

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

FREMONT UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2009040633

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter on May 15, 2009, in Fremont, California.

Jack Bannon, Director of Special Services for the Fremont Unified School District (District), represented the District.

Mother and Father (Parents) appeared on behalf of Student. Student was not present at the hearing.

On April 16, 2009, the District filed a request for a due process hearing. No continuances were granted in this case. At hearing on May 15, 2009, oral and documentary evidence were received, and the parties presented oral closing arguments. On the same date, the record was closed and the matter was submitted for decision.

ISSUES¹

1. Did the District file its request for a due process hearing without unnecessary delay following Parents' request for an independent educational evaluation (IEE), such that Student is not entitled to an IEE at public expense?

¹ The issues have been reframed and reorganized for purposes of clarity and organization in light of Parents' affirmative defenses. (See Order Following Prehearing Conference dated May 8, 2009.)

2. Was the District's speech and language assessment conducted in November 2008 appropriate, such that Student is not entitled to an IEE at public expense?

CONTENTIONS OF THE PARTIES

District contends that its 2008 triennial assessment of Student was appropriate because speech and language impairment was his only area of suspected disability and the District was not required to assess in any other areas. In addition, the District argues that the speech and language assessment was conducted by a qualified speech and language pathologist in compliance with state and federal law. District also maintains that it did not unnecessarily delay in filing its request for due process. According to the District, the parties were engaged in good faith discussions regarding Parents' request for an IEE, and the District was not required to file its due process request during those negotiations. District therefore asserts that Student's request for an IEE should be denied.

Student contends that the District's request for an order determining that its speech and language assessment was appropriate should be denied because the District failed to follow the law requiring it to file a due process hearing request or fund an IEE without unnecessary delay upon a parent's request for an IEE. Student argues that the District's delays in responding to Parents' request for an IEE and its failure to file for due process during a period of four months from the date of Parents' request for the IEE constituted unnecessary delay. Student contends that the District failed to offer a selection of independent assessors, failed to provide sufficient agency criteria information, and failed to negotiate the IEE in good faith, which contributed to District's delay.² In addition, Student argues that the District's speech and language assessment failed to assess Student's unique needs related to speech dysfluencies and oral and written narrative discourse, and was therefore inappropriate. Student seeks an order for the District to fund an IEE.

FACTUAL FINDINGS

Background

1. Student is nine years old, and resides with Parents within the jurisdictional boundaries of the District. Student began the 2008-2009 school year in the third grade at Forest Park Elementary School in the District.

² Parents did not file a request for a due process hearing claiming a denial of FAPE based on the IEE negotiations. Therefore, the circumstances of the IEE negotiations are only considered for their relevance to the issue of the District's delay in filing its request for a due process hearing.

2. Student did not begin to speak until the age of two, and began receiving speech and language therapy in August 2002. In connection with his transition into the District beginning at the age of three, Student was found eligible for special education and related services under the category of a speech and language impairment due to moderate delays in grammar and limited spontaneous language. In other respects at that time, he had average verbal reasoning abilities and above average nonverbal reasoning skills.

2008 Triennial Assessment

3. The local education agency (LEA) is required to reassess a special education pupil at least once every three years (the triennial assessment), unless the parent and the LEA agree otherwise. Assessments shall be conducted in all areas related to the pupil's suspected disability or disabilities and shall be conducted by persons who are knowledgeable and competent to perform the assessments, as determined by the LEA. No single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program.

4. During the 2008-2009 school year, Student's triennial assessment IEP was due in December 2008. On October 13, 2008, Parents requested in writing that Student's triennial assessment include a cognitive as well as a speech and language assessment. On October 27, 2008, Parents signed an assessment plan consenting to an assessment by District's speech and language pathologist in the area of "communicative development." No other areas of assessment were proposed or agreed upon.

5. Charlene Sim, a licensed speech and language pathologist employed by the District, conducted Student's triennial speech and language assessment on November 14, 2008, and issued a report dated December 5, 2008. Ms. Sim attended an IEP meeting on December 15, 2008, during which the results of her assessment report were reviewed and discussed by the IEP team, including Parents.

Parents' Request for an IEE

6. The procedural safeguards of California law and the federal Individuals with Disabilities in Education Improvement Act (IDEA 2004) provide that, under certain conditions, a pupil is entitled to obtain an IEE at public expense. An independent educational assessment requires an assessment to be conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. To obtain an IEE, the parent must disagree with an assessment obtained by the public agency and request an IEE. The LEA may ask for the parent's reason why he or she objects to the public assessment, but may not require an explanation.

7. If a parent requests an IEE at public expense, the public agency or LEA, in this case the District, is required, without unnecessary delay, to either:

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

(b) Ensure that an IEE is provided at public expense, unless the LEA demonstrates in an impartial hearing that an evaluation obtained by the parent did not meet agency criteria.

8. During the IEP meeting on December 15, 2008, Parents verbally communicated to the District members of the IEP team their disagreement with the District's triennial speech and language assessment and requested an IEE. Parents had prepared a written IEE request and submitted that request to the District at the IEP meeting. Parents requested that the IEE be conducted by East Bay Therapy, located in Pleasanton, California.

District's Response to the IEE Request

9. On December 19, 2008, Randy Linscheid, a special education program specialist with the District who had attended the IEP meeting, mailed Parents two authorization forms, one from the California Department of Education (CDE) Diagnostic Center of Northern California located in Fremont (Fremont Diagnostic Center), and the other from the Mission Valley Special Education Local Plan Area (SELPA), which, in essence, proposed that the District would agree to fund an IEE to be conducted by the Fremont Diagnostic Center.

10. Thus, the District promptly responded to Parents' request for an IEE and agreed to conduct one. The District did not respond to Parents' request that the IEE be conducted by East Bay Therapy and did not explain why it proposed the Fremont Diagnostic Center instead. Thereafter, the District failed to ensure that it provided an IEE at public expense as required by law by conducting and completing negotiations regarding the IEE with Parents without unnecessary delay, as found below.

11. Subsequent to the District's IEE offer on December 19, 2008, Parents misplaced the IEE forms and also delayed in responding to the District's offer, while they conducted research and made inquiries. Because Parents misplaced the IEE authorization forms, Mr. Linscheid re-mailed the forms to Parents on January 5 or 6, 2009, along with a Fremont Diagnostic Center parent interview form for their completion and return.

12. On January 20, 2009, not having heard from Parents, Mr. Linscheid emailed Parents and asked them to return the IEE assessment forms for the Fremont Diagnostic Center. On the same date, Parents responded to Mr. Linscheid and requested the "agency criteria" used by the District to select the Fremont Diagnostic Center. On January 27, 2009, Mr. Linscheid responded with a brief description of the Fremont Diagnostic Center's history and qualifications.

13. Between January 27, and April 16, 2009, when the District filed its request for a due process hearing, the District and Parents continued sporadic written communications regarding the proposed IEE. In early February 2009, the District notified Parents that Mr. Linscheid was reassigned and replaced by a new program specialist, Julie Kelly. On February 6, 2009, Parents emailed Ms. Kelly and again requested information regarding the District's agency criteria. Ms. Kelly emailed Parents on the same date and generally described Fremont Diagnostic Center's qualifications to conduct an IEE, but did not provide any other information regarding criteria used by the District, if any, to select assessors when it initiated assessments. Parents also asked Ms. Kelly whether Lindamood-Bell, a private, nonpublic agency (NPA), would meet the District's criteria for a qualified assessor and did not receive an answer. There is no evidence of any communications between the parties between February 6, and February 20, 2009. On February 20, 2009, the District sent Parents a "written prior notice" in which the District refused to conduct an IEE "per parent request for specific provider," (i.e., East Bay Therapy).³ On February 23, 2009, Parents emailed Ms. Kelly to express their concerns that the District was not following legal requirements for an IEE, including failing to provide agency criteria, and failing to provide Parents a choice of independent assessors. By this time, Student's request for an IEE had been pending for over two months.

14. On March 6, 2009, Parents filed a compliance complaint with CDE regarding the District's alleged mishandling of their IEE request. By letter dated March 11, 2009, CDE notified Parents and the Superintendent of the District of CDE's receipt of Parents' complaint, and the commencement of its investigation into whether the District violated federal law for "failure to adhere to required procedures when a parent requests an independent educational evaluation...."⁴

15. On March 24, 2009, Parents received from the District a three-page Mission Valley SELPA excerpt on IEEs which contained legal citations regarding agency criteria, but did not contain any information about what the District's or the SELPA's agency criteria or guidelines were. The evidence established that on April 2, 2009, Parents received a second prior written notice from the District refusing any IEE whatsoever.

16. The law requiring the District to either file a request for a due process hearing or fund an IEE without unnecessary delay following a parental request for an IEE does not define or limit what an unnecessary delay may be. The evidence in this case supports a conclusion that there was some explainable delay. For example, as found above, during the

³ The written notice of refusal ambiguously listed the Fremont Diagnostic Center as an "option," which Parents understood to be a continued offer for Fremont Diagnostic Center to conduct the IEE.

⁴ CDE's compliance report dated May 8, 2009, was admitted into evidence, but CDE's investigation and findings are not dispositive of the issues in the present case. CDE conducts limited investigations, has 60 days to investigate and issue a report regarding technical compliance, and does not have jurisdiction to determine whether any violation may result in a denial of a free appropriate public education (FAPE). Therefore, the CDE report was accorded little weight.

initial delay of two months from Parents' request on December 15, 2008, to about February 11, 2009,⁵ some time understandably lapsed when Parents lost the IEE forms and made inquiries, Ms. Kelly became the new program specialist assigned to Student, and negotiations for an IEE sporadically took place. While that total delay was not wholly necessary, some of it was explained and was not unreasonable.

17. However, from the date of the IEP meeting on December 15, 2008, until the District's mailing of prior written notice to Parents on February 20, 2009, the District delayed in responding to Parents' inquiries about the process for selection of an assessor to conduct the IEE, including agency criteria. The District's responses were not forthcoming in a reasonably timely manner, and most responses did not adequately address Parents' questions. Moreover, the District did not produce evidence to establish that its continued delay for a period of two additional months after February 20, 2009, until it filed a request for a due process hearing in mid-April 2009, was reasonable. When the District sent a "final" notice of refusal on April 2, it delayed two more weeks, inexplicably, until April 16, 2009, when the request for a hearing was filed with OAH. No one from the District testified about the circumstances of the delays. Given that significant time had already passed, the continued delay after February 20, 2009, resulted in a total four-month lapse since Parents requested an IEE on December 15, 2008. There was no evidence that the subsequent delay, after mid-February until April 16, 2009, was reasonable or necessary.

18. Accordingly, the District' overall delay from the time that Parents requested an IEE in mid-December 2008, until the District filed a request for due process on April 16, 2009, with some exceptions noted above, was unreasonable and constituted an unnecessary delay. Student is therefore entitled to an IEE in the area of speech and language at public expense.

The Appropriateness of District's Assessment

19. As found above, Student is entitled to a speech and language IEE at public expense due to the District's unnecessary delay in filing its request for a due process hearing. Accordingly, this Decision need not address the issue of the substantive appropriateness of the District's 2008 triennial assessment.

Remedies

20. It is evident under the legal requirements set forth in Factual Findings 6 and 7 above that a parent may request reimbursement for a privately obtained assessment as a means of requesting that the LEA fund an assessment. Parents did not obtain a private IEE and did not present evidence to support a reimbursement order at hearing. This remedy is therefore not available.

⁵ Following Parents' questions to Ms. Kelly on February 6, 2009, and Ms. Kelly's responses, the District was entitled to wait a few school days, until about February 11, for Parents to decide or otherwise respond.

21. If an IEE is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent's right to an IEE. District did not present evidence of either the District's or the SELPA's agency criteria for the selection and qualifications of an assessor, the location of the assessment, the cost limits, or the approved instruments. In addition, the District did not present competent evidence of the qualifications of Fremont Diagnostic Center aside from hearsay communications to Parents.⁶ Parents also did not present evidence of the qualifications of any preferred entity or person to conduct an IEE.

22. Accordingly, in light of the District's lengthy delay to file its request for a hearing after Parents requested an IEE, and failure to produce evidence of its agency criteria for the selection of an assessor, Parents may select a licensed speech and language pathologist of their choice to conduct Student's speech and language or "communicative development" IEE.

LEGAL CONCLUSIONS

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who filed the request for due process has the burden of persuasion at the due process hearing. District filed for a due process hearing and bears the burden of persuasion.

2. "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" include transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(a)(26); Ed. Code, § 56363, subd. (a).) Related services include speech and language therapy services. (Ed. Code, § 56363, subd. (b)(1).)

3. The LEA shall reassess a special education pupil at least once every three years unless the parent and the local education agency (LEA) agree otherwise. (Ed. Code, § 56381.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b); Ed. Code, § 56320, subds. (e), (f).) Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (20 U.S.C. § 1414(b)(3)(A)(iv); Ed. Code, §§ 56320, subd. (g), 56322.)

⁶ In a special education due process hearing, hearsay is not sufficient in itself to support a finding of fact, unless it would be admissible over objection in a civil action, but may be used to explain or supplement other direct evidence. (Cal. Code Regs., tit. 5, § 3082, subd. (b).)

Issue 1: Did the District file its request for a due process hearing without unnecessary delay following Parents' request for an IEE, such that Student is not entitled to an IEE at public expense?

4. 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).)

5. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) 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).)

6. If an IEE is at public expense, the criteria under which the assessment is obtained, including the location, limitations for the assessment, minimum qualifications of the examiner, cost limits, and use of approved instruments must be the same as the criteria that the public agency uses when it initiates an assessment, to the extent those criteria are consistent with the parent’s right to an IEE. (34 C.F.R. § 300.502(e)(1).)

7. Whether an LEA files a due process complaint 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, 47 IDELR 12), the court determined that the school district unnecessarily delayed filing its due process request. The school district first 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. After the pupil complied with the district’s demands, the district then waited another eight weeks, without explanation, before filing its request. In total, the school district waited three months after the pupil first requested an IEE at public expense to file its request. (*Id.* at pgs. 5-6, 8-9.) The court held that the school district had thereby waived its right to contest the IEE.

8. In another recent case, the court held that a school district's 10-week delay in filing a due process request was not a per se violation.⁷ (*L.S. v. Abington Sch. Dist.* (E.D. Pa., Sept. 28, 2007) 48 IDELR 244.) The court emphasized that there was evidence of ongoing efforts during that time to resolve the matter. In addition, assuming there was a procedural violation due to the delay, the court found it did not result in a denial of a FAPE to justify ordering the District to pay for an IEE.

9. Based on Factual Findings 4 through 22, and Legal Conclusions 2 through 8, the District's delays in either funding an IEE or filing its request for a due process hearing for four months after Parents requested an IEE constituted, in total, an unreasonable and unnecessary delay. While some portions of the first two months of the delay were explained by both parties, including Parents' loss of the IEE forms and silence for several weeks in January 2009, the evidence shows that Parents sought information during that time, and the information was not forthcoming from District. Due to the change in the District's program specialist assignments in early February 2009, Parents had to introduce themselves to Ms. Kelly, and start a new dialogue regarding their IEE concerns. District's delay in sending a prior written notice of refusal until February 20, 2009, which ambiguously continued to offer the Fremont Diagnostic Center, was also unexplained. Overall this delay was unreasonable. Even assuming that the District's delay until February 20, 2009, was reasonable, there was no evidence to support any justification for continued delay thereafter. The continued delay for two more months was without explanation; it exacerbated the previous delay and denied Student a timely IEE or other resolution. Student is therefore entitled to a speech and language IEE at public expense. In the absence of evidence as to the District's agency criteria used to select or hire an assessor, licensure by the State of California shall suffice to meet the legal requirement for such criteria. Accordingly, Parents shall be entitled to select a licensed speech and language pathologist to conduct the IEE.

Issue 2: Was the District's speech and language assessment conducted in November 2008 appropriate, such that Student is not entitled to an IEE at public expense?

10. As set forth in Factual Findings 4 through 22, and Legal Conclusions 2 through 9 above, Student is entitled to a speech and language IEE at public expense. Therefore, this Decision need not reach the second issue as to the appropriateness of the District's November 2008 assessment.

ORDER

1 Within 15 days from the date of this Decision, the District shall present to Parents a written assessment plan for a speech and language IEE at public expense, including

⁷ The court found a net six-week delay in filing, after an initial 30-day negotiation or informal "resolution" period following the parents' request for an IEE.

