

77 IDELR 181

120 LRP 32822

**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**

U.S. Court of Appeals, Ninth Circuit

19-55912

October 26, 2020

Related Index Numbers

200.050 Right to FAPE

290.010 Obligation to Serve

380.001 Entitlement to Special Education Services

380.005 Parochial School Students

410.005 In General

410.015 Private School Costs

410.025 Tuition and Other Services

Judge / Administrative Officer

MARY H. MURGUIA

Judge / Administrative Officer

JOHN B. OWENS

Judge / Administrative Officer

BENJAMIN H. SETTLE

On Appeal from the U.S. District Court, Central
District of California

UNPUBLISHED

AFFIRMING a decision reported at 74 IDELR 231

See related decisions at 117 LRP 49424, 120 LRP
39401, and 121 LRP 2400

See decision in related case reported at 74 IDELR 56

Ruling

Because a California district knew that the parents of
a parochial school student with a disability wanted
their daughter to return to public school, it erred in

conditioning their request for an updated IEP on the
student's reenrollment. The 9th U.S. Circuit Court of
Appeals affirmed a District Court ruling at 74 IDELR
231 that required the district to reimburse the parents
for the student's private placement.

Meaning

A district's obligation to offer FAPE to a resident
student with a disability doesn't end when the parents
enroll the student in an out-of-district private school.
This means that the district must convene an IEP
meeting if it has any reason to believe the parents are
interested in a public program. Here, the parents sent
the district three letters requesting an IEP. Had the
district convened an IEP meeting, it might have
avoided paying for the student's parochial school
placement. *Editor's note: Per court order, this
decision has not been released for publication in
official or permanent law reports.*

Case Summary

A California district made an expensive mistake
when it refused to develop a new IEP for a middle
schooler with a disability unless she left her parochial
school and reenrolled in the public school system.
The 9th Circuit held that the district's failure to make
FAPE available amounted to an IDEA violation and
entitled the parents to recover the cost of the student's
private placement. The three-judge panel observed
that a district must make FAPE available to all
resident students with disabilities, even those enrolled
in out-of-district private schools, upon the parent's
request. Because the student still lived in the district,
the panel explained, the district remained responsible
for reevaluating her and providing special education
services. The panel recognized that the district would
not have to make a written offer of FAPE if the
parents clearly stated their intent to continue the
student's private placement. However, it rejected the
district's claim that the parents had no interest in a
public school program. "In fact, [the parents'] letters
to [the district] in 2015 and 2016 indicate that they are
still interested in a public-school placement for [the
student], and [the district] was required to provide an

offer of FAPE," the panel wrote in an unpublished decision. The panel also held that the parochial school placement was appropriate, and that the parents' failure to provide 10 days' notice of that placement did not warrant a reduction of their reimbursement award. The 9th Circuit thus affirmed a District Court ruling in the parents' favor reported at 74 IDELR 231.

Full Text

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 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.

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

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

Statutes Cited

20 USC 1400(d)(1)(A)
20 USC 1414(a)
20 USC 1414(d)
20 USC 1415(b)(6)
20 USC 1415(f)
20 USC 1415(g)(2)
20 USC 1414(d)(4)(A)
20 USC 1414(d)(1)(A)(i)(I)

Cases Cited

626 F.3d 43155 IDELR 153 -- Followed
635 F.3d 115556 IDELR 121 -- Followed