BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2020030673

PARENTS ON BEHALF OF STUDENT

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

DECISION

JANUARY 15, 2021

On March 17, 2020, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming Bellflower Unified School District. On May 1, 2020, OAH granted Bellflower's request for a continuance. Administrative Law Judge Chris Butchko heard this matter by videoconference on October 6, 7, 8, 13, 14, 20, 22, 27, 28, and 29, and November 9, 10 and 13, 2020.

Tania Whiteleather, Attorney at Law, represented Student. One of Student's parents attended all hearing days on Student's behalf. OAH provided a Spanish language interpreter each day who repeated in Parent's primary language everything

said at hearing. Richard D. Brady, Attorney at Law, and Marcia P. Brady, Attorney at Law, represented Bellflower. Matthew Adair, Bellflower's Special Education Program Administrator, attended all hearing days on behalf of Bellflower.

At the parties' request, OAH continued the matter to December 30, 2020, for written closing briefs. Upon receiving briefing by the parties, OAH closed the record and deemed the matter submitted on December 30, 2020.

ISSUES

1. Did Bellflower deny Student a free appropriate public education, known as FAPE, by impeding Parents from meaningfully participating in the development of the January 14, 2019 individualized education program, referred to as an IEP, by failing to offer present levels of performance and baselines?
2. Did Bellflower deny Student a FAPE by failing to offer objectively measurable annual goals in its January 14, 2019 IEP?
3. Did Bellflower deny Student a FAPE by failing to base its January 14, 2019 offer of programs and services in an IEP, on Student's present levels of performance?

Student had additional claims in her due process hearing request, which were set out in the September 25, 2020 order Following Prehearing Conference. On October 6, 2020, Student narrowed the issues to the three listed above by filing a Withdrawal of Issues. In this action, Student's sole requested relief is reimbursement to Parents of tuition payments from November 29, 2018, to November 17, 2019, when the IEP team met to consider the last of a group of independent assessments Bellflower had been ordered to provide to Student.

Because of the structure of Student's briefing, the third issue is now designated as Issue 1 and the original Issue 1 is now Issue 3. Other than this reorganization, no

substantive change was made to Student's issues. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443)

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.) All subsequent references to the Code of Federal Regulations are to the 2006 version. 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 FAPE 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 FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 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; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Student bears the burden of proof in this matter. 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 over 18 years old, and by the time of the hearing she had received a high school diploma from New Harvest Christian School, the private school she attended. Parents brought this action pursuant to a power of attorney for educational decision-making Student had granted to Parents. Student was last enrolled with Bellflower in the 2013-2014 school year. Student continually resided with Parents within Bellflower's geographic boundaries during all relevant times but attended New Harvest since the 2014-2015 school year. Student was previously eligible for special education services due to disability in speech and language, but in 2014 Bellflower found Student eligible for special education services as a student with Autism Spectrum Disorder, referred to as autism.

This is the third due process action between the parties decided by OAH since November 2017. In the first action, OAH Case No. 2017050338, Parents sought to have Bellflower conduct assessments and hold an IEP team meeting. Bellflower believed that it had no obligation to do so because Student was attending school in a different district. OAH held that Bellflower was responsible for developing an IEP for Student as her district of residence. OAH ordered Bellflower to contract for and fund independent educational evaluations of Student and directed Bellflower to hold an IEP team meeting to prepare an educational plan for Student once those assessments were completed. OAH also ordered Bellflower to reimburse parents for Student's tuition at New Harvest until the earlier of the holding of an IEP team meeting or the end of the 2017-2018 school year.

Bellflower continued to believe that it was not the educational agency responsible for Student's education and did not comply with OAH's order. Parents filed

a second action with OAH in July 2018, OAH Case No, 2018071234, asserting that Bellflower failed to conduct assessments ordered by OAH or additional ones requested by Parents, and that Bellflower denied Student her educational rights by failing to make an offer of FAPE for the 2018-2019 school year. Bellflower maintained that it did not have to make a FAPE offer to Student due to an agreement between schools in the local plan area. The second OAH decision held that the agreement did not affect Student's rights against Bellflower and ordered Bellflower reimburse Parents for the cost of attending New Harvest through November 2018 and immediately fund the previously-ordered assessments and additional assessments in central auditory processing and transition needs.

ISSUE 1: DID BELLFLOWER DENY STUDENT FAPE BY IMPEDING PARENTS FROM MEANINGFULLY PARTICIPATING IN THE DEVELOPMENT OF THE JANUARY 14, 2019 IEP THROUGH FAILING TO OFFER PRESENT LEVELS OF PERFORMANCE AND BASELINES?

Student contends that Bellflower conducted the January 14, 2019 IEP team meeting despite knowing that it needed additional information about Student's current performance and ability levels to identify her educational needs. Student argues that Bellflower had not conducted any of the independent assessments it had been ordered to do when it made its offer of FAPE at the IEP team meeting in January 2019. Student argues that the present levels of performance reported by Bellflower were inaccurate because they were drafted without current assessment information. Although Bellflower convened further IEP team meetings, the last independent assessment was not considered until November 2019. Bellflower argues that it had all available information about Student's present levels at the January 2019 team meeting because it had

information from recent transition and health assessments it conducted and from Parent's input at the IEP team meeting.

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 individualized education program, called 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), 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, 300.501.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for 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).)

In general, a child eligible for special education must be provided access to specialized instruction and related services individually designed to provide educational benefit through an IEP reasonably calculated to enable the 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].) The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified School Dist*. (9th Cir. 2017) 858 F.3d 1189, stating that that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so as to enable the child to make progress in the curriculum, taking into account the child's potential.

An annual IEP must contain a statement of the individual's present levels of academic achievement and functional performance, including how the disability of the individual affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The present levels of performance create baselines for designing educational programming and measuring a student's future progress toward annual goals. A parent can use these to monitor their child's progress to see how effectively the IEP is meeting her needs.

Information about a student's present levels can come from many sources. The IDEA requires that people who know and have worked with the Student, such as parents, teachers, and evaluators, attend the IEP team meeting. (34 CFR 300.321 (a).) A primary source of information about a student's ability will be assessments performed in student's suspected areas of need. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).)

The section of the IEP that includes the student's performance and ability levels must be sufficiently comprehensive to provide a baseline that reflects the entire range of the child's needs, including both academic, such as reading, math, communication, and nonacademic areas, such as daily life activities and mobility. This statement should provide relevant background information about the child's areas of need, strengths, interests, and learning style. (34 C.F.R. § 300.324 (a).)

Assessments must be conducted by trained and knowledgeable personnel. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and

academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).) However, no single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. § 300.304(b)(2) (2006).)

A failure to include appropriate statements of a student's present performance levels is a procedural violation of the IDEA. Procedural violations only deny a student FAPE if they impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) In other words, "procedural flaws in an IEP's formulation do not automatically violate the IDEA, but rather do so only when the resulting IEP is not 'reasonably calculated to enable the child to receive educational benefits.'" (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 821, quoting *Rowley*, supra, 458 U.S. 176, 207.)

Parents play a "significant role" in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist*. (2007) 549 U.S. 1190; 20 U.S.C. § 1414(d)(1)(B)(i); 35 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1).) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox*

County Schools (6th Cir. 2003) 315 F.3d 688, 683.) A parent has the right to participate not just in the formation of the IEP report, but also in the enforcement of it. (*M.C. v. Antelope Valley*, *supra*, 858 F.3d 1189, 1198.) The information parents receive from the assessments presented at the IEP team meeting enables them to exercise their rights to participate in the formulation of an educational plan and to monitor its effectiveness. (*Id.*; *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1126 "[T]he failure to obtain necessary information about [Student's] disorder prevented an informed discussion with his parents about his specific needs....")

The appropriateness of an IEP and the elements contained within it is not judged in hindsight; its reasonableness is evaluated according to the information available when it was created. (*JG v. Douglas County School Dist*. (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

STUDENT'S PRESENT LEVELS AT THE JANUARY 14, 2019 IEP MEETING

Student has been attending New Harvest since the 2014-2015 school year. Bellflower last assessed Student in 2013. Bellflower refused Parents' requests for assessment and the development of an IEP because it believed that the district where the New Harvest school was located was responsible for her education. Parent succeeded in two actions brought to have Bellflower compelled to conduct assessments and hold an IEP team meeting. OAH issued orders in November 2017 and January 2019.

OAH ORDERS REQUIRING INDEPENDENT ASSESSMENTS

OAH's November 2017 order directed Bellflower to fund independent educational evaluations in all areas that it should have assessed as part of a triennial assessment. OAH ordered independent assessments in psychoeducational functioning, speech and language, occupational therapy needs, and functional behavior. In addition,

Bellflower was to reimburse Parents for the cost of tuition at New Harvest until Bellflower held an IEP team meeting and offered FAPE or until the end of the 2017-2018 school year. Bellflower appealed the decision and took no action to comply with that order during the 2017-2018 school year.

Student filed her second action against Bellflower on July 30, 2018, after the end of the 2017-2018 school year. While that matter was in process, on October 3, 2018, the California Department of Education decided a compliance action Parents brought to compel Bellflower to comply with OAH's November 2017 order requiring reimbursement for the New Harvest tuition. The investigation report ordered Bellflower to provide to the Department of Education evidence that Bellflower had reimbursed Parents as ordered by OAH.

On October 3, 2018, the United States District Court for the Central District of California issued an order enforcing OAH's November 2017 order and denying Bellflower's request for a stay of OAH's order. Neither the compliance matter nor the District Court action addressed the independent assessments ordered by OAH.

On October 5, 2018, Bellflower sent Parents plans for the required independent assessments and for an additional assessment of Student's health. A health assessment is commonly conducted as part of a triennial assessment but OAH had not ordered one. In addition, although OAH ordered an independent assessment of Student's transition needs, Bellflower obtained consent from Parents to conduct a separate assessment by its staff. Bellflower reimbursed Parents for the 2017-2018 tuition on October 12, 2018. Bellflower then began the process of identifying and contracting with the independent assessors. Bellflower's Board of Education approved the first contract with an independent assessor on December 6, 2018.

Parents agreed to take Student to Bellflower's offices for the health and transition assessments on December 7, 2018. On December 6, 2018, Bellflower's Program Administrator sent Parents an invitation for a triennial IEP team meeting to be held on December 14, 2018. On December 20, 2018, the parties rescheduled the meeting to January 14, 2019. None of the independent assessments were completed and some had not been contracted when the IEP team meeting was held on January 14, 2019. There is no good faith basis on which it could be believed that the IEP team would have had all necessary information on Student's abilities and needs at either proposed date.

After hearing on Student's second action, OAH's January 25, 2019 order reaffirmed the earlier order of independent assessments and ordered additional independent assessments in central auditory processing and transition needs. OAH ordered further reimbursement of tuition through November 28, 2018, which was the last date for which there was proof in the record of Student's attendance at New Harvest.

OAH's November 2017 decision was affirmed in the United States District Court in October 2018. On October 15, 2020, between the fifth and sixth days of this hearing, the United States Court of Appeal for the Ninth Circuit heard argument on the appeal. On October 26, 2020, the Ninth Circuit affirmed the District Court and OAH, finding that the obligations of the school district where a student resides continue even if the student is enrolled in a private school in another district. (*Bellflower Unified School District v. Lua*, --- Fed.Appx ---, 2020 WL 6268424.)

BELLFLOWER'S TRANSITION ASSESSMENT

Bellflower's Transition Specialist met with Student on December 7, 2018, to conduct the transition assessment. Prior to the assessment, the Transition Specialist did

not review any records concerning Student or do any other preparatory work. Because of Student's autism, Parent brought Student to the assessment and stayed in the room while the Transition Specialist worked, but Parent did not sit in on the assessment. The Transition Specialist interviewed Student using a worksheet the specialist had designed and had Student use a computer program designed to plot career interests based upon the Holland Six Personality Types Profile. The whole process took about an hour, with half of that time taken up by the interview. The Transition Specialist did not ask Parent any questions about Student's abilities or verify any of Student's responses to her questions at any time. The Transition Specialist did no further information gathering before writing up her assessment.

In response to the Transition Specialist's questions, Student reported that she could do most self-care skills, such as basic hygiene, cooking, laundry, and shopping, and that she could use city bus services to get around town. Student stated that she planned to get a driver's license, but she did not have one. The Transition Specialist asked if Student could prepare a budget to live on $20 for a week, and Student responded that she could do so. Student stated that she did not need help or instruction in any areas or classes to meet her educational or work goals. Student planned to attend a university and become a veterinary assistant. The Transition Specialist believed that Student was being honest in her responses and accepted all of them uncritically.

The resulting transition assessment report recommended that Student visit college campuses and consult with a college counselor about necessary coursework for colleges or trade schools that offer veterinary certification programs. It noted that Student needed instruction in the process of obtaining a driver's license and proposed that Student memorize her social security number to keep it secure when applying for

jobs or to colleges. The Transition Specialist rarely worked with students who did not attend Bellflower's schools. She would have scheduled additional meetings with Student to follow up and adjust the transition plan if Student were in a Bellflower school.

EDUCATION SPECIALIST'S REPORT

Bellflower assigned an Education Specialist to gather information about Student's present levels of academic ability and performance. The Education Specialist did this by consulting Bellflower's electronic records on Student, which ended with her departure in 2014. Because Student was not attending Bellflower's schools, the Education Specialist had only the old information, which she planned to update based upon information provided at the team meeting.

BELLFLOWER'S JANUARY 14, 2019 PRESENT LEVELS INFORMATION

The Education Specialist prepared baselines for all four goals discussed at the January 14, 2019 IEP team meeting in advance of the meeting. She took the first two, in reading and math, from the previous triennial assessment conducted in 2013. The last two concerned transition readiness, and the Transition Specialist composed them based upon her assessment. The IEP report and the included offer of FAPE recognized no other areas of need and thus included no other baselines for Student.

The reading comprehension baseline stated, "Based upon results from 2013 Tri Assessment- broad reading score low 4th grade level, reading comprehension mid 2nd grade, passage comprehension mid 2nd grade level." At the IEP team meeting, Parent stated that "right now everything is at the ninth grade" level. The Education Specialist

accepted Parent's characterization, but did not change the baseline or the goal derived from it.

Similarly, the Education Specialist based the math goal upon the 2013 assessments, but the IEP team modified it by adding a comment by Parent. The goal read as "Based upon results from 2013 Tri Assessment: broad math score low 3rd grade, math calculation score mid 3rd grade, math reasoning score low 3rd grade, calculations score mid 3rd grade. [Parent] states that [Student] is currently working on pre-algebra content." At the IEP team meeting, Parent responded to the Education Specialist's comment that Student was working on "basic math facts" by interjecting "And pre-algebra."

The IEP team did not discuss the meaning or import of Parent's information about Student's current ability levels. The IEP team noted that New Harvest, as a private school, did not conduct state testing on academic levels. Lacking any actual information about Student's present levels of ability or performance, the team uncritically accepted Parent's comments and moved on. The team did not examine Parent's understanding of her daughter's ability or ask what constituted pre-algebra work. The only information that was not nearly six years out of date came from Parent's lay assessment. Parent was not an education professional and was not qualified to be the sole source of current information about Student's academics. (Ed. Code §56381, subd (a); § 56320 (e), (g).)

New Harvest's Principal was invited to the team meeting but had to cancel due to a death in her family. No current teacher was invited to the meeting. The IDEA requires that one of a student's current instructional providers be a member of the IEP team, but Student has not raised that as an issue in this action. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321 (a), Ed. Code, § 56341, subd. (b).) The IEP team meeting took place as

scheduled despite the absence of any education professional knowledgeable about Student's current level of academic ability.

An independent psychoeducational assessor completed a report on Student's academic abilities in April of 2019. The assessor found that Student's reading comprehension ability had only advanced from second grade level in 2013 to fourth grade level in 2019. However, Student's reading fluency was at the post-high school level, indicating that "reading, without being concerned with meaning, is much stronger than understanding what she is reading." Her writing skills ranged from second to sixth grade level, with a strength in single word spelling.

The independent assessor found Student's math abilities to be at the fifth-grade level, six grades below her class level. The assessor found that Student could not do basic applied math tasks. Student could not decide which operations to apply in connection with money and measurement and could not identify coins. Although Student was taking an algebra class, the assessor found that Student "was unable to follow the most basic of problems involving variables or factoring" and routinely failed to pass tests even with one-to-one instruction and extra practice. Student had progressed from the levels found for her reading and math abilities in 2013, but not as far as Parent reported to the IEP team. Although the independent assessment was conducted after the January IEP team meeting, it demonstrates that, if Bellflower had made a reasonable effort to determine Student's present levels of performance, the IEP team would have known that the information in January 2019 IEP was not close to being an accurate representation of Student's abilities.

The two academic baselines did not accurately report Student's present levels of performance. Those were the only baselines for Student's academic abilities in any IEP for the time period for which relief is sought and they were not revised during that time

period. The November 2019 IEP team meeting report still contained the January 14, 2019 baselines, despite the fact that the IEP team met in May 2019 to consider the independent psychoeducational assessment. Parents could not meaningfully participate in the planning of Student's academic program or monitor its effectiveness because the IEP team meeting did not provide them with any information about Student's current level of academic performance or ability.

The two transition baselines were similarly unconnected from Student's actual present levels of ability. The first noted simply that "[Student] has expressed interest in obtaining a part time job after high school while attending college." The second is similar: "[Student] has expressed interests [sic] in attending college after high school." These statements report Student's hopes and wishes, not on her ability. Neither of them presented any information about what Student could do or had achieved.

In addition, the transition assessment which developed these baselines was based entirely on Student's responses to the Transition Specialist's questions. Parent testified at hearing that Student did not have the self-care skills that she reported. For example, Parent testified that Student could not use city buses and had never shopped by herself. Parent's testimony was corroborated by the psychoeducational assessor's report that Student could not identify coins. More significantly, those factual conflicts show the baselines were developed based solely upon Student's responses, a single measure used to determine the appropriate program for Student's transition plan. (Ed. Code §56381, subd (a); § 56320 (e).) Student confessed no needs to the Transition Specialist and stated that she could perform every task put to her. The Transition Specialist accepted Student's assurance that her disability did not require her to receive any help or instruction to meet her educational or work goals and repeated that to the IEP team. Student's responses required verification or corroboration of some kind, and it was not

appropriate for the IEP team to present Student's baselines to Parent without using any other source of information.

Bellflower failed to provide accurate baselines reflecting Student's present levels of achievement and functional performance in academics and transition readiness at the January 14, 2019 IEP team meeting. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) Because Parents did not have accurate information about Student's present levels of ability, they were significantly impeded in their ability to participate in the decision-making process regarding their daughter's education. (*M.C., supra*, 858 F.3d at 1198, *Timothy O., supra*, 833 F.3d at 1126.) Although Parent did actively participate at the January 14, 2019 IEP team meeting, she did so without being accurately informed about Student's specific needs. By creating baselines that failed to inform Parents about Student's abilities and deficits, Bellflower committed a procedural violation that denied Student FAPE because her parents were unable to meaningfully participate in the planning of her education. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also *W.G., supra*, 960 F.2d at 1483-1484.)

The Education Specialist and the Program Administrator both testified that they hoped Student would accept the offer of FAPE made at the January 14, 2019 IEP team meeting and re-enroll with Bellflower. They believed any deficiencies in Student's education plan could be fixed through a 30-day review after Student had been in school and staff had learned her needs, a solution suggested by Bellflower in its closing brief. An intention to address deficiencies in an offer of FAPE does not remedy inadequacies or make the FAPE offer appropriate. A parent is not required to accept such an offer, and, in any event, a student would be denied her right to an appropriate education during the implementation of such an inadequate plan.

Bellflower contended at hearing that Parent interfered with its ability to obtain information about Student, but the evidence at hearing and Bellflower's recitation of facts in briefing established at most that Parent made promises about obtaining for Bellflower samples of Student's private-school current work. Parent did not promptly deliver on that promise, but parents have no obligation to gather the available information for a school district's use at an IEP team meeting. Parents did not prevent Bellflower from obtaining information from Student's private school, and Bellflower has not raised that factually unsupported defense. Although Bellflower raised the "snapshot rule" from *J.G. v. Douglas County School Dist.*, 552 F.3d at 801, at hearing, it has not argued it in its briefing other than to include a citation to a parallel case in its general discussion on the law. In any event, a district's failure to have all available information cannot be excused by its unilateral decision to proceed without that information. The IDEA requires that an IEP team have comprehensive information about a student's disability and its impact. (34 C.F.R. §§ 300.305; 300.324 (a).)

In its briefing of remedies, Bellflower contends that Parent's active participation and Bellflower's responsive interaction at the January 14, 2019 IEP team meeting bars her from contending that she was denied meaningful participation. Bellflower cites *Baquerizo v. Garden Grove* (9th Cir. 2016) 826 F.3d 1179 (*Baquerizo*), which noted that "at no point during the meeting was Student's Guardian or Student's counsel denied the ability to participate in the discussion" because they were very active in making comments and the district IEP team members were responsive to those comments and suggestions. Further, Bellflower argues that *Baquerizo* established that the failure to have sufficient information about a Student's present levels was excused where a "school district created a plan that was a concrete as possible with the available data." (*Ibid.*, at 1189.) Bellflower leaves out important context for the *Baquerizo* ruling.

The cited *Baquerizo* case was the second decision dealing with disputes between those parties in essentially the same time period. As noted in *Baquerizo*, a previous OAH decision, affirmed at the District Court level and not appealed, found that Student's Guardian's interference with the school district's attempts to gather information, assess, and hold an IEP team meeting excused the District's failure to hold an IEP team meeting. (Ibid. at 1182.) The Ninth Circuit noted the only reasons the school district lacked information about that student's present performance levels were delays and lack of cooperation by Guardian. It found that the Guardian was precluded from arguing that a procedural violation which Guardian caused by "thwarting" the school district's "great efforts to conduct assessments" caused a denial of FAPE. (*Ibid*. at 1185.) Here, Student's Parent did not prevent Bellflower from obtaining available information. Likewise, Parent does not contend here she was denied active participation at the IEP team meeting, but that the failure to provide information about Student's present levels made her participation uninformed.

Bellflower abdicated its responsibility to gather all available relevant information about Student's present levels of ability and performance by delegating the work to the family. Parent was not a trained educational professional and Student was not a transition specialist. Parents and the students themselves may assist the IEP teams by providing information known to them about that student's academic abilities and needs, but the family may not be the single source or sole criterion for determining a student's academic program. (Ed. Code §56381, subd (a); § 56320 (e).) Further, relying solely upon self-reporting by the family falls well short of the requirement that a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).)

The Education Specialist wrote goals in all areas of need known to her at the time of the January 14, 2019 IEP team meeting. Although Student was a child with autism, no baselines were established and no goals prepared for any needs Student might have in socialization, speech and language, or for occupational therapy. Although independent assessments were conducted and fourteen additional areas of need in those areas were identified, the original four baselines were never corrected or updated. The failure to provide accurate baselines of Student's present levels of performance and ability meant that Parents did not have adequate information to meaningfully participate in the decision-making process for Student's education. This denied Student her right to a FAPE.

ISSUE 2: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO OFFER OBJECTIVELY MEASURABLE ANNUAL GOALS IN ITS JANUARY 14, 2019 IEP?

Student contends the January 14, 2019 IEP did not contain objectively measurable annual goals. Bellflower argues that the goals were objectively measurable.

An annual IEP must also contain a statement of measurable annual goals designed to meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general education curriculum; and meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

Student's four goals in the report of the January 14, 2019 IEP team meeting were:

1. By January 2020, given an assignment requiring [Student] to A.C.E the question, [Student] will Answer the question, Cite textual evidence for support and Explain [her] answer by connecting it to the quote with a response that includes at least 4 sentences per question with fewer than 3 spelling, grammar or punctuation errors per question as measured by student work samples.
2. By January 2020, given a calculator and use of notes, [Student] will solve linear equations and inequalities in one variable, including equations with variable coefficients with at least 75% accuracy in 3 out of 4 trials as measured by student work samples/teacher records.
3. By January 2020, given a sample job application, [Student] will complete at least 70% of the application without case carrier or parent guidance/support with fewer than 5 errors in spelling, grammar and punctuation per application as expressed interest in obtaining measured by sample job application.
4. By January 2020, [Student] will list at least 3 requirements to apply to a college of her choosing and will provide at least 2 possible major choices in at least 2 out of 4 case carrier-student meetings as measured by case carrier anecdotal records.

Bellflower notes that these goals were objectively measurable by reference to Student's work samples or job application or by reviewing her list of college requirements and major choices.

Student did not brief this issue in closing argument. Student has only claimed that the goals are not objectively measurable and has not explained how that is so. The statement of the issue does not assert that the IEP failed to contain goals in all areas of need or that the goals were poorly matched to Student's needs. If a party has a claim

that is related to a cause of action and fails to allege that claim, the party may not pursue that claim. (*A.W. v. Tehachapi Unified School Dist*. (C.D. Cal., March 8, 2019, No. 1:17-cv-00854-DAD-JLT) 2019 WL 1092574, *6, aff'd. (9th Cir. 2020) 810 Fed.Appx. 588.)

The goals each contain numerical targets which may be used to evaluate Student's progress. They do not contain subjective elements that may differ between observers and involve matters of opinion. Student has not carried her burden of proof on this issue.

ISSUE 3: DID BELLFLOWER DENY STUDENT A FAPE BY FAILING TO BASE ITS JANUARY 14, 2019 OFFER OF PROGRAMS AND SERVICES IN AN IEP ON STUDENT'S PRESENT LEVELS OF PERFORMANCE?

Although separately plead, this appears to be the same as the re-designated Issue 1, without the inclusion of the denial of parental participation. Procedural violations only deny a student FAPE if they impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

Student did not separately argue in final briefing that this alleged procedural violation impeded Student's right to a FAPE or caused a deprivation of educational benefits, factors which were not raised in Issue 1. Bellflower did have a separate section on this issue, but it simply recounted the discussion of Student's present levels from the IEP team meeting and the transition assessment and concluded that the team

"considered and confirmed" Student's present levels of performance. As this claim appears substantively identical to, but less complete than, Issue 1, that claim has been addressed first and resolved as establishing a serious infringement of parental participation. Student did not assert and demonstrate the other two possible ways to prove a denial of FAPE for a procedural violation. Therefore, no ruling is made on this claim as Issue 3 is redundant of Issue 1. (See *Khamenian v. Irvine Unified School Dist*. (C.D. Cal., Aug. 29, 2017, SACV 16-01730 JVS (JCGx)) 2017 WL 10562631, * 7.).

REMEDY

Student prevailed on Issue 1. Although Student asked for educational expenses, compensatory education, and training of Bellflower's staff in her due process request, counsel reported at hearing that Parent was only seeking reimbursement for tuition at the New Harvest school for the period from November 2018 through the date of the November 2019 IEP Team meeting. Student's final briefing likewise only requests reimbursement for private educational costs, and the record supports only reimbursement of New Harvest school tuition and necessary fees. No other educational expenses were alleged or proved at hearing.

Administrative law judges have broad latitude to fashion appropriate equitable remedies for FAPE denials. (*School Comm. Of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370; *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516 (c)(3) (2006).) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra,* 31 F.3d at 1497.)

Parents 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. (20 U.S.C. § 1412(a)(10)C(ii); 34 C.F.R. § 300.148(c).) The determination of whether to award reimbursement and how much to award is a matter of judicial discretion. (*School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369.) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S. Ct. 36, 1126 L. Ed. 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable).)

Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances:

1. At the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense;
2. The parents did not give written notice to the school district ten business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense;
3. Before the parents removed their child from the public school, the school district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or

4. the parents acted unreasonably.

(20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at1496.) Factors to be considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*Target Range, supra*, 960 F.2d at p. 1487; *Glendale Unified School Dist. v. Almasi* (C.D. Cal 2000) 122 F.Supp.2d 1093, 1109.)

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from re-litigating issues that were, or could have been, raised in that action. (*Allen v. McCurry* (1980) 449 U.S. 90, 94.) Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigating the issue in a suit on a different cause of action involving a party to the first case. (*Ibid.*; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; see also *Migra v. Warren City Sch. Dist. Bd. of Ed.* (1984) 465 U.S. 75, 77, n. 1 (federal courts use the term "issue preclusion" to describe the doctrine of collateral estoppel).) Collateral estoppel and res judicata are judicial doctrines which apply to determinations made in administrative settings. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944, citing *People v. Sims* (1982) 32 Cal.3d 468, 479; *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732.)

OAH's order of January 25, 2019, in Student's second action only required reimbursement to November 28, 2018. Student stated in her due process hearing request here that she was seeking reimbursement for the 2018-2019 school year through the extended school year period of 2019. Student was without any offer of FAPE at all from Bellflower until January 14, 2019. Accordingly, Bellflower denied Student FAPE for that time period. Student proved that the offer of FAPE made at the January 2019 IEP team meeting did not cure that denial of FAPE because Bellflower denied Parents the ability to meaningfully participate in the educational decision-making process. Although the defective baseline information was not cured at that November 19, 2019 IEP team meeting, it is arguable that Parents had sufficient information to participate meaningfully after all the independent educational assessments were completed, including an independent transition assessment. No finding is made for the time period after November 19, 2019. Parent has not contended that that IEP offer made then was inadequate and has cut off her requested recovery as of that date. Accordingly, Parent is entitled to some recovery of the tuition expenses.

No equitable grounds exist to modify the amount of recovery. The program Administrator for Bellflower believed that Parents really did not want to return Student to attendance in Bellflower and believed that they overpromised their assistance in getting work samples from the private school, he was forthright in admitting that they did not interfere with Bellflower's attempts to obtain information itself. Some of Parent's actions were less than fully cooperative, such as putting expiration dates on the releases of information granted to Bellflower for the independent assessors and objecting to Bellflower's request for the test protocols underlying the psychoeducational assessment, these were not severe enough to justify a reduction. Any reduction would likely be offset by consideration of Bellflower's failure to timely comply with OAH's orders that it contract for independent assessments and convene an IEP team meeting.

Although the behavior might appear contemptuous, it was based on a colorable belief that its agreement with other schools in the local plan area relieved it of responsibility for Student. Accordingly, reimbursement will not be modified on equitable grounds.

Student demonstrated that the monthly cost of attendance at New Harvest was $435 per month and that Parents were charged a $150 registration fee. The previous action between the parties established that there should be a reduction of 5% in the tuition amount because that percentage of the school day was devoted to religious instruction. Testimony here by New Harvest's principal buttressed the conclusion that a small portion of the day involved scriptural memorization and other non-secular activities. Collateral estoppel further supports adopting the 5% reduction in tuition.

The due process hearing request asked only for reimbursement to the end of the 2018-2019 school year. However, cutting off Parent's recovery at that date might require the filing of a new action, which would inconvenience the parties and waste judicial resources. Bellflower was informed at hearing that Parents were seeking recovery of tuition paid from November 29, 2018 through November 19, 2019, and agreed to the time period. To grant complete relief for the injury demonstrated, Parents will be granted recovery for the cost of attendance and all necessary school fees for the period from November 29, 2018 through November 19, 2019.

Parents have not sought mileage reimbursement here.

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.

Issue 1: Student proved that Bellflower denied her FAPE by significantly impeding Parents' ability to meaningfully participate in educational planning at the January 14, 2019 IEP team meeting. Student prevailed on Issue 3 and obtained all requested relief.

Issue 2: Student did not prove that the goals written in the report of the January 14, 2019 IEP team meeting were not objectively measurable. Bellflower prevailed on Issue 2.

Issue 3: This issue was not separately decided because it was repetitive of issue 1. No ruling was made on Issue 3.

ORDER

Within 30 days of this decision, Bellflower shall reimburse Parents $3967.20, which represents ten months of tuition at $435 per month at New Harvest, with a reduction of eight days for the difference between the dates of November 19 and November 28. That amount has been reduced by 5% for the percentage of time spent on religious instruction. Bellflower shall reimburse Parents a further $150 for the student registration fee. No reduction is made in that amount, as the fee is not dependent upon instructional content. No further documentation of these expenses is required, as Student submitted sufficient documentation at hearing for Bellflower to reimburse Parents for Student's attendance at New Harvest.

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/
Chris Butchko
Administrative Law Judge
Office of Administrative Hearings