

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2013090674

v.

DIXON UNIFIED SCHOOL DISTRICT.

**DECISION**

On September 20, 2013, Student, through his Parents, filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, naming the Dixon Unified School District.<sup>1</sup> On November 4, 2013, the matter was continued for good cause.

Administrative Law Judge Charles Marson heard this matter in Dixon, California, on February 25 and 26, 2014. Tania L. Whiteleather, Attorney at Law, represented Student. Student's Mother was present throughout the hearing. Student did not attend.

Adam J. Newman, Attorney at Law, represented Dixon. Julie Kehoe, Dixon's Director of Special Education and Student Services, was present throughout the hearing.

On the last day of hearing, the parties were granted a continuance to file written closing arguments by the close of business on March 21, 2014. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted.

**ISSUES**

1. Did Dixon deny Student a free appropriate public education (FAPE) during the school year 2012-2013 by failing to timely provide him with the independent educational evaluation (IEE) that was agreed to in February 2013?

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<sup>1</sup> Student also named the Dixon Montessori Charter School, the Fairfield-Suisun Unified School District, and the Solano Special Education Local Plan Area. Those parties were dismissed prior to hearing.

2. Did Dixon deny Student a FAPE during the school year 2012-2013 by requiring the Parent's chosen IEE assessor to follow special education local plan area and Dixon requirements that were not consistent with the Individuals with Disabilities Education Act (IDEA) and state law?

## SUMMARY OF DECISION

This Decision holds that Dixon unreasonably delayed in providing a behavioral IEE of Student by negotiating slowly, inadequately, and fruitlessly for five months with Dr. Christine Meade, the agreed-upon assessor. Dixon's flawed negotiation and failure to pursue more timely alternatives delayed the conduct of the IEE for more than six months, and Dixon is therefore liable to reimburse Parents for its costs. The Decision does not address whether Dixon attempted to impose on Dr. Meade any conditions on the assessment it did not impose on its own assessors.

## FACTUAL FINDINGS

### *Background and Jurisdiction*

1. Student is a ten-year-old male who lives with Parents within the geographical boundaries of Dixon and at all relevant times has been eligible for, and receiving, special education and related services in the categories of other health impairment and speech and language impairment. Student has difficulty regulating his behavior, which interferes with his access to education.

2. During the relevant time period, Student was placed, by agreement of the parties, in the neighboring Fairfield-Suisun Unified School District. In late 2012 or early 2013, a Dixon behaviorist conducted a functional analysis assessment of Student. The parties discussed that assessment at an individualized education program (IEP) team meeting on February 6, 2013,<sup>2</sup> during which Parents informed Dixon that they disagreed with the assessment and made a written request for an IEE funded by Dixon. They requested that the District contract with Dr. Christine Meade, a behaviorist, to conduct another functional analysis assessment.<sup>3</sup>

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<sup>2</sup> All dates in this Decision are in 2013 unless otherwise stated.

<sup>3</sup> Dr. Meade is a semi-retired behaviorist and entrepreneur. She has a Ph.D. from a teacher's college in special education administration and a Ph.D. in clinical psychology with an emphasis in Applied Behavior Analysis. She has been licensed by the State as a psychologist, although that license is not current. Since 2007, Dr. Meade has conducted almost 500 independent behavioral assessments, including assessments for districts or parents in Solano, Contra Costa, and Santa Clara counties. She also has a small company

3. Elizabeth Connaughton, Dixon's Director of Special Education and Pupil Services, received Parents' IEE request at the February 6 meeting and was responsible for responding to it.<sup>4</sup> From February 22 to July 3, Ms. Connaughton attempted to negotiate a contract for the IEE with Dr. Meade. On July 3, Dr. Meade withdrew from the negotiation, and Dixon proposed other assessors to Parents. Rather than responding, Parents then privately hired Dr. Meade to do a functional analysis assessment and now seek reimbursement for their expenses in doing so.

*Timely Provision of the IEE*

4. The IEE contemplated by the parties and Dr. Meade was more complicated than most assessments. Since the subject of the assessment was Student's behavior in school, the parties understood that Student would have to be attending classes during the assessment. The IEE would have required three-way cooperation among Dr. Meade and her staff, Dixon, and Fairfield-Suisun (where Student attended classes). Many professionals would have been involved in it, and their efforts would have required significant coordination. Dr. Meade estimated during her negotiations with Dixon that the assessment and report would take a maximum of 30 days to complete, and Dixon did not disagree.

5. In a letter to Parents on February 11, Ms. Connaughton agreed to conduct the IEE they had requested on February 6, but rejected Dr. Meade as the assessor and proposed others. She rejected Dr. Meade because she had verbal information from which she inferred that Dr. Meade's license had been suspended or that she had been terminated from a previous employment as the result of some legal proceeding. This information soon proved incorrect, and on February 22, Ms. Connaughton notified Parents that Dr. Meade was acceptable to Dixon as the assessor.

6. On February 22, Ms. Connaughton emailed Dr. Meade to express Dixon's interest in contracting with her for the IEE. Dr. Meade responded by email on February 25, asking about the anticipated timeline for the assessment and proposing dates and times for a telephone call. Ms. Connaughton did not schedule a call or respond to that email. Instead,

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that produces online training for educators, and does some consulting in non-educational areas.

<sup>4</sup> Ms. Connaughton was Dixon's Director of Special Education and Pupil Services during the 2011-2012 and 2012-2013 school years. She has a master's degree in special education from California State University at Sacramento, a mild/moderate teaching credential, and an administrative services credential. From 2008 to 2011 she was a coordinator for the Region 4 office administering California's Quality Education Investment Act. She has also been an educational consultant, an elementary school principal, and a special day class (resource) teacher. Since July 2013 she has been the Assistant Director of the Solano Special Education Local Plan Area.

on March 3, Ms. Connaughton sent a new email stating that she was “just checking in” about the contract and offering to help with furthering it. She did not send a draft contract or mention any timeline for the assessment. Ms. Connaughton erroneously addressed her March 3 email by adding an extra letter in Dr. Meade’s email address, and Dr. Meade did not receive the email.

7. In mid-March, Ms. Connaughton and Dr. Meade spoke by telephone, and, on March 25, Dr. Meade sent Ms. Connaughton a lengthy email specifying her proposals for a contract. These included suggesting a variable rate structure, requiring use of the “A-B-C data collection tool” by all involved, requesting the protocols (written requirements or procedures) for assessments from Fairfield-Suisun, and inquiring whether the assessment needed to be compliant with the Hughes Bill, a set of regulatory requirements for behavior assessments that has since been repealed. In the email, Dr. Meade made a tentative proposal for billing, expressed the hope she had answered Ms. Connaughton’s questions, and added that since schedules were getting tight and spring break was approaching, she and Dixon had only the week of April 8th to complete the paperwork and meet about the details of the assessment.

8. Ms. Connaughton did not respond to Dr. Meade’s suggestion for completion of the contract by the week of Monday, April 8. Sometime during that week, two months after Parents requested the IEE, Ms. Connaughton mailed a first draft of a contract to Dr. Meade. Ms. Connaughton based the draft on a template she obtained from Dixon’s business office. The draft contained 17 general provisions from the template, and began by stating that the agreement was made on January 1. However, in another provision, it stated that the term of the contract was from January 12 through June 30 and allowed termination of the contract if not completed during its stated term. The draft promised a payment of \$4,000 for Dr. Meade’s services and added an Appendix A addressing the particulars of the assessment. The draft did not contain some of the provisions requested on March 25 by Dr. Meade, and Ms. Connaughton did not explain their omission. On April 12, Ms. Connaughton learned from Parents’ advocate that Dr. Meade had not received the mailed draft, so on April 15 she emailed it, stating that the draft “[d]oesn’t appear to have made it to you last week.”

9. Dr. Meade responded that evening, April 15, requesting a number of changes in the contract. She stated that the dates in the contract needed to be changed from January to April. She pointed out that the first draft incorrectly identified the assessor as Elizabeth Osono, rather than herself,<sup>5</sup> and that it failed to include the clause she had requested promising full collaboration of staff. She requested that the contract be made between Dixon and Edlinx LLC, her corporation. Dr. Meade also requested the forms for fingerprints from her and her staff (which the contract required), and again requested the protocols to be followed by her staff at Fairfield-Suisun. Finally, she reminded

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<sup>5</sup> Dixon was at the same time negotiating an IEE contract with Ms. Osono, an occupational therapist.

Ms. Connaughton that the contract should state whether the assessment had to comply with the Hughes Bill requirements.

10. On April 17, Ms. Connaughton responded by email that she would make the requested changes and send another draft contract by April 19. However, Ms. Connaughton then decided to have the revisions reviewed by Dixon's counsel first. Dixon's counsel approved the draft on May 2, but Ms. Connaughton did not send the revised version (the second draft) to Dr. Meade until May 6, by mail and May 9, by email.<sup>6</sup> At the same time, Ms. Connaughton forwarded the requested Fairfield-Suisun protocols.<sup>7</sup>

11. The second draft of the contract identified Edlinx LLC as the consultant and contained the requested promise of full collaboration by all staff. However, it still did not reflect the correct dates for the contract. It stated that the agreement was made on April 1 and provided for a term from April 1 to June 30. Dr. Meade promptly responded by stating that "there appears to be a date error" and "[t]he contract is dated in April and we are now in mid-May." She expressed hope that the contract could be completed and the assessment begun in the following week.

12. Ms. Connaughton and Dr. Meade spoke again in May. Ms. Connaughton then mailed a third draft to Dr. Meade on May 18, and emailed it on May 20. The third draft stated that the agreement was entered into on May 18. The term of the agreement was from May 18 through June 30. Dr. Meade responded on May 20, again protesting the predating of the contract on the ground that it reduced her time for completing the assessment: "It appears you are predating the assessment which cuts the 60 day timeline down. Is there a reason that the contracts appear to keep being misrepresented on the timeline."<sup>8</sup> Ms. Connaughton did not respond to this email.

13. Dr. Meade then emailed Ms. Connaughton on May 23, explaining the importance of properly dating the contract. She noted that a contract reciting a start time before the actual beginning of the assessment could give a false impression of delay by the assessor, and therefore such contracts were usually dated a few days after the signature to

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<sup>6</sup> During this period Ms. Connaughton spent significant time negotiating details of the proposed assessment with Fairfield-Suisun staff. However, these negotiations mostly occurred at the same time the second draft of the contract was being examined by Dixon's attorneys, and therefore did not materially prolong the contracting process.

<sup>7</sup> At hearing Dr. Meade testified that Ms. Connaughton did not attach the correct document containing the protocols, but there was no evidence she made that complaint any earlier.

<sup>8</sup> Parents and Dr. Meade believed that the 60-day timeline applicable to assessments done by a district applied to the IEE. (See Legal Conclusion No. 5.)

allow time for processing paperwork and fingerprints.<sup>9</sup> Ms. Connaughton replied on May 24, thanking Dr. Meade for the information. She proposed a start time for the contract of June 3, which Dr. Meade accepted. They also agreed that the end date of the contract should not be June 30 but should be in the fall of the next school year, in case the assessment was not completed by the end of summer school.

14. Ms. Connoughton testified that on May 24, she sent a fourth version of the contract to Dr. Meade and a copy to Mother. Mother testified she did not receive the attachment, and Dr. Meade was not sure whether she received the email or the attachment. Ms. Connaughton and Julie Kehoe, Ms. Connaughton's successor, both testified that in preparation for hearing they examined Ms. Connaughton's email files and found both that the email had been sent and that the fourth version of the contract (and a fingerprint form) were attached to the email. The preponderance of the evidence showed that Ms. Connaughton did send the email and its attached draft on the 24th. The fourth draft of the contract was still incorrectly dated: it stated in its first line that the agreement was made on May 24 (not June 3, as the parties had agreed), and once again that date was inconsistent with the stated term of the fourth draft, which was from April 3 to September 30.

15. Dr. Meade did not immediately reply to Ms. Connaughton's May 24 email and attached fourth proposal. Ms. Connaughton testified that she telephoned Dr. Meade on May 29 and June 7 to follow up, but does not recall speaking to her directly. Dr. Meade testified that the two spoke, probably on the latter date, and that Ms. Connaughton told her she was changing jobs; that she was not sure she could finish the IEE before she left; that responsibility for the IEE might pass to her successor; that the District was considering offering Student a different placement; and that the IEE might therefore become unnecessary. Ms. Connaughton denied she ever said those things to Dr. Meade. It is not necessary to resolve this conflict in the evidence because it does not bear importantly on the adequacy of Dixon's efforts to obtain the IEE. At the time of the call Dixon was awaiting a response from Dr. Meade to its May 24 fourth draft of the contract.

16. Dr. Meade wrote to Ms. Connaughton on June 18, complaining that "again, there is a discrepancy between the dates of your proposed contract and the date received. Please advise if you still want to proceed with our company providing the assessment."<sup>10</sup>

17. The record does not reflect that Ms. Connaughton communicated to Dr. Meade again. It does contain a letter, dated June 21, from Ms. Connaughton to Parents, stating that "As of today, June 19, 2013, I still do not have a signed contract from Dr. Meade." Ms. Connoughton added that "we are confident that we can finalize the arrangements with

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<sup>9</sup> Dr. Meade also credibly testified at hearing that a predated contract can make it appear that an assessor is delaying the start of the assessment and not meeting deadlines.

<sup>10</sup> Since Dr. Meade also complained of an end date of June 30, she may have been looking at the third draft of the contract rather than the fourth. This does not matter, because by June 18 all versions of the contract contained starting dates well in the past.

Dr. Meade,” but there was no evidence that she or anyone at Dixon further contacted Dr. Meade.

18. On July 3, Dr. Meade emailed Ms. Connaughton as follows:

After reviewing your offered contract with our legal advisors, and comparing the contract to multiple current partners/contractors, we have deemed that this contract is too restrictive, [has] significantly been altered from the first submitted contract, and is biased without fair working conditions for Edlinx to properly perform the requested service and receive compensation in an orderly fashion.

Dr. Meade had not made any of these complaints before July 3. She had not claimed that the contract was too restrictive. The contract had not in fact been significantly altered from the first version, except for the dates or at Dr. Meade’s request. Dr. Meade had not previously made any claim about bias or poor working conditions, and the timeliness of payments had never been in dispute. Dr. Meade testified that the email was written by Edlinx’s attorney.

19. Dr. Meade’s July 3 email closed with this statement: “Should you wish to contract with our company for [the assessment], then we suggest that you use a similar contract used in other districts and resubmit your request.” On July 12, an attorney for Dixon notified Parents that, in light of Dr. Meade’s July 3 email, Dixon “deems it infeasible to contract with Dr. Meade” and that Dixon “construes her email as terminating the pending contract negotiations.” The attorney offered Parents their choice of two other named assessors. Parents, who throughout the negotiations had become increasingly critical of the delay, chose not to respond to that offer. Instead, at some time in summer 2013, Parents privately employed Dr. Meade to conduct a functional analysis assessment of Student.

#### *The Cost of Dr. Meade’s Assessment*

20. Dr. Meade observed Student in class for nearly four hours on September 25, and observed him again for about an hour on October 16. During these observations she spoke informally to Student’s one-to-one aide, a Dixon behaviorist, Student’s teacher, one of the teacher’s classroom assistants, and Student’s speech and language therapist. Dr. Meade also observed Student for approximately ten hours in the home, daycare, and community settings as a substitute for the more extensive observations at school she would have been allowed to conduct had she been employed directly by Dixon. She collected and analyzed data in all those settings, interviewed Student, his daycare provider, and his family members, and examined his medical and educational files. She also conducted discrete trials (an Applied Behavior Analysis methodology) to test various hypotheses.

21. Dr. Meade wrote a report on her findings that addressed Student’s behavioral excesses, strengths, and deficits; his communication and socialization skills; the parameters of his behavior; potential reinforcers of good behavior; and alternative skills he needed to improve his self-regulation. She identified target (undesirable) behaviors and addressed their

antecedents and consequences, and proposed several strategies for addressing the antecedents. She made numerous recommendations for his educational program and attached a proposed behavior intervention plan for consideration by Student's IEP team. She then attended Student's IEP team meeting on November 6, where she presented and discussed her report and recommendations.

22. Dr. Meade established at hearing that she had agreed to "cap" her bill to Parents for her services at \$7,500. She has been paid one cent of that amount so far. Dr. Meade also testified that some of those services were rendered after the IEP meeting of November 6, and were part of an ongoing arrangement with Parents. For the work Dr. Meade performed directly on the assessment, she will charge Parents \$5,500, her company's minimum fee to parents, and an additional \$500 for her attendance and participation at the IEP team meeting. The evidence showed, therefore, that the direct cost of Dr. Meade's assessment to Parents will be approximately \$6,000.

#### *Allegedly Impermissible Contract Conditions Imposed by Dixon on Dr. Meade*

23. Since it is decided here that Dixon unnecessarily delayed its provision of the requested IEE and must reimburse Parents for their costs, it is not necessary to decide whether Dixon sought to impose impermissible conditions on its proposed contract with Dr. Meade. The relief granted here would be the same regardless of the outcome of that dispute.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>11</sup>*

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.)<sup>12</sup> The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and

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<sup>11</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>12</sup> All citations to regulations in the Code of Federal Regulations are to the 2006 versions unless otherwise stated.

conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [in California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].)

*Issue One: Did Dixon deny Student a FAPE during the school year 2012-2013 by failing to timely provide him with the IEE that was agreed to in February 2013?*

#### *Unnecessary Delay*

4. When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for a 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); (b)(2)(i), (ii); see Ed. Code, § 56329, subd. (c).)

5. When a district conducts an assessment, it must generally complete the assessment and hold an IEP team meeting to discuss the results within 60 days of its receipt of an assessment plan signed by parents. (Ed. Code, §§ 56302.1, subd. (a); 56043, subsd. (c), (f)(1); 56344, subd. (a); see 20 U.S.C. § 1414(a)(1)(C)(i)(I).) Student's argument that the same 60-day timeline also applies to IEE's is not supported by authority and is unpersuasive. If the 60-day timeline did apply, there would be no need for the additional "unnecessary delay" requirement in the federal regulation governing IEE's. Moreover, that same

regulation prohibits the imposition by a district of any timeline on an IEE. (34 C.F.R. § 300.502(e)(2).) The 60-day timeline applicable to district assessments illustrates Congress's concern that assessments be promptly completed, but it does not apply to the IEE here.

6. Whether a district's delay is unnecessary within the meaning of the above regulation is a fact-specific inquiry. Many decisions have found delays shorter than the delay in this matter unnecessary. In *Pajaro Valley Unified School Dist. v. J.S.* (N.D. Cal. Dec. 15, 2006, C06-0380 PVT) 2006 WL 3734289, p. 3, for example, the court determined that the school district unnecessarily delayed filing its due process request because it waited almost three months to do so. (See also *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 107-108, 111 [four month delay unnecessary]; *Student v. Temecula Valley Unified School Dist.* (OAH, Jan. 14, 2013, No. 2012020458 [four- and-one-half month delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, Dec. 14, 2012, No. 2012090139 [70 day delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, July 7, 2011, No. 2011020188) [90-day delay unnecessary]; *Lafayette School Dist. v. Student* (OAH, July 1, 2009, No. 2008120161) [74-day delay unnecessary]; *Fremont Unified School Dist. v. Student* (OAH, June 1, 2009, No. 2009040633) [four month delay unnecessary]; *Student v. Los Angeles Unified School Dist.* (OAH, June 20, 2007, No. 2006120420 [64-day delay unnecessary]; cf. *H.S. v. San Jose Unified School Dist.* (N.D.Cal. May 6, 2013, No. C 12-06358 SI) 2013 WL 1891398, pp. 2-4 [seven month delay unnecessary].)

7. When a district can document good faith efforts to resolve a dispute over an IEE, some delay has been found reasonable. In *L.S. v. Abington School Dist.* (E.D. Pa. Sept. 28, 2007, No. 06-5172) 2007 WL 2851268, p. 9, the court held that a school district's ten-week delay in filing a due process request was not a per se violation of the IDEA. The court emphasized that there was evidence of ongoing efforts during that time to resolve the matter, including numerous emails and the holding of a resolution session, and that the district, within 27 days of the request, told parents orally that the request would be denied. (*Ibid.*) Similarly, in *J.P. v. Ripon Unified School Dist.* (E.D.Cal. April 14, 2009, No. 2: 07-cv-02084-MCE-DAD) 2009 WL 1034993, pp. 7-8, the court found that a delay of over two months was not unreasonable, because the district was able to produce a series of letters showing its attempts to resolve the matter with parents, and because a final impasse was not reached until three weeks before the district filed for a due process hearing.

8. The nature of a district's duty to ensure that an IEE is provided without unnecessary delay (34 C.F.R. § 300.502(b)) is not explained by existing decisions. It is also not addressed by the comments that accompanied the adoption of the regulation. (See Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed.Reg. 46540, 46689-46691 (Aug. 14, 2006).) Dixon argues that the regulatory mandate was satisfied here because it maintained ongoing good faith communications with Dr. Meade in an attempt to secure a contract. Dixon's proposed standard is not adequate because it asks less from a district than the language of the regulation, which focuses not on good faith and ongoing communications, but on promptness and accomplishment.

9. The regulation requires that the district “ensure” that the IEE is provided without unnecessary delay. (34 C.F.R. § 500.502(b).) The plain and ordinary meaning of “ensure” is “make certain that (something) shall occur or be the case . . . make certain of obtaining or providing (something) . . .” (New Oxford American Dictionary (2001) p. 566; Random House Dictionary of the English Language (2d ed. 1987) p. 648 [“to secure” or “to make sure or certain”].) The duty to make sure or certain that an IEE is provided without unnecessary delay would reasonably include contracting with an assessor, requesting that Parents identify another assessor if the first refuses or delays the proposed contract, and seeing the assessment to completion. Dixon did not discharge that duty here.

10. *D.A. v. Fairfield-Suisun Unified School Dist.* (E.D.Cal. Sept. 18, 2013, No. 2:11-cv-01174-TLN-KJN) 2013 WL 5278952 (*D.A.*), supplies a useful comparison. In that case the District was held to have acted diligently, notwithstanding a delay from December 2008 to the end of the school year (a period of approximately six months), in seeking a contract for an IEE. Dixon now argues that its conduct in this matter was “highly analogous” to the district’s conduct in *D.A.*, and was therefore adequately prompt. However, virtually all of the delay in *D.A.* was attributable to the parent (whose advocate furnished an incorrect address for a preferred assessor, causing mail to be undeliverable) or attributable to the unreasonable demands of an assessor requested by parents, a Dr. Swain, who “declined to accept the District’s contract for services without making significant changes, including a refusal to observe Student in an educational setting . . .” (*Id.* at p. 17). In accepting the district’s reasons for delay in *D.A.*, the court found it important that, during the delay, the district actively sought and pursued suggestions from parents for other assessors with whom it could contract, and suggested other assessors itself. (*Id.* at p. 18.) Dixon did not take any of those steps here until five months after the IEE request and after its negotiation with Dr. Meade had failed. And there is no indication in the district court’s decision in *D.A.* that any unnecessary delay there was attributable to any conduct by the school district. For the reasons below, the same cannot be said of Dixon’s conduct in this case.

#### *Prejudice from Procedural Violation of IDEA*

11. A procedural violation of the IDEA results in a denial of FAPE only if it impedes the child’s right to a FAPE, significantly impedes the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents’ child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii).) This rule applies to relief from an unnecessarily delayed IEE. (See, e.g., *Taylor v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 105, 109-110.)

#### *Importance of IEE’s to Informed Parental Participation*

12. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] the Supreme Court placed great emphasis on the importance of the procedural protections of the IDEA, especially those that guarantee participation by parents:

... [W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

(*Rowley, supra*, 458 U.S. at pp. 205-206.)

13. The IEP is the “modus operandi” of the IDEA; it is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” (*Burlington School Comm. v. Massachusetts Dept. of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].) Parental participation in the development of an IEP is therefore essential to the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994]. It is “[a]mong the most important procedural safeguards” in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

14. The IEE is not just an additional tool for determining a student’s needs; it is designed to give parents essential information to use in the IEP process. The Supreme Court has stressed the importance of the IEE in redressing the relative advantages a school district has in expertise and in its superior control of information about a student:

School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. . . . [Parents] have the right to an independent educational evaluation of the[ir] child . . . . IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

(*Schaffer v. Weast, supra*, 546 U.S. at pp. 60-61 [citations and internal quotation marks omitted].) Recently the Eleventh Circuit, in rejecting an attack on the regulation allowing for an IEE to be conducted at public expense, observed that “[t]he right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP.” (*Phillip C. v. Jefferson County Bd. of Educ.* (11th Cir. 2012) 701 F.3d 691, 698 [citation omitted].)

#### *Length of Delay*

15. Parents requested the IEE on February 6. The District announced it had broken off negotiations with Dr. Meade on July 12, five months and one week after the request. At that time the District was in the same position it was on February 6: it had not begun to contract for the IEE. Parents had some responsibility for the delay starting shortly

after July 12 since they did not respond to Dixon's last communication regarding the failure of negotiations with Dr. Meade, and for this reason their claim that the actual delay was more than a year is overstated. However, Dixon was also responsible for part of the delay after July 12. By then both the academic year and summer school were over, and no matter how diligently either party pursued the assessment, it could not begin until the start of the new school year in mid-August because it had to be done while Student attended classes. Even if Dixon had promptly contracted with another assessor after July 12, the assessment, which would have taken up to 30 days, could not have been completed ("provided," as required by the regulation) until at least mid-September because its start had been delayed into the summer months. Thus, the total delay resulting from the flaws in Dixon's contracting process would have been a minimum of six months and one or two weeks, even if the process had been promptly completed after Dr. Meade withdrew.

### *Justification for Delay*

16. Dixon responded to the February 6 request on February 11, a reasonably short time that cannot be considered unnecessary delay. But from February 11 to February 22, Dixon unnecessarily delayed because it declined to contract with Dr. Meade based on information about her credentials that Dixon now concedes was incorrect. The evidence showed that this information was simply something Ms. Connaughton had heard; there was no evidence that it was reliable or that she took any time to investigate it until her position was challenged.

17. On February 22, Dixon contacted Dr. Meade but did not propose a contract at that time. Ms. Connaughton's explanation at hearing that she did not send a draft contract because she did not yet know whether Dr. Meade was willing to do the assessment, or what compensation she might require, was unpersuasive. Dixon had extensive and sometimes demanding contract terms it knew it would require, including the pages of general provisions contained in the template for all its consulting contracts, while the portion that had to be adapted to Dr. Meade's proposed IEE consisted only of a brief appendix and the filling in of a few blanks. Dixon could have shortened the process by several weeks by sending at least its required provisions to Dr. Meade, and some statement of the timeline required for the assessment, leaving the space for compensation blank. No evidence explained why the District failed to propose its many required contract elements on February 22, or at least after the first exchange of messages at the end of February, when Dr. Meade's interest in conducting the assessment was apparent. Dixon's failure to propose any contract terms until the week of April 7, and its decision to wait instead until after Dr. Meade proposed terms herself, contributed significantly to Dixon's unnecessary delay in creating a first draft of a contract with Dr. Meade.

18. Starting with the first draft of the contract sent during the week of April 7, and received on April 15, and lasting throughout the failed negotiation with Dr. Meade, Dixon unnecessarily delayed provision of the IEE because every version of the contract it proposed was predated and therefore unacceptable to Dr. Meade, whose objection to a predated contract was reasonable and was made at her earliest opportunity and repeatedly thereafter.

In her April 15 response to the first draft she received that day, Dr. Meade made clear her objection to signing a contract that purported to show that she started earlier than she would have actually started. Ms. Connaughton conceded at hearing that both the first draft of the contract, which was sent the week of April 7, and the second draft of the contract, which was sent on May 6, were erroneously dated.

19. Ms. Connaughton testified that the template for the contract supplied by Dixon's business office did not require any particular dates and it was up to her to insert the dates. The first version, sent the week of April 7, stated that the agreement was entered into on January 1. The second version, sent on May 6, stated that the agreement was entered into on April 1. These dates were fictional and Dixon does not defend them. Dixon's predating of all of the versions of the contract it proposed, and its inconsistent dating of the April 7 and May 24 versions were unnecessary and unjustified.

20. The first sentence in all drafts of the contract stated that the agreement was "made" on a stated date. Ms. Connaughton testified that the day the third draft of the agreement stated it was made, May 18, reflected the day she created the contract. However, an agreement is "made" when the parties sign it, not when one party sends a draft to the other. None of the proposed contracts sent by Ms. Connaughton to Dr. Meade was signed by her or any other representative of Dixon. So the third and fourth versions of the contract were, like their predecessors, factually and legally wrong in the date stated for making the agreement. And the fourth version of the contract, which gave May 24 as the day the agreement was made, inconsistently gave April 3 as the beginning of the contract's term.

21. In at least two emails, Ms. Connaughton expressed her concern that the contracting process was taking too long, and there is no reason to doubt her sincerity. However, the evidence did not show that her concern resulted in action to accelerate the process. At least until May 24, the impetus for prompt completion of the contract and the assessment came almost entirely from Dr. Meade. In her February 25 response to Dixon's invitation to enter into a contract, Dr. Meade asked: "What is the timeline you are seeking for the [assessment]?" There was no evidence that Dixon answered that question. When Dr. Meade detailed her contract requirements in an email on March 25, she stated: "[s]chedules are getting tight and I understand that the districts are going on spring break soon, so that gives us until the week of April 8th to get all paperwork completed and meet . . .". She did not receive a draft contract from Dixon until April 15. And when she responded on May 13 to the second draft of the contract, Dr. Meade expressed the hope that the contract could be completed and the assessment begun within a week. Dixon did not respond to these suggestions or attempt to conform to these proposed schedules. Instead it sent the first version of the contract during the week of April 7, in which it proposed a completion date of June 30, almost five months after the IEE request; second and third drafts on May 6 and May 18 with a June 30 completion date; and a fourth draft on May 24 with a completion date of September 30. Dixon's actions never reflected intent that the assessment be completed promptly.

22. Dixon does not argue that any of the contract terms Dr. Meade sought, at least until her July 3 email, was unreasonable. It does argue persuasively that Dr. Meade's conduct became dilatory when Dr. Meade did not respond to the still-incorrect dates in the May 24 proposed contract until June 18, and that her July 3 email raised several substantive objections to the proposed contract that Dixon could not have reasonably anticipated, since Dr. Meade had known of the allegedly objectionable conditions since April 15 and not mentioned them earlier. Dr. Meade's July 3 email was disingenuous in inserting new disputes into the negotiation and was correctly interpreted by Dixon as a termination of negotiations. However, by May 24, the IEE request was already three-and-a-half months old, and the fourth draft of the contract was not just misdated again; it also contradicted the express written agreement of the parties that the start date of the contract would be June 3 – a date Dixon had itself proposed. So even if Dr. Meade had continued to bargain promptly and in good faith, Dixon's outstanding offer during that period was inadequate and predictably unacceptable to her.

23. Dixon's criticisms of Dr. Meade's conduct during the negotiations assume a parity of responsibility that the law does not impose. As a private party, Dr. Meade was under no obligation, under special education law at least, to bargain without delay, reasonably, or even in good faith. Dixon offers no reason why Parents, and by extension Student, should be held responsible for any delay or unreasonableness on Dr. Meade's part. There was no evidence that Parents were aware of any such delay or unreasonableness, or that Dixon brought any such problems to their attention. Nor does Dixon offer any reasoning to support its claim that it was Dr. Meade who should have unilaterally corrected the dates on the fourth version of the contract. The legal duty to provide an IEE without unnecessary delay was solely Dixon's, and if Dr. Meade acted too slowly or unreasonably, it was part of Dixon's duty to ensure that the IEE was timely provided to propose that Parents locate another assessor who would be more diligent and cooperative. Dixon failed to act on that duty.

24. Dixon did not explain at hearing why, after Ms. Connaughton's telephone calls in late May and early June, it had no further contact with Dr. Meade. Having received Dr. Meade's email of June 18, Dixon could reasonably have contacted her again to attempt to work out acceptable terms, but for reasons the record does not reflect, it abandoned all efforts to do so well before it received her July 3 email.

25. For the reasons set forth above, Dixon unnecessarily delayed providing the promised IEE for nearly all of the five months that elapsed between Parents' request and Dr. Meade's termination of negotiations. Because school was no longer in session by that time, Dixon was also responsible for at least another month to six weeks of delay until Student could again be observed in class. This constituted unnecessary delay within the meaning of the applicable regulation (34 C.F.R. § 300.502(b)).

## *Consequences of Delay*

26. Dixon correctly contends that there was no direct evidence at hearing that its delay in providing Student's IEE had any adverse effect on his education, but Dixon does not address the impact of the delay on Parents' participatory rights. Student's program for the school year 2013-2014 was addressed at his annual IEP team meeting on May 13, more than three months after the IEE request. Had Dixon promptly provided the requested IEE, the results would have been available to Parents at that meeting and assisted them in negotiating and deciding upon Student's program for the upcoming academic year. Because of Dixon's delay, Parents were deprived of that information until November 6, at which time Student had been attending school since August, under an IEP developed without the benefit of Dr. Meade's assessment. Even then, the assessment had to be done in the school year following the one in which it was requested, and therefore was not done in the same grade, class or setting that Parents had in mind when they requested it. The delay therefore permanently deprived Parents of significant useful information concerning their son's disabilities and educational needs during the academic year in which they requested it, and delayed the receipt of new useful information well into the next academic year.<sup>13</sup> For six months Parents were "left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." (*Schaffer v. Weast, supra*, 546 U.S. at p. 61.) This constituted a significant impediment to their participation in the decisional process concerning Student's program, and therefore constituted a denial of FAPE.

*Issue Two: Did Dixon deny Student a FAPE during the school year 2012-2013 by requiring the Parent's chosen IEE assessor to follow special education local plan area and Dixon requirements that were not consistent with the IDEA and state law?*

27. Because the evidence on this issue was not adequately developed, and the outcome of the issue would not alter the relief to which Parents are entitled, it is unnecessary to address this issue.

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<sup>13</sup> There was also some evidence, though it was not conclusive, that Dixon also found Dr. Meade's recommendations useful, when they finally arrived, in shaping Student's educational program. On February 18, 2014, as part of a motion to permit an additional observation of Student by Dr. Meade, Student's attorney submitted a declaration stating that she attended an IEP team meeting for Student on January 28, 2014, and at that meeting "District staff assured us that each and every suggested behavior intervention that Dr. Meade had included in her assessment report was being provided by the District to [Student]." (Official notice is taken of the pleadings and papers on file in this matter.) Student's attorney repeated that representation at hearing. On neither occasion did the District dispute the claim.

*Remedy for an Unnecessarily Delayed IEE*

28. Compensatory education is generally not an appropriate remedy for a district's failure to provide an IEE without unnecessary delay. (*P.P. v. West Chester Area School Dist.* (3d Cir. 2009) 585 F.3d 727, 738.) The appropriate remedy is reimbursement to parents for the cost of obtaining the IEE themselves. (*Jefferson County Bd. of Educ. v. Lolita S.* (N.D.Ala. Sept. 30, 2013, No. CV-12-BE-2324-S) 2013 WL 5519656, pp. 33, 36; *Pajaro Valley Unified School Dist. v. J.S.*, *supra*, 2006 WL 3734289, p. 5.)

29. Dr. Meade spent approximately five hours observing Student at school, and perhaps twice that time observing him in other contexts. She also conducted numerous interviews and spent additional time in writing a thorough report. She will charge Parents her company's minimum fee to parents of \$5,500 for the assessment, which in view of her qualifications and the time and effort she expended is a reasonable fee. She will also charge them \$500 for attending Student's November 6 IEP team meeting and presenting and discussing her assessment and recommendations, which is also a reasonable fee. Dixon does not question the reasonableness of these amounts. Parents will therefore be awarded reimbursement in the amount of \$6,000, as specified in the Order below, for obtaining Dr. Meade's assessment and her participation in the November 6 IEP team meeting. Parents are not entitled to reimbursement of additional expenses for Dr. Meade's efforts after the November 6 IEP team meeting.

ORDER

1. Within 45 days of the presentation by Parents of an invoice from Dr. Meade for her assessment of Student and her attendance at his November 6 IEP team meeting, Dixon will compensate Dr. Meade in the amount shown on the invoice, not to exceed \$6,000. If Parents choose to pay Dr. Meade directly, Dixon will reimburse Parents within 45 days of the presentation of the above-described invoice from Dr. Meade and proof of payment by Parents in the form of cancelled checks or credit card billings, in an amount not to exceed \$6,000.

2. Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue One. Issue Two was not decided.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a state or federal court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: April 18, 2014

\_\_\_\_\_/s/\_\_\_\_\_  
CHARLES MARSON  
Administrative Law Judge  
Office of Administrative Hearings