

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matters of :

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT

Respondent.

OAH CASE NO. N 2006120420

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT

Respondent.

OAH CASE NO. N 2007050027

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on May 9 - 11, 2007, in Los Angeles, California.

Petitioner (Student), was represented by David M. Grey, Attorney at Law, of Grey & Grey. Student's mother (Mother) was present throughout the hearing.¹

Respondent, (District), was represented by Susan Park, Attorney at Law, of Fagen, Friedman & Fulfrost. Patty Brooks Leach, District's Due Process Specialist for Special Education, was present throughout the hearing.

¹ Student's Mother and Father shall be collectively referenced as Parents in this decision.

At the due process hearing, on May 10 and May 11, 2007, the ALJ received sworn oral testimony and documentary evidence. At the conclusion of the hearing, the parties agreed that the record would remain open in order for the parties to submit written closing arguments. Both parties timely filed their briefs on or before noon, May 22, 2007. The ALJ closed the record and deemed the matter submitted as of that date.²

PROCEDURAL MATTERS³

Student's Due Process Hearing Request was filed on December 12, 2006. On February 22, 2007, Student moved for leave to file her First Amended Due Process Hearing Request which included the issues set forth below.⁴ District did not oppose Student's motion to amend and on March 1, 2007, OAH granted Student's motion and all applicable timelines recommenced. On March 30, 2007, the parties jointly requested that the due process hearing be continued and on April 3, 2007, OAH granted the continuance.

A telephonic prehearing conference in Student's case was held on April 30, 2007. Prior to the prehearing conference the parties filed and exchanged prehearing conference statements. Student objected to District's right to defend the appropriateness of its assessments in her case as contrary to the clear and unambiguous language of 34 C.F.R. § 500.502 (2006). The parties engaged in extensive argument on this issue and the ALJ indicated that she would hear motions the first morning of trial.

District's Due Process Hearing Request was filed on April 30, 2007, with a motion to consolidate its hearing with Student's due process hearing request. On May 7, 2007, Student filed a Notice of Insufficiency which OAH overruled that same day.

² Student requested oral argument, but District requested a written briefing schedule. When the ALJ offered to accommodate both parties, Student's counsel objected on two grounds: 1) that District would have the advantage of hearing his argument when preparing its closing brief; and 2) the submission of written briefs would delay the publication of the decision. Student's counsel agreed to file a written brief if the briefs were exchanged simultaneously and if the time for the decision would not be extended to accommodate submission of closing briefs. The parties stipulated that the briefs would be filed no later than noon, May 22, 2007, and exchanged no earlier than that time. The ALJ issued an order consistent with the parties' stipulation, including an order that the time for the decision shall not be extended by the number of days between the close of testimony and the submission of closing briefs.

³ The pleadings, briefs of the parties and orders issued by OAH in N2006120420 and N2007050027 are part of the official record of this consolidated hearing.

⁴ Student withdrew without prejudice the following claims and remedies: Student's "problem 1" that she was denied NPA speech services; her claim that District's failure to fund the requested IEEs also constituted a denial of FAPE; Student's inclusion of the Woodcock-Johnson III (WJ III) standardized test as part of her request for a psychoeducational IEE at public expense; her request for compensatory education as a remedy.

On May 9 and 10, 2007, the ALJ heard pre-trial motions. Student moved for a decision in her favor on her due process request for an independent educational evaluation (IEE) at public expense in the area of speech and language. Student also moved to dismiss District's due process hearing request as untimely. In addition to her written motions, Student moved to strike a reference in District's due process hearing request to a confidential settlement communication between the parties dated March 27, 2007. District moved to defend the appropriateness of its assessments in Student's case. District's motion to consolidate its case with Student's case was also heard.

After consideration of the parties' written briefs, evidentiary stipulations, and oral arguments, the ALJ denied Student's motion for a decision in her favor⁵ and denied without prejudice Student's motion to dismiss District's due process hearing request on the ground that District unnecessarily delayed in filing its request.⁶ The ALJ sustained Student's motion to strike a reference to a March 27, 2007, confidential settlement communication in District's due process hearing request. The ALJ denied District's motion to defend the appropriateness of its assessments in Student's case. The ALJ granted District's motion to consolidate and consolidated District's case with Student's case for hearing⁷.

⁵ Student relied upon District's March 9, 2007, letter which constituted both District's formal response to Student's First Amended Complaint and its settlement offer. The letter was never filed with OAH and the specific statement Student relied upon contained an express reservation of District's rights consistent with an offer of settlement. In its opposition to Student's motion, District noted that the offer was made subject to its reservation of rights and the issue was not resolved. Nevertheless, District tried to introduce the letter as evidence during the hearing. Student objected to District's attempts to introduce this letter as evidence on the ground that it contained offers of settlement. Student's objection was sustained in part, and the letter was limited as evidence of District's notification of its defense. In short, both parties attempted to selectively apply the statutory bar against admissions of confidential settlement communications. (*See Evid. Code*, §§1152, 1154.)

⁶ In deciding to deny Student's motion without prejudice, the ALJ considered stipulated facts offered by the parties exclusively to determine this pre-trial motion. The ALJ stated that she would reconsider the issue of whether District's due process request was filed "without unnecessary delay" based upon evidence introduced at trial.

⁷ Student's counsel offered conflicting arguments in support of Student's opposition to consolidation. Student's counsel made clear that he wanted to proceed with Student's case forthwith. He opposed a continuance of Student's case, even agreeing to shorten the time he previously requested to prepare his opposition to District's motion to consolidate so that Student's case could go forward as scheduled. In his written brief he argued that consolidation would not be appropriate because the timeline for Student's case would have to change. In response to his concerns, the ALJ consolidated the cases on the condition that District's case proceeds within the statutory timeline set for Student's case. During oral argument Student's counsel further objected to consolidation on the ground that Student would be prejudiced since he did not have the opportunity to retain experts to defend against District's claim that its assessments were appropriate. The ALJ did not find counsel's argument credible. Counsel failed to make a credible offer of proof as to why he did not retain expert witnesses earlier. Counsel accompanied Parents to the IEP team meeting and had access to the assessments no later than February 12, 2007.

ISSUES⁸

1. Whether Student is entitled to independent educational evaluations (IEEs) at public expense for speech and language and psychoeducation.⁹

2. Whether District's annual behavioral goal number three, as set forth in the February 12, 2007, IEP, which states that "[student] will independently incorporate the new student within the new activity or will identify an alternative activity/peer to engage in/with 100 percent accuracy, in 4 out of 10 pay [sic] opportunities," and its failure to discuss or revise this goal as appropriate, denied Petitioner a FAPE.

REMEDIES

Whether Student is entitled to the following relief should she prevail on issues (1) and (2).

Issue 1:

- (A) An order that District pay for an independent speech and language educational assessment;
- (B) An order that District pay for an independent psychoeducation assessment; and
- (C) An order that District furnish Petitioner with the agency criteria for IEEs;

Issue 2:

An order that the District revise annual behavior goal number three so that it is understandable and meaningful to the family.

Whether District is entitled to the following relief if it prevails on Issue 1:

An order affirming the appropriateness of District's speech and language and psychoeducation assessments and denying Student's requested IEEs.

For either party:

Any other relief the AJJ deems appropriate.

⁸ The issues have been reframed and reorganized for this Decision.

⁹ Student's due process hearing request included issues 1 and 2. Issue 1 was the sole issue in District's due process hearing request.

CONTENTIONS OF THE PARTIES

Student's Mother disagreed with District's speech and language and psychoeducation assessments and requested IEEs at public expense. Student maintains that District is barred from defending its assessments as appropriate because it failed to follow the clear and unambiguous applicable regulation which requires District to file its own due process request without unnecessary delay. Moreover, District failed to follow its own procedures which dictate that it file a due process request. In Student's case, District may only be relieved of funding the requested IEEs if it can show that Student's independent assessments did not comport with agency criteria. Here, this option was unavailable to District because Student had not secured the requested IEEs.

Student further maintains that District failed to prepare a clear annual behavior goal and that its delay in revising the goal constituted a denial of FAPE. Student claims that parental participation was thwarted by District's dilatory conduct and that she was denied an educational benefit.

District alleges that Student's requests for IEEs should be denied because its assessments were appropriate. District maintains that it did not "unnecessarily delay" in filing its request for three reasons. According to District, since Student filed its due process hearing request first placing the IEEs in issue, it was unnecessary to file a separate request, especially since District notified Student that it would be defending the appropriateness of its assessments. Second, the parties were engaged in settlement discussions so it was unnecessary to file its due process request until the parties completed settlement discussions. Finally, District maintains that its disputed assessments were appropriate as they were conducted in accordance with assessment procedures specified in the federal IDEA and State special education law.

FACTUAL FINDINGS

Background Information

1. Student was born on September 9, 2001, and is five years old. Student resides in the District with her family and attends kindergarten in a District elementary school.

2. In 2004, Student's private physician diagnosed her with autism spectrum disorder. As a result of her physician's diagnosis, the Lanterman Regional Center (Regional Center) referred Student for a psychological evaluation with a licensed clinical psychologist. The psychologist diagnosed Student with expressive language delay and pervasive developmental disorder NOI (not otherwise specified.). Before her third birthday, the Regional Center re-evaluated Student for continued services and determined that Student remained eligible for its services under the category of autistic disorder, mild high functioning.

3. District held its first IEP meeting for Student in June 2004 and determined she was eligible for special education and related services under the categories of developmental delay and speech and language. Student was placed in a District preschool. At the last preschool IEP team meeting in June 2006, the team conducted a three-year reassessment of Student to determine her continued eligibility, reviewed Student's annual progress and developed a transition IEP in anticipation of Student's entry into kindergarten. The IEP team recommended that Student remain eligible under the category of speech and language, and continue to be eligible for special education as developmentally delayed until the next annual review. Parents consented to the IEP.

4. In fall 2006, Student entered a general education kindergarten class at a District elementary school (District elementary school). On November 14, 2006, Student's IEP team meeting was held at the District elementary school. At this meeting, District's team members, determined that Student was eligible for special education and related services under the singular category of speech and language impairment. Parents disagreed with District's characterization of Student's eligibility. Parents were concerned about Student's progress with receptive and expressive language and her classification of mild autism by the Lanterman Regional Center. District staff recommended a full psychoeducational reassessment of Student to address Parents' concerns, to determine whether a change in eligibility was warranted, and to identify any additional special education services. With Parents' consent District conducted psychoeducation and speech and language assessments.¹⁰

5. On February 12, 2007, an IEP team meeting was held to discuss the results of the psychoeducation and speech and language assessments and to review the basis of Student's eligibility for special education. The IEP team also developed annual behavioral goal number three at this meeting, among other goals.¹¹ All necessary members of the IEP team were present. Parents attended the IEP team meeting with their attorney. Parents left the meeting without consenting to the IEP.

Mother's Request for Independent Educational Evaluations at Public Expense

6. Student claims that she met her burden of proving that she is entitled to IEEs at public expense. To obtain an IEE, Parents must disagree with an assessment obtained by the public agency and request an IEE. (Legal Conclusion 5.) Accordingly, Student fulfills her burden of proof in her due process request for IEEs at public expense when she provides evidence that (1) Parents informed the District that they disagreed with its assessments, and (2) Parents requested the IEEs. (Legal Conclusion 1.)

¹⁰ This decision only addresses assessments that are the subject of Parents' request for independent educational evaluations at public expense.

¹¹ Only matters raised at the IEP team meeting relevant to the issues raised in the parties' pleadings have been included in this decision.

7. Student satisfied her burden of proof. On two separate occasions, Parents submitted a written request for IEEs at public expense in the areas of speech and language and psychoeducation. On February 15, 2007, Mother hand-delivered a written request for IEEs. On March 1, 2007, Mother hand-delivered her signed copy of the February 12, 2007, IEP team report where she again indicated her disagreement with the District's speech and language and psychoeducation assessments and requested IEEs. In her signed IEP team report, Mother also explained the reasons for her disagreement. After considering Mother's request, District elected not to provide Parents the IEEs at public expense.

8. District's obligation to fund the IEEs at public expense can be discharged in three discrete ways. Upon receipt of Mother's request, District can agree to fund the requested IEEs at public expense. If the District elects not to fund the IEE at public expense, it can wait for Student to file a due process hearing request and defend Parents' request for IEEs by proving that the IEEs secured by Parents did not meet agency criteria. Additionally, District can also file its own independent request for a due process hearing "without unnecessary delay" to prove that its assessments were appropriate. (Legal Conclusion 6.)

9. No evidence was presented that Parents secured IEEs after they delivered their written request to the District. Consequently, at the hearing District could not challenge Parent's right to the IEEs at public expense on the ground that the IEEs did not meet agency criteria. For this reason, at the hearing District could only discharge its obligation to fund the IEEs by filing its own due process request and meeting its burden of proving that its assessments were appropriate. (Legal Conclusion 6.)

10. Student contends that District is not entitled to bar Parents' request for IEEs by proving that its assessments were appropriate because it unnecessarily delayed filing its due process hearing request. District has the burden of proving that it filed its due process request without "unnecessary delay". (Legal Conclusions 1, 6 and 7.) District maintained that it did not "unnecessarily delay" in filing its request for three reasons: (1) Student filed its due process hearing request first, placing the IEEs in issue and making it unnecessary to file a separate request; (2) District notified Student that it would be defending the appropriateness of its assessments; and (3) it was engaged in settlement discussions so filing its due process request was unnecessary until settlement discussions were exhausted.

11. As noted in finding 7 above, on February 15, 2007, Mother hand-delivered her letter requesting an IEE to District. In response to Mother's letter, that same day, Mr. Juan A. Arias (Mr. Arias), the office technician at the District elementary school, provided Mother with a memo informing her that she would have to "initiate the informal dispute resolution for IEP disagreements." In his memo, Mr. Arias also advised Mother to include with her paperwork her original letter outlining the reasons for her disagreement. Attached to the memo was a flow chart developed by the District that described the "nonadversarial" informal dispute resolution process and contained forms for Parents to initiate that process. The packet also contained instructions and forms for Parents to initiate formal proceedings with the Special Education Division of the Office of Administrative hearings. Mr. Arias appeared to be an honest and hardworking employee of the District. It was apparent from his

testimony that he carefully followed the instructions given to him by his supervisors and did not substitute their judgment with his own.

12. Mr. Arias's response to Mother was made at the direction of the District elementary school's assistant principal and special education administrator, Mr. Robert F. Lee (Mr. Lee). The District elementary school's principal relied upon Mr. Lee to manage special education matters. As the special education administrator, Mr. Lee was responsible for managing all aspects of the IEP and due process. Mr. Lee made sure that referrals for assessments were addressed, approved and timely completed. He made sure that the IEP team comprised the required representatives. He conducted IEP team meetings. He advised the elementary school principal and Mr. Arias on how to respond to parents when they disagree with IEP team recommendations.

13. On January 22, 2007, Mr. Lee left his position at the District elementary school to take another position within the District. Upon Mr. Lee's departure, the elementary school was left without an administrator knowledgeable about special education or the IEP process, including, dispute resolution procedures. At the request of the District elementary school's principal, Mr. Lee returned to conduct the February 12, 2007, IEP team meeting and to instruct the principal and Mr. Arias on how to respond to Mother's letter. Mr. Lee was familiar with Student's file because he administered Student's November 2006 IEP team meeting.

14. At the conclusion of the February 12 IEP team meeting, Mr. Lee de-briefed the principal, compiled a package of forms, and advised the principal and Mr. Arias to provide Parents the forms if they objected to the IEP. Mr. Lee acknowledged that District's response to parents when they request IEEs at public expense differs from its response to parents' objections to other matters raised in the IEP. Parents' requests for IEEs must be referred to the support unit assigned to Student's elementary school.¹² Mr. Lee did not discuss with the principal or Mr. Arias how to respond if Student's Parents requested IEEs. Mr. Lee was contacted several times with questions regarding Parent's disagreements with the IEP, but at the hearing did not recall specifically being asked about Mother's request for an IEE. Mr. Lee testified candidly about the scope of his responsibilities, what he was told, and what he advised. His testimony regarding the Mother's request for IEEs was consistent with District's written policies and accordingly was given weight.

15. Uncontroverted evidence established that District did not follow its own policies in its response to Mother's IEEs. District's policies with respect to Parents requests for IEEs at public expense are set forth in its special education manual.

Part II, Chapter 3, of the manual, entitled "Initial Assessment, Reassessment, and Independent Educational Evaluation," at Section VII (C) (2) (in relevant part) instructs District's representatives to:

¹² District is comprised of smaller districts. Each smaller district contains a central support office or unit which provides administrative and resource support for the member schools.

- Advise the parent[s] that if the District disagrees with their request for an IEE at public expense, because it believes that its assessment was appropriate, that the District will initiate a due process hearing to determine if an IEE at public expense is required.

District did not advise Mother that it would initiate a due process hearing to determine if an IEE at public expense is required.

16. District also departed from its procedures for reviewing requests for IEEs at public expense when it failed to fulfill the obligations assigned to its Special Education Support Unit Administrator. The District in Section VII (C) (4) and (C) (5) of its manual instructs District's representatives to forward parents' requests for IEEs at public expense to their Special Education Support Unit Administrator with a copy of the IEP and disputed assessments. Upon receipt of the documents, the Support Unit Administrator is responsible for reviewing the documents and "with the appropriate discipline" determining if an IEE will be offered at public expense." If the Support Unit Administrator "agrees" to provide an IEE at public expense, the parent must be provided with a list of names of independent assessors. If the parents choose a person not on the list, the person "must meet the same criteria for qualified examiners named by the District." The District also "must initiate a due process hearing" if the Support Unit Administrator does not agree with the assessor selected by the parents. Ms. Danielle Borello (Ms. Borello), the school psychologist, testified that she submitted Mother's IEE request to the Special Education Support Unit Administrator; however, it was apparent from testimony at the hearing that this administrator did not fulfill her obligations as required by the manual.

17. Before Mother requested the IEEs, she filed a formal due process request on another issue. Ms. Patty Brooks Leach (Ms Leach) was assigned to Student's case. Ms. Leach works at the District-level and her job is to assist in the resolution of due process disputes after they have been filed. Ms. Leach works closely with District's counsel and also has access to administrators throughout the District to assist her in dispute resolution. Ms. Leach also directly communicates with parents or their counsel in an effort to fashion a resolution to pending disputes. Ms. Leach testified at the hearing. She was knowledgeable about District's policies and practices and spoke in a frank and direct manner about her job and district operations. Her testimony was given great weight.

18. It was apparent from Ms. Leach's testimony that she, not the Special Education Support Unit Administrator, was responsible for investigating and coordinating District's response. Substituting a District-level employee like Ms. Leach for the Support Unit Administrator, in and of itself, should not conflict with the objectives of Section VII, as long as Ms. Leach fulfilled the duties of the Support Unit Administrator.

19. Ms. Leach did fulfill some of the responsibilities of the Support Unit Administrator. On February 20, 2007, five days after Mother submitted her request to Mr. Arias, she was informed of Mother's IEE request. That same day she spoke with Student's counsel about Mother's objections to the assessments. She was not surprised that Mother

requested an IEE for speech and language because the request was consistent with Student's existing due process hearing request. She indicated to Student's counsel that District would probably not have a problem with funding an IEE for speech and language. According to Ms. Leach, her offer of a speech and language IEE at public expense was not an admission that District's speech and language assessment was inappropriate. Although she thought District's assessment was good, she also wanted to provide incentives to settle Student's case. To Ms. Leach, the request for a psychoeducation IEE was "new territory" unrelated to the issue in the existing dispute. After she spoke with Student's counsel, Ms. Leach contacted Senior District Psychologist Specialist for the local unit, Ms. Monique Arbuckle. Ms. Arbuckle endorsed the psychoeducation assessment conducted by her unit psychologist, Ms. Danielle Borello (Ms. Borello). By February 22, 2007, Ms. Leach determined that District's psychoeducation assessment was "defensible" and concluded that the District would not fund the requested IEE.

20. Ms. Leach did not fulfill all the essential duties of Support Unit Administrator. By her own admission, Ms. Leach's responsibilities were limited to resolving due process disputes.¹³ Consistent with her role in settlement, Ms. Leach testified that the proposal she discussed with Student's counsel on February 20, 2007, involved considerations other than the merits of Student's claims. It was also apparent from Ms. Leach's testimony and demeanor at the hearing that she was an essential participant in District's settlement strategy. Ms. Leach, with or without the assistance of her counsel's objections, was careful not to respond to questions which involved attorney-client communications with District's counsel. Given Ms. Leach's involvement in settlement, she could not be relied upon to fulfill District's obligations to respond to Mother's request for IEEs.

21. Despite the limitations imposed by her job, Ms. Leach appeared to be the only individual at the District discussing the IEEs with Mother, albeit through Student's counsel. At no time did Ms. Leach inform Student's counsel that District would be filing its own due process hearing request as required by the statute or its manual. On cross-examination, Ms. Leach admitted that it was conceivable that she informed Student's counsel that she could not address disputes unless they were part of a formal due process hearing.¹⁴ On February 22, 2007, two days after Student's counsel spoke to Ms. Leach, Student amended her due process request to include the disputed IEEs.

22. Ms. Leach very clearly testified that her involvement in resolving due process disputes did not discharge District's obligations to respond to Mother's requests for IEEs. Ms. Leach relied upon her understanding of District's special education manual in her testimony. Ms. Leach acknowledged that it was the local unit's responsibility to inform parents of its decision to fund IEEs and to initiate a due process hearing request when it decided not to fund the requested IEEs. Ms. Leach unequivocally stated that Mr. Arias's

¹⁴ Ms. Leach denied telling Student's counsel that Mother would have to file a due process request if Mother wanted IEEs, because she "would never encourage anyone to file for due process."

response, as set forth in finding 11 above, was wrong. Ms. Leach confirmed that it was District's duty to file a due process request when it disagreed with a parent's request for IEEs, even where a pupil has already filed a due process request. In Ms. Leech's experience, it is common for District to counter-file. In her experience, it is also standard practice for District to engage in settlement discussions after it has filed for due process.

23. District did not meet its burden of proving that it filed its due process request without unnecessary delay. District filed its due process hearing request on April 30, 2007, 74 days after Mother first requested the IEEs, 67 days after Student filed her amended complaint and nine days before Student's due process hearing. District notified Student that it would defend the appropriateness of its assessments in its response to Student's amended complaint dated March 9, 2007. This type of notification does not satisfy District's obligation to notify Parents that District will file its own due process request and file the request. District filed its due process request the same day of the prehearing conference in Student's case, and only after Student objected to District's plan to defend the appropriateness of its assessments in her case. District's last minute filing constituted unnecessary delay because District's claim that it rightfully relied upon Student's filing and its notice to Student of its intent to defend was not supported by the applicable regulation, District's special education manual, or its custom and practice.¹⁵

Annual Behavioral Goal Number Three

24. Student alleges that District's failure to revise an unintelligible behavioral goal denied Student a FAPE because District's conduct impeded parental participation and denied Student an educational benefit. Student has the burden of proof on this issue. (Legal Conclusion 1.) Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Legal Conclusion 8.) The IEP must include measurable annual goals designed to meet Student's unique needs resulting from the disability to enable the student to be involved in and make progress in the general education curriculum and meet the Student's other educational needs. (*Ibid.*) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (Legal Conclusions 2 through 4.)

25. Annual behavioral goal number three was devised by the IEP team at the February 12, 2007, meeting. As the only goal developed as part of Student's behavior support plan, it was an essential component of Student's IEP. Annual goal number three was

¹⁵ It became apparent from the parties' objections at hearing, that evidence of settlement discussions was not a fair measure of what constituted "necessary" delay. Settlement discussions are confidential and accordingly it is impossible for the trier of fact to ascertain whether they were meaningful and when the parties have exhausted settlement efforts and intend to go to trial.

designed to address Student's negative interactions with peers that impeded her ability to access her education. As set forth in the February 12, 2007, IEP, annual behavior goal number three provides:

[Student] will independently incorporate the new student within the new activity or will identify an alternative activity/peer to engage in/with 100% accuracy, in 4 of 10 pay [sic] opportunities.

Ms. Borello, the school psychologist, was responsible for preparing this goal. However, Ms. Borello was not assigned to the District elementary school full-time. Ms. Borello developed a training program for District staff to address peer-to-peer interactions. Notwithstanding Ms. Borello's training program, the goal as written had to be understood by District staff at the school so that it could be implemented without Ms. Borello's assistance. The goal as written was unintelligible.

26. Parents were present at the IEP team meeting and participated in drafting annual goal number three. Parents' attorney was also present at the meeting. During the three-hour long IEP team meeting, Parents consulted extensively with their attorney about annual goal number three. Parents did not lodge an objection to this annual goal at the IEP team meeting.

27. Parents did not sign the IEP at the conclusion of the IEP team meeting. When Mother reviewed annual behavior goal number three after the meeting, she realized that it was unintelligible. On February 16, 2007, Mother sent a facsimile to Ms. Borello requesting that the goal be clarified. Ms. Monique Arbuckle, Ms. Borello's supervisor, declared that Mother's request was "ridiculous." She instructed Ms. Borello not to work with Mother and to let the disagreement be handled through due process. On February 21, 2007, Ms. Borello communicated District's unwillingness to revise the goal to Mother. After District refused to revise the goal, Mother filed for due process. Mother repeated her written request for clarification as part of her objections to the IEP, which she hand-delivered to Mr. Arias on March 1, 2007.

28. On April 12, 2007, Ms. Borello, guided by District's counsel, submitted a proposed revision of annual behavioral goal number three to Mother and agreed to amend the IEP if Mother found the goal acceptable. The revised goal provides as follows:

At least four times per week during recess or lunch, [Student] will independently do the following: (1) if [Student] is participating in play or conversation with a peer, and a second peer begins participating in the activity, [Student] will independently continue the activity for at least one minute with both peers; (2) if [Student] is participating in play or conversation with a peer, and the peer begins a different activity without [Student], she will independently begin a different activity or approach a

different peer to play with or converse with for at least eight minutes.
'Independently' means without reminders or prompting.

29. At the hearing, Ms. Borello admitted that annual behavior goal number three, as originally drafted, was not clear, despite her good intentions. Mother testified that the revised annual goal was acceptable.

30. Mother contends that the failure of District to cooperate with her sooner and revise the goal constituted a denial of FAPE because she was prevented from participating in the revision of the goal and Student was denied an educational benefit. Clearly, Mother was an active participant in the IEP team meeting. Before Mother amended her due process hearing request to include the contested goal, District refused to revise the goal, although Ms. Borello did speak with her. Once Mother filed for due process, her interaction with District was complicated by her participation in due process which intruded upon District's ability to directly communicate with her. Mother had her own counsel, however, who had access to Ms. Leach, District's due process specialist, so she continued to participate through counsel. District's initial refusal to agree to Mother's request to amend the goal, after Mother fully participated in the IEP team meeting, does not establish that Mother did not participate in Student's IEP. Mother did have an opportunity to meaningfully participate in the development of the goal and to make her disagreement known.

31. District's failure to amend the annual goal earlier, which it concedes was unclear, did deny Student an educational benefit since its conduct delayed the implementation of a measurable annual goal which was central to the IEP. For this reason, Student met her burden of proving that delay in revising annual behavioral goal three, denied Student FAPE.

LEGAL CONCLUSIONS

Applicable Law

Burden of Proof

1. The Petitioner has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) Student, as the Petitioner on issue one, has to show that Parent requested an IEE at public expense due to a disagreement with the assessments obtained by the District. (34 C.F.R. § 300.502(b)(1), (b)(2).) District, as the Petitioner on issue one, has to show that it filed its due process complaint without unnecessary delay, and that its assessments were appropriate. Student, as the Petitioner on issue two, has the burden of proof. (*Id.*; 34 C.F.R. § 300.502(b)(4); *Schaffer v. Weast, supra*, 126 S.Ct. at p. 534 ["When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute."])

The General Principles of the IDEA

2. Under both the IDEA and state law, students with disabilities have the right to a FAPE. (20 U.S.C. §§1400, 1412(a)(1)(A); Ed. Code, § 56000.) FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and that conform to the student's individualized education program. (20 U.S.C. § 1401(9).)

3. The congressional mandate to provide a FAPE to children includes both a procedural and a substantive component. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 205, [102 S.Ct. 3034] (hereafter, *Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's individual education program (IEP) to determine if it was reasonably calculated to enable the student to receive some educational benefit (*Ibid.*; see also, *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*)).

4. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. (*Target Range, supra*, 960 F.2d at p. 1482.)

Independent Educational Assessments/Public Expense

5. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

6. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student's request for an IEE, the public agency must, without unnecessary delay, either:

(i) File a due process complaint to request a hearing to show that its assessment is appropriate; or

(ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria.

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].) The public agency may ask for the parent's reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).) In other words, when a parent requests an IEE, and the district neither files its own due process complaint nor provides the IEE, the burden of proof is on the district to demonstrate that the parent's privately obtained IEE did not meet agency criteria. (See 34 C.F.R. § 300.502(b)(2)(ii); *Schaffer v. Weast, supra*, 126 S.Ct. at p. 534 ["When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute."])

7. Whether a district filed its due process hearing request without "unnecessary delay" is a fact specific inquiry. In *Pajaro Valley Unified School Dist. v. J.S.* ((N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 U.S. Dist. LEXIS 90840), the court determined that the district unnecessarily delayed filing its due process request. The pupil had not filed a request for due process. After the pupil requested an IEE, the district waited three weeks and then demanded that the pupil reiterate its request, warning the pupil that it was "prepared" to go to due process to defend its assessments. (*Id.* at p.*5-6, 8-9.) After the Student complied with the district's demands, District waited another eight weeks before filing its request. In total, without explanation, the district waited three months after Student first requested an IEE at public expense to file its request. (*Id.* at p.*8-9.)

Goals and Objectives

8. The IEP for special education students, must include measurable annual goals designed to meet the student's needs that result from the disability to enable the student to be involved in and make progress in the general education curriculum and meet the student's other educational needs that result from the disability. The IEP must include a description of how the student's progress towards meeting such goals will be measured and when periodic reports will be provided. (20 U.S.C. § 1414(d)(1)(A), Ed. Code, § 56345, subds. (a)(2), (3).) Measurable annual goals enable the student, parents, and educators to monitor progress and

to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).)

Parental Participation in the IEP Process

9. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parent for enhancing his or her child's education throughout the child's education. (20 U.S.C. §§ 1414(c)(1)(B) [during assessments], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(C)(2)(III) [during IEP meetings], 300.1533(a)(1)(i) [during assessments]; Ed. Code, § 56341.1 subds. (a)(1) [during development of IEP], (d)(3) [during revision of IEP], & (e) [right to participate in an IEP].)

10. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

Determination of Issues

Based on the factual findings and applicable law, it is determined as follows:

Issue 1: Whether Student is entitled to IEEs at public expense for speech and language and psychoeducation.

Based upon Legal Conclusions 1 through 7 and Factual Findings 1 through 23, Student is entitled to IEEs at public expense. Mother properly requested in writing IEEs at public expense for speech and language and psychoeducation and indicated that she disagreed with District's assessments. District's only allowable defense in Student's case was not available to it because there was no evidence that Mother obtained IEEs. Accordingly, District could not challenge the IEEs on the ground that they did not meet agency criteria. District unnecessarily delayed in filing its request for due process. Due to inadequate staff supervision, District failed to properly instruct Mother. District incorrectly informed Mother that she had to file, and lead Student's attorney to believe that Student had to file in order for District to resolve the dispute. District was not justified in relying upon Student's filing, because the applicable regulation and its own special education manual do not recognize any exception to its duty to file. District's standard practice is to counter-file and conduct settlement discussions while the matter proceeds to hearing. District had ample

opportunity to counter-file but only did so 64 days after Student filed her due process request for IEEs. District filed its request for due process nine days before the hearing in Student's case, only after it became clear that Student's objection to its defense would be ruled on at trial.

Issue 2: Whether District's annual behavioral goal number three, as set forth in the February 12, 2007, IEP, which states that "[student] will independently incorporate the new student within the new activity or will identify an alternative activity/peer to engage in/with 100 percent accuracy, in 4 out of 10 pay [sic] opportunities," and its failure to discuss or revise this goal as appropriate, denied Petitioner a FAPE.

Based upon Legal Conclusions 1 through 4, and 8 through 10, and Factual Findings 5 and 24 through 31, annual behavior goal three, as originally drafted, was unintelligible and did not provide Student an educational benefit. A clear annual behavior goal was required to guide District personnel responsible for implementing the goal. District's delay in revising the goal denied Student FAPE.

ORDER

1. Student is entitled to independent educational assessments in speech and language and psychoeducation at public expense (excluding the WJ III standardized test). District shall provide Student with agency criteria for conducting the assessments within five business days of this decision, and shall cooperate with Student to facilitate the completion of the assessments pursuant to agency criteria and payment.

2. Annual behavioral goal number 3 contained in the February 2007, IEP team document shall be revised according to the April 12, 2007, letter made part of the hearing record as Exhibit "7."

3. District's case is dismissed.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on all issues heard in its due process hearing request and also prevailed on District's complaint.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: June 20, 2007

A handwritten signature in black ink, appearing to read "Eileen M. Cohn", written over a horizontal line.

EILEEN M. COHN

Administrative Law Judge

Special Education Division

Office of Administrative Hearings