No.

IN THE

Supreme Court of the United States

BELLFLOWER UNIFIED SCHOOL DISTRICT,
Petitioner,

vs.

FERNANDO LUA, individually and on behalf of minor K.L.,
SANDRA LUA, individually and on behalf of minor K.L.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., requires that each Local Educational Agency ("LEA") provide a free appropriate public education ("FAPE") to certain eligible students. Petitioner is a California LEA within whose boundaries student K.L. resided. K.L's parents unilaterally placed K.L. in a private parochial school located outside Petitioner's boundaries. An Administrative Law Judge found Petitioner to be the LEA responsible for providing reassessments to K.L. and that Petitioner's refusal to provide reassessments denied K.L. a FAPE. As a remedy for the denial of FAPE, the ALJ ordered Petitioner to reimburse K.L.'s parents for the costs of the unilateral private placement. The questions presented are:

1. Is the District of Residence the responsible Local Educational Agency for providing reassessments, and coordinate provision of special education, to a student who lives within the residential boundaries of that school district but who was unilaterally parentally placed in a private parochial school located within another school district's boundaries?

2. Is reimbursement of the unilateral private placement appropriate where there was no denial of FAPE prior to the enrollment, parents failed to provide preplacement notice to the District of Residence, and the private parochial school provides no special education services and is not otherwise appropriate?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are:

Petitioner, Bellflower Unified School District

Respondents, Fernando Lua, individually and on behalf of minor K.L., and Sandra Lua, individually and on behalf of minor K.L.

The proceedings in other courts that are related to this proceeding are:

- *Bellflower Unified School District v. Fernando Lua, et al.*, Case No. CV 18-0043 FMO (FFMx), U.S. District Court for the Central District of California. Judgment entered July 8, 2019.

- *Bellflower Unified School District v. Fernando Lua, et al.*, Case No. 19-55912, U.S. Court of Appeals for the Ninth Circuit. Judgment entered October 26, 2020. Order Denying Petition for Rehearing En Banc entered December 2, 2020.

No corporations are involved in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

The Bellflower Unified School District petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's October 26, 2020 unpublished memorandum appears at 2020 WL 6268424 (9th Cir. October 26, 2020) and attached as Appendix A. The Ninth Circuit's December 2, 2020 Order denying the petition for rehearing *en banc* is attached as Appendix B. The July 8, 2019 opinion of the district court affirming the Administrative Law Judge's Decision is attached as Appendix D. The November 20, 2017 Administrative Law Judge's Decision is attached as Appendix E.

JURISDICTION

On July 8, 2019, the district court entered judgment against the Bellflower Unified School District, which affirmed the Administrative Law Judge's decision. BUSD filed a timely appeal to the Ninth Circuit Court of Appeals, which affirmed the judgment on October 26, 2020. BUSD filed a timely petition for rehearing *en banc*. On December 2, 2020, the court denied the petition for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400 *et seq*., 34 C.F.R. Section 300.130 *et seq.,* and California Education Code Sections 56171 *et seq*., the relevant portions of which are attached as Appendix F.

STATEMENT OF THE CASE

A. Introduction

This petition concerns the duty of Bellflower Unified School District ("BUSD"), to provide assessments and an offer of special education services to K.L.[1] ("Student"), a student who resides with her parents ("Parents") within BUSD's geographical boundaries but whom Parents unilaterally placed at a private school within a different school district's boundaries, pursuant to the Individuals with Disabilities Education Act ("IDEA") under 20 U.S.C. § 1401 et seq. and California Education Code § 56000 et seq., as well as the cases interpreting these statutes, including Board of Education of the *Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 102 S.Ct 3034, 73 L.Ed.2d 690 ("Rowley").

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[1] Because the administrative record was sealed by the District Court and the Student was a minor when the District Court case was filed, Student's name will remain redacted as "K.L."

In 2012, Student was enrolled in BUSD, was eligible to receive special education, and began receiving special education from BUSD.

BUSD is a member of the Mid-Cities SELPA (IEP, ER 160, AR 190)[2] and NLMUSD is a member of the ABC/Norwalk-La Mirada SELPA (ISP, ER 186, AR 216). Both of these SELPAs are parties to the Greater Los Angeles Area SELPAs Agreement ("GLAAS Agreement"), as revised May 30, 2014 (GLAAS Agreement, ER 327, AR 357).

The GLAAS Agreement provided that whenever a student who lives within the boundaries of one school district ("District of Residence" or "DOR") (BUSD herein) attends a private school within the boundaries of another school district ("District of Location" or "DOL") (NLMUSD here), the DOL is responsible for "Search and Serve" and for completing "timely and

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[2] The Record On Appeal includes the Excerpts of Record presented to the Ninth Circuit Court of Appeals, which Excerpts will be cited by page number as "([title], ER __)." Because this is an appeal of an administrative matter, the sealed Administrative Record will also be cited as "AR" followed by the page number assigned by the California Office of Administrative Hearings ("OAH") appearing at the top of the document. Thus, the first page of the Administrative Record, included in the Excerpts of Record, will be "([title], ER __, AR 1)."

meaningful consultation" with local private school (GLAAS Agreement, ER 327, AR 357).

The GLAAS Agreement provided: (1) that DOL "completes assessment and determines eligibility" and "holds an IEP meeting to determine eligibility;" (2) "5. … If parent agrees to attend public school, the [DOR] develops an IEP;" (3) "7. If at any time, the parent indicates that they would prefer to attend a public school, the DOR will be contacted to hold an IEP and provide an offer of FAPE;" (4) "8. If student continues to be a private school student, district of location (DOL) will conduct triennial to establish continuing eligibility." (GLAAS Agreement, ER 328, AR 358).

B. 2014 IEP Team Meeting

Student's parents received an English/ Spanish Parents' Rights and Procedural Safeguards packet at the start of each IEP Team meeting, including in June 2014 (Safeguards, ER 387, AR 417). The packet at "***What are the rules relating to my decision to unilaterally place my child in a private school?"*** states:

The IDEA does not require an LEA to pay for the cost of education, including special education and related services, of your child with a disability at a private school or facility if the LEA made a FAPE available to your child and you choose to place the child in a private school or facility. However, the school district where the private school is located must include your child in the population whose needs are addressed under the

IDEA provisions regarding children who have been placed by their parents in a private school under 34 C.F.R. Sections 300.131 through 300.144.

The reimbursement to a parent for placement of a child in a private school or agency may be ordered by a Hearing officer or court when it is determined that the LEA did not provide a FAPE to the child in a timely manner prior to the enrollment and that the private placement is appropriate. Reimbursement may be reduced if, at the most recent IEP team meeting prior to removing the child from public school, the parent failed to inform the LEA that they were rejecting the proposed placement and of their intent to place their child in a private school at public expense, or if the parent failed to provide that information in writing to the LEA at least 10 business days prior of the removal of the child from public school.

(Safeguards, ER 400, AR 430) (Emphasis added).

On July 3, 2014, Parents consented in writing, through their attorney, to a proposed IEP ("Student's 2013 IEP") "in its entirety" that provided Student with a free appropriate public education ("FAPE") (Letter dated July 3, 2014, ER 331, AR 361). Parents were represented by counsel, Special Education Law Firm ("SELF") throughout the development and acceptance of this IEP (Letter dated July 3, 2014, ER 331, AR 361)(Testimony of Sandra Lua, ER 490, AR 721). The Student's 2013 IEP Notes and the Goal progress reports show that Student was making meaningful progress (IEP, ER 160, AR 190). Student's 2013 IEP Team determined

the Least Restrictive Environment ("LRE") for Student to be at Student's home school, BMHS, in self-contained Specialized Academic Instruction ("SAI") consisting of RSP for Math and SDC for English (IEP, ER 159, AR 191). The IEP Notes were read aloud and accepted as read (IEP, ER 159, AR 191). The full "Offer of FAPE – SERVICES" was set forth on the IEP that was consented to by Parents through their attorney. (IEP, ER 182-3, AR 212-3).

On September 8, 2014, Parents' attorney notified BUSD that Parents had withdrawn Student from BUSD and enrolled her at New Harvest Christian School ("NHCS"), a private parochial school located outside the boundaries of BUSD but within NLMUSD's boundaries, and directed BUSD to cease contacting Parents about Student's attendance (Letter dated September 8, 2014, ER 333, AR 363). This withdrawal was without prior notice to or consent by BUSD or Student's IEP Team (Testimony of Sandra Lua, ER 498-500, AR 729-731).

Parents never gave "any written notice [to BUSD] that [they] were going to be coming back and asking for an offer of FAPE." (Testimony of Sandra Lua, ER 499, AR 730).

Student continued to attend NHCS (Letter dated August 10, 2015, ER 233, AR 263). Parents consistently indicated that they intend for Student to continue to remain enrolled at NHCS. Although Parents later asserted that they withdrew Student because they were concerned about Student's

interactions with a 6th grade boy, Parents did not share their concerns with Student's IEP Team prior to their withdrawal of Student (Testimony of Sandra Lua, ER 490, AR 721) (Testimony of Sandra Lua, ER 496, AR 727).

In October 2014, NLMUSD held an Individual Service Plan ("ISP") meeting per the GLAAS Agreement, which was attended by Parent, SELF, and others including BUSD (ISP, ER 187, AR 217). BUSD informed Parents that BUSD would provide services to Student if she enrolled in a BUSD school. Parent did not indicate that she preferred for Student to attend a public school.

The ISP states, "[NLMUSD] (LEA) will provide the special education services(s) below for the student while enrolled in private school …" The ISP states, "Parent shared that there are no concerns at this time. [Student] is doing well. She has only 6 to 7 students in her class [at] New Harvest. Parent shared that her grades are fine." (ISP, ER 186, AR 216). The ISP states, "By signing this document, the parent/guardian(s) have indicated to the District of Residence (DOR) that they have chosen to unilaterally enroll or continue to enroll the student in a private school without the consent of, referral by, or at expense of the District. It is further acknowledged that the DOR has offered to develop an IEP when the Student's parent/guardian express an interest in enrolling the student in public school. The parents understand in accordance with IDEA 2004, their rights to due process do not apply in the private

school setting." (ISP, ER 186, AR 216) (emphasis added).

Tracy McSparren, BUSD's Superintendent, testified at the OAH hearing that the offer of FAPE to Student, through the IEP that was accepted in July 2014, was never withdrawn and would be available to Student when she was again enrolled at BUSD. (Testimony of Tracy McSparren, ER 463-4, AR 580-1).

In April 2015, Parent sent BUSD two letters, one letter requesting documents and another letter requesting an IEP, but they did not indicate that they preferred Student to attend public school (Letters dated April 23, 2015, ER 338-9, AR 368-69).

BUSD timely responded to both letters by providing the requested documents and referring Parents to NLMUSD for special education services per the GLAAS Agreement (Letter dated April 27, 2015, ER 158, AR 188) (Letter dated April 28, 2015, ER 197, AR 227). BUSD informed Parents that if they enrolled Student in BUSD, BUSD would provide a parallel placement for Student based on the provisions of Student's IEP (to which they had consented) and that "[w]ithin 30 days of [Student's] attending school in BUSD, BUSD will hold an IEP so the IEP Team can determine what, if any, changes to [Student's] IEP may need to occur and they will receive a new offer of FAPE from [BUSD] based on the review and full consideration of student records, along with input from staff from [NHCS], NLMUSD, and [BUSD] staff who work

with [Student] during her first 30 days of attendance in BUSD." (Letter dated April 28, 2015, ER 198, AR 228).

In May 2015, Parents sent BUSD another letter admitting not providing any notice to BUSD prior to withdrawing Student, and that "we will not enroll [Student] back into the Bellflower USD based on the provisions in her most recent IEP …." Parents admit in their letter, "[W]e should have noted our withdrawal of our agreement to the last IEP for [Student] and we should have provided the District with the legally required 10 day notice of our intent to place [Student] privately and that we would seek reimbursement from the District for all of the costs associated with that placement, of course none of that happened." (Letter dated May 12, 2015, ER 200, AR 230) (emphasis added). Parents did not say they prefer Student to attend a public school or agree to enroll Student in BUSD.

BUSD timely responded and noted that Parents did not indicate how their placing Student at this private parochial school, which provided Student with no special education services, could meet Student's unique educational needs, much less meet her needs better than implementing the IEP. (Letter dated May 14, 2015, ER 201, AR 231).

In April 2016, Parents sent BUSD another letter requesting a hypothetical offer of placement for Student for the 2016-2017 school year. (Letter dated April 8, 2016, ER 340, AR 370). Parents did not say that they prefer for Student to attend a public school or that they agree to enroll Student in

BUSD. BUSD timely responded that Student is not currently enrolled in BUSD and setting out the specific offer of FAPE once Student is enrolled in BUSD and that they should contact NLMUSD for the appropriate special education services while Student is enrolled at NHCS. (Letter dated April 11, 2016, ER 211-2, AR 241-2).

In September 2016, Parents sent BUSD an email admitting that "[Student] previously had an IEP with the Bellflower Unified School District, and it was only because the District flat out refused to do anything about my daughter being bullied and sexually harassed by another student that we were forced to pull her out of the District and place her in a private school for her 7th and 8th grade years." (Email dated September 6, 2016, ER 342, AR 372)(emphasis added).

Parent testified that she withdrew Student because of a problem with the sixth grade boy (Testimony of Sandra Lua, ER 500, AR 731) and that she never told the IEP Team. (Testimony of Sandra Lua, ER 490, AR 721) Parents' withdrawal of Student had nothing to do with BUSD's provision of FAPE, but rather a different issue -- not an issue raised in the OAH matter. BUSD timely responded to Parents' email in the same manner as it had to Parents' letter in May 2016. (Letter dated September 14, 2016, ER 213, AR 243).

C. CDE Compliance Matter.

In November 2016, Parents filed a complaint with the California Department of Education ("CDE") falsely claiming that Parents removed Student from BUSD's placement and privately placed her at NHCS because they disagreed with BUSD's offer of FAPE for the 2015-2016 school year. (Letter dated November 18, 2016, ER 217, AR 247). This allegation was made even though Parents' admitted two months earlier that the only reason for the withdrawal was the bullying (Email dated September 6, 2016, ER 342, AR 372) – yet they had not mentioned the bullying to the IEP Team prior to the withdrawal. (Testimony of Sandra Lua, ER 490, AR 721). Based upon this complaint, CDE ordered BUSD to hold an IEP Team Meeting, but did not direct BUSD to assess Student or provide a FAPE for Student. (CDE Investigation Report, ER 353, AR 383).

In February 2017, in compliance with the CDE directive, BUSD held the meeting. (IEP dated February 15, 2017, ER 226, AR 256). During the discussion at the meeting as to placement, Student's Advocate Christopher Russell stated "Parent is very comfortable with the current school site since Parent's concerns are noted and [Student] knows how to access support." (IEP dated February 15, 2017, ER 227, AR 257). BUSD shared a proposed assessment plan, dependent upon Student's enrollment in BUSD. (IEP dated February 15, 2017, ER 227, AR 257). Parents did not agree to enroll Student in BUSD but signed the

assessment plan and gave it to BUSD at that meeting. It was the impression of the Program Administrator at the February 15, 2017 meeting that Parents would not be enrolling Student with BUSD. (Testimony of Marciela Harvin, ER 594-5, AR 973-4). Parent initialed the IEP to show she received a copy of the PRPS packet and a copy of the IEP. (IEP dated February 15, 2017, ER 228, AR 258). Parents never consented to this proposed IEP and never enrolled Student at BUSD.

On March 7, 2017, following the holding of this meeting, CDE sent BUSD a letter confirming that their "case is now closed" and that "The District provided evidence an individualized education program meeting has been convened for the student." (Letter dated March 7, 2017, ER 386, AR 416).

On April 3, 2017, BUSD sent a letter to NLMUSD stating that Student is still enrolled in NHCS located in NLMUSD's boundaries, and reiterated NLMUSD's duty to "Search and serve" Student. (Letter dated April 3, 2017, ER 361-2, AR 391-2)(GLAAS Agreement, ER 327, AR 357).

D. Due Process Matter.

On or about May 5, 2017, Parents filed a Due Process Complaint ("DPC") against BUSD. (Due Process Complaint, ER 609, AR 1). BUSD answered the DPC. (Response to DPC, ER 597, AR 22). On September 26, 2017 (Transcript of hearing, ER 426, AR 516) and September 27, 2017 (Transcript of hearing, ER 504, AR 798),

Administrative Law Judge ("ALJ") Linda Johnson heard the matter.

Tracy McSparren testified as to BUSD's understanding of the GLAAS Agreement as it applied to Student's situation and to BUSD's continuing offer of FAPE to Student (Testimony of Tracy McSparren, ER 467-469, AR 667-9). She also testified as to the reason BUSD did not hold an IEP Team Meeting until 2017. (Testimony of Tracy McSparren, ER 478-9, AR 678-9). It was Ms. McSparren's understanding that Parents want to keep Student at NHCS and not enroll her in BUSD. (Testimony of Tracy McSparren, ER 484, AR 684). There has continued to be a very specific offer of FAPE for Student (Testimony of Tracy McSparren, ER 466-7, AR 686-7).

Parent testified at the hearing very clearly and without hesitation that she desired for Student to remain at NHCS even if Student were to be provided the same services she believes her child needs at public expense at a public school in BUSD. (Testimony of Sandra Lua, ER 591-2, AR 931-2). Parent's testimony was consistent with her past actions of never trying or agreeing to enroll Student at a school in BUSD.

NHCS Principal Cathy Garcia also testified at the hearing. (Testimony of Cathy Garcia, ER 512, AR 806). Ms. Garcia has no Education Degree, no California Teaching Credential, no California Administrative Credential, and no public school teaching experience. (Testimony of Cathy Garcia, ER 512, AR 806). None of the fifteen teachers at

NHCS (K-12) are California Credentialed. (Testimony of Cathy Garcia, ER 513, AR 807). Student was in a single combined classroom with all of the high school students with 3 teachers and 2 aides. (Testimony of Cathy Garcia, ER 590, AR 884). Student was the only 10th grader and before that, Student was the only 9th grader. (Testimony of Cathy Garcia, ER 532, AR 826). In her 8th grade class, there was only one other eighth grade student. (Testimony of Cathy Garcia, ER 532, AR 826). In her 7th grade class, there were two other seventh grade students. (Testimony of Cathy Garcia, ER 532, AR 826).

NHCS uses the "Accelerated Christian Education Curriculum K-12" and goes by the acronym A.C.E. (Testimony of Cathy Garcia, ER 514, AR 808). According to www.aceministries.com/curriculum, the "Accelerated Christian Education is a Bible-based, Christian K-12 curriculum." (NHCS webpage printout, ER 386, AR 415). The "Core Subjects include … Bible Reading (Levels 1-6)" (NHCS webpage printout, ER 386, AR 415). The website says, "The core curriculum provides students with academics, skill building, reading practice, character and wisdom training, and knowledge of God and His Word." (NHCS webpage printout, ER 386, AR 415). "Each core subject consists of 12 PACEs (Packet of Accelerated Christian Education) per level." (NHCS webpage printout, ER 386, AR 415).

Ms. Garcia testified, "Bible is interspersed throughout the curriculum" (Testimony of Cathy

Garcia, ER 551, AR 845) and provided an example of when studying Lincoln, they would teach on character as well, teaching about honesty and they would review a Bible scripture about speaking truth. (Testimony of Cathy Garcia, ER 551, AR 845) Student would then be tested on facts of history and be required to recite the memory Bible passage to pass the test on scripture and character. (Testimony of Cathy Garcia, ER 551, AR 845). Ms. Garcia testified, "they will interweave God's Word into the science lesson as well. So it is definitely a core part of the curriculum." (Testimony of Cathy Garcia, ER 552, AR 846). Ms. Garcia testified that Student will have to complete the Bible PACEs to be able to graduate from NHCS. (Testimony of Cathy Garcia, ER 571, AR 865).

Ms. Garcia also testified that NHCS diplomas are "not accepted at Cal State or UC's" (Testimony of Cathy Garcia, ER 581, AR 875) so students who receive only a NHCS diploma are unable to gain acceptance at Cal State Universities or the University of California schools upon graduation from NHCS. Ms. Garcia testified that the NHCS diploma would "not be an accredited diploma." (Testimony of Cathy Garcia, ER 574, AR at 868).

Accrediting only comes in with the sister program through Lighthouse Christian Academy in Tennessee. (Testimony of Cathy Garcia, ER 580-1, AR 874-875). If Student gets accepted by Lighthouse Christian Academy in Tennessee, she can go into dual enrollment with Lighthouse

Christian Academy. Student can only get an accredited High School Diploma through dual enrollment. (Testimony of Cathy Garcia, ER 581, AR 875).

Ms. Garcia testified that Student is not presently "tied in" with Lighthouse Christian Academy and NHCS does not have the accreditation to issue her a California High School Diploma. (Testimony of Cathy Garcia, ER 559, AR 853). Garcia testified that they are working to get Student's curriculum levels up. (Testimony of Cathy Garcia, ER 559, AR 853) Student has not been accepted yet by Lighthouse and they will not know until end of sophomore year if she will be eligible to dual enroll. (Testimony of Cathy Garcia, ER 560, AR 854).

Ms. Garcia also testified that NHCS is not equipped to deal with behavior problems and can't deal with emotional issues. (Testimony of Cathy Garcia, ER 546, 563, AR 840, 857). NHCS provides no special education services and has no special education department. (Testimony of Cathy Garcia, ER 515, AR 809).

E. ALJ's Decision

On November 20, 2017, following a two day evidentiary hearing, the ALJ issued a ruling ("ALJ's Decision") finding that BUSD was the responsible LEA for providing IEP's and assessments. The ALJ ordered BUSD to reimburse Parents for regular school year tuition and mandatory expenses that Parents incurred as a

result their unilateral private parochial placement of Student and for expenses related to one round trip transportation per attendance day. The ALJ further ordered BUSD to provide certain Independent Educational Evaluations ("IEEs").

F. District Court Appeal

Pursuant to 20 U.S.C. § 1415, BUSD timely appealed the ALJ's Decision to the U.S. District Court and Parents counter-claimed for immediate enforcement of the ALJ's Decision and for attorneys' fees and costs, and BUSD timely answered the counterclaim. On July 8, 2019, the District Court entered a Judgment affirming the ALJ's Decision (Judgment, ER 1)(Appendix C at A-9).

G. Ninth Circuit Appeal

On August 5, 2019, BUSD timely appealed the District Court's Judgment. (Notice of Appeal, ER 20) On October 26, 2020, the Ninth Circuit Court of Appeals affirmed the District Court's Judgment. (Appendix A at A-1.) BUSD filed a timely petition for rehearing *en banc*. On December 2, 2020, the Ninth Circuit Court of Appeals denied the petition for rehearing *en banc*. (Appendix B at A-7.)

REASONS FOR GRANTING THIS PETITION

This Court's intervention is necessary to correct a prejudicial error made by the Ninth Circuit Court of Appeals and to provide the much needed guidance as to the respective responsibilities of the District of Residence ("DOR") and District of Location ("DOL") in providing reassessments and special education services. This Court's intervention is also necessary to correct a prejudicial error made by the Ninth Circuit Court of Appeals and to provide much needed guidance as to the reimbursement of tuition and fees in a unilateral private placement where there was no prior notice given and the private school provides no education services.

Because Parents unilaterally and without prior notice withdrew Student and placed her in a private parochial school outside of BUSD's geographical boundaries, and because Parents have not indicated that they would prefer for Student to attend school within BUSD, BUSD is not the correct LEA responsible for providing an IEP or assessments to Student. BUSD should not be required to reimburse the tuition and costs for this private parochial school that does not provide special education services to Student.

A. The Ninth Circuit Improperly Determined That BUSD Was the Local Educational Agency Responsible For Reassessments and Providing Special Education to Student.

In its Memorandum, the Ninth Circuit held that "The district court properly affirmed the ALJ's determination that BUSD denied K.L. a FAPE" and pointed to the authorities of: (1) Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,592 (Aug. 14, 2006), and (2) *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 460. (See, Appendix A at A-3.) Neither of these authorities support the holding.

First, nowhere in 71 Fed. Reg. 46,592 (See, Appendix F at A-105-106) does the regulation "specifically contemplate that, upon a parent's request, a school district must evaluate a child residing in its district for purposes of making a FAPE available to her, even if she is enrolled in a private school in another district." To the contrary, 71 Fed. Reg. 46,590 (See Appendix F at A-103-104) states: "The revisions to the Act in 2004 significantly changed the obligation of States and LEAs to children with disabilities enrolled by their parents in private elementary schools and secondary schools. Section 612(a)(10)(A) of the Act now requires LEAs in which the private schools are located, rather than the LEAs in which the parents of such children reside, to conduct child find and

provide equitable services to parentally-placed private school children with disabilities." 71 Fed. Reg. 46,590. This is a direct statement that the DOR is not responsible for the child find activities – it is the DOL that is responsible. This is directly contrary to the Ninth Circuit's holding that the DOR is responsible for child find activities.

Second, the court incorrectly asserts that *J.W., supra*, 626 F.3d at 460, supports the conclusion that BUSD denied K.L. a FAPE in this situation. (See, Appendix F at A-3-4). In *J.W.*, the Ninth Circuit adopted the district court's decision verbatim, setting it out in an appendix, which decision found that the school district had in fact made a formal offer, albeit late, but this tardiness was harmless error. *Id.* The *J.W.* decision did not discuss the effect of the unilateral placement being out of state, as the issue did not arise. This case does not support the Ninth Circuit's conclusion that BUSD denied a FAPE to K.L. in this case.

The Ninth Circuit, in its Memorandum, concedes that the DOL might have obligations, but incorrectly asserts that "these obligations do not absolve the district of residence of its responsibilities under the IDEA. [citing *J.W.*]" (See, Appendix A at A-4). This assertion is incorrect, as set out in 71 Fed. Reg. 46,590, which states that "Section 612(a)(10)(A) of the Act now requires LEAs in which the private schools are located, rather than the LEAs in which the parents of such children reside, to conduct child find and provide equitable services to parentally-placed private

school children with disabilities." (71 Fed. Reg. 46,590 (Emphasis added).)(See, Appendix F at A-104.)

The District of Location (DOL) is the LEA for students enrolled in private schools. "Child find" for students enrolled by their parents in private school is the responsibility of the district in which the private school is located. (34 C.F.R. § 300.131, 71 Fed. Reg. 46590, Ed. Code, § 56171.)

This statement of the law is mirrored by the GLAAS Agreement (GLAAS Agreement, ER 327, AR 357). This child find responsibility extends to reassessments. (71 Fed. Reg. 46593.)(See, Appendix F at A-106.) The purpose of this child find activity is to ensure the equitable participation of parentally placed private school children in services that a school district may provide to children who attend private school in the district, as well as an accurate count of those children. (Office of Special Education Programs (OSEP), Letter to Eig, January 28, 2009, 52 IDELR 136.)

Education Code section 56171 provides:

> Pursuant to Section 300.131 of Title 34 of the Code of Federal Regulations, local educational agencies shall locate, identify, and assess all private school children with disabilities, including religiously affiliated school age children, who have disabilities and are in need of special education and related services

> attending private school in the service area of the local educational agencies where the private school is **located** in accordance with Section 56301. The activities undertaken to carry out this responsibility for private school children with disabilities shall be comparable to activities undertaken in accordance with Section 1412(a)(10)(A)(ii) of Title 20 of the United States Code.

(Ed. Code, § 56171 (emphasis added).) (Appendix F at A-111.)

34 C.F.R. § 300.131(a) provides that "[e]ach LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools **located in the school district** served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§ 300.111 and 300.201." (34 C.F.R. § 300.131(a) (emphasis added).)(Appendix F at A-98.) The DOL must provide child find for the students enrolled in private schools located in their district -- even if the student resides in a different state. (34 C.F.R. § 300.131(f).)(Appendix F at A-99.)

BUSD stopped being the LEA for Student in September 2014 when Parent (without any prior notice or warning) withdrew Student from BUSD and unilaterally placed Student at NHCS, a private parochial school located in the service area for NLMUSD. BUSD repeatedly notified Parent that

NLMUSD was the LEA responsible for administering Student's special education and that Parent should look to NLMUSD for assessments and services. BUSD has not resumed being the LEA at any time since Parent's withdrew Student.

Parents' correspondence in 2015 and 2016 show that Parent intended that Student would continue her enrollment at her private school. Where the parent expresses an intention to keep the Student enrolled in the private school, the DOR has no obligation to make FAPE available to the child. (71 Fed. Reg. 46,593.)(Appendix F at A-108.)

The Ninth Circuit, in its Memorandum, stated: "BUSD contends that it offered K.L. an IEP in 2014 and that it was not required to further update her IEP because K.L.'s parents made clear that they did not intend to re-enroll K.L. at BUSD. These arguments are not supported by the IDEA or by the record." (Appendix A at A-4-5.) The Ninth Circuit Memorandum also states: "[T]he record does not support BUSD's contention that K.L.'s parents expressed a clear intent to keep K.L. enrolled at New Harvest. In fact, K.L.'s parents' letters to BUSD in 2015 and 2016 indicate they were still interested in a public-school placement for K.L., and BUSD was required to provide an offer of FAPE." (Appendix A at A-5.)

This is a misstatement of BUSD's contention and the record on appeal. Parents consented to this IEP and there was no showing that this IEP denied FAPE to Student. The record on appeal shows that Parents consented to this IEP in July

2014 and then withdrew Student in September 2014. The record also shows that Parents repeatedly told BUSD that they were happy with Student's placement at NHCS and intended to keep her at NHCS. The Ninth Circuit ignored these facts presented to it in the record on appeal.

The requirements of an LEA listed in 34 C.F.R. § 300.131 *et seq*. and Education Code section 56171 *et seq*. apply only to NLMUSD as it is the DOL rather than BUSD. Because Student was not enrolled in BUSD from September 2014 to present, BUSD has had no duty to hold an IEP Team Meeting in 2015, 2016 or 2017, to provide any services to Student, and has had no duty to conduct triennial assessments or any assessments. Therefore, BUSD did not deny FAPE to Student relating to requests for IEP team meetings in 2015 and 2016 (Issue #1), Student's triennial assessment (Issue #2), and assessments in all areas of suspected disability (Issue #3). The ALJ erroneously found that BUSD had an obligation to assess Student.

This is plain prejudicial error, as the evidence showed that Parents never indicated their preference or willingness to enroll Student in BUSD. Under the GLAAS Agreement at paragraph 8, "If student continues to be a private school student, district of location (DOL) [here, NLMUSD – not BUSD] will conduct triennial [assessments] to establish continuing eligibility." (GLAAS Agreement, ER 328, AR 358). This GLAAS Agreement requirement under Paragraph 8

comports with the respective duties of the DOL [NLMUSD] and DOR [BUSD] under 34 C.F.R. § 300.131(a). The ALJ committed a serious, prejudicial error by failing to apply the legal standard and erroneously found that BUSD had the duty to hold an IEP team meeting and to assess Student. This legal error should have been corrected by the reversal of the ALJ's Decision, either by the district court or by the Ninth Circuit Court of Appeals.

B. The Ninth Circuit Improperly Affirmed the Remedy of Reimbursement For The Cost of This Unilateral Private Placement.

In its Memorandum, the Ninth Circuit held that "Further, the district court properly affirmed the ALJ's award of reimbursement for K.L.'s private-school tuition for the 2015–2016 and 2016–2017 school years." (Appendix A at A-4.)

Although the Ninth Circuit correctly states the standard for allowing reimbursement of unilateral private placements, it disregarded that standard in applying it to this situation. The Ninth Circuit correctly states: "Parents may receive reimbursement for the unilateral placement of a child in a private school if the LEA did not make a FAPE available to the child in a timely manner prior to that enrollment and the private placement is appropriate. *See* 34 C.F.R. § 300.148(c)." (Memorandum, Appendix A at A-4.)(Emphasis added.)

The timing of the FAPE denial and the enrollment at the private school is critically important. The appropriateness of the unilateral placement is also critically important. The Ninth Circuit erred as to both of these factors.

1. There Was No Denial of FAPE Prior to the Unilateral Private Placement.

The Ninth Circuit disregards the requirement in the C.F.R. section that it quoted, 34 C.F.R. § 300.148(c), that the denial of FAPE must precede the enrollment in the private placement. Here, the enrollment occurred in September 2014 -- before there was any asserted denial of FAPE. The 2014 IEP did not deny FAPE to Student. The ALJ found that the denial of FAPE occurred after the September 2014 enrollment. The ALJ, district court, and Ninth Circuit disregarded this critically important timing requirement.

Parents withdrew Student without prior notice and without giving any reason and unilaterally placed her at a private school outside of BUSD's jurisdiction at a time when they had agreed to the Student's 2013 IEP. Parent admitted that they withdrew Student because of a problem with another student. The withdrawal was not because BUSD denied Student a FAPE. The Student's 2013 IEP would have provided FAPE – Parents consented to it "in its entirety."

Given the choice to enroll in BUSD or stay at NHCS, Parents unequivocally continue to choose

for Student to stay at NHCS – no matter what – because "she is happy." Parent Mom testified repeatedly that she would prefer Student to stay at NHCS. (Testimony of Sandra Lua, ER 591-2, AR 931-2).

BUSD continued to offer to provide FAPE to Student and when Student enrolled in the BUSD, BUSD would use Student's 2013 IEP as a parallel placement until the initial IEP Team Meeting could be held. Parents did not prove that BUSD failed to provide Student with FAPE relating to requests for IEP team meetings in 2015 and 2016 (Issue #1), Student's triennial assessment (Issue #2), and assessments in all areas of suspected disability (Issue #3).

The Ninth Circuit stated: "K.L.'s 2014 IEP was not a permissible placeholder, as her 2014 IEP would not address her 'present levels of academic achievement and functional performance' as they existed in 2015 or 2016. *Id.* § 1414(d)(1)(A)(i)(I)." (Appendix A at A-5.) The Ninth Circuit misunderstood the argument being made. BUSD was not contending that the 2013 IEP is a once for all IEP, but rather that BUSD would start with this IEP as a parallel placement, as it is required for all incoming students who are already on an IEP, and immediately modify it to address the present levels of performance.

BUSD should not be forced to reimburse Parents for education services provided by NHCS where FAPE was made available to Student yet Parents unilaterally withdrew Student. Education

Code section 56174 provides, "The local educational *agency shall not be required to pay* for the cost of education, including special education and related services, of a child with a disability at a private school or facility *if the local educational agency made a free appropriate public education available to the child* and the parent of the child elected to place the child in the private school or facility." (Ed. Code, § 56174.)

Student's 2013 IEP provided FAPE to Student. Parents failed to prove that Student's IEP they consented to would not have met Student's special educational needs. A FAPE in BUSD remains available to Student, but Student is not enrolled in BUSD. BUSD never withdrew its offer of FAPE it made in the last agreed to IEP. BUSD has repeatedly offered that if Student enrolls in BUSD, BUSD will provide a FAPE by initially providing an interim IEP based on the last agreed to IEP and then by assessing, observing, collecting records and performance data, etc. BUSD would then hold an IEP to amend Student's placement, goals, services, and supports within 30 days of Student's attendance in BUSD.

The ALJ committed prejudicial error in finding that there was a denial of FAPE in this case where Parents never proved that the 2013 IEP would not provide FAPE to Student. The district court and Ninth Circuit failed to correct this error.

The Ninth Circuit, in its Memorandum, also stated:

> Finally, under California law, an ALJ may reduce or deny a reimbursement award where the parent did not give written notice to the LEA at least ten days prior to the removal of the child from public school. Cal. Educ. Code § 56176. Here, although K.L.'s parents' failed to provide ten days' notice before withdrawing K.L. from BUSD in 2014, BUSD fails to make any argument as to why the ALJ was required to use her discretion to reduce the reimbursement award for K.L.'s private school tuition. In any event, K.L.'s parents notified BUSD of K.L.'s placement at New Harvest and their intent to seek reimbursement in May 2015, and the ALJ awarded reimbursement for the 2015 and 2016 school years, well after BUSD had notice of K.L.'s withdrawal.
>
> (Appendix A at A-6)

This requirement of giving prior notice is related to the requirement of a finding of denial of FAPE prior to the enrollment. They both deal with fair notice to the school district and an opportunity to address a problem before the students are merely withdrawn from the school district. Education Code Section 56176 provides that the reimbursement may be denied if: (a) Parent did not inform the IEP team prior to the removal of the

"concerns" and the intent to remove the student; or (b) Parent did not give prior written notice of the intent to remove the student ten days prior to the removal. (See, Ed. Code, § 56176.) Parents here did neither of these.

Parents consented to the IEP on July 3, 2014. On September 8, 2014, Parents through their counsel notified BUSD of the withdrawal ***after*** *the withdrawal* had already happened. Parent notices provided in 2015, 2016, and 2017 were not about their intention to remove Student -- Student was not enrolled in any school located in BUSD after her withdrawal. Parents' correspondence were notices demanding reimbursement because they had Student at the private school. Parents have been unreasonable at all times herein. They withdrew Student and have indicated multiple times including in February 2017 and during the OAH hearing that they would not consent to any placement at BUSD because they wanted Student to stay at NHCS.

Since Student's withdrawal in 2014, Parents never enrolled Student in BUSD. Despite asking for IEPs and public offers of FAPE, they never agreed to enroll Student in a school in BUSD.

Had Parents notified BUSD that there was a problem with bullying, it is very likely that the situation could have been addressed and Parents would have kept Student enrolled at BUSD. This argument has been made, and continues to be made, including in this Petition for Review.

2. The Private Placement Was Not "Appropriate."

The Ninth Circuit correctly stated the standard for "appropriate placement" for the unilateral private placement:

> The parent "need not show that a private placement furnishes every special service necessary to maximize their child's potential," but rather "need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child." *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.

(Appendix A at A-4)(emphasis added.)

The Ninth Circuit stated but then disregarded this requirement that the private school provide "educational instruction specially designed to meet the unique needs of a handicapped child." Instead, the Ninth Circuit erroneous found the private placement "appropriate," stating: "Further, the ALJ properly determined that K.L.'s placement was appropriate because New Harvest provided K.L. with diagnostic tests upon enrollment to assess her academic proficiency and needs and provided K.L. with one-on-one tutoring assistance and extra help from her teachers." (Appendix A at A-5).

The "diagnostic tests" are not "educational instruction." These diagnostic tests are assessments – not instruction. The "one-to-one tutoring assistance and extra help from her teachers" is not "specially designed to meet the unique needs of a handicapped child." This tutoring and extra help are general education assistance – what every student needs and received. This is not specially designed to meet the unique needs of a handicapped child." This private placement was not appropriate.

The NHCS placement was shown by the record to be not appropriate, for the following reasons: (1) NHCS does not provide any special education services. (Letter of February 23, 2015, ER 190, AR 220); (2) There are no California Credentialed educators at NHCS. Principal Garcia and the teachers at NHCS have no California Education Credentials; (3) NHCS Student records do not provide objective criteria to determine Student's levels of performance; (4) Student cannot obtain an accredited California High School Diploma from NHCS; Principal Garcia testified that Student is in 10th grade, but she is not yet working in a program that will enable her to earn a California accredited high school diploma; NHCS is not accredited to provide a California High School diploma; and (5) NHCS is a religious school and its *Bible* based curriculum interweaves *Bible* studies across all subjects.

BUSD should not be compelled to reimburse for education services provided by NHCS where

NHCS's teaching methods and curriculum are *entirely Bible based.* Education Code section 56172, subdivision (f) requires that "Special education and related services, including materials and equipment, provided to a pupil with a disability who has been parentally placed in a private school shall be secular, neutral, and nonideological, as required by Section 1412(a)(10)(A)(vi) of Title 20 of the United States Code and Section 300.138(c)(2) of Title 34 of the Code of Federal Regulations." (Ed. Code, § 56172, subd. (f).)

The required reimbursement for this private placement violates the Establishment Clause of the Constitution, in that it is a forced payment that the State of California is compelling BUSD to make for the tuition and costs of a student attending a private parochial school at which the Bible is interwoven into its curriculum and its study is required of all students for graduation. This forced payment supports NHCS which has a non-secular purpose in teaching students biblical principles in every class taught at the school. This forced payment has a primary effect of advancing the Christian religion as taught by NHCS. This forced payment is also an excessive entanglement between the State of California and NHCS with its interweaving of the Bible in its curriculum. (See, *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745.) If any of the prongs of the "*Lemon* test" is not met, the government action violates the First Amendment. (*Edwards v. Aguillard* (1987) 482 U.S. 578, 583, 107 S.Ct. 2573, 96 L.Ed.2d 510.)

The NHCS Bible-based ACE Ministries individualized curriculum includes testing on memorization and recitation of Bible verses and Biblical studies interwoven throughout all subjects. NHCS's curriculum and teaching methods are not secular, neutral, and non-ideological. Courts are admonished to be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." (*Edwards*, *supra*, 482 U.S. at 583-84.) Compelling BUSD to reimburse for this private placement.

The Ninth Circuit, in its Memorandum stated: "The fact that New Harvest is a parochial school does not change this analysis." (Appendix A at A-5). BUSD is not asserting that placement at a parochial school is *per se* inappropriate. BUSD has asserted, and continues to assert, that this specific placement at NHCS is not appropriate where its *Bible* based curriculum interweaves *Bible* studies across all subjects.

The Ninth Circuit, in *C.B., supra,* 635 F.3d at 1159 (quoting *Florence County School District Four v. Carter* (1993) 510 U.S. 7, 114 S.Ct. 361, 126 L. Ed 2d 284, 15-16) stated:

> In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), the Supreme Court set minimum criteria that must be met before a guardian may obtain reimbursement for the unilateral placement of a child in a private school. A parent or guardian is

> "entitled to reimbursement only if a federal court concludes both (1) that the public placement violated the IDEA, and (2) that the private school placement was proper under the [IDEA]."[*County of San Diego v. Cal. Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1466] (citing *Carter*). If either criterion is not met, the parent or guardian may not obtain reimbursement. *Id.* If both criteria are satisfied, the district court then must exercise its "broad discretion" and weigh "equitable considerations" to determine whether, and how much, reimbursement is appropriate. *Carter* (internal quotation marks omitted).
>
> *(C.B., supra,* 635 F.3d at 1159.)

In the *C.B.* case, the ALJ found that it was "undisputed" that the public school's placement violated the IDEA (unlike here where there was no showing that BUSD's proposed placement was a violation of the IDEA). (*C.B.*, 635 F.3d at 1158-59.) C.B.'s guardian had timely objected to the proposed placement (unlike here where Parents had consented to the IEP) and the guardian gave prior notification that she would be obtaining supplemental services and seeking reimbursement (unlike here where Parents failed to give prior notice). (*Id.*) In *C.B.*, the ALJ found, that the Reading and Language Center (the "Center") provided most but not all of the individualized

services needed (it lacked only arithmetic). (*C.B.*, 635 F.3d at 1158 and 1160.) That is far different from the situation here in which the NHCS provides no special education services at all and is an impermissible non-secular school that interweaves the Bible into its core curriculum. In the follow-up case decided in 2016, the same parties (C.B. and Garden Grove Unified) came before the Ninth Circuit and this time the school district prevailed due to the guardian's actions when she "thwarted" the school district's efforts "by being uncooperative" and her failure to show a violation of the IDEA by the school district. (*See*, *Baquerizo v. Garden Grove Unified Sch. Dist.* (9th Cir. 2016) 826 F.3d 1179.)

The **First Circuit Court of Appeals**, in *Amann v. Stow Sch. Sys.* (1st Cir. 1992) 982 F.2d 644, ruled in favor of the school district (Town of Stow, MA) where the parents withdrew their child without consent and unilaterally placed the child with a private school in a different school district (Lincoln, MA), and stated:

> First, the Amanns say that Stow [DOR] ignored its statutory duty to "prepare" an IEP for Christopher between September 1987 and January 1989. Stow had last reviewed Christopher's IEP in December 1986, and the IDEA requires responsible educational agencies to re-examine IEPs at least annually. 20 U.S.C. § 1414(a)(5). However, federal regula-

> tions promulgated under the IDEA also say that public officials need "develop[] and implement[]" an IEP for a child in private school only if the child was "placed in or referred to [the] private school or facility by a public agency." 34 C.F.R. § 300.341(b)[3] (emphasis added).
>
> By December 1987, when the 1986 IEP would have come up for its annual review, Christopher had enrolled at Carroll School [a private school in DOL]. He was not placed there by a public agency; his parents enrolled him unilaterally, without challenging the IEP or obtaining Stow's consent to the transfer. According to regulation, their action relieved the Town of its responsibility to "develop and implement" an IEP for Christopher; and if Stow was not required to create an IEP for Christopher, then it follows that the Town had no obligation to review or revise the IEP already in place.[4]
>
> N.4: Our decision in [*Burlington v. Department of Education* (1st Cir.1984) 736 F.2d 773] is not to the contrary. There, the parents placed

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[3] 34 C.F.R. § 300.341 was superseded and replaced by 34 C.F.R. § 300.146.

> their child in a private school, but they also invoked their right to an impartial due process hearing on the adequacy of the Town's IEP. We said "that pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs, in accordance with applicable law." 736 F.2d at 794. The review process may take several years, and "[w]ithout an IEP as a starting point, the court [would be] faced with a mere hypothesis of what the Town would have proposed and effectuated during the subsequent years." *Id*. The pendency of review, not the placement in private school, creates the need to maintain and update the IEP. Because the Amanns did not complain formally about the IEP, or invoke their right to a BSEA hearing concerning its adequacy, there was no administrative or judicial review pending between September 1987 and January 1989, and hence no obligation to review and revise.
>
> *(Amann, supra,* 982 F.2d at 651.)

The **Fourth Circuit Court of Appeals**, in *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.* (4th Cir. 2002) 303 F.3d 523, stated:

> A school district is only required to continue developing IEPs for a

disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review. See *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 651 n. 4 (1st Cir.1992); *Burlington*, 736 F.2d at 794. Even if a prior year's IEP is contested and the school district fails to develop subsequent-year IEPs, "the losing party in the dispute over the contested IEP ... will have the burden of producing evidence and persuading the court of changed circumstances that render the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years." *Andersen v. Dist. of Columbia*, 877 F.2d 1018, 1022 (D.C. Cir. 1989) (quoting *Burlington*, 736 F.2d at 795) (emphasis in original).

In this case, the parents withdrew MM from the District's schools in 1996, but they did not request a due process hearing as to any IEP until March of 1998. The District was therefore under no continuing obligation in 1997 to develop an IEP for MM. Even if the District had been so obliged, the Parents have made no showing of changed circumstances. Because the District was not obliged to develop an

> IEP for MM for the 1997-98 school year, we will affirm, on this alternate ground, the award of summary judgment to the District on the 1997-98 IEP.
>
> *(MM, supra,* F.3d 523 at 536-7.)

The Ninth Circuit erred by disregarding the standard for reimbursement of unilateral private placements that it had set forth in its Memorandum, that "Parents may receive reimbursement for the unilateral placement of a child in a private school if the LEA did *not make a FAPE available* to the child in a timely manner *prior to that enrollment and* the private *placement is appropriate*. *See* 34 C.F.R. § 300.148(c)." (Memorandum, Appendix A at A-4.)(Emphasis added.)

The Supreme Court should grant review of the Ninth Circuit's decision to correct this prejudicial error as to the reimbursement for this unilateral private placement.

CONCLUSION AND PRAYER FOR RELIEF

The Courts of Appeal need guidance about the relative responsibilities of the school districts where a student resides in one district but is unilaterally parentally placed in a private school located within the geographical boundaries of a different school district and the requirements for reimbursement for that unilateral parental private placement.

This Court should grant certiorari to review the Ninth Circuit's judgment.

DATED: April 29, 2021

Respectfully submitted,

LAW OFFICES OF ERIC BATHEN

RICHARD D. BRADY
Counsel of Record
ERIC J. BATHEN

Counsel for Petitioner
BELLFLOWER UNIFIED SCHOOL DISTRICT

APPENDIX

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

F I L E D
OCT 26 2020
Molly C. Dwyer, Clerk
U.S. Court of Appeals

No. 19-55912
D.C. No. 2:18-cv-00043-FMO-FFM

MEMORANDUM*

BELLFLOWER UNIFIED SCHOOL DISTRICT,
Plaintiff-counter-defendant-Appellant,

v.

FERNANDO LUA, individually and on behalf of minor K.L.,
Defendant-Appellee,

SANDRA LUA, individually and on behalf of minor K.L.,
Defendant-counter-claimant-Appellee.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

Argued and Submitted October 15, 2020
Pasadena, California

Before: MURGUIA and OWENS, Circuit Judges, and SETTLE,** District Judge.

Bellflower Unified School District ("BUSD") appeals the district court's affirmance of an Administrative Law Judge's ("ALJ") determination that BUSD violated the Individuals with Disabilities Education Act ("IDEA") by failing to make a free appropriate public education ("FAPE") available to K.L., a minor who resided in the school district. BUSD also challenges the ALJ's decision ordering reimbursement to K.L. and her parents for the cost of sending K.L. to New Harvest Christian School ("New Harvest"), a private parochial school located within another school district's geographical boundaries. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The IDEA was enacted in 1975 to "ensure that all children with disabilities have available to them a free appropriate public education." 20

** The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

U.S.C. § 1400(d)(1)(A). The IDEA requires that a local educational agency ("LEA") conduct evaluations to determine whether a student is a "child with a disability," *id.* § 1414(a), and develop, in conjunction with the child's parents and teachers, an individualized education plan ("IEP") for each child with a disability, *id.* § 1414(d). A parent may bring a complaint about "any matter relating to" the child's evaluation and educational placement and is entitled to an administrative due process hearing on the complaint. *Id.* §§ 1415(b)(6), (f), (g)(2).

The district court properly affirmed the ALJ's determination that BUSD denied K.L. a FAPE. The Department of Education's regulations implementing the IDEA specifically contemplate that, upon a parent's request, a school district must evaluate a child residing in its district for purposes of making a FAPE available to her, even if she is enrolled in a private school in another district. *See* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,592 (Aug. 14, 2006). Even where a parent has informed the district of residence that the child has been placed at a private school outside the state, this Court has held that the district is still required to make a formal written offer of placement for a child with a disability. *See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 460 (9th Cir. 2010). Therefore, as K.L.'s district of residence, BUSD was

the LEA responsible for conducting assessments and providing special education services for K.L. *See* 71 Fed. Reg. at 46,592. Although a child's unilateral placement in a private school outside the district might trigger obligations for the "district of location," including "child find" responsibilities under 34 C.F.R. § 300.131(a), these obligations do not absolve the district of residence of its responsibilities under the IDEA. *J.W.*, 626 F.3d at 460.

Further, the district court properly affirmed the ALJ's award of reimbursement for K.L.'s private-school tuition for the 2015–2016 and 2016–2017 school years. Parents may receive reimbursement for the unilateral placement of a child in a private school if the LEA did not make a FAPE available to the child in a timely manner prior to that enrollment and the private placement is appropriate. *See* 34 C.F.R. § 300.148(c). The parent "need not show that a private placement furnishes every special service necessary to maximize their child's potential," but rather "need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child." *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011).

BUSD contends that it offered K.L. an IEP in 2014 and that it was not required to further update her IEP because K.L.'s parents made clear that they did not intend to re-enroll K.L. at BUSD.

These arguments are not supported by the IDEA or by the record. An LEA must ensure that a child's IEP is reviewed annually and revised as appropriate. 20 U.S.C. § 1414(d)(4)(A). As the LEA responsible for offering K.L. a FAPE, BUSD violated the IDEA by refusing to convene an IEP meeting in 2015 and 2016 despite multiple requests from K.L.'s parents. K.L.'s 2014 IEP was not a permissible placeholder, as her 2014 IEP would not address her "present levels of academic achievement and functional performance" as they existed in 2015 or 2016. *Id*. § 1414(d)(1)(A)(i)(I). While "the LEA where the child resides need not make FAPE available to the child" if "the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA," *see* 71 Fed. Reg. at 46,593, the record does not support BUSD's contention that K.L.'s parents expressed a clear intent to keep K.L. enrolled at New Harvest. In fact, K.L.'s parents' letters to BUSD in 2015 and 2016 indicate they were still interested in a public-school placement for K.L., and BUSD was required to provide an offer of FAPE. BUSD failed to do so.

Further, the ALJ properly determined that K.L.'s placement was appropriate because New Harvest provided K.L. with diagnostic tests upon enrollment to assess her academic proficiency and needs and provided K.L. with one-on-one tutoring assistance and extra help from her teachers. The fact that New Harvest is a parochial school does not change this analysis. K.L.'s parents were therefore

entitled to reimbursement for K.L.'s private school tuition.

Finally, under California law, an ALJ may reduce or deny a reimbursement award where the parent did not give written notice to the LEA at least ten days prior to the removal of the child from public school. Cal. Educ. Code § 56176. Here, although K.L.'s parents' failed to provide ten days' notice before withdrawing K.L. from BUSD in 2014, BUSD fails to make any argument as to why the ALJ was required to use her discretion to reduce the reimbursement award for K.L.'s private school tuition. In any event, K.L.'s parents notified BUSD of K.L.'s placement at New Harvest and their intent to seek reimbursement in May 2015, and the ALJ awarded reimbursement for the 2015 and 2016 school years, well after BUSD had notice of K.L.'s withdrawal.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

F I L E D
DEC 2 2020
Molly C. Dwyer, Clerk
U.S. Court of Appeals

No. 19-55912
D.C. No. 2:18-cv-00043-FMO-FFM
Central District of California, Los Angeles

ORDER

BELLFLOWER UNIFIED SCHOOL DISTRICT,
Plaintiff-counter-defendant-Appellant,

v.

FERNANDO LUA, individually and on behalf of minor K.L.,
Defendant-Appellee,

SANDRA LUA, individually and on behalf of minor K.L.,
Defendant-counter-claimant-Appellee.

Before: MURGUIA and OWENS, Circuit Judges, and SETTLE,* District Judge.

Judges Murguia and Owens voted to deny the petition for rehearing en banc, and Judge Settle recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED (Doc. 50).

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* The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 18-0043 FMO (FFMx)

BELLFLOWER UNIFIED SCHOOL DISTRICT,

Plaintiff,

v.

FERNANDO LUA, *et al.*,

Defendants.

JUDGMENT

IT IS ADJUDGED that the administrative law judge's determination of November 20, 2017, is affirmed.

Dated this 8th day of July, 2019.

/s/
Fernando M. Olguin
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 18-0043 FMO (FFMx)

BELLFLOWER UNIFIED SCHOOL DISTRICT,
Plaintiff,

v.

FERNANDO LUA, *et al.*,
Defendants.

ORDER AFFIRMING DECISION OF OFFICE OF ADMINISTRATIVE HEARINGS

INTRODUCTION

This appeal concerns an Administrative Due Process Hearing under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*. Plaintiff Bellflower Unified School District ("Bellflower" or "School District") challenges the administrative law judge's ("ALJ") decision in favor of K.L. and her parents Fernando Lua ("Fernando"), and Sandra Lua ("Sandra") (collectively, "K.L.'s parents"). (*See* Dkt. 1,

Complaint). The ALJ found that the School District had failed to hold an individualized education program ("IEP") meeting despite multiple requests from K.L.'s parents. (*See* AR 457). The ALJ also determined that the School District had "deprived [K.L.'s parents] of the opportunity to meaningfully participate in the development of [K.L.'s] educational program because it failed to assess [K.L.]." (*Id.*). Lastly, the ALJ found that "the IEP team was not able to make an appropriate FAPE[1] offer and [K.L.'s parents]] were not able to meaningfully participate in the IEP team meeting." (*Id.*). The ALJ therefore awarded K.L.'s parents the costs they incurred from having to place K.L. in private school. (*See id.* at 471).

The court, having reviewed all the briefing with respect to the parties' Joint Trial Brief (see Dkt. 42, "Joint Br."), concludes that oral argument is not necessary to resolve the parties' dispute. *See* Fed. R. Civ. P. 78; Local Rule 7-15; *Willis v.*

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[1] FAPE" refers to the free appropriate public education that public school districts "must make . . . available to all children with disabilities." *Fry v. Napoleon Community Schs.*, 137 S.Ct. 743, 53 (2017) (internal quotation marks omitted). "A FAPE is defined as an education that is provided at public expense, meets the standards of the state educational agency, and is in conformity with the student's IEP." *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1184 (9th Cir. 2016).

Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 6 2001).

SUMMARY OF FACTS

The facts underlying this action are ably set forth in the ALJ's decision. (*See* AR 456-72). Accordingly, "[i]nsofar as any specific fact is not disputed, the ALJ's factual findings are adopted in recognition of the 'due weight' to be given to those administrative proceedings." *Tehachapi Unified Sch. Dist. v. K.M. by & through Markham*, 2018 WL 4735735, *3 (E.D. Cal. 2018) (quoting *R.B., ex rel. F.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 937 (9th Cir. 2007)); *see Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) ("We give deference to the administrative findings of the Hearing Officer particularly when, as here, they are thorough and careful.").

LEGAL STANDARD

The IDEA provides that "[a]ny party aggrieved by the findings and decision" of the ALJ "shall have the right to bring a civil action with respect to the complaint . . . in a district court of the United States." 20 U.S.C. § 1415(i)(2)(A). In such actions, the court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)

(2)(C). The burden of persuasion is on the party challenging the administrative decision. *L.M. ex rel. Sam M. v. Capistrano Unified Sch. Dist.*, 556 23 F.3d 900, 910 (9th Cir. 2009).

Judicial review in IDEA cases "differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993). In IDEA cases, courts give "less deference than is conventional" in the review of administrative decisions. *Id*. at 1472 (quoting *Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C. Cir. 1988)). As summarized in *Ash v. Lake Oswego Sch. Dist.*, 980 F.2d 585 (9th Cir. 1992):

> The court, in recognition of the expertise of the administrative agency, must consider the findings carefully. . . . After such consideration, the court is free to accept or reject the findings in part or in whole. Thus, . . . federal courts cannot ignore the administrative findings. . . . Ultimately, however, the weight to be accorded administrative findings under the IDEA is a matter within the discretion of the federal courts.

Id. at 587-88 (internal citations omitted); *see Ojai*, 4 F.3d at 1474.

"The amount of deference accorded the hearing officer's findings increases where they are 'thorough and careful.'" *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995); see *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1053 (9th Cir. 2012) ("An administrative hearing officer's 'thorough and careful' findings receive particular deference."). After such consideration, "the court is free to accept or reject the findings in part or in whole." *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987) (citation omitted). "When the court has before it all the evidence regarding the disputed issues, it may make a final judgment in what is not a true summary judgment procedure [but] a bench trial based on a stipulated record." *Miller v. San Mateo-Foster City Unified Sch. Dist.*, 318 F.Supp.2d 851, 859 (N.D. Cal. 2004) (internal quotation marks omitted); *see Ojai*, 4 F.3d at 1472 (finding such a procedure proper when the court "had before it all of the[ ] evidence regarding the issues in dispute[.]"); *see also, Beth B. v. Van Clay*, 282 F.3d 493, 496 n. 2 (7th Cir. 2002) (noting that summary judgment is appropriate in IDEA cases "even when the facts are in dispute, and is based on a preponderance of the evidence."); *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 709 (10th Cir. 1998) (acknowledging that in IDEA cases, even at summary judgment, the district court has an "obligation to independently review the record and reach a decision based on a preponderance of the evidence.").

DISCUSSION

I. INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;" "ensure that the rights of children with disabilities and parents of such children are protected;" and "assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities[.]" 20 U.S.C. § 1400(d)(1)(A)-(C). "To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements." *Anchorage Sch. Dist.*, 689 F.3d at 1053-54; *Ojai*, 4 F.3d at 1469 ("The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures.").

The IDEA's primary goal of assuring that all disabled children have a "free and appropriate public education," or FAPE, that meets their unique educational needs, *see* 20 U.S.C. § 1400(c), is achieved through the development of an IEP for

each child with a disability. *See* 20 U.S.C. § 1414; *Ojai*, 4 F.3d at 1469. The IEP is crafted by a team that includes a student's parents, teachers, the local educational agency, and where appropriate, the student. *See* 20 U.S.C. § 1414(d)(1)(B). The IEP must consist of various items including "a statement of the child's present levels of academic achievement and functional performance," "a statement of measurable annual goals, including academic and functional goals," and "a description of how the child's progress toward meeting the annual goals . . . will be measured." *Id.* at § 1414(d)(1)(A). Local educational agencies must review, and where appropriate revise, each student's IEP at least annually. *See id*. at 1414(d)(4)(A).

The IDEA also puts in place extensive procedural safeguards for the benefit of disabled children and their parents, including the opportunity to review records, the right to be notified of any changes in identification, evaluation, and placement of the student, as well as the right to file a Due Process Complaint regarding their child's education. 20 U.S.C. § 1415(b)-(h). Such complaints may lead to mediation or an appearance at an impartial Due Process Hearing conducted by a hearing officer. *See id.* at § 1415(e)-(f).

II. THE SCHOOL DISTRICT'S OBLIGATION TO CONDUCT AN IEP.

K.L. lives within the boundaries of the Bellflower Unified School District. (*See* AR 457). Until September 2014, K.L. attended one of Bellflower's elementary schools. (*See id.* at 457-58). An IEP team meeting for K.L. was held in June 2014, to help her transition from sixth grade to middle school. (*See id.* at 457). Following that meeting, Bellflower offered an IEP for K.L., which K.L.'s parents accepted. (*See id.* at 457-58). However, on September 8, 2014, K.L.'s parents enrolled her at the New Harvest Christian School ("New Harvest"), a private parochial school located within the boundaries of the Norwalk-La Mirada Unified School District ("Norwalk"). (*See id.* at 458; Dkt. 42, Joint Br. at 4).

On April 23, 2015, K.L.'s parents sent a letter to Bellflower stating that the reason they removed K.L. from the School District was because they feared for her safety[2] and they didn't believe that K.L. was making sufficient academic progress. (*See* AR 458). In another letter, also dated for April 23, 2015, K.L.'s mother, Sandra, stated: "I believe the District has been either misinformed or wrongly assumed that my daughter being privately placed

[2] Specifically, they were dissatisfied with the School District's inadequate response to allegations that another student was harassing K.L. (*See* AR 458).

means that I am not interested in an offer of a Free and Appropriate Public Education (FAPE) for her. I am still interested in a public school placement for [K.L.] and request the District provide an offer of FAPE for the 2015/2016 school year." (*Id*. at 369). Sandra continued: "Please consider this letter to be my oral written request for an IEP team meeting to be scheduled for [K.L.]." (*Id*.). However, the School District refused to conduct an IEP for K.L. (*See* AR 458). In an April 28, 2015, letter, Tracy McSparren ("McSparren"), a School District administrator, told K.L.'s parents that because K.L. "is not currently enrolled in [the School District], nor does she attend any private school located in the [Bellflower Unified School District] boundaries," Bellflower had no obligation to conduct an IEP. (AR 227). According to McSparren, it was Norwalk's responsibility to attend to K.L.'s needs. (*See id*.). McSparren offered to hold an IEP meeting within 30 days of K.L.'s re-enrollment at a school located within the School District. (*See id*. at 228).

K.L.'s parents sent two more letters requesting an IEP, the first on May 12, 2015. (*See* AR 459). They sent the second letter on April 8, 2016, requesting an IEP in advance of the 2016-17 school year. (*See id*.). They also sent an email on September 6, 2016, making the same request. (*See id*.). But in each instance, Bellflower refused to conduct an IEP. (*See id*.)

Title 20 U.S.C. § 1414(d)(2)(A) provides that "[a]t the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program[.]" In turn, § 1414(a)(2)(A)(ii) obligates a school district to conduct a reevaluation of a child's IEP "if the child's parents or teacher requests a reevaluation." In other words, "school districts must conduct an assessment of a student's educational needs if the parent requests one[.]" *Hill v. Dist. of Columbia*, 2016 WL 4506972, *17 (D.D.C. 2016).

Bellflower does not dispute that it is a local educational agency, (*see, generally*, Dkt. 42, Joint Br.), but seems to argue that it was not the agency with jurisdiction over K.L., because K.L. attended New Harvest within the Norwalk school district. (*See id*. at 16-20). However, the School District provides no authority establishing that Norwalk, rather than it, has jurisdiction over K.L. (*See, generally*, Dkt. 42, Joint Br.). This is unsurprising, given that jurisdiction for IEP purposes is determined by the disabled student's residency. *See, e.g., Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 450 (2d Cir. 2015) (noting § 1414(d)(2)(A)'s requirement, and then observing: "It is undisputed that the Student was, at all relevant times, resident in East Lyme and within the Board's jurisdiction. The Board therefore violated the IDEA by failing to offer IEPs for these school years, and these violations deprived the Student of a FAPE.");

Phillips v. Independent Sch. Dist. No. 3 of Okmulgee Cty., 2018 WL 442997, *3 (E.D. Okla. 2018) ("The Act requires each local education agency (i.e., school district) to have in effect an IEP for each child with a disability within the agency's jurisdiction, at the beginning of each school year. It is an absurd result if a school district need not resolve the residency issue before the beginning of the school year, let alone raising it two years later.") (internal citation, alteration, and quotation marks omitted).

In particular, the court is persuaded by *Dep't of Educ., State of Haw. v. M.F. ex rel. R.F.*, 840 F.Supp.2d 1214 (D. Haw. 2011), which addressed a similar issue. The court there held that "'jurisdiction' refers to geography – that is, it refers to a student's residence as the criteria for which a local agency is responsible for IDEA compliance." *Id.* at 1231 n. 14. The court noted commentary to IDEA regulations, stating that "§ 300.201 already clarifies that the district of residence is responsible for making FAPE available to the child. Accordingly, the district in which the private elementary or secondary school is located is not responsible for making FAPE available to a child residing in another district." 71 Fed.Reg. 46540-01 (2006); *see also S.B. v. San Mateo Foster City Sch. Dist.*, 2017 WL 4856868, *17 (N.D. Cal. 2017) (concluding that "what matters in determining the district's ongoing responsibilities is where the child resides, rather than where they are currently enrolled in school"). In short, the ALJ did not

commit error when it held that the School District was responsible for conducting an IEP following K.L.'s parents' request for one.

III. REIMBURSEMENT

The School District next challenges the ALJ's decision to award K.L. and her parents the cost of sending K.L. to private school. (*See* Dkt. 42, Joint Br. at 21-35). In support of its argument, the School District relies on *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155 (9th Cir. 2011). (*See* Dkt. 42, Joint Br. at 21-22). The School District's reliance on *C.B.* is unpersuasive. In that case, the Ninth Circuit held that "[a] parent or guardian is entitled to reimbursement [for placing a child in private school] only if a federal court concludes both (1) that the public placement violated the IDEA, and (2) that the private school placement was proper under the [IDEA]." *Id.* at 1159 (internal quotation marks omitted). The School District challenges both prongs, arguing that it did not violate the IDEA and that K.L.'s placement in New Harvest was improper. (*See* Dkt. 42, Joint Br. at 21-22).

As to the first prong, "[a] child is denied a FAPE only when the procedural violation result[s] in the loss of educational opportunity or seriously infringe[s] the parents' opportunity to participate in the IEP formation process." *R.B.*, 496 F.3d at 938 (internal quotation marks omitted). Where, as here, the School District failed even to offer an IEP, *see*

supra at § II., the court readily concludes that the School District violated the IDEA. *See East Lyme*, 790 F.3d at 450 ("The Board therefore violated the IDEA by failing to offer IEPs for these school years, and these violations deprived the Student of a FAPE."). And to the extent the School District relies on the June 2014 IEP and offer of FAPE, (*see* Dkt. 42, Joint Br. at 22), it fails to explain why the June 2014 IEP is sufficient to satisfy the School District's IDEA obligations with respect to K.L.'s 2015 and 2016 requests for an IEP. (*See, generally*, Dkt. 42, Joint Br.). In any event, the School District overlooks the IDEA's requirement that it was obligated to reevaluate this IEP "if the child's parents or teachers requests a reevaluation." 20 U.S.C. § 1414(a)(2)(A)(ii). In other words, the fact that the School District offered K.L. an IEP in June 2014 does not excuse its present failure to be responsive to K.L.'s more recent IEP requests.

With respect to the second prong, "[a] placement is proper if it is specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *J.T. ex rel. Renee T. v. Dep't of Educ. Haw.*, 695 F.Appx. 227, 228 (9th Cir. 2017) (internal quotation marks omitted). The School District contends that New Harvest lacks special education services, does not have "California Credentialed educators," does not "provide objective criteria to determine [K.L.'s] levels of performance," and does not furnish "a California accredited high school diploma." (Dkt.

42, Joint Br. at 29). The School District also makes much of the fact that New Harvest is a Christian school that incorporates religious instruction into its curriculum.[3] (*See id*. at 29, 31-32).

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[3] The School District also raises a statute of limitations argument. (*See* Dkt. 42, Joint Br. at 24-25). However, the ALJ rejected this argument, finding that K.L.'s complaint "does not appear [to claim] anything more than the two year statute of limitations." (AR 68). The School District does not address the ALJ's reasoning. (*See, generally*, Dkt. 42, Joint Br.). Instead, it points to the withdrawal of K.L. from the School District, and seems to imply that this was the event which triggered the limitations period. (*See id.* at 25). But this misses the mark because "the IDEA's statute of limitations is triggered when the parent or agency knew or should have known about the alleged action that forms the basis of the complaint[.]" *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936, 944 (9th Cir. 2017) (internal quotation marks and emphasis omitted). Here, the School District's refusal to perform an IEP took place within the context of a series of letters the parties exchanged in April and May of 2015. Specifically, McSparren sent a letter refusing to conduct an IEP on April 28, 2015. (*See* AR 227-28). While it is not clear when K.L.'s parents received this letter, they responded to McSparren's letter in a May 12, 2015, letter in which they once again requested an IEP meeting. (*See* AR 229-30). In a May 14, 2015, letter, the School District again refused to conduct the IEP. (*See id.* at 231-33). It was this letter which purported to "constitute[] prior written notice to [K.L.'s parents] that the District will not reimburse [them] for any costs associated with" placing K.L. in private school. (AR 233). K.L.'s parents filed their Request for Mediation and Due Process Hearing on May 4, 2017. (*See* AR 1-2). Put briefly, the

The School District's contentions are unpersuasive. "[P]arents need not show that a private placement furnishes every special service necessary to maximize their child's potential." *C.B.*, 635 F.3d at 1159 (quoting *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 365 (2d Cir. 2006)). Instead, "[t]hey need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *Id.* Accordingly, in *C.B.*, the Ninth Circuit affirmed a district court order awarding full reimbursement for the costs of attending a private school where that school "delivered many, but not all, of the special education services that [the child] needed." *Id.* at 1160; *see also id.* ("The district court gave great weight to the fact that [the child] received significant benefits in important areas of his special educational needs."); *S.L. ex rel. Loof v. Upland Unified Sch. Dist.*, 747 F.3d 1155, 1160 (9th Cir. 2014) (rejecting improper placement argument where the private school's "instructional materials and curriculum, structure, support, and socialization" led to the student becoming "more socially involved with other students," "receiv[ing] good grades and [being] promoted to fifth grade").

School District has not given the court any reason to disturb the ALJ's determination that K.L.'s administrative complaint was timely filed

Here, as in *C.B.* and *S.L.*, K.L.'s placement at New Harvest was proper because it provided her with "significant educational benefits." *See C.B.*, 635 F.3d at 1159; *see, e.g., Ash v. Lake Oswego Sch. Dist. No. 7J*, 766 F.Supp. 852, 863 (D. Or. 1991) (finding placement "appropriate" where student's "severe behavioral problems have improved, and he has received significant educational benefits from that placement"). New Harvest provided K.L. with diagnostic tests upon her enrollment to assess her academic proficiency and needs. (*See* AR 220). These tests showed that K.L. was "below grade level," and when New Harvest provided her with sixth grade course work, "she was unable to do the work." (*Id.*). New Harvest then provided K.L. with a fourth grade curriculum, and with the assistance of "one on one tutoring" and "extra help" from her teachers, combined with K.L.'s "supportive mother," K.L. was able to perform successfully at that grade level. (*Id.*). K.L. achieved significant academic progress during her tenure at New Harvest. After three years of instruction, she was working at grade level. (*See* AR 461). She took classes in English, math, science, history, etymology, and physical education. (*See id.*). K.L. subsequently passed her ninth grade classes.[4] (*See id.*).

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[4] Despite the School District's concern regarding the religious aspects of New Harvest's curriculum, it did not come forward with any case law suggesting that the religious nature of a private school renders a student's placement in that school improper. *(See, generally,* Dkt. 42, Joint Br.). Indeed, such case law would be in conflict

Finally, the School District argues that the ALJ was wrong to award relief to K.L. and her parents in light of their failure to give the School District ten days' notice before withdrawing K.L. from the School District. (*See* Dkt. 42, Joint Br. at 32-34). The School District claims that it received notice of K.L.'s withdrawal on September 8, 2014. (*See id.* at 33) ("On September 8, 2014, Parents through their counsel notified BUSD of the withdrawal after the withdrawal had already happened.") (emphasis omitted); *see also* AR 363 (the letter of withdrawal)). However, the School District does not supply the court with the actual date of withdrawal. (*See*, *generally*, Dkt. 42, Joint Br.). Nor does it give the court any reason to doubt the ALJ's determination that K.L.'s parents "withdrew [K.L.] from [the] District on September 8, 2014," the same day the School District was purportedly informed of the withdrawal. (AR 458). In any event, the language of the pertinent statute, Cal. Educ. Code § 56176, provides only that reimbursement for the cost of private school placement "may be reduced or denied" upon failure to give ten days notice. As such, the ALJ (and, by extension, the court) is given the discretion to derogate or annul damages resulting from the private placement. *See Barron v. Reich*, 13 F.3d

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with *S.L.*, where the Ninth Circuit found that a student's placement "in a private, parochial school called Our Lady of Assumption" was appropriate, and ordered the school district to reimburse the student and her parents for the cost of tuition. 747 F.3d at 1157, 1160.

1370, 1375-76 (9th Cir. 1994) (statute's use of term "may" rather than "shall" indicates grant of discretion); *Ngatia v. Holder*, 328 F.Appx. 387, 388 (9th Cir. 2009) (same principle). The School District furnishes no reason why the ALJ should have exercised this discretion to deny K.L. and her parents the costs of placing K.L. in private school. (*See, generally*, Dkt. 42, Joint Br. at 32-34). Accordingly, the court affirms the ALJ's decision awarding K.L. and her parents the cost of sending K.L. to private school.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. The decision of the ALJ granting relief for defendants is **affirmed**. Judgment shall be entered accordingly.

2. Prior to the filing of any motion for attorney's fees and costs, the parties shall meet and confer in a good faith effort to resolve the motion.

Dated this 8th day of July, 2019.

/s/ Fernando M. Olguin
United States District Judge

APPENDIX E

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS STATE OF CALIFORNIA

OAH Case no. 2017050338

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

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.

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.

ISSUES[2]

(1) Did District deny Student a free appropriate public education by failing to timely convene an individualized education program team

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

[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.)

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 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

[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.

Harvin, general education teacher; an administrator designee; two service coordinators; a special education teacher; and Eric Bathen, District's 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.

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 IDEA[4]

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

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[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.

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. § 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

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

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 Dist.* (9th Cir. 2016) 822 F.3d 1105, 1124-1125, held a school district's failure to assess Student may result in substantially

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

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

Docusign by:
Linda Johnson

LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings

APPENDIX F

List of Authorities **Page**

UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CODES

20 U.S.C. § 1415

§1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to

such child, and to obtain an independent educational evaluation of the child.

(2) (A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the

notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7) (A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or

youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation,

the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that

the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall

include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) Opportunity to meet with a disinterested party.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity, to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) List of qualified mediators.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) Costs.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Scheduling and location.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Written agreement.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) Mediation discussions.—Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any

subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local

educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's

evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice

filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

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

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free

appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in

controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or

multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A), the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives

are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a func- tional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral interven-

tion plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school

premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this

paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsi- bilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and

remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under sub- sections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State

law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(o) Separate complaint

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(Pub. L. 91–230, title VI, §615, as added Pub. L. 108–446, title I, §101, Dec. 3, 2004, 118 Stat. 2715.)

28 U.S.C. § 1291

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme

Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §48, 65 Stat. 726; Pub. L. 85–508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97–164, title I, §124, Apr. 2, 1982, 96 Stat. 36.)

28 U.S.C. § 1294

§1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.
(June 25, 1948, ch. 646, 62 Stat. 930; Oct. 31, 1951, ch. 655, §50(a), 65 Stat. 727; Pub. L. 85–508, §12(g), July 7, 1958, 72 Stat. 348; Pub. L. 86–3, §14(c), Mar. 18, 1959, 73 Stat. 10; Pub. L. 87–189, §5, Aug. 30, 1961, 75 Stat. 417; Pub. L. 95–598, title II, §237,

Nov. 6, 1978, 92 Stat. 2667; Pub. L. 97–164, title I, §126, Apr. 2, 1982, 96 Stat. 37.)

28 U.S.C. § 1331

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. (June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85–554, §1, July 25, 1958, 72 Stat. 415; Pub. L. 94–574, §2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96–486, §2(a), Dec. 1, 1980, 94 Stat. 2369.)

CODE OF FEDERAL REGULATIONS

34 C.F.R. § 300.131

§ 300.131 Child find for parentally-placed private school children with disabilities.

(a) *General.* Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, in accordance with paragraphs (b) through (e) of this section, and §§300.111 and 300.201.

(b) *Child find design*. The child find process must be designed to ensure— (1) The equitable participation of parentally- placed private school children; and (2) An accurate count of those children.

(c) *Activities*. In carrying out the requirements of this section, the LEA, or, if

applicable, the SEA, must undertake activities similar to the activities under- taken for the agency's public school children.

(d) *Cost.* The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under §300.133.

(e) *Completion period.* The child find process must be completed in a time period comparable to that for students attending public schools in the LEA consistent with §300.301.

(f) *Out-of-State children.* Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

(Approved by the Office of Management and Budget under control number 1820–0030) (Authority: 20 U.S.C. 1412(a)(10)(A)(ii))

34 C.F.R. § 300.146

§ 300.146 State educational agency responsibility.

Each SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency—

(a) Is provided special education and related services—

(1) In conformance with an IEP that meets the requirements of §§300.320 through

300.325; and

(2) At no cost to the parents;

(b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs including the requirements of this part, except for §300.156(c); and

(c) Has all of the rights of a child with a disability who is served by a public agency.

(Approved by the Office of Management and Budget under control number 1820–0030) (Authority: 20 U.S.C. 1412(a)(10)(B)) [71 FR 46753, Aug. 14, 2006, as amended at 82 FR 29759, June 30, 2017]

34 C.F.R. § 300.148

§ 300.148 Placement of children by parents when FAPE is at issue.

(a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§ 300.131 through 300.144.

(b) *Disagreements about FAPE.* Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

(c) *Reimbursement for private school place-*

ment. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

(d) *Limitation on reimbursement.* The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503 (a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement—

(1) Must not be reduced or denied for failure to provide the notice if—

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to § 300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if—

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

(Approved by the Office of Management and Budget under control number 1820-0030) (Authority: 20

U.S.C. 1412(a)(10)(C))

34 C.F.R. § 300.341

§ 300.341 State educational agency responsibility.

(a) Public agencies. The SEA shall ensure that each public agency develops and implements an IEP for each of its children with disabilities.

(b) Private schools and facilities. The SEA shall ensure that an IEP is developed and implemented for each child with a disability who— (1) Is placed in or referred to a private school or facility by a public agency; or (2) Is enrolled in a parochial school or other private school and receives special education or related services from a public agency.
(Authority: 20 U.S.C. 1412 (4), (6); 1413(a)(4)) (superseded)

FEDERAL REGISTER

71 Fed. Reg. 46590 (Excerpts)

Children in Private Schools
Children With Disabilities Enrolled by Their Parents in Private Schools

General Comments

Comment: Many comments were received regarding the parentally-placed private school children with disabilities requirements in

§§ 300.130 through 300.144. Many commenters supported the changes to the regulations and believed the regulations simplify the processes for both private schools and public schools. Numerous commenters, however, expressed concern regarding the implementation of the private school requirements.

Many of the commenters expressed concern with the requirement that the LEAs where private elementary schools and secondary schools are located are now responsible for child find, individual evaluations, and the provision of services for children with disabilities enrolled by their parents in private schools located in the LEA.

These commenters described the private school provisions in the Act and the NPRM as burdensome and difficult to understand.

Discussion: The revisions to the Act in 2004 significantly changed the obligation of States and LEAs to children with disabilities enrolled by their parents in private elementary schools and secondary schools. Section 612(a)(10)(A) of the Act now requires LEAs in which the private schools are located, rather than the LEAs in which the parents of such children reside, to conduct child find and provide equitable services to parentally-placed private school children with disabilities.

71 Fed. Reg. 46591-92 (Excerpts)

Child Find for Parentally-Placed Private School Children With Disabilities (§ 300.131)

Comment: A few commenters recommended permitting the LEA where private schools are located to request reimbursement from the LEA where the child resides for the cost of conducting an individual evaluation, as may be required under the child find requirements in § 300.131.

One commenter recommended that the LEA where private schools are located be responsible for locating and identifying children with disabilities enrolled by their parents in private schools and the LEA where the children reside be responsible for conducting individual evaluations.

Discussion: Section 300.131, consistent with section 612(a)(10)(A)(i) of the Act, requires that the LEA where private elementary schools and secondary schools in which the child is enrolled are located, not the LEA where the child resides, is responsible for conducting child find, including an individual evaluation for a child with a disability enrolled by the child's parent in a private elementary school or secondary school located in the LEA. The Act specifies that the LEA where the private schools are located is responsible for conducting both the child find process and the initial evaluation.

Therefore, the LEA where private schools are located may not seek reimbursement from the LEA of residence for the cost of conducting the evaluation or to request that the LEA of residence conduct the evaluation. However, the LEA where the private elementary school or secondary school is located has options as to how it meets its responsibilities. For example, the LEA may assume the responsibility itself, contract with another public agency (including the public agency of residence), or make other arrangements.

Changes: None.

71 Fed. Reg. 46593

Comment: A few commenters stated that § 300.131 does not address which LEA has the responsibility for reevaluations. Discussion: The LEA where the private schools are located is responsible for conducting reevaluations of children with disabilities enrolled by their parents in private elementary schools and secondary schools located within the LEA. Reevaluation is a part of the LEA's child find responsibility for parentally placed private school children under section 612(a)(10)(A) of the Act. Changes: None.

Comment: One commenter expressed concern that the regulations permit a parent to request an evaluation from the LEA of residence at the same time the child is being evaluated by the LEA where the private elementary school or secondary school is located, resulting in two LEAs

simultaneously conducting evaluations of the same child. Discussion: We recognize that there could be times when parents request that their parentally-placed child be evaluated by different LEAs if the child is attending a private school that is not in the LEA in which they reside. For example, because most States generally allocate the responsibility for making FAPE available to the LEA in which the child's parents reside, and that could be a different LEA from the LEA in which the child's private school is located, parents could ask two different LEAs to evaluate their child for different purposes at the same time. Although there is nothing in this part that would prohibit parents from requesting that their child be evaluated by the LEA responsible for FAPE for purposes of having a program of FAPE made available to the child at the same time that the parents have requested that the LEA where the private school is located evaluate their child for purposes of considering the child for equitable services, we do not encourage this practice. We note that new § 300.622(b)(4) requires parental consent for the release of information about parentally-placed private school children between LEAs; therefore, as a practical matter, one LEA may not know that a parent also requested an evaluation from another LEA. However, we do not believe that the child's best interests would be well-served if the parents requested evaluations of their child by the resident school district and the LEA where the private school is located, even though these evaluations are conducted for different purposes. A practice of subjecting a child to repeated testing by separate LEAs in close

proximity of time may not be the most effective or desirable way of ensuring that the evaluation is a meaningful measure of whether a child has a disability or of providing an appropriate assessment of the child's educational needs. Changes: None.

Comment: Some commenters requested the regulations clarify which LEA (the LEA of residence or the LEA where the private elementary schools or secondary schools are located) is responsible for offering FAPE to children identified through child find under § 300.131 so that parents can make an informed decision regarding their children's education. Discussion: If a determination is made by the LEA where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child. We do not believe that a change to the regulations is necessary, as § 300.201 already clarifies that the district of residence is responsible for making FAPE available to the child. Accordingly, the district in which the private elementary or secondary school is located is not responsible for making FAPE available to a child residing in another district. Changes: None.

Comment: One commenter requested clarification of the term "activities similar" in § 300.131(c). Another commenter recommended clarifying that these activities include, but are not

limited to, activities relating to evaluations and reevaluations. One commenter requested that children with disabilities parentally-placed in private schools be identified and evaluated as quickly as possible. Discussion: Section 300.131(c), consistent with section 612(a)(10)(A)(ii)(III) of the Act, requires that, in carrying out child find for parentally-placed private school children, SEAs and LEAs must undertake activities similar to those activities undertaken for their publicly enrolled or publicly-placed children. This would generally include, but is not limited to, such activities as widely distributing informational brochures, providing regular public service announcements, staffing exhibits at health fairs and other community activities, and creating direct liaisons with private schools. Activities for child find must be completed in a time period comparable to those activities for public school children. This means that LEAs must conduct child find activities, including individual evaluations, for parentally-placed private school children within a reasonable period of time and without undue delay, and may not wait until after child find for public school children is conducted. In addition, evaluations of all children suspected of having disabilities under Part B of the Act, regardless of whether they are enrolled by their parents in private elementary schools or secondary schools, must be conducted in accordance with the requirements in §§ 300.300 through 300.311, consistent with section 614(a) through (c) of the Act, which describes the procedures for evaluations and reevaluations for all children with disabilities. We believe the phrase

"activities similar" is understood by SEAs and LEAs and, therefore, it is not necessary to regulate on the meaning of the phrase. Changes: None.

Provision of Services for Parentally Placed Private School Children With Disabilities—Basic Requirement (§ 300.132)

Comment: Several commenters expressed confusion regarding which LEA is responsible for paying for the equitable services provided to a parentally-placed private elementary school or secondary school child, the district of the child's residence or the LEA where the private school is located. Discussion: We believe § 300.133, consistent with section 612(a)(10)(A) of the Act, is sufficiently clear that the LEA where the private elementary schools and secondary schools are located is responsible for paying for the equitable services provided to a parentally-placed private elementary school or secondary school child. These provisions provide that the LEA where the private elementary and secondary schools are located must spend a proportionate amount of its Federal funds available under Part B of the Act for services for children with disabilities enrolled by their parents in private elementary schools and secondary schools located in the LEA. The Act does not permit an exception to this requirement. No further clarification is needed. Changes: None.

CALIFORNIA EDUCATION CODES

Ed. Code § 56171

Pursuant to Section 300.131 of Title 34 of the Code of Federal Regulations, local educational agencies shall locate, identify, and assess all private school children with disabilities, including religiously affiliated school age children, who have disabilities and are in need of special education and related services attending private school in the service area of the local educational agencies where the private school is located in accordance with Section 56301. The activities undertaken to carry out this responsibility for private school children with disabilities shall be comparable to activities undertaken in accordance with Section 1412(a)(10)(A)(ii) of Title 20 of the United States Code.

(Amended by Stats. 2007, Ch. 454, Sec. 12. Effective October 10, 2007.)

Ed. Code § 56172

(a) The local educational agency shall make provision for the participation of private school children with disabilities in special education programs under this part by providing them with special education and related services in accordance with the provisions of this article and Section 1412(a)(10)(A) of Title 20 of the United States Code and Section 300.132 of Title 34 of the Code of Federal Regulations.

(b) The local educational agency or, where appropriate, the department, shall ensure timely

and meaningful consultation with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children in accordance with Section 1412(a)(10)(A)(iii) of Title 20 of the United States Code and Section 300.134 of Title 34 of the Code of Federal Regulations.

(c) When timely and meaningful consultation as required in subdivision (b) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if the representatives do not provide the affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the department in accordance with Section 1412(a)(10)(A)(iv) of Title 20 of the United States Code.

(d) A private school official shall have the right, pursuant to Section 1412(a)(10)(A)(v) of Title 20 of the United States Code and Section 300.136 of Title 34 of the Code of Federal Regulations, to submit a complaint to the department that the local educational agency did not engage in consultation that was meaningful and timely or did not give due consideration to the views of the private school official.

(e) The provision of equitable services for children enrolled in private schools by their parents shall be provided by employees of a public agency, as defined in Section 56028.5, or through contract by the public agency with an individual,

association, agency, organization, or other entity.

(f) Special education and related services, including materials and equipment, provided to a pupil with a disability who has been parentally placed in a private school shall be secular, neutral, and nonideological, as required by Section 1412(a)(10)(A)(vi) of Title 20 of the United States Code and Section 300.138(c)(2) of Title 34 of the Code of Federal Regulations.

(Amended by Stats. 2007, Ch. 56, Sec. 27. Effective January 1, 2008.)

Ed. Code § 56174

The local educational agency shall not be required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the local educational agency made a free appropriate public education available to the child and the parent of the child elected to place the child in the private school or facility.

(Amended by Stats. 2007, Ch. 56, Sec. 28. Effective January 1, 2008.)

Ed. Code § 56175

If a parent or guardian of an individual with exceptional needs, who previously received special education and related services under the authority of the local educational agency, enrolls the child in a private elementary or secondary school without the consent of or referral by the local educational agency, a court or a due process hearing officer may require the local educational agency to reimburse the parent or guardian for the cost of that

enrollment if the court or due process hearing officer finds that the local educational agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment in the private elementary or secondary school and that the private placement is appropriate, in accordance with Section 1412(a)(10)(C)(ii) of Title 20 of the United States Code and Section 300.148(c) of Title 34 of the Code of Federal Regulations.
(Amended by Stats. 2007, Ch. 56, Sec. 30. Effective January 1, 2008.)

Ed. Code § 56176

The cost of the reimbursement described in Section 56175 may be reduced or denied pursuant to clause (iii) of subparagraph (C) of paragraph (10) of subsection (a) of Section 1412 of Title 20 of the United States Code in the event of any of the following:

(a) At the most recent individualized education program meeting that a parent or guardian attended prior to removal of the child from the public school, the parent or guardian did not inform the individualized education program team that they were rejecting the placement proposed by the local educational agency to provide a free appropriate public education to the child, including stating his or her concerns and the intent to enroll the child in a private school at public expense.

(b) The parent or guardian did not give written notice to the local educational agency of the information described in subdivision (a) at least 10

business days, including any holidays that occur on a business day, prior to the removal of the child from the public school.

(c) Prior to the parent's or guardian's removal of the child from the public school, the local educational agency informed the parent, through the notice requirements described in paragraph (3) of subsection (b) of Section 1415 of Title 20 of the United States Code, of its intent to assess the child, including a statement of the purpose of the assessment that was appropriate and reasonable, but the parent or guardian did not make the child available for the assessment.

(d) Upon a judicial finding of unreasonableness with respect to actions taken by a parent or guardian.

(Amended by Stats. 2005, Ch. 653, Sec. 12. Effective October 7, 2005.)

Ed. Code § 56505

(a) The state hearing shall be conducted in accordance with regulations adopted by the board.

(b) The hearing shall be held at a time and place reasonably convenient to the parent and the pupil.

(c) (1) The hearing shall be conducted by a person who, at a minimum, shall possess knowledge of, and the ability to understand, the provisions of this part and related state statutes and implementing regulations, the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), federal regulations pertaining to the act, and legal interpretations of

this part and the federal law by federal and state courts, and who has satisfactorily completed training pursuant to this subdivision. The Superintendent shall establish standards for the training of hearing officers, the degree of specialization of the hearing officers, and the quality control mechanisms to be used to ensure that the hearings are fair and the decisions are accurate.

(2) The hearing officer shall possess the knowledge and ability to conduct hearings in accordance with appropriate standard legal practice.

(3) The hearing officer shall possess the knowledge and ability to render and write decisions in accordance with appropriate standard legal practice.

(4) A due process hearing shall not be conducted by an individual listed in Section 1415(f)(3)(A)(i) of Title 20 of the United States Code. Pursuant to Section 300.511(c)(2) of Title 34 of the Code of Federal Regulations, a person who is qualified to conduct a hearing is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. The hearing officer shall encourage the parties to a hearing to consider the option of mediation as an alternative to a hearing.

(d) Pursuant to Section 300.518(a) of Title 34 of the Code of Federal Regulations, during the pendency of the hearing proceedings, including the actual state-level hearing, or judicial proceeding regarding a due process hearing, the pupil shall remain in his or her present placement, except as

provided in Section 300.533 of Title 34 of the Code of Federal Regulations, unless the public agency and the parent agree otherwise. A pupil applying for initial admission to a public school, with the consent of his or her parent, shall be placed in the public school program until all proceedings have been completed. As provided in Section 300.518(d) of Title 34 of the Code of Federal Regulations, if the decision of a hearing officer in a due process hearing or a state review official in an administrative appeal agrees with the parent of the pupil that a change of placement is appropriate, that placement shall be treated as an agreement between the state or local educational agency and the parent. In accordance with Section 300.518(c) of Title 34 of the Code of Federal Regulations, if a due process hearing request involves an application for initial services from a child who is transitioning from an early education program under Chapter 4.4 (commencing with Section 56425) to a special education program serving individuals with exceptional needs between the ages of three to five years, inclusive, under Chapter 4.45 (commencing with Section 56440), and is no longer eligible for early education services because the child has turned three years of age, the local educational agency is not required to provide early education services that the child had been receiving. If the child is found eligible for special education and related services for children age three years of age and older, and the parent consents to the initial provision of special education and related services under Section 300.300(b) of Title 34 of the Code of Federal Regulations, the local educational agency

shall provide those special education and related services that are not in dispute between the parent and the local educational agency.

(e) A party to the hearing held pursuant to this section shall be afforded the following rights consistent with state and federal statutes and regulations:

(1) The right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of individuals with exceptional needs.

(2) The right to present evidence, written arguments, and oral arguments.

(3) The right to confront, cross- examine, and compel the attendance of, witnesses.

(4) The right to a written, or, at the option of the parent, electronic, verbatim record of the hearing.

(5) The right to written, or, at the option of the parent, electronic, findings of fact and decisions. The record of the hearing and the findings of fact and decisions shall be provided at no cost to parents in accordance with Section 300.512(c)(3) of Title 34 of the Code of Federal Regulations. The findings and decisions shall be made available to the public after any personally identifiable information has been deleted consistent with the confidentiality requirements of Section 1417(c) of Title 20 of the United States Code and shall also be transmitted to the Advisory Commission on Special Education pursuant to Section 1415(h)(4) of Title 20 of the United States Code.

(6) The right to be informed by the other parties to the hearing, at least 10 days before the hearing, as to what those parties believe are the issues to be decided at the hearing and their proposed resolution of those issues. Upon the request of a parent who is not represented by an attorney, the agency responsible for conducting hearings shall provide a mediator to assist the parent in identifying the issues and the proposed resolution of the issues.

(7) The right to receive from other parties to the hearing, at least five business days before the hearing, a copy of all documents and a list of all witnesses and their general area of testimony that the parties intend to present at the hearing. Included in the material to be disclosed to all parties at least five business days before a hearing shall be all assessments completed by that date and recommenda- tions based on the assessments that the parties intend to use at the hearing.

(8) The right, pursuant to Section 300.512(a)(3) of Title 34 of the Code of Federal Regulations, to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.

(f) (1) In accordance with Section 1415(f)(3)(E) of Title 20 of the United States Code, the decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(2) In matters alleging a procedural violation, a due process hearing officer may find

that a child did not receive a free appropriate public education only if the procedural violation did any of the following:

(A) Impeded the right of the child to a free appropriate public education.

(B) Significantly impeded the opportunity of the parent to participate in the decision-making process regarding the provision of a free appropriate public education to the child of the parent.

(C) Caused a deprivation of educational benefits.

(3) The hearing conducted pursuant to this section shall be completed and a written, reasoned decision, including the reasons for a nonpublic, nonsectarian school placement, the provision of nonpublic, nonsectarian agency services, or the reimbursement for the placement or services, taking into account the require- ments of subdivision (a) of Section 56365, shall be mailed to all parties to the hearing not later than 45 days after the expiration of the 30-day period pursuant to subdivision (c) of Section 56501.5. Either party to the hearing may request the hearing officer to grant an extension. The extension shall be granted upon a showing of good cause. The hearing officer shall apply Rule 3.1332 of the California Rules of Court in making a determination of what constitutes good cause. An extension shall extend the time for rendering a final administrative decision only for a period equal to the length of the extension. A second or subsequent extension may be granted for good cause or any other purpose at the discretion of the hearing officer.

(4) This subdivision does not preclude a due process hearing officer from ordering a local educational agency to comply with procedural requirements under this chapter.

(g) Subdivision (f) does not alter the burden of proof required in a due process hearing, or prevent a hearing officer from ordering a compensatory remedy for an individual with exceptional needs.

(h) The hearing conducted pursuant to this section shall be the final administrative determination and binding on all parties.

(i) In decisions relating to the placement of individuals with exceptional needs, the person conducting the state hearing shall consider cost, in addition to all other factors that are considered.

(j) In a hearing conducted pursuant to this section, the hearing officer shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent of the pupil to participate in the formulation process of the individualized education program.

(k) This chapter does not preclude a party aggrieved by the findings and decisions in a hearing under this section from exercising the right to appeal the decision to a state court of competent jurisdiction. An aggrieved party also may exercise the right to bring a civil action in a district court of the United States without regard to the amount in controversy, pursuant to Section 300.516 of Title 34 of the Code of Federal Regulations. An appeal shall

be made within 90 days of receipt of the hearing decision. During the pendency of an administrative or judicial proceeding conducted pursuant to Chapter 5 (commencing with Section 56500), the child involved in the hearing shall remain in his or her present educational placement, unless the public agency and the parent of the child agree otherwise. An action brought under this subdivision shall adhere to Section 300.516(c) of Title 34 of the Code of Federal Regulations.

(l) A request for a due process hearing arising under subdivision (a) of Section 56501 shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. In accordance with Section 1415(f)(3)(D) of Title 20 of the United States Code, the time period specified in this subdivision does not apply to a parent if the parent was prevented from requesting the due process hearing due to either of the following:

(1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request.

(2) The withholding of information by the local educational agency from the parent that was required under this part to be provided to the parent.

(m) Pursuant to Section 300.511(c) of Title 34 of the Code of Federal Regulations, each public agency shall keep a list of the persons who serve as due process hearing officers, in accordance with Section 56504.5, and the list shall include a statement of the qualifications of each of those

persons. The list of hearing officers shall be provided to the public agencies by the organization or entity under contract with the department to conduct due process hearings.

(n) A party who filed for a due process hearing before the effective date of this section is not bound by the two-year statute of limitations time period in subdivision (l) if the party filed a request within the three-year statute of limitations provision pursuant to subdivision (l), as that subdivision read before October 9, 2006.

(Amended by Stats. 2018, Ch. 874, Sec. 1. (AB 2580) Effective January 1, 2019.)