District contends it did not need to hold an IEP team meeting because Student attended a private school located in a different school district. District further argued it did not have to hold an IEP team meeting or provide an offer of FAPE until Student reenrolled in District.

Applicable Law

7. Absent a statutory exception, the IDEA mandates that a district offer a FAPE to all students who reside in it. States must ensure that “[a] free appropriate public

education is available to all children with disability residing in the State between the ages of 3 and 21.” (20 U.S.C. § 1412(a)(1)(A).) 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. (Ed. Code, § 56344, subd. (c); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) Developing an IEP is a necessary predicate to offering a FAPE, and the obligation to offer a FAPE also includes an obligation to develop an IEP. (Cf. *Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 238–39 [129 S.Ct. 2484, 174 L.Ed.2d 168] [“[W]hen a child requires special education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP”].)

8. To provide a FAPE, a school district must develop an IEP that is reasonably calculated to provide an eligible disabled child with an educational benefit. (*Rowley, supra*, 458 U.S. at pp. 206-207.) The district must review the child's IEP at least once a year and make revisions if necessary. (20 U.S.C. § 1414(d)(4); Ed. Code, § 56341.1, subd. (d).) A parent's failure to cooperate in the development of the IEP does not negate this duty. (*Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 (*M.P.*); 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a) [School districts “...cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the parents.” (*M.P. supra*, 689 F.3d at p. 1055, citing *W.B. v. Board of Trustees of Target Range School Dist. No. 23, etc.* (9th Cir. 1992) 960 F.2d 1479, 1485, *superseded in part by statute on other grounds* (*Target Range*).].)

9. An IEP team meeting requested by a parent shall be held within 30 calendar days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days, from the date of receipt of the parent's written request. (Ed. Code, §§ 56343.5; 56043, subd. (l).) Each public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of

the determination that the child needs special related services. (34 C.F.R 300.323(c)(1).)

10. The failure to timely hold an IEP team meeting is a procedural violation. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2) and (j); *Target Range, supra*, 960 F.2d at p. 1484 ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].)

11. A district's failure to provide parents a timely, formal, written IEP offer is not a per se denial of FAPE. It may be excused as harmless error where parents participated fully in the IEP process, understood the placement and services being offered by the district, and the written offer was not significantly delayed. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461 [District failed to make formal written IEP offer prior to start of new school year, but presented such an offer to parents three days after the start of the new school year].)

12. The IDEA and the regulations promulgated pursuant to the IDEA guarantee that the parents of each child with a disability participate in any group that makes decisions on the educational placement of their child. It emphasizes the participation of the parents in developing jointly with the school district the child's educational program and assessing its effectiveness. (20 U.S.C. § 1415(a); see also 20 U.S.C. § 1400(d)(1)(B) (rights of parents protected); 20 U.S.C. 1414(c)(1)(B) (input from parents specified); 20 U.S.C § 1414(a)(1)(D) (parental consent specified); 20 U.S.C. § 1415(b) (opportunity for parents to examine the record specified); and 20 U.S.C. § 1414(d)(2)(C)(i) and (ii)(requiring school district to consult with parents of students

transferring into district in the development of a comparable interim IEP).)

13. “Parentally-placed private school children with disabilities” is a defined term that means children with disabilities enrolled by their parents in private schools or facilities. (Ed. Code, § 56170; 34 C.F.R. § 300.130.) No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. (Ed. Code, § 56174.5; 34 C.F.R. § 300.137(a).) Instead, parents of a child in private school have two options: (1) accept the offer of a FAPE and enroll their student in the public school, or (2) keep their child in private school and receive “proportional share” services, if any, provided to the student pursuant to title 20 United States Code § 1412(a)(10) and title 34 Code of Federal Regulations §§ 300.130–300.144. (*District of Columbia v. Wolfire* (D.D.C. 2014) 10 F.Supp.3d 89, 92.)

14. Developing an IEP to inform a child’s parents about the services that could be offered in an effort to provide that student with a FAPE is not the same thing as requiring the local educational agency to provide the services described in the IEP. As a result, the development of an IEP does not implicate the limitations of Title 20 United States Code section 1412(a)(10) or title 34 Code of Federal Regulations section 300.147(a). (*Id.*)

15. If Parents of a private school child request an IEP for their child, the local educational agency is required to honor that request. (*Id.* at pp. 93-94; *District of Columbia v. Vinyard* (D.D.C. 2013) 971 F.Supp.2d 103, 111; *Hack v. Deer Valley Unified School Dist.* (D.Ariz. July 14, 2017, No. CV-15-02255-PHX-JJT) 2017 WL 2991970, * 6; *Letter to Eig* (OSEP 2009) 52 IDELR 20 136 (local educational agency where student resides cannot refuse to conduct the evaluation and determine the child’s eligibility for FAPE because the child attends a private school in another district).) Parents are entitled to place student in private school even though district of residence had not previously

denied student a FAPE, and also seek a FAPE from district in which parents continue to reside. (*J.S. v. Scarsdale Union Free School* (S.D.N.Y. 2011) 826 F.Supp.2d 635, 665-668 [“a district-of residence’s obligations do not simply end because a child has been privately placed elsewhere, as the District argues—rather, the IDEA’s obligations may be shared.”]; 71 Fed. Reg. 46593 (2006); *Board of Educ. of Evanston-Skokie Community Consol. School Dist. 65 v. Risen* (N.D. Ill., June 25, 2013, No. 12 C 5073) 2013 WL 3224439, at *12-14; *District of Columbia v. Oliver* (D.D.C., Feb. 21, 2014, No. CV 13-00215 BAH/DAR) 2014 WL 686860, at *4 [Districts have no obligation to *provide* FAPE to parentally placed private school students with disabilities; but they do have an obligation to make FAPE *available* and cannot fulfill this duty without developing an IEP].)

16. An offer of placement must be made to a unilaterally placed student even if the district strongly believes that the student is not coming back to the district, or parents have indicated that they will not be pursuing services from the district. The requirement of a formal, written offer should be enforced rigorously and provides parents with an opportunity to accept or reject the placement offer. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, *cert. den.*, 513 U.S. 965 (1994).) 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, supra*, 689 F.3d at p. 1055.) Re-enrollment in public school is not required to receive an IEP. (See *Woods v. Northport Public School* (6th Cir. 2012) 487 Fed. Appx. 968, 979-980 [“It was inappropriate to require [student] to re-enroll in public school in order to receive an amended IEP” ...[.]“It is residency, rather than enrollment, that triggers a district’s IDEA obligations.”]; Cf. *N.B. v. State of Hawaii Department of Educ.* (D.Hawaii, July 21, 2014, No. CIV 13-00439 LEK-BMK) 2014 WL 3663452 [A district’s obligation to implement an interstate transfer student’s IEP begins when the student enrolls in public school].)

17. Even when parents have already decided to place their child in private school, the school district is not excused from obtaining their participation in the IEP process. In *D.B. ex rel. Roberts v. Santa Monica-Malibu Unified School District* (9th Cir. 2015) 606 Fed. Appx. 359, 360-361, the school district held an IEP team meeting to determine student's placement and services for the following school year without parents, who were unavailable and had already decided student would not be attending a district school. The court found that the failure to include parents in the IEP team meeting was a procedural violation that denied the Student a FAPE in the following school year. ["Furthermore, even if D.B.'s parents already had decided to enroll D.B. at the Westview School, their exclusion was not permissible. See *Anchorage School Dist v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 ('[T]he IDEA, its implementing regulations, and our case law all emphasize the importance of parental involvement and advocacy, even when the parents' preferences do not align with those of the educational agency.')." *D.B. ex rel. Roberts, supra*, 606 Fed. Appx. 359 at p. 361.]

18. Parents of a child placed in private school with an existing IEP may choose to revoke consent in writing for the provision of special education and related services to their child. (Ed. Code, § 56346, subd. (d).) If the parents do not revoke consent in writing, the school district must continue to periodically evaluate the student's special education needs, either on its own initiative or at the request of the student's parents or teacher. (20 U.S.C. §§ 1412(a)(3)(A) and (a)(4), 1414(a); *Department of Educ., State of Hawaii v. M.F. ex rel. R.F.*, (D.Hawaii 2011) 840 F.Supp.2d 1214, 1228-1230, *clarified on denial of reconsideration*, (D.Hawaii, Feb. 28, 2012, No. CIV 11-00047 JMS) 2012 WL 639141 [rejecting public agency's argument that the student's disenrollment from public education, without a written revocation of consent to special education services, excused the agency from preparing further IEP's until the parents subsequently requested services].)

19. A school district must conduct an IEP team meeting for a special education student at least annually "to review the pupil's progress, the [IEP], including whether the annual goals for the pupil are being achieved, and the appropriateness of placement, and to make any necessary revisions." (Ed. Code, § 56343, subd. (d); 20 U.S.C. § 1414(d)(4)(A)(i).) The statutes make no exception for the situation in which a parent has unilaterally placed her child in a private school and is demanding reimbursement because the District allegedly failed to offer or provide a FAPE. The duty of the District to hold annual IEP team meetings continues during that period. (*Briere v. Fair Haven Grade School Dist.* (D.Vt. 1996) 948 F.Supp. 1242, 1254.)

Analysis

20. Student proved in Issue 1 that District denied her a FAPE by failing to convene an IEP team meeting after Parents requested one. District was well aware of Student and that she lived within its boundaries. Student had attended school at District since 2004 and qualified for special education services the entire time. Although Parents withdrew Student from District on September 8, 2014, they still resided within District boundaries, and Parents repeatedly asked for an IEP team meeting and an offer of FAPE beginning on April 23, 2015.

21. Parents consented to the June 3, 2014 IEP through their attorney on July 3, 2014. On May 12, 2015, Parents informed District they disagreed with the June 3, 2014 IEP and were privately placing Student and seeking reimbursement. Although Parents disagreed with District's June 3, 2014 offer of FAPE, Parents did not revoke consent for Student to receive special education services.

22. Between April 23, 2015, and February 15, 2017, when District finally held an IEP team meeting, Parents asked District to hold an IEP team meeting and provide an offer of FAPE four times. Parents requested an IEP team meeting on April 23, 2015, May 12, 2015, April 8, 2016, and September 16, 2016. District responded to every

communication and consistently denied the request stating it did not have a legal obligation to hold an IEP team meeting or provide an offer of FAPE until Student reenrolled in District. District erroneously believed it was relieved of its obligations to Student once she dis-enrolled in District and began attending a private parochial school located in a different district. District further argued that because Student did not specifically state she preferred to attend public school District was relieved of any obligation to offer FAPE. District was not obligated to provide FAPE to Student while she was attending a private school, but, it was obligated to hold an IEP team meeting and offer FAPE. Furthermore, District was obligated to hold an IEP team meeting within 30 days of Parents' request. District did not hold an IEP team meeting until February 15, 2017, nearly two years after Parents' initial request for an IEP team meeting. Contrary to District's position, Student did not need to enroll in District, the fact that she was a resident of the district was sufficient to obligate District to hold an IEP team meeting.

ISSUES 2 AND 3 – FAILURE TO ASSESS AND DENIAL OF PARENTAL PARTICIPATION

23. Student contends District denied her a FAPE by failing to conduct triennial assessments. Student further contends that District's failure to assess Student resulted in a denial of parental participation in the IEP team meeting.

24. District contends it did not have a duty to assess Student until she reenrolled in District and the district of location of the private parochial school was responsible for any assessments.

Applicable Law – Assessments

25. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and

300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)⁶

26. The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary.⁷ (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) The school district must also conduct a reevaluation if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reevaluation. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) A school district must also conduct a reevaluation upon the request of the child's parent or teacher. (20 U.S.C. § 1414 (a)(2)(A)(ii); 34 C.F.R. § 300.303(a)(2); Ed. Code, § 56381, subd. (a)(1).)

Applicable Law – Parental Participation

27. The informed involvement of parents is central to the IEP process. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the IDEA. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) The Ninth Circuit Court of Appeals in *Timothy O. v Paso Robles Unified School*

⁶ Evaluations under IDEA are referred to as "assessments" under California law. (Ed. Code, § 56302.5.) The terms are used interchangeably throughout the Decision.

⁷ Three year reevaluations are commonly referred to as triennial evaluations or triennial assessments. The terms are used interchangeably throughout the Decision.

Dist. (9th Cir. 2016) 822 F.3d 1105, 1124-1125, held a school district's failure to assess Student may result in substantially hindering a parent's ability to participate in a child's educational program, and seriously deprive the child's parents, teachers and district staff of the information necessary to develop an appropriate educational program with appropriate supports and services for the child. Failure to assess the Student therefore resulted in a denial of FAPE. (*Id.* at pp. 1124-1126.)

Analysis

28. Student proved in Issues 2 and 3 that District denied her a FAPE and deprived Parents of the opportunity to participate in the development of her educational program because it did not offer to or assess Student while she was enrolled in private school. Student did not attend a District school after the end of the 2013-2014 school year. District last assessed Student in 2012. District should have offered to conduct a triennial assessment for Student in 2015, which it did not do. District offered an assessment plan that Mother signed at the February 15, 2017 IEP team meeting. However, District reminded Parents it would not assess Student until she reenrolled in District.

29. District's failure to conduct a triennial assessment for Student was a significant procedural violation of the IDEA depriving Parents of the opportunity for meaningful participation in the development of Student's educational program, and denied Student a FAPE. By not assessing Student the IEP team did not have updated information to create an IEP and offer FAPE to Student. If District had procedurally complied with the IDEA and assessed Student the IEP team would have been able to discuss Student's present levels of performance with current information instead of the generalities Ms. Garcia provided. The IEP team would also have been able to create new goals based on Student's updated present levels and offer services, supports, and placement to meet those goals. Parents would have then had the opportunity to ask

questions and voice concerns based on current information, instead of relying on an IEP that was three years old. Parents would also have had the opportunity to make an informed decision to either return Student to District or keep her at the private parochial school. Because District failed to assess Student and denied Parents the opportunity to meaningfully participate in the IEP team meeting, Parents were left with no option but to keep Student at the private parochial school.

REMEDIES

1. Student prevailed on Issues 1, 2 and 3. Student's requested remedies included requests for reimbursement and independent educational evaluations.

2. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [1055 S.Ct. 96] (*Burlington*).) When school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. ALJ's have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; 20 U.S.C. § 1415(i)(2)(C)(3).)

3. 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 Bd. of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.) 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 student with an educational benefit. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14, [114 S.Ct. 361] (*Carter*).) Parents may receive

reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); Ed. Code, § 56175; *Carter, supra*, 510 U.S. 7, 15-16 [114 S.Ct. 361].) The appropriateness of the private placement is governed by equitable considerations. (*Ibid.*) The Ninth Circuit has held that to qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special education service necessary to maximize their child's potential. (*C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.)

4. 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.

5. Student requests reimbursement for the private parochial school as a remedy for District's denial of FAPE. On May 12, 2015, Parents notified District of their disagreement with the June 3, 2014 IEP and intent to place Student in private parochial school and seek reimbursement. District provided a prior written notice on May 14, 2015, denying Parents' request for placement and defending District's offer in the June 3, 2014 IEP. Although Parents unilaterally enrolled Student in the private parochial school and did not inform District of their disagreement with the June 3, 2014 IEP until a year later, Parents demonstrated their desire and willingness to have Student attend a public school by asking four times for an IEP team meeting and a District FAPE offer. Had District conducted a triennial assessment and held an IEP team meeting at that time, Parents would have had the opportunity to choose between District's offer of FAPE and the private parochial school. Student made progress at the private parochial school; the diagnostic test Student took in 2014 placed her at a fourth grade level, and the undisputed testimony from Ms. Garcia was that Student passed all her ninth grade classes and was performing at grade level.

6. Parents proved by providing invoices and proofs of payment that they paid \$9,137 in identifiable mandatory fees and tuition for the regular school year for the period of September 2015 through June 2017. This includes \$4,500 for tuition and fees for the 2015-2016 school year, \$4,550 in tuition and fees for the 2016-2017 school year, \$37 for an art class during the 2016-2017 school year, and \$50 to retake five tests during the 2015-2016 and 2016-2017 school years. Reimbursement for Parents' expense in sending Student to a private parochial school during the regular school year is reasonable under the facts of this case. Student did not prove she required extended school year services, therefore reimbursement does not include the amount Parents paid for extended school year. Reimbursement also does not include \$35 paid on November 2, 2015, for a fundraiser, or \$596 paid during the 2016-2017 school year that was not accounted for.

7. An independent educational evaluation at public expense may also be awarded as an equitable remedy if necessary to grant appropriate relief to a party. (*Los Angeles Unified School Dist. v. D.L.* (C.D. Cal. 2008) 548 F.Supp.2d 815, 822-823.)

8. Student also requests independent educational evaluations in all areas in which District should have assessed as part of the triennial assessment. Student specifically requested psychoeducational, speech and language, occupational therapy, behavior, central auditory processing, and assistive technology independent educational evaluations. District should have conducted Student's triennial assessment in 2015. District did not do so. District did not offer an assessment plan to Parents until February 15, 2017, which they signed. District identified academic achievement; health; intellectual development; language and speech communication development; motor development; social and emotional; adaptive behavior; and post-secondary transition as areas to be assessed; to date, District still has not conducted the assessment. By conditioning any assessment District conducted on Student's reenrollment in District,

District violated its obligations to Student and Parents under the IDEA, as discussed above. Therefore, Student is entitled to independent educational evaluations in the areas of: psychoeducation; speech and language; occupational therapy; and behavior, the areas identified in the February 15, 2017 assessment plan, Student did not prove she needed an assistive technology evaluation or a central auditory processing evaluation and those areas were not listed on the assessment plan.

9. Because of District's failure to assess it would not be equitable to require Parents to fund Student's tuition at her parochial school until the independent educational evaluations are conducted and District holds an IEP team meeting to make a formal offer of FAPE. The District's denial of FAPE continues until it makes a formal FAPE offer with updated present levels of performance based on assessment information.

ORDER

1. Within 45 days of this Decision, District shall reimburse Parents for the cost of the private parochial school from September 2015 through June 2017, in the amount of \$9,137. No further proof of payment is required as sufficient proof was submitted at hearing.

2. Upon receipt of proof of the number of days Student actually attended the private parochial school for the 2015-2016 and 2016-2017 regular school years, District shall reimburse Parents for one round trip daily between Student's home and school, consisting of 9.58 miles, at the 2017 Internal Revenue Service standard rate of \$.53.5 per mile.

3. District shall reimburse Parents for Student's tuition and mandatory fees at the private parochial school and mileage for one round trip daily between Student's home and the private parochial school through the 2017-2018 school year, or until District holds an IEP team meeting to develop a new IEP and makes an offer of FAPE to

Student, whichever occurs first.

4. District shall immediately fund independent educational evaluations for Student in the areas of: psychoeducation; speech and language; occupational therapy; and behavior.

5. All of Student's other requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on all three issues.

RIGHT TO APPEAL

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

Dated: November 20, 2017

_____/s/_____
LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings