

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2011020678

**DECISION**

Administrative Law Judge Susan Ruff, Office of Administrative Hearings, State of California (OAH) heard this matter on April 19, 20, 21, 26, and 27, 2011, in San Francisco, California.

Laurene Bresnick, Esq., represented Student and his parents (Student). Student's parents were present during the hearing.

William Trejo, Esq., represented the San Francisco Unified School District (District). Jennifer Woolverton, Esq., Sophronia Brown-Bess, Special Education Supervisor, Ruth Deip, Deputy General Counsel, and Pamela Macy, Supervisor of Designated Instructional Services, also appeared at various times on behalf of the District.

Student filed his request for a due process hearing on February 18, 2011. On March 23, 2011, OAH granted a continuance of the hearing. At the close of the hearing, the parties were granted time to file written closing arguments. The parties' written closing arguments were received on May 18, 2011.<sup>1</sup>

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<sup>1</sup> To maintain a clear record, Student's written closing argument has been marked as Exhibit S-38, and the District's written closing argument has been marked as Exhibit D-26. Student filed an objection to the District's written closing argument on the basis that it did not follow the proper format. That objection is overruled.

## ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) for the 2009-2010 school year under the Individuals with Disabilities Education Act (IDEA) by failing to provide a timely and appropriate assessment to determine eligibility for special education services, to hold an individualized educational program (IEP) team meeting, and to offer special education placement and services, following Student's parents' request for a special education referral on August 19, 2009?<sup>2</sup>

2. Did the District deny Student a FAPE for the 2009-2010 and 2010-2011 school years by failing to make a formal, specific written offer of FAPE in the March 17, 2010 IEP document that clearly identified the proposed program (placement and services), and the start date, frequency, location and duration of placement and services?

3. Did the District deny Student a FAPE for the 2010-2011 school year by:

a) Including inaccurate present levels of performance and goals in the March 17, 2010 IEP, in all areas except math, that were not calibrated to address Student's current needs?

b) Failing to develop goals in the areas of socialization and attention in the March 17, 2010 IEP?

c) Offering placement and services in the March 17, 2010 IEP that were not reasonably calculated to confer educational benefit on Student?

4. Did the District deny Student a FAPE for the 2009-2010 school year by failing to conduct an IEP meeting in a timely manner following the Student's parents' request for an IEP on December 14, 2009?

5. Did the District deny Student a FAPE for the 2009-2010 school year by failing to provide appropriate prior written notice when the District:

a) Refused to assess Student following Student's parents' request on August 19, 2009?

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<sup>2</sup> These issues are taken from Student's prehearing conference (PHC) statement which was filed with OAH on April 5, 2011, but they have been reorganized to provide greater clarity. On April 13, 2011, Student made a written request to OAH to amend the issues stated in the PHC order to conform to the issues listed in Student's due process hearing request and PHC statement. That request was granted on the first day of hearing, April 19, 2011, with two exceptions: Issue Six listed in Student's PHC statement was already included within Student's other issues and was not a separate issue. Issue Eight addressed the appropriate remedy. It will be considered along with the other remedies sought by Student, but is not a separate issue for hearing.

b) Refused to hold an IEP meeting in response to Student's parents' request on December 14, 2009?

c) Sent Student's parents another assessment plan to determine Student's eligibility in February 2010, after it had already sent Student to another school district for this same eligibility determination?

6. Did the District deny Student a FAPE for the 2009-2010 school year when it failed to make special education placement and services available as soon as possible in accordance with the March 17, 2010 IEP?

### CONTENTIONS

Student contends that the District should have assessed Student and held an IEP team meeting after the District received the written request for a special education assessment from Student's parents in August 2009. Student also contends that the District did not hold a timely IEP team meeting after Student's parents sent a letter to the District requesting special education in December 2009. Student contends that the IEP offer ultimately made by the District in March 2010 was both procedurally and substantively inappropriate. Student alleges other procedural violations, including failure to provide prior written notice.

The District contends that it had no duty to assess Student in August 2009 because Student was attending a private school located within a different school district. Instead, the District argues that the other school district had the duty to assess under the "child-find" laws. The District contends that it attempted to hold a timely IEP meeting after the December 2009 request, but was delayed because of winter break and matters beyond its control, such as Student's family vacation. The District contends that its IEP was both substantively and procedurally appropriate and that it met the other procedural requirements of law, including the prior written notice requirements.

This Decision finds that the District, as the jurisdiction where Student's parents resided, had a duty to assess Student when it received the written referral for special education assessment and services from Student's parents in August 2009. The "child-find" laws relied upon by the District were never intended to abrogate the duty of the district of residence to assess. The District's failure to assess deprived Student of an IEP offer until March 2010 and deprived Student's parents of the opportunity to participate in the IEP process, resulting in a substantive denial of FAPE.

The Decision also finds that the IEP offer ultimately made by the District was confusing and did not clearly identify the placement and services, or start date, location and duration of the placement and services. The IEP also contained inappropriate goals. Those procedural violations prevented Student from receiving a proper FAPE offer and resulted in a substantive denial of FAPE from March 17, 2010, until the time of the hearing.

Because those procedural violations denied Student a FAPE throughout the time periods relevant in this case, it is not necessary for this Decision to address the remaining procedural and substantive violations alleged by Student. Student is the prevailing party herein.

## FACTUAL FINDINGS

1. Student is an 11-year-old boy who is eligible for special education and related services. At all times relevant to this proceeding, Student's parents have lived within the jurisdiction of the District. Student has multiple disabilities, including, but not limited to, attention deficit hyperactivity disorder (ADHD), anxiety, and learning disabilities.

### *Events Prior to the August 19, 2009 Letter*

2. On January 8, 2003, when Student was three years old, Student's mother sent a letter to the District requesting a special education assessment for Student. Included with the letter was documentation providing proof of the family's residence within the District. The District assessed Student and found Student eligible for special education.

3. Student received preschool special education services from the District until he was kindergarten age. At that point, based on concerns about his readiness for kindergarten, Student's parents placed him in a private preschool, the San Francisco School, at their own expense. Student continued at that school during the following school year.

4. Student's educational needs due to his disability were greater than the San Francisco School program was designed to address. Student's parents then placed him in a private school which specialized in teaching children with learning disabilities, the Charles Armstrong School (Armstrong). Despite the move to Armstrong, Student continued to have academic difficulties. The school tried various strategies and accommodations for Student. Student's parents, working in conjunction with Student's psychiatrist, attempted many different medication therapies to address Student's ADHD. None of these strategies or therapies was successful, and Student continued to fall behind his peers in his studies. Student was becoming stressed and anxious about school.

5. Toward the end of Student's third grade year, Student's parents began to investigate other educational options for Student. They contacted Ellen Krantz, Ph.D., to obtain a neuropsychological assessment of Student, but were told that Dr. Krantz had a long waiting list before she could conduct the assessment.

### *Events from the August 19, 2009 Letter to the December 14, 2009 Letter*

6. On August 19, 2009, Student's mother sent a letter to the District seeking a special education assessment. During the hearing, Student's mother explained that Student's parents sought the assessment from the District because they were at their wits end about

what to do with Student's education. It had been a difficult year for Student at Armstrong. In addition, it was a long commute for the family to take Student to Armstrong, and the school was very expensive. Student's parents wanted to know if there were any other educational options for Student besides Armstrong.

7. Student's mother still had on her computer the letter she had sent to the District requesting an assessment when Student was three years old, so she used that as a template. She changed the information on the letter to reflect Student's current circumstances and sent the letter to the District.

8. The subject line of the letter stated "RE: Request for IEP." The first line of the letter read, "I would like my child assessed for special education services in San Francisco." Enclosed with the letter was a utility bill to establish proof of residency. A handwritten notation on the document indicated that it was received on August 21, 2009.

9. The District did not assess Student pursuant to that request, nor did the District prepare and send an assessment plan to Student's parents. Instead, Sheila Meneely, Supervisor of the Screening and Assessment Center for the District, telephoned Student's mother and left a voice mail message stating that, because Student was attending private school within the boundaries of a different school district, Student's parents would have to seek an assessment from that school district.

10. Student's mother called back and left a message on Meneely's voice mail asking for clarification as to why Student needed to be assessed in a different district when the family resided in San Francisco. Meneely called back and left a message explaining that this was the proper procedure. Meneely followed up that message with a written letter instructing Student's parents to contact the school district in Belmont for the assessment. Her letter opened with the sentence: "I am writing in response to your letter requesting an assessment of your son, [Student], to determine eligibility for special education services." In the second paragraph of the letter, Meneely explained, in part:

In reviewing the request you submitted, I note that [Student] is attending a private school in Belmont, California. The Code of Federal Regulations (34 CFR 300.131) specifies that each Local Education Agency (LEA) must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary and secondary schools located in the school district served by the LEA. I have enclosed the request you sent me in order that you may deliver it to the LEA in Belmont.

11. Based on Meneely's letter and telephone message, Student's mother understood that the District required a two-step process in order to make special education services available to Student. First, Student's parents would have to seek an assessment and eligibility determination from the Belmont-Redwood Shores School District (Belmont).

Second, they would bring that assessment and eligibility finding to the District, which would then hold an IEP team meeting for Student.

12. Student's parents followed the District's instructions and contacted Belmont to request an assessment. Belmont conducted a speech and language assessment of Student and a psycho-educational assessment of Student. By this time, Dr. Krantz had started her assessment and had begun testing of Student. Rather than retesting Student, Belmont requested copies of Dr. Krantz's preliminary findings and test scores. Krantz sent Belmont her tables which contained the scoring for the various tests she had given.

13. On November 23, 2009, Belmont held a meeting with Student's parents to discuss the findings of Belmont's assessment. Student's teachers from Armstrong attended the meeting. Belmont found that Student was eligible for special education under the categories of specific learning disability, speech-language impairment, and other health impairment.

14. The parties dispute what Student's parents told the representatives from Belmont during the meeting. Shirley Guich, a school psychologist from Belmont, testified that Belmont asked Student's parents during the meeting whether they intended to have their child stay in the private school or seek a public school placement in their home district. She recalled that Student's parents told her they were keeping their child at Armstrong. Because Belmont was not the district where Student's parents resided, it had no duty to prepare an IEP for Student. Belmont prepared a service plan for Student which called for Belmont to provide two hours of consultation per year to Armstrong on behalf of Student. Student's mother signed her agreement to that service plan. Guich was not aware of whether those consultation services had ever been provided to Student.

15. Student's mother had a different recollection of what was said during the meeting. She testified that Student's parents had made clear to Belmont that they wanted special education services from San Francisco Unified School District and that they were seeking eligibility from Belmont for that purpose. She signed the page agreeing to Belmont services because she thought that was the appropriate procedure to obtain a District IEP. She did not want to decline anything Belmont offered because she wanted to bring the offer back to the District to obtain special education services there.

16. The District relies upon language contained within the Belmont service plan as proof that Student's parents did not intend to seek special education services from the District. The service plan entered into evidence at the hearing consisted of three pages. Page three contained the notes of the Belmont meeting. Page two consisted of the signature page in which Student's mother consented to the consultation services offered in the service plan. Page one contained the language upon which the District relies. The page listed the "District of Residence/DOR" as San Francisco Unified and contained, in part, the following language:

Check one of the following two boxes:

The above-named student is eligible for special education services. The student's parents have expressed an interest in enrolling the student in public school. Accordingly, the DOR has offered a free appropriate public education, (FAPE), available to the student by developing an individualized educational program, (IEP), on \_\_\_\_\_ (insert date here). By their signatures below, the student's parents acknowledge and agree that:

- (1) the DOR has offered a FAPE available to the student; and
- (2) the IEP developed on \_\_\_\_\_ (insert date here) constitutes a FAPE.

***OR***

The above-named student is eligible for special education services. The student's parents have clearly stated to the DOR that they will enroll or will continue to enroll the student in a private school without the consent of, referral by, or payment by the DOR. The student's parents have made it clear that they are not interested in the development of an IEP. Accordingly, the DOR has offered to develop an IEP if and when the student's parents express an interest in enrolling student in public school. By their signatures below, the student's parents decline the development of an IEP at this time and state that they are enrolling or are continuing to enroll the student at the following private school:

17. The second box was checked on the form, but no private school was listed below the paragraph. Student's mother signed the sign-in sheet during the meeting and she recalled receiving page three (the notes page) of the service plan in the mail shortly after the meeting. She did not recall whether she also received a copy of the first page of the service plan containing the language discussed in Factual Finding 16 above in the mail. When she received the document from Belmont, her focus was on the notes page because that contained the eligibility finding she needed to take to the District.

18. The District contends that the check mark in the second box on page one of the service plan and Guich's testimony regarding the comments made by Student's parents during the Belmont meeting provide proof that Student's parents did not intend to obtain special education services from the District at the time they met with Belmont. Therefore, the District contends that it had no duty to assess Student as of August 19, 2009. The evidence does not support that contention.

19. Student's mother was highly credible when she testified that Student's parents intended to seek an IEP offer from the District at the time they went to Belmont. Her testimony was supported by her conduct. At all times from August 2009 through March 2010, the actions of Student's parents were consistent with those of people who sought an IEP offer from the District. Their August 19 letter requested a District IEP and special education services. They went to Belmont because the District told them to do so. As

discussed below, as soon as Student's mother received the Belmont finding of eligibility, she took it back to the District and once again requested an IEP.

20. Even if Guich was correct that Student's parents told her during the Belmont meeting that they intended to keep Student at Armstrong, it does not prove the District's contention. Student's parents were not seeking an IEP from Belmont, so it was logical for them to tell Belmont they intended to keep Student at Armstrong. They only went to Belmont because the District told them to do so.

21. The box checked on page one of the service plan, set forth in Factual Finding 16 above, does not prove the District's contention. Neither box on that page was applicable to Student's situation. Belmont was not the DOR and could not make an IEP offer on behalf of the DOR. Therefore, it could not have checked the first box on that page. However, the second box was equally inapplicable to Student. Belmont could not state accurately: "Accordingly, the DOR has offered to develop an IEP if and when the student's parents express an interest in enrolling the student in public school." The DOR had done no such thing. Belmont could not and did not make an IEP offer on behalf of the District. It appears that Belmont checked the second box because it was the less inapplicable of the two, not because it accurately reflected Student's circumstances.<sup>3</sup>

22. The evidence supports a finding that, at all times when they dealt with Belmont, Student's parents intended to seek an IEP offer from the District. They sought an assessment from Belmont only because the District instructed them to do so. As discussed in Legal Conclusions 2 – 16 below, the failure of the District to assess Student and hold an IEP team meeting in response to the August 19 letter constituted a procedural violation of special education law which resulted in a substantive denial of FAPE.

*Events from the December 14, 2009 Letter to the March 17, 2010 IEP Meeting*

23. After Student's parents received the finding of eligibility from Belmont in the mail, Student's mother wrote to the District once more and requested an offer for special education services based on the Belmont eligibility findings. With her letter she included copies of the Belmont service plan and assessments. Her letter was sent on December 14, 2009, and received by the District on December 17, 2009, two business days before the District went on winter break.

24. Student contends that the District failed to hold a timely IEP meeting after receipt of the December 14, 2009 letter requesting a meeting. As discussed in Legal Conclusions 16 and 27 below, because the failure to assess and hold an IEP team meeting after receipt of the August 19, 2009 letter constituted an ongoing denial of FAPE until the

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<sup>3</sup> Nothing in this decision is intended to criticize Belmont's actions in this matter. The District created this confusing situation by instructing Student's parents to go to Belmont for Student's assessment. Had the District assessed Student in accordance with its legal obligations, the confusion could have been avoided.

IEP team meeting was finally held in March 2010, it is not necessary to decide whether the failure to hold a timely IEP after receipt of the December letter was also a denial of FAPE until March 2010.

However, the parties' conduct between December 14, 2009, and March 17, 2010, is relevant to the equitable considerations involved in determining the appropriate remedy, so detailed Factual Findings will be made herein regarding that time period.

25. District Special Education Supervisor Sophronia Brown-Bess would normally have been the person to schedule the IEP meeting based on Student's parents' December 14 letter. Meneely received the letter and sent an email to notify Brown-Bess, but Brown-Bess was already on winter break.

26. Dr. Krantz completed her assessment report in approximately December 2009. Her assessment included extensive testing of Student, including standardized testing in the areas of cognitive ability, academic achievement, and behavior. She found discrepancies between Student's verbal and nonverbal performance on the tests and noted that Student struggled with communication and expression throughout her testing. She determined, among other things, that Student had processing speed problems, an anxiety disorder, and attention problems. She recommended many possible interventions that might assist Student's teachers when instructing him. In general, she felt that Student required a structured learning environment with a very small student-to-teacher ratio.

27. In January 2010, Student's parents had a meeting with the teachers and staff at Armstrong. Krantz attended the meeting and discussed her recommendations. The staff at Armstrong did not believe they could adjust their program to meet the recommendations Krantz listed in her report. They were concerned that Armstrong might not be the best placement for Student. Student's parents began to investigate other possible private school placements for Student.

28. The District's winter break ran from December 21, 2009, to January 4, 2010. On January 15, 2010, Brown-Bess sent a letter to Student's parents regarding their request for special education. The letter instructed Student's parents to enroll Student in the District and told them to provide two proofs of residence to the District. During the hearing, Brown-Bess explained that the District's protocol when a pupil is new to the District is to make sure that the parents have enrolled the child and provided proof of residency. When a new child does not have an IEP, the District offers an interim school placement with the understanding that the District staff will use that opportunity to gather information about the child.

29. During cross examination, Brown-Bess admitted that the District could not require Student's parents to enroll Student in the District prior to holding an IEP team meeting for Student. She said the District's protocol was to request enrollment and that is what she did.

30. The language of Brown-Bess's January 15 letter made the "request" for enrollment mandatory. The letter included a sentence which read "[u]pon enrollment, SFUSD will be pleased to schedule and convene an Individualized Educational Program (IEP) meeting to develop a 30-day Interim IEP given that [Student] is transferring to SFUSD during the school year, as provided under the IDEA 2004." The letter concluded with the following two paragraphs:

To expedite the process, I am proposing potential dates and times for the initial IEP meeting. However, as stated above, before the IEP meeting may proceed, a completed enrollment form and proof of residency must be submitted and accepted by SFUSD's Education Placement Center. The proposed dates and times are as follows:

1. January 21st @ 9:00am or
2. January 27th @ 3:00pm.

Please contact me at (415) 376-7616 if you have any questions regarding this letter, to confirm one of the IEP dates or propose alternative date/times. Thank you.

Brown-Bess's letter also included a form for release of confidential information for Student's mother to sign.

31. Student's mother received Brown-Bess's letter around January 20, 2010. She followed the directions and went to the District office to pick up the enrollment forms. She signed the enrollment forms on January 30, 2010, and dropped them off on February 1, 2010, along with the requested proofs of residence. She gathered four documents providing proof of residence instead of the required two, in an abundance of caution. In response to question eight of the new student enrollment questionnaire which asked if there were any other issues of which the District should be aware, Student's mother wrote: "See report Dr. Ellen Krantz."

32. Student's mother also signed the release form that Brown-Bess had sent her and made a copy of the Krantz report for the District. The District staff at the enrollment office told her to take the report and the release to the District's special education office located at a different address. She complied and dropped off the release form along with the copy of Krantz's report in an envelope that she personally delivered to the District's special education office on February 1, 2010. The District's Screening and Assessment Center stamped the signed release as "received" on February 1, 2010. The handwritten note from Student's mother accompanying those documents requested that Brown-Bess call her to schedule an IEP team meeting.

33. It is not clear what happened to the copy of the Krantz report that Student's mother provided to the District. The District staff who attended the IEP meeting in March 2010 testified that they had never seen the Krantz report prior to that meeting. Brown-Bess

explained that the District's protocol when an outside assessment is received is to give that assessment to a school psychologist in the District's Screening and Assessment Center. The school psychologist reviews the assessment and uses that information as part of the District's evaluation process. Brown-Bess testified that she never saw the written note from Student's mother that accompanied the Krantz report until the District began preparing for the due process proceeding. She said that typically when something is delivered to the District office for her, an individual in the front office gives the information to her. However, her desk is in an open area used by multiple individuals.

34. On approximately February 5, 2010, Brown-Bess telephoned Student's mother and offered Student an interim placement in a District special education class at William Cobb Elementary School (Cobb). Brown-Bess chose the classroom at Cobb because Cobb used the Slingerland methodology, just as Armstrong typically did. She made the 30-day interim placement offer to give the District an opportunity to gather more information about Student while Student was in the District program.

35. Student's mother told Brown-Bess that Student's parents were not comfortable moving Student to a District placement until they had an IEP team meeting and specific plan, along with Dr. Krantz's input on whether the plan would be appropriate. On February 8, she wrote an email to Brown-Bess to confirm their prior conversation and requested an IEP meeting as soon as possible.

36. On February 9, 2010, Meneely drafted an assessment plan for Student. She did this on advice of counsel, not because the District felt that Student needed to be assessed again. She testified that best practices indicated that Student's parents should be offered another opportunity for assessment, even if the District was not requiring such an assessment before an IEP offer could be made. A box checked at the top of the assessment plan indicated that it was an assessment for purposes of determining eligibility. It called for assessment in the areas of: cognitive development/thinking strategies, motor development, perceptual development, communications/language functioning, social/emotional development, and academic achievement.

37. Student's mother recalled receiving an assessment plan at some point, but she could not remember when. She testified that the assessment plan she received indicated that it was for the purpose of determining eligibility. She did not think such an assessment was necessary because Belmont had already determined that Student was eligible for special education, so she did not agree to the assessment.

38. On February 22, 2010, Student's parents sent a letter to Meneely, enclosing an addendum report from Krantz and Student's grade four report card from Armstrong. A stamp on the letter indicates that it was received by the District's Screening and Assessment Center on February 26, 2010.

39. On February 24, 2010, Brown-Bess sent Student's parents a letter suggesting possible IEP meeting dates. The letter noted that Student's parents were on vacation from

February 15 through 25, so the dates proposed were in March. Brown-Bess suggested dates beginning with March 1, 2010, the first school day after Student's family returned from vacation. The letter referred to the assessment plan sent to Student's parents by the District's Screening and Assessment Department, but did not require that Student's parents sign the plan. Student's parents agreed to one of the proposed dates, March 17, 2010, and an IEP team meeting was held on that date.

40. On March 12, 2010, the Friday before the IEP meeting, Susan Devine, an Elementary Special Education Content Specialist for the District, telephoned Kathleen Agoglia, one of Student's teachers at Armstrong, to obtain information about Student's current levels of functioning in his classroom. Agoglia preferred to communicate through email, so Devine followed up with an email asking specific questions about Student's behavior and his academic abilities. The email was sent at 6:51 p.m. on Friday, after Agoglia had left for the weekend. Devine and Agoglia exchanged emails on the following Monday and Tuesday.

41. Agoglia felt that the questions in Devine's email were unusual for a District IEP team to send to a private school teacher. Agoglia's teaching coach at Armstrong told her she did not have to respond. Agoglia decided to respond with the information that would be appropriate for Student's homeroom teacher, and answered some of Devine's questions by email on Tuesday, March 16, 2010. She referred Devine to Student's psycho-educational evaluation done by Krantz for more specific information. Devine testified that Agoglia's answers did not provide sufficient information to identify Student's present levels of performance or help Devine draft proposed goals for the IEP in areas such as reading comprehension.

#### *The March 17, 2010 IEP Meeting*

42. Both of Student's parents attended the IEP team meeting on March 17, 2010. The District representatives at the meeting included Brown-Bess, Devine, and Pamela Macy. The meeting was held at Cobb and the principal from Cobb attended the meeting. Meneely attended for part of the meeting as a school psychologist and was excused after her part of the IEP discussion. Agoglia and a transition specialist from Armstrong also attended the meeting. The District speech-language pathologist was not at the meeting, but Macy had a background in speech pathology.

43. During the meeting, Student's parents provided the IEP team with a background on Student and his needs. The team also received information from Agoglia. Student's parents told the team that they had been investigating different private schools for Student and that they preferred Star Academy as a possible placement for Student.

44. There was also a discussion about assessments. The District staff mentioned the February 2010 assessment plan, but did not state it was necessary to assess Student before an IEP offer could be made. Student's parents explained that Student's prior testing with Dr. Krantz had been a very frustrating and difficult experience for Student, so they

preferred that no further testing be done at that time. The team discussed the possibility of an assessment of assistive technology devices (AT) and agreed that the District would assess Student in the area of AT in the fall.

45. During their testimony, the District IEP team members expressed concerns about the lack of specific information they had regarding Student's educational needs and present levels of performance during the March IEP meeting. Because the District had not conducted its own assessment, it was forced to rely upon the Belmont assessment and other sources for its information. Brown-Bess and Devine testified that they were unable to obtain sufficient information from Agoglia to determine Student's present levels of performance.

46. Macy testified that the Belmont speech and language assessment was inadequate and insufficient to determine Student's needs in the area of speech and language. She felt that the District needed its own assessment in that area. The District recommended a supplemental assessment in the area of speech and language during the IEP team meeting. However, the District staff did not tell Student's parents at that time or any later time that a District speech and language assessment was necessary before an IEP offer could be made.

47. Although Student's mother had provided Krantz's written report to the District prior to the meeting, the District IEP team members, including Meneely, Brown-Bess, Devine, and Macy, testified that the first time they saw Krantz's report was at the IEP meeting. Meneely explained that Krantz's report was too lengthy to read and comment on during the meeting. She told Student's parents that the District would review Krantz's report and it would become part of the evaluation process at the point that the parents elected to allow the District to evaluate Student.

48. Near the end of the meeting the District staff went into a private caucus without Student's parents for about 20 minutes. During the hearing, Devine explained that the purpose of the caucus was so the District staff could discuss "as a team" what type of classroom would best fit Student's needs and find out if that classroom was open. Based on what Brown-Bess had learned during the meeting, she believed that Cobb might not be the best fit for Student. During the caucus, Brown-Bess contacted the Francis Scott Key Elementary School (Francis Scott Key) to see if they had any openings in the District's Intensive Language Learning (ILL) special day class (SDC). The District staff discussed amongst themselves possible placements in light of what they had learned during the meeting.

49. After the private caucus, the District staff returned to the meeting and gave Student's parents a verbal IEP offer. The offer consisted of a placement in the ILL SDC at Francis Scott Key. Devine described the District's offer as an "interim" offer to allow the District to observe Student in class. Brown-Bess felt that once Student started in a District classroom, the teacher could observe his present levels and the District could provide activities at his current levels, so he could have educational success.

50. Suzanne Kelley, who teaches the ILL SDC class at Francis Scott Key, described her class during the hearing. She said the class includes third to fifth grade students. All the students in her class need speech and language services. The maximum limit for pupils in her classroom is 14, but she currently has only 10. She has two classroom aides to assist her and one inclusion aide in her class for most of the time. The speech-language pathologist comes into the class to assist on a regular basis. Kelley co-teaches physical education with another fifth-grade teacher for about 90 minutes per week. This year, she is also participating in a program for children learning to speak English in which pupils who are English language learners come into her room for English language development and the pupils who are not English language learners go to a different classroom where they receive language arts support.

51. Kelley divides the class into small groups for math, with approximately five to six pupils per group. She works with one group while the others work at their desks with assistance from the aides. She makes a point of working on socialization skills and pragmatic language in her class. If a pupil needs more support according to the pupil's IEP, that support is given. This can be done through "designated adult support" which refers to an aide who works directly with the child at times designated by the teacher, depending on the needs of the individual student. Sometimes the pupil is provided direct support from the aide, and other times the aide steps back to provide indirect support. Kelley's lessons typically include a visual component, and she uses techniques such as physical manipulatives to assist the students. If the child's IEP calls for resource support, it can be provided by either push in (which involves the resource teacher coming into the classroom to work with the child) or pull out (in which the child leaves the classroom to go to the resource room for instruction).

52. Aside from the sign-in sheet which was passed around and signed at the March 2010 IEP team meeting and the meeting agenda, no other documents prepared by the District staff were provided to Student's parents on that date. No written IEP offer was given to Student's parents during the meeting. The team discussed general areas for goals and objectives, but no specific language for those goals was drafted or agreed upon during the meeting.

53. Student's parents were concerned about changing Student's placement so close to the end of the school year to a place they had never visited. They said that they preferred to keep Student in the private school, but they agreed to view the proposed classroom. Student remained at Armstrong through the end of the 2009-2010 school year.

54. The District staff offered the Francis Scott Key placement beginning, not as of the date of the IEP team meeting, but instead starting with the extended school year (ESY) in the summer of 2010. The District staff chose that start date because of the preference of Student's parents to keep Student at Armstrong through the end of the school year.

55. On April 30, 2010, Meneely mailed a proposed assessment plan to Student's parents along with a cover letter explaining that this was the third time the District was

offering such an assessment. The assessment plan was the same one Meneely had drafted in February and did not include the agreed-upon AT assessment. Meneely had left the IEP team meeting prior to the time the AT assessment was discussed. She sent the assessment offer a third time on advice of counsel, not based on discussions at the IEP team meeting or because the District believed an assessment was necessary to offer a FAPE.

*The District's Written Offer of Special Education Placement and Services*

56. About two weeks after the IEP team meeting, Student's parents received the District's written IEP offer. Student contends that the District's written IEP offer failed to clearly identify the proposed placement and services, as well as the start date, frequency, location and duration of the placement and services.

57. Devine drafted the written IEP document in collaboration with Brown-Bess. Meneely was not involved in the drafting of the written IEP and did not approve the Krantz report for use by the staff members who were drafting the written IEP. Devine reviewed some of the test results in the Krantz report in order to obtain information regarding grade levels in some academic areas, but she did not otherwise rely on that report in drafting the proposed IEP because it had not been approved for use by Meneely. Brown-Bess reviewed the Krantz report briefly after the IEP meeting, but not in depth.

58. The District's written IEP offer contained numerous factual errors. For example, on the front page of the document, Student's grade level was listed as 10th grade instead of fourth grade. The IEP listed the date of the initial referral for special education services as the date of the IEP meeting (March 17, 2010), rather than August 19, 2009, when the letter was sent by Student's parents. The date of Student's last evaluation was incorrectly listed as July 16, 2009.

59. The written IEP proposed placement in the District's ILL SDC class at Francis Scott Key, but was ambiguous about when the placement and services would start. The District witnesses who testified at hearing said that the services were offered to start during ESY in the summer of 2010. That testimony was supported by the description of the District's offer of FAPE in the notes section at the end of the written IEP. However, earlier parts of the written IEP stated that the placement and services would begin on March 17, 2010.

60. The written IEP was also unclear as to what portion of Student's day would take place in a general education classroom. The notes at the back of the IEP document described Student's program as "Blended Program at Francis Scott Key to include: SDC ILL (Intensive Language and Learning) and RSP direct instruction" including 180 minutes of speech-language services per month, 150 minutes of weekly RSP support and "Designated Adult Support." The notes also stated that "Mainstreaming was discussed for [Student] when appropriate." These notes seem to imply that Student would be in either the SDC or the resource program for his entire day.

61. However, other portions of the written IEP document seemed to contradict this. For example, the document stated that Student would be “Inside Gen Classroom” for 32 percent of his school time, that Student would receive physical education in a general education setting, and that Student would receive 150 minutes per week of specialized academic instruction in a “regular classroom” and 240 minutes per week of individual and small group instruction in a “separate classroom.” Kelley testified that the pupils in her SDC attend a mainstream science class, but Kelley was not at Student’s IEP meeting, and did not testify whether Student would go to that mainstream class if he was placed in her class. When Brown-Bess was asked whether Student would be placed a regular education classroom, she answered, “Absolutely not.”

62. Brown-Bess testified that the reference to 150 minutes per week of specialized instruction in the “regular classroom” referred to the resource teacher providing services to Student, not to a general education classroom. She testified that the resource service is considered a general education function, because children are pulled out of the general education classroom to the resource classroom. She said that the percentage of time “inside gen classroom” (32 percent) in Student’s IEP referred to recess, lunch, assemblies, and similar opportunities where Student would have access to his typical peers. Later in her testimony, she clarified that the 32 percent time in general education included Student’s time in the resource program. She explained that the teacher would have determined whether Student was appropriate for mainstreaming after he started in the SDC the program. She also admitted on cross-examination that the IEP did not specify whether the 150 minutes of resource services were supposed to be push in or pull out.

63. Devine testified that the 32 percent time would include the time Student was in general education classes such as physical education, art or gardening. In her opinion, that was not considered mainstreaming. She explained that mainstreaming involved going into the general education classroom for academic subjects.

64. Kelley testified that if a child was pulled out of her classroom for resource support that would not be considered a regular education environment. She explained that mainstreaming is when a child from her class goes into the general education classroom, such as when the pupils in her class go to the mainstream science class. She said that there is “reverse mainstreaming” in her class this year because the children who are English language learners are coming into her SDC class.

65. The written IEP offer stated that Student would receive 180 minutes per month of speech and language services in a “separate classroom.” Macy testified that the 180 minutes per month would consist of 60 minutes a week for three weeks out of every month. She said those services could be either push in or pull out services and they might be individual services or small group services, depending on Student’s needs.

66. Devine testified that the offer was intended to be for an interim IEP, to give the District 30 days to review the placement, after which the IEP team would meet again. A

box was checked on the front page of the IEP beside the word “draft,” but nothing else in the document indicated that the proposed offer of placement and services was an interim offer.

67. As discussed in Legal Conclusions 17 – 18 below, the law requires a school district to make an IEP offer which clearly sets forth the proposed placement and services. The evidence supports a finding that the District committed a procedural violation of IDEA by failing to do so in the instant case. Anyone looking at Student’s written IEP document would be confused as to whether and how often Student would be in a regular education environment, whether he would be pulled out of his SDC for resource services and speech-language or receive them in the SDC, whether his speech-language services would be individual or group, and would also be confused about when his services were supposed to start. Even after testimony at the due process hearing, it is still not entirely clear what Student’s educational program would have looked like if his parents had agreed to the March 17 IEP.

68. Student also contends that the written IEP document contained inaccurate present levels of performance and goals (in all areas except math) and goals that were not calibrated to address Student’s current needs. The IEP contained goals and objectives in the areas of math, reading, reading comprehension, writing and spelling.

69. In Krantz’s opinion, several of the goals and objectives in Student’s IEP were inconsistent and did not correspond with Student’s present levels of performance. In particular, she felt that the English-language arts/reading goal was confusing because the heading of the goal said “Grade 1,” but the second objective called for Student to be given a reading passage at a fourth grade level. At the time that Krantz conducted her assessment, Student was neither at the first grade nor the fourth grade level in reading. Instead, he was reading somewhere around the second grade level.

70. Krantz had the same problem with the reading comprehension goals. Those goals called for Student to read a passage at the fifth grade level, but Student was reading at a second grade level. With respect to the goal regarding English-language arts/written and oral -- spelling, the District had drafted the goal at the third grade level, but Krantz had found Student to be functioning somewhere between second and third grade level. She thought that the third-grade level would be too high. With respect to the first of his English-language arts/writing goals, he had already met the goal at the time of her assessment, so it would not be an appropriate annual goal.

71. Devine, who drafted the goals, said that she based the present levels of performance and goals on the information in the Belmont report and the information she received from Agolia. She could not rely specifically on the Krantz report because Meneely had not approved it for use, but she did refer to the report to obtain information as to Student’s grade level of functioning. She said that most of the grade levels listed in Krantz’s report showed Student to be around the second grade level. Because she had not received sufficient information from Agolia, she started the IEP goals at a basic level to see what Student could accomplish.

72. Kelley testified that the goals listed in Student's IEP were the type that she routinely implemented in her ILL SDC class. She felt confident that if a pupil came into her class with the goals listed in Student's IEP, she could instruct that child and the child would gain educational benefit.

73. Meneely did not believe that Student needed additional goals in the areas of attention or anxiety. She felt that Student's educational accommodations in the IEP would be sufficient to address his attention issues. She recalled a discussion about Student's anxiety during the IEP team meeting but did not believe that his anxiety rose to the level of emotional disturbance. She thought it could be adequately addressed with the accommodations offered in the IEP.

74. The evidence supports a finding that the written IEP offer contained inappropriate goals. Krantz was the only individual who thoroughly assessed Student and understood his needs. She was a qualified neuropsychologist with years of experience. Her testimony carried great weight in this matter. Her opinion that the goals and objectives described in Factual Findings 68 – 70 were inappropriate for Student is persuasive.

75. The testimony of the District witnesses was not sufficient to contradict Krantz's opinion. Kelley was a very credible witness and seemed to be an excellent teacher with a great understanding of her field of practice, but she did not assess Student, attend Student's IEP or draft the District's written offer. She could only go by what she read in the documents prepared by others. The other District witnesses were also dedicated, competent educators who testified credibly at the hearing, but they were working from inadequate information. They admitted that neither the Belmont assessment nor the information they received from Armstrong was sufficient to determine Student's present levels and goals. Because of District policy, they were not permitted to rely on Krantz's report (although Devine did rely on it to a very limited extent).

76. As discussed in Legal Conclusions 17 – 27 below, the District's procedural violations in making an inadequate IEP offer, without a specific, clear offer of placement and services, and with inadequate goals and objectives, impeded Student's right to a FAPE and resulted in a substantive denial of FAPE. Because these procedural violations denied Student a FAPE, it is unnecessary to determine whether the District's proposed IEP also denied Student a FAPE from a substantive point of view (whether it was reasonably calculated to provide Student with educational benefit).

#### *Factual Findings Regarding Proposed Remedies*

77. No IEP team meeting was held by the District for Student between March 17, 2010, and the start of the due process hearing in April 2011. The District's March 17, 2010 IEP offer was the most recent special education offer made by the District for Student.

78. On August 11, 2010, Student's parents, through their counsel, gave written notice to the District that they would be placing Student at Star Academy and would be

seeking reimbursement from the District.<sup>4</sup> Student's parents placed Student at Star Academy (Star) beginning in August 2010 and he was still attending Star at the time of the hearing. At the hearing, the parties stipulated that Star was an appropriate educational placement for Student.

79. Student seeks four remedies, if a denial of FAPE is found: 1) reimbursement for the money Student's parents spent to educate Student at Armstrong during the 2009-2010 school year; 2) reimbursement for the cost of educating Student at Star Academy during the 2010-2011 school year; 3) reimbursement for the cost of Krantz's assessment; and 4) prospective placement for Student at Star Academy.

80. The evidence supports a finding that Armstrong was an appropriate educational setting for Student, even if it was not the optimal setting. During the hearing, Maggie Dale and Kathleen Agoglia, Student's fourth grade teachers, described the program at Armstrong. There were about 18 students in the fourth grade class, two teachers, and one classroom aide. The classroom was very organized, schedule-oriented, and predictable. The school is specialized for children with language-based learning disorders and is designed to create a safe environment to help those children overcome self-esteem problems. The physical environment is designed to minimize distractions. At times the class is broken into small groups, but the walls separating the groups are designed to be soundproof to prevent groups from distracting the other students. There are no typically developing students at Armstrong. Generally Armstrong is considered a transition school, in which pupils attend for one or two years and then head back to their previous school placement.

81. The testimony of Student's teachers and his report card from Armstrong showed that Student made some progress while at Armstrong. Although the educational staff at Armstrong did not believe he was making the type of progress that would have been expected by a pupil at Armstrong, it was still an appropriate educational setting for purposes of reimbursement.

82. Student's parents were charged well over \$25,000.00 to educate Student at Armstrong during the 2009-2010 school year. They seek reimbursement for \$22,720.00, which represents the amounts they were charged between November 2, 2009, and the end of the school year. That amount is reasonable and the District will be ordered to reimburse Student's parents for that amount.

83. The District stipulated that Star Academy was an appropriate alternative placement for Student, so it is not necessary to make factual findings regarding the nature of the educational program at Star Academy or the educational progress Student made while attending there. Student's parents submitted an invoice from Star showing that they have

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<sup>4</sup> There was testimony during the hearing that Student's parents filed for due process against the District twice between May 2010 and February 2011, when the instant case was filed. Those prior due process filings were dismissed without prejudice and have no relevance to the facts of this case.

been and/or will be charged more than \$37,000.00 for tuition and other costs to educate Student at Star Academy for the 2010-2011 school year. Of that amount, Student submitted cancelled checks totaling \$32,127.68 already paid to Star for Student's educational costs at Star up to the time of the hearing. That amount is reasonable and the District will be ordered to reimburse Student's parents for that amount.

84. Student also seeks reimbursement for transportation costs to and from Armstrong and Star Academy from November 2, 2009, to the date of the hearing. However, Student did not provide sufficient evidence to support the amount of those transportation costs.

85. Student's parents will continue to incur tuition and transportation costs while Student remains at Star Academy. As will be discussed in the Legal Conclusions below, because there is no proper IEP offer outstanding from the District, it is appropriate to order the District to place Student prospectively at Star Academy as of the date of this Decision and to reimburse Student's parents for any tuition or transportation costs they incurred for Student's placement at Star Academy between April 19, 2011, and the date of this Decision. The prospective placement at Star Academy shall include transportation, as well as two individual and one group speech-language tutoring session per week and one individual and one group occupational therapy session per week (as noted on the invoice from Star Academy entered into evidence at hearing). As discussed in Factual Finding 65 above, the District's proposed IEP recognized Student's need for speech-language services, so it is appropriate for Student to continue to receive those services prospectively while attending Star Academy. During the hearing, Annie Crowder, the Head of School at Star Academy, explained that Star assessed Student when he started attending the school and determined that he required occupational therapy sessions to address his low arousal, fine motor skills, and upper body strength. Her testimony and the District's stipulation as to the appropriateness of the Star Academy program are sufficient to support a finding that continuing occupational therapy services are necessary to meet Student's educational needs while attending Star Academy.

86. Student's parents were billed \$9884 for Dr. Krantz's assessment and report.

## LEGAL CONCLUSIONS

1. The Student, as the party filing this due process case, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

*Did the District Deny Student a FAPE for the 2009-2010 School Year by Failing to Provide a Timely and Appropriate Assessment to Determine Eligibility for Special Education Services, to Hold an IEP Team Meeting, and to Offer Special Education Placement and Services, Following Student's Parents' Request for a Special Education Referral on August 19, 2009?*

2. The parties rely on different sections of special education law in arguing whether the District had a duty to assess Student as of August 19, 2009. The District relies on the federal and state “child find” laws and contends that the District properly referred Student’s parents to Belmont to obtain an assessment of Student. Student relies on the California laws that require the school district in which the child’s parents reside to assess the child for special education once a written referral for special education is made.

3. California law sets forth very specific requirements for pupil assessments. Before any action is taken with respect to the initial placement of a special needs child in special education, an individual assessment shall be conducted by qualified persons. (Ed. Code, § 56320.) Education Code section 56029 provides that a “referral for assessment” includes a written request for assessment made by a parent or guardian of the child. Once a district receives a referral for assessment the district must develop a proposed assessment plan within 15 calendar days, not counting days such as school vacations, unless the parent agrees to an extension. (Ed. Code, § 56043, subd. (a).) California regulations make it clear that: “[a]ll referrals for special education and related services shall initiate the assessment process and shall be documented.” (Cal. Code Regs., tit. 5, § 3021, subd. (a).) After an initial assessment, a reassessment shall be conducted at least once every three years, unless the parents and educational agency agree otherwise. (Ed. Code, § 56381, subd. (a)(2).) A District shall also conduct a reassessment if the child’s parents or teacher requests a reassessment. (Ed. Code, § 56381, subd. (a)(1).)<sup>5</sup>

4. The “child find” provisions are designed to assist school districts in locating pupils with special needs in private schools whose parents may not be aware that their children are entitled to a FAPE. A school district is required to “actively and systematically” seek out all children with exceptional needs who reside within the district (Ed. Code, § 56300) including those in private schools. (Ed. Code, § 56301.) All children with disabilities who are in need of special education and related services shall be “identified, located, and assessed...” (Ed. Code, § 56301, subd. (a).) A district is also responsible for “the planning of an instructional program to meet the assessed needs.” (Ed. Code, § 56302.)

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<sup>5</sup> There are exceptions to this assessment requirement, for example, when a District has already assessed a child within a year of the current assessment request. (Ed. Code, § 56381, subd. (a)(2).) Those exceptions are not relevant under the facts of this case. The District does not dispute that Student was entitled to an assessment as of August 2009; the District merely contends that it was not the educational agency with the duty to conduct that assessment.

5. At times, a child may attend a private school located in a different school district from the one in which the child’s parents reside. Under those circumstances, the law places the burden for “child find” on the district where the private school is located. (34 C.F.R. § 300.131 (2006); Ed. Code, § 56171.) This allocation of child find responsibility makes sense, because it is easier for the district where a private school is located to “find” special needs children within that district who may be in need of services. However, once a child has been “found” the burden of offering a FAPE remains with the district where the child’s parents reside. (See Ed. Code, § 48200 [child must attend school in the district where the parents reside]; *Katz v. Los Gatos-Saratoga Joint Union High School District* (2004) 117 Cal. App. 4th 47.) The district where the private school is located is only required to provide a service plan for the privately placed child to receive equitable services, depending on availability. (See Ed. Code, §§ 56172 – 56174.5.)

6. The District contends that, because the federal regulations require the school district in which the private school is located to seek out, identify, and evaluate all children with disabilities who are enrolled in that private school, Belmont had the obligation to assess Student for special education services, not the District.

7. The District’s interpretation of the law is in error. The District is correct that the district where the private school is located has the child find obligation, but the instant case does not involve a child find situation. As discussed in Factual Findings 1 – 22 above, in the instant case, the child had already been “found.” Student’s parents wrote to their district of residence requesting an assessment of their child for special education services. There was no need for Belmont to seek out, identify and evaluate Student. There was no need for Belmont to be involved in the assessment process at all. This is no different than any other assessment case in which a child’s parents ask a district to assess their child for special education services. As stated in Legal Conclusions 3 – 5 above, California law provides that the school district in which the child’s parents reside is responsible for assessing and providing special education services to the child.

8. The comments to the federal regulations make it clear that federal law did not intend to abrogate the responsibility of the district of residence to assess a child when required to do so under state law, even when a child attends a private school in a different district. Instead, each district has a separate duty to assess if a child’s parents approach that district seeking assessment:

*Comment:* One commenter expressed concern that the regulations permit a parent to request an evaluation from the LEA [local education agency] 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 with a private school is located in evaluate their child for purposes of considering the child for equitable services, we do not encourage this practice.

(71 Fed. Reg. 46593 (August 14, 2006).)

9. To the extent that the District believes that the federal laws regarding child find abrogated the duty imposed by California law on the district of residence to assess a child upon specific written request by the child's parents, the District's interpretation of the law is in error. The District had a legal duty to assess Student pursuant to the August 19, 2009 letter. The District did not do so. The failure to do so constituted a procedural violation of special education law.

10. In the District's written closing argument, the District states that the August 19, 2009 letter "was properly classified by District as an eligibility re-assessment." None of the District employees who testified at the hearing supported that characterization of the August 19 letter. However, even if they had, the result does not change. As of August 2009, it had been more than three years since Student was assessed and his parents requested a reassessment. Whether the District staff classified the August 19 letter as a request for initial assessment or for a reassessment, the District was still required to conduct an assessment under these circumstances. The District failed to conduct an assessment and hold an IEP team meeting within the statutory time periods. As a result of the failure by the District to conduct an assessment in response to the August 19 request, no IEP team meeting was held for Student until March 2010. For much of the 2009-2010 school year, Student had no offer of FAPE from the District. The District committed a procedural violation of special education law by failing to comply with legal requirements to assess Student and follow up that assessment with an IEP meeting.

11. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(C) Caused a deprivation of educational benefits.

12. As discussed in Factual Findings 1 – 41 above, the failure by the District to conduct a timely assessment significantly impeded the opportunity of Student’s parents to participate in the decision-making process regarding the provision of FAPE to their child. Student’s parents specifically requested an assessment and IEP from the District. Instead, they were pushed away to another school district which had no duty by law to create an IEP for Student. As a result of this, Student’s parents were unable to attend an IEP meeting for their child until March 2010 and no IEP was created for Student until March 2010. Belmont created a three-page service plan that offered only two hours of consultation services per year, not a full IEP.

13. In its written closing argument, the District argued that Student’s parents had never intended to seek an IEP from the District, but instead wanted to keep their child in private school. As discussed in Factual Findings 18 – 22 above, the evidence does not support the District’s contention in this regard. At all times in this matter prior to the IEP meeting of March 2010, Student’s parents sought an IEP offer from the District. Their August 19 letter specifically requested an IEP and special education services. They followed every procedural step that the District required them to go through in order to obtain that IEP. As soon as Belmont assessed Student, they went back to the District to obtain an IEP.

14. However, even if Student’s parents had never intended to enroll Student in a public school, they were still entitled to the protections of IDEA. They were entitled to see what the District had to offer by way of a FAPE, and to have the opportunity to make a choice between a free public placement and a private one. By pushing Student’s parents to Belmont for their assessment, the District delayed the IEP process for months. During those months Student was denied the benefit of a District IEP and his parents were denied participation in the IEP process.

15. Finally, the District argues that, even if it had an obligation to assess, because Belmont assessed within the legal timelines, there was no violation by the District. The District's argument is in error. First of all, the District employees themselves testified that the Belmont assessment was inadequate, at least in part, and insufficient to enable the District to develop present levels of performance and proposed goals for Student. Second, because Belmont assessed Student instead of the District, no IEP was developed for Student. Belmont had no legal obligation to hold an IEP team meeting for Student or draft an IEP offer. The two hours of consultation services proposed in the Belmont service plan did not even come close to the full placement and services that would have been in an IEP offer.

16. The evidence supports a finding that the District’s failure to assess Student after receipt of the August 19, 2009 letter and the District’s failure to hold a timely IEP meeting to review that assessment resulted in a substantive denial of FAPE. The denial of FAPE was an ongoing violation that continued until the IEP team meeting was finally held and a written offer of FAPE made in the March 17, 2010 IEP.

*Did the District Deny Student a FAPE for the 2009-2010 and 2010-2011 School Years by Failing to Make a Formal, Specific Written Offer of FAPE in the March 17, 2010 IEP Document and by Failing to Include Appropriate Goals?*

17. An IEP is a written document that contains statements regarding a child's "present levels of academic achievement and functional performance" and a "statement of measurable annual goals, including academic and functional goals" designed to meet the child's educational needs. (Ed. Code, § 56345, subd. (a)(1), (2); 34 C.F.R. § 300.320(a) (2006).) The IEP must also contain: 1) a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (Ed. Code, § 56345, subd. (a)(3); 34 C.F.R. § 300.320(a)(3) (2006)); 2) a statement of the special education and related services and supplementary aids and services to be provided to the pupil and a statement of program modifications and supports to enable the pupil to advance toward attaining his goals and make progress in the general education curriculum (Ed. Code, § 56345, subd. (a)(4); 34 C.F.R. § 300.320(a)(4) (2006)); 3) an explanation of the extent, if any, that the pupil will not participate with nondisabled pupils in the regular class or activities (Ed. Code, § 56345, subd. (a)(5); 34 C.F.R. § 300.320(a)(5) (2006)); and 4) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the pupil on state and districtwide assessments. (Ed. Code, § 56345, subd. (a)(6); 34 C.F.R. § 300.320(a)(6).)

18. A District is required to make a "formal, specific offer" of placement and services in writing, even if the District believes that a child's parents have no intention of accepting that offer. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519 (*Union*); see also *Glendale Unified School District v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093). In *Union*, the court described the reasons for requiring a formal, specific offer in writing:

The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in 'presenting complaints with respect to any matter relating to the...educational placement of the child.'"

(*Union, supra*, at p. 1526.)

19. As discussed in Factual Findings 42 – 67 above, the District's March 17, 2010 written IEP offer is a confusing document that was difficult to understand even after testimony during the hearing. At some points the document seems to be offering a general education placement in a "regular classroom" for part of Student's time, while at other points it seems to offer solely a mix of SDC and resource room placement. Based on the testimony at hearing, it was unclear whether Student, if placed in the District's proposed program, would have attended a general education science class and physical education class. It was

unclear whether his resource support services would occur in the SDC classroom or out of it. It was unclear whether his speech language services would occur in the classroom or out of it and whether they would be individual or group services. It was unclear whether the services would begin as of March 17, 2010, or as of the summer during the ESY. It was unclear whether Student would have gone to a different classroom when the English-language learning pupils came into the SDC.

20. Likewise, as discussed in Factual Findings 68 – 76 above, many of the goals and objectives contained within the March 2010 IEP were inappropriate.

21. In its written closing argument, the District does not dispute that the present levels of performance contained in the March 2010 IEP were inaccurate. The closing argument states, in part: “[Student’s parents] knew that the District could not accurately determine present levels as a result of the inability of Student’s then-current teacher to provide adequate information.” Because goals are derived from the present levels of performance, inaccurate present levels of performance could lead to inappropriate goals. The District argues that the proposed IEP was intended to be for an interim offer, to give the District 30 days to observe Student in class to determine his appropriate levels of performance and goals. The District contends that the District staff did not have sufficient information to determine Student’s needs because Student’s private school teachers were uncooperative in providing information prior to and during the meeting and the Belmont assessment was not sufficient in areas such as speech and language. The District staff members drafting the written IEP were not permitted to rely on Krantz’s assessment and they had conducted no assessment of their own.

22. As a general rule, the law only requires a school district’s IEP offer to be based on what was objectively reasonable at the time the offer was made. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). For example, when a child’s parents are uncooperative with the school district in the IEP process by refusing to consent to proposed assessment plans or refusing to sign waivers to allow the IEP team to obtain information from private schools or providers, a school district cannot be faulted for making an IEP offer based on the limited information in the school district’s possession.

23. However, the holding in the *Adams* case was never intended to allow a school district to bury its head in the sand and fail to take reasonable steps to obtain the information it needs. In the instant case, Student’s parents were cooperative with the District staff at all times prior to and during the March 2010 IEP meeting. They complied with every request the District made -- they went to Belmont to obtain an assessment, they signed a release allowing the District to contact Student’s physicians, they enrolled Student in the District, they provided proofs of residence, and they provided the District with copies of the assessments done by Belmont and Krantz. While it is true that they refused to consent to the psycho-educational assessment the District proposed beginning in February 2010, that assessment was presented to them as a voluntary matter which was not necessary for the District staff to make an IEP offer. Under the circumstances, their failure to consent to that assessment cannot in any way be construed as a failure to cooperate.

24. This case presents a very good picture of the wisdom of the California Legislature in enacting laws to require the district of residence to assess upon a referral for special education. Had the District assessed in accordance with its statutory duties, it would have had complete, current information regarding Student's needs and present levels of performance. It could have provided a timely IEP offer for Student based on current testing results. Student's parents could have reviewed that IEP offer near the start of the 2009-2010 school year, instead of near the end.

25. In its written closing argument, the District stated, "In the IEP, the District documented its intent to supplement the IEP with information gathered within the first 30 days of enrollment. This process would be the only way to determine true present levels." The District argues that any procedural violation due to the inaccurate present levels of performance and inappropriate goals in the March 17 IEP would not result in a substantive denial of FAPE because those problems could be corrected after the District had an opportunity to observe Student in the District placement for 30 days. The District failed to cite any authority stating that, instead of conducting a necessary assessment, a District may force a child's parents to place a child in a District program that may not be appropriate for a month or more in order to allow the District to gather information on the present levels of performance. Such an argument flies in the face of the clear legislative intent to have a comprehensive assessment to determine a child's educational needs. In the instant case, Student had already been deprived of an appropriate public school placement offer for the seven months between August 19, 2009, and March 17, 2010. Assuming the District intended to start this "interim" placement during ESY in the summer of 2010, Student would have continued to lack an appropriate IEP until at least 30 days after that ESY placement began and a new IEP meeting could be scheduled and held to revise the goals. In other words, Student would have been without an appropriate IEP for over a year after his parents made their initial request for special education.

26. Student met his burden of showing that the District committed a procedural violation of IDEA by failing to make a formal, specific offer of FAPE in the March 17, 2010 IEP document. Student also met his burden to show that many of the goals contained within that IEP document were inappropriate. Those procedural violations substantially interfered with the ability of Student's parents to participate in the IEP process and impeded Student's right to a FAPE, resulting in a substantive denial of FAPE. Because no further IEP offers were made by the District after the March 17, 2010 offer, that failure to offer a FAPE continued up to and including the dates of the hearing in April 2011.

27. Because Student prevailed in proving that the District's procedural violations resulted in a substantive denial of FAPE at all times at issue in Student's due process request, there is no need to address the remaining procedural and substantive issues of Student's due process request. (See *Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 895.)

*The Appropriate Remedy for the District's Denial of FAPE*

28. A parent may be entitled to reimbursement for placing a student in a private school without the agreement of the school district if the parents prove at a due process hearing that: 1) the District had not made a FAPE available to the student prior to the placement; and 2) that the private placement is appropriate. (20 U.S.C. §1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c) (2006); Ed. Code, § 56175; see also *School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*) (reimbursement for unilateral placement may be awarded under the IDEA when the District's proposed placement does not provide a FAPE.)

29. To be appropriate, the parent's private placement does not have to meet the standards of a public school offer of FAPE. (Ed. Code, §§ 56175, 56176; 34 C.F.R. § 300.148(c) (2006).) It must, however, address the student's needs and provide educational benefit to the student. (See *W.G. v. Board of Trustees of Target Range School District*, *supra*, 960 F.2d at p. 1487.) The Ninth Circuit recently clarified that a private placement need not furnish "every special service necessary to maximize [a] child's potential." (*C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, 1159.) Instead, the private placement must provide "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to benefit from instruction." (*Ibid.*)

30. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*)). There is no obligation to provide day-for-day compensation for time missed. The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (*Ibid.*) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*Burlington, supra*, 471 U.S. at p. 369.) An award of reimbursement may be reduced if warranted by an analysis of the equities of the case. The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at pp. 1496-1498.)

31. As discussed above in Factual Findings 1 – 76 and Legal Conclusions 1 – 27, the District failed to provide Student with a FAPE at all times between August 19, 2009, and the time of the hearing in April 2011. Under the facts of this case, the equities weigh heavily in favor of Student's parents. Student's parents did everything required of them by the District and jumped through every procedural hoop placed before them by the District's protocols and procedures. They went to Belmont to get the assessment, they enrolled Student in the District and provided the required proof of residence, they responded to the District's phone calls and emails, they signed all required releases to allow the District to obtain information, they attended the IEP team meeting, and they provided the District with the various assessments they had received from Belmont and Krantz.

32. It was the District that delayed the development of Student's IEP, first by failing to assess in accordance with the law and later by placing additional procedural obstacles in the way of an IEP team meeting, such as requiring enrollment and proof of residence in January 2010. As discussed above in Factual Findings 2 and 8, the District had twice received proof of residence from Student's parents -- in 2003 when Student's parents first sought special education for Student, and in August 2009, when Student's parents once again sought special education services. Brown-Bess herself admitted during her testimony that Student could not be required to enroll in the District before having an IEP meeting, but the letter she sent required enrollment.

33. In some circumstances, the failure of the child's parents to consent to an assessment can affect the remedy in a special education case. (See, e.g., *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1315.) However, as set forth in Factual Findings 36 – 55 above, at no point did the District staff require an assessment or tell Student's parents that such an assessment was necessary for the District to offer FAPE. Indeed, the District witnesses at the hearing maintained that they did not need a new psycho-educational assessment in order to make an IEP offer for Student. Under these circumstances, the failure of Student's parents to sign the assessment plan does not affect their ability to recover reimbursement.

34. The parties stipulated during the hearing that Star Academy is an appropriate alternative placement for Student. Given the good faith of Student's parents at all times in this matter and the delays caused by the District's protocols and procedures, it is appropriate to award Student's parents reimbursement for their costs to educate Student at Star Academy during the 2010-2011 school year. Because there was no appropriate offer of FAPE from the District, Student's parents had no choice but to place Student in a private school that would meet his needs.

35. Likewise, as set forth in Factual Findings 77 – 86 above, the evidence supports a finding that Armstrong was an appropriate placement for Student during the 2009-2010 school year. While it is true that the teachers at Armstrong did not believe Student was making sufficient progress at the school, his report card at Armstrong and the testimony of the Armstrong teachers indicated that he was, at least, making some progress. Student's parents had no choice but to maintain Student's placement at Armstrong while they sought an IEP offer from the District. They were not required to place Student in an unknown classroom as Brown-Bess proposed for the interim placement. They were also not required to place their child in the District's proposed IEP program, when that program was not specifically described in the IEP and was not based on a correct understanding of Student's needs and present levels of performance. The decision of Student's parents to keep Student at Armstrong through the end of the school year was appropriate.

36. Student's parents are entitled to their requested reimbursement for Armstrong and Star Academy. However, as discussed in Factual Finding 84 above, there was insufficient evidence presented at the hearing to award reimbursement for transportation costs.

37. It is also appropriate to order the District to place Student in Star Academy prospectively until such time as the District makes an IEP offer that is either accepted by Student's parents or determined to be appropriate after an administrative hearing. There was no evidence presented at hearing that the District attempted to remedy any of the procedural violations that occurred in this case. There was no evidence that the District held another IEP team meeting with Student's parents after mailing the March 2010 offer. At this point, there is no proper offer of a FAPE outstanding for Student. Because both parties acknowledge that Star Academy is an appropriate alternative placement, that school should be Student's placement until a proper IEP offer is made. The District shall fund Student's placement at Star Academy (including the speech-language and occupational therapy services discussed in Factual Finding 85 above), either by directly contracting with Star Academy, or by reimbursing Student's parents for their expenses, upon proof of payment. The funding shall include ESY in addition to the regular school year. The District shall also either provide transportation for Student to attend Star Academy or reimburse Student's parents for the transportation costs at the District's standard reimbursement rate.

38. The final remedy sought by Student is reimbursement for Krantz's assessment. While it is true that Krantz provided the only detailed assessment of Student's needs during the times relevant to this case, reimbursement for that assessment is not warranted. Student's parents sought out an assessment from Krantz before they even went to the District seeking special education services. They did not contract with Krantz due to the District's failure to assess Student or because they disagreed with an assessment done by the District. Under these circumstances, the equities of situation do not warrant an order that the District reimburse Student's parents for their costs in procuring the Krantz assessment.

## ORDER

1. The District will reimburse Student's parents in the amount of \$ 54,847.68 within 60 days of the date of this Decision.

2. The District shall fund Student's placement at Star Academy, including all tuition for the regular school year, extended school year, costs of transportation at the District's standard reimbursement rate, as well as two individual and one group speech-language tutoring session per week and one individual and one group occupational therapy session per week, beginning as of April 19, 2011, and continuing forward until such time as one of the following occurs: 1) a new IEP is developed and agreed to by Student's parents; 2) Student ceases to attend Star Academy; 3) Student's family moves out of the District's jurisdiction; or 4) a new IEP is developed by the District and found to be appropriate after an administrative hearing.

3. The District may fund Student's placement at Star Academy either by directly contracting with Star Academy and providing transportation at the District's expense, or the District may reimburse Student's parents for tuition and/or transportation upon presentation of proof of payment. The District shall choose which method (contract with Star Academy

or reimbursement to Student's parents) to use. If the District chooses to reimburse Student's parents, the District shall make reimbursement within 60 days of the date Student's parents provide each proof of payment to the District.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here Student prevailed on all issues heard and decided in this matter.

#### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this Decision. (Ed Code, § 56505, subd. (k).)

Dated: June 17, 2011

/s/  
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SUSAN RUFF  
Administrative Law Judge  
Office of Administrative Hearings